

TERRORISM AND JUST WAR TRADITION: ISSUES OF COMPATIBILITY

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ABSTRACT

In simplest terms, I intend to argue in this dissertation that at least some types of terrorism are permissible within a Just War framework. There are two forms that this argument can take. There is the weak form that concludes that at least some types of terrorism are permissible within a Just War framework but leaves open the question of the justifiability of any formulation of Just War Theory. There is also the strong form of the argument that at least some types of terrorism are permissible within a Just War framework and that the Just War Tradition is the correct moral theory to govern martial actions, and therefore concludes that at least some types of terrorism are permissible. In my dissertation, I am arguing for the weaker claim and leaving open the question of the correctness of any formulation of Just War Theory. If Just War Tradition is correct and I am successful in demonstrating that at least some types of terrorism are permissible within a Just War framework, then I will have shown that at least some types of terrorism are permissible. As I have said, though, my project is not to argue to defend any version of Just War Theory that Just War Tradition is correct but rather to merely to demonstrate that at least some types of terrorism are permissible within a Just War framework.

When evaluating any use of force within the scope of a Just War framework, two questions need to be addressed: (1) was it appropriate to engage in the use of force (*jus ad bellum* considerations), and (2) was the force used appropriately (*jus in bello* considerations). It is within the scope of these two questions that most of the objections to terrorism arise. In my dissertation, I argue that a terrorist campaign or action can meet key standards of *jus ad bellum* and *jus in bello* implicit in Just War Theory. I show how these standards can be met in response to two central objections to terrorism, that terrorists lack the authority to make war, and that the random targeting of civilians renders terrorism unjustifiable.

I approach the question whether it is appropriate for terrorists to engage in the use of violent force from the perspective of a Lockean theory of individual sovereignty. I show that the authority to engage in martial activities rests with governments because that authority has been granted them by those individuals who have come together to form the community over which the government has been given authority. Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the governments' using that authority appropriately. When governments fail to use their delegated authority appropriately, then individuals can once again exercise their rights. This includes coming together to form new communities—non-governmental organizations—through which to exercise their power, including their right of self-defense.

I deal with the second question, the appropriateness of terrorist tactics, e.g. intentionally targeting members of civilian populations, by arguing that many more members of the civilian population are combatants than most people realize. I argue that anyone who is dangerous in the martial sense, where the martial sense of dangerousness is understood as having one's behavior purposely directed in support or military or other martial activities makes one a combatant.

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CHAPTER ONE

INTRODUCTION

1.1-Introduction

In simplest terms, I intend to argue in this dissertation that at least some types of terrorism are permissible within a Just War framework. This argument can take two forms. The weak form is that at least some types of terrorism are permissible within a Just War framework but leaves open the question of the justifiability of any formulation of Just War Theory. The strong form of the argument is that at least some types of terrorism are permissible within a Just War framework and that the Just War Tradition is the correct moral theory to govern martial actions, and therefore at least some types of terrorism are permissible. In my dissertation, I am arguing for the weaker claim and leaving open the question of the correctness of any formulation of Just War Theory. If Just War Tradition is correct and I am successful in demonstrating that at least some types of terrorism are permissible within a Just War framework, then I will have shown that at least some types of terrorism are permissible. As I have said, though, my project is not to argue that Just War Tradition is correct but rather to merely to demonstrate that at least some types of terrorism are permissible within a Just War framework. This will be significant, though, because, despite the fact that I have not shown Just War Tradition to be correct, if I am successful in demonstrating that at least some types of terrorism are compatible with the Just War Tradition, then those who already accept the correctness of the Just War Tradition—as the United States often seems to—will also have to accept the permissibility of at least some types of terrorism.

I am interested in terrorism in general and have no particular terrorist organization or type of terrorism, save non-governmental political terrorism, in mind. In Chapter Three, I shall argue that a non-governmental political terrorist is a person who engages in political terrorist acts where a political terrorist act is defined as:

...the use of force or the threat of force against appropriately random non-conventional targets (both persons and their property) for the purpose of instilling terror in a larger population in order to coerce them or the governmental leaders they have authorized into bringing about the terrorists' political agenda.¹

Notice that this definition says nothing about race, religion, nationality, creed, etc. It could apply equally to the Irish Republican Army, Al-Qaeda, the People's Liberation Army, the Congolese Revolutionary Movement, or some future terrorist organization yet to be formed. My purpose is not to defend any particular terrorist organization or particular terrorist act. My purpose is to demonstrate the compatibility of Just War Tradition and terrorism. That is, I shall argue acts that satisfy the above definition of political terrorism can also satisfy the requirements of Just War Tradition.

Just War Tradition is traditionally divided into two main components—*jus ad bellum* (justice for war) and *jus in bello* (justice in war).² *Jus ad bellum* is concerned with the justness of the decision to go to war whereas *jus in bello* is concerned with the justness of actions within a war. A war can be just (morally justified, that is) or unjust (unjustified), then in virtue of satisfying or failing to satisfy the criteria of *jus ad bellum*—Right Authority, Just Cause, Right

¹ We should distinguish between the violent use of force used by terrorists and militaries and the non-violent use of force used by those who engage in civil disobedience. Unless otherwise indicated I shall use 'force' to refer to the former. I shall address this issue more fully in Chapter Three.

² Some Just War thinkers will include a third component in their Just War Theory—*jus post bellum* (justice after the war). Since this is not relevant to my discussion, I shall not address it in this dissertation except indirectly in my discussion of the duties of field commanders and heads of state in wartime.

Intention, Right Goal, Proportionality *ad Bellum* and Last Resort. Likewise, actions within a war can be just or unjust in virtue of satisfying or failing to satisfying the *jus in bello* criteria of Discrimination and Proportionality *in Bello*.³

I shall argue that at least some types of terrorist campaigns can be morally justified in the same sense that some wars can be morally justified and some terrorist acts can be morally justified as some military actions within wars can be morally justified.⁴ This of course does not mean that all terrorist campaigns and acts can be morally justified any more than all wars or all military actions within wars can be morally justified. It does, though, contradict the idea that a terrorist campaign or act is immoral simply because it is a terrorist campaign or act once Just War Theory is taken as given.

According to James Turner Johnson:

...the concept of just war does not begin with a "presumption against war" focused on the harm which war may do, but with a presumption against injustice focused on the need for responsible use of force in response to wrongdoing. *Force, according to the core meaning of just war tradition, is an instrumentality that may be good or evil, depending on the use to which it is put.* The whole structure of the *jus ad bellum* of just war tradition has to do with specifying the terms under

³ There is an open debate between Just War thinkers regarding the relationship between the *jus ad bellum* requirements of a just war and the *jus in bello* requirements. Most Just War thinkers agree that significant *jus in bello* violations can render an otherwise just war (one that satisfies the *jus ad bellum* criteria) unjust, but there is disagreement about whether a war that is unjust because it violates the *jus ad bellum* criteria taints actions conducted within the war such that those actions which would be otherwise just (ones that satisfies the *jus in bello* criteria) would be unjust. I shall argue in Chapter Two that *jus ad bellum* considerations should not be taken as morally tainting *jus in bello* actions. Except where otherwise indicated I shall treat the issue of the justness of the decision to go to war and the issue of the justness of military actions with the war as separate questions.

⁴ There is no generally accepted term for organized terrorist activity directed at a common goal, with the possible exception of 'jihad,' which corresponds to our use of 'war.' Because of its Muslim connotations 'jihad' is too group-specific to be an acceptable general term denoting all such organized terrorist activities. I shall, therefore, adopt the phrase 'terrorist campaign' to mirror the kinds of activities we associate with 'war' and the phrase 'terrorist act' to mirror military actions which occur within a war.

which those in political power are authorized to resort to force for good--that is, to rectify specific injustices. (The emphasis is mine.)⁵

Why begin with a “presumption against terrorism”? Just as the rightness or wrongness of the force used by military forces is going to depend on the use to which it is put, so too is the rightness or wrongness of the force used by terrorists. What we need to do is evaluate the use of force by terrorists.

When evaluating any use of force within the scope of a Just War framework, two questions need to be addressed: (1) was it appropriate to engage in the use of force (*jus ad bellum* considerations), and (2) was the force used appropriately (*jus in bello* considerations). It is within the scope of these two questions that most of the objections to terrorism arise. Consider the following characterization of terrorism by Walter Laqueur:

Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted.⁶

Laqueur’s characterization is an indictment of terrorism for both its illegitimate use of force and how that force is used. Laqueur and many Just War thinkers maintain that it is not appropriate for terrorist to engage in the use of force to achieve their goals.

In his definition, Laqueur has captured the two most common and pressing objections to terrorism, the first is that terrorists do not have the authority to use political violence. This corresponds to one of the *jus ad bellum* criteria of Just War Tradition requires that the person(s)

⁵ James Turner Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984) pp. 35-6. This is opposed, for example, to the views of J. Bryan Hehir who does maintain that just war theory begins with a presumption against the use of force.

Essentially, the ethic of war starts with the presumption against the use of force. To look at war as a moral reality we start with the presumption that war is a bad way to handle human affairs. That does not say that war is never possible in moral terms but it says to go to war one must meet a series of tests, a series of hurdles, if you will, to justify this blunt and bloody instrument of human intercourse. J. Bryan Hehir, "Crisis in the Middle East: Issues of War," *Woodstock Report* 25 (March 1991): p. 3.

⁶ Walter Laqueur, *The Age of Terrorism* (Boston: Little Brown, 1987) p. 78.

making the decision to go to war must have the proper authority (the criterion of Right Authority). Traditionally *jus ad bellum* criteria have been seen to apply strictly to governments. Only the appropriate governmental agent/agency can possess such authority. This position, for example, can be found in Plato:

Any person making peace or war with any parties independently of the Commonwealth shall likewise incur the pain of death. If a section of the state makes peace or war with any on its own account, the generals shall bring the authors of the measure before a court, and the penalty for conviction shall be death.⁷

And Aquinas:

For it is not the business of a private individual to declare war, because he can seek redress of his rights from the tribunal of his superior. Moreover, it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the commonwealth is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them.⁸

The second objection that is normally levied against terrorists is that they intentionally attack civilians. This fact more than any other is why people object to terrorist tactics. But why is intentionally targeting civilians wrong? Consider the following case: Imagine that the year is 1943 and Nazi Germany has begun to wage war on American soil. As part of their general strategy the German High Command has ordered the bombing of all elementary schools with the

⁷ Plato, "Laws," in *Complete Works*, ed. John M. Cooper and D. S. Hutchinson (Indianapolis, Ind.: Hackett Pub., 1997), p. 1603.

⁸ Aquinas, "War and Killing," in *On Law, Morality, and Politics*, ed. J. Regan Richard and William P. Baumgarth (Indianapolis: Hackett Pub, 2002), p. 221.

intention of targeting the children who attend them. Such an action would, I believe, be construed by most people as immoral. The ‘theoretical’ or ‘philosophical’ question, though, is: What is wrong with this action? What would be wrong with the German military intentionally targeting American elementary school children during the Second World War?

For any attack to be just within a Just War framework it must satisfy the *jus in bello* (justice in war) criteria of Discrimination and Proportionality *in Bello*. The criterion of Discrimination between Combatants and Noncombatants states that a necessary but not sufficient condition for the one’s actions in war to be just is that one not intentionally target innocent persons and that participants in the war must discriminate between legitimate and illegitimate targets. Now, in this context, ‘innocent’ is understood in terms of non-involvement in the war effort rather than moral culpability. This is normally discussed in terms of the appropriate distinction between combatants and noncombatants.

The criterion of Proportionality *in Bello* holds that a necessary but not sufficient condition for one’s actions in war to be just is that the good achieved by performing the action outweigh the harm the action causes.⁹ So, intentionally targeting civilians is wrong if either the following is true: (1) the civilian in question is a noncombatant or (2) attacking the civilian would violate the criterion of Proportionality *in Bello*.¹⁰

When considering the morality of an attack on some segment of a civilian population, most just war thinkers view soldiers as combatants and civilians as noncombatants. This is, I believe, because most people ultimately view war as an activity between soldiers.¹¹ Civilians are

⁹ The good here is understood in terms of military necessity rather than objective morality. Accordingly, Nazi Germany’s blowing up an English munitions dump would count as the good to be compared to the harm.

¹⁰ In Chapter Five, I shall focus on the issue of when civilians become combatants and leave the question of proportionality for Chapter Six.

¹¹ Throughout this dissertation, I shall use the term ‘soldier’ interchangeably with ‘member of the armed forces’ so that ‘soldier’ will refer equally to soldiers, marines, airman, and sailors.

seen as outsiders, distinct from the conflict. This is why when Vitoria, the Sixteenth Century political theorist, identified those who were immune from attack during a just war he included “the rest of the peaceful population.”¹² Following Vitoria’s lead Michael Walzer argues in his book *Just and Unjust Wars*:

[S]oldiers as a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command. No doubt, they do not always fight; nor is war their personnel enterprise. But it is the enterprise of the class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind.¹³

“[W]ar...is the enterprise of the class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind.” And such a view is easily in accordance with the common perception that civilians are noncombatants, attacked only illicitly.

The problem with a view like Walzer’s, as I shall argue in Chapter Five, is that war, at least as it is practiced in countries such as the United States, is an enterprise that does not leave civilians behind, because of governments’ practice of incorporating civilians into the war effort. In Chapter Five I shall critically examine how many civilians are left behind as modern warfare is practiced. I shall aim to show that the number of civilians who have lost their immunity in contemporary wars is significantly higher than most people realize.

In order to prove my thesis that at least some terrorist campaigns and acts are permissible within the scope of a Just War framework, I am going to have to demonstrate that terrorists can satisfy both the *jus ad bellum* criteria (primarily that they can legitimately engage in the relevant

¹² See Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, 2nd ed. (Upper Saddle River, N.J.: Prentice Hall, 1999) p. 56.

¹³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed. (New York: Basic Books, 1992) p. 141.

use of force), and the *jus in bello* criteria. Before I can do this, though, I must clarify what terrorism and the Just War Tradition are. Through this discussion I will show my reader why I interpret the Tradition as I do and on what species of terrorism I wish to focus. This, though, is not as a simple task as one might hope. Both terrorism and Just War tradition pose problems for those who seek to understand them. Let us begin with the Just War Tradition. While I will be discussing the particulars of the Just War criteria in the second chapter it will be useful here to set the background by first considering the relationship between tradition, theory and convention which affects how Just War Tradition is often understood. Once this is done I shall provide a brief outline of how this dissertation will proceed.

1.2-Tradition, Theory and the Law of Armed Conflict

As difficult as it is to discover an appropriate definition of terrorism, in some ways understanding Just War Tradition is even more complex than terrorism. Thought pertaining to the just initiation and conduct of war has developed for over a millennium. Sometimes scholars refer to this body of thought as Just War Theory, sometimes as Just War Tradition. Whether one refers to this development as Just War Theory or Just War Tradition may seem superficial at first glance. To the contrary, I believe that understanding the difference between dealing with a theory versus a tradition is critical in properly understanding the nature of just wars. With this in mind, then, I want to discuss the relationship between Just War Tradition, Just War Theory, and the conventions governing the Law of Armed Conflict (LOAC). The Law of Armed Conflict is, ‘[t]hat part of international law that regulates the conduct of armed hostilities.’¹⁴ Understanding these relationships becomes crucial in applying Just War Tradition to any kind of conflict

¹⁴ United States Department of Defense, *Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms* (Washington DC: Joint Chiefs of Staff Publication, April 2001 (as amended August 2005)) p. 301.

because there is a significant amount of conflation between theory, tradition and convention within the Just War literature.

I begin by considering the distinction between tradition and theory. As I have indicated it is a mistake to conflate a Just War Theory with the Just War Tradition. I intend to suggest in this section that while there is value in learning from tradition, tradition has certain limitations which make relying too heavily upon it problematic. Following epistemic methodology when constructing guidelines for a just war we want to begin with those principles that are most certain and then move to those that are less certain. This means that we must have some philosophical justification for maintaining and applying the Just War criteria. Viewing Just War as tradition does not do this. Let us begin considering the difference between theory and tradition.

A theory is a “body of rules, ideas, principles, and techniques that applies to a particular subject...”¹⁵

A tradition, on the other hand, is “a body of long-established customs and beliefs viewed as a set of precedents.”¹⁶

This distinction, between “rules, ideas and principles” in contrast to “long-established customs and beliefs viewed as a set of precedents” is important because of how the practice of respected writers undermines it. When looking at issues related to evaluating the justness of a war, we are dealing with thinkers who call their work Just War Theories but who develop their work by reliance on the context of a Just War Tradition. Just War as tradition and Just War as theory both evaluate the justness of a war by applying a set of criteria (in fact they normally apply the same set of criteria), but the basis for these criteria are different. For Just War as tradition the bases of the criteria are the customs and beliefs that have come to be codified because of their long

¹⁵ http://encarta.msn.com/dictionary/_theory.html Accessed August 28, 2005.

¹⁶ http://encarta.msn.com/dictionary/_tradition.html Accessed August 28, 2005.

acceptance. Just War as theory, on the other hand, basis their criteria on philosophical analysis. So it is not sufficient that a criterion is a product of long established custom and belief. What is important is the underlying reasoning behind the criterion.¹⁷

When developing a Just War Theory, that is, these thinkers do so within the scope of long-established customs and beliefs, which are often treated as a set of precedents. In other words, how war has been practiced may influence the Just War Tradition beyond the extent to which that practice can be justified by moral principles. That Just War thinkers often treat previous practices and conventions as precedents is important because, as I shall demonstrate, it affects how they approach critical parts of their theory-construction. There are two important limitations to relying upon tradition:

1. Traditions, are based upon past wars, customs, and experiences and
2. traditions are normally based upon the experiences of the victor or most powerful.

That tradition is based upon custom and experience and more importantly the customs and experiences of a particular group means that Just War as tradition is going to be agent-relative. Just War Tradition for the most of its existence was a European Christian movement. As such it was based upon the customs and experiences of that particular group.

What is needed is an agent-neutral analysis of the Just War criteria in order to have a Just War Theory that can be universally applied. That is a theory that can be applied to a war not only regardless of the particular circumstances surrounding the war (e.g. the types of weapons used), but also as independently as possible of the customs (culture) and experiences of the ones evaluating the war.

¹⁷ It is important to note that this distinction is not intended to be a chronological one. Some Just War thinkers will focus on the philosophical basis for the Just War criteria, and some will accept the criteria as a matter of custom. It is also possible for there to be a mixture of the two. That is, that some Just War thinkers focused on the philosophical basis for some criteria while accepting others as a matter of custom.

The fact that we are dealing with the development of theories within the context of long-standing tradition creates an interesting dynamic for Just War scholars. As we shall see, as a tradition, Just War thinking has been reactionary. That is, the major shifts in Just War thinking have resulted from significant changes in both the character of war and our understanding of the nature of war. We might refer to these as paradigm shifts in the tradition. W. V. O'Brien, for example, writes:

In classic just war doctrine, offensive wars were permitted to protect vital rights unjustly threatened or injured. Moreover, in a form now archaic, offensive wars of vindictive justice against infidels and heretics were once permitted. Such wars disappeared with the decline of the religious, holy war element as a cause and rationale for wars.¹⁸

As with most long-standing traditions, though, these paradigm shifts in thinking are the exception rather than the rule. In the intervals between paradigm shifts there is a propensity to rely on deeply-accepted tradition, rather than to engage in serious philosophical analysis of the basic tenants of the tradition. Examining a brief history of Just War Tradition will make this point more clearly.

1.2.1-A Brief History of the Just War Tradition

I shall provide a sketch of the development of the Just War Tradition—focusing on the paradigm shifts in the tradition. This discussion should not be understood as being comprehensive of either the Just War Tradition or of the particular Just War thinkers discussed. A full or detailed history of the Just War tradition lies beyond my scope. Accordingly, I focus my discussion on aspects of the just war tradition that influence the justifiability of terrorist

¹⁸ William Vincent O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981) p. 22.

activity and that need reevaluation because of their reliance on the circumstantial and conventional, rather than the theoretical.

In the West the idea that the requirements of justice entail restraints on when and how wars can be fought has a long history. It was not, however until after the conversion of Constantine that the idea of just war was considered an independent area of philosophical or theological inquiry. Prior to Christianity, discussions of just war discussions can be divided roughly into three categories: (1) practical examples, (2) discussions parasitic on other philosophical inquiries, and (3) legal considerations. Issues of the morality of war both in terms of going to war and just conduct within war occur in the writings of many authors including Thucydides,¹⁹ Euripides,²⁰ Polybius,²¹ Caesar,²² and Xenophon.²³ These discussions, though, are a part of histories, plays or poems rather than an attempt to give a philosophical analysis of the morality of war. This is not to say that early philosophers paid no attention to the morality of

¹⁹ See Paul Woodruff, ed., *On Justice, Power, and Human Nature: The Essence of Thucydides' History of the Peloponnesian War* (Indianapolis: Hackett, 1993).

²⁰ In his Euripides, "The Heracleidae," in Euripides I : *Alcestis, the Medea, the Heracleidae, Hippolytus, the Cyclops, Heracles, Iphigenia in Tauris* (New York: The Modern Library, 1957), 960-67. Euripides dramatizes the prohibition against harming prisoners of war. See Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p.10.

²¹ "Polybius records [Polybius, *The Histories of Polybius*, trans. Fridericus Hultsch and Evelyn S. Shuckburgh (Westport, Conn.: Greenwood Press, 1974) vol. 1, bk. V, 9-11.] examples of injustice in the conduct of war and contrast such action with concerns for justice on the battlefield shown by both Philip and Alexander." Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p.11.

²² "...Julius Caesar chronicles his beneficence towards defeated foes in his Civil Wars, and in a letter to Cicero he writes:

You are right to infer of me...that there is nothing further from my nature than cruelty. Whilst I take great pleasure from that fact, I am proud indeed that my action wins your approval. I am not moved because it is said that those, whom I let go, have departed to wage war on me again, for there is nothing I like better that I should be true to myself and they to themselves." Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 11. (Quoted by Cicero in a letter to Atticus dated March 26, 49 B.C.)

²³ "Xenophon's historical narratives [Xenophon, "Cyropaedia," in Xenophon's *Cyropaedia, or, Institution of Cyrus, and the Hellenics* (London: George Bell & Sons, 1891), vii, 1, 41. and Xenophon, "Anabasis," in Xenophon's *Cyropaedia, or, Institution of Cyrus, and the Hellenics* (London: George Bell & Sons, 1891), vii, 1, 29.] points to Greek concern for considerations of justice in both when and how to wage war." Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, p. 10.

war. The writings of Greco-Roman philosopher such as Plato²⁴ and Aristotle²⁵ were not without discussion of the moral issues related to the morality of war, but discussions were relatively sparse and always part of a larger discussion of ethics or political philosophy. We can find some detailed discussions of what constitutes a just war in the works of the Roman philosopher and jurist Cicero (c. 106-43 B.C.), but his interests lay in providing a legalistic account of what constitutes a just war rather than a moral one.²⁶

For the first three centuries of its existence, Christianity maintained a strict policy of pacifism. In the early church homicide was one of the few unpardonable sins and the reason for the killing did not matter. Accordingly, military service was prohibited. By the beginning of the fourth century the Roman Empire stretched across the known world and had been divided into quarters. Each quarter was under the control of an Emperor—two senior emperors (Augusti) and two junior emperors (Caesars). For the first time in Roman history, the rulers did not reside in the city of Rome, and as such the citizens of the city declined in both prestige and benefits. Responding to the resentment of those living in Rome, Maxentius (known to history as Maxentius the Usurper) seized control of the city and declared himself emperor. In 312 A. D. after several failed attempts to retake the city by other emperors the junior emperor of the west—Constantine (known to history as Constantine the Great)—marched on Rome with 25,000 soldiers (one quarter the number loyal to Maxentius). According to legend on the way to Rome

²⁴ Plato, *The Republic*, trans. Richard W. Sterling and William C. Scott, 1st ed. (New York: Norton, 1985) Bk. V 471a5-b5. and Plato, "Laws," Bk. XII 955b9-c6. See Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p.10.

²⁵ Aristotle, *The Nicomachean Ethics*, trans. H. Rackham, Rev. ed., *Loeb Classical Library*; 73. (Cambridge, Mass.: Harvard University Press, 1990) 1177b6., Aristotle, *Politics* (Indianapolis, Ind.: Hackett Pub, 1998) 1256b25, 425a10-18, 425b11-16. See Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 10.

²⁶ Marcus Tullius Cicero, *On Duties*, ed. Miriam T. Griffin and E. M. Atkins, trans. Miriam T. Griffin and E. M. Atkins, *Cambridge Texts in the History of Political Thought* (New York: Cambridge University Press, 1991) Bk. I, XI., See Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 10.

Constantine received a vision from God instructing him to place the mark of Christ upon the shields of his soldiers. God told Constantine "by this sign you will be victor."²⁷ Constantine did as he was bid and was able to retake the city. After his battle Constantine became the patron of Sylvester, the Bishop of Rome, and some time around 327 A. D. converted to Christianity.

With the conversion of Constantine the Church found itself in a unique position. It was for the first time recognized legally as a religion in Rome and had the head of the Roman army as one of its members. This forced the Church to reevaluate its position on military service. They had to find some way to reconcile the death and destruction that occurred in war with their teachings. This required them to consider the morality of war to an extent that until then had been unnecessary.

Ambrose (c. 339-397), building on the legalistic work of Cicero, was the first Christian thinker to deal with the idea of a just war, albeit in a relatively superficial way. Building off of the work of Ambrose, Augustine (354-430) formalized three criteria of just war: legitimate authority, just cause and right intention. Accordingly, Augustine is recognized as the father of the Just War Tradition. Aquinas (1225-1274), incorporating Aristotelian ideas into Christian reasoning, would expand upon these same three criteria.²⁸

Modern jurists such as Vitoria (1492-1546), Suarez (1548–1617) and Grotius (1583-1645) would continue to build upon the works of Augustine and Aquinas and add criteria to the Just War Tradition. These early jurists were reacting in part to all of the following: the invention of the nation-state, the idea that there were natural laws that governed and protected all people regardless of nationality or religion, the secularization of political power, and the colonization of

²⁷ Lactantius, *De Mortibus Persecutorum*, trans. J. L. Creed (Oxford: Clarendon Press, 1984) Chapter XLIV.

²⁸ From Ambrose to Aquinas there was significant fine tuning of the early Church's position on just war but there was little significant change.

the Americas by European states. Vitoria and Suarez added three further criteria: proportionality, last resort, and that the war must be winnable.

As Augustine is considered the father of the Just War Tradition, so Vitoria could rightfully be considered the father of modern Just War Tradition. Vitoria provided the framework in which Just War Thinkers who followed him could fully develop the tradition. According to James Turner Johnson, Vitoria's treatment of just war shaped the thinking of subsequent thinkers in three important ways.

[The first was that he] drew together into a coherent whole the various strands of just war doctrine that he had inherited from the Middle Ages. The second way in which Vitoria shaped the thought of his successors is found in his focus upon natural law as the ultimate justification for the limits imposed by the just war tradition. The third element of Vitoria's thought that significantly influenced later thinkers is that he was not so certain as his predecessors that the just side in a war could always be identified.²⁹

The most significant contribution Grotius made to the work of Vitoria was to secularize the Just War Tradition. While Vitoria was the first to fully adopt natural law as the basis for the limitations on war, he still understood natural law in relation to divine law. Grotius, on the other hand, understood natural law in terms of the natural inclinations of human beings qua human beings. As a result he was able to transfer the Just War Tradition from Christendom to the international arena.

With the development of a true international community in the eighteenth and nineteenth centuries the direction of the Just War Tradition shifted to an emphasis on *jus ad bellum*

²⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 339.

considerations. More important than how wars were fought were the formal procedures for justly declaring war. This focus, though, changed early in the twentieth century with the introduction of the machine gun. The development of warfare in the twentieth century can be understood in terms of a progression of more and more devastating weapons. As our destructive ability increased so did the focus on *jus in bello* considerations to the point where they dominate the contemporary debate.

Notice the large gaps in time between significant shifts in the tradition. There is four hundred years between Cicero and Ambrose/Augustine, eight hundred years between Augustine and Aquinas, two hundred years between Aquinas and the modern jurists, and four hundred years since any significant changes to the tradition other than its codification into international law in the eighteenth, nineteenth, and early twentieth centuries. Also note that those thinkers who were engaged in shaping Just War Tradition represented the powers of their time, whether it is the Republic of Rome, the Church, or the European nations. As I have indicated in the beginning of this section, one of the limitations of tradition is that it is based upon the experiences of the victor or the most powerful. This will become more apparent when we examine the relationship between Just War Tradition and the conventions of international law.

1.2.2- The Law of Armed Conflict

One of the last steps in the development of Just War Tradition was its incorporation into international law. Consider international law governing warfare as it manifests itself in a series of conventions. The Law of Armed Conflict—most notable the three Hague Conventions (1899, 1907 and 1925)³⁰ and the four Geneva Conventions (1949)³¹ are a set of ratified treaties with the

³⁰ See <http://www.lib.byu.edu/~rdh/wwi/hague.html> for text of Hague Conventions. Accessed September 5, 2005. See also Signatures to the 1889 Hague Convention, "1889 Hague Convention," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000) and Signatures to the 1907

force of law in accordance with which one has to act in order for one's actions in regard to war to be legally acceptable.

It is a mistake, though, to view the Law of Armed Conflict as merely an intended application of Just War Theory. There are a number of strategic reasons that might lead parties to a convention to agree that "X is to be avoided" without broaching whether X is (always) unjust. Similarly, there are strategic reasons why parties to a convention would agree not to prohibit certain activities, or to prohibit them only conditionally despite their being unjust.

Consider the case of the Geneva Protocol of 1925—the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The Geneva Protocol, as the title suggests, prohibited the use of chemical and biological weapons. There were one hundred and thirty five signatories to the protocol with forty three nations signing with reservations. There were a number of reservations, but only three of them are relevant to our discussion. The first reservation is that the signatory will view the protocol as binding only in regards to relations with other signatories. There were thirty one countries which signed under this reservation. They are: Australia, Bahamas, The, Belgium, Botswana, Bulgaria, Burma, Canada, Chile, China, People's Republic of, Estonia, Fiji, France,

Hague Convention IV Respecting the Laws and Customs of War on Land, "1907 Hague Convention Iv Respecting the Laws and Customs of War on Land," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000).

³¹ See <http://www1.umn.edu/humanrts/instree/y1gcacws.htm> for the text of the 1st Geneva Convention; <http://www1.umn.edu/humanrts/instree/y2gcacws.htm> for the text of the 2nd Geneva Convention; <http://www.icrc.org/ihl.nsf/0/6fef854a3517b75ac125641e004a9e68?OpenDocument> for the text of the 3rd Geneva Convention; and <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5> for the text of the 4th Geneva Convention. Accessed September 5, 2005. See also Signatures to the 1949 Geneva Convention I, "1949 Geneva Convention I," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000), Signatures to the 1949 Geneva Convention II, "1949 Geneva Convention Ii," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000), Signatures to the 1949 Geneva Convention III, "1949 Geneva Convention Iii," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000), Signatures to the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, "1949 Geneva Convention Iv Relative to the Protection of Civilian Persons in Time of War," in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (New York: Oxford University Press, 2000).

Grenada, Guyana, India, Iraq, Jordan, Korea South, Kuwait, New Zealand, Nigeria, Papua New Guinea, Portugal, Romania, Seychelles, Singapore, South Africa, Spain, Swaziland, Union of Soviet Socialist Republics and the United Kingdom.

The second reservation is that the protocol will cease to be binding in regard to any enemy states whose armed forces or allies do not observe provisions. In other words, the signatory reserves the right to use biological or chemical weapons in response to the use of biological or chemical weapons by an enemy state or its allies. There were thirty-four countries that signed the protocol under this reservation. They are: Australia, Bahamas, The, Belgium, Botswana, Bulgaria, Burma, Canada, Chile, China, People's Republic of, Czechoslovakia, Estonia, Fiji, France, Grenada, Guyana, India, Iraq, Jordan, Korea South, Kuwait, Libya, Mongolia, New Zealand, Nigeria, Papua New Guinea, Portugal, Romania, Seychelles, Singapore, South Africa, Spain, Swaziland, Union of Soviet Socialist Republics and the United Kingdom.

The final reservation is a variation of the second. The third reservation is that the protocol will cease to be binding as regards use of chemical agents with respect to any enemy State whose armed forces or allies do not observe provisions. There are three signatories that signed the protocol under this reservation. They are: Suriname, Netherlands and the United States.

These reservations illustrate the significant gap between a legally binding treaty and what can be justified from a Just War perspective. Within a Just War framework the prohibition against the use of biological and chemical weapons is based upon one's inability to use such weapons in accordance with the *jus in bello* criterion of Discrimination between Combatants and Noncombatants. Biological and chemical weapons, at least as the technology currently exists, cannot discriminate between legitimate and illegitimate targets, and so it cannot be used.

Whether an enemy nation recognizes this prohibition or actively violates it is irrelevant to the fact that if one is to act in accordance with the Just War Tradition one is prohibited in using biological or chemical weapons. Enemy violations of Just War principles do not affect one's own responsibilities. Thus, one's actions could be permissible with the scope of the Law of Armed Conflict, but be in violation of the principles of the Just War Theory.

This is not the position, though, that nations take when they are forming and agreeing to the Laws of Armed Conflict. O'Brian, for example, tells us:

...[M]odern international law has sacrificed justice in its attempt virtually to eliminate the competence of the state to engage in war unilaterally. The problem is that this decision to put peace, security, and stability above justice in the international hierarchy of values was based on the assumption that there would be both effective collective security to enforce the peace and the peaceful settlement of disputes.³²

Presumably, there is a relationship between Just War Theory and the Law of Armed Conflict. The creation of such laws is motivated, I believe, at least in part, by a desire to codify the humanitarian principles found within the Just War Theory. This is not to say, though, that the Law of Armed Conflict should be understood as articulating the limits and breadth of the principles of Just War Theory—as the reservations to the Geneva Protocol show. The Law of Armed Conflict is, like any other group of treaties, a collection of agreed on positions. The Law of Armed Conflict was written by the victors in specific conflicts, so that their perspectives as victors and as participants in a war fought with certain technologies are likely reflected in treaties, even though we would want a theory to be independent of and abstracted from such

³² O'Brien, *The Conduct of Just and Limited War* p. 23.

considerations. Just as one's actions could be permissible with the scope of the Law of Armed Conflict, but be in violation of the principles of the Just War Theory, so too can one's actions be permissible according to the principles of Just War Theory and yet be in violation of the Law of Armed Conflict.

An implication of the fact that the Law of Armed Conflict is a set of treaties is parties might be engaged in armed conflict that did not participate in the construction of the treaties or sign off on them. Just as those nations that did ratify the Law of Armed Conflict would not have done so if the Law of Armed Conflict placed them at a significant disadvantage, non-signatories who would find themselves at a disadvantage by adhering to the Law of Armed Conflict cannot be expected to do so.³³ The Law of Armed Conflict is designed by nations of a certain kind with particular—and similar—war fighting capabilities. Smaller nations and non-governmental organizations that lack the fighting capacities of nations such as the United States, Russia, and England cannot be expected to fight in the same manner.³⁴ This is not to suggest that these parties are not governed by rules; they are—those dictated by Just War Theory. They are not necessarily confined by treaties designed by larger much more powerful nations.

Considering the question of who has immunity from attack will help make this point more salient. As I have mentioned, historically there has been a recognized distinction between combatants and noncombatants. Traditionally the status of combatant has been restricted to members of the military (with the exception of medical personnel, clerics, wounded soldiers who

³³ This of course assumes that there are actions available to the non-signature parties [that](#), while prohibited by the Conventions, are permissible under the constraints of Just War Theory.

³⁴ Imagine for instance that United States, Russia, and England an identical number of buildings in their respective nations, and as it so happened in each nation a third of the buildings were painted white, a third black and a third yellow. Under such circumstances, it would not be surprising to find that these nations have come together and agreed to restrict attacks to only yellow buildings. Now imagine that a nation who was not party to this agreement has two thirds of its buildings painted yellow. Clearly, it would be unreasonable to expect this nation to abide by such restrictions.

no longer pose a threat to the enemy, soldiers in the process of surrendering, and prisoners of war (POWs)). Traditionally the status of noncombatant has been applied to the entire civilian population (with the exception of those few individuals who directly support the fighting such as munitions workers). By targeting civilians, then, terrorists are in violation of the traditions (and conventions) followed by most modern armies attempting (or claiming) to act in accordance with Just War Theory.

This of course does not mean that by targeting civilians terrorists are in violation of Just War Theory. Just War Theory is a set a moral principles that aims to explicate how one must act in order for one's actions in regard to war to be morally acceptable.

To clarify: in warfare, shifts in tactics are morally impermissible only if they violate the criteria for *jus in bello*. One of the criteria of *jus in bello* is that combatants discriminate between other combatants and noncombatants in their application of force. Intentionally killing civilians, then, is a violation of this criterion only if the civilians in question are noncombatants. The question becomes, "How does one distinguish between combatants and noncombatants?" This question is not merely concerned with how one can target only combatants, but with which members of a population fall into the category of combatant and which fall into the category of noncombatant. Just War theory tells us what the principle of noncombatant immunity is, but Just War tradition has told us to whom that principle applies. Whether tradition has correctly applied that principle cannot be determined, I contend, from the underdeveloped theory available to this time.

Two related factors have led to the confusion over the proper application of principle of noncombatant immunity. It is true not only that (1) Just War thinkers have relied too heavily on

tradition, practice and international Conventions to determine who is a combatant, but also that (2) the tradition is backwards-looking.

In deciding how to apply the principle of non-combatant immunity, many philosophers start with the traditions, practices, and conventions of war and attempt to formulate a Just War Theory to explain such practices. In other words they incorporate the Conventions into their starting point and formulate a theory that reflects and rationalizes the conventions, rather than starting with the theory and criticizing and deriving appropriate conventions from a stronger theoretical base. While an analysis of such short cuts can be useful, danger lies in the fact that the Law of Armed Conflict is a set of agreed-upon practices governing certain kinds of behaviors in regards to the parties involved. It is important to keep in mind that like any treaty, the primary driving force in the construction of the Law of Armed Conflict governing warfare was the national interests of the countries involved, rather than a set of moral principles such as those incorporated in Just War Theory. -

Furthermore, the problems of fighting the most recent war are usually prominent in their thinking. In other words, a second limitation of incorporating tradition into one's starting point is that tradition is backwards-looking. There is an old saying, "Generals are always prepared to fight the last war." The classic example of this is the Maginot Line.

The Maginot Line was a line of concrete fortifications, tank obstacles, machine gun posts and other defenses which France constructed along its borders with Germany and with Italy in the wake of World War I...The French believed the fortification would provide time for their army to mobilize in the event of attack

and also compensate for numerical weakness. The success of static, defensive combat in World War I was a key influence on French thinking.³⁵

German forces were able to completely bypass the Maginot Line. The problem was that France was prepared to fight the entrenched warfare of World War I. Of course, generals are not the only ones to fall prey to this kind myopic focus on past methods. Just War thinkers who rely to heavily on tradition can run into the same difficulties, as I intend to argue.

1.2.3-Summary

When we look at the rules that govern modern armed conflict we find three sources: (1) Just War as theory, (2) Just War as tradition, and (3) The Laws of Armed Conflict. Johnson, who makes no distinction between Just War as tradition and Just War as theory, tells us that Just War Theory is:

...a body of moral wisdom deeply and broadly rooted in Western ideals, institutions, and experiences. Developed over history as a result of contributions from both secular and religious sources, [it reflects] the practice of statecraft and war as well as moral and political theory....³⁶

From a philosophical position the best choice for evaluating the justness of any martial activity is going to be Just War as theory. Ideally, the fundamental principles that drive a theory are going to theoretically grounded. As such they can be applied in a non-arbitrary fashion, and as new situations present themselves those situations can be evaluated based upon the theoretical implications of the theory's principles. If those theoretical foundations are not in place, then the rules of war become a matter of etiquette and law rather than morality.

³⁵ http://en.wikipedia.org/wiki/Maginot_Line Accessed September 5, 2005.

³⁶ James Turner Johnson, *Morality & Contemporary Warfare* (New Haven: Yale University Press, 1999) p.23.

As a matter of fact, many militaries, such as the United States Army, are guided by international agreement and tradition (custom) rather than theoretically grounded moral principles. According to the United States Army's Field Manual outlining the rules governing armed conflict, there are two sources for their rules.

a. Lawmaking Treaties (or Conventions), such as The Hague and Geneva Conventions.

b. Custom. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. Lawmaking treaties may be compared with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law.³⁷

Well established customs or traditions regarding the practice of warfare takes on the role that the idea of common law plays in many national legal systems.

It is not surprising that a nation would choose to base the rules it follows during an armed conflict on the treaties it has agreed to and the practice it has long recognized and followed. It is problematic, though, for the reasons I have given in the previous section. There are too many factors other than concerns for justness, such as security issues, that play a role in the creation of international laws.

Basing the rules governing armed conflicts on customs and traditions is equally problematic. One of the biggest difficulties is that practices that establish themselves as traditions between warring parties are normally the result of similarities in the culture, level of technology,

³⁷ United States Army, "Field Manual 27-10 Law of Land Warfare," (Washington D.C.: Army Publishing Directorate, 1976), Chapter 1, Section 1, para. 4.

combat techniques, etc. It is important to remember that the traditions surrounding the development the Just War Tradition were Christian Europeans who were more alike than different. Attempting to impose a standard of warfare on someone else's culture simply because that is how war is traditionally fought within one's own culture is akin to attempting to impose a standard of dress on another culture simply because that is how people dress in one's own culture. Now I am not trying to condemn all tradition within the Just War Traditions, nor am I claiming that none of the traditions is morally justifiable. What I am arguing is that accepting the practice *merely* because it is tradition is problematic.

Both Just War as tradition and Just War as theory have criteria by which they evaluate the justness of wars. The question, though, is "What is the basis of these criteria?" As Johnson indicates, the source for much of Just War Tradition is religious as well as the practices of statecraft and war. The question is whether these religious sources and secular practices have been sufficiently philosophically vetted to warrant their inclusion as ungrounded principles or assumptions in a Just War Theory. This is important because it speaks to the probative force of the theory or tradition. A theory properly constructed will theoretically ground all of its principles save those few assumption that cannot reasonably be proven. A tradition on the other hand by its very nature will rely on long standing customs, beliefs and practices, eschewing the parsimony of theory.³⁸

While this makes sense if one's goal is to create church doctrine or national and international laws to govern a particular people, it is unlikely to result in theory that can

³⁸ This is not to say that there will be no assumptions made in a theory—no primitive principles. For example, when discussing noncombatant immunity Walzer tells us:

...the theoretical problem is not to describe how immunity is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationship.

Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 145n.

Walzer does not defend the principle that human beings *qua* human being have a *prima facie* right not to be attacked. The issue is not that there exist assumptions, but the source from which those assumptions are derived.

accommodate significant changes in the circumstances of war. In other words, what is true of the distinction between combatants and noncombatants in the sixteenth century or even the early twentieth century is not necessarily going to be true in the twenty-first century, with the changed circumstances of war. This dissertation aims to demonstrate that a discussion of just wars, then that relies upon tradition is going to lack the probative force of one that is grounded in theory.

In contrast, I aim to make my work theoretical, to work primarily from rules and principles, rather than from tradition and conventions. I believe and shall argue in this dissertation, however, that reliance on tradition causes many Just War thinkers to accept customary views regarding important features of the Just War Tradition—particularly regarding who constitutes a noncombatant and who has proper authority to initiate a conflict—without the philosophical investigation that these questions require.

With this said, I shall, for the sake of convenience and to stay consistent with the Just War literature, adopt the use of the phrase “Just War Tradition” to signify the breadth of Just War thinking that encompasses both the tradition and various Just War Theories.

1.3-Plan for the Dissertation

In this dissertation, I am arguing that at least some forms of non-governmental political terrorism are compatible with the Just War Tradition. When evaluating any use of force within the scope of a Just War framework, two questions need to be addressed: (1) was it appropriate to engage in the use of force (*jus ad bellum* considerations), and (2) was the force used appropriately (*jus in bello* considerations). It is within the scope of these two questions that most of the objections to terrorism arise. In order to show the compatibility of political terrorism and Just War Tradition, then, I am going to have to show first that the terrorist use of force can be

legitimate (Terrorists can satisfy *jus ad bellum* criteria.) and second that nothing inherent in the terrorist use of force to attack civilians violates the criteria of *jus in bello*.

Before I explain what I am going to do in the preceding chapters, I want to make a couple of preliminary comments. First, I believe that the historical development of the Just War Theory can be deceptive. As I indicated in the Section 1.2.1, the Theory started with only three criteria—right authority, just cause, and right intention—and over the course of centuries further criteria were identified. Notice that I say identified rather than added. Understanding Just War Theory requires understanding the interrelationship of the six criteria. It is my contention throughout this dissertation that it is more accurate, and more useful, to understand the criteria of right goal, last resort, and proportionality *ad Bellum* —as well as the *jus in bello* (justice in war) criteria as discovered implications of the other criteria, rather than ad hoc additions to the theory.

The second comment I wish to make is in regards to the scope of my project. The complexity of Just War Theory and the nature of my project allow only for a cursory discussion of each of the criteria. Fairness requires that I acknowledge that each of the criteria has a long history and that even among contemporary Just War Thinkers there is much debate about the best way to understand them. As with many philosophical traditions there is a general consensus regarding these criteria and much of the debate revolves around fine-tuning the details. It is within this general consensus that I intend to work. My discussion of the *jus ad bellum* criteria will not require me to make any controversial moves regarding the understanding of the traditional criteria. Instead, I shall simply consider the criteria in terms many others have neglected.

In Chapter Two I shall provide the Just War framework in which the discussion of the permissibility of terrorism will occur. I shall begin by identifying the scope of Just War

Tradition, which I shall argue goes far beyond merely governing when and how wars are to be fought justly. Just War Tradition, I shall argue, governs any use of a particular type of force/violence (martial force). Once I have accomplished this I shall briefly discuss the conditions traditionally held to be necessary for one to engage in a just war. In this discussion, I shall identify and consider particular aspects of the Just War Tradition that are relevant to my project.

In Chapter Three I shall provide a purely descriptive definition of non-governmental political terrorism. I shall argue that many of the problems associated with defining terrorism stem first from a propensity by those making the definition to construct the definition with morally loaded terms—such as “murder” and “illegal” —thus begging the question of the permissibility of terrorism, and second, that there is a wide variety of types of terrorism, defined by the motives and nature of the terrorist in question. That is, a terrorist can be politically motivated or driven by some other motive such as revenge or greed. Similarly terrorist acts can be performed by individuals, corporations, and governments. Both the motive and nature of the terrorist are going to affect the permissibility of the terrorist’s actions. The scope of Just War Tradition is going to limit our focus to the political terrorist, and scope of this dissertation is going to limit our focus to non-governmental entities.

In Chapter Four I shall address the question of whether terrorists can satisfy the criteria of *jus ad bellum*. While I shall examine the compatibility of terrorism and Just War Tradition in terms of all six *jus ad bellum* criteria (Right Authority, Just Cause, Right Intention, Right Aim, Proportionality *ad Bellum* and Last Resort) my primary focus shall be on the criterion of Right Authority. This is, after all, one of the two major objections to terrorism—that terrorists engage in the illegitimate use of force. This is, as I have indicated, because terrorists are individuals or

members of non-governmental organizations and traditionally *jus ad bellum* criteria have been taken to apply only to governments and their designated representatives. The first part of my project, then, is going to be twofold. First, I am going to show that the *jus ad bellum* criteria apply to individuals and non-governmental organizations as well as governments. Second, I will show that there is nothing inherent in the character of terrorism that would preclude terrorists from satisfying *jus ad bellum* criteria.

Once I have established that terrorists can satisfy the *jus ad bellum* criteria I shall turn my attention to questions of their ability to satisfy the criteria of *jus in bello*. The second question that needs to be addressed in our exploration of the compatibility of terrorism and Just War Tradition is whether the force terrorists use is used appropriately. In other words, can terrorist acts satisfy *jus in bello* criteria? Again, this is a general question about the nature of terrorist acts, not a specific question of any particular terrorist action. The question is not which, if any, terrorist acts have satisfied *jus in bello* criteria, but whether there is anything inherent in the nature of a terrorist act that would preclude it from satisfying the *jus in bello*. Perhaps no question in the study of the morality of modern warfare is as fundamental as who may be intentionally targeted. For any attack to be just within a Just War framework it must satisfy the *jus in bello* criteria of Discrimination and Proportionality *in Bello*.

In Chapter Five I shall consider the criterion of Discrimination between Combatants and Noncombatants. As I have said, this criterion is traditionally understood in terms of the combatant/noncombatant distinction where noncombatants are those individuals who have not engaged themselves in martial activities and as such have not lost their immunity from attack. I shall not dispute the connection between involvement in martial activities and the loss of immunity from attack, but rather argue that a far greater percentage of the civilian population

than is traditionally thought falls into the class of combatant. In Chapter Five I shall begin with the traditional view that makes one a combatant is that one is dangerous and then provide a detailed analysis of what it means to be dangerous within a Just War Tradition context. This I shall refer to as being dangerous in the martial sense. Anyone I shall argue, whether a member of the armed forces or a civilian, who is dangerous in this sense, has lost his or her immunity from intentional attack and is therefore a combatant.

In Chapter Six I shall examine the second and final necessary condition for being a legitimate target—Proportionality *in Bello*. I shall begin by examining the nature of this criterion. Unlike the criterion of Proportionality *ad Bellum* the criterion of Proportionality *in Bello* is not concerned with the relationship between the objective goods and harms caused by an action within a war. Rather it is concerned with proportionality in terms of military or martial necessity. That is, the value of the military objectives achieved relative to the position of the person performing the action much outweigh the harms caused by the action.

Finally in Chapter Seven I shall be asking what criteria a terrorist interested in political terrorism would have to meet in order for their actions to be justified within a Just War framework, keeping in mind that I am not interested in any particular terrorist organization or act. I shall consider general conclusions regarding the relationship between political terrorism and Just War Tradition. It might be the case that no terrorist has ever satisfied such criteria. This of course is no more problematic for my project than the possibility that no war has ever satisfied the criteria of Just War Tradition.

CHAPTER TWO

JUST WAR THEORY: AN ANALYTICAL APPROACH

2.1-Introduction

In this chapter, I shall sketch the Just War framework within which the morality of terrorist campaigns and acts will be evaluated. As I indicated in Chapter One, the Just War Tradition is divided into two main components—*jus ad bellum* (justice for war) and *jus in bello* (justice in war). *Jus ad bellum* is concerned with the justness of the decision to go to war whereas *jus in bello* is concerned with the justness of actions within a war. The *jus ad bellum* criteria consists of six necessary conditions for the decision to go to war (to engage in martial activities) to be just—Right Authority, Just Cause, Right Intention, Right Goal, Proportionality *ad Bellum* and Last Resort. The *jus in bello* criteria consists of two criteria for any action within a war to be just—Discrimination and Proportionality *in Bello*. In the previous chapter, I give a brief history of the development of the Just War Tradition; in this chapter I shall explain what each criterion requires.

Although, as I shall point out through the course of this dissertation I believe there are some problems with many of the current interpretations of Just War Tradition, I do not intend to develop an entirely new theory of just war. Rather I shall focus primarily on two (essential but particular) questions that Just War thinkers must face—who or what constitutes right authority (to initiate war) and who constitutes a legitimate target for direct attack (those persons who are combatants and whose intentional attack satisfies the *jus in bello* criterion of Proportionality *in bello*). It is my intention, when I am finished with this project, to have developed these areas of

Just War Theory in a way that is normative rather than political, legal or religious, in a way that is not bound by weapon type or by the circumstances of our day. With that said, my project will, nevertheless, deal with the permissibility of terrorist acts within the scope of all the criteria of the Just War Tradition. It is not my intention to reinvent Just War Theory, but rather to repair two areas that I believe have not received sufficient philosophical inquiry. I should add that part of the motivation for this project is that I believe that the nature of war has changed significantly because of changes in our socio-political environment. These changes, I believe, warrant a paradigm shift in our just war thinking.¹

In order to provide the appropriate framework for my dissertation this chapter will consider the criteria of *jus ad bellum* (justice for going to war) and *jus in bello* (justice in war) in turn. As I discuss each criterion, I shall provide first a brief historical sketch including resources from both historical and contemporary thinkers. I shall then consider in what ways that criterion relates to criteria of either *jus ad bellum* or *jus in bello*, and then finally I shall briefly outline how I think the criterion should be properly understood. (Where argument is appropriate, it shall wait until a later chapter.) Before I look at the criteria of the Just War Tradition, I wish first to consider the scope of the Just War Tradition.

2.2-The Scope of Just War Tradition

What is the scope of Just War Tradition? In this section, I shall argue that the scope of the Just War Tradition is any use of martial force, where ‘martial force’ is understood as the use of

¹ Although I am focusing on two tenets within the Just War Tradition for repair, I am not presuming that the rest of the framework is acceptable as it stands. To the contrary, the general character and acceptability of Just War Theory is beyond the scope of this dissertation. As I indicated in Chapter One, there are two claims that one can make in regards to the permissibility of terrorism within the Just War framework. The weaker claim is that at least some forms of terrorism are compatible with the Just War Tradition, but leaves open the question of the acceptability of the Just War Tradition. The stronger claim is that at least some forms of terrorism are compatible with the Just War Tradition, and that the Just War Tradition is correct. In this dissertation I am arguing for the weaker claim.

force or violence between one or more sovereign parties—where sovereign parties are parties that have no common higher authority to resolve their conflict. I shall argue first that, despite the focus on wars in the literature, Just War Tradition cannot be concerned only with conflicts that reach the level of a war. Next I shall argue that the activities over which Just War Tradition ranges is not coextensive with military activities. There will be military activities that do not involve the use of force or violence against other sovereign parties, as there will be non-military activities that do involve the use of force or violence against other sovereign parties. Finally, I shall explain that the use of martial force cannot be restricted to governments, because, as I shall argue in Chapter Four, sovereignty is not restricted to governments.

The driving principle behind Just War Tradition is that under certain circumstances the use of force and/or violence is necessary to maintain or restore justice. Just War Tradition then is concerned with the circumstances under which a force that is measured in its degree and direction can be used justly. Historically Just War Tradition has focused its discussion on the justifiable use of force in terms of the decision to go to and actions within wars. This is, I believe, because before the invention of weapons of mass destruction wars were the worse manifestation of the use of forces/violence. It is a mistake, though, to view Just War Tradition as applying only to wars. Certainly, war is one way in which such force/violence can be employed, but it is not the only way.

The United States distinguishes its use of military force between wars and Military Operations Other Than Wars (MOOTW). In Joint Publication 3-07 the United States Air Force characterizes war as, "... large-scale, sustained combat operations to achieve national objectives

or protect national interests....”² MOOTW on the other hand, “...encompass the use of military capabilities across the range of military operations short of war.”³ MOOTW,

...focus on deterring war, resolving conflict, promoting peace, and supporting civil authorities in response to domestic crises ...MOOTW may involve elements of combat and noncombat operations in peacetime, conflict, and war situations. MOOTW involving combat, such as peace enforcement, may have many of the same characteristics of war, including active combat operations and employment of most combat capabilities.⁴

MOOTW operations can be

1. combat operations (enforcement of sanctions, enforcing exclusion zones, protection of shipping, strikes/raids),
2. non-combat operations (arms control support, domestic support operations, foreign humanitarian assistance. nation assistance, show of force, support to insurgency) and
3. operations that overlap between combat and noncombatant missions (combating terrorism, counter-drug operations, ensuring freedom of navigation, Noncombatant Evacuation Operations (NEO), peace operations, recovery operations).

Certainly, we do not want to say that every legitimate use of force/violence under Just War Tradition has to be on the scale of a large-scale, sustained combat operation. After all an important component of the Just War Tradition is that one should use the minimum amount of

² United States Department of the Air Force, *Military Operations Other Than War* (Washington D. C.: U.S. Air Force, 1996) p. I-1.

³ Ibid.

⁴ Ibid.

force necessary in order to restore or maintain justice. If justice can be served by pursuing military actions short of war, then Just War Tradition would require one to do so.

We might be tempted, then, to say that Just War Tradition seeks to provide appropriate direction for military operations. This too, though, would be a mistake. Not all military operations fall within the scope of the Just War Tradition. Just War Tradition is concerned with the use of a particular kind of force/violence—which I shall refer to as *martial force*. As we shall see in Section 2.3.1, in our discussion of the criterion of Right Authority, part of what justifies governments (sovereigns) in using violence against one another is that they lack a common superior to which they could turn to remedy the perceived injustice done. Not all uses of force or violence by governments, though, fall under this justification for not all uses of force or violence by governments are against other sovereign entities—not all governmental force is martial force. For example, governments will often use force or violence to enforce the laws of their own domain. Similarly not all exercises of martial force by governments will be performed by the military. There are many non-military organizations within governments that engage in martial force, such as the United States Central Intelligence Agency (CIA).

It is also a mistake to view the use of martial force—which I shall refer to as *martial activities*—as being restricted to governments. As I shall argue in Chapter Four it is possible for non-governmental entities, such as individuals, to find themselves in circumstances where they are sovereign—they stand in relation to another with no common superior to mediate injustices. Just War Tradition, then, does not range over merely wars, but any use of martial activities.

The scope of the Just War Tradition is any martial activity whether that activity be a war or single campaign; whether that activity be performed by the government-sponsored military or some non-governmental entity—such as a terrorist organization.

2.3-Jus ad Bellum

Though not all Just War thinkers agree as to which criteria should be included in the list of *jus ad bellum* criteria there are six criteria that dominate the options: (1) Right Authority, (2) Just Cause, (3) Right Intention, (4) Right Aim, (5) Proportionality *ad Bellum*, and (6) Last Resort. It is these six that I shall use in this dissertation as the necessary and sufficient conditions for the decision to go to war to be just. In addition to these six criteria I shall look briefly at three other proposed criteria that are often identified as *jus ad bellum* criteria: (1) Public Declaration of War (2) Reasonable Chance of Success, and (3) Comparative Justice.

2.3.1-Right Authority

The criterion of Right Authority states that a necessary but not sufficient condition for the decision to go to war to be justified is that those who make the decision to go to war possess the authority to do so. Historically, as in modern times, the authority to make war has rested almost exclusively with governments.⁵ Since Aquinas there have been two ideas driving the discussion of this criterion. The first is that wars are fought in defense of the common good, and therefore, the decision to go to war should rest with those who are responsible for that good. Aquinas writes, "...as the care of the commonwealth is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them."⁶

The second idea is that what justifies governments' going to war is that they do not have any political superiors. In the absence of any higher authority, they and their enemies have no common set of laws and procedures through which to seek justice. This is not, according to most Just War Thinkers, true for individuals. Aquinas explains of individuals that, "...it is not the

⁵ With the exception of Augustine, all Just War thinkers have made allowances for some form of revolution. Those who have discussed specifically the question of revolutions/civil wars in terms of the criterion of Right Authority often talk in terms of revolutionary governments.

⁶ Aquinas, "War and Killing," p. 221.

business of a private individual to declare war, because he can seek redress of his rights from the tribunal of his superior.”⁷ Similarly, in the United States, states do not have the authority to declare war on each other inasmuch as the laws and judicatory of the United States provide a framework for resolution of conflicts between states.

In more recent times Right Authority has been given a much more legalistic flavor. Most modern nation states, though constitutions or legislation, have endowed particular branches of their governments with the authority to declare war. In the United States, for example, that authority rests with Congress. It is these constitutionally or legally recognized entities that are thought to have the proper authority to engage in martial activities.

The difficulty in applying this criterion to contemporary conflicts, such as those that involve the use of terrorism, is in attempting to answer the question of what kinds of entities can possess the authority to go to war. As I have indicated, most Just War thinkers would restrict this class to governments. If this is true, then, no non-governmental terrorist act can meet this criterion. Whether this claim is right, though, will depend to a great extent on whether governmental authority is sovereign or derived. If governments derive their authority from individuals, then there might be circumstances under which those individuals may reclaim that authority.

2.3.2-Just Cause

The criterion of Just Cause states that a necessary but not sufficient condition for a justified decision to go to war is that there exists a just cause for going to war. Historically Just Cause has been understood to include defense against attack, retaking something wrongly taken,

⁷ Ibid., p.221.

or punishing evil.⁸ In more recent times, though, Just Cause has generally been thought to be restricted primarily to responses to unwarranted aggression.⁹ Just Cause then would permit defense against attack, defense of another against attack, and humanitarian intervention (defense of subjects in the face of the ineptitude or aggression of their own government).¹⁰ One of the biggest challenges in evaluating contemporary conflicts in terms of this criterion is determining what constitutes an unwarranted aggression. If one were to examine the Israeli-Palestinian conflict in terms of unwarranted aggression the question might hinge on who had a rightful claim to the disputed land. This question, though, is not one that I believe can be readily answered. I shall discuss these difficulties more fully in Section 3.4.1.7 when I discuss Comparative Justice.

2.3.3-Right Intention

The criterion of Right Intention states that a necessary but not sufficient condition for the decision to go to war to be justified is that those making the decision to go to war must be doing so for the right intentions. Historically Right Intention has been understood in contrast to specific perverse intentions. Augustine, for example, identified perverse intentions for war in the following passage. “The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war.”¹¹ In more recent times Right Intention has generally been thought to

⁸ Citing Augustine Aquinas tells us:

Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault. Wherefore Augustine says (Questions. in Hept., qu. x, super Jos.): "A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly." Ibid., p. 221.

⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* pp. 51-53.

¹⁰ The assumption of the above is that all people are properly the subjects of some government. The general idea of humanitarian defense, however, does not require this assumption.

¹¹ Again citing Augustine Aquinas writes:

Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. Hence Augustine says (De Verb. Dom. [The words

mean that one's intentions must be in accord with the cause which justified one to go to war. In the "The Challenge of Peace: God's Promise and Our Response," the United States Conference of Catholic Bishops state:

95. d) Right Intention: Right intention is related to just cause -war can be legitimately intended only for the reasons set forth above as a just cause. During the conflict, right intention means pursuit of peace and reconciliation, including avoiding unnecessarily destructive acts or imposing unreasonable conditions (e.g., unconditional surrender).¹²

There is some debate however, regarding whether one may have perverse intentions as well. Some Just War thinkers, like Augustine, argue that one's intentions must be exclusively right intentions. Other thinkers argue that one may have perverse intentions as long as one has the right intention as well.¹³

The criterion of right intention is in some ways the most controversial of the criteria, not because of the difficulty in applying it, but rather because of whether it should be considered a necessary condition for a just war. That is, if all the other criteria are met, many Just War

quoted are to be found not in St. Augustine's works, but Can. Apud. Caus. xxiii, qu. 1): "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good." For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says (Contra Faust. xxii, 74): "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war." Aquinas, "War and Killing," p. 221.

¹² Catholic Church. National Conference of Catholic Bishops. Ad Hoc Committee on War and Peace, *The Challenge of Peace--God's Promise and Our Response: Pastoral Letter of the National Conference of Catholic Bishops on War and Peace: Second Draft* (Washington, D.C.: United States Catholic Conference, 1982). See <http://www.osjspm.org/cst/cp.htm> Accessed September, 5 2005.

¹³ Douglas Lackey, for example takes this position when he writes, "[i]f it is too much to insist that political leaders make decisions solely on moral grounds, or even primarily on moral grounds, we can insist that dire for what is morally right be at least one of their motives." Douglas P Lackey, *The Ethics of War and Peace* (Englewood Cliffs, N.J.: Prentice Hall, 1989) p. 32.

thinkers, particularly secular thinkers, suggest that the intention of the decision maker does not affect the justness of the decision.¹⁴

In a time when those who made the decision to go to war had the potential for great personal gain the importance of intentions was easy to appreciate. If a medieval lord went to war because he lusted for another lord's wife, then the luster's intention could get in the way of any justice of his cause. But in modern warfare, personal spoils for rulers are not likely to be involved. There may be commercial spoils, but they are likely to be spread widely enough to blur the line between the (allegedly more just) order created through the warfare versus the (allegedly more unjust) order before the war. It should be noted, though, that when individuals, such as terrorists, exercise their right to use martial force, the potential for acting purely for personal reasons might be as great as in the case of the medieval lord. There is nothing inherent in either the character of terrorists or the manner in which they are organized that would necessitate this perverse intention.

Of course the perverse intentions do not have to be directed at personal gain for the person(s) making the decision. The intention might be directed at benefiting some privileged class or special interest group. As such the justification of any martial activity is clouded to the extent that the authority who undertakes the activity foresees attractive consequences for a class of folks different from (but potentially overlapping with) folks who comprise the commonweal whose public goods have been aggressed against. Often, though the structure of the organization making such decisions can mitigate these concerns. In organizations authorized to pursue the interests of societies, for example, divisions of powers can create responsibilities and provide

¹⁴ Grotius, for example wrote, "But such motives, though blamable, when connected with a just war, do not render the war itself unjust, nor invalidate its conquests." See <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf> p. 232.

opportunities for examining and evaluating any special interests that may otherwise hold sway without critical scrutiny and thus without explicit consent. Nor are such divisions of power restricted to governmental organizations. Such organizational structures are as available to the non-governmental organizations of those alienated from resident governments as they are to governments. While any further elaboration or criticism of the concept of division of powers is beyond the scope of this dissertation, this discussion should be sufficient to demonstrate that appropriate attention should be paid to the role of intentions when evaluating the decision to go to war.

2.3.4-The Right Goal (Aim)

The criterion of the Right Goal states that a necessary but not sufficient condition for the decision to go to war to be justified is that the goal or aim of going to war must be a lasting peace. This is by far the most non-controversial of the criteria. Starting as far back as Aristotle and continuing into the new century thinkers have argued that a just war must have as its aim a lasting peace.¹⁵ I shall assume this non-contentious criterion throughout. While I believe this dissertation casts no doubt upon this criterion, I do briefly consider some of its implications in my Chapter Six when I discuss the duties of soldiers and politicians in making war.

2.3.5- Proportionality *ad Bellum*

The criterion of Proportionality *ad Bellum* states that a necessary but not sufficient condition for the decision to go to war to be justified is that the goods one hopes to achieve by resorting to military force outweighs the harm that one foresees resulting from the use of that force. Historically Proportionality *ad Bellum* has been understood either in terms of the goods caused by war outweighing the harms, or a proportionately grave cause. That is, the cause for

¹⁵ See Aristotle, *The Nicomachean Ethics* 1177b6. and Aquinas, "War and Killing," p. 220.

which one goes to war must be sufficient to warrant the harm that going to war is likely to bring. These two positions are still dominate among contemporary thinkers, but in more recent times some thinkers, such as Walzer have argued that the Proportionality *ad Bellum* criterion can never be satisfied, regardless of whether the harm the war causes is compared to the good brought about by successful conduct of the war or to the gravity of the harm precipitating it. The goods and harms that it would have us weigh against one another cannot be compared in any meaningful way. Weighing life against freedom, for example, is involves comparing incommensurables. While most thinkers think that satisfying this criterion is possible, Walzer's objection does indicate a serious difficulty with attempting to evaluate contemporary conflicts in terms of their Proportionality *ad Bellum*. The value that one puts on things such as human life, freedom, religion, cultural identity, national honor, etc. is going to vary considerably and it is unclear on what basis one would assert objective standards. I shall nevertheless accept this traditional criterion, since none of the concerns I discuss turns significantly on it.

2.3.6-Last Resort

The criterion of Last Resort states that a necessary but not sufficient condition for the decision to go to war to be justified is that war be a last resort. Historically Last Resort has been understood to mean that all possible peaceful solutions to a conflict must be pursued before the use of force was justified. In more recent times it has been generally accepted that it is not possible to pursue all possible peaceful solutions. Contrarily, as Walzer argues, there will always be one more thing to try.¹⁶ This recognition has led modern Just War thinkers either to dismiss Last Resort as being unachievable or to argue that a reasonable person standard needs to be applied. The difficulty in applying a reasonable person standard to this criterion is that it is not

¹⁶ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 4.

clear by what standards we determine what a reasonable person would do. The United States faced this problem in the Second Gulf War. Its idea of what was reasonable differed from much of international community. As with Proportionality *ad Bellum*, I can accept Last Resort since none of my discussion significantly involves it.¹⁷

2.3.7-Other Possible *Jus ad Bellum* Criteria

As I have indicated, there are three other requirements that are sometimes included by Just War thinkers in the list of *jus ad bellum* criteria: (1) Reasonable Chance of Success, (2) Public Declaration and (3) Comparative Justice.

2.3.7.1-Reasonable Chance of Success

The requirement of a Reasonable Chance of Success holds that a necessary but not sufficient condition for the decision to go to war to be justified is that there must be a reasonable chance of success. Almost every modern Just War Thinker has some version of the criterion in their Just War Theory. The issue is not whether a reasonable chance of success is necessary in order to have a just war, but rather whether it should be treated as its own criteria. Many Just War thinkers, including myself, believe that a reasonable chance of success should be considered an entailment of the criterion of Proportionality *ad Bellum*. Historically Proportionality *ad Bellum* has been understood to mean that there is a reasonable chance of victory. This is because if there is no chance of achieving the goals for which one goes to war—bringing about a lasting peace—then there is no chance that going to war will bring about more good than the harms caused by the war. Imagine that during the Cold War the former Soviet Union launched all of its nuclear missiles at the United States. The bombardment of missiles is sufficient to destroy all life

¹⁷ See my discussion of Comparative Justice in Section 3.4.1.7.3 for a further discussion of this difficulty.

in the United States and the United States has no way to prevent the missiles from striking their targets. The United States does have a small window of opportunity, though, to respond in kind and launch its nuclear arsenal at the Soviet Union. Is the United States justified under a Just War framework in doing so? No. There is no good that could be achieved by the mutual destruction. The United States has no chance of victory—of restoring justice—only revenge. The argument against United States’ destruction of the Soviet Union in this hypothetical case, though, is a constraint of proportionality. I shall, therefore, address the issue of a reasonable chance of success in Chapter Four when I deal more thoroughly with the criterion of Proportionality *ad Bellum*.

2.3.7.2-Formal Declaration

The requirement for a public declaration of war dates back to Cicero and was initially implemented because of considerations of national honor. “No war is considered just unless it has been proclaimed and declared, and unless reparation has first been demanded.”¹⁸ Cicero’s reference to reparations is important. In part the inclusion of a requirement of formal declaration can be grounded in the criterion of Last Resort. A formal declaration of war gives those who have committed the injustices which have created a just cause for going to war an opportunity to make reparations. As I mention in Section 2.3.6 and shall argue further in Chapter Four, the criterion of Last Resort is circumstantial. That is, when we talk about pursuing all possible peaceful solutions before going to war it is important to understand that the modifier ‘all possible’ range over the possible reasonable or acceptable solutions available to the person(s) making the decisions rather than all logically possible or even available solutions. In the Just

¹⁸ Marcus Tullius Cicero, *On Duties*, trans. Miriam T. Griffin and E. M. Atkins, *Cambridge Texts in the History of Political Thought*. (Cambridge: Cambridge University Press, 1991) p. 213.

War Tradition, ‘reasonable or acceptable solution’ is going to range over those solutions that are going to promote justice. Pursuing a peaceful solution in the face of an aggressor who is committing genocide—at the cost of considerable human life—for example, is not likely to qualify as a reasonable or acceptable alternative to martial activities. Similarly, in a case of a significant balance of power, or in any case where the element of surprise is necessary for the injured party to restore justice, a formal declaration of war is likely to be an unreasonable or unacceptable solution. Therefore, I shall not include a formal declaration of war as a necessary *jus ad bellum* criterion.

2.3.7.3-Comparative Justice

The requirement of comparative justice is a modifier for the criterion of Just Cause and as such I do not believe it should be treated as a separate criterion. Rather it is an important consideration when evaluating the justness of one’s cause. Tracing its roots to Vitoria, Comparative Justice recognizes that in many circumstances both sides of a conflict can (and often do) have a just cause to go to war. Following Vitoria, Walzer asks:

...on opposite sides of the conflict, whether all belligerents might be able to claim a just cause for war. He comments that, because a government's propaganda machine makes it difficult to know the truth about just cause, the moral decision-making process is highly complex.¹⁹

That is, there may be rights and wrongs on both sides of the conflict and in order for one side to justly go to war the injustices suffered by one side must significantly outweigh the injustices suffered by the other. Of course, this is going to run into the same problem that I hinted at in my

¹⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 74.

previous discussion of Last Resort (see Section 2.3.6). Why? Because ‘just cause’ becomes perspectival as different parties invoke different histories, which in turn yield different *status quo antes*. It will be easy to construct elaborate self-consistent and internally coherent lines of reasoning, once the different parties’ different histories are given play. The question of comparative justice, then, forces a recognition of the complexities of determining whether one has a just cause for war, rather than being an independent criterion.²⁰

2.3.8-Summary

According to the Just War Tradition, the combination of these six necessary conditions (Right Authority, Just Cause, Right Intention, Right Aim, Proportionality *ad Bellum*, and Last Resort) is sufficient for justifying going to war. Being justified in going to war is a necessary but not sufficient condition for the war itself to be just. In order for the war to be just, the actions of those involved in fighting the war must be just as well. Their actions must meet the two criteria of *jus in bello*: Discrimination between Combatants and Noncombatants and Proportionality *in Bello*.

2.4-Jus in Bello

The *jus in bello* component of the Just War Tradition is concerned with justice within war—how wars are fought. There are two criteria to this component: (1) Discrimination between Combatants and Noncombatants, and (2) Proportionality *in Bello*. Before we consider these two criteria, though, I want to consider the relationship between *jus ad bellum* and *jus in bello*. Particularly I want to examine how *jus ad bellum* considerations affect those of *jus in bello*.²¹

²⁰ See Donald Scherer and James W. Child, *Two Paths toward Peace* (Philadelphia: Temple University Press, 1992). for a similar line of reasoning.

²¹ There are other concerns regarding the *jus ad bellum/jus in bello* relationship facing Just War thinkers, but no others are pertinent to our present discussion.

There is significant contention among Just War Thinkers regarding this relationship. Some thinkers, such as Walzer, believe that they are logically distinct.

Jus ad bellum requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement. The two sorts of judgments are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.²²

Others, though, hold that *jus ad bellum* considerations supervene on *jus in bello* evaluations.²³

There are two questions that need to be addressed. The first is whether *jus ad bellum* considerations impose special requirements and/or restrictions on the kind of actions that can and/or must be performed within the war. The second question is whether *jus ad bellum* considerations can render any actions performed within the war unjust. That is, whether the fact that a war is unjust because of the failure to satisfy one or more *jus ad bellum* criteria necessitates that any action performed in support of that war is also unjust.

To the first question, I answer yes. *Jus ad bellum* considerations do impose special requirements and/or restrictions on the kind of actions that can and/or must be performed within the war. In particular, I have in mind the criterion of Right Aim and the criterion of Proportionality *ad Bellum*. These two criteria are going to affect the responsibilities that one has in regards to satisfying the criterion of Proportionality *in bello*. The criterion of Right Aim requires that the goal of any just war is going to be a lasting peace. Fulfilling this criterion is going to entail that at least some of those participating in the war have a duty to pursue activities

²² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 21.

²³ Brian Orend, *Michael Walzer on War and Justice* (Montreal: McGill-Queen's University Press, 2000) pp. 112-13.

that minimize the obstacles to a peaceful resolution of the war. The criterion of Proportionality *ad Bellum* requires that one not engage in any activities that will make a lasting peace impossible.²⁴

To the second question, whether the fact that a war is *jus ad bellum* unjust affects the justness of the actions of those individuals fighting in the war (*jus in bello* consideration), I answer no. The soldier fighting in an unjust war is not morally tainted by the injustices of his or her war.

Some Just War thinkers hold that the justness of a soldier's cause does affect the justness of his or her actions independent of his or her adhering to or violating the criteria of *jus in bello*. The idea is that if one side of the conflict is engaged in an unjust war—for example they were fighting an unwarranted war of aggression, then the members of the unjust side are morally tainted. From this perspective even when the soldiers of the unjust side kill other combatants, they are unjustified. The chief British prosecutor at the Nuremberg trials made the following argument.

The killing of combatants is justifiable...only where the war itself is legal [satisfies *jus ad bellum* requirements]. But where the war is illegal [violates *jus ad bellum* requirements]...there is nothing to justify the killing and these murders are not to be distinguished from those of any other lawless robber bands.

In essence, they are criminals by virtue of their participation in a criminal enterprise (an unjust war). By extension the soldiers fighting on the just side of the war would be akin to police

²⁴ See Chapter Six for a more detailed discussion of how these considerations manifest themselves is the application of the criterion of Proportionality *in Bello*.

officers, justified by the justness of their cause [preservation of the rule of law], even when they may be unjustified in the strategy they follow or the tactics they employ.

I shall argue in Chapter Six, when I discuss the criterion of Proportionality *in Bello*, that the justness of the war in which a soldier fights in does not affect his ability to satisfy the *jus in bello* criteria. According to the Just War Tradition, those who lack a higher authority from whom to seek remedies for injustices may, when appropriate, use force in order to restore or maintain justice. Within a Just War framework, such force is to be considered a weapon that must be controlled and properly directed in order to be used justly. As I shall explain more fully in Chapter Four, neither the authority to use martial actions in the service of justice, nor the responsibility for maintaining control over the martial forces employed is restricted to governments. Justice sometimes requires that force be employed in order to rectify or prevent some injustice. This force may be employed by those who conflict, having no common authority for resolving their conflict, when they have failed in their attempts to negotiate their conflict. This is true, I shall argue, whether they are governmental or non-governmental entities.²⁵ This, of course is not to say that the actions of soldiers cannot be unjust; it is to assert that the justness of their actions will be understood in terms of *jus in bello* criteria rather than *jus ad bellum* criteria.

2.4.1-The Scope of *Jus in Bello*

When discussing activities such as war and terrorism it is easy to fall in the trap of focusing on killing. Killing is after all what most people would consider the worse part of such martial activities. Just War Tradition, particularly *jus in bello* considerations, is not concerned

²⁵ In Chapter Six, I shall argue that in order for the force to be used justly it must be controlled and properly directed. Any control over martial forces is going to require a high degree of discipline and it is this requirement of discipline that is going to entail a presumption that orders given are legitimate. Therefore, any group exercising such force must work under the presumption that orders given are legitimate. It is this presumption that allows soldiers, regardless of the justness of their war, to face each other as equals.

strictly with killing. It is concerned with all the harms caused by martial activities including but not limited to harms to people, property and the environment.²⁶ This means that the criterion of Discrimination between Combatants and Noncombatants prohibits not only killing non-combatants, but intentional attack aimed at harming them in any way.

Death and grave bodily injury are not the only harms that one can intentionally inflict upon a noncombatant. One important focus that is absent from much of the Just War Tradition literature is what constitutes a harm in the context of a just war. I suspect this is because the threat of death overshadows other considerations, but it is a question that must be answered before any judgment about the viability of Just War Tradition can be made. Although the list of rights might vary depending on the particulars of the theory, some commonly accepted rights are the rights to life, bodily integrity, mental integrity, property, freedom, not to be deceived (the right not to be lied to), freedom of worship, etc.²⁷ Now Just War thinkers normally focus on the first three, but what of the other rights? Any action that would intentionally violate one or more right of a noncombatant is going to be a violation of the criterion of Discrimination between Combatants and Noncombatants. *Jus in bello* criteria are going to govern the use of any kind of violence or force in the pursuit of martial activities. This is going to include non-lethal weapons as well as lethal force. It will also include both physical and psychological attacks.

2.4.2-Discrimination between Combatants and Noncombatants

The criterion of Discrimination between Combatants and Noncombatants states that a necessary but not sufficient condition for one's actions in war to be just is that one not intentionally target innocent persons—where innocence is understood in terms of non-

²⁶ Although the tradition seems to presume that the latter two are concerns because they are seen as harms to people.

²⁷ This is not, of course, intended to be a comprehensive list.

involvement in the war effort rather than moral culpability—and that participants in the war must discriminate between legitimate and illegitimate targets, or in other words, participants in the war may not intentionally attack others who are not engaged in the conflict. Historically this criterion has been understood to mean that there were certain classes of individuals that could not be intentionally attacked. These included, but were not limited to women, children, pilgrims, religious persons, the wounded, and the general, peaceful civilian population.²⁸

Contemporary Just War Thinkers maintain that combatants and noncombatants have been divided as follows: Noncombatants include civilians who do not directly support the war effort, medical personnel, chaplains, and the wounded who no longer resist, prisoners of war and those soldiers in the process of surrendering. Combatants consist of members of the military and those members of the civilian population who directly support the war effort—such as munitions workers.

As I have indicated, the criterion obligates one to do more than simply not intentionally target noncombatants, but to discriminate between legitimate and illegitimate targets of an intentional attack. A legitimate target of an intentional attack is a combatant whose attack would satisfy the criterion of Proportionality *in Bello*. (We shall discuss the criterion of Proportionality *in Bello* in the following section and in greater detail in Chapter Six.) The United States military characterizes legitimate targets in terms of military objectives:

Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization

²⁸ Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 56.

would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.²⁹

Military objectives are combatants and objects which contribute to the enemies' war-fighting or war-sustaining capacity whose attack would provide a definite military advantage.

The fact that only military objectives may be intentionally attacked does not mean that noncombatants and combatants whose attack would not satisfy the criterion of Proportionality Means cannot be knowingly harmed in martial operations. As Vitoria writes:

Sometimes it is right, in virtue of collateral circumstance, to slay the innocent, even knowingly, as when a fortress of [a] city is stormed in a just war, although it is known that there are a number of innocent people in it and although cannons and other engines of war cannot be discharged...without destroying innocent together with the guilty [combatants]. The proof is that war could not otherwise be waged against even the guilty and the justice of belligerents would be balked.³⁰

In other words, illegitimate targets may be the object of an attack, assuming certain criterion have been met, in the sense that one may take actions that will knowingly cause them harm, even though they may never be the intentional object of an attack. The question is how one distinguishes between the intended and merely foreseen object of an attack. In answer to this question, Just War thinkers have adopted the Doctrine of Double Effect. The Doctrine of Double Effect, grounded in the works of Aquinas, recognizes that some actions will have dual effects—the intended effect and the merely foreseen effect. In deontological systems such as the Just War Tradition and the Christian tradition, which produced the Doctrine of Double Effect, whether one

²⁹ United States Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (Washington D. C.: Dept. of the Navy, Office of the Chief of Naval Operations, 1991) para. 8.1.1.

³⁰ Francisco de Vitoria, "On the American Indians," in *Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), Section III, 37.

fulfills one's moral responsibility depends on one's intentions. This is not to suggest that one is never responsible for unintentional harms brought about by one's actions, only that harming illegitimate targets, when those harms are unintended, is defeasible in a way that intentionally harming illegitimate targets is not. For the purposes of this dissertation, I shall adopt Michael Walzer's version of the Doctrine of Double Effect as it is formulated by Paul Christopher.

(1) The bad effect is unintended; (2) The bad effect is proportional to the desired military objectives; (3) The bad effect is not a direct means to the good effect (e.g., bomb cities to encourage peace talks); and (4) Action are taken to minimize the foreseeable bad effect, even if it means accepting an increased risk to combatants.³¹

The difficulty in applying this criterion to contemporary conflicts such as those that involve the use of terrorism, is that there has not been sufficient philosophical investigation into what makes a person either a combatant or noncombatant. The misapplication of the criterion, I shall eventually argue, causes us to grant noncombatant immunity to those who should be construed as combatants.

2.4.3- Proportionality *in Bello*

The criterion of Proportionality *in Bello* states that a necessary but not sufficient condition for one's actions in war to be just is that the good achieved by performing the action outweigh the harm the action causes. Historically this has been understood to mean that certain

³¹ Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 93. This is a reformulation of Walzer's revision of the Doctrine of Double Effect. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* pp.153-55. This is a reformulation of the traditional Doctrine of Double Effect to be applicable specifically to martial operations. The standard formulation is: (1) The good effect cannot be inherently evil; (2) The good effect is intended while the bad effect is merely foreseen; (3) The bad effect cannot be the means by which the good effect is brought about; and (4) There is a proportionally grave reason for allowing the bad effect.

limits should be placed on how one could fight. These limits included what kinds of weapons could be used, what days one could fight on (no holy days), and who could fight. In more recent times Proportionality *in Bello* has generally been understood to mean that the military advantage gained from an action must outweigh the harm caused by the action. This too has led to some general limitation of types of weapons. Certain weapons are assumed to cause unnecessary suffering, and are therefore *prima facie* in violation of the criterion. The same difficulty we considered when we looked at the criterion of Proportionality *ad Bellum* occurs when we attempt to apply this criterion to contemporary conflicts. How do we rate the value of territory against the loss of human lives? It is unclear what rational means provides any non-contentious answer to this question.

2.4.4-Conflicting *Jus in Bello* Criteria

It is possible for the two *jus in bello* criteria to conflict. The criterion of Discrimination between Combatants and Noncombatants holds that it is never permissible to intentionally target noncombatants. The criterion of proportionality requires one to perform that action which would allow one to achieve the good while producing the least amount of harms. Cases will arise, though, where intentionally targeting noncombatants will be what proportionality requires. Consider the following case by Paul Ramsey.

...At the time Iwo Jima had been taken in 1945, war gases were available to the American commander. They were not used, not for fear of retaliation, but on humanitarian grounds. Instead, explosives and flame were used to dislodge the Japanese. In the end, almost 21,000 defending troops were killed, and this country suffered 7,000 dead marines and 18,000 other casualties. With gas [the deadly gases available] the same result would have been obtained on the island, but the

airfield would have been intact, and 25,000 American casualties would have been avoided. If the new incapacitating agents had been available, it is conceivable that neither side would have lost any appreciable number of men.³²

In a discussion of Proportionality *in Bello* Ramsey is arguing that the criterion governs not only the killing of noncombatants, but combatants as well. He suggests that if incapacitating agents had been available then Proportionality *in Bello* would require their use because they would make the deaths of the combatants unnecessary in achieving the military objective. Now let us change the example slightly. Instead of Iwo Jima let us imagine a city populated with noncombatants. To this number, then we can add the unintentional deaths of 20,000 noncombatants. Using incapacitating agents against the entire population would entail intentionally targeting noncombatants, even though the criterion of Proportionality *in Bello* would require the targeting on the plausible premise that temporary incapacitation is a lesser harm than death.

Would, though, the use of incapacitating agents be permissible if their use would allow for the achievement of the military objective with no or little casualties? The answer according to the Just War Tradition would be no. Incapacitating agents, though they may seem preferable to lethal force, are nevertheless a form of intentional attack. Intentionally putting the noncombatants to sleep along with the combatants violates the criterion of Discrimination between Combatants and Noncombatants. When such conflicts occur, the criterion of Discrimination between Combatants and Noncombatants trumps the criterion of Proportionality *in Bello*.

³² Paul Ramsey, *The Just War: Force and Political Responsibility* (Lanham, MD: University Press of America, 1983) pp. 470-71.

2.5-Conclusion

In this Chapter, I have provided the Just War framework within which I will discuss the permissibility of terrorism. I have identified the scope of Just War Tradition, which is, as I have argued, not limited to merely war. Just War Tradition governs any martial activity, which is the use of force or violence between sovereigns—between two or more entities that do not have a common superior to which they can turn in order to have their disputes mediated. With this said, for the purposes of this project, it will often be useful when working with the Just War literature to talk in terms of the decision to go war and actions within a war. Therefore, in this dissertation I shall use the terms ‘war,’ ‘armed conflict,’ and ‘martial activity’ interchangeable unless otherwise indicated. But before we can move ahead to a discussion of whether terrorism can be justified within a Just War framework, we need to clarify what “terrorism” means. In the following Chapter, I shall provide a purely descriptive definition of non-governmental terrorism.

CHAPTER THREE

NON-GOVERNMENTAL POLITICAL TERRORISM

3.1-Introduction

In the previous chapter I have set out the framework in which the permissibility of terrorist attacks is to be judged. In order to determine whether or not at least some terrorist campaigns and acts are consistent with Just War Tradition we must first have at least a rudimentarily understanding of what terrorism is. We need a working definition, and there are a great number of definitions from which we may choose. Not surprisingly, a great many of these definitions define terrorism in such a way as to make it by definition immoral and/or criminal. In doing so, they beg the question as to the morality of terrorism. In order to give a proper philosophical analysis of the permissibility of terrorism we must begin with a purely descriptive (value neutral) definition of terrorism.

In my readings it has quickly become apparent that determining an appropriate definition of terrorism can itself be the subject of a dissertation. One author has suggested that there are over one hundred different definitions of terrorism—most of them unsatisfactory for one reason or another.¹ Part of the difficulty is that types of terrorism are often distinguished by their motives. For instance,

in retaliatory terrorism, the motive is revenge;

in greed-based terrorism, the motive is greed;

in psychological terrorism, the motive is the pleasure derived from causing terror, and

¹ Haig Khatchadourian, *The Morality of Terrorism* (New York: P. Lang, 1998) p. 2.

in political terrorism, the motive is to retain or change some political aspect of a government.

It is worth noting that what differentiates these classes of terrorism is the motive which drives the attack—i.e. greed, revenge, pleasure, or political direction. This motive-based distinction is important because Just War thinkers use the motivation for going to war as a criterion in the evaluation of the justness of a given war. The first criterion of *jus ad bellum* is that the cause is just, and a just cause is standardly understood in terms of intending to promote justice.² Any use of force, then, that is going to be justified within a Just War Theory is going to have the proper motivation. The only terrorist acts that are going to have the promotion of justice as a motive are acts of political terrorism. This is not to suggest that all acts of political terrorism are going to have the proper motivation, merely that they are the ones that have the potential of meeting this criterion.³ Since, however, such terrorism is the only terrorism that has the potential for justification within a Just War Tradition it is on political terrorism that I shall henceforth focus.

Even when we limit ourselves to political terrorism, there are several types of political terrorism to be considered. Besides definitions based on motive, kinds of terrorism can be distinguished by the type of actor initiating the terrorism. Sean Anderson and Stephan Sloan in their *Historical Dictionary of Terrorism* give the following summary of the main characteristics of actor types and types of goals for political terrorism.

² Duane L. Cady, "Just War," in *An Encyclopedia of War and Ethics*, ed. Donald A. Wells (Westport, Conn.: Greenwood Press, 1996), p. 256.

³ The motive for retaining or changing some political aspect of a government may be the power it will give to some group that would like the power, regardless of whether their way of getting it, their having it, or its existence for any party to have, would be just.

Table 1: Summery of Typological Classification Scheme [of Terrorism] ⁴**I. Types of Actor****STATE**

- Acting against their own people to preserve their regime, sometimes called state repression, regime terrorism, or “state terror.”
- Acting against other states to topple their governments, known also as state sponsorship of terrorism.
- Acting against other states to force political changes, that is, changes in policies of targeted governments, also called state sponsorship or terrorism.

REVOLUTIONARY

- Acting to overthrow a regime to establish a new regime.
- Acting to create a new state out of the territory of an existing state, e.g. nationalist insurgents.
- Acting to create a fundamental change in the nation-state system, e.g., pan-nationalist or anarchistic movements.

ENTREPRENEURIAL

- Acting autonomously from any existing nation-state but also from any aspirant would-be nation-state.
- Operating transnationally, may hire themselves out to states or other groups.
- Engaging in criminal actions but usually as a means to other political ends, e.g. bank robberies and kidnapping for ransom in order to finance operations or else to drive out some foreign presence.

II. Goals of Actors

- Regime maintenance
- Regime change
- Limited advantage (subsystem changes)

At first glance the definition of state terrorism may seem to apply to most uses of military force by governments with the power and will to force political change in other nations. Consequently, to avoid any confusion, a further distinction needs to be drawn here between the conventional use of force/violence by a nation—e.g. using its armed forces—and the unconventional use of force/violence by a nation—e.g. adopting terrorist tactics or using terrorist organizations as its surrogate.

⁴ Sean Anderson and Stephen Sloan, *Historical Dictionary of Terrorism*, 2nd ed. (Lanham: Scarecrow Press, 2002) p. 21.

From all of the above, we can derive two broad types of political terrorism—governmental political terrorism and non-governmental political terrorism (to include individuals, organizations and corporations.⁵) As Walzer points out the use of terror to achieve political and military objectives is not restricted to non-governmental entities.

The word “terrorism” is used most often to describe revolutionary violence. That is a small victory for champions of order, among whom the uses of terror are by no means unknown. *The systematic terrorizing of whole populations is a strategy of both conventional and guerrilla war, and of established governments as well as radical movements.* Its purpose is to destroy the morale of a nation or a class, to undercut its solidarity; the method is the random murder of innocent people.

Randomness is the crucial feature of terrorist activity. If one wishes fear spread and intensify over time, it is not desirable to kill specific people identified in some particular way with a regime, a party, or policy. Death must come by chance to individual Frenchmen or Germans, Protestants, or Jews, simply because they are Frenchmen or Germans, Protestants or Jews, until they feel themselves fatally exposed and demand that their governments negotiate for their safety.⁶

(Emphasize is mine.)

Many people would, for example, view the United States’ use of the Atom bomb on Japan and the carpet bombing of Dresden, Germany during World War Two as acts of governmental terrorism. While I agree that acts such as these are rightly viewed as terrorism, they shall not be

⁵ I do think that the notion of political should be extended beyond reference to governments, however. What I mean by this is that I would include corporate terrorism—where the violence is intended to change the policies or practices of a corporation or industry—as a subclass of political terrorism. Corporations can be the victim of terrorism, but can also perform terrorist acts either directly or by providing support to terrorist organizations. Like any other entity performing terrorist acts, such acts can be driven by a multitude of motives including both greed and the promotion or inhibition of justice (political).

⁶ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 197.

the focus of my dissertation. In this dissertation, I am concerned with the compatibility of non-governmental political terrorism and the Just War Tradition. This should not be taken as an acceptance of the moral permissibility of such terrorist acts. I do believe that the Atom bomb on Japan and the carpet bombing of Dresden violated at least one of the criteria of the Just War Tradition⁷. Rather my exclusion of governmental terrorism from my project is dictated by the need to focus my discussion narrowly. I do believe, though, that many of the things I have to say about non-governmental political terrorism are also relevant to issues concerning governmental political terrorism, which shall become the focus of my dissertation. Now let us turn to defining non-governmental political terrorism. (Hereafter I shall use ‘terrorism’ to refer to non-governmental terrorism unless otherwise indicated.)

One of the things that make many definitions of terrorism problematic, as I have suggested, is that there is no attempt to make the definition neutral—purely descriptive. A great many definitions define terrorism in such a way as to make it by definition immoral and/or criminal. Consider the following five definitions of terrorism (Throughout, the emphases are mine.):

1. *All terrorist acts are crimes.* Many would also be violations of the rules of war, if a state of war existed. All involve violence or the threat of violence, often coupled with specific demands. The targets are mainly civilians. The motives are political. The actions generally are designed to achieve maximum publicity. The perpetrators are usually members of an organized group, and unlike other criminals, they often claim credit for the act. (This is a true hallmark of terrorism.)

⁷ Although, I have not performed the necessary analysis of the use of the Atom bomb on Japan and the carpet bombing of Dresden, Germany during World War Two, I suspect that these actions would violate the *jus in bello* criterion of Discrimination between Combatants and Noncombatants because the type and/or manner in which the weapons were deployed prevented any possibility for discriminating between legitimate and illegitimate targets at the time of their use.

And, finally, it is intrinsic to a terrorist act that it is usually intended to produce psychological effects far beyond the immediate physical damage. One's person's terrorist is everyone's terrorist.⁸

2. Terrorism: As defined by the FBI, "the *unlawful use of force* against persons or property to intimidate or coerce a government, the civilian population or any segment thereof, in the furtherance of political or social objectives". This definition includes three elements: (1) Terrorist activities are *illegal* and involve the use of force. (2) The actions are intended to intimidate or coerce. (3) The actions are committed in support of political or social objectives. (FEMA-SS)⁹
3. What separates the terrorist from the traditional revolutionary is a persistent refusal to direct violence at military objectives. Terrorism, on this account, is the threat or use of violence against noncombatants for political purposes. In ordinary war, the deaths of civilians are side effects of military operations directed at military targets. In terrorist operations, the civilian is the direct and intentional target of attack.¹⁰
4. Terrorism is *the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent* to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience.¹¹

⁸ Brian Jenkins, quoted in Jacob W. F. Sundberg, "Introduction to International Terrorism—The Tactics and Strategy of International Terrorism," in Magnus D. Sandbu and Peter Nordbeck, eds. *International Terrorism: Report from a Seminar Arranged by the European Law Students Association* 1987. [Lund]: Jurisforlaget i Lund: Distribution, Akademibokhandeln i Lund, 1989.

⁹ See United States Department of Justice, FBI, *Terrorism in the United States*, 1988. (Terrorist Research and Analytical Center, Counterterrorism Section, Criminal Investigative Division, December 31, 1988), p. 34.

¹⁰ Lackey, *The Ethics of War and Peace* p.85.

¹¹ James Poland, *Understanding Terrorism: Groups, Strategies, and Responses*, 2nd ed. (Englewood Cliffs, NJ: Prentice Hall, 1988) p. 11.

5. Terrorism constitutes *the illegitimate use of force* to achieve a political objective when innocent people are targeted.¹²

Such pejorative definitions are not too terribly surprising. Most institutions that attempt to define terrorism do so in order to create legislation against it. This has posed a problem, for example, for the United Nations in their attempt to define terrorism. Of course the United Nations' desire to define terrorism is driven by a desire to create international laws against its use. The problem is that many countries are unwilling to accept any definition that fails to "distinguish between acts of terrorism and acts in exercise of the legitimate right to self-determination and defense against foreign occupation."¹³ This in itself is interesting because it suggests that many nations believe that actions that might be defined acts of terrorism are permissible if they are acts in exercise of legitimate right to self-determination and defense against foreign occupation. Of course this begs the question of what constitutes a 'legitimate right to self-determination.' This is a question that I shall address in Chapter Four.

Any definition created with the purpose of criminalizing terrorism is going to depict terrorism in an immoral and/or criminal light. Murder by definition is the unlawful killing of a human being or fetus with malice of forethought. By defining terrorism in terms of 'illegal use of force,' 'murder' and 'mayhem' one begs the question of its morality. The terms of the definition imply that terrorism is by its nature immoral.

This view rests on two basic assumptions:

1. The use of force to achieve political objectives is permissible only for governments, and any use of force by a terrorist organization is, as such, illicit, and

¹² Laqueur, *The Age of Terrorism* p. 78.

¹³ Han Seung-Soo, "Statement by the President at the Close of the General Debate at the 56th Session of the General Assembly on 16 November 2001."

See <http://www.un.org/ga/president/56/speech/011116a.htm> Accessed September 5, 2005.

2. The intentional targeting of members of the general civilian population of a nation is never permissible.

Regardless of any actions a government may take that might warrant attack, traditionally the general civilian population is thought to retain its innocence—and, thus, its immunity from intentional attacks. Terrorism according to most definitions is going to involve both the illicit (i.e., unauthorized) use of force and the intentional targeting of innocent civilians.

I do not believe these assumptions are correct. Terrorist acts, I believe, are like any other acts that involve the use of force—there are going to be circumstances in which the act is morally acceptable and there are going to be circumstances in which the act is morally unacceptable. If this is true then I should be able to give a purely descriptive definition of terrorism that is neutral. Even if these evaluative assumptions were correct, it should be possible to provide a purely descriptive definition of terrorism and then provide the substantial argument that acts of terrorism are never justified.

3.2-A Descriptive Definition of Non-Governmental Political Terrorism

In order to create a purely descriptive definition of terrorism I shall consider six characteristics normally associated with a terrorist act:

1. Terrorism involves the use or the threat of the use of violence,
2. The intention is to instill fear in its ultimate target,
3. The violence is politically motivated,
4. The violence is random,
5. The use of violence is unlawful or illegitimate, and
6. The immediate target is the civilian population.

The last two characteristics, I believe, are the most important for the purposes of this project. As I suggested above, I believe that most (pejorative) formulations of these two characteristics rest on faulty assumptions. I shall not, however, provide arguments for why this is true at this point. What I shall do now is to discuss each of the six conditions separately. (In Chapter Four, I will discuss whether terrorists always use violence illicitly, that is, without proper authority, and in Chapter Five I will discuss whether their targeting of civilians means that they are unjustified for not properly discriminating between combatants and civilians.)

From the above characteristics, we can sketch the following rough working definition of political terrorism. *The use of violence or the threat of random violence directed at civilians of a nation, in violation of that nation's law, as part of a campaign to effect political changes the terrorists favor or advocate.* Let us now consider separately six elements within this descriptive definition.

3.2.1-The Use or the Threat of the Use of Force/Violence

This characteristic will be essential to any definition of terrorism, and is one that I believe needs very little comment. Presumably, a terrorist need never perform a violent act. If there was a credible reason, for example, to believe that a particular terrorist possesses tactical nuclear weapons, then he/she could instill the necessary fear by simply threatening detonation. In most cases, though, the threat of violence or force comes after some act of violence, so that the threat of further violence or force becomes credible.

It also should be noted that many definitions of terrorism, such as the United States' definition includes not only the use of violence but the use of force as well. Recall the following definition from the United States State Federal Bureau of Investigations:

Terrorism: As defined by the FBI, "the unlawful use of force against persons or property to intimidate or coerce a government, the civilian population or any segment thereof, in the furtherance of political or social objectives". This definition includes three elements: (1) Terrorist activities are illegal and involve the use of force. (2) The actions are intended to intimidate or coerce. (3) The actions are committed in support of political or social objectives. (FEMA-SS)¹⁴

Assuming that the United States intends the term 'force' to mean something distinct from 'violence,' it might appear as if this is going to have some odd implications. One might think that this would mean that all acts of non-violent civil disobedience, if they wield any force at all, would also be acts of terrorism. Now while governments in power may have (self-serving) reasons for wanting to depict non-violent protestors such as Martin Luther King Jr. or Nelson Mandela as terrorists, it is not a characterization that most people would be willing to accept. Such a fear is unfounded for two reasons. The first is that in order for any act of civil-disobedience to qualify as a terrorist act it would have to have the purpose of instilling terror in a larger population than that to which its force is directed. The purpose of acts of civil disobedience is to raise awareness rather than to cause fear. More importantly, though, civil disobedience does not qualify as a martial activity because it is false that those who engage in civil-disobedience lack a higher authority to which to appeal. Civil-disobedience by its nature is intended to work within the confines of a legal system. Its goal, as I have said, is to draw attention to a social injustice in order that changes may occur. Martin Luther King, Jr., for example, was clear that he non-violently protested various laws of the United States or of its

¹⁴ See United States Department of Justice, FBI, Terrorism in the United States, 1988. (Terrorist Research and Analytical Center, Counterterrorism Section, Criminal Investigative Division, December 31, 1988), p. 34.

states, counties of cities, on the grounds that they conflicted with rights of all citizens under the constitution of the United States.

3.2.2-Intention to Instill Fear in Ultimate Target

What is worth noting here is that terrorism has two targets, two intended groups of victims—the immediate victims of the violence and those who are intended to be frightened into action by the fear of future violence. The immediate targets are normally the targets of a physical attack, while the ultimate targets are the target of a psychological attack.¹⁵

3.2.3-The Violence as Politically Motivated

This characteristic motivation is going to distinguish political terrorism from other forms. As I have previously noted, there are many different types of terrorism—

retaliatory terrorism (where the motive is revenge),

greed-based terrorism (where the motive is monetary gain),

psychological terrorism (where the motive is the pleasure derived at causing terror), and

political terrorism (where the motive is to retain or change some political aspect of a government)

just to name a few. It is worth noting that what differentiates these classes of terrorism is the motive that drives the attack—i.e. greed, revenge, pleasure, political change. This motive-based distinction is important because the motive for the violence is a crucial factor in determining the justification for initiating violent actions. Just War theorists, for example, use the motivation for going to war as a criterion in the evaluation of the justness of a given war. One of the most important criterions of *jus ad bellum* is that the cause is just, and a just cause is standardly

¹⁵ One could argue that there exists a third target for terrorist attacks—policy makers and those individuals who are capable of influencing the policy makers. For our purposes nothing hangs on which view is adopted.

understood in terms of intending to promote justice.¹⁶ Any act of violence, then, that is going to be justified by a Just War Theory is going to have the proper motivation. Only terrorist acts that are politically motivated are going to have the promotion of justice as a motive. This is not to suggest that all acts of political terrorism are going to have the proper motivation, merely that they are the ones that have the potential of meeting this criterion. As my preliminary remarks have already indicated, henceforth I shall focus on politically motivated terrorism.

3.2.4-The Violence as Random

This point is particularly stressed by Michael Walzer.

Randomness is the crucial feature of terrorist activity. If one wishes fear spread and intensified over time, it is not desirable to kill specific people identified in some particular way with a regime, a party, or policy. Death must come by chance to individual Frenchmen or Germans, Protestants, or Jews, simply because they are Frenchmen or Germans, Protestants or Jews, until they feel themselves fatally exposed and demand that their governments negotiate for their safety.¹⁷

This characteristic is more controversial than the others that I have discussed so far. I believe that the randomness of the violence should be understood in a narrower sense than Walzer would seem to suggest. The violence need not be completely random. In fact, as Walzer seems to acknowledge, particular groups need to be targeted in order to instill within them the desired fear. Let us take Walzer's example of targeting the French merely because they are French. A political terrorist would target the French for the sake of some change in the policies or government of France. But random violence would include violence against people on other continents where neither French action nor the history of such is part of the victims' lives. It

¹⁶ Cady, "Just War," p. 256.

¹⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 197.

would scarcely be intelligible, much less effective, for anti-French political terrorists to target such victims.

Similarly, one could choose not to target French children. The consequences of such policies would be that French parents would not fear that their children would be intentionally killed, but this does not mean that they would not fear for their own safety. If one were attempting to terrorize the French people into forcing their government into performing some kind of action, then it would behoove one to target those French citizens who are capable of doing so. It does little good to terrorize those that are incapable of affecting the government—such as those that cannot vote or lack other means of applying influence. (In a country where the opinion of some group, women, for example, was thought to be of no significance, it would be pointless and unjustified to target them.) No, one restricts oneself to a much smaller target group, and yet attacks are still random attacks within that group. After all, the smaller the target group the more likely any member of that group is to fall victim to an attack. I would be much more afraid of a terrorist that targeted academics than I would be of a terrorist that merely targeted Americans. The randomness of the targeting, then, is restricted in scope to an appropriate segment of the population. I shall hereafter refer to such targeting as being ‘appropriately random.’

3.2.5-The Use of Violence as Unlawful or Illegitimate

This characteristic is mentioned in some definitions of terrorism and not others, but it is, I believe, implicit in all of them. The uninteresting and ad hoc reading of this characteristic is that the violence violates the laws of the nation in which the terrorist act is performed. The more interesting and accurate reading of this characteristic is that the terrorist performing the action does not have the legitimate authority to conduct an attack on a nation. This is one of the

characteristics that is often seen as distinguishing a terrorist act from an act of war or other martial activities conducted by a nation state.

Of course having the legitimate authority is also one of the requirements for initiating a just war. I shall address this more fully in Chapter Four. But what is a defensible conception of legitimate authority? It seems that any understanding of “legitimate authority” that restricts its use to preexisting governments is going to be unacceptable and not in keeping with the Just War Tradition. Such a narrow restriction on legitimate authority would not only prohibit terrorism, but any form of revolutionary action. In the proceeding chapters I shall argue that governments acquire their right to use force from their subjects and that at times it is not only permissible but obligatory for those citizens to reclaim that right to use force. Consider the following excerpt from the American Declaration of Independence.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.... when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under

absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.¹⁸

In this elegant passage Jefferson lays the foundation for the type of argument that I shall provide to show that there are occasions when individuals may use force normally reserved for governments. These instances are going to occur when governments become destructive of the ends they were created to protect. Among other things, I shall argue that a government may become destructive of these ends not only by becoming tyrannical, but by abdicating its responsibilities to protect its subjects from foreign threats. So individuals may reclaim the right to use force not only against its own government but against external threats as well.

3.2.6-The Immediate Target as Innocent Civilians

Again, this characteristic is recognized by every definition, although, the exact nature of the immediate target is a matter of dispute. How one classifies the immediate targets of terrorist attacks is perhaps the most important factor in evaluating the morality of terrorism. The appropriate description for the immediate targets of a terrorist attack, I believe, is ‘non-conventional targets’ where non-conventional targets is understood as being those targets that are not condoned by normal military conventions. That is, after all, the heart of the distinction: terrorists target people that military forces would not normally attack.

The fact, though, that terrorists target people who the military would not normally attack does not mean that in doing so they are attacking people whom the military would always be prohibited from attacking. There is an assumption that most of the civilian population of any nation has immunity from attack during a war simply because they are civilians rather than soldiers. While this might be true, it certainly does not have to be so. In Chapter Five, I shall give

¹⁸ Thomas Jefferson, "Declaration of Independence," in *The American Reader: Words That Moved a Nation*, ed. Diane Ravitch (New York: Perennial, 2000), p. 37.

a detailed analysis of the way in which soldiers lose their immunity—by becoming dangerous. What makes a soldier dangerous is not only training and commitment to a military organization, an organization molded to exert violent force, but the engagement of that military force in combat to affect its political will. In Chapter Five I shall argue that many members of the civilian population can and often do lose their immunity in the same way—i.e. by becoming dangerous in this same martial sense.¹⁹

3.2.7-A Definition of Non-Governmental Political Terrorism

In summary, I am going to understand non-governmental political terrorism as the use of force or the threat of force against appropriately random non-conventional targets (both persons and their property) for the purpose of instilling terror in a larger population in order to coerce that larger population or the governmental leaders they have authorized into bringing about the terrorists' political agenda. (Unless otherwise noted I shall use 'terrorism' to refer specifically to non-governmental politically terrorism. I use terrorism in this narrow way not to legislate that governments cannot sponsor terrorism but because this dissertation focuses on whether non-governmental terrorism is ever justifiable within the Just War Tradition.)

3.3-Conclusion

In this chapter, I have provided a purely descriptive definition of terrorism. I have defined a non-governmental political terrorist as a person who engages in political terrorist acts where a political terrorist act is defined as the use of force or the threat of force against appropriately random non-conventional targets (both persons and their property) for the purpose of instilling

¹⁹ For the purposes of this dissertation 'martial,' as in martial activities, martially dangerous, and martial sense, shall not only refer to the use of military force, but any political use of force. This shall include but is not limited to economic sanctions, terrorism, and intelligence and counterintelligence activities.

terror in a larger population in order to coerce that population or the governmental leaders they have authorized into bringing about the terrorists' political agenda.

Having done so and having outlined in Chapter Two the Just War framework in which terrorist acts are to be judged, I have provided the necessary tools for evaluating the compatibility of terrorism and the Just War Tradition. In the following chapter, I shall begin examining the compatibility of terrorist campaigns with the *jus ad bellum* criteria.

CHAPTER FOUR

ON *JUS AD BELLUM* CONSIDERATIONS WITH SPECIAL ATTENTION TO SOVEREIGNTY AND RIGHT AUTHORITY

4.1-Introduction

As I have indicated, the purpose of my overall project is to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition. In the previous two chapters, I have defined the scope of terrorism I intend to evaluate and outlined the framework of the Just War Tradition. In this chapter, I shall focus on the compatibility of terrorism with the *jus ad bellum* criteria for engaging in a just war. The *jus ad bellum* criteria, of course, are concerned with what has to be true in order for one's going to war to be justifiable:

- the person(s) making the decision to go to war must have the right authority,
- the cause must be just,
- the person(s) making the decision to go to war must have the right intention,
- the person(s) making the decision to go to war must have the right goal (aim),
- the harm generated by going to war must be proportionate to the good achieved by going to war, and
- war must be the last resort.

If you look at these six criteria you notice that three of them, (1), (3) and (4), identify requirements regarding the person(s) making the decision to go to war. A discussion of these criteria can be broken down into two simple questions—who and how. Who has the authority to

make the decision to go to war; and how do they make the decision to go to war? The other three criteria, (2), (5) and (6) focus on some feature of the conflict itself.

I shall begin with the “who” question—who has the authority to declare war. It is worth pausing here a moment to make sure that we are clear on what kind of authority we are talking about. In simplest terms, we can begin by dividing governmental activities into two broad categories: domestic activities and international activities. Of these, we are primarily concerned with international activities. International activities can be further broken down into two broad subcategories: diplomatic activities and martial activities. Martial activities would obviously include, but may not be limited to war-time activities; martial activities also include military operations other than war (MOOTW): espionage, intelligence gathering, assassination, etc. Diplomatic activities we will take to be all non-martial activities between nations. For our purposes, we are primarily concerned with the authority to engage in martial activities, but small range of diplomatic activities can be relevant to our discussion. What I have in mind especially is the authority to make peace, and to secure allies. As we will discuss in the following chapter, in order for the decision to go to war to be just, securing peace must be possible. This would entail that those who have the authority to engage in martial activities must also have the authority to terminate them.

One would think that in answering the ‘who’ question I would be focusing on the question of whether a terrorist can authorize the use of martial activities. This, though, is not the case. In Chapter One, I explained that the two most common objections to terrorists are that (1) as non-governmental entities, terrorists and terrorist organizations lack the proper authority to engage in martial activities, and (2) their method of employing violence, targeting civilians, is inherently unjust. To argue successfully for the compatibility of terrorism and Just War Theory I

will need to overcome these two objections. It is important, though, to keep in mind that these are two separate questions. Whether terrorists have the proper authority to use martial activities is independent of how they will use that force. Once terrorist methods, (2), are separated from the possible authority of non-governmental entities (1), the issue of whether terrorists can have the proper authority to use political force is solely a matter of whether any non-governmental entity, whether it is a person or organization, can have the proper authority. I do not have to show, then, that terrorists have the proper authority to engage in martial activities, but rather that it is possible for the non-governmental entities that terrorist organizations are to possess the proper authority to use martial activities. I will discuss the question of terrorists' methods in Chapters Five and Six.

4.2-Right Authority

As I have indicated previously, the criterion of Right Authority states that a necessary but not sufficient condition for the decision to go to war (to engage in martial activities) to be justified is that those who make the decision to go to war possess the authority to do so. The questions, then, is who has the authority to declare war (engage in martial activities)?

The simple answer is the person or organization designated by their government to declare war—whether they are prince, president or parliament. I will take this answer as a starting place, which I will develop through the criticism of the suggestion that in modern times Right Authority has taken on a legalistic flavor. Most modern states, through constitutions or legislation, have endowed particular branches of their governments with the authority to declare war. In the United States, for example, the authority to declare war rests with Congress, while the authority to engage in limited martial activities rests with the President.

For our purposes, there are two problems with acquiescing in this legalistic turn. First, it confuses the question of what is required by Just War Theory with what is required by national or international law. Second, it begs the question of why the government has the authority to use martial activities. This is the question that has to be answered in order to determine if it is ever permissible for non-governmental entities to engage in martial activities.

Since Aquinas there have been two ideas driving the discussion of governmental authority to wage war. The first is that wars are fought in defense of the common good, and therefore, the decision to go to war should rest with those who are responsible for that good. The second is that what justifies governments' going to war is that they do not have any political superiors. In the absence of any higher authority, they and their enemies have no common set of laws and procedures through which to seek justice. This is not, according to most Just War Thinkers, true for individuals. Both of these points attempt to explain why governments, rather than non-governmental entities, should have the authority to engage in martial activities, but do not fully explain how governments derive such authority. To understand this we will have to look at the purposes for which governments are formed.

Early in the tradition thinkers such as Augustine and Aquinas held that what justified the use of force by governments was the divine right of kings. The rulers of governments, it was believed, were appointed by God to shepherd their subjects towards the True Path. Later thinkers such as Grotius maintained that people came together to form governments for their mutual benefit. That is, they posited a theory of individual sovereignty—that states derive their authority from their subjects. For the purposes of my dissertation, I am not going to defend the claim that the theory of individual sovereignty is correct, but rather assume that it is true. Nor am I going to defend a particular theory of individual sovereignty as the best theory. To move my discussion

forward I shall adopt John Locke's theory of individual sovereignty. I adopt Locke's theory on the assumption that my discussion will not hang on any peculiarity of Locke's. I shall begin then with an exposition of Locke's political theory as it relates to the idea of individual sovereignty.¹

4.2.1 Locke's Theory of Individual Sovereignty

We are concerned with the origins of a government's authority to engage in martial activities. In other words, we are concerned with the origins of political power. We should begin, then by being clear in regards to what we mean by political power. Locke defines political power as:

...a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good.²

From this we can understand the purpose of political power in terms of promoting the public good by creating and enforcing laws and by defending the state against foreign threats.

According to Locke the source of this power comes, "from compact and agreement and the mutual consent of those who make up the community."³ In order to fully understand political power, according to Locke, we must begin by examining humanity in its original state; in the state in which people lived prior to the invention of the state—in the state of nature.⁴ As with

¹ If kings are God's appointed interpreters of his will and governments derive their validity from what God wills—independently of the desires or consent of any individual—then a Just War Theory based on such a view of the aim and authority of government will yield very different conclusions not only about terrorism but also about the right to revolution, which will at least need a very different grounding—in the demonstrable failing of the king properly to interpret God's will.

² John Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus*, ed. Peter Laslett, Rev. ed. (New York: New American Library, 1965) § 1.3.

³ Ibid. § 15.171.

⁴ Ibid. § 2.4.

many philosophers of his time Locke begins with the state of nature. According to Locke, the state of nature is the state:

...all men are naturally in...a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man.⁵

The state of nature according to Locke is, "...a state of peace, goodwill, mutual assistance, and preservation."⁶ People within the state of nature are equals living together according to reason, with the ability to judge one another, but without a common superior on earth.

The supposition that these people have perfect freedom does not mean that they are free to harm one another. Locke tells us, "[T]hough this be a state of liberty, yet it is not a state of license."⁷ People are bound to act according to the Law of Nature.

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions...⁸

Not only is everyone in the state of nature bound by the law of nature, but "in the state of Nature every one has the executive power of the law of Nature."⁹ By executive power, Locke means the right to identify and enforce the law of nature. As D. A. Lloyd Thomas points out, the executive power of the law of nature has three main aspects:

⁵ Ibid.

⁶ Ibid. § 3.19.

⁷ Ibid. § 1.6.

⁸ Ibid. § 2.6.

⁹ Ibid. § 2.13.

1. The right to judge for yourself what actions are and are not in accordance with the law of nature.
2. The right to restrain attempts to violate the law of nature, using force if necessary.
3. In the case of those who, in the light of your conscientious judgment have violated the law of nature, the right to judge what is the appropriate punishment, and attempt to impose the punishment.¹⁰

The law of nature, if it is to have significance, must be identifiable and enforceable. Since in the state of nature there is no higher authority to appeal to for enforcement of the law of nature as equals, each individual must be capable of identifying and enforcing the law.

Governments are formed then when individuals come together and turn over there executive powers to a common authority. Notice, though, that unlike a philosopher such as Thomas Hobbes who thinks that the lives of men in the state of nature are “nasty, brutish, and short,” Locke paints a far more benevolent picture of the state of nature.¹¹ The question, then, is “Why form governments?” Why give up one’s authority and subjugate one’s self to another individual or group of individuals? According to Locke the state of nature is problematic because, though all people are bound by the law of Nature, not all people adhere to it. Because there are people who will not adhere to the law of nature, the state of nature can turn into a state of war. A state of war occurs when one attempts to put another, without their consent, under their absolute power. There are those in the state of nature, then that would seek to make another his or her slave. Locke writes:

¹⁰ David Lloyd Thomas, *Routledge Philosophy Guidebook to Locke on Government*, Routledge Philosophy Guidebooks. (London ; New York: Routledge, 1995) pp. 20-21.

¹¹ Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson, *Penguin Classics*. (Harmondsworth, Eng.: Penguin, 1985) p. 186.

For I have reason to conclude that he who would get me into his power without my consent would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for nobody can desire to have me in his absolute power unless it be to compel me by force to that which is against the right of my freedom- i.e. make me a slave.¹²

Anyone who seeks to put another under his or her absolute power against their will, according to Locke threatens not only their freedom but their lives as well. In order to safeguard against such dangers people come together to form communities—governments. So according to Locke men form governments for their “comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.”¹³ And in forming a community or government they “... make one body politic, wherein the majority has a right to act and conclude the rest.”¹⁴

Accordingly, people come to form governments for their mutual benefit. In doing so they entrust the government with the power (rights) they possessed in the state of nature. For Locke, then political power is:

...that power which every man having in the state of Nature has given up into the hands of the society, and therein to the governors whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good and the preservation of their property.¹⁵

3.17. ¹² Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* §

¹³ Ibid. § 7.95.

¹⁴ Ibid.

¹⁵ Ibid. § 15.171.

Governments then has no greater power than any individual possessed for all governmental power is derived from the rights of the individuals who consented to be governed, for nobody can transfer to another more power than he has in himself. Nor does the government possess absolute power over the individuals it governs, because no one has an absolute arbitrary power over himself.¹⁶ Thus, the authority of the government is limited to those ends for which the government was formed.

Remember my assumption is not that Locke is correct in every detail of his theory. I am postulating simply that some theory of individual sovereignty with the analytic elements I have exemplified by reference to Locke is true. We can sum up Locke's view as follows:

- (1) Locke begins in the state of nature where people are equals living together according to reason, with the ability to judge one another, but without a common superior on earth.
- (2) People in the state of nature are bound to act according to the Law of Nature.
- (3) In the state of Nature, every one has the executive power of the law of Nature.
- (4) Some will seek to put others under his or her absolute power against their will, which according to Locke threatens not only their freedom but their lives as well.
- (5) Therefore, people come to form governments for their mutual benefit.
- (6) In doing so they invest the government with their executive powers, but governments then has no greater power than any individual possessed.

A theory of individual sovereignty provides two grounds for the justified use of martial activities. The first is through mutual consent. Each person consents to allow the government to use force both to promote the common good as well as to prevent activities that would be

¹⁶ Ibid. § II 155.

opposed to the common good. The second is based on individual rights. Each individual has the right to use justified force to protect him or her self and others (s)he cares about from unjustified harm. Many political philosophers and property theorists have also argued that this right extends to protecting certain nonhuman objects which one cares about. The often-drawn corollary of this view of individual rights is that when people form governments they delegate to the government the right to defend them. Thus, according to both the argument from mutual consent and the argument from individual rights the authority of the government derives from a presumed, more fundamental authority of individuals.

Within our discussion of Locke we have identified the source of the government's authority for the use of martial activities. The government's justification for using martial activities, then, is grounded in (1) the individual's right to self-defense and (2) the fact that there is no higher power to which governments to turn to in order to resolve disputes [the fact that governments in relation to one another remain in the state of nature].

4.2.2-Individual Exercise of Political Power

Now we want to consider whether individuals as well as governments can legitimately engage in martial activities. Most Just War thinkers seem to think that the answer to this question is no. But why would this be the case? We need to ask ourselves what is the difference between the individual and the government? The difference is not that only one has the right to act in one's own or another's self defense, because the individual does not give up this right when (s)he endows the government with authority to act on his or her behalf.

Presumably, then, it is the fact that individuals can turn to the government for help. This is, though, not always true. According to Locke, people are in the state of nature when they have no government—no common authority with real political power over them. The absence of a

government, though, is not the only occasion on which people can find themselves in a state of nature. There are, I believe, three other instances when it is false to say that an individual or individuals can turn to their government in order to seek remedies for injustices being incurred:

- (1) Their government itself is imposing the injustices,
- (2) Their government is too weak to prevent or correct the injustices, and
- (3) Their government is indifferent to or unwilling to prevent or correct the injustices.

If any of these circumstances arise then the government has betrayed or forsaken, or proven itself incapable of fulfilling the contract on which its authority rests. If this occurs then its subjects are free to exercise the power they bestowed upon the government. In other words, the subjects of such a government find themselves once again in a state of nature and accordingly have the right to exercise their executive authority. As William Uzgalis writes:

It is sometimes assumed that the state of nature is a state in which there is no government at all. This is only partially true. It is possible to have in the state of nature either no government, illegitimate government, or legitimate government with less than full political power.¹⁷

4.2.3-Individual Rights and the Dissolution of the State

In the last chapter of his second treatise Locke discusses the occasions on which a government may be dissolved. I want to consider three cases that warrant subjects' reclaiming their authority. The first occasion on which a government may be dissolved is when the government misuses its power.¹⁸ According to Locke, governments are limited in their use of power towards those ends

¹⁷ (Uzgalis, William, "John Locke", The Stanford Encyclopedia of Philosophy (Summer 2005 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2005/entries/locke/> Accessed September 5, 2005.

¹⁸ Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* § II.175.

to which the government was formed—the public good of the society. Therefore, a government never has the authority to “destroy, enslave, or designedly to impoverish the [its] subjects.”¹⁹ Since the rights of individuals are limited by the law of nature and a government cannot acquire from its subjects any more power or authority than any individual has, the rights of governments are limited by the law of nature as well. A government that violates the law of nature then returns its subjects to a state of nature or more specifically puts itself into a state of war with its subjects and they may exercise their executive powers accordingly.

The second occasion on which a government may be dissolved is when the government ignores its responsibilities.²⁰ According to Locke when “there is no longer the administration of justice for the securing of men's rights, nor any remaining power within the community to direct the force, or provide for the necessities of the public, there certainly is no government left.”²¹ When laws are not enforced or cannot be enforced then it is the same as having no law at all. Governments, as I see it, may ignore their responsibilities for three causes: the inability to fulfill their obligations, indifference, or corruption. If any of these three are true then the subjects of such governments find themselves once again in the state of nature and again have recourse to their executive powers.

The final occasion on which a government may be dissolved is when the government delivers its people into the subjection of a foreign power.

[T]he delivery also of the people into the subjection of a foreign power, either by the prince or by the legislative, is certainly a change of the legislative, and so a dissolution of the government. For the end why people entered into society being

¹⁹ Ibid.

²⁰ Ibid. § II.219.

²¹ Ibid.

to be preserved one entire, free, independent society to be governed by its own laws, this is lost whenever they are given up into the power of another.²²

As with the second case— neglecting its responsibilities, a government’s delivering its people into the subjection of a foreign power can be the result of corruption, the inability to do otherwise, or indifference. Regardless of the cause, the result is the same—a breach of the social contract.

If anyone of these grounds for the dissolution of government holds true then the individual finds himself in the state of nature. Since there is no higher power for individuals to turn to in the instance of a particular conflict in order to resolve disputes, the individuals can reclaim and exercise their rights to engage in martial activities—protect themselves and those they care about.

So far I have laid out the Lockean theory of individual sovereignty. I have shown that the authority to engage in martial activities rests with governments because that authority has been granted them by those individuals who have come together to form the community over which the government has been given authority. Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the government’s using that authority appropriately. When government fails to use its delegated authority appropriately, then individuals can once again exercise their rights. This includes coming together to form new communities—non-governmental organizations—through which to exercise their power.

²² Ibid. § II.217.

The purpose of this exercise being to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition, we need therefore to clarify the differences, if any, between governments and individuals or non-governmental organizations in terms of the criterion of Right Authority. I have argued that under the right conditions individuals can reclaim the right to engage in martial activities and so can satisfy the criterion of Right Authority. This though is not to say that individuals can claim the same authority of the government. Individuals can claim only such authority as relates to themselves and to those who wish (consent) to form a new community (organization) with them.

Each person gives the government jurisdiction over them when a government is formed. This entitles the government to act on behalf of those consenting subjects. The government that has no political superiors then can go to war in their citizens' name. This is not true of individuals who have reclaimed their rights, including the right to engage in martial activities, from the government. Unless such individuals have received the consent of the rest of the citizenry, they can act only on behalf of themselves and those who have joined with them. This does not mean though that they cannot act to protect others from harm. They possess the authority to engage in humanitarian aid. Individuals, though, do not have the authority to put any one other than themselves into a state of war. In this, they differ from governments who have the authority to go to war on their subjects' behalf.

The upshot of this argument is that since the authority of government is derived, any of the above three failures of government nullifies a government's authority, so that that authority, including the authority of self-defense and the authority to create alternative government, reverts to the individual. Accordingly, suppose a political terrorist whose government has failed in any of the above three manners. The government's failure will have nullified the government's

authority. The individual will then be left to form such organizations as the individual believes will facilitate correction of the defects of past governance. Those organizations, like nations, with no higher authority in common between them, will have to their members the same rights and responsibilities that nations have in resolving conflicts between and among them.

Once it has been established that it is possible both for individuals and non-governmental organizations to possess the proper authority to engage in martial activities, the other five criteria of *jus ad bellum* They are necessary features for the decision maker to have in order for the decision to use martial activities to be justified, but, as we shall see, there is nothing about them that would require the decision maker to be an agent of a government.

4.3-Just Cause

As I have stated previously, the criterion of Just Cause states that a necessary but not sufficient condition for a justified decision to go to war is that there exists a just cause for going to war. Historically Just Cause has been understood to include defense against attack, retaking something wrongly taken, or punishing evil. In more recent times, though, Just Cause has generally been thought to be restricted primarily to responses to unwarranted aggression. Walzer writes:

Nothing but aggression can justify war. The central purpose of the theory is to limit the occasions for war. "There is a single and only just cause for commencing a war," wrote Vitoria, "namely, a wrong received."" There must actually have been a wrong, and it must actually have been received (or its receipt must be, as it

were, only minutes away). Nothing else warrants the use of force in international society-above all, not any difference of religion or politics.²³

Most contemporary Just War thinkers, then, hold that Just Cause permits defense against attack, defense of another against attack, and humanitarian intervention (defense of subjects in the face of the aggression of their own government). In regards to humanitarian intervention, Richard Regan tells us:

Nations may also have humanitarian reasons for intervening militarily in the internal affairs and civil wars of other nations. Foreign governments may be totalitarian or authoritarian, oppressing ethnic or religious minorities, or even practicing genocide. Or foreign revolutionaries may be seeking to impose a totalitarian regime. Or foreign nations may be sinking or have already sunk into a state of anarchy. Such humanitarian reasons have ... traditionally not been considered just causes for outside nations or the world community to intervene militarily, although they would in the case of actual or impending anarchy if the nominal government invited outside nations to do so. But world opinion is changing in this regard, and humanitarian reasons are *prima facie* causes for intervention. Whether or not it is proportionately just for outside nations or the world community to intervene militarily is another question.²⁴

²³ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 62.

²⁴ J. Regan Richard, *Just War: Principles and Cases* (Washington, D.C.: Catholic University of America Press, 1996) p. 69. In my discussion of humanitarian intervention here I have in mind specifically intervention against unwarranted military aggression. One might wonder about other types of humanitarian intervention, though. One might ask: is government *X* justified (regardless of the wishes or consent of government *Y*) in humanitarian intervention when a natural disaster in country *Y* overwhelms all local rescue capacities? I think this is a far more difficult question and one that lies outside the scope of this dissertation. I will say, though, that unwarranted aggression can take many forms and I would suggest that denying one's people the help needed by denying the assistance would qualify as a government's aggression against its own people.

There are three important issues to consider when attempting to understand the criterion of Just Cause. The first is that while nothing but an aggression will justify war, not every aggression will constitute a just cause. Walzer tells us:

Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.²⁵

According to Walzer, every use of force by one nation against the territorial integrity of another nation is an act of aggression, but certainly not every violation of a nation's territorial integrity justifies military action. Suppose that the United States included an uninhabited island in the middle of Pacific Ocean. This island is five miles square and has neither natural resources nor strategic value. Now suppose that Belgium has seized the Island in order to build a chocolate factory. Clearly, such an aggression would not constitute a just cause.

The second issue is what constitutes an aggression. Vitoria talked in terms of being wronged. In modern times, we would be more likely to talk in terms of being harmed, but what kinds of harms count as an aggression in terms of the criterion of Just Cause? What kind of harms count—physical, financial, emotional, spiritual, cultural, etc? Most people want to focus on the physical threats that constitute an aggression, but clearly there are other kinds. One nation, for example, might attempt to ruin another's economy by flooding it with counterfeit currency. Any action, I believe that is intended to seriously threaten or undermine the targeted governments' ability to perform its delegated functions would qualify as an unwarranted aggression.

²⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 62.

The third issue involves the idea of Comparative Justice that I mentioned in Chapter Two. One of the biggest challenges in evaluating contemporary conflicts in terms of satisfying this criterion is determining what constitutes an unwarranted aggression. If one were to examine the Israeli-Palestinian conflict in terms of unwarranted aggression, the question would hinge on who had a rightful claim to the disputed land. This question, though, is not one that I believe could be readily answered. Comparative Justice recognizes that the world is not black and white, but made up of many shades of gray. Conflicts are seldom neat and often there have been unwarranted aggression on both sides. What Comparative Justice requires is not that for the one side to be just while the other is unjust, but rather that one side be more just than the other.

Note that to this point I have merely pointed out some of the complexities that are involved in establishing a just cause for war. I have not attempted to resolve any of these issues nor do I intend to. The fact that determining what a just cause is, is a highly complex and difficult matter is true for both governments and non-governmental agents.

What I am concerned with is whether individuals and non-governmental organizations can have just cause to engage in martial activities. Just causes for governments occur in the form of aggression, where aggression is understood in terms of harms or wrongs done. Since the purpose of a government is to promote and protect the common good, harms against nations need to be understood in terms of harms against this common good. Think back to my example of the small American island. One way to understand why aggression against the island would not constitute a just cause is that such aggression caused no harm for the people of the United States.

The purpose of this exercise being to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition, therefore before we move on to the criterion of Right Intention we need to clarify the differences,

if any, between governments and individuals and non-governmental organizations in terms of the criterion of Just Cause. There is, I believe, no significant difference between governments and individuals and non-governmental organizations in terms of the criterion of Just Cause. The trespasses that constitute a just cause for martial action on the part of a government are ultimately grounded in the rights of the individual. According to Locke's theory of individual sovereignty the authority of the state is derived from the executive powers of the individual. Walzer follows this line of reasoning when he writes:

The rights in question are summed up in the lawbooks as territorial integrity and political sovereignty. The two belong to states, but they derive ultimately from the rights of individuals, and from them they take their force. "The duties of states are nothing more than the duties and rights of the men who compose them."²⁶

The government's rights to territorial integrity and political sovereignty are means to ensure the rights of the individual.

4.4-Right Intention

As I have stated previously the criterion of Right Intention states that a necessary but not sufficient condition for the decision to go to war to be justified is that those making the decision to go to war must be doing so for the right intentions. As I have indicated this criterion is in many ways the most controversial, not because there is contention over how it should be interpreted, but in regards to whether it should be retained as a requirement at all. Historically the criterion of Right Intention has been viewed in two ways. The first is that the criterion requires

²⁶ Ibid. p. 53, John Westlake, *The Collected Papers of John Westlake on Public International Law*, ed. Lassa Francis Lawrence Oppenheim (Cambridge: The University press, 1914) p.78.

one to possess a particular intention, and the second is that that the criterion requires one not to possess certain perverse intentions. Both of these are related to Just War Tradition's deontological roots. Many deontologists believe that intentions are an important part of what defines an action. Consider the case of two executioners. In the case of the first executioner the execution is authorized by the proper authority, the sentence is justly imposed (the convicted is actually guilty) and the intention of the executioner at the time the axe strikes is to fulfill his role as the agent of the state. In such a case, the act is an execution. The second case is identical to the first in all aspects but one. As with the first the execution is authorized by the proper authority, the sentence is justly imposed (the convicted is actually guilty) but this time it so happens that the man brought before the executioner had run off with the executioner's wife the year before. So this time the intention of the executioner at the time the axe strikes is to kill the man who has stolen his wife. In this second case, the act is not an execution justified by the state, but rather a murder.

In modern times many Just War thinkers have moved away from this view that possessing the proper intentions is necessary for a war to be just. Whether this is true or not, or which intentions are required and/or which are forbidden are not relevant to our purposes. The purpose of this exercise is to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition. What we are concerned with, then, is whether some fundamental difference between individuals and governments makes individuals incapable of satisfying this requirement. Therefore, before we move on to the criterion of Right Aim we need to clarify the differences, if any, between governments and individuals and non-governmental organizations in terms of the criterion of Right Intention. Simply enough, there is nothing about an individual/non-governmental

organization versus a government that would allow the latter to possess the right intentions and would preclude the former from doing so as well. One might think that the intention to protect one's subjects is not impossible for individuals since they do not have subjects. While it is true that as individuals they do not have subjects, they can still have the intention to protect the relevant group of people—the members of one's society.

4.5-The Right Goal (Aim)

As I have explained in Chapter Two the criterion of the Right Goal states that a necessary but not sufficient condition for the decision to go to war to be justified is that goal or aim of going to war must be a lasting peace. This is by far the most non-controversial of the criteria, and I shall not spend much time on it. Starting as far back as Plato and continuing into the new century thinkers have argued that a just war must have as its aim a lasting peace. Just wars are fought over injustices that make peace impossible. The goal of a just war then is to rectify the injustice thereby creating a situation where peace can once again be maintained. This will have some important implications for the criterion of Proportionality *ad Bellum* because this criterion precludes any actions that would make peace impossible. These implications shall be more fully addressed in the section addressing proportionality.

The purpose of this exercise being to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition, therefore before we move on to the criterion of Proportionality *ad Bellum* we need to clarify the differences, if any, between governments and individuals and non-governmental organizations in terms of the criterion of Right Aim. There is, as I have said, only one acceptable aim of a just war—peace. This is equally true for governments, individuals, and non-governmental

organizations. There is nothing inherent in the nature of either an individual or non-governmental organization that would preclude it from acting according to this goal.

4.6- Proportionality *ad Bellum*

The criterion of Proportionality *ad Bellum* states that a necessary but not sufficient condition for the decision to go to war to be justified is that the good one hopes to achieve by resorting to martial activities outweighs the harm that one foresees resulting from the use of that force.²⁷ The first thing that should be noted is that this criterion is as concerned with the decision to go to war as it is with the war itself. The harms and goods brought about by the war are a consequent of the decision to go to war and so this criterion can be rewritten as ‘the goods one hopes to achieve by deciding to go to war must outweigh the harms one foresees resulting from the decision to go to war.’ The reason that this is important is because the criterion of Proportionality *ad Bellum* governs not only the decision to go to war, but the decision not to go to war, and the decision of when to go to war. Let us consider these in turn.

4.6.1-Making the Decision to Go to War—to engage in martial activities

When someone with the authority to engage in martial activities makes the decision to go to war, it must be believed that the good that will be achieved by going to war will outweigh the foreseen harms. The particulars of what goods are achieved by going to war are, of course, going to be contingent on the situation, but in general the goods achieved by going to war are understood in terms of rectifying the injustice(s) which were the cause(s) for going to war. This criterion, then, needs to be understood in relation to both the criterion of Just Cause and the criterion of Right Aim. As we have noted in our earlier discussion of the criterion of Just Cause a

²⁷ There are a number of difficulties with this criterion that I shall not address here because they apply equally to whoever is making the decision to engage in martial activities. These difficulties include determining which goods and harms should be part of the evaluation; attempting to compare values such human life, freedom, and national honor, among others.

cause must be just not only in kind, but also in scope. Not only does a just cause for war have to be the right kind of injury—the right kind of injustice, but the cause for which one goes to war must also be sufficient to warrant the harm that going to war is likely to bring. Of course, the goods to harms ratio is going to be situational and can result in different responses to two identical injustices. For the sake of example, let us presume that the prevention of the proliferation of nuclear weapons is a just cause for engaging in martial activities. Now imagine that both the island nation of Antigua and Barbuda and North Korea are known to be developing nuclear weapons. Clearly the fact that Antigua and Barbuda has a standing military of 170 men versus North Korea's standing army of 1,022,000 is going to affect the likely harms that going to war will produce. The criterion of Proportionality *ad Bellum* might, then, allow and require going to war with the one and not the other. Considerations of proportionality, then, are going to supervene on consideration of just cause when making decisions regarding the use of martial activities.

Similarly, the criterion of Right Aim is going to impose constraints on considerations of proportionality. As I have previously pointed out, the only proper aim for a just war is a lasting peace. This is understood in terms of rectifying the injustice that makes war necessary, for the existence of such injustices makes a lasting peace a dubious thing at best. The criterion of Right Aim entails two points that manifest themselves in considerations of proportionality.

Peace must be possible, and

There must be a reasonable chance of success.

The fact that the only proper aim of a just war is a lasting peace entails that those involved cannot engage in any activities that would make peace impossible. This, of course, will be at least somewhat relative to the parties involved. The destruction of Mecca, for example,

might be an act that makes peaces impossible while the destruction of Chicago might not. This might sound as if this is a limitation on the means one employs in fighting a war and as such should be a consideration of *jus in bello* rather than *jus ad bellum*, and it is and it is not—at least not merely. It is a limitation on the means one can employ in the use of force, but such considerations are not limited to *jus in bello*. When one is evaluating the Proportionality *ad Bellum* of a war one must consider what actions will be necessary in order to wage war. If the war cannot be waged without engaging in activities that which would make a lasting peace impossible, then the war cannot be fought.

Of course, the requirement that peace be possible also entails that those who engage in martial activities also have the authority/capacity to end the conflict. Having the capacity to end the conflict would have to include command and control over all relevant forces. This might pose a special problem for non-governmental entities that have reclaimed the right to engage in martial activities. If those individuals who have come together to engage in martial activities do not recognize a central leadership, then peace might not be possible, for in order to have peace one must have the capacity to end hostilities. Of course, there is nothing inherent about non-governmental organizations that would make it impossible for the organization to establish its own purposes, government and line of authority. The argument is simply that only such an organization can have the authority to engage in martial activities.

Another point that would seem to be entailed by the criterion of Right Aim is that there must be a reasonable chance of success. In fact, as I pointed out earlier in this chapter, some Just War thinkers employ this as a separate criterion. The criterion of a Chance of Success, then, states that a necessary but not sufficient condition for the decision to go to war to be justified is that there must be a reasonable chance of success. It might be tempting to say that non-

governmental entities, such as terrorist organizations can never satisfy this feature of the Just War Tradition because they have no real chance of success against super powers such as the United States and China. Of course, this is not merely a problem for non-governmental entities. It would prove equally a problem for the world's twenty smallest countries—Vatican, Monaco, Nauru, Tuvalu, San Marino, Liechtenstein, Saint Kitts and Nevis, Maldives, Malta, Saint Vincent and the Grenadines, Barbados, Antigua and Barbuda, Seychelles, Andorra, Bahrain, Saint Lucia, Singapore, Micronesia, Kiribati, and Tonga—as well.

It is important to be careful how we understand the notion of success. The mistake, though, is in thinking of success as being synonymous military dominance. There are many kinds of battles and many ways in which to win, as military strategists and guerrilla leaders across the ages and across cultures have recognized. There is, I would suggest, value in resisting injustice absent one's ability to be victorious. For a people hopelessly overmatched, facing certain defeat and subjugation, success can lie in the act of resistance. It may bring the victory of an undaunted spirit and it may obstruct an enemy in how fully it imposes its will. Over a long run, it may even convince an enemy that a mitigated imposition of its will is not worth a high, ongoing cost. I would argue that there is value in the struggle against injustice independent of one's ability to dominate it militarily. As Edmund Burke pointed out "All that is necessary for the triumph of evil is that good men do nothing." If we take this to heart then inaction in the face of evil, even if the inaction is motivated by the belief that one cannot win over evil, promotes evil. Similarly, opposing evil, even if one cannot remove the enemy from the life of the people has value if for no other reason then evil knows that it cannot function unopposed.

There are, though, I believe, other goods that come from opposing injustices even in the face of defeat. There are some that might be dismissed as being too intangible such as human

dignity, but there are others that are more concrete. Perhaps the most significant is the impact that such actions have on future generations. Let us take the advice of the Texans at the battle of San Jacinto and “remember the Alamo.”

San Antonio was a major Mexican stronghold, and so its capture by Texans in 1835 was no minor victory. 144 soldiers under Lieutenant Colonel W. B. Travis were in charge of protecting the city on February 22 of 1836, when Santa Anna and nearly 5,000 troops showed up. Unwilling to allow Santa Anna to push further into the interior, the Texans retreated into the Alamo's fortifications on the 23rd, taking about 30 refugees with them. Santa Anna demanded unconditional surrender and was answered with cannon fire; the most famous siege in American history was begun. On March 1, 32 more Texans from Gonzales reached the fort, bringing the total resisting force to about 196, including Davey Crockett (with some of his Tennessee Rifleman), Jim Bowie, and the 16 women and children who would be the only survivors when the dust cleared. On March 6, several thousand Mexicans stormed the small fort. Every fighting defender, soldier and volunteer alike, died in the heat of battle, and their bodies were burnt on Santa Anna's order. The Mexican general bragged of "glorious victory", but one of his aides noted "One more such 'glorious victory' and we are finished." The Mexican army lost around 1,600 badly needed troops at the Alamo, and made martyrs of the valiant revolutionaries they killed there. Soon after, at the battle of San

Jacinto, Mexicans faced final defeat at the hands of Texans rallied by the famous cry: "Remember the Alamo!"²⁸

Why is it that every child in America knows about the siege of the Alamo when so many more ‘important’ and ‘successful’ battles have been relegated to relative obscurity? It is to a great extent because there seems to be something particularly noble about fighting against all odds that fires the imagination. The fact that these Texans were willing to fight for their independence, even knowing that their battle was lost speaks to the value of that freedom. In an important sense, they are martyrs to freedom, where martyrs are as people “who makes sacrifices or suffer greatly in order to advance a cause or principle.” What’s interesting about the idea of martyrdom is that the martyr makes the sacrifice in order to advance a cause, not necessarily to achieve it. They set precedent, they act as examples for others to follow, and they bring attention to the cause and in doing so they hope to advance the cause.

The same holds true for those that go to war against injustice knowing that they cannot hope to be victorious. I believe that in doing so, it they can nevertheless advance the cause of justice and in that bringing about an important good. So, even if victory is impossible a martial action can nevertheless be successful in the above terms, provided at least that the actions do not at the same time violate other cannons of Just War, like the aim for peace.

4.6.2-Making the Decision Not to Go to War— not to engage in martial activities

Most Just War thinkers when discussing the criterion of Proportionality *ad Bellum* focus on proportionality in terms of going to war. But just as going to war can be just in the sense that it will produce more good than harm refraining from going to war can be unjust in the sense that

²⁸ Taken from the following website: <http://www.htowne.com/items/itemhtSA02.asp> Accessed September 5, 2005.

doing so can produce more harm than good. As Edmund Burke pointed out, “All that is necessary for the triumph of evil is that good men do nothing.” This is true for both individuals and governments. Just wars are fought to rectify some injustice. If the war is not fought, then the injustice presumably continues uncontested. So not only is proportionality concerned with ensuring that more good than harm is caused by going to war, it must also be concerned, if the decision is made not to go to war, with ensuring that more good than harm is caused by not going to war. This is important because it makes some wars not only permissible, but also obligatory. Any evaluation of the justness of a war then is going to have to be made not only in terms of the likely consequences of going to war, but in terms of the likely consequences of not going to war as well.²⁹

4.6.3-Making the Decision When to Go to War—when to engage in martial activities

The final consideration of the criterion of Proportionality *ad Bellum* is determining when one should engage in martial activities. The final criterion, which we shall discuss in the next section, is the criterion of Last Resort. War according to Just War Tradition should always be the last resort. There is a fine line, however, that has to be walked. Just wars are in response to significant injustices. As I indicated above, proportionality is concerned in part with the harm caused by the decision not to go to war in the face of such injustices. It is similarly concerned with the harms caused by delaying going to war. Considerations of proportionality, then, are going to impose limitations on what reasonable alternatives to war can be pursued prior to going to war. I shall put off further consideration of this until my discussion of Last Resort.

²⁹ The alternative to going to war should not be conceived simply as the contradictory. It should be conceived as the alternative contrary that is most likely to achieve justice. When I say that ‘it makes some wars obligatory’, the obligatory wars are not all those where war is more likely than doing nothing is to restoring justice. The obligatory ones are those where war is more likely than any contrary to restore justice.

The purpose of this exercise being to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition, therefore before we move on to the criterion of Last Resort we need to clarify the differences, if any, between governments and both individuals and non-governmental organizations in terms of the criterion of Proportionality *ad Bellum*. There are two areas of concern that we have addressed. The first is that in order to make peace there must be sufficient command and control of those involved in the hostilities. If the individuals or non-governmental organizations that initiate the conflict lack the capacity to terminate it, then they cannot satisfy the criterion of Proportionality *ad Bellum*. Again, there is nothing inherent in the nature of individuals or non-governmental organizations that would preclude them from having such command and control. The second area of concern is that individuals and non-governmental organizations because of their size and lack of support would seem to lack a reasonable chance of achieving military dominance over a country of any significant strength. This, though, is only a problem if we narrowly define success. I have argued that success should be more broadly construed.³⁰

4.7-Last Resort

The final criterion I want to look at is the criterion of Last Resort. The criterion of Last Resort states that a necessary but not sufficient condition for the decision to go to war to be justified is that war be a last resort. Historically Last Resort has been understood to mean that all possible peaceful solutions to a conflict must be pursued before the use of force was justified. But in more recent times, the criterion of Last Resort has come into question because it has been

³⁰ There is a related point, though, that should be addressed. The fact that individuals and non-governmental organizations are weaker by design they out of necessity will have to attack softer (non-military) targets. In Chapters Five I shall argue that there are many non-military targets which nevertheless can be considered combatants. Despite their combatant status many people might be tempted to view the death of civilians as a greater harm than death of military personnel.

generally accepted that it is not possible to pursue all possible peaceful solutions. This has led some Just War thinkers to advocate discarding the criterion while others, such as Michael Walzer argue for the importance of the criterion, but maintain that it should be understood in weaker sense. Walzer writes:

We say of war that it is the 'last resort' because of the unpredictable, unexpected, unintended, and unavoidable horrors that it regularly brings. In fact, war isn't the last resort, for 'lastness' is a metaphysical condition, which is never actually reached in real life: it is always possible to do something else, or to do it again, before doing whatever it is that comes last. The notion of lastness is cautionary-- but this caution is necessary: look hard for alternatives before you 'let loose the dogs of war.'³¹

The criterion of Last Resort is important because it compels those with the authority to engage in martial activities to seek acceptable alternatives before doing so. What constitutes an acceptable alternative to war? As I indicated in the previous section pursuing alternatives to war for the sake of pursuing alternatives would violate the criterion of Proportionality *ad Bellum* because it will perpetuate unnecessary harms. First, an acceptable alternative would be one that has a reasonable chance of success. Second, an acceptable alternative would be one that was proportionate to the injustice being perpetrated. If territory has been annexed by another nation, but the inhabitants of that territory are otherwise being treated humanly, then diplomatic talks might be an acceptable alternative to immediate war. If, though, territory has been annexed by another nation, and the inhabitants of that territory are being killed at the rate of 10,000 a day,

³¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 4.

then diplomatic talks might very well be an unacceptable alternative to immediate military action.

An acceptable alternative would also, of course, have to be one that promoted justice. Remember an underlining precept of Just War Tradition is that in the face of certain injustices a lasting peace is impossible. Actions that promote further injustices may delay or prevent military conflicts, but they do not promote a lasting peace, which is the only proper goal of the Just War Tradition. The United States Congress has so far approved 151.1 Billion dollars for the Second Persian Gulf War, also known as the Iraq War, (Mar.–Apr., 2003). One might think that a possible peaceful solution then would have been to offer the Iraqi leadership 151 billion dollars to accede to our demands rather than attempting to achieve our goals through force. To do so, however, would be to promote injustice rather than justice and be opposed to the very purpose of Just War Tradition.

The purpose of this exercise being to demonstrate that individuals and non-governmental organizations, such as terrorist organizations, can satisfy the criteria of Just War Tradition therefore before concluding, we need to clarify the differences, if any, between governments and individuals and non-governmental organizations in terms of the criterion of Last Resort. As I indicated in Chapter Three when we talk about pursuing all possible acceptable peaceful solutions before engaging in martial activities, it is important to understand that the modifier ‘all possible’ range over the possible acceptable solutions available to the person(s) making the decisions. What constitutes an acceptable alternative to martial activities, then, is going to be relative to the party(ies) making the decision. The possible acceptable solutions available to a country like the United States will be vastly greater than those available to a country like Luxemburg. Similarly, the acceptable solutions available to a country like Luxemburg are going

to significantly greater than those available to most individuals and non-governmental organizations. The point is that individuals and non-governmental organizations lack the same resources as governments and as such may exhaust their non-violent options far more quickly. There is nothing, though about this criterion that would exclude individuals and non-governmental organizations from fulfilling it; they are simply likely to fulfill it much more quickly than a power such as the United States.

4.8-Conclusion

In this chapter, I have argued that the six *jus ad bellum* criteria of Just War Tradition (Right Authority, Just Cause, Right Intention, Right Aim, Proportionality *ad Bellum* and Last Resort) can be satisfied by individuals and non-governmental organizations. This would include terrorists and terrorist organizations. The most important of these criteria in terms of this dissertation is the criterion of Right Authority. Beginning from a Lockean theory of individual sovereignty, I have argued that the authority to engage in martial activities rests with governments because that authority has been granted them by those individuals who have come together to form the community over which the government has been given authority. That is, governments derive their authority to engage in martial activities from the individual's right to exercise his or her executive powers that each individual possesses in the state of nature. Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the governments' using that authority appropriately. When governments fail to use their delegated authority appropriately, then individuals can once again exercise their rights. This includes coming together to form new communities—non-governmental organizations—through which to exercise their power.

The question then becomes, when is it appropriate for a subject to begin exercising his or her executive powers. Following Locke, once again I have identified three instances under which governments loss their authority:

- (1) When governments misuse their power,
- (2) When governments ignore their responsibilities, and
- (3) When governments deliver their subjects into the subjection of a foreign power.

If any of these instances were to come about, then individuals would find themselves in the state of nature and it would be appropriate for them to exercise their executive powers. My purpose in this chapter has been to show that at least in theory some types of political terrorism can be compatible with the *jus ad bellum* criteria of Just War Tradition. It is sufficient for the purposes of my discussion of Right Authority, then to leave the discussion of when a government losses its authority at a general level. I am taking it for granted that there are going to be some misuses of governmental powers and some instances of ignoring responsibilities by governments that are so grievous that they cause the government to lose its authority. Though it lies outside the scope of this dissertation, in order to evaluate the justness of any particular terrorist campaign, a far more detailed analysis of the conditions under which a misuse of power or the ignoring of responsibilities constitutes the loss of governmental authority would need to be rendered.

Now that I have dealt with the *jus ad bellum* criteria I shall address the compatibility of the *jus in bello* criteria and terrorism in Chapters Five, and Six.

CHAPTER FIVE

ON *JUS IN BELLO* CONSIDERATIONS I: THE CRITERION OF DISCRIMINATION BETWEEN COMBATANTS AND NONCOMBATANTS

5.1-Introduction

In the previous chapter, I have dealt with the compatibility of terrorism and the *jus ad bellum* criteria of Just War Tradition. In this chapter, I shall begin considering the compatibility of terrorism and the *jus in bello* criteria of Just War Tradition. Of course, the *jus in bello* criteria deal with the justness of actions that are performed within a war or other martial campaign.¹

There are two main questions that the *jus in bello* criteria deal with:

- (1) Who constitutes a legitimate target for intentional attack, and
- (2) What methods may be employed in such attacks.

The primary focus of this dissertation shall be answering the first question—who may be intentionally attacked. In my discussion of proportionality in Chapter Six, I shall briefly touch on the second question—regarding the methods of attack.

As I indicated in Chapter One, in order for any person to be considered a legitimate target for an intentional attack two conditions must be satisfied. The attack must satisfy two criteria:

- The criterion of Discrimination between Combatants and Noncombatants, and
- The criterion of Proportionality *in Bello*.

¹ Again, for consistently with the literature I shall use ‘war’ interchangeably with ‘martial activities’ unless otherwise indicated.

I shall deal with the criterion of Discrimination between Combatants and Noncombatants in this chapter and put off the question of proportionality until Chapter Six. The criterion of Discrimination between Combatants and Noncombatants states that a necessary but not sufficient condition for the one's actions in war to be just is that, although a belligerent may target combatants, one may not intentionally target innocent persons—where innocent is understood martially, i.e., in terms of non-involvement in the war effort, rather than moral culpability. In order for terrorism to be compatible with Just War Tradition, then, terrorist acts must be able to satisfy this criterion.

Terrorists intentionally target civilians. This more than any other reason is why people object to terrorist tactics. This, though, is a violation of the criterion only if the civilians in question are noncombatants. As I have suggested there is a presumption within the Just War Tradition that the vast majority of the civilian population are noncombatants. But as I suggested in Chapter One, part of the problem with the reliance on tradition, practice and the Law of Armed Conflict is the resulting lack of philosophical inquiry into the relevant characteristics of war that might justify broader target selection, and such philosophical inquiry would require a clear articulation of key notions such as dangerousness.

As I shall argue shortly what determines whether a person is a combatant or a noncombatant (martially innocent) is whether they are dangerous, but despite the significance of dangerousness in determining who is a combatant and who is a noncombatant, little work has been done on what about a person makes him or her become dangerous. This is important because in order to have a clear and distinct break between those who have lost their immunity and those who have not, the criterion must be consistently applied to all persons.

A misapplication of the criterion can result in either the targeting of those who are not legitimate targets or granting immunity to those who do not warrant it. Obvious justice requires one to avoid the former. The latter, though, can be equally problematic. By failing to recognize all possible legitimate targets one could perform disproportionate actions by choosing targets that result in a greater death toll. Proportionality *in Bello* requires one to choose those targets that can achieve the military objectives with the least harm done. Passing over weaker targets wrongly presumed to be immune but pivotal to military success can result in a violation of this requirement.

Similarly, because of this lack of philosophical inquiry, Just War Tradition is dependent on previous practices rather than applying criteria based on the relevant features of the conflict in question. Changes in technologies and martial tactics can have a significant effect on the status of civilians as combatants. As Regan notes:

...the rigid distinction between military combatants as the guilty enemy and civilian noncombatants as the innocent enemy has become obsolete. Civilians produce the weapons and equipment integral to the waging of modern war and civilians maintain a modern belligerent's industrial infrastructure (its railroads, roads, communications systems, and electric power), which is also integral to the waging of modern war.²

Accordingly, we need to reevaluate the presumption of the noncombatant status of civilians in order to determine the compatibility of terrorism and the *jus in bello* criterion of Discrimination between Combatants and Noncombatants. As Thomas Nagel tells us, “the hostile treatment of any person [in the context of a just war] must be justified in terms of something

² Regan, Richard, *Just War: Principles and Cases* p. 90.

about that *person* [his italics] which makes the treatment appropriate.”³ What we must do, then, is articulate what it is about a person that justifies intentionally targeting him or her. What is it about that person that makes him or her a combatant.

In this chapter, then, I shall provide a philosophical basis for the combatant-noncombatant distinction.⁴ I shall begin by providing a backdrop for our discussion by

- (1) Outlining what it means to be martially innocent (Section 5.1.1) and
- (2) Briefly discussing some relevant features of the martial activities in which the combatant/noncombatant distinction will be understood. (Section 5.1.2)

Once this is done, I shall begin my analysis of what it means to be dangerous in the martial sense by

- (3) Discussing the more general question how anyone becomes dangerous. (Section 5.2)

Having done this I shall move on to

- (4) Discussing how one becomes dangerous in a military or martial context. (Section 5.3)

In doing this, I shall clearly articulate the conditions under which a person becomes a combatant—namely being dangerous in the martial sense. Having established this I shall conclude by

- (5) Considering how one can become a combatant through an omission rather than an action. (Section 5.5)

5.1.1-On Martially Innocent Persons

What is the difference between combatants and the martially innocent—those who are innocent in the context of some martial activity (noncombatants)? In addressing this question

³ Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1, no. 2 (Winter, 1972): p. 64.

⁴ The combatant/noncombatant distinction as I shall argue is based on dangerous behavior.

Michael Walzer in his book *Just and Unjust Wars* argues that the project is not to explain why noncombatants have not lost their right to be intentionally attacked. According to Walzer, and rightly so I believe, everyone begins with immunity from attack or, in other words, with the right not to be intentionally attacked.

...[T]he theoretical problem is not to describe how immunity is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationship.⁵

Accordingly, every one begins with immunity and what we need to account for is how some people come to lose their right not to be intentionally attacked.

In the context of a Just War framework a person does not lose his or her immunity from intentional attack because of some moral culpability. When we talk about ‘the innocent’ in warfare, we do not mean the morally innocent. We are concerned with the *artially* innocent, where martial innocence is understood in terms of being non-dangerous. Anthony Kenny explains:

The most important of the traditional conditions for a just war was that it should not involve the deliberate killing of non-combatants. This was some times called the prohibition on ‘killing the innocent’, but innocence in question had nothing to do with the moral guiltlessness or lack of responsibility: the ‘innocent’ were those who were not *nocentes* in the sense of engaged in harming one’s own [enemy] forces.⁶

⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p.145n.

⁶ Anthony John Patrick Kenny, *The Logic of Deterrence* (London: Firethorn Press, 1985) p. 10.

Like Nagel, Walzer holds that what differentiates combatants and noncombatants is that combatants have done something or are doing something that has caused them to lose their immunity, while the noncombatants are martially innocent, which is to say that, “they have done nothing, and are doing nothing, that entails the loss of their rights.”⁷ According to Walzer, the right not to be intentionally attacked is lost by those who bear arms ‘effectively because they pose a danger to other people. It is retained by those who don’t bear arms at all.’⁸ It is by becoming a danger to others, on this view, that soldiers lose their immunity.⁹ It should be noted that there is a tension in Walzer’s work regarding the role the soldier plays in his becoming a dangerous man. That is, whether there is some degree of voluntariness in any soldier’s becoming dangerous. In some passages, such as the ones above, Walzer seems to suggest that being a soldier is sufficient for a person to be dangerous. In others, he seems to suggest that a soldier’s conversion into a dangerous man is at least to some degree voluntary. For instance, Walzer writes the following depiction of a soldier:

He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man. For that reason he finds himself endangered.¹⁰

In this passage, Walzer describes soldiers as combatants because they have *allowed* themselves to become dangerous. This suggests that there is some voluntariness behind soldiers, becoming

⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 146.

⁸ Ibid. p. 145.

⁹ It should be noted here that making oneself dangerous is necessary but not sufficient to make one a legitimate target. As I have argued, Just War Theory itself yields the conclusion that making oneself dangerous is no more than a necessary condition of being a legitimate target. The killing of anyone in a just war, whether they are a combatant or a noncombatant, is governed by the conditions proportionality in terms of both *jus ad bellum* and *jus ad bello*. I shall discuss how each of these conditions impacts the legitimacy of killing combatants in their respective chapters.

¹⁰ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 142.

dangerous that is relevant to their losing their immunity from intentional attack. Thus, the ambiguity in Walzer about how soldier loses immunity from intentional attack forces consideration of whether those who are dangerous independent of any volition of their own are combatants. In Section 5.2.2, I argue that whether one's behavior is voluntary is not relevant to whether one is dangerous, and does not affect one's status as a combatant.

Having established that martially innocent persons (noncombatants) are those individuals who have not lost their right against intentional attack because they are not dangerous, we must turn to the question of how one becomes dangerous. Before we can do this, though, we must consider the context in which a person loses their immunity from intentional attack by becoming dangerous—martial activities. After all, there are many contexts in which a person can become dangerous. A police officer can be dangerous in relation to the fugitive she attempts to capture, for example, but when we are considering the application of the Just War Tradition we are considering very special circumstances, different from those of the police officer and fugitive. With this in mind, I want to take a moment to consider some relevant features of martial activities.

5.1.2-On Martial Activities

How, then, are martial activities appropriately characterized? The first relevant feature of martial activities I want to address is that martial activities involve the use of force or violence between one or more sovereign parties—where sovereign parties are parties that have no common higher authority to resolve their conflict. As I explained in Chapter Two, this lack of a common higher authority is a necessary requirement for any use of force to qualify as a martial activity. To be a just use of force, the parties must not only lack a higher authority; they must also lack any alternative resort. As I have indicated, within a Just War framework, what justifies

a sovereign party in exercising martial force is some perceived injustice. The purpose of the martial force is to undermine or undo the political processes of one's adversary that have resulted in the injustice. If those political processes can be undermined through some non-violent means, then Just War Tradition requires one to do so. It is only after all non-violent response have been exhausted that the use of force is justified.

The parties involved in martial activities are normally organizations, although this is a product of practicality rather than any necessary feature of martial activities.¹¹ This becomes relevant to understanding the dangerousness of combatants because one's dangerousness is often understood in terms of participating in the activities of a dangerous organization. Walzer, for example, claims that being a member of the class soldier is sufficient to make any individual within the class a combatant.

[S]oldiers as a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command. No doubt, they do not always fight; nor is war their personnel enterprise. But it is the enterprise of the class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind.¹²

While I think Walzer is mistaken in his claim that what makes every soldier dangerous is that, “they are trained to fight, provided with weapons, required to fight on command,” as I shall argue in Section 5.3.2, I do believe that Walzer captures the idea that participating in the activities of a martially dangerous organization makes one dangerous. What distinguishes

¹¹ If there were only two people, they could engage in martial activities in relation to one another. Similarly, if a person had unlimited power—literally a Superman—then he should be able to engage in martial activities with others. In a world such as ours, though, the vastness of martial activities normally requires a corresponding effect by a number of individuals—an organization.

¹² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 141.

soldiers from civilians, though, is not that soldiers participate in the activities of a martial organization while civilians do not. What distinguishes soldiers from civilians is that we know, because of their membership, that soldiers participate in the activities of a martial organization, while in the case of civilians their participation has to be determined.¹³

Another important feature of martial activities is that the force used within a martial activity is used in order to stop dangerous behavior, not as a form of retribution. This is why a soldier who has been incapacitated through either injury or imprisonment can no longer be intentionally targeted. The soldier is no longer dangerous—his participation in the activities of his martial organization has been terminated. This does not mean that a combatant who is guilty of crimes cannot be punished; only that such punishment is not influenced by his combatant status. Punishment for war crimes is possible because of the extent to which sovereign parties who find the dispute between them irresolvable have agreed to boundaries on the behavior of combatants, and/or because of the sanctions sovereign parties place on certain behaviors in regards to those who fall under their jurisdiction.

The final point that I want to make is that it is important to understand that within the context of a martial activity, a person is a combatant relative to some particular party or parties. Take World War II as an example. During World War II a soldier in the United States Army was a combatant in relation to the armies of Germany, Japan, and (for a portion of the war) Italy. He was not a combatant in relation to armies of England or France, nor, after the creation of the Italian Co-Belligerent Forces in 1943, was he a combatant in relation to the army of Italy. Simply being a soldier does not make one a combatant. The soldier has to be part of an organization that

¹³ This, of course, does not take into account those soldiers who because of their profession, status as POW or injuries do not or nor longer participate in the activities of the dangerous organization to which they belong.

is engaged in a martial activity. Even under these circumstances, the soldier is a combatant only in relation to the parties with which his martial organization is in conflict. After all, if there is no irresolvable conflict between martial organizations, then there is no danger. So when we say ‘A is a combatant,’ this is shorthand for ‘A is a combatant in relation to X,’ where X is a sovereign party or parties with whom the organization to which A contributes is engaged in martial activities.

We are now in a position to articulate what it means for a person to be dangerous.

5.2-On Being Dangerous—A Definition of Danger and Dangerous

I want to begin simply enough with a common definition of ‘danger’ and ‘dangerous.’

The Oxford English Dictionary defines ‘Danger’ as:

- (1) “exposure or vulnerability to harm, injury, or loss,” and
- (2) “somebody or something that may cause harm, injury or loss.”¹⁴

Military personnel are part of an organization designed to cause harm, injury or loss or to expose their adversaries, or render them vulnerable to, harm, injury or loss, and by doing so allow them to undermine the political processes of their adversary which have led to the perceived injustices.

‘Dangerous’ is defined as “Fraught with danger or risk; causing or occasioning danger; perilous, hazardous, risky, unsafe.”¹⁵ In this dissertation I shall focus on the middle clause (causing or occasioning danger) because military personnel are regarded as dangerous in the sense that they are organized to be prepared to cause or occasion danger.¹⁶

¹⁴ J. A. Simpson and E. S. C. Weiner, eds., *The Oxford English Dictionary*, 2nd ed. (Oxford: Oxford University Press, 1989) p. 242.

¹⁵ Ibid.

¹⁶ The second clause might also, of course, refer to the dangerous behavior of nonhuman animals, but in the context of a discussion of Just War Tradition, the dangerousness of nonhuman animals is not relevant except where their behavior is directed in support of the war by some human agency. In such event, the animal in question is merely a weapon employed by human beings. In the first and third sense of dangerousness, I think, it is not persons

This definition presents a disjunction between causing and occasioning danger. Since occasioning is a concept that is not found in the literature I do want to take a moment to explain its meaning. The definition of ‘occasion’ in the Oxford English Dictionary includes: “to induce by affording an opportunity or a ground; to urge or impel by circumstance.”¹⁷ One can occasion danger through either a commission or an omission. That is, one can either cause the circumstances to come about that afford an opportunity for certain harms to occur, or one can allow the circumstances to come about that afford an opportunity for certain harms to occur. Rather than introduce new terminology into the discussion that is not found in the literature, I shall work with the causing/allowing distinction rather than the causing/occasioning distinction.

In this chapter, my primary focus shall be on being dangerous by causing danger, because this is the type of behavior that martial activities are most concerned with, and much of what I have to say in my discussion of commissions will apply to omissions as well. With this said, I will at the end of this chapter consider what it means for a failure to act to be a martially dangerous omission.

5.2.1-Three Ways to Cause Danger

The three ways that a person can cause danger are by: (1) planning, (2) executing, or (3) providing support for acts that may cause harm, injury or loss. I believe these functions are rather self-explanatory. Let us consider a non-military, non-violent example. Consider the case of burying toxic waste in a city park. I am assuming that the toxic waste will leak in the soil and pose a hazard for the children who play in the park. As such, the act of burying the toxic waste is

but some other kind of entity that is said to be dangerous. An event, for example, can be fraught with danger or perilous, hazardous, risky, or unsafe. This is not to say that the terms ‘perilous,’ ‘hazardous,’ ‘risky,’ and ‘unsafe’ cannot be used to describe human behavior, but these terms when employed are meant to be synonymous with the second sense of dangerousness. Accordingly, a human’s behavior is said to be perilous, hazardous, risky, or unsafe when it causes or occasions danger for one’s self or others.

¹⁷ Simpson and Weiner, eds., *The Oxford English Dictionary* p. 242.

a dangerous act. Who, though, caused the danger? The people who actually dug the whole and buried the toxic waste have obviously caused the danger. These people fall under the category of executing the danger. The person or persons who decided that the waste should be buried in the park caused the danger as well.¹⁸ We will suppose that the manager of the plant that manufactured the waste made the decision. She would fall under the category of planning the danger. Finally, any one who provided necessary information or equipment would fall under the category of supporting the danger. I have in mind here someone, knowing what the plant manager was planning, who provided the plant manager with the schedule of park security or rented the manager equipment.

5.2.2-Voluntarily, Negligent, Involuntarily and Non-Voluntarily Behavior

As I indicated in Section 5.1.1, there is a tension in Walzer's writings regarding the importance of voluntariness in a soldier's becoming dangerous. One of the difficulties, though, in conducting a discussion of dangerousness is that a value neutral account of a person's dangerous behavior can run counter to our moral intuitions. When hearing of a case such as the one involving the burying of toxic waste in a city park our thoughts automatically turn to the immorality of the behavior. Normally for a behavior to be immoral, it must be voluntary or caused through negligence.¹⁹ Accordingly, a person who voluntarily throws a brick off a roof onto a crowded sidewalk below and hits a passerby has done something immoral. Likewise, some one with limited juggling ability who attempts to juggle bricks at the edge of a roof above a crowded sidewalk—giving no care to the risk to those walking below—has done something

¹⁸ I am assuming they were different from those who did the burying, but a person can act in more than one capacity.

¹⁹ In tort law a person is negligent by "causing injury or harm to another person or to property as the result of doing something or failing to provide a proper or reasonable level of care." See <http://encarta.msn.com/dictionary/negligence.html> Accessed on September 5, 2005.

immoral when the bricks fall and hit someone passing by below. (There would also be negligence on the part of the jobsite foreman who did not detour pedestrians around the area into which an accidentally dropped brick would likely fall.) Most people, though, would hold that a construction worker who has taken due care but trips on a roof and accidentally drops bricks off the roof onto the crowded street below has done nothing immoral even if the bricks hits and kills a passerby.²⁰ We are not, however, concerned with the morality of the behavior. We are concerned with whether the behavior is dangerous. A person can plan, execute or provide support for dangerous behavior not only (1) voluntarily and (2) through negligence, but also (3) involuntarily and (4) non-voluntarily.

The more interesting cases for our discussion are those who are not voluntarily dangerous. Here I am distinguishing between being involuntarily and non-voluntarily dangerous. A person is involuntarily dangerous if they are compelled by some outside force to behave dangerously. A conscripted soldier would be an example of a person who is involuntarily dangerous. A hostage who is fitted with an explosive devise and forced to walk into a group of targeted police officers is another. What differentiates these involuntarily dangerous individuals from those who are non-voluntarily dangerous is that the involuntarily dangerous do will themselves to perform actions that play a causal role in the danger. The conscripted soldier picks up his gun, for example, or the outfitted hostage decides to walk towards the police, rather than sitting on the ground. That is, even though they are being threatened themselves, they do participate in the hostile actions they are ordered to perform. Because of this, such individuals fall in one of my prior three groups—planning, executing, or providing support for hostilities,

²⁰ As we shall see the behavior of the construction worker would be dangerous in the martial sense (in the sense that is relevant to Just War considerations) only if his tripping was a purposely directed attack on those below. For example some unknown agent who set a trap with the purpose of tripping the construction worker and causing the worker to drop the bricks on those passing by below would thereby make the construction worker dangerous.

depending on their role—despite the fact that they are forced to participate in the causal chain. Whatever their role and despite their involuntary involvement, their behavior fits the definition of dangerousness: it is behavior that has been directed (by someone) towards ‘causing harm, injury or loss.’

People who play a non-voluntary role in a causal chain do not will themselves to perform any behavior, dangerous or otherwise. They are dangerous through no action of their own. A man who is thrown from an aircraft poses a danger to those on whom he may fall. An infant infected with a deadly contagion spreads it non-voluntarily. It is important to remember, though, that even those who are dangerous non-voluntarily may have their behavior purposely directed at causing the danger. The man may be thrown from the plane purposely in order to kill some of those who walk below, or the infant may be infected with the contagion purposely in order to spread a plague. That is, the man kills those on whom he lands and the infant those to whom she spreads the contagion, but the purpose is the purpose of those who push and infect them.

The fact that we may respond with lethal force regardless of the voluntariness of the behavior threatening us is consistent with many theories of self-defense. Consider the following three cases from Judith J. Thomson.

- (1) [Y]ou are standing in a meadow, innocently minding your own business, and a truck suddenly heads toward you. You try to sidestep the truck, but it turns as you turn. Now you can see the driver: he is a man you know has long hated you.²¹
- (2) [S]uppose some villain had just injected him [the truck driver] with a drug that made him go temporarily crazy. It is not his fault that he is going to kill you if you do not blow up the truck, he is not villainously aggressing against you; but he is

²¹ Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20, no. 4 (Autumn, 1991): 283.

aggressing against you, and he will in fact kill you if you do not blow up the truck.²²

- (3) [Y]ou are lying in the sun on your deck. Up in the cliff-top park above your house, a fat man is sitting on a bench, eating a picnic lunch. A villain now pushes the fat man off the cliff down toward you. If you do nothing, the fat man will fall on you, and be safe. But he is very fat, so if he falls on you, he will squash you flat and thereby kill you. What alternative do you have? Well, you only have time to shift the position of your awning; if you do this, the fat man will be deflected away from you. But deflecting him away from you will be deflecting him past the edge of the deck down onto the road below.²³

According to Thomson, and correctly I believe, it is permissible to use lethal force in all three cases. It is only in the first case, though, that the person engaging in the dangerous behavior is doing so voluntarily. The fact that the second two cases involve behaviors which are not voluntarily performed is irrelevant to the permissibility of using lethal force. What matters, in the context of the Thomson's scenarios, is the danger the behavior poses. This is because, as I have explained in Section 5.1.2, martial activities, if they are to be just, are concerned with stopping dangerous behavior not punishing wrong doers. Voluntariness might factor into one's moral culpability for performing some behavior, but is not relevant to whether the behavior is dangerous. Since the voluntariness of one's behavior does not affect whether one's behavior is dangerous, the voluntariness of one's behavior does not affect one's status as a combatant or not combatant.

²² Ibid.: 284.

²³ Ibid.: 287.

Similarly, most Just War Thinkers, including Walzer, hold that whether a soldier is an enthusiastic participant, or an oppressed conscript does not influence whether that soldier is a combatant. What matters is the danger he poses to others in the context of the conflict. Even if we were to adopt Walzer's position that soldiers allow themselves to become dangerous, I believe, that participation in martial activities by such an oppressed conscript would nevertheless constitute involuntary participation. Such a position might exclude those who are non-voluntarily dangerous from the ranks of combatants, but this would account for a relatively small percentage of those who might contribute to the war effort and would have little affect on my overall conclusion. Even restricting combatancy to those who are voluntarily and involuntarily dangerous will have significant consequences for the civilian populations of countries like the United States.

Now that we have considered dangerousness in general let us turn to the dangerousness of soldiers.

5.3-On the Dangerousness of Soldiers

Most Just War Thinkers agree that a person becomes a combatant by becoming dangerous, where the dangerousness of the soldier is understood in terms of some contribution²⁴ to the war effort. I propose to accept this standard view, that what makes a person a combatant is that (s)he is dangerous, but only after a more detailed analysis of what it means to be dangerous in a military context—what it means to contribute to or support some martial activity or effort. Once this is done we can see to what extent the civilian population can or cannot lose its immunity.

²⁴ In this dissertation I am using 'contribution' and 'participation,' in the sense of contributing to or participating in the activities of a dangerous organization interchangeably. Similarly, I am taking a contribution to the activities of a dangerous organization and contributing to the war effort to be analogous acts.

Focusing on soldiers at the outset, I am going to assume that all soldiers (with the standard exceptions) are combatants.²⁵ Those soldiers who are standardly considered to have maintained their noncombatant immunity are medical personnel, clerics, wounded soldiers who have ceased hostilities, soldiers in the process of surrendering, and prisoners of war (POWs). If all soldiers (minus these exceptions) are combatants and all combatants are dangerous then all soldiers (minus these exceptions) are dangerous. The important question is how are these soldiers dangerous? Let us begin by considering Walzer's discussion of the dangerousness of soldiers.

5.3.1-Walzer's Dangerous Mistake

Walzer, as I have indicated, believes that soldiers are combatants because, "they are trained to fight, provided with weapons, required to fight on command."²⁶ War, according to Walzer, is the enterprise of their class and this fact makes them quite different from the civilians they have left behind. While I agree with Walzer that being a member of a dangerous organization, and therefore participating in the activities of organization, makes one a combatant, I believe he overstates the distinction between soldiers and civilians. Walzer makes his mistake in not articulating properly the different ways in which soldiers can be dangerous. Walzer maintains that all military members are equally dangerous because they are part of the class of soldiers. That is, Walzer holds that all soldiers, regardless of assignment, are dangerous in the same way. My concern with Walzer's position is that it is uninformative. Simply to say that because one is a soldier one is dangerous fails to identify what it is about soldiers that make them dangerous. Accordingly, Walzer leaves it impossible to determine whether non-soldiers might make themselves dangerous in the same ways.

²⁵ I should argue at some point that a set of noncombatant soldiers includes soldiers other than those identified by the standard exemptions. These would include soldiers in military prisons as well as soldiers who are so incompetent that they lack the ability to contribute to the goals of the military.

²⁶ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 141.

To buttress the theoretical foundation of Walzer's view, we need to begin by recognizing that not all members of the military perform the same type of duties. For any mission there are soldiers who plan the mission, soldiers who execute the mission, and soldiers who provide the support necessary to accomplish the mission.²⁷ It is easy when we are considering martial activities to focus solely on those soldiers who execute the mission—the trigger pullers, the soldiers, marines, airman, and sailors who operate the weapons systems. These are, after all, the men and women who wield the bombs, bullets, and bayonets that are the instruments of death. We can divide members of the armed forces, however, into four groups. The first group is that of command and control. This is going to consist of the military leadership who plan and organize military operations. The second I shall refer to as “trigger pullers.” These are the soldiers, marines, airman, and sailors who operate the weapons systems. The third group shall consist of support personnel such as military cooks and those personnel who maintain equipment. These are, as I have said, the men and women of the armed forces who play a variety of roles necessary to support a military's readiness and ability to fight. The final group of individuals is going to consist of military noncombatants (medical personnel, clerics, etc.). Let us consider the combatant groups of trigger pullers and support personnel. (I shall not specifically address the command and control section of the military organization, because although, they are a separate grouping I am including under support personnel those who function in command and control roles. In terms of duties they function very much like support personnel.)

Trigger Pullers are by far the most universally accepted example of combatants. It is important, though, to understand why. To simply say that they are dangerous to others is an explanation too simplistic to be useful. The dangerousness of a soldier cannot be understood in

²⁷ Note that these correspond to my discussion of the three ways one may cause danger on Section 5.2.1.

terms of individual self-defense. As I have argued previously, soldiers are part of an organization; when they are dangerous, they are part of military campaigns. Military campaigns are launched to achieve some military objective. Military campaigns are not launched to protect the lives of one's soldiers, or at least not primarily for that reason. Ultimately the reason why lives of soldiers are important is that the organization needs soldiers in order to accomplish military missions. People can be dangerous in the sense that they threaten the success of that military objective. What makes opposing trigger pullers particularly dangerous is that they are in the best position to use force to prevent the enemy or the adversary from being victorious. Because they can use force to prevent the completion of the mission, one is justified in using force to counter the danger to success that their force poses.

I now want to turn to the third category of soldier—**Support Personnel**. My objection to Walzer's handling of these soldiers and those in the command and control section is that he treats them as if they are dangerous in the same way that trigger pullers are. Walzer considers all soldiers equally dangerous and dangerous in the same way. This poses a problem for Walzer because even trigger pullers are at times defenseless in the sense that they are, at that particular moment, out of reach of their weapon. This is what Walzer refers to as the naked soldier—the soldier in pajamas, without orders and weapons, even without glasses and shoes. The question becomes what justifies killing soldiers when they are not armed—when they are at play, at rest, or photocopying field manuals. In response to this concern, as I have said, Walzer claims that being a member of the class soldier is sufficient to make one a combatant.

It is the fact that soldiers as a class are trained, armed and ready to fight, according to Walzer, that justifies targeting even the naked soldier.²⁸ In this I think Walzer is correct, but where he makes his mistake is in treating all soldiers as if they are dangerous in the same way. I agree that all military personnel are dangerous because they are trained and ready to fight, but the problem is that Walzer thinks that ‘trained and ready to fight’ for the munitions specialist in the Air Force means the same thing as it does for the trigger puller. That Walzer holds this view is clearer when you look at what Walzer says about civilians who work in munitions factories. Walzer agrees that civilian munitions workers when they are manufacturing ammunition are dangerous and can be targeted, but he wants to restrict targeting them to the periods when they are actually engaged in the manufacturing. Despite their being dangerous, Walzer wants to distinguish munitions workers from soldiers because, he believes, they are only dangerous while in the factory. Walzer writes:

[T]hese are not armed men, ready to fight, and so they can be attacked only in their factories (not in their homes), when they are actually engaged in activities threatening and harmful to their enemies.²⁹

The problem with Walzer's account is that Air Force munitions specialists are not dangerous because they are armed with rifles and are ready to use them. Most of the United States Military does not, even in wartime, perform its duties armed. As to their readiness to fight with a rifle or other weapon—most military members, however willing to fight in such a manner, are also severely unqualified to do so. A cook or munitions specialist in the United States Air Force

²⁸ One might think that this might also apply to the relationship between police officers and criminals, since police officers are also trained, armed and ready to fight. Remember, though, my discussion in Section 5.1.2. The discussion of the combatant/noncombatant distinction only applies within the context of martial activity. Since police officers and criminals have a higher authority to appeal to their relationship is not applicable to our discussion of combatancy.

²⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 145.

qualifies on his primary weapon—the M16A—every three years (this is also the only time he/she gets to practice with/handle the weapon), and in order to qualify he/she must hit the targets fifteen out of forty shots. Security Forces in the United States Air Force qualify on their primary weapon every six months and must hit the target thirty-six out forty shots. Security Forces also qualify on their weapons at night, with the protective mask (gas mask) on, after they have run in place to increase breathing, etc. Cooks and munitions specialist do none of this. Marines and Army infantry personnel have even more stringent criteria for qualification. This is not to mention those soldiers who must qualify on such complex weapon systems as tanks and military aircraft. Walzer treats all military members as if they were members of the Army's Infantry. The complexity of modern weapons and thus the necessity of complex training and repeated practice to be reasonably qualified to use the weapons effectively produce a situation where such a view is untenable. To claim that a cook, munitions specialist or secretary is a threat to enemy soldiers in the same way that actual combat personnel are seems absurd.

This is not to say that cooks are not dangerous. Nor is it to say that cooks or Air Force munitions specialists do not fight. They do fight in the sense that they perform their necessary duties in support of their unit's military objectives. Consider a military aircraft mechanic. When is he more dangerous, when he is on guard duty with a rifle he fires once every few years or when he is ensuring that the fighters and bombers are war-ready? Clearly, it is the latter. It is the (trained) ability to contribute, often in a specialized way, perhaps uniquely, in an organized activity aimed at undermining the political processes of an adversary that makes some soldier dangerous, even if, alone, his or her specialized ability does not increase the soldier's capacity to kill. The ability to pull a trigger is no more than a specialized ability, however central it may be given modern means of warfare.

Soldiers are dangerous, then, because of their participation in the activities of a dangerous organization. This is true for both trigger pullers and support personnel. Munitions specialists in the Air Force have a saying: “Without us it’s just the world’s biggest airline.” What makes munitions specialists dangerous is not their willingness to perform the function of trigger puller. What makes munitions specialists dangerous is their willingness and ability to perform a task necessary to accomplish the mission of a dangerous organization.

The key word here is ‘specialist.’ They are specialists in a critical career field. While it is true that all soldiers³⁰ are dangerous, not all soldiers are dangerous in the same way. Some are dangerous because they bear arms, some are dangerous through command and control, and some are dangerous because they provide the necessary support for the other two. The common way in which they are dangerous is in that they are parts of an organization that aims at undermining the political processes of an adversary through the use of force.

So there are three ways in which a soldier can contribute to participate in the mission: (1) by planning (command and control), (2) executing (trigger pullers) and (3) providing support for the mission. Fulfilling anyone of these roles is sufficient to make a soldier dangerous and thereby a combatant. What makes a soldier dangerous—whether he is a bombardier or data processor—is that he is contributing to (planning, executing, or provide support for) the activities of a dangerous organization—the military. Militaries are dangerous because they are organizations trained to use violent force in the face of unresolvable conflict. Military personnel become combatants because the organization (national government) that directs their activities has exercised its sovereignty in response to an unresolved conflict with another such organization by engaging its military forces to disrupt its adversary’s political processes, with which it conflicts.

³⁰ Again, we are talking about all soldiers who are combatants.

Through my discussion of Walzer's error, I have begun to sketch an appropriate picture of what it means to be dangerous and the ways in which soldiers can be dangerous. So far, I have been focusing on military combatants. If, though, we compare military combatants and military noncombatants we will discover another important aspect of what makes a military combatant a combatant—that his behavior is purposely directed in support of the martial activities.

5.3.2-Being Purposely Directed

What does it mean to say, as Walzer does, that the enterprise of the class of soldier is war? It means that the purpose of the class is to wage war (or at least to be prepared to wage war). The behavior of the members of that class then, is purposely directed towards those ends. This becomes clearer when we consider the difference between a military combatant (a cook) and a military noncombatant (a health care provider or chaplain). The purpose of most military personnel—including cooks—is to support the military mission—to help achieve victory. In this sense, cooks are no different from those who provide for military transportation or do the actual fighting. Some military personnel, though—most notably doctors and clergy—have a different function. A doctor's purpose (at least in theory) is to preserve human life in whatever form it takes. A doctor's obligation is to preserve life whether it is of friendly forces, enemy forces, or civilians.³¹

Consider also doctors' obligations when they are captured by the enemy. Most soldiers when captured are considered prisoners of war (POW). When medical personnel or chaplains are captured, they are considered detained personnel. This means that they retain their right to perform their respective duties. In fact, they have an obligation to avoid losing their detainee

³¹ This general obligation to preserve life is contrary and on occasion will come into conflict with a requirement of working steadfastly to achieve the military's mission. Once medical personnel redirect their purpose from saving lives to achieving the military's mission they, like any other dangerous person, would lose their immunity.

status by avoiding behavior that would make them a threat to the enemy. It would be by becoming a danger to the enemy that chaplains and medical personnel would lose their special protection.

In contrast, if a cook becomes a POW she has an obligation to attempt to escape (when it is reasonable to do so) and rejoin her unit. If a doctor, though, becomes a detainee she does not have a similar obligation. If she believes that her skills can be better used in the POW camp, then she can stay. Similarly, a cook has an obligation to avoid capture. Doctors, however, can surrender if doing so is necessary to stay and treat wounded soldiers. The difference is that the cook cannot fulfill her function to support the military mission as a POW, while a doctor can fulfill her function to preserve life in a POW camp. The difference, if you will, is that the cook's mission, unlike the doctor's, is necessarily linked to the mission of the military organization for which (s)he cooks, a mission that stands in a violent relationship to the adversary.

This is not to suggest that the doctor's or cleric's immunity is absolute. Like any one else, they can lose their right not to be intentionally killed. If for example the mission of doctors in the military were to "preserve the fighting strength," rather than to save lives, I believe doctors would be combatants.³² That is, if their purpose became directed at achieving military objectives rather than at promoting life, then it would seem that there would be no significant moral difference between the doctor and the mechanic; they would both maintain military readiness, regardless of the type of equipment—mechanical or biological—on which they operate.

³² "To Preserve the Fighting Strength" is the current motto and mission of the United States Army Medical Department (AMEDDS).

The dangerous behavior, then, must be *purposely directed* in support of the activities of a dangerous organization, an organization that is using violent force to disrupt the political processes of an adversary with which it stands in conflict.

Why include, as part of what it means to be combatant, a requirement that the dangerous behavior must be purposely directed towards the war effort? Why not count as a combatant anyone whose behavior contributes to the war effort—purposefully or not? Part of the reason is that, at its roots, the Just War Tradition is a deontological system, the concern of which extends beyond merely with the consequences of one's actions. The requirement of purposefulness of direction focuses on intentions (if not of the people acting, then of those who are directing their actions) rather than consequences.

There is a more practical concern, though. Without such a condition not only would far more enemy nationals be combatants, but many of one's own citizens would be combatants in opposition to their government. Imagine that countries *X* and *Y* are at war. Let us consider the ways in which one can be dangerous to *X*.

One's behavior aids *Y*'s ability to engage in martial activities.

One's behavior is purposely directed at aiding *Y*'s ability to engage in martial activities.

One's behavior is not purposely directed at aiding *Y*'s ability to engage in martial activities, but it nevertheless does so.

One's behavior hinders *X*'s ability to engage in martial activities.

One's behavior is purposely directed at hindering *X*'s ability to engage in martial activities.

One's behavior is purposely directed at hindering *X*'s ability to engage in martial activities for the purpose of contributing to *Y*'s war effort.

One's behavior is purposely directed at hindering *X*'s ability to engage in martial activities for a purpose other than contributing to *Y*'s war effort.

One's behavior is not purposely directed at hindering *X*'s ability to engage in martial activities, but it nevertheless does so.

If we include as a condition of being martially dangerous that one's behavior must be purposely directed at contributing to the war effort of *Y*, then only those who are engaging in behavior which is consistent with 1a and 2ai would be combatants. If, though, we have no such condition, then any one who either aids *Y*'s ability to engage in martial activities or hinders *X*'s ability to engage in martial activities is a combatant against *X*. Such a construal would make combatants against *X* not only of many of *Y*'s citizens, but many of *X*'s citizens as well, as I shall now argue.

Let us consider those who might hinder *X*'s ability to engage in martial activities, though not for the purpose of contributing to *Y*'s war effort. These would be those individuals whose behavior is consistent with 2aii and 2b. The first are those individuals whose behavior is purposely directed at hindering *X*'s ability to engage in martial activities for a purpose other than contributing to *Y*'s war effort. These would include individuals who objected to the war for moral or religious reasons and publicly engaged in protests in order to undermine popular support for the war, as well as those individuals who because of philosophical or religious reasons are pacifists and encourage those who might be expected to fight in the war to refuse to do so.

The second group consists of those individuals whose behavior is not purposely directed at hindering *X*'s ability to engage in martial activities, but it nevertheless does so. These would include:

Incompetent military and political leaders,

Those who attempt to place moral limits on the actions that *X*'s soldiers can perform during the war,

Those who attempt to place a limit on the amount of monetary and material resources that can be used in the war,

The poor and infirmed who use up government resources that might otherwise be used for the war effort,

Members of the media that disseminate information capable of undermine popular support for the war,

Those who are capable of fighting but who choose not to,

Parents who, fearing for their child's safety, discourage the child from military involvement, etc.

Any theory of combatancy, certainly any that can qualify as a "Just War" theory, must be able to distinguish between those who hinder a nation's ability to engage in martial activities for hostile purposes, and those who do not.

5.3.3-On Contributions

There are two final aspect of a soldier's contribution that I want to consider. The first is that the significance of the contribution is not relevant to whether a soldier is combatant. Soldiers are dangerous insofar as they contribute to the organization—the military. The individual's contribution, though, does not have to be necessary for the organization's (mission's) success in

order for the individual to be dangerous. A military organization is like a colony of termites. As individuals the termites pose little danger. As a whole, though, the colony can do tremendous damage. Consider the Allied invasion of Normandy on June 6, 1944. There were 156,000 soldiers involved in the invasion of Normandy on D-Day. Each of these soldiers was a combatant despite the fact that none played a necessary role in achieving the mission.

The second point I want to make is one that I touched on in Section 5.1.2. Just War Tradition is not concerned with punishing prior behavior; it is concerned with stopping ongoing behavior. If we look at those soldiers who are standardly considered to have maintained their noncombatant immunity we see they include wounded soldiers who have ceased hostilities, soldiers in the process of surrendering, and POWs. Wounded soldiers who have ceased hostilities, soldiers in the process of surrendering, and POWs are military noncombatants because their condition (either injury or confinement) terminates their participation in the activities of their martial organization. While it is true that it is possible for them to reinitiate their participation when they regain their health or freedom, at the moment they are not participating in the activities of the martial organization. As such, they are not combatants. While this might seem relatively trivial when discussing military personnel, this point becomes more of a concern when one considers the general civilian population. In the civilian population, we are far more likely to find one-time contributions to the war effort that have terminated.

Consider someone like Bill Gates. If Bill Gates plans on giving twenty billion dollars a year to the war effort for the duration of the war he is engaged in dangerous behavior. He is making and planning on making an ongoing contribution to the war effort. This would make him a combatant. If, though, Bill Gates gives his entire fortune to the war effort at one time, and is not planning to raise more money for the war effort, then once he has given the money away, he

is not a combatant (assuming that his behavior does not support the war in some other fashion). The size of Gates's contribution is irrelevant. Once he no longer contributes, he is no longer dangerous in the martial sense.

We are now in a position to set out what it means to be dangerous in the martial sense.

5.4-Dangerous in the Martial Sense

An individual is a combatant, then, if (s)he is dangerous in the martial sense. Being dangerous in the martial sense is participating in the activities of a martially dangerous organization. By martially dangerous organization, I mean organizations that

- (1) Are established to respond to human conflict,
- (2) Have no system of laws in common (have no higher authority to which to appeal in order to seek remedies for injustices done), and
- (3) Because of 2, must resort to violence in order to disrupt the political ends of those with whom they conflict, thus to effect their will thereby to settle the conflict.

Participating means that one's behavior is purposely directed towards achieving the goals of the organization. In the case of a war, those activities would be activities in support of the war effort. Other instances might be participating in the activities of a vicious, oppressive or aggressive government that aims, respectively, to stifle the will of its own or of other people.

Some important features of one's participation are:

- (1) One can participate in the activities of a dangerous organization by either planning, executing or providing support for the dangerous activities;
- (2) Participation can be voluntary, involuntary, or non-voluntary;
- (3) The value of a person's participation is irrelevant to his or her combatancy status, and
- (4) Once a person's participation ends, he or she is no longer a combatant.

Any persons, then, regardless of their status as military member or civilian, if they are dangerous in this martial sense, are combatants. Combatancy, of course, is understood in terms of a relation to some particular adversary or adversaries. So when we say ‘A is a combatant,’ this is shorthand for ‘A is a combatant in relation to X,’ where X is a sovereign party or parties with whom the organization to which A contributes is engaged in martial activities.

Before I turn to a discussion of how this sense of dangerousness might apply itself to segments of the civilian population I want to briefly consider becoming dangerous in the martial sense through omissions. Up to this point, my discussion of participating in the activities of martially dangerous organizations has focused on playing a causal role in the martial activities. In other words, I have focused on those people who become combatants because their behavior has been purposely directed at the war effort through some act. There is a very practical reason for this. Traditionally, the mechanism in war for stopping dangerous behavior is to kill or otherwise incapacitate the dangerous person. What makes an omission dangerous, though, is that the person did not perform some action. Attacking the person, particularly if (s)he is killed, will often have the effect of ensuring that the person cannot act. Nevertheless, one can be dangerous in the martial sense because of an omission, and as such martially dangerous omissions deserve some consideration.

5.5-Martially Dangerous Omissions

In this section, I want to consider those people whose behavior is dangerous because of an omission rather than an action. In this section, then, I am going first to explain what an omission is and second to show how one’s omission can make one dangerous in the martial sense.

The idea that one can be dangerous by not acting is not a new notion. Both criminal and civil statutes recognize that not acting in a particular way can constitute dangerous behavior. For example, one may be dangerous because one fails to prevent a dangerous situation from arising or because one fails to eliminate the danger once the dangerous situation arises. Therefore, we know that omissions are sometimes dangerous. If they are not always dangerous, then we need to distinguish when omissions are dangerous from when they are not. First, though, we must distinguish between those who allow some state of affairs to occur and those who merely do nothing to prevent it from occurring.

At this moment some person is drowning, some person is starving to death, some person is being raped and some child is being beaten. Presumably, the fact that you are reading this dissertation means that you are not saving the drowning person, the starving person, the rape victim or the battered child. This is not to say, though, that you allowed a person to drown, starve to death, be raped or battered. Merely not preventing *X* is not the same as allowing *X* to occur. Consider the following by R. G. Frey:

The distinction between act and omission (or between acts of commission and acts of omission) may be construed broadly as the distinction between acting and failing to act, between a doing or a doing-something and a not-doing or a doing-nothing. Not all failures to act, however, amount to an omission: a non-swimmer who fails to save the drowning man, where entering the water is the only way to save him, would seem to be a case in point.³³

³³ R. G. Frey, "Acts and Omissions," in *Encyclopedia of Ethics*, ed. Lawrence C. Becker and Charlotte B. Becker (New York: Garland Pub., 1992), p. 14.

In our discussion, we are concerned with dangerous behavior rather than immoral behavior. Even so, we must be able to distinguish between mere failures to act and omissions. Let us consider an example that deals with a dangerous omission. Imagine that two countries are at war—Countries *P* and *Q*. Within *P* lives a seventeen year-old boy, Smith, who is the world's greatest shot—as he has proven in countless international competitions. Now Smith is planning to join the military where he will become the most successful sniper in the history of *P*.

According to the laws of *P*, the parents of any person under eighteen years old can prevent their child from joining the military by submitting a particular form to the proper authorities. If Smith's parents fail to prevent their son from joining the military (fail to submit the proper form), their failing to act is dangerous because it will result in their son's being dangerous. But, if Smith joins the military many more people than Smith's parents failed to prevent him from joining the military. In fact, everyone failed to do so. It is as true of the citizens of *Q*, the enemy country, that they failed to act to prevent Smith from joining the military as it is of his parents.

It would be absurd, though, to say of the citizens of *Q* that they have become combatants against their own country because of their failure to act to prevent Smith from joining the military, and this absurdity demonstrates the correctness of the intuition that there is a difference between allowing and merely doing nothing. Accordingly, what we need is an account of the difference between allowing and merely doing nothing. What analysis of the difference, we may ask, would illuminate the relevant difference between Smith's parents and citizens of *Q*, with regard to Smith's joining the army? Frey identifies the following conditions as being necessary and jointly sufficient for a failure to act to be an omission.

- (1) *A* does not *X*, but has to the degree required, the ability to *X* (e.g. can swim);

(2) A has the opportunity to X in non-life-threatening/non-catastrophic loss circumstances

(e.g. no raging sea);

(3) A is or may be expected to X.³⁴

As I have indicated Frey, like most philosophers, is interested in the morality of omissions. As such, he focuses on immoral omissions—those omissions where the person allowing X is morally blameworthy (or praiseworthy) for not acting differently. Not all omissions, though, are subject to moral judgment. Therefore, I argue, below, that (3) should be omitted from our account of omissions: Imagine that a man is preparing to pull out of his driveway and hears the siren of an approaching fire truck. The man does not pull out of his driveway—allowing the fire truck an unimpeded path—though he has both the ability and opportunity to do so. Now we might say, generally speaking, absent the sounding siren, that the man would be expected to pull out of his driveway, but I believe that such expectations must be understood in the context of the circumstance in which the man finds himself. Given the sounding siren and the proximity of the fire truck a man in such circumstances would not be expected to pull out of his driveway. Often times one allows X to happen and allowing X is exactly what one would be expected to do. So while A's being expected to X may be a necessary condition for not Xing to be an instance of an immoral omission, it is not, I believe, a necessary condition for not Xing being an instance of an omission. Rather, Frey's first two conditions, (1) "A does not X, but has to the degree required, the ability to X (e.g. can swim);" and (2) "A has the opportunity to X in non-life-threatening/non-catastrophic loss circumstances (e.g. no raging sea)" are sufficient for not Xing to be an

³⁴ Ibid. Eric D'Arcy identifies two causes for our expecting A to X:

It may be expected because X is something A usually does, or people usually do, in the situation in question.

...X is required of him [A] by some rule which he is expected to follow. This may, of course, be some moral rule, precept or principle; but it will often be a non-moral rule. Eric D'Arcy, *Human Acts: An Essay in Their Moral Evaluation* (Oxford: Clarendon Press, 1963) p. 42.

omission. For the purposes of this project, I shall be adopting this model of allowing as the necessary and jointly sufficient conditions for an omission to constitute an instance of an allowing.

Now that we have distinguished between merely not *Xing* and allowing *Y*, we need to distinguish further between allowing in general and allowings which make one dangerous in the martial sense. I have argued that in order to be dangerous in the martial sense one's behavior must be purposely directed in support of some dangerous organization engaged in martial activity. One of the key features of a martially dangerous omission that is going to distinguish it from other omissions is that the dangerous behavior is purposely directed towards a particular end. Accordingly, in order for an omission to be a martially dangerous omission, *A*'s not *Xing* must be purposely directed at bringing about *Y*, where *Y* is some contribution to the relevant martial activities.

Thus, the necessary conditions for an omission to be a martially dangerous omission are:

- (1) *A* does not *X*, but has to the degree required, the ability to *X*;
- (2) *A* has the opportunity to *X* in non-life-threatening/non-catastrophic loss circumstances;
- (3) *A*'s not *Xing* is purposely directed at bringing about *Y*, and
- (4) *Y* is some contribution to the relevant martial activities.

With these conditions in place, we can distinguish between the behavior of Smith's parents in the above case, and the citizens of *Q* who also failed to act to prevent Smith from joining the military.

Smith's parents had the ability to prevent Smith from joining the military—they could submit the proper form. We will assume that they had the opportunity. They had the knowledge of the law, access to the form and sufficient time to submit it. If Smith's parents failed to prevent

Smith from joining the military for the purpose of his contributing to the war effort, then they would have satisfied the third and fourth conditions as well. If, on the other hand, they did not prevent Smith from joining the military for some other purpose, say they are indifferent to any war or possible war and their aim was simply not to further antagonize relationships with a 17 year-old child from whom they may feel typically (but unhappily) alienated, then their failure to prevent their son from joining the military would not be a martially dangerous omission.

Presumably, most citizens of *Q* have neither the ability nor opportunity to prevent Smith from joining the military. Imagine, however, that a citizen of *Q* does. Imagine that a citizen of *Q*, *C*, who has training in some lethal method of killing happens to be sitting next to young Smith, while Smith is journeying to basic training, and citizen *C* does not kill young Smith. Would *C*'s failure to act be a martially dangerous omission and make *C* combatant against his own people? It would only if *C*'s failure to act was purposely directed in support of the martial activities of *P*. If, though, *C*'s failure to act was for some other purpose, say to avoid imprisonment, then, it would not be a martially dangerous omission. Moreover, even if *C*'s failure to act were a martially dangerous omission, *C* would be a combatant only if he continued to contribute to the martial activities of *P*, only, that is, if he remained dangerous to his nation.

It is possible to imagine many omissions that are causally implicated in the effectiveness of the martial activity of a given nation. In many cases, however, the omission is a discrete act, unrelated to any pattern of activity directed to achieve martial purposes. Such omissions will not make those who omit the actions combatants without such an ongoing pattern of activity. If an individual's pattern of omissions has an ongoing effect on a martial enterprise and either the individual or some other party (perhaps within a military organization) directs that pattern of omission to accomplish the hostile intent of some military organization, then—and only then—

does the pattern of omission become a danger that makes the ommitter dangerous. Under that circumstance targeting the ommitter would meet the Criterion of Discrimination between Combatants and Noncombatants, at which point the appropriate question of justification would be whether targeting the ommitter could be a part of minimizing the violence required to bring hostilities to a successful conclusion. That question of proportionality I leave for Chapter Six.

I now want to consider some on the segments of the civilian population that can become dangerous in the martial sense.

5.6-Who Can Become a Combatant—Being Dangerous in the Martial Sense?

Who can become a combatant? The quick answer is anyone who can become dangerous in this martial sense—anyone whose behavior can be purposely directed in support of the war. Unlike other Just War thinkers, I do not *a priori* exclude any group from those who can become combatants. Often times some groups are excluded because they do not possess the requisite capacity to form the intention of contributing to the war effort. As the infant infected with the contagion shows, though, possessing the intention to aid the war effort is not a prerequisite for being dangerous in the martial sense. What matters is the purpose towards which one's behavior is being directed, and even those, like an infant, who lack the capacity to form morally significant intentions, can have their behavior directed in support of the war. Nor does lacking the capacity for self-directed action, such as in the case of the comatose patient automatically exclude one from the category of combatant. Civilians in a permanent vegetative state can have explosives strapped to their chests and air dropped over the enemy or plague-infected patients could be catapulted over the city wall. Thus, while I agree with the claim of Michael Walzer that *every* one begins with immunity it is equally true that *every* one is subject to losing it because one's behavior may make one dangerous. For the purposes of determining one's dangerousness,

it does not matter whether one's behavior is voluntarily, involuntarily or non-voluntarily supporting the war. Every man, woman and child can become dangerous in the martial sense and can thereby become a combatant.

Some people will object that such a broad sweeping understanding of combatancy will undermine the combatant-noncombatant distinction. If anyone can be a combatant, they will say, then rules that are intended to protect noncombatants become trivial at best. Jeffrie G. Murphy argues something along these lines:

If a combatant is understood solely as one who performs an action which is a causally necessary condition for waging the war, then the following are going to be combatants: farmers, employees at a city water works, and any one who pays taxes. Obviously a country cannot wage war if there is no food, no basic affairs of its cities, and no money to pay for it. And of course the list of persons "responsible" for the war in this sense could be greatly extended. But if all these persons are in the class of combatants, then the rule "protect noncombatants" is going to amount to little more than "protect babies and the senile." But one would, I think, have more ambition for it [the rule protecting noncombatants] than that...³⁵

Murphy wants the Just War criterion of Discrimination between Combatants and Noncombatants to limit, to the greatest extent possible, the number of people who can be legitimately attacked and any interpretation of the criterion that does not "protect" a sufficient portion of the population is going to be unacceptable. Despite Murphy's ambitions, the

³⁵ Jeffrie G. Murphy, "The Killing of the Innocent," in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law*, ed. Jeffrie G. Murphy (Boston: D. Reidel Pub. Co., 1979), p. 7.

combatant/noncombatant distinction is not concerned with protecting as many people as possible—it is concerned with protecting the martially innocent. The fact that an entire population may become dangerous because of the enlistment of their behavior in the military attempt to disrupt the political ends of the adversary says something about that population and how its behavior is molded to the purposes of its military, rather than about the criterion of Discrimination between Combatants and Noncombatants. Most people may agree that it is a lamentable commentary on the nature of war that the opportunities for losing one's immunity from intentional attack are so many and include ones beyond an individual's ability to control (as when a man is dropped from a plane or an infant is infected with a contagion). It will remain true, nevertheless, that those whose behavior has made them martially dangerous to others have lost their immunity from intentional attack.

While in a conventional war soldiers will inevitably constitute the bulk of legitimate targets, they are unlikely to be the only ones. In the United States, for example, over 800,000 civilians work for the Department of Defense, constituting one quarter of the United States' armed forces. We need then to consider the implication for the civilian population of our previous discussion of becoming dangerous in the martial sense. What I shall do in the remainder of this chapter is consider more specifically which segments of a civilian population can become combatants. I shall consider specifically three aspects of the civilian population—taxpayers, farmers, and children.³⁶

³⁶ My exclusion of other segments of the civilian population in this dissertation should not be taken as an indication of their potential for being dangerous in the martial sense.

5.6.1-Taxpayers

If a thousand men were not to pay their tax-bill this year that would not be a violent and bloody measure, as it would be to pay them, and enable the State to commit violence and shed innocent blood.³⁷

Providing financial support for martial activities makes one dangerous in the martial sense. This can be seen in the attitudes of the United States government and the international community's response to those who fund terrorist organizations. The International Convention on the Suppression of the Financing of Terrorism clearly states that:

...the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain.³⁸

And President George W. Bush in a speech before the National Endowment of Democracy on October 6, 2004 stated that:

The United States makes no distinction between those who commit acts of terror and those who support and harbor them, because they're equally as guilty of murder.³⁹

Similarly, the United States' National Strategy for Combating Terrorism states that as part of the United States' plan to combat terrorism that the United States is prepared to attack the financial support base of terrorist organizations. The United States' National Strategy for Combating Terrorism is:

³⁷ Henry David Thoreau, "Civil Disobedience," in *American Spiritualities: A Reader*, ed. Catherine L. Albanese (Bloomington: Indiana University Press, 2001), p. 310.

³⁸ Signatures to the International Convention for the Suppression of the Financing of Terrorism, "International Convention for the Suppression of the Financing of Terrorism," (December 1999).

³⁹ President George W. Bush. (2005, October). On the Nature of the Enemy We Face and the Strategy for Victory. Speech presented at the National Endowment for Democracy, New York, New York.

- Defeat terrorist organizations of global reach by attacking their sanctuaries; leadership; command, control, and communications; material support; *and finances*. (Emphasis is mine.)
- Deny further sponsorship, support, and sanctuary for terrorists.
- Diminish the underlying conditions that terrorists seek to exploit.
- Defend the United States, our citizens, and our interests at home and abroad.
- Use all the tools at our disposal: diplomatic, law enforcement, intelligence, financial, and military.⁴⁰

Paying taxes that would go in part or in whole to finance military operations has long been considered participation in the military operation by those who are opposed to such actions for moral or religious reasons. Consider the following by Henry D. Thoreau, Mohandas Gandhi, and Leo Tolstoy:

See what gross inconsistency is tolerated. I have heard some of my townsmen say, 'I should like to have them order me out to help put down an insurrection of the slaves, or to march to Mexico, — see if I would go;' and yet these very men have each, directly by their allegiance, and so indirectly, at least, by their money, furnished a substitute. The soldier is applauded who refuses to serve in an unjust war by those who do not refuse to sustain the unjust government which makes the war...⁴¹

If only each King, Emperor, and President understood that his work of directing armies is not an honourable and important duty, as his flatterers persuade him it

⁴⁰ http://djibouti.usembassy.gov/response_to_terrorism.html Accessed December 5, 2005.

⁴¹ Thoreau, "Civil Disobedience."

is, but a bad and shameful act of preparation for murder – and if each private individual understood that the payment of taxes wherewith to hire and equip soldiers, and, above all, army-service itself, are not matters of indifference, but are bad and shameful actions by which he not only permits but participates in murder – then this power of Emperors, Kings, and Presidents, which now arouses our indignation...would disappear of itself.⁴²

He or she who supports a State organized in the military way—whether directly or indirectly—participates in the sin. Each man old or young takes part in the sin by contributing to the maintenance of the State by paying taxes.⁴³

Similarly thirty-eight members of the 109th Congress recognized that when some part of their tax money goes to financing military campaigns taxpayers are participants in the war by introducing, on May 25, 2005, a bill entitled, ‘Religious Freedom Peace Tax Fund Act,’ which if passed would:

...affirm the religious freedom of taxpayers who are conscientiously opposed to participation in war, to provide that the income, estate, or gift tax payments of such taxpayers be used for nonmilitary purposes, to create the Religious Freedom Peace Tax Fund to receive such tax payments, to improve revenue collection, and for other purposes.⁴⁴

In essence, the bill would extend conscientious objector status to American taxpayers who because of their ethical and/or religious beliefs did not wish to provide financial support for military activities.

⁴² Leo Tolstoy, "Thou Shalt Not Kill," *Freedom* 14, no. 153 (December 1900). See <http://praxeology.net/LNT-SNK.htm> Accessed February 12, 2006

⁴³ Mohandas Gandhi, *Non-Violent Resistance* (New York: Courier Dover Publications, 2001) p. 359.

⁴⁴ "Religious Freedom Peace Tax Fund Act," 109th Congress (2005).

As long as taxpayers finance a dangerous organization (provide financial support for their nation's military), it will be true that they themselves are dangerous in the martial sense and are therefore combatants.

I commonly encounter three objections to the idea that one can lose his or her immunity by paying taxes: (1) if all taxpayers are combatants, then everyone is a combatant and we have total war; (2) paying taxes is compulsorily, and (3) for most people the amount of money that they contribute to the war effort is insignificant. Let us consider these in turn.

(1) Some people will object that such a broad sweeping understanding of combatancy will undermine the combatant-noncombatant distinction. Along these lines, it will be said that if anyone can be a combatant then rules that are intended to protect noncombatants become trivial at best. The first objection is to a large extent Murphy's concern. If everyone is a combatant, then no one is protected by the criterion of Discrimination between Combatants and Noncombatants.

I believe that this objection is based on the mistaken view that the criterion of Discrimination is designed to minimize violence. Like all the criteria of Just War, the job of this criterion is to state under what conditions intentional attack on a person is justified. It is not for the criterion to decide whether many or few meet the requirement. There is no way that a theoretical requirement can presuppose that circumstances must always be such that application of the criterion will significantly limit the number to whom it applies.

I believe that this objection is also based on the mistaken view that everyone who is a combatant is a legitimate target for attack. Put another way, if every citizen of an enemy state is a combatant then I can kill any and every citizen of that state that I want. This of course is not true. Who is a legitimate target for attack is determined by both the criterion of Discrimination between Combatants and Noncombatants and the criterion of Proportionality *in Bello*. Thus,

even if everyone were a combatant, legitimate attacks would still be limited by concerns of proportionality. The objection that if paying taxes makes one a combatant then there will be too many combatants is really a concern to protect as many as possible from legitimate attack, and proportionality is the means Just War Theory provides for limiting attacks on those who have lost their immunity from intentional attack. At the same time, as I noted above, the criterion of Proportionality *in Bello* is subject to poor results if it is applied after the Criterion of Discrimination between Combatants and Noncombatants has been applied too narrowly.

(2) As I have already explained—one's actions do not have to be voluntary in order to be dangerous in the martial sense. Just as soldiers who are conscripted into fighting a war are combatants, those citizens who are conscripted into financing the war are combatants as well. Since conscripts can be legitimate targets, so can compelled taxpayers. Since taxpaying is not a consensual activity, taxpayers face the same options as conscripted soldiers—participate as ordered or face the consequences. The point that applies both to soldiers and to taxpayers is that the non-voluntary character of their behavior does not undermine how it may be dangerous to the adversary's military. For that military to act in a justified manner, it needs to consider how its adversary is dangerous, not whether the dangerous behavior is voluntary.

(3) The third objection, like the first, deals more with the proportionality than with whether or not taxpayers should be combatants. The size of one's contribution does not affect whether one is contributing to the war effort, but rather whether proportionality would justify taking actions to stop the contribution. As we have seen, a party may be dangerous and a legitimate target even if the party has no necessary or strategically significant role in an enterprise that makes the party a danger to others. Just as soldiers are combatants even if no particular soldier's contribution is necessary for achieving the military objectives, so too

taxpayers are combatants even if no particular taxpayer's contribution is necessary to achieve the military objectives. And again, how much any individual contributes is contingent on the design of the system set up to collect the money. Consider the sale of war bonds in the United States during World War II. On September 21, 1943 singer Kate Smith in a sixteen-hour marathon was able to raise \$40,000,000 for the war effort. Adjusted for inflation, this amount would equal a contribution of \$453,403,601.55 to the war effort today.⁴⁵ Again, whether any individual taxpayer or group of taxpayers is a legitimate target is going to be a product of both their combatancy status and whether an attack upon them can satisfy the criterion of Proportionality *in Bello*. Here I have argued only that by paying taxes that support military operations, one loses one's immunity from attack.

5.6.2-Farmers (and Other Food Providers)

Let us talk about farmers. One of the ways that philosophers such as Murphy, Nagel and Walzer have tried to limit the number of people that could become combatants through their contribution is by trying to differentiate between providing for a soldier's needs *qua* human being and providing for a soldier's needs *qua* soldier. The classic example is that a munitions worker would provide for a soldier's needs *qua* soldier, while a farmer (or cook) provides for a soldier's needs *qua* human being. Now this distinction is not original. To a large extent, this is what justifies the noncombatant status shared by medical personnel and clerics. In effect, what Nagel and Walzer want is to extend the considerations normally reserved for medical personnel and clerics to anyone who seems to meet a humanitarian need rather than a war-time need. It should be noted here, though, that one difference between Walzer and Nagel is that Nagel wants

⁴⁵ Determined with the inflation calculator at <http://www.westegg.com/inflation/infl.cgi> Accessed September 5, 2005.

to apply this principle across the board, while Walzer wants to apply it only to civilians. Nagel, for example, would apply the principle equally to military or civilian cooks. For Nagel the only soldiers who are combatants are the trigger pullers and those support personnel who meet their needs *qua* soldier. Walzer, on the other hand, holds that all military members are combatants regardless of the manner in which they support the trigger pullers. While I approve of the consistent manner with which Nagel treats soldiers and civilians, I do believe that there is a significant difference between the military and civilian cooks to warrant automatically granting the civilian cook immunity from attack. Let us consider the supplying of food to soldiers in general. Certainly what Nagel has to say about cooks—that since they provide for a soldier’s needs *qua* human being they should not be considered combatants—would hold true for farmers and distributors of food as well.

Does the fact, though, that a farmer provides soldiers merely with food—which every human being needs to live—entail that he is a noncombatant? Almost always, the answer is going to be no. In most cases we are not talking about meeting the necessary nutritional requirements for human beings to continue to live, but meeting the nutritional needs of a fighting force. What needs to be true in order for the farmer to be a noncombatant is for his action to be directed at a purpose other than a military one. Soldiers are fed, though, so that soldiers can fight. Food and bottled water are sent to soldiers overseas, for example, so that soldiers may function overseas. If a farmer provides food to soldiers so that they can continue to fight or will be more proficient fighters, then his behavior is directed purposely towards a military goal, and his behavior is implicated in the organization of the military as certainly as is the military cook.

The question, then, is whether the civilians who provide soldiers with food are more like the military cook or the health care professional. Clearly some food manufacturers produce food

strictly for military personnel, and design the food in such a way as to improve a military's effectiveness. What I have in mind is Meals Ready to Eat (MRE). MREs are light-weight meals which are designed to fit in the cargo pocket of a military uniform. The content of one MRE meal bag provides an average of 1250 kilocalories (13 % protein, 36 % fat, and 51 % carbohydrates). It also provides 1/3 of the Military Recommended Daily Allowance of vitamins and minerals determined essential by the Surgeon General of the United States. In short, they are intended to provide military members with the resources they need to accomplish their mission more effectively. This is true not only in the sense of meeting their dietary needs (for military purposes), but by providing the individual soldier with a means of carrying his food with him. This allows soldiers to operate away from the support elements of larger units without having to worry about finding food in the area of operation. This seems clearly to be a case where the purpose goes beyond meeting the needs of soldiers as human beings.

5.6.3-Children

Consider the following case. Imagine that the year is 1943 and Nazi Germany has begun to wage war on American soil. As part of their general strategy, the German High Command has ordered the bombing of all elementary schools with the intention of targeting the children who attend them. Again, almost everyone's intuitions are that the intentional targeting of children during war is impermissible. This, though, is based upon the assumption that the children in question are martially innocent. I have argued that "innocence" within the scope of the Just War Tradition is understood as being non-dangerous rather than not morally culpable. (Trigger-pulling soldiers engaged in a just cause are not morally culpable, after all; they are legitimate targets because they are martially dangerous, because they are part of an organization using martial means to undermine the political organization of the adversary.) So to argue that

children lack moral culpability says nothing about their status as combatants or noncombatants.

What has to be evaluated is the contribution they make to the war effort.

In his Fireside Chat on December 9, 1941, President Roosevelt told America: "We are now in this war. We are all in it - all the way. Every single man, woman, and child is a partner in the most tremendous undertaking of our American history."⁴⁶ The role that children would play in this partnership was far from symbolic. Elementary school children were, in essence, conscripted to service in support of the war effort. During the war, schools across America redesigned their curriculum in order to redirect their student's actions towards victory. In a 1942 edition of the *Instructor* W. W. D. Sones begins his article "School Children Mobilize" by characterizing this contribution:

ELEMENTARY Teachers, leading an army of twenty million school children, are rapidly marshalling this powerful force in support of victory. How powerful this force can be is shown by some striking figures. If each child among these-millions of children were to:

Save the light from one fifty-watts electric bulb for one hour each day,
enough energy would be saved to operate a good-sized aluminum or chemical
plant continuously,

Collect one pound of scrap iron a week, they would provide material each
week for three destroyers, or three hundred seventy tanks.

⁴⁶ See <http://www.presidency.ucsb.edu/showdoc.php?id=921&type=4&president=32> Accessed on September 5, 2005.

Buy one ten-cent Defense Stamp each week, they would be contributing to the amount of two million dollars weekly, or one hundred million dollars a year.⁴⁷

School children supported the war effort in a variety of ways. They grew victory gardens, took over household duties so their parents could work in factories, conserved and recycled critical materials, increasing the supply of commodities valuable for military purposes, and raised money through the sale of war bonds and stamps. At the end of the 1941-42 school year school children had raised more than \$81,000,000.⁴⁸ By the end of the war, children had raised more than \$300,000,000 in war bond and stamp sales.⁴⁹ If we consider inflation \$300,000,000 in 1944 would be worth \$3,205,020,746.09 in 2005 dollars.⁵⁰

Children in the United States during World War II were, in essence, conscripted into service in support of the war and did, as an organized force, make a significant material contribution to the war effort. As such, they would be rightly considered combatants.

5.6.4-Summary

There are two important points to keep in mind when we are considering the combatant or noncombatant status of civilians. The first is that being a combatant is a necessary but not sufficient condition under Just War Tradition to make one a legitimate target for attack. Attacking any combatant must also satisfy the criterion of proportionality. There may be combatants who are never legitimate targets for attack, but it is critical that we correctly identify who is a combatant and who is not.

⁴⁷ W. W. D. Sones, "School Children Mobilize," *The Instructor* 57, no. 7 (1942).

⁴⁸ Sherry Field, "Roosevelt's World War II: Army of Community Service Workers," *Social Education* 60, no. 5 (September 1996): p. 280.

⁴⁹ Ibid.

⁵⁰ Determined with the inflation calculator at <http://www.westegg.com/inflation/infl.cgi> Accessed September 5, 2005.

The second point is that the purpose of the Just War Tradition is not to ensure that as few people as possible are combatants or legitimate subjects of attack; rather the purpose is to ensure that military actions are performed justly. It is a mistake to shy away from a proper understanding of noncombatant immunity because it entails more people and more classes of people are combatants than one is comfortable so classifying. This would be like the politician who rejects a definition of 'poverty' because it entails classifying too many citizens as poor. If one is concerned about the number of poor people, the proper response would seem to be to deal with the conditions that result in citizens' meeting the definition. Similarly, if one is concerned about children losing their immunity—and I think we should be—then what we need to concern ourselves with is ensuring that children are not engaged in activities that support the war. If someone straps an explosive device to a toddler and sends him running towards me so that I will be killed in the explosion, the fact that I can respond to the threat with lethal force—if that is the only recourse open to me—tells us nothing of the acceptability of the moral theory governing such behavior. It does, though, tell us something about the person who chose to make the child dangerous.

So there is nothing inherent in the choosing of civilian targets which would preclude an individual who has done so from satisfying the criterion of Discrimination between Combatants and Noncombatants. What matters is the target's combatancy status, not their status as soldier or civilian. Of course, soldiers or civilians are only combatants when the nation for which they fight is engaged in martial activity, and then they are combatants only in relation to those with which their nation is martially engaged.

5.7 Terrorism and the Criterion of Discrimination between Combatants and Noncombatants

In Chapter Four, I have argued that the authority to engage in martial activities rests with governments because that authority has been granted them by those individuals who have come together to form the community for which the government has been given authority over. That is, governments derive their authority to engage in martial activities from the individual's right to exercise his or her executive powers which each individual possess in the state of nature.

Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the governments' using that authority appropriately. When governments fail to use their delegated authority appropriately, then individuals can once again exercise their rights.

While non-governmental organizations, such as terrorist groups, may have the same authority as governments to engage in martial activities, they are unlikely to have the same power base and access to resources. The character of the conflicts they have and the resources they have, then, will determine when they have exhausted peaceful approaches to conflict resolution. For lack of power, they may be without alternative to a resort to violence to protect themselves and establish the legitimacy of a government that can represent them. Who their adversaries are and how their adversaries enlist the behavior of others to support the adversaries' positions in the conflict will then materially affect what is dangerous to them. Accordingly, those whose behavior is so directed as to contribute to harm against them may meet the criterion of a person who has lost immunity from intentional attack and become a legitimate target

(subject to constraints of the Criterion of Proportionality *in Bello*, yet to be discussed in Chapter Six).

5.8-Preferencing Dangerousness

It has been suggested that this discussion is but one possible interpretation of the Just War Tradition criterion of Discrimination between Combatants and Noncombatants—one with disturbing implications. It falls upon me, then, to explain why this interpretation, despite its implications, should be preferred over other interpretations. As I have suggested previously, there is a long history within the Just War Tradition of understanding combatancy in terms of dangerousness. Despite the central role dangerousness has played, though, there has been little philosophical analysis of what it means for a person to be dangerous in the context of a martial activity. In this chapter, I have attempted to provide just such an analysis. In essence, I have argued that:

- (1) The Just War Tradition is committed to X (that what makes a person a combatant is that they are martially dangerous).
- (2) If one is committed to X, then there is no philosophical reason not to be committed to Y (that all people, including civilians who are martially dangerous are combatants).
- (3) So, Just War Tradition should be committed to Y.

Just War thinkers, then are faced with a choice. Either they can remain committed to X, and thereby accept the implication that they are also committed to Y, or they can develop some other basis for combatancy that would guarantee a larger number of noncombatants. There are, though, or so I believe, no better candidates for Discrimination between Combatants and Noncombatants. To clarify this, I shall consider the two other possible interpretations of this criterion that seem at

all plausible: (1) moral culpability and (2) making the combatant/noncombatant distinction coextensive with the soldier/civilian distinction.

Let us begin by considering moral culpability, rather than dangerousness, as the basis for Discrimination between Combatants and Noncombatants. Such an interpretation would hold that combatants are morally guilty while noncombatants are morally innocent because of the martial activity in which they are engaged. In Chapter Six I will proffer an argument for why belligerents must meet one another on the battlefield as moral equals. Briefly, I argue that according to the Just War Tradition, those who lack a higher authority from whom to seek remedies for injustices may, when appropriate, use force in order to restore or maintain justice. Within a Just War framework, such force is to be considered a weapon that must be controlled and properly directed in order to be used justly. The authority to use martial actions in the service of justice is not, as I explained in Chapter Four, restricted to governments, nor is the responsibility for maintaining control over the martial forces employed. Justice sometimes requires that force be employed in order to rectify or prevent some injustice. This force may be employed by those who conflict, have no common authority for resolving their conflict and fail in their attempts to negotiate their conflict. This is true whether they are governmental or non-governmental entities. In order for the force to be used justly, it must be controlled and properly directed. Any control over martial forces is going to require a high degree of discipline and it is this requirement of discipline that is going to entail a presumption that orders given are legitimate. Therefore, any group exercising such force must employ the presumption that orders given are legitimate. This presumption that orders given are legitimate entails that belligerents are not morally culpable for the justness of the war in which they fight, and as such as meet as moral equals.

This argument aside, there are several problems with such an interpretation. The first is that prisoners of war, although they have been rendered non-dangerous by their capture, can nevertheless remain morally culpable because of their previous fighting in the war. Under this interpretation, despite their status as POWs, they would be combatants and could—if Proportionality *in bello* could be satisfied—be legitimate targets for attack. The second problem is that there may be members of the civilian population who are morally culpable in terms of the war, but are not martially dangerous. Imagine Country Z where the decision to go to war is made by a general vote of the civilian population. Two-thirds of the country's citizens must vote in favor of going to war in order for any use of martial force to be initiated. If this were the only action that these citizens took, then they would not be martially dangerous because they would make no ongoing contribution to the war effort. They would be morally culpable, however, and under this interpretation would be combatants.

The third problem with this interpretation is that combatancy as morally culpability will exclude the possibility that soldiers on the unjust side of a war could act within the war justly because no one that they fight against has any moral culpability. Consider the following argument for the equality of soldiers based on the nature and practice of war given by Walzer. According to Walzer the character of war is such that certain practical considerations have to be taken into account if fighting wars is to be permissible. The most obvious consideration is that warfare must be governed by rules. Anything that would prevent war from being rule bound would be unacceptable. This is why, for example, there was a time when it was considered unacceptable to target officers. Officers were seen as imposing order on the enlisted forces—keeping them from reverting to an uncontrollable mob. Similarly, Walzer believes that without a stipulation regarding the equality of soldiers the rules that govern warfare would vanish.

Without the equal right to kill, war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement.⁵¹

If one side of the conflict were by definition engaged in unjust actions, then there would be no moral reason for them to abide by any rules of war. Similarly, there would be no moral reason for those directing the actions of such soldiers to attempt to impose such rules.

The final problem with this interpretation is that what presumably makes soldiers morally culpable in the context of a war is that they are contributing to the war effort. This, though, will also extend to the civilian population. As I have already explained, there are many ways in which civilians contribute to the war effort. Nor can we excuse civilians because their behavior is involuntary, at least not without excusing conscripted soldiers. First, not all contributions made by civilians are involuntary. Second, if civilians who are forced into service of the war effort are not morally culpable because their contribution is involuntary, then conscripted soldiers too would not be morally culpable for their actions. This interpretation leaves us, then with a dilemma, either:

Conscripted soldiers who fought on the unjust side would not be morally culpable for their actions because they are involuntary, or

Many civilians who were essentially conscripted into support of the war effort would also be morally culpable and therefore combatants.

For these reasons I believe basing combatancy on moral culpability is an unacceptable alternative.

⁵¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 41.

One might think that the combatant/noncombatant distinction should be seen as being coextensive with the soldier/civilian distinction. There would be two benefits for such an interpretation. The first is that it would map on to most people's common sense understanding of the combatant/noncombatant distinction, and second it would seem to bring about the desired result of guaranteeing a larger group of noncombatants. This interpretation, though, has its own ~~set of~~ problems. The first problem is that it does not allow for a non-arbitrary way to distinguish those groups who have traditionally been thought to be military noncombatants (medical personnel, clerics, soldiers in the process of surrounding, wounded soldiers no longer engaged in combat and prisoners of war) from other soldiers. As such, they would all equally be combatants. One might object here that my reference class (military noncombatants) is non-problematic because they are not trigger-pullers. But, of course, most of the military are not trigger pullers. My point is that officers who provide command and control (as the public would probably acknowledge) and soldiers such as cooks who provide necessary support (as perhaps they might not so readily agree) are traditionally and systemically combatants (unlike medics and clerics), even though they are not trigger-pullers.

The second problem is that making the combatant-noncombatant distinction equivalent to the soldier-civilian distinction cannot take into account, in a non-arbitrary fashion, those civilians who do participate directly in the war effort. These would include political leaders, weapons' manufacturers, civilian contractors who provide direct support for military operations.

Third, this interpretation requires that there be a clear distinction between soldiers and civilians. This will be a problem when dealing with insurgence groups, guerrilla warfare, resistance or freedom fighters, terrorists, etc. The Merchant Marines is a perfect example. Although, they are civilians:

U.S. Merchant Marines have served in every U.S. war or conflict since the American Revolutionary War. Merchant mariners were involved in what is considered the first sea engagement of the Revolutionary War. On June 12, 1775, they crashed into the British vessel *Margaretta*, engaged in hand-to-hand combat and overtook the crew. During World War II, the merchant mariners had the highest ratio of deaths per capita, one in 26, higher than any other U.S. service. In Operation Iraqi Freedom, more than 5,000 merchant mariners served aboard 157 ships bringing essential combat cargo and supplies to the troops.⁵²

Despite the fact that Merchant mariners are considered by international law to be combatants, an interpretation of the combatant/noncombatant distinction that viewed it as being coextensive with the soldier/civilian distinction would not be able to justify such a classification.

Accordingly, such an interpretation of the combatant/noncombatant distinction is based upon tradition and the desire to exclude as many people as possible from the intentional harms of war, rather than philosophical principles. As I explained in Chapter One, this presents a problem when attempting to apply the distinction to new circumstances of war. For these reasons, I believe understanding the combatant/noncombatant distinction as being coextensive with the soldier/civilian distinction is an unacceptable alternative.

Understanding combatancy in terms of dangerousness, despite its implications in regards to the status of many segments of the civilian population, best deals with the philosophical justifications for a person as a combatant, and the practical considerations of applying the distinction to an ever-changing war environment. While interpreting combatancy in terms of

⁵² JO2(AW) Alicia Rogers, CFAO Public Affairs, "70th-annual National Maritime Day honored at Naha Military Port." See <http://www.cfao.navy.mil/pao/30MAY03.htm> Accessed March 9, 2006.

dangerous does not capture everything that the Just War as tradition might want, as I have shown, the alternatives I have discussed are inferior to it.

5.9-Conclusion

In this chapter, I have examined the compatibility of terrorism and the *jus in bello* criterion of Discrimination between Combatants and Noncombatants. Terrorists intentionally target civilians, which has traditionally been understood in the context of the Just War Tradition to be a violation of the criterion of Discrimination between Combatants and Noncombatants. In order, then, to demonstrate the compatibility of terrorism and Just War Tradition, I have shown that intentionally targeting civilians is not necessarily a violation of the criterion of Discrimination between Combatants and Noncombatants merely because those who were intentionally targeted were civilians. I began with a philosophical analysis of how one becomes a combatant. I concluded that one becomes a combatant by becoming dangerous in the martial sense. Being dangerous in the martial sense is participating in the activities of a dangerous organization. By a dangerous organization, I mean any organization that

- (1) is established to respond to human conflict,
- (2) has no system of laws in common (have no higher authority to which to appeal in order to seek remedies for injustices done), and
- (3) because of (2) must resort to violence in order to disrupt the political ends of those with whom they conflict, thus to effect their will thereby to settle the conflict.

Participating means that one's behavior is purposely directed towards achieving the goals of the organization.

I have also identified four important aspects of a person's contribution that should be noted:

- (1) One can participate in the activities of a dangerous organization by either planning, executing or providing support for the dangerous activities;
- (2) Participation can be voluntary, involuntary, or non-voluntary;
- (3) The value of a person's participation is irrelevant to his or her combatancy status, and
- (4) Once a person's participation ends, he or she is no longer a combatant.

Combatancy, as I have indicated, is understood in terms of a relation to some particular adversary or adversaries. So when we say 'A is a combatant,' this is shorthand for 'A is a combatant in relation to X,' where X is a sovereign party or parties with whom the organization to which A contributes is engaged in martial activities.

There is nothing about being a civilian that precludes one from becoming dangerous in this martial sense. In order to have a clear and distinct break between those who have lost their immunity and those who have not, the criteria must be consistently applied to all persons. Consistency demands that whosoever behavior makes them dangerous in the martial sense thereby becomes a combatant.⁵³

I believe that my analysis has shown that there is no *prima facie* reason to preclude civilians from possible combatant status. Therefore, the fact that terrorists intentionally target civilians does not necessitate a violation of the criterion of Discrimination between Combatants and Noncombatants.

The purpose of this chapter was to begin showing that at least some forms of non-governmental political terrorist acts could be compatible with the *jus in bello* component of the Just War Tradition. I did this by showing that there was nothing inherent in character of a civilian that necessitate civilians being noncombatants. If combatancy applies equally to soldiers

⁵³ This, of course, presupposes that their dangerous behavior is continuous rather than a single event.

and civilians, then terrorists can satisfy the criterion of Discrimination between Combatants and Noncombatants even if their primary target choice are segments of the civilian population.

Satisfying the criterion of Discrimination between Combatants and Noncombatants only meets one of two *jus in bello* criteria. In order for terrorism to be compatible with the Just War Tradition of *jus in bello*, terrorists will also have to be able to satisfy the criterion of Proportionality *in Bello* as well. In following chapter, then, I shall consider the compatibility of terrorism and the final *jus in bello* criterion of Proportionality *in Bello*.

CHAPTER SIX

ON JUS IN BELLO CONSIDERATIONS II: THE CRITERION OF PROPORTIONALITY IN BELLO

6.1-Introduction

In Chapter Five, I have argued that one becomes a combatant by being dangerous in the martial sense, where being dangerous in the martial sense is understood as participating in the activities of a dangerous organization. By dangerous organizations, I mean organizations that

- (1) are established to respond to human conflict,
- (2) have no system of laws in common with their adversaries (have no higher authority to which to appeal in order to seek remedies for grievances done and resolve conflicts within an established and consensually agreed-upon framework), and
- (3) because of (2) resort to violence in order to resolve some grievance favorably.

Participating means that one's behavior is purposely directed towards achieving the goals of the organization. On this account anyone whose behavior is purposely directed towards the war effort either through a commission or omission is a combatant.

This, though, is not the same as saying that everyone whose behavior is purposely directed towards the war effort is a legitimate target, that is, is a target that may be intentionally attacked. In order for any person to be a legitimate target for an intentional attack according to *jus in bello* two criteria have to be met:

- (1) The person must be a combatant (the criterion of Discrimination between Combatants and Noncombatants) and

(2) The attack must meet the criterion of Proportionality *in Bello*.

In this chapter, I shall consider the second element necessary for becoming a legitimate target—satisfying the criterion of Proportionality *in Bello*.

This though will be far from an easy task. In evaluating the conditions under which this criterion can be satisfied, Just War Tradition suffers from the same problems as any moral theory that includes a proportionality requirement—by what calculus does one determine the proportionality of any particular situation. As R. R. Baxter writes:

The rule of proportionality...has never been easy to apply in particular cases and ...is little more than a cautionary rule, requiring the commander to stop and think before he orders a bombardment.¹

Many people seem to treat the issue of disproportionality along the same lines indicated by the attitude of Supreme Court Justice Potter Stewart-towards pornography when he wrote: "I shall not today attempt to further define [obscenity]...but I know it when I see it."² While I will not, in this chapter, attempt to provide such a calculus, I shall go one step further than Justice Stewart. I shall provide some sufficient conditions for a martial action or operation to be disproportionate, even if I cannot give the necessary conditions for such an action or operation to be proportionate. The existence of sufficient conditions for a disproportionate martial action or operation will assure that not all non-immune persons are legitimate targets.

This discussion shall consist of five parts. In the first, I shall explain what the criterion of proportionality is. In the second, I shall explore what requirements the criterion imposes on those who are acting within a Just War framework. We shall see that those requirements are contingent

¹ R. R. Baxter, "Modernizing Law of War," *Military Law Review* 165 (1978): pp. 178-79.

² *Jacobellis v. Ohio*, 378 US 184, 197, 200 (1964) (Stewart, J., concurring).

on the epistemic vantage point from which the person views the martial objective being evaluated. In the third section, I shall briefly consider the affect one's status as a combatant or noncombatant has on considerations of proportionality. In the forth section, I shall consider the relationship between terrorism and proportionality. In the final part of our discussion, I shall articulate some sufficient conditions for a martial action to be disproportionate—to fail to satisfy the criterion of Proportionality.

6.2-What is the Criterion of Proportionality of Means?

The criterion of Proportionality *in Bello* states that a necessary but not sufficient condition for the one's actions in war to be just is that the good achieved by performing the action outweigh the harm the action causes. To understand this criterion we must first understand the relationship between the goods achieved and the harms done. I want to begin with Henry Sidgwick's discussion of the duties of belligerents, "fighting in the name of justice, and under the restraints of morality."³

To begin with the mutual duties of belligerents. [sic] The general principle of such duties seems not difficult to state. It is clear that the aim of a moral combatant must be to disable his opponent, and force him to submission, but not to do him (1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount-of the mischief.⁴

In his analysis of this passage Walzer writes:

³ Henry Sidgwick, *The Elements of Politics* (New York: Kraus Reprint, 1969) Chapter XVI, Section 2.

⁴ Ibid.

What is being prohibited here is excessive harm. Two criteria are proposed for the determination of excess. The first is that of victory itself, or what is usually called military necessity. The second depends upon some notion of proportionality: we are to weigh ‘the mischief done,’ which presumably means not only the immediate harm to individuals but also any injury to the permanent interests of mankind, against the contribution that mischief makes to the end of victory.⁵

Walzer derives from this passage two criteria: military necessity and proportionality. This passage is better understood, I believe as describing a single criterion—proportionality—that has two components:

- (1) Military Necessity—Any actions which causes harms that are unnecessary to achieve one’s military objectives are prohibited⁶, and
- (2) The harms caused must be proportionate to the military advantages achieved by achieving one’s military objectives.

The *jus in bello* proportionality requirement is concerned with ensuring that the harms brought about by an action within a war do not outweigh the advantage offered one’s military objectives for that action, as well as ensuring efficiency of military operation in the sense of least harm to effect the military goal. This means (1) that some military objectives are not worth the harms that would be caused by attempting to achieve them, and (2) that one is prohibiting in causing any harm that is unnecessary to achieving one’s military objectives.

⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 129.

⁶ Here we are concerned with actions which will or are likely to cause harm.

6.2.1-Military Necessity

The notion of military necessity, while critical to applying the criterion of Proportionality is often misunderstood, so it is worth taking a moment to consider it in more detail. The first thing to understand about military necessity, as it is used within a Just War framework, is that it constrains one to perform no military actions that do not facilitate one's ability to achieve one's military objectives.

In this, Just War Tradition conflicts with the international laws governing armed conflict. As Robert Holmes and Paul Christopher note, there is a tension between the notion of military necessity within Just War Theory and the humanitarian principles (the *jus in bello* criteria) codified in international law.⁷ In his book *The Ethics of War & Peace: An Introduction to Legal and Moral Issues* Christopher writes, "[m]ore recently, military necessity has been used to refer to a justification for setting aside or overriding the *jus in bello* principles found in the laws of war for the sake of military objectives."⁸ Holmes explains that in an attempt to defuse this tension military necessity is often defined in terms of obedience to international law. He gives three examples:

- (1) Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.⁹
- (2) Military necessity justifies a resort to all measures which are indispensable for securing this object [to bring about the complete submission of the enemy as soon as possible by

⁷ Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 158, Robert L. Holmes, *On War and Morality* (Princeton, N.J.: Princeton University Press, 1989) p. 106.

⁸ Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 158.

⁹ Holmes, *On War and Morality* pp. 101-02.

regulated violence] and which are not forbidden by the modern laws and customs of war.¹⁰

- (3) [Military necessity is] that principle which justifies measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.¹¹

The problem with making military necessity subservient to international law, as Christopher tells us, is that, “[a]lmost every humanitarian law that is articulated in either the Geneva and Hague Conventions to the Nuremberg Principles specifies that certain actions are prohibited *unless required by military necessity*.”¹² Christopher goes on to add:

Under existing international and national laws the prohibition against harming innocents may be subjectively overridden for the purpose of military advantage, or even military convenience...Understood this way, military necessity amounts to a claim that certain blatantly immoral acts are justified on no other basis than that they might contribute in some way to military objectives.¹³

In support of Christopher’s view that international law lets military necessity justify too much, it can be noted that caveats regarding military necessity can be found in most of the major documents of the Law of Armed Conflict. Consider, for example, the Nuremberg Principles:

War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public

¹⁰ Ibid. p. 102.

¹¹ Ibid.

¹² Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p.134.

¹³ Ibid. p.159.

or private property, wanton destruction of cities, towns, or villages, or devastation *not justified by military necessity*. (Emphasize is mine.)¹⁴

And the preamble to the 1907 Hague Convention IV:

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit...* (Emphases is mine.)¹⁵

And again the conclusion of the 1949 Geneva Convention IV:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful [sic] killing, torture or inhuman treatment, including biological experiments, willfully [sic] causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully [sic] depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly. (Emphases is mine.)¹⁶

Thus, the notion of military necessity in international law is clearly different from the notion of military necessity in Just War Theory. As it is used within the context of the international laws governing armed conflicts, the notion of military necessity seems to function as a mechanism to

¹⁴ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950. <http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument> Accessed January 11, 2006

¹⁵ Signatures to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, "1907 Hague Convention IV Respecting the Laws and Customs of War on Land."

¹⁶ Signatures to the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, "1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War."

ensure that humanitarian considerations (such as *jus in bello* requirements) do not curtail a nation's ability to achieve its military objectives. In Just War Theory, to the contrary, *jus in bello* requirements serve to ensure that a nation's desire to achieve its military objectives does not override humanitarian considerations. In the context of a Just War framework, military necessity functions as a mechanism to ensure that no unnecessary harms or suffering is caused by one's attack.

Another important aspect of military necessity is that it is a very weak sense of necessity. Military necessity, as it is used in the context of a just war, does not require ~~that it be the case~~ that an objective could not be achieved if the actions were not performed. It is often the case that more than one course of action could achieve the same objective. Accordingly, in a strong sense of necessity any such actions are unnecessary. What is required of this weaker sense of necessity is (1) all other things being equal (likeliness of success, friendly casualties, etc.) one must choose the action that will produce the least amount of harm, and (2) once a course of action has been chosen, one is prohibited from causing any harm that is not necessary to achieving the objective.

Before moving on, I want to make a final point about relationship between military necessity and collateral damage. It has been suggested to me that collateral damage (the destruction of noncombatant targets) would have to fail to satisfy the requirements of military necessity because by their very nature the destruction of noncombatant targets contributes nothing to one's ability to achieve one's military objective. While it is true that the destruction of noncombatant targets contributes nothing to one's ability to achieve one's military objective, what ties collateral damage to the notion of military necessity is that, if it is justified, it is an unavoidable byproduct of one's actions. Collateral damage is necessary in the sense that strikes

on legitimate targets, which are necessary in the above defined sense, could not be performed without causing the damage.¹⁷

6.3-Applying the Requirements of Proportionality

Now let us consider the requirements of proportionality as they apply to those involved in martial activities. In this section, I argue that the duties one has in accordance with the criterion of Proportionality *in Bello* are going to be relative to one's epistemic vantage with regard to the military objective(s) towards which one's actions are directed. The criterion of Proportionality requires a judgment about the relationship between the harms caused by an action and the military advantage gained by achieving the objective towards which the actions aim. In order to make such a judgment one must have sufficient understanding of both the harms caused by the action and the military advantage gained by achieving the objective towards which the actions aim. Not every soldier engaged in an action in support of a military objective, though, is in an epistemic position to make such judgments.

To access any combatant's epistemic status, the first thing that we have to understand is that most soldiers play a dual role: on the one hand, they act as they are directed, and on the other hand, they take initiatives of their own, typically within the scope of the direction they receive. It will be helpful here to look at the United States Army's rank structure. For the purpose of this dissertation, I shall use the United States Army as a model.

Consider the following table:

¹⁷ The notion of military necessity is a complex one, and one that, I believe, needs further investigation before a stronger claim about the viability of Just War Tradition can be made. For the purposes of this dissertation, this analysis is sufficient to allow us to pursue the weaker claim regarding the compatibility of terrorism and Just War Tradition.

Table 2: Active Duty United States Army Personnel by Rank/Grade¹⁸

Rank/Grade	Command Position	Manning
General (O-10)	General Officer	11
Lieutenant General (O-9)	General Officer	47
Major General (O-8)	General Officer	99
Brigadier General (O-7)	General Officer	151
Colonel (O-6)	Field Grade Officer	3,788
Lieutenant Colonel (O-5)	Field Grade Officer	9,170
Major (O-4)	Field Grade Officer	14,503
Captain (O-3)	Company Grade Officer	24,407
1 st Lieutenant (O-2)	Company Grade Officer	9,472
2 nd Lieutenant (O-1)	Company Grade Officer	6,218
Sergeant Major (E-9)	Non-Commissioned Officer	3,497
First/Master Sergeant (E-8)	Non-Commissioned Officer	10,944
Sergeant First Class (E-7)	Non-Commissioned Officer	36,707
Staff Sergeant (E-6)	Non-Commissioned Officer	59,563
Sergeant (E-5)	Non-Commissioned Officer	79,500
Corporal/Specialist (E-4)	Non-Commissioned Officer /Lower Enlisted	110,533
Private First Class (E-3)	Lower Enlisted	58,632
Private E-2 (E-2)	Lower Enlisted	26,301
Private E-1 (E-1)	Lower Enlisted	21,441

¹⁸ This table represents the United States Army's manning table as of November 30, 2005. This information was acquired from the Department of Defense's Directorate for Information and Reports at the following website: <http://web1.whs.osd.mil/mmids/military/rg0511.pdf> Accessed January 18, 2006. This table excludes warrant officers which are given a rank between enlisted and officer for technical skills and do not serve in command positions and cadets at the Military Academy.

Army personnel can be divided into two general groups: enlisted soldiers and officers. Enlisted soldiers are divided into two further groups: Non-Commissioned Officers (NCOs) and the lower enlisted. NCOs (corporal-sergeant major) are enlisted personnel who supervise other soldiers while the lower enlisted (private first class, private E-2 and private E-1) have no command authority. The officer corps is divided into three groups: company grade officers, field grade officers and general officers. Company grade officers (2nd lieutenant-captain) command units which are not generally expected to operate independently for any significant length of time. Field grade officers (major-colonel) command units which can be expected to operate independently for short periods of time. General officers (brigadier general-general) command units which are expected to operate independently for extended periods of time.

There is a famous quotation attributed to Thomas Paine which is often appealed to, “Lead, follow or get out of the way.” While this might seem sage advice, it presents a false trichotomy within the rank structure we are considering. With the exception of the lower enlisted, who have no command authority, every soldier is expected both to lead and to follow. The role that they are playing is going to affect how they relate to criterion of Proportionality. Let us consider these in turn beginning with their role as follower.

6.3.1-Soldier *qua* Follower

Every soldier is a follower. This is true of the lower enlisted, NCOs, company grade officers, field grade officers and general officer. Every one from the lowest private to the highest general is required to follow orders. In understanding a soldier *qua* follower’s relationship to the criterion of Proportionality, it is important first to understand soldiers’ relationship to one another. Soldiers, as I argue below, face one another as equals—that is, no soldier has a greater

right to kill the enemy or not to be killed by the enemy than any other soldier involved in the conflict.

What I am arguing here is that the justness of a soldier's cause does not affect the justness of his or her actions within the war. In other words, a soldier fighting within an unjust war can nevertheless fight justly. The equality of soldiers is founded in the Just War Theory and is, I believe, in a practical sense the rock on which Just War Theory operates. Justification for the equality of soldiers can take three forms (1) epistemological worries, (2) worries about agency, and (3) issues surrounding the notion of patriotism.¹⁹ For the purposes of this dissertation, I shall focus on epistemological worries that those who fight their nations' wars are not in a position to know the justness of their cause.

Vitoria tells us that, "A prince is not able and ought not always to render reasons for the war to his subjects, and if the subjects cannot serve in the war unless they are first satisfied of its justice, the state would fall into grave peril." Therefore, consider a particular soldier, *S*, fighting for a particular government, *G*, against the background of information, *I*, available to the soldier, at least in part from *G*. Since, following Vitoria, a prince is not able and ought not always to render reasons for the war to his subjects, *S* cannot know that, whatever case *I* makes for the justification of going to war, it is not overridden by information unavailable to *S*, it follows that the context of war always leaves any soldier with reasons for which one could rationally doubt whatever justification for war (s)he has been provided. Because of this, Vitoria held that soldiers were always protected by a cloak of "invincible ignorance."

¹⁹ See Richard Shoonhoven's paper, "Invincible Ignorance and the Moral Equality of ... Lawyers?" presented at the conference JSCOPE 2003. The paper can be found at the following website: http://atlas.usafa.af.mil/jscope/JSCOPE03/Shoonhoven03.html#_edn1 Accessed September 5, 2005.

Because of this ignorance the soldier is responsible for how (s)he fights (and the justice thereof); the proper political authority is responsible for whether he fights (and the justice thereof), and the objective he serves. Since there is no superior authority to adjudicate between quarrelling nations, if they have exhausted what other remedies they might reasonably use, then they are ~~then~~ justified in making a decision whether to go to war. Since that authority and decision is the ruler's, the soldier is responsible, provided it is not apparent that the ruler has misused authority, only for how (s)he fights, not whether.

This ignorance may stem from the fact that those who make the decision to go to war will not or cannot disclose all the relevant information to those who are doing the actual fighting. It might be because of the complexities of the political situation. As Walzer points out, "because a government's propaganda machine makes it difficult to know the truth about just cause, the moral decision-making process is highly complex."²⁰

Beyond this epistemic concern lies a better justification of the state of soldiers' ignorance regarding the justness of their cause. There is a necessary presumption, I believe, on soldiers' part regarding the lawfulness of orders given and the justness of their cause that can be grounded in considerations of justice. The very acceptance of the Just War Tradition recognizes the necessity of using force in order to maintain and/or restore justice, and the use of such force requires this presumption on part of the soldier. To demonstrate this I shall make the following argument:

- (1) Maintaining and restoring justice at times requires the use of military (or other martial) force.

²⁰ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 74.

- (2) The ability to employ and use military force to maintain and restore justice requires the existence of properly functioning standing armies.
 - (3) In order to maintain properly functioning standing armies strict discipline must be maintained.
 - (4) In order to maintain strict discipline soldiers, for the most part, must follow orders given by those appointed over them.
 - (5) In order for soldiers to follow orders, the presumption must be that orders given by superiors are lawful.²¹
 - (6) It is this presumption of lawfulness that dissolves the guilt or innocence on the battlefield.
 - (7) This, though, is not to say that soldiers do not bear any responsibility for their actions.
- Let us consider these points in turn.

6.3.1.1-Argument for Moral Equality of Soldiers

- (1) Maintaining and restoring justice at times requires the use of military (or other martial) force. As I discussed in Chapter Three, one of the underlining presuppositions of Just War Theory is that any justly fought war arises after all reasonable non-violent methods for the security of justice have been exhausted. Once this so-called criterion of the Last Resort has been satisfied, the security of justice now depends on the use of force—particularly military force.
- (2) The ability to employ and use military force to maintain and restore justice requires the existence of properly functioning standing armies. Note that I stated that the requirements of justice entail a need for a standing army—an army that exists in both times of

²¹ In the context of our discussion of obeying orders I am using the term ‘lawful’ not merely in the sense of legal, but in a broader connotation to incorporate notions of legitimate or in keeping with the criteria of Just War Theory. A lawful order, then, is merely one that should be obeyed, while unlawful is one that should not.

peace and conflict. First, as the old adage goes, “a strong offence is a good defense.” The lack of ability to defend oneself invites attack. The presence of a standing army then helps maintain the peace by discouraging those who would break it. Remember that the goal of any war is to promote a lasting peace. Such a peace normally requires the ability to enforce its terms. Secondly, newly formed armies are inexperienced and often times ineffectual. The use of such an army would undoubtedly result in a much higher casualty rate, and significantly decrease the chances of victory.

This requirement is reinforced under contemporary conditions of conflict. It has to be a contingent matter how quickly a foreign military force can overwhelm an undefended nation. Therefore, it is possible (and in conditions of modern warfare, including transportation, often inevitable) that a foreign military force might be able to overwhelm an undefended nation faster than the nation could prepare to defend itself.

(3) In order to maintain properly functioning standing armies strict discipline must be maintained. Anyone who has attempted to get three children up, ready and to school on time knows what an arduous task it can be. Now imagine what would be involved in moving 50 or 100 or 200 thousand soldiers to a single location. With an invasion force, it is crucial that everyone be where they are supposed to be at the right time. If elements of the invasion are early or late, then there are going to be wholes in the line. Now imagine what it would take to provide the necessary support they would need once they got there —food, housing, sanitation, proper clothing, inoculations against regional ailments, etc. If the supply lines are not ready to provide the force with the necessary supplies then the army is at a stand still.

Moreover, two of the most important aspects of many military operations are speed and stealth. Without strict discipline and the attention to detail that it incurs, such movements of

personnel and equipment could not occur within the confines of mission requirements. The stealth and coordination of complexly organized efforts characteristics of military operations require the existence of such a disciplined force.

(4) In order to maintain strict discipline soldiers, for the most part, must follow orders given them by those appointed over them. First and foremost, discipline in the military is a matter of adherence to orders. Soldiers must do what they are told, when they are told, and how they are told. Because of the size and nature of armies, orders cannot and often should not be explained to individual soldiers. My uncle went through flight school in the US Army Air Core in 1943 and as part of the program, they played a game referred to as beaver. When a superior officer yelled ‘beaver,’ all of the trainees would drop to the floor and start chewing on the closest item made of wood. The purpose of this exercise was to instill into them an immediate response to orders. When a radar operator commands “veer right,” one cannot take the time to ask why. Many components of the modern army have similar aspects. When anyone yells “incoming” the ingrained instinct of any soldier is to spread out and hit the ground, belly first. Soldiers are commanded to perform by any standards terrifying acts and by normal standards horrific ones as well. An army cannot function if soldiers do not follow orders. There must exist, then, a presumption that orders given to soldiers by their superiors are legitimate and need to be followed.

(5) In order for soldiers to follow orders the presumption must be that orders given by superiors are lawful.²² As I have discussed the nature of a soldier’s duties often requires an immediate and an almost unwavering obedience to orders. Soldiers cannot function if they must

²² In the context of our discussion of obeying orders I am using the term ‘lawful’ not merely in the sense of legal, but in a broader connotation to incorporate notions of legitimate or in keeping with the criteria of Just War Theory. A lawful order, then, is merely one that should be obeyed, while unlawful is one that should not.

evaluate each and every order. Even if a soldier desired to do so, the compartmentalized and sensitive nature of military intelligence would make such a task impossible in modern warfare. In order to perform the tasks asked of them soldiers must trust both in the necessity of their action and the lawfulness of their orders.

(6) This presumption of lawfulness dissolves the guilt or innocence on the battlefield.

The necessity of this requirement of obedience to orders alleviates soldiers of responsibility for their presumptive behavior and for the type of wars in which they fight. Their presumptive obedience to the direction of the orders they receive means that those who direct them must bear responsibility for what they order.

(7) This, though, is not to say that soldiers do not bear any responsibility for their actions. Remember Just war theory has two distinct sets of criteria for evaluating the justness of a given war—the conditions of justice for going to war (*jus ad bellum*) and justice in war (*jus in bello*). The first applies to those who make the decision to go to war, and the second applies to those who are engaged in the practice and process of war.²³ Soldiers can be held accountable for violating the rules of war/the criteria of *jus in bello* (e.g. intentionally killing noncombatants). Moreover, the presumption that the orders of one's superiors are just is rebuttable, and soldiers are responsible for assessing those orders so that they do not follow obviously illegitimate ones. Walzer writes:

Not that [the soldier's] obedience can never be criminal; for when he violates the rules of war, superior orders are no defense. The atrocities that he commits are his

²³ This will include both those soldiers who are in service when the war begins and those who join the service after the commencement of hostilities. As I shall argue, unless there is overwhelming evidence that the war violates crimes against humanity, a soldier regardless of when he enters service is under the presumption that orders given him are just. Now it might be the case that members of the civilian population have evidence not available to members of the armed forces of such crimes. Such knowledge, though, would be cause to refuse service.

own; the war is not. It is conceived, both in international law and in ordinary moral judgment, as the king's business—a matter of state policy, not of individual volition, except when the individual is the king.²⁴

Soldiers can be held accountable for violating the rules of war because even in cases where soldiers are pressed into service they still maintain some control over which actions they will and will not perform. The standard is high, though. Soldiers have an obligation to disobey orders that any reasonable person would consider an atrocity. Short of this, though, the presumption is obedience.²⁵

Soldiers cannot be held responsible for the character of the war that they are fighting in because they cannot choose in which wars they will fight. It is this non-responsibility of soldiers facing each other on the battlefield that makes them equal on the battlefield. It is this need for the use military force to maintain and restore justice and the requirement of obedience to orders that differentiates the case of the soldier from that of the serial killer. In the former, all involved are morally equal (perhaps morally neutral is a more accurate description), and as such may equally act upon the danger posed by the other. In the latter justice requires that one is justified in acting only on unjust dangers. Because a just order is not secure, the presumption of civil society, that citizens should rely on the law and police to defend them from aggression, is overturned, i.e., not applicable. Even if becoming a soldier is voluntary, the conclusion that soldiers *qua* followers have no responsibility holds provided one is volunteering to be part of a standing force that will be engaged at the discretion of the authority and engaged in such a way

²⁴ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 39.

²⁵ Mark Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War* (New Brunswick, N.J.: Transaction Publishers, 1999) pp. 41-71.

that only if a weak presumption about the legitimacy of the authority's action is not met may a soldier exercise any legitimate choice about whether to follow a specific order.

In summary, then, conflicts in human affairs are inevitable. When such conflicts arise within a civil society where justice is the rule, then justice requires that the appropriate authorities govern over the conflict. When conflicts arise, though, outside the scope of a civil society, then the requirements and constraints of justice differ. It is within the latter that our discussion is rooted.

6.3.1.2-Relevance of the Equality of Soldiers

What is the relevance of the equality of soldiers for our present discussion of proportionality? The relevance is that in their role as followers, soldiers are acting under the presumption that the orders given them are legitimate. The presumption that orders are lawful entails a presumption that the targets one is ordered to attack are legitimate targets—that is, they are (1) combatants and (2) attacking them satisfies the criterion of Proportionality *in Bello*.²⁶

As I have argued, the duties one has in accordance with the criterion of Proportionality *in Bello* are going to be relative to an individual's epistemic vantage point, in relation to the military objective(s) at which one's actions are aimed. Soldiers qua followers are more often than not going to lack sufficient understanding of the objectives at which their actions aim to be in a position to judge proportionality in any fine-tuned way. In the same way that soldiers are ignorant of the reasons why their governments go to war, so too they are often ignorant of the

²⁶ One might argue that this is not true. If I am ordered to attack a location, (coordinates, a location, a building, a hill), then I am ordered to neutralize whoever is there, whether they are soldiers or bystanders. The confusion in such a position, though, lies in ignoring the function of the Doctrine of Double Effect. When one is ordered to attack a location one is ordered, if the order is lawful, to attack only the legitimate targets at that location. Now one may know that there are bystanders at or near the location that will be harmed in the attack, but such bystanders are not intentionally attacked.

true nature and scope of the military objectives towards which their actions are directed. This has to do with the way in which martial organizations are structured and operate. Accordingly, even if soldier *qua* follower F can clearly ascertain that means M is unnecessary for achieving goal G soldier *qua* follower F may be ignorant that means M is necessary for achieving covert goal CG .

Consider the following organizational structure of the United States Army.

Table 3: United States Army Organizational Chart

Unit	Number of Personnel	Leadership	Composition
Squad	9 to 10 Soldiers	Sergeant (NCO)	
Platoon	16 to 44 Soldiers	Lieutenant (Company Grade Officer)	Two to Four Squads
Company	62 to 190 Soldiers	Captain (Company Grade Officer)	Three to Five Platoons
Battalion	300 to 1,000 Soldiers	Lieutenant Colonel (Field Grade Officer)	Four to Six Companies
Brigade	3,000 to 5,000 Soldiers	Colonel (Field Grade Officer)	Two to Five Battalions
Division	10,000 to 15,000 Soldiers	Major General (General Officer)	Three Brigades
Corps	20,000 to 45,000 Soldiers	Lieutenant General (General Officer)	Two to Five Divisions
Army	50,000 + Soldiers	Lieutenant General or Higher (General Officer)	Two or More Corps

Suppose that a Brigade commander is given the task of cutting off supply lines to enemy forces in a particular area of operation. He develops a plan of action and issues orders to the battalion commanders under his command. To one of these battalion commanders he assigns the task of securing a City X. This battalion commander develops a plan of actions and issues orders the company commanders under his command. One of these company commanders is tasked with securing the south side of City X. This company commander develops a plan of action and issues orders to the platoon leaders under his command. One of these platoon leaders is tasked with securing Bridge Y. This platoon leader develops a plan of action and issues orders to the squad leaders under his command. One of these squad leaders is tasked with securing the operations building at the north end of Bridge Y. This squad leader develops a plan of action and issues orders to the individual soldiers under his command. One of these soldiers (Private Smith) is assigned the task of laying down suppressing fire in order to cover the approach of the other members of the squad.

Accordingly, in the scenario I presented above, Private Smith lays down suppressive fire in support of his squad seizing the operations building, which is in support of his platoon's securing the bridge, which is support of the company's securing the south side of the city, which is in support of the battalion's securing the city, which is in support of the brigade's cutting off the enemy supply lines. At each level there is a specific military objective, and at each level the objective was accomplished in support of some larger objective. Thus, besides achieving his own objective of protecting the members of his squad, the actions of Private Smith were supporting at least five other military objectives. The simple fact of the distance between Private Smith's objective of protecting his squad and that of the brigade commander's objective of cutting off

supply lines would make it impossible for Smith to have sufficient understanding to apply the criterion to the question of the role his actions play in the larger plan.

Of course, not all the soldiers in our scenario are as far away from brigade commander as Smith. What of them? Their ability to have a sufficient understanding of the role their mission plays in the overall battle plan is going to be limited by the need for operational security (OPSEC). A major component of any military operation is OPSEC, which focuses on denying the enemy any information that could be used against our national interests. A significant part of controlling information is giving individuals only that information which they must have in order to complete their mission. Soldiers qua followers, then, are often kept ignorant of the role their mission (achieving their objective) plays in the larger battle plan. Because soldiers are informed on a need-to-know basis, they cannot be in a position to judge the military advantage successfully completing their mission offers.

6.3.1.3-Responsibilities of Soldiers qua Followers

I now want to consider what responsibilities soldiers qua followers have in regards to the criterion of Proportionality. In determining this we have to consider two questions: “What is combatant *C* in a position to know that matters to be responsible conduct, given *C*’s role?” and “What is combatant *C* in no position or in a dubious position to know that matters to responsible conduct in *C*’s role?” What has to be known in order for them to be responsible for assessing proportionality is the military advantage that achieving the military objectives will provide.

I have argued, though, that because of the way in which martial organizations are structured and operate, soldiers qua followers cannot be responsible for the proportionality of the objectives of their mission (the objective at which their actions are immediately directed). This does not mean, though, that they have no responsibilities whatsoever. There is still the objective

at which their actions are immediately directed at. Let us begin with the lower enlisted—those soldiers with no command authority—because their case is the simplest.

At all levels of command, soldiers are responsible for the proportionality of their specific actions, but the presumption is that any action that they are ordered to perform satisfies the proportionality. Any objective they are ordered to achieve can be achieved reasonably, through non-prohibited and proportional military means. So, for lower enlisted soldiers proportionality most often takes the form of not using forbidden weapons. The United States Army for example prohibits the use of certain weapons that have been “calculated to cause unnecessary suffering.”

It is especially forbidden * * * to employ arms, projectiles, or material calculated to cause unnecessary suffering.²⁷ (*HR, art. 23, par. (e).*)

b. Interpretation. What weapons cause “unnecessary injury” can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to

²⁷ One might ask if the use of torture constitutes unnecessary suffering if the harms inflicted are necessary to acquire information vital to the war effort. Remember, though, that we are talking here about inflicting unnecessary suffering on combatants. Those being tortured are presumably prisoners and as such no longer qualify as combatants. As noncombatants the *jus in bello* criterion of Discrimination would forbid intentionally harming them. This would include torturing them for information regardless of its value.

inflammation a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.²⁸

So lower enlisted soldiers are acting under the presumption that their action—in trying to achieve a particular military objective—satisfies proportionality, and they are responsible for not performing any action (using forbidden weapons for example) which would undermine that presumption. They are in a position to know that such weapons will violate proportionality because they cause unnecessary suffering, but not the role their actions play in the overall battle plan.

NCOs, company grade officer, field grade officers, and general officers in their role as followers have the same responsibilities as the lower enlisted, not to engage in any actions which would undermine the presumption that the orders under which they are acting are legitimate—that the objective they are assigned satisfies proportionality. What makes the evaluation of these soldiers more complex is that they not only follow orders; they give them as well. I want to turn now to question of soldier qua leader.

6.3.2-Soldier qua Leader

With the exception of the lower enlisted who have no command authority, all soldiers act in the role of a follower when they receive their orders and then move into the role of leader when they lead the mission they are assigned. Many mission leaders are often engaged in planning at least some aspect of the mission. This will include choosing the military objectives with which their subordinate units will be tasked. In terms of choosing military objectives, they are required to evaluate the harms that are likely to occur in achieving the objective and the value the objective has in relation to the mission that they have been assigned to accomplish. They are

²⁸ United States Army, "Field Manual 27-10 Law of Land Warfare," Chapter 2 Section III para. 33b.

also responsible for not assigning any task that could not be accomplished without violating the criterion of Proportionality. In this way, all soldiers in leadership positions are responsible that the means they direct those under their command to use in achieving the presumably legal and valid orders they have themselves received are proportional to the goal they have been tasked to achieve, to the extent that their knowledge allows them to ascertain such proportionality.

Having noted the importance of the soldier's epistemic vantage point in relation to his military objective and its role in his nation's overall battle plan for determining the soldier's responsibilities for satisfying the criterion of Proportionality, we are in a position to identify three different epistemic vantage points for most martial activities: (1) tactical, (2) strategic, and (3) political. The tactical vantage point is going to be the one in which most of the engaged soldiers find themselves. Within this vantage point, a soldier lacks sufficient understanding of the role his actions plays in the overall battle plan. The lower enlisted will most certainly fall into this group as will most NCOs, company grade officers and field grade officers.

In contrast to a tactical vantage point, the strategic epistemic vantage point occurs when a soldier has sufficient understanding of the role military objectives play in his nation's over-all plan for victory. Soldiers within this vantage point, normally general officers or the equivalent, have the same responsibilities as those of the individual soldiers and mission planners, with respect to orders they are given. In addition, because of their extended vantage point, these soldiers are responsible to ensure that they do not order any mission that would, in Walzer's words, cause "any injury to the permanent interests of mankind." As the lower enlisted are forbidden from using weapons that are known to cause unnecessary suffering, so soldiers at this level are forbidden from engaging in activities that are known to make a lasting peace impossible. That is, they are responsible for ensuring that they do not engage in any activities

that would make a lasting peace impossible. Soldiers at this level can be said to have a negative duty not to engage in any activities that would hinder or jeopardize a lasting peace. For instance, toxins that make a territory uninhabitable would undermine the possibility of peace by compromising the region's habitability.

6.3.3-Political Leaders

The last group that I want to discuss consists of the political leaders who determine the national goals for which martial activities are conducted. These people occupy the political vantage point. Political leaders have a vantage point from which to concern themselves with how the operation of the war will affect the quality of international relations after the war. That is, what obstacles to peaceful settlement of disputes is the conduct of the war making more or less likely and what tools for peaceful settlement of disputes is the war aiding or hindering? Unlike the strategic leader, the political leader is required to conduct the war so as to minimize opportunities for obstacles to peaceful resolution of disputes to arise and maximize tools for future war-avoidance. In other words, political leaders have a positive duty not to compromise but to bring about, or to facilitate a lasting peace. Again, any war represents the failure of diplomacy from preventing war. Now consider unresolved disputes, constrained channels of diplomacy, imperial objectives for commerce, lack of opportunities for redress of unintended harms. These and their like breed conflict, its non-resolution and escalation. Leaders have a positive duty to use the unhappiness of conflict to avoid and minimizing future breeding grounds of war. Since Just War Theory affirms that even with regard to the most justified war, the world would be a better place if the war had been avoidable, and since political leaders have advantages of epistemic status and political authority that others lack, they are uniquely responsible for minimizing the future occasion for war.

This obligation to pursue that which would make a lasting peace more likely and to avoid that which would make a lasting peace less likely does not exist merely during times of war. Just as political leaders are obligated to pursue a lasting peace in times of war, so too are they obligated during times of peace to avoid, as much as possible, those circumstances that would make war a necessity. Of course, we are not merely talking about avoiding wars with other nations. As I explained in my discussion of individual sovereignty in Chapter Four, the authority governments possess has been granted them by those individuals who have come together to form the community over which the government has been given authority. Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the government's using that authority appropriately. When governments fail to use their delegated authority appropriately, then individuals can once again exercise their rights. This includes coming together to form new communities—non-governmental organizations—through which to exercise their power, including their right of self-defense. In other words if the government does not use its authority appropriately then its citizenry can go to war with its government. Accordingly, the continued diligence of government in responding to the standard infelicities and conflicts of a society and the courage to diagnose and prescribe for emerging challenges are positive duties of heads of state.

One of the purposes for forming governments is to establish and protect the rights of the people over whom the government has been granted authority. The difficulty in a country like the United States, which prizes pluralism, is that there are numerous moral, philosophical, humanistic, and religious foundations for these rights. It is a simple fact of human nature, once we begin considering the varieties of rights of individuals, that we are going to have conflicts ~~we~~

of rights. Most monistic theories that provide a basis for rights are going to have some mechanism in place to negotiate a resolution between rights conflicts. Once a plurality of values is introduced without a postulated ranking of values, there is no way for a theory to provide a formula to negotiate rights conflict resolution. There must be some meta-influence which imposes conflict resolution. Without such resolution there are going to be a significant degree conflicts between rights which will translate into rights violations. When rights violations become significant enough the citizenry will go to war with their government in order to install a government which will prevent such violations. So in a pluralistic society such as the United States political leaders must act as this meta-influence to negotiate rights conflicts involving different theoretical foundations. Accordingly, the desirability of the stability of the social order of the nation makes it incumbent on political leaders of pluralistic nations to define and facilitate the occurrence of circumstances under which conflicts involving different theoretical foundations are eliminated or minimized.

6.3.4-Summary

These vantage points and their corresponding duties can be summed up in the following chart. As I have indicated every soldier is a follower. For the convenience of this chart I shall address the lower enlisted in their role as followers and others in their role as leaders.

Table 4: Tactical Epistemic Vantage Point and Duties of Proportionality

Epistemic Position		Leadership Position	What they are in a Position to Know	Responsibilities
Tactical Vantage Point	Soldier <i>qua</i> Follower	Lower Enlisted	1. That any order given is presumed legitimate, and 2. that certain means of fighting or forbidden because they cause unnecessary suffering.	Not to perform any actions which cause unnecessary suffering
	Soldier <i>qua</i> Leader	NCOs, Company Grade Officers, Field Grade Officers	What is necessary in order to accomplish the assigned mission.	1. Not to order any actions which are not necessary for and proportional to the military objectives assigned him or which cannot be accomplished without violating the criterion of Proportionality, and 2. to determine what is needed to compromise the enemy's effectiveness with minimal harm and to act accordingly.

Table 5: Strategic Epistemic Vantage Point and Duties of Proportionality

Epistemic Position		Leadership Position	What they are in a Position to Know	Responsibilities
Strategic Vantage Point	Soldier <i>qua</i> Leader	General Grade Officers	1. The role of military objectives plays in the overall battle plan and 2. what actions are likely to make a lasting peace impossible.	1. Not to assign any military objectives which are not necessary for and proportional to the overall goal of victory, or which cannot be accomplished without violating the criterion of Proportionality, and 2. not to engage in any activity which would make a lasting peace impossible.

Table 6: Political Epistemic Vantage Point and Duties of Proportionality

Epistemic Position		Leadership Position	What they are in a Position to Know	Responsibilities
Political Vantage Point		Political Leaders	What actions would encourage a lasting peace.	1. Not to establish any national goals or policies which would require individual soldiers, mission leaders or mission planners to violate the restrictions placed upon them by the criterion of Proportionality, and 2. to minimize the obstacles to a peaceful resolution of the dispute.

6.4-On Combatancy

Before I move on to the issue of terrorism and proportionality, I want to say a few words about the role the combatant status of those killed or injured in an attack plays in considerations of proportionality.

6.4.1-Noncombatant Collateral Damage

The first point I want to address is that of collateral damage. It is a sad fact of war that in war innocents are killed. Recall that as Vitoria wrote:

Sometimes it is right, in virtue of collateral circumstance, to slay the innocent, even knowingly, as when a fortress of [a] city is stormed in a just war, although it known that there are a number of innocent people in it and although cannons and other engines of war cannot be discharged...without destroying innocent together with the guilty [combatants]. The proof is that war could not otherwise be waged against even the guilty and the justice of belligerents would be balked.¹

Such collateral damage is permissible within a Just War framework because of the Doctrine of Double Effect, which I explained in Chapter Two, consists of four conditions:

- (1) The bad effect is unintended;
- (2) The bad effect is proportional to the desired military objectives;
- 3) The bad effect is not a direct means to the good effect (e.g., bomb cities to encourage peace talks); and
- (4) Actions are taken to minimize the foreseeable bad effect, even if it means accepting an increased risk to combatants.²

¹ Vitoria, "On the American Indians," Section III, 37.

² Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* p. 93.

I am going to set aside the question of how one weighs the lives of innocent victims against the military advantage achieving the military objective provides and address the question of whether we can weigh the lives of noncombatants differently. That is, is the death of a child worse than that of an elderly man, a woman worse than a man, a criminal worse than a priest, a friendly noncombatant worse than an enemy noncombatant, etc. I propose that such considerations cannot factor into the decision-making process when planning military campaigns. Consider the following case:

You have received word that the enemy is about to finish a weapons system which if employed could turn the tide of the war against you. In order to finish the weapons system the enemy needs two components. One is being manufactured in Factory *A* and one is being manufactured in Factory *B*. Without either component, the weapons system will not function and each component is irreplaceable. So destroying either plant would serve to render the weapons system useless. Your resources are such that you can attack only one factory. For each plant, all the relevant tactical conditions are identical—distance to target, chance of success, weather conditions, etc. The only discernable difference between the plants is the type of noncombatants that would be killed if the factory were to be bombed. Factory *A* is next to a prison and if attacked it is determined that one hundred inmates would be killed. Factory *B* is next to a retirement community and if attacked it is determined that one hundred elderly persons would be killed.

The question is, could you choose to bomb Factory *A* rather than Factory *B* based upon the characteristics of noncombatants that would be killed. I believe that basing your decision on where to attack on some feature of the noncombatants who would be killed undermines the Doctrine of Double Effect. This is because what justifies the deaths of noncombatants is that

their deaths are unavoidable and unintentional via the Doctrine of Double Effect. Taking into account characteristics of noncombatants—such as their moral culpability—undermines this justification.

6.4.2-Combatants

The Law of Armed Conflict focuses almost exclusively on proportionality in terms of avoiding harms to those it classifies as noncombatants—in particular the general civilian population of nations involved in the conflict. This makes sense because noncombatants by definition do not contribute to the war effort and as such an attack upon them cannot help in achieving one's military objectives. As I have said, though, the criterion of Proportionality *in Bello* is concerned with preventing unnecessary harms. This will obviously include harms to noncombatants, but it applies equally to unnecessary harms involving combatants as well. Recall the Ramsey's example I discussed in Chapter Two:

...At the time Iwo Jima had been taken in 1945, war gases were available to the American commander. They were not used, not for fear of retaliation, but on humanitarian grounds. Instead, explosives and flame were used to dislodge the Japanese. In the end, almost 21,000 defending troops were killed, and this country suffered 7,000 dead marines and 18,000 other casualties. With gas [the deadly gases available] the same result would have been obtained on the island, but the airfield would have been intact, and 25,000 American casualties would have been avoided. If the new incapacitating agents had been available, it is conceivable that neither side would have lost any appreciable number of men.³

³ Ramsey, *The Just War: Force and Political Responsibility*.

If incapacitating agents were available in this case, proportionality would require their use. Its purpose after all is to prevent unnecessary harm. Thus, the criterion applies equally to combatants and noncombatants.

The question I want to address is whether the moral culpability of a combatant affects the proportionality of attacking them. In the previous section, I argued when talking about noncombatants that it did not. This was because what justified the deaths of noncombatants was that their deaths were unavoidable and unintentional via the Doctrine of Double Effect. Taking into account characteristics of noncombatants—such as their moral culpability—undermine this process. When we are dealing with combatants, though, we do not have this difficulty. Combatants are intentionally killed, and I believe that the moral culpability of a combatant does affect how great a harm his or her death constitutes. The question of the innocent aggressor is one that has drawn much attention in the philosophical literature and while there is significant agreement that such aggressors can be killed, it is also recognized that the deaths of such people are worse than the deaths of the morally culpable. For this reason, I believe, it is a greater harm to kill involuntary or non-voluntary combatants than to kill those who voluntarily contribute to the war effort.

6.5-Terrorism and Proportionality

One may object, as I turn to the question of terrorism, that my previous discussion does not apply to terrorist organizations. As the argument goes, my discussion of proportionality so far has been based, to a great extent, on this idea that soldiers serve under the presumption that orders given them are legitimate. Terrorists, it might be claimed, are not soldiers. The presumption of the legitimacy of orders in the case of soldiers is based upon governments' need to maintain a standing army so that they may act to maintain or restore justice. Since terrorists

are not soldiers in a standing army and do not serve under the authority of a government, my previous discussion of proportionality seems not to apply to them.

This argument, though, fails because justice is not simply a concern of governments. It is the concern of all people. According to the Just War Tradition, those who lack a higher authority from whom to seek remedies for injustices may, when appropriate, use force in order to restore or maintain justice. Within a Just War framework, such force is to be considered a weapon that must be controlled and properly directed in order to be used justly. The authority to use martial actions in the service of justice is not, as I explained in Chapter Four, restricted to governments, nor is the responsibility for maintaining control over the martial forces employed. Justice sometimes requires that force be employed in order to rectify or prevent some injustice. This force may be employed by those who conflict, have no common authority for resolving their conflict and fail in their attempts to negotiate their conflict. This is true whether they are governmental or non-governmental entities. In order for the force to be used justly it must be controlled and properly directed. Any control over martial forces is going to require a high degree of discipline and it is this requirement of discipline that is going to entail a presumption that orders given are legitimate. Therefore, any group exercising such force must employ the presumption that orders given are legitimate.

Though their organization may be different, like traditional armies, terrorists can be divided into followers and leaders. There are going to be low-level leaders, high-level leaders and the equivalent of political leaders. As I have just argued, terrorist organizations, if they are to be employed within the scope of a Just War framework, must be controlled and directed, and so work under the presumption that orders are legitimate in response to grievances for which mutually-acceptable procedures of resolution are unavailable. Those terrorists who play the role

of follower find themselves in the same circumstances (requiring speed, stealth and coordination) as those of their military counterparts. Similarly, terrorist organizations work under the same practical considerations of secrecy as traditional militaries, which require the restriction of the dissemination of information to a need-to-know basis. This means that, as with many military leaders, many terrorists are going to find themselves in the tactical epistemic vantage point. Their understanding is going to be limited to the scope of the particular mission in which they are involved in. Surely there will be those terrorists who have a greater knowledge of the overall battle plan of the organization and there will be some terrorists who also play a role akin to head of state. Such individuals will find themselves in a greater epistemic vantage point (strategic and political respectively) and as such will have greater responsibilities in regards to the proportionality of the actions in which they are engaged in. In this, though, they are no different from their military counterparts. Accordingly, everything that I have said about proportionality in my initial discussion applies equally to terrorists. The strictures of Proportionality *in bello* laid out above can in theory be met not only by traditional armies but also by terrorist organizations.

6.5.1-Military versus Terrorist Tactics

It is worth taking a moment here to discuss the difference between traditional military and terrorist tactics. As with military personnel, proportionality for terrorists is going to be understood in terms of the harms caused compared to the advantages provided by achieving their objectives. Terrorist objectives can be divided into three tiers: (1) the destruction of the immediate target, (2) instilling fear into a larger population, and (3) bringing about some political change that rectifies the injustice motivating their struggle.⁴ Considerations of proportionality are going to attach themselves to each tier, but as I have indicated, terrorists can work within any of

⁴ Of course terrorist can use the threat of force rather than actual force and thereby bypassing the first tier.

epistemic vantage points. This means that not every terrorist is going to be responsible for the proportionality of each tier. Just like armies, terrorist organizations are going to have leaders and followers—planners and doers.

There are two aspects of terrorism that are worth mentioning in the context of our discussion of proportionality. The first is that terrorist tactics may provide an advantage over traditional military tactics. Consider the difference between traditional military tactics and those commonly practiced by terrorist organizations. As I mentioned in Chapter Two, the United States military defines military objectives as:

...combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.⁵

What is relevant to our discussion is the fact that military advantage in this passage is understood in terms of the “total or partial destruction, capture, or neutralization” of the combatants and/or objects which “effectively contribute to the enemy's war-fighting or war-sustaining capability.” Armies traditionally think in terms of destruction, capture and neutralization. Achieving these ends will often require large-scale sustained martial activities. If an army for example were to attempt to disrupt the financing of a foreign military by targeting the taxpayers who funded it, they would presumably have to incapacitate a significant portion of a nation's population.

⁵ United States Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* para. 8.1.1.

Terrorist tactics are more concerned with psychological attacks than physical ones. That is, terrorists' greatest weapon is fear. They physically attack a small percentage of the population in order to instill fear in the rest of the population. So, while terrorists may not attack fewer people than military forces, the harm caused by such psychological attacks is going to be significantly less, I believe, than the physical attacks involved in standard military operations.⁶

It might be argued that this advantage exists only if terrorists can achieve their goals. This brings me to the second aspect of terrorism that I want to address—their ability to successfully achieve their aims. A common objection to terrorism is that terrorism has never been proven as a successful means for bringing about political change. The first point I want to make, in response, is that the use of force in conjunction with the threat of further violence in order to bring about social or political change is a tactic that has been successfully used by governments and religious organizations for centuries. Arguably, the United States' dropping of the atomic bomb on Japan is such an example. Similarly, if we take the Old Testament literally, one of the earliest examples of terrorism was the destruction of Sodom and Gomorra. Peter tells us, "He [God] condemned the cities Sodom and Gemorrah by reducing them to ashes as a warning to future sinners..."⁷ My point here is that there is nothing inherent in the tactics that terrorists use that would necessarily condemn them to failure. It might be that most terrorist organizations lack the resources necessary to be successful, but with nuclear, biological and chemical weapons

⁶ This is not to suggest that the military cannot use terror as a weapon. Consider the following operation reported by Major General Edward G. Lansdale:

One psywar operation played upon the popular dread of an asuang, or vampire... When a Huk patrol came along the trail, the (Philippine army) ambushers silently snatched the last man of the patrol... They puncture his neck with two holes, vampire fashion, held the body up by the heels, drained it of blood, and put the corpse back on the trail. When the Huks returned to look for the missing man and found their bloodless comrade, every member of the patrol believed that the asuang had got him and that one of them would be next. When daylight came, the whole Huk squadron moved out of the vicinity. (In the Midst of Wars an American's Mission to Southeast Asia, Fordham University Press, New York.)

⁷ II Peter 2:6. See <http://www.sofc.org/DAILY/6-23-2000.htm> Accessed February 12, 2006

becoming easier to access this may very well be changing. Of course another important factor that affects how successful a terrorist organization can be is the nature of their objective. As I discussed in Chapter Three, I think that the notion of victory should be broadly construed. The goal of a terrorist organization may be to topple a government, but it does not have to be. It might be to change a particular policy or attitude, or the objective might be to set the groundwork for the next generation to be able to achieve its objectives. A more recent instance of successful terrorism would arguably be that of the Hamas in Palestine.

Hamas, the Arabic acronym for the “Islamic Resistance Movement” (Harakat Muqawama al Islamiyya), is a nonstate **Islamic fundamentalist**, revolutionary Palestinian group devoted to the complete eradication of the State of Israel and the creation of an Islamic Palestinian state...Hamas officially announced its existence with the publication of the “Covenant of the Islamic Resistance Movement” on 18 August 1988, but in fact it is continuous with the Ikhwan al Muslimin (**Muslim Brotherhood**) branch that established itself in Palestine in 1946...(p. 193)

While the Hamas has not been completely successful in achieving its goals of eradicating Israel and establishing an Islamic Palestinian state, the fact that it is in a position to rise to the leadership of the Palestinian Authority suggests that they have achieved a relatively high degree of success. Similarly, the victory of Hamas in the Palestinian election of January 2006 shows that people unfriendly to or suspicious of a non-governmental organization that uses violence may underestimate the desires of previously unrepresented people to find governments that will be responsive to their concerns.

6.6- Sufficient Conditions for a Martial Action or Operation to be Disproportionate

In this chapter, I have discussed the criterion of Proportionality *in Bello*. Any theory with a proportionality requirement is going to suffer difficulties in articulating the calculus under which it should be evaluation. Just War Tradition is no different. This, though, is equally a problem of military organizations and of terrorist ones. Despite our inability to enumerate the necessary conditions for an action or operation to be proportionate, we can at least identify some of the sufficient conditions for a martial action or operation to be disproportionate. There are four conditions any of which would be sufficient to render an action disproportionate.

The first is that it violates military necessity. In simplest terms, this means causing unnecessary suffering. How this will apply to terrorist actions, though, is more problematic than how it will apply to traditional military tactics. Traditional military tactics requires one to disable enemy forces either through capture, injury or death. There is no need to cause enemy soldier pain. This might not be true in the case of terrorism. One of the goals of a terrorist attack is to cause fear in a larger population. Causing great pain in those attacked might very well enhance this fear, making the pain a necessary component of the attack. This aside, the notion of military necessity can still be violated by terrorists. Killing more people than necessary to instill the requisite fear would be one example. Similarly, attacking those whose deaths would fail to produce the sought-after fear, would be another example. Imagine that terrorists targeted the homeless in a society that did not place any value on such people. One side of necessity is that one cannot use more force than is required to achieve one's goals. The other side is that one cannot use so little force that one could not achieve one's goals. A biological terrorist attack that consisted in giving every one in a particular city a cold, (and nothing more) would most likely violate proportionality. Important for terrorists is not to use tactics that only strengthen the

resolve of one's adversaries. The pain such counter-effective tactics produce will all be unjustified.

The Second sufficient condition for a martial action or operation to be disproportionate is for the advantage provided by achieving one's objective to be outweighed by the harms done. Terrorizing a civilian population can satisfy proportionality in a country only where the civilian population can influence political change. In a country where the civilian population is oppressed by its government, the advantage created by terrorizing the civilian population is unlikely to ever outweigh the harms caused by the terrorist attacks. In such a country, terrorists must target members of the ruling elite.

The third and fourth conditions are related. The third condition applies to high-level martial leaders and political leaders who are prohibited from engaging in any action that would make a lasting peace impossible. Engaging in such actions will constitute a sufficient condition for an action to be disproportionate. The fourth condition applies to political leaders who are required to pursue activities that will make a lasting peace more likely. Failure to pursue such opportunities will also constitute a sufficient condition for an action to be disproportionate. Failing to prohibit weapons which would cause unnecessary suffering or tactics that would otherwise violate *jus in bello* criteria would be an example.

6.7-Conclusion

In this chapter, I have examined the criterion of Proportionality *in Bello*. This criterion has two components.

- (1) Military Necessity—Only those actions which are necessary to achieve one's military objectives are justified, and

- (2) The harms caused must be proportionate to the military advantages achieved by achieving one's military objectives.

Not all martial personnel, though, are going to have the same requirements imposed upon them by the criterion. The amount of one's responsibilities in terms of the criterion is going to be a product of one's role and one's epistemic position. One's role can consist of being a follower, a martial leader (at a variety of levels), or a political leader. One's epistemic position can include understanding one's immediate objective, the role one's objective plays in the overall battle plan, the affects one's actions has on one's nation's (organization's) ability to make a lasting peace, and/or what actions are needed to further a lasting peace.

Whether one is part of a recognized government (either a member of the military or political leader) or part of a non-governmental organization (such as a terrorist organization) is irrelevant to one's ability to be subject to or satisfy the criterion of Proportionality. Anyone who exercises the authority to use force to restore or maintain justice, or uses force under such an authority plays one (or more) of the above mentioned roles and stand in one (or more) of the above mentioned epistemic positions. As such, whether military member, political leader or terrorist, they are subject to and can satisfy or fail to satisfy the criterion according to their actions.

CHAPTER SEVEN

CONCLUSION

7.1-Introduction

When arguing for the compatibility of non-governmental political terrorism and the Just War Tradition one can make the weak claim that at least some non-governmental political terrorist acts can be permissible within a Just War framework without arguing for the acceptableness of the Just War Tradition. Or one can make the stronger claim that the Just War Tradition is correct and since at least some non-governmental political terrorist acts are permissible within a Just War framework, some non-governmental political terrorist acts are permissible. In this dissertation, I am leaving open the question of the acceptability of the Just War Tradition. I have argued simply for the weaker claim that at least some non-governmental political terrorist acts can be permissible within a Just War framework. In Section 7.5 I shall address some of the considerations that would have to be explored before the stronger claim could be made.

When evaluating any use of force within the scope of a Just War framework, two questions need to be addressed: (1) was it appropriate to engage in the use of force, and (2) was the force used appropriately. Accordingly, Just War Tradition is divided into two main components—*jus ad bellum* (justice for war) and *jus in bello* (justice in war). *Jus ad bellum* is concerned with the justness of the decision to engage in martial activities whereas *jus in bello* is concerned with the justness of performing martial activities. A martial activity can be just (morally justified, that is) or unjust (unjustified), then in virtue of satisfying or failing to satisfy

the criteria of *jus ad bellum*—Right Authority, Just Cause, Right Intention, Right Goal, Proportionality *ad Bellum* and Last Resort. Likewise, martial activities can be just or unjust in virtue of satisfying or failing to satisfying the *jus in bello* criteria of Discrimination between Combatants and Noncombatants and Proportionality *in bello*.

As I explained in Chapter Three, a non-governmental political terrorist is a non-governmental entity that engages in political terrorist acts. In turn, a political terrorist act is defined as an act that uses force or the threat of force against appropriately random, non-conventional targets (both persons and their property) for the purpose of instilling terror in a larger population in order to coerce them or the governmental leaders they have authorized into bringing about the terrorists' political agenda.

There are two main objections to terrorism. The first is that terrorists lack the appropriate authority to use martial force—which if true would be a violation of the *jus ad bellum* criterion of Right Authority. The second objection is that terrorists intentionally attack civilians and civilians are thought, by most, to be noncombatants. If civilians are truly noncombatants, then this would be a violation of the *jus in bello* criterion of Discrimination between Combatants and Noncombatants. In order for terrorism to be permissible within a Just War framework, it must not only meet these objections, but satisfy all six of the *Jus ad bellum* criteria as well as both *jus in bello* criteria.

7.2-Satisfying Jus ad Bellum Criteria

Jus ad bellum is concerned with the justness of the decision to engage in martial activities. A martial activity can be just (morally justified, that is) or unjust (unjustified), then in virtue of satisfying or failing to satisfy the criteria of *jus ad bellum*—Right Authority, Just

Cause, Right Intention, Right Goal, Proportionality *ad Bellum* and Last Resort. Let us review how terrorism interacts with each of these criteria.

7.2.1-Right Authority

The criterion of Right Authority states that a necessary but not sufficient condition for the decision to go to war to be justified is that those who make the decision to go to war possess the authority to do so. One of the most common objections to terrorism is that terrorist as non-governmental entities lack the authority to engage in martial activities. I deal with this objection by appealing to a Lockean theory of individual sovereignty.

Beginning from a Lockean theory of individual sovereignty, I have argued that the authority to engage in martial activities rests with governments because that authority has been granted them by those individuals who have come together to form the community over which the government has been given authority. That is, governments derive their authority to engage in martial activities from the individual's right to exercise his or her executive powers, which each individual possess in the state of nature. Individuals who have delegated authority to the government, however, have not alienated their right to engage in martial activities. Instead, they have suspended exercising their right to engage in martial activities contingent upon the governments' using that authority appropriately. When governments fail to use their delegated authority appropriately, then individuals can once again exercise their rights. This includes coming together to form new communities—non-governmental organizations—through which to exercise their power.

The question then becomes, when is it appropriate for a subject to begin exercising his or her executive powers. Following Locke once again I have identified three instances under which governments lose their authority:

- (1) When governments misuse their power,
- (2) When governments ignore their responsibilities (a government might ignore its responsibility because it lacks the power to act, or because it is corrupt), or
- (3) When governments deliver their subjects into the subjection of a foreign power.

Whenever any such conditions occur, individuals would find themselves in the state of nature and it would be appropriate for them to exercise their executive powers.

Under the right conditions, then, individuals can reclaim the right to engage in martial activities and so can satisfy the criterion of Right Authority. This, though, is not to say that individuals can claim the same authority the government has. Individuals can claim only such authority as relates to themselves and those who wish to form a new community (organization) with them.

Each person gives the government jurisdiction over them when a government is formed. This entitles the government to act on behalf of their subjects. The government then can go to war in their citizens' name. This is not true of individuals who have reclaimed from the government their rights, including the right to engage in martial activities. Unless such individuals have received the consent of the rest of the citizenry, they can act only on behalf of themselves and those who have joined with them. This does not mean, though, that they cannot act to protect others from harm. They possess the authority to engage in humanitarian aid. In this, they differ from governments who have the authority to go to war on their subjects' behalf.

There is nothing inherent in terrorism that would preclude a terrorist, under the appropriate conditions, from exercising his or her right to engage in martial activities in order to maintain or restore justice.

7.2.2-Just Cause

The criterion of Just Cause states that a necessary but not sufficient condition for a justified decision to go to war is that there exists a just cause for going to war. There is, I have argued, no significant difference between governments and individuals and non-governmental organizations in terms of the criterion of Just Cause. The trespasses that constitute a just cause for martial action on the part of a government are ultimately grounded in the rights of the individual. According to Locke's theory of individual sovereignty the authority of the state is derived from the executive powers of the individual. Walzer follows this line of reasoning when he writes:

The rights in question are summed up in the lawbooks as territorial integrity and political sovereignty. The two belong to states, but they derive ultimately from the rights of individuals, and from them they take their force. "The duties of states are nothing more than the duties and rights of the men who compose them."¹

The government's rights to territorial integrity and political sovereignty are means to ensure the rights of the individual. Once we recognize the individual's right to engage in martial activities it follows that there can exist for the individual (terrorist) a just cause for using such force.

7.2.3-Right Intention

The criterion of Right Intention states that a necessary but not sufficient condition for the decision to go to war to be justified is that those making the decision to go to war must be doing

¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 53, Westlake, *The Collected Papers of John Westlake on Public International Law* p.78.

so for the right intentions. In modern times many Just War thinkers have moved away from this view that possessing the proper intentions are necessary for a war to be just. Whether this is true, or which intentions are required and/or which are forbidden are not relevant to our purposes.

Simply enough, there is nothing about a terrorist versus a government that would allow the latter to possess the right intentions and would preclude the former from doing so as well. One might think that the intention to protect one's subjects is impossible for individuals since they do not have subjects. While it is true that as individuals they do not have subjects, they can still have the intention to protect the relevant group of people—the members of one's society.

7.2.4-Right Aim

The criterion of the Right Goal states that a necessary but not sufficient condition for the decision to go to war to be justified is that goal or aim of going to war must be a lasting peace. As I have said, there is only one acceptable aim of a just war—peace. This is equally true for governments, individuals, and non-governmental organizations. There is nothing inherent in the nature of either a terrorist or terrorist organization that would preclude it from acting according to this goal.

7.2.5- Proportionality *ad Bellum*

The criterion of Proportionality *ad Bellum* states that a necessary but not sufficient condition for the decision to go to war to be justified is that the goods one hopes to achieve by resorting to military force outweighs the harm that one foresees resulting from the use of that force. We have addressed two areas of concern. The first is that in order to make peace there must be sufficient command and control of those involved in the hostilities. If the individuals or non-governmental organizations that initiate the conflict lack the capacity to terminate it, then they cannot satisfy the criterion of Proportionality *ad Bellum*. Again, there is nothing inherent in

the nature of individuals or non-governmental organizations that would preclude them from having such command and control. The second area of concern is that individuals and non-governmental organizations because of their size and lack of support would seem to lack a reasonable chance of achieving military dominance over a country of any significant strength.

There are, though, I believe, other goods that come from opposing injustices even in the face of defeat. Beyond human dignity, which some might dismiss as too intangible, are others that are more concrete. Perhaps the most significant is the impact that such actions have on future generations. Why is it that every child in America knows about the siege of the Alamo when so many more ‘important’ and ‘successful’ battles have been relegated to relative obscurity? To a great extent, it is because there seems to be something particularly noble about fighting against all odds that fires the imagination. The fact that these Texans were willing to fight for their independence, even knowing that their battle was lost speaks to the value of that freedom. In an important sense they are martyrs to freedom, where martyrs are people, “who makes sacrifices or suffer greatly in order to advance a cause or principle.” What’s interesting about the idea of martyrdom is that the martyr makes the sacrifice in order to advance a cause, not necessarily to achieve it. They set precedent, they act as examples for others to follow, and they bring attention to the cause and in doing so they hope to advance the cause.

The same holds true for those that go to war against injustice knowing that they cannot hope to be victorious. I believe that in doing so, it they can nevertheless advance the cause of justice and in that bringing about an important good. Thus, even if victory is impossible, as people argue is the case with terrorism, a martial action can nevertheless be successful.

7.2.6-Last Resort

The criterion of Last Resort states that a necessary but not sufficient condition for the decision to go to war to be justified is that war be a last resort. As I indicated in Chapter Four, when we talk about pursuing all possible acceptable peaceful solutions before engaging in martial activities it is important to understand that the modifier ‘all possible’ range over the possible acceptable solutions available to the person(s) making the decisions. What constitutes an acceptable alternative to martial activities, when we compare its application to states and to terrorist organizations, is going to be relative to the party(ies) make the decision. The possible acceptable solutions available to a country like the United States will vastly greater than those available to a country like Luxemburg. Similarly, the acceptable solutions available to a country like Luxemburg are going to significantly greater than those available to most individuals and non-governmental organizations. The point is that individuals and non-governmental organizations lack the same resources as governments and as such will exhaust their non-violent options far more quickly. There is nothing about this criterion, though, that would exclude terrorists from fulfilling it; they are simply likely to fulfill it much more quickly than a power such as the United States.

7.2.7- Satisfying the Conditions of the Just War Tradition

As I have argued, there is nothing inherent about the character of terrorist groups or terrorist activities that would necessarily preclude such groups from satisfying any and all of the *jus ad bellum* criteria—thereby allowing for the possibility that a terrorist or terrorist organization could justly engage in martial activities. As I have demonstrated, the most pressing objection to terrorism in terms of the *jus as bellum* criteria is the claim that terrorists lack the proper authority to engage in martial activities. Once it has been shown that non-governmental

entities, including terrorists and terrorist organizations can exercise such authority, as I have done in this dissertation, the ability to satisfy the remaining criteria become no more difficult than it would be for any commonly recognized sovereign.

This, of course, only shows that it is possible for terrorists to satisfy the first component of the Just War Tradition. We must now review terrorist's ability to satisfy Just War Tradition's *jus in bello* criteria.

7.3-Satisfying Jus in Bello Criteria

Jus in bello is concerned with the justness of martial activities. A martial activity can be just (morally justified, that is) or unjust (unjustified), then in virtue of satisfying or failing to satisfy the criteria of *jus in bello*—Discrimination between Combatants and Noncombatants and Proportionality *ad Bellum*. Let us review how terrorism interacts with each of these criteria.

7.3.1-Discrimination between Combatants and Noncombatants

The criterion of Discrimination between Combatants and Noncombatants states that a necessary but not sufficient condition for one's actions in war to be just is that one not intentionally target innocent persons—where innocent is understood in terms of non-involvement in the war effort rather than moral culpability—and that belligerents must discriminate between legitimate and illegitimate targets. Note that there are two aspects of this criterion. The first is that it is never permissible to intentional attack noncombatants. The second component is that belligerents must discriminate between legitimate and illegitimate targets. For a person to be a legitimate target for intentional attack the following two conditions must be met:

- (1) The person must be a combatant (the criterion of Discrimination between Combatants and Noncombatants) and
- (2) The attack must meet the criterion of Proportionality *in Bello*.

The biggest *jus in bello* objection to terrorist tactics is that they violate the criterion of Discrimination between Combatants and Noncombatants by intentionally targeting members of the civilian population. This objection is grounded upon the assumption that most members of any civilian population are noncombatants and as such can never be the legitimate target of an intentional attack. In order to know who is and is not a combatant we must first understand how one loses their immunity from intentionally attack—becomes a combatant. In Chapter Five, therefore, I investigated how one becomes a combatant.

I concluded that an individual is a combatant if (s)he is dangerous in the martial sense. Being dangerous in the martial sense is participating in the activities of a martially dangerous organization. By martially dangerous organizations, I mean organizations that:

- (1) Are established to respond to human conflict,
- (2) Have no system of laws in common (have no higher authority to which to appeal in order to seek remedies for injustices done), and
- (3) Because of 2, must resort to violence in order to disrupt the political ends of those with whom they conflict, thus to effect their will thereby to settle the conflict.

Participating means that one's behavior is purposely directed towards achieving the goals of the organization. In the case of a war those activities would be activities in support of the war effort. Other instances might be participating in the activities of a vicious, oppressive or aggressive government that aims, respectively, to stifle the will of its own or of other people. Some important features of one's participation are:

- (1) One can participate in the activities of a dangerous organization by either planning, executing or providing support for the dangerous activities;
- (2) One's participation can be voluntary, involuntary, or non-voluntary;

- (3) The value of a person's participation is irrelevant to his or her combatancy status, and
- (4) Once a person's participation ends, he or she is no longer a combatant.

Any person, then, regardless of their status as military member or civilian who is dangerous in this martial sense is a combatant. In Chapter Five I considered three segments of the civilian population—taxpayers, food providers, and children—and described the way in which each can be or are combatants.

The primary focus in my discussion of this criterion was on behavior that was dangerous through some action, since this constitutes the majority of the behavior that we are concerned with in the context of martial activities. Despite this focus, one can be dangerous in the martial sense because of an omission and as such dangerous omissions do need to be addressed. The necessary conditions for an omission to be a martially dangerous omission are:

- (1) *A* does not *X*, but has to the degree required, the ability to *X*;
- (2) *A* has the opportunity to *X* in non-life-threatening/non-catastrophic loss circumstances;
- (3) *A*'s not *X*ing is purposely directed at bringing about *Y*, and
- (4) *Y* is some contribution to the relevant martial activities.

I have argued that there is nothing inherent about being a civilian versus being a soldier that necessitates civilian being noncombatants. That is, there is nothing about being a civilian that precludes one from becoming dangerous in the martial sense, through either commissions or omissions. In fact once we properly analyze what it means to be dangerous in the context of martial activities, we can see that there are many more civilian combatants than is normally believed. Thus, nothing inherent in the choosing civilian targets precludes an individual who has done so from satisfying the criterion of Discrimination between Combatants and Noncombatants. What matters is the target's combatancy status, not their status as soldier or civilian. For terrorist

attacks to be just, then, the range of appropriately random targets of terrorist activity must be confined to persons whose actions or omissions are purposefully directed to martial efforts (i.e., combatants).

7.3.2- Proportionality *in Bello*

The criterion of Proportionality *in Bello* states that a necessary but not sufficient condition for the one's actions in war to be just is that the good achieved by performing the action (understood in terms of the military advantage gained by achieving one's objective) outweigh the harm the action causes. The criterion of Proportionality *in Bello* is particularly difficult to apply because of the ambiguity in what constitutes a harm and a military advantage, and because of the complexity of determining who has the responsibility for satisfying the criterion for any particular action. This difficulty is not one, though, that poses a special problem for terrorists. It is equally a problem for anyone, regardless of the nature of the martial organization to which they belong, who must act in accordance with the condition.

Three questions need to be addressed in order to determine whether terrorists are capable of satisfying the criterion. The first is whether the nature of terrorist organizations necessitates terrorists being unable to satisfy the criterion. One might argue that because terrorists are not members of a standing army the presumption that orders given them are legitimate does not exist. If this true, then my discussion of Proportionality *in Bello* would not apply to terrorists.

This argument, though, fails because justice is not simply a concern of governments. It is the concern of all people. According to the Just War Tradition, those who lack a higher authority from whom to seek remedies for injustices may, when appropriate, use force in order to restore or maintain justice. Within a Just War framework, such force is to be considered a weapon that must be controlled and properly directed in order to be used justly. As I explained in Chapter

Four, neither the authority to use martial actions in the service of justice nor the responsibility for maintaining control over the martial forces employed is restricted to governments. Justice sometimes requires that force be employed in order to rectify or prevent some injustice. This force may be employed by those who conflict, have no common authority for resolving their conflict and fail in their attempts to negotiate their conflict. This is true whether they are governmental or non-governmental entities. In order for the force to be used justly, it must be controlled and properly directed. Any control over martial forces is going to require a high degree of discipline and it is this requirement of discipline that is going to entail a presumption that orders given are legitimate. Therefore, any group exercising such force (whether it is a terrorist organization or government sponsored army) must work under the presumption that orders given are legitimate.

The second is whether the nature of terrorist tactics necessitates terrorists being unable to satisfy the criterion. In particular, what I have in mind is terrorists' use of fear as a weapon. I have argued that such a tactic might actually satisfy proportionality concerns more easily than traditional military tactics because, if successful, the terrorists could achieve their goals with less physical harm done. While terrorist tactics might target the same number of people as traditional military tactics, the majority of their intended targets are attacked psychologically rather than physically. I am assuming that, in general, psychological attacks produce less harm than physically ones. Under these assumptions, terrorists can achieve their goals with less harm than traditional military tactics.

The final question is whether terrorists can successfully achieve their goals. If it were impossible for terrorist qua terrorists to achieve their goals, then they would never be able to satisfy the criterion of Proportionality *in Bello*. There is nothing about either the nature of a

terrorist organization or of terrorist tactics that necessitates failure. First, as I have argued, examples such as the Battle of the Alamo, suggest that the notion of success should be understood in terms other than mere military dominance. Second, terrorists' ability to be successful is going to be in part contingent on the kinds of technologies available to them. A terrorist with nuclear, biological or chemical weapons might very well be able to instill the fear needed to bring about his or her goal. Finally, the recent advancements of the Palestinian terrorist organization, Hamas, demonstrate the potential terrorists have for achieving their goals.

There is nothing about the nature of terrorism, either in its organization or tactics that necessitates its being unable to satisfy the criterion of Proportionality *in Bello*.

7.3.3- Satisfying the Conditions of the Just War Tradition

The most pressing objection levied against terrorists is that they intentionally target civilians. The supposition is that such intentional attacks violate the criterion of Discrimination between Combatants and Noncombatants. This, though, is only a problem in terms of Just War considerations if the civilians intentionally targeted are in fact noncombatants. I have argued that nothing inherent in the nature of being a civilian necessitates having noncombatant status. Civilians, if their behavior is being purposely directed towards the war effort, are as much combatants as any soldier. Terrorists' propensity to intentionally target civilians, therefore, does not entail a violation of the Just War Tradition. Similarly, as I have argued, nothing about the nature of terrorism, either in its organization or tactics, necessitates its being unable to satisfy the criterion of Proportionality *in Bello*. Terrorism can, therefore, satisfy the *jus in bello* component of the Just War Tradition.

7.4-The Viability of the Just War Tradition

Despite the fact that in this dissertation I have focused on the weaker of the two claims I am often asked about my view regarding the viability of the Just War Tradition as an acceptable moral theory for governing how and when wars are to be fought. I have several concerns about the viability of the Just War Tradition, the biggest around what I see as a tension between Just War Tradition's deontological roots, with an absolute prohibition against intentionally attacking the innocent, and innocence defined in non-moral terms. I say 'deontological roots,' because while Just War Tradition clearly was founded upon deontological principles, its status today is unclear. I will come back to this point in a moment, but first I want to focus on this tension between an absolute prohibition on intentionally attacking the innocent and defining 'innocence' non-morally. Part of this complexity stems from the fact that in a Just War context one can have morally innocent combatants and morally guilty innocents. That is, one can have people who have had no part in starting the war and are conscripted into service against their will, people who are nevertheless combatants because of their contribution to the war effort. Likewise, one can have people who initiated the war—e.g. voted to launch an unprovoked attack in order to acquire desired territory—who are nevertheless innocent because once the vote was taken they made no contribution to the war effort. According to the criterion of Discrimination between Combatants and Noncombatants, intentionally targeting the morally innocent combatant is permissible while intentionally targeting the morally guilty noncombatant is forbidden. Now recall the scenario I proffered in Chapter Two. Imagine a case where there are two options: intentionally target combatants with standard weapons that allow for discrimination and have a casualty rate in the tens of thousands or use an incapacitating agent that would result in no casualties, but that targets combatants and noncombatants equally. The prohibition against

intentionally targeting noncombatants would require one to choose the first option. But choosing intentionally to kill tens of thousands of combatants rather than choosing intentionally to incapacitate, but otherwise leave unharmed, noncombatants seems absurd. This is particularly true if the combatants are morally innocent while the noncombatants are morally guilty.

My second concern relating to the deontological status of the Just War Tradition and the prohibition against intentionally targeting noncombatants centers around the question of just how much modern Just War Theories are deontological theories. As a general rule people treat Just War Theories as if they were deontological. This is evident in the absolute prohibition against intentionally killing the innocent. The problem, though, is that it is unclear that anyone has worked through the implications of the Just War Tradition's being deontological. In the literature, intentionally targeting the innocent is almost exclusively discussed in terms of a prohibition against killing. This is understandable since death is arguably the greatest harm one can inflict upon a person. Death, however, is not always the aim in a military attack. Soldiers are often taught that it is better to wound than to kill because it takes up far more resources for the enemy to deal with a wounded soldier than a dead one. As I discussed in Chapter Two, deontological theories are often characterized in terms of rights violations. In most deontological theories, a person has more rights than simply the right to life. Walzer, for example, when he defines an innocent writes, "We call them innocent people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights."² Although the list of rights might vary depending on the particulars of the theory, some commonly accepted rights are the right to life, bodily integrity, mental integrity, property, freedom, not to be deceived (the

² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* p. 146.

right not to be lied to), freedom of worship, etc.³ Now Just War thinkers normally focus on the first three, but what of the other rights?

What about respecting these other rights? If Just War Tradition is deontological in nature, then one is no more permitted to violate a person's right to liberty, property, or freedom from deception, then one is permitted to violate his or her right to life. As a matter of practice, these other rights are often violated. It is common practice, for example, for an invading army, when entering a new area of operation, to round up noncombatants and hold them in a secure location, and disinformation is a long established tool of warfare. In practical terms, it is unclear to me that a modern military could function, or at least function efficiently, without intentionally violating some rights of noncombatants.

These are some of the issues that, to my mind, must be resolved before one could render a verdict about the viability of the Just War Tradition.

Notice that these concerns revolve around Just War Tradition's deontological foundations. These foundations, as I have explained, result from the development of the Tradition within a Catholic framework. An important question that needs to be addressed is whether a Just War Theory has to be grounded in a deontological theory, or whether a Just War Theory can have a consequentialist foundation? Because of the constraints of this project, I was not able to address this question, and failing to do so is a significant limitation of this dissertation. In order for any analysis of the Just War Tradition to be complete, these basic questions regarding the moral foundations of the Tradition require treatment.

³ This is not, of course, intended to be a comprehensive list.

7.5-Summary

As I have said, when arguing for the compatibility of non-governmental political terrorism and the Just War Tradition, one can make the weak claim that at least some non-governmental political terrorist acts can be permissible within a Just War framework without arguing for the acceptability of the Just War Tradition. Or one can make the stronger claim that the Just War Tradition is correct and since at least some non-governmental political terrorist acts are permissible within a Just War framework, some non-governmental political terrorist acts are permissible. In this dissertation, I have argued for the weaker claim that at least some non-governmental political terrorist acts can be permissible within a Just War framework and have left open the question of the acceptability of the Just War Tradition. I have shown that non-governmental political terrorists can satisfy each of the necessary conditions for a martial campaign to be just according to the Just War Tradition. My argument leaves three options:

- (1) Accept the Just War Tradition as the correct moral theory for governing the use of martial force and thereby accept that some non-governmental terrorist acts can be justified.
- (2) Reject the Just War Tradition and adopt some other moral theory for governing the use of martial force. Of course, doing so still leaves open the question of the permissibility of terrorist acts.
- (3) Reject the morality of war altogether—adopt some form of pacifism.

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