

September 2004

An Introduction to the Just War Tradition

John F. Coverdale

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Recommended Citation

John F. Coverdale, *An Introduction to the Just War Tradition*, 16 Pace Int'l L. Rev. 221 (2004)

DOI: <https://doi.org/10.58948/2331-3536.1164>

Available at: <https://digitalcommons.pace.edu/pilr/vol16/iss2/1>

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PACE UNIVERSITY
SCHOOL OF LAW

INTERNATIONAL LAW REVIEW

Volume XVI, Number II

Fall 2004

ARTICLES

AN INTRODUCTION TO THE JUST
WAR TRADITION†

John F. Coverdale*

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† Work on this article was supported by the Seton Hall University School of Law Summer Research Grant Program. James Boyan provided highly effective research assistance. Both are gratefully acknowledged.

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I. INTRODUCTION

Debates over American foreign policy, particularly the wars in Afghanistan and Iraq, have frequently been framed in terms of whether they meet the conditions for a “just war.”¹ Authors

¹ See, e.g., Michael Novak, *Civilian Casualties & Turmoil*, NATIONAL REVIEW ONLINE, Feb. 18, 2003, at <http://www.nationalreview.com/novak/novak021803.asp> (last visited Jan. 30, 2005); *The Moral Imperative: Religion, Morality and the War*, THE ECONOMIST, Mar. 1, 2003, at 2003 WL 6245108; Louis Rene Beres, *The Decision Ahead: Debating a War Against Iraq*, CHICAGO TRIBUNE, Mar. 16, 2003, at C1; Margot Patterson, *Catholic Press Takes Issue with U.S. War on Iraq*, NATIONAL CATHOLIC REPORTER, Sept. 20, 2002, available at <http://www.natcath.org/NCR_Online/archives/092002/092002j.htm>; John Kelsey, [sic] *Just War: The Details*, CHICAGO TRIBUNE, Nov. 10, 2002, at C1; Brad Roberts, *NBC-Armed Rogues: Is There a Moral Case for Preemption*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND ‘JUST WAR’ TODAY 83 (Elliott Abrams ed., 1998); Ramesh Ponnuru, *Just Carter*, NAT’L REVIEW ONLINE, Mar. 10, 2003; Peter Steinfels, *Beliefs: The Just-War Tradition, Its Last-Resort Criterion and the Debate on an Invasion of Iraq*, N.Y. TIMES, Mar. 1, 2003, at A 16; A.C. Grayling, *Fighting is a Last Resort; Aquinas Defined the Just War: Few Conflicts Have Ever Met His Criteria*, NEW STATESMAN, Aug. 12, 2002, at 10; Michael Quinlan, *The Just War Litmus Test*, THE TABLET, Oct. 13, 2001, available at http://thetablet.co.uk/cgi-bin/archive_db.cgi?tablet-00571; J. Bottum, *You Say You Want a Just War? Look at What the Coalition Forces Have Just Accomplished*, THE WEEKLY STANDARD, Apr. 21, 2003; William Galston, *Problems of Preemptive War; Why America’s Place in the World Will Shift – For the Worse – If We Attack Iraq*, THE AMERICAN PROSPECT, Sept. 23, 2002, at 22; Jean Bethke Elshtain, *A Just War*, BOSTON GLOBE, Oct. 6, 2002; David Blankenhorn, William A. Galston and John Kelsay, *War Should Be Our Last Resort*, ORLANDO SENTINEL, Nov. 10, 2002, at G.1; Keith Pavlischek, *Now, Only Preemption is Containment*, Center for Public Justice – Capital Commentary, (Mar. 10, 2003), at [http://www.cpjjustice.org/stories/storyReader\\$948](http://www.cpjjustice.org/stories/storyReader$948); Carol Eisenberg, *Principles and Practice/ Rethinking Just War Theory in a Time of Terrorism and Weapons of Mass Destruction*, NEWSDAY, Nov. 29, 2003, at B.28.; Keith Pavlischek, *Just War Principles and Counterterrorism*, Center for Public Justice, Sept. 24, 2001 at [http://www.cpjjustice.org/stories/storyReader\\$595](http://www.cpjjustice.org/stories/storyReader$595); J. Bryan Hehir, *What Can be Done*, AMERICA, Oct. 8, 2001, at <http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=1066&issueID=345>; Richard Falk, *Ends and Means: Defin-*

differ not only in their conclusions about the specific conflicts but also in how they frame the issue. This is hardly surprising because the just war tradition is a complex one, which has evolved over the course of more than 1,500 years.

Originally, just war theory was proposed and developed by Christian thinkers, especially theologians and canonists. Later it acquired a philosophical foundation and subsequently found partial expression in both customary and positive international law.² This essay will draw freely on these various currents, which constitute the larger just war tradition. When examining provisions of international law, it will treat them not as legal principles that require painstaking textual analysis, but as indications of the beliefs and positions of the international community, which to a large degree represent the development of the just war tradition.

Although the just war tradition is wide-ranging and varied, it is defined by certain basic premises that mark its outer limits. The belief that wars can sometimes be justified sets it apart from pacifism, and the belief that the decision to go to war and the methods of waging war are subject to moral scrutiny sets it off from realism, which considers war outside the scope of moral judgment. Within those limits, theorists working within the just war tradition differ among themselves not only on nuances of the theory but on basic points, such as whether a war can be justified by anything other than the need to defend oneself against an armed attack that has already begun.³ This article offers readers a structured introduction to theories that fall within the just war tradition, examining the substantial points of agreement among those working within the tradition, the points at which they differ and the grounds for those differences.

Just war theory focuses on two questions: 1) the conditions that can justify recourse to war, in classic terminology, the *ius ad bellum*, and 2) the limitations on the methods that may justly be used in waging war, the *ius in bello*. Although often

ing a Just War, THE NATION, Oct. 11, 2001, at 11; James Turner Johnson, *Jihad and Just War*, FIRST THINGS, June/July 2002, at 12-14.

² See James T. Johnson, *Just War Theory: What's the Use?* 19 WORLDVIEW 41 (1976).

³ See *infra* note 26 and accompanying text.

given short shrift in expositions of just war theory, an issue, which must be answered even before discussing the conditions that can justify a particular war, is the moral justification for deliberately killing enemy combatants. If direct killing of enemy combatants cannot be morally justified, there can be no just war. I will, therefore, address that question in Part II of this article. Part III will deal with the *ius ad bellum*, and Part IV will examine the *ius in bello*.

II. THE JUSTIFICATION FOR KILLING ENEMY COMBATANTS

Many just war theorists simply assume that the deliberate killing of enemy combatants can be morally justified provided that the *ius ad bellum* and *ius in bello* conditions are met. There are two reasons, however, why we need to explore the moral justification for the deliberate killing of enemy combatants: first, if it cannot be justified, there can be no just war, and second, an understanding of why deliberate killing of enemy combatants is permissible is essential to understanding one of the principal aspects of the *ius in bello*, the immunity of non-combatants from direct attack.

Virtually every ethical system reflects the basic principle that deliberately taking the life of an innocent human being is wrong. Classical just war theory requires "the habitual and mutual recognition" of "the fundamental unity and moral equality of the belligerents."⁴ In a just war, "the state of war in which [the belligerents] find themselves is not allowed to obscure the common humanity of the belligerents."⁵ Just war theory requires, therefore, even more than other positions, a justification for killing enemy combatants.

Many just war theorists simply translate the moral principle that intentionally killing innocent human beings is wrong, into the principle that intentionally killing noncombatants is wrong, with the implication that killing combatants is not wrong. It is not, however, immediately obvious that noncombatants are innocent and combatants are not,⁶ and therefore it is

⁴ A.J. COATES, *THE ETHICS OF WAR* 60 (1997).

⁵ *Id.*

⁶ See Jeffrie G. Murphy, *The Killing of the Innocent*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 341, 350 (Malham M. Wakin ed., 2d. ed. 1986). ("Why, then should we worry about killing noncombatants and think it wrong to do so –

not immediately obvious that one may kill combatants with moral impunity.⁷

If we take the term "innocent" to mean "free from moral wrong, sin or guilt," some noncombatants, for example a newspaper editor who deliberately stirs up an unjust war, may be guilty with respect to the war. Many enemy soldiers, on the other hand, may be entirely guilt-free with respect to the war. They may have been conscripted against their will, and may scrupulously avoid violating the legal and moral rules of war. Whatever the moral character of their individual private lives, there may be nothing about their status as combatants that stains them with any moral guilt. They may be equally innocent from the legal point of view, having broken no laws that would expose them to punishment, much less to capital punishment.

If the principle that it is always wrong to directly kill the innocent absolutely forbade killing those who are not morally or legally guilty, there could be no just war.⁸ It is essential, therefore, to ask in what sense enemy combatants should be considered guilty, or at least non-innocent, and therefore subject to being deliberately killed in war.

One of the earliest and most influential formulators of a just war theory, Augustine, analogizes a just war to an individual's defense of another person who is being attacked. Just as an individual who witnesses an unjust attack on another may use force to defend the person being attacked, so too public authorities may defend the common good and society with violence, even lethal violence. This analogy throws light on the

especially when we realize that among the noncombatants there will be some, at any rate, who are morally and/or legally guilty of various things and that among the combatants there will be those who are morally and/or legally innocent?")

⁷ As Murphy has observed, "when we unthinkingly reduce the moral prohibition against intentional killing of innocents to . . . 'Do not kill noncombatants' we lose the background of moral and legal thinking which makes the principle seem plausible when formulated in terms of innocence." *Id.*

⁸ Holmes, for instance, is led by the contention that the relevant consideration is moral innocence to the conclusion that no modern war can be just. See ROBERT L. HOLMES, ON WAR AND MORALITY 183-200 (1989). But see Germain G. Grisez, *Toward a Consistent Natural-Law Ethics of Killing* 15 AM. J. JURIS. 64 (1970) (arguing that the moral innocence of individual enemy soldiers makes it immoral to intend to kill them, but arguing for an expanded version of the principle of double effect which, he maintains, justifies defensive wars.)

meaning of innocence because, in the case of defense of an individual, we do not require the defender to inquire into the personal moral guilt of the attacker before repelling his attack. Provided that the attack does not seem to be objectively justified, the mere fact of attacking another renders the attacker liable to being repulsed by force, even if the aggressor is suffering from a psychological condition that deprives him of freedom and consequently of moral and legal responsibility.⁹ What is significant in self-defense is not the personal moral guilt or innocence of the attacker but his use of force against another without objective moral justification. This is also true of an enemy combatant.

Thomas Aquinas does not directly address the justification for killing individual enemy combatants, but the answer he would have given had he posed the question can be clearly discerned from what he says about closely related topics. In the internal affairs of a community, Aquinas says, public authorities may lawfully kill someone who has become "dangerous and infectious to the community."¹⁰ In fact, according to Aquinas, "it is praiseworthy and advantageous that he be killed in order to safeguard the common good."¹¹ Aquinas' stress here is on the defense of the common good.¹²

Similarly, in order to safeguard the common good of the community against external enemies, public authorities may use lethal force.¹³ It is important to note that Aquinas is not talking here only about indirect or unintended killing of enemy combatants. In a justified war, according to Aquinas, direct,

⁹ See RICHARD J. REGAN, *JUST WAR: PRINCIPLES AND CASES* 87 (1996).

¹⁰ THOMAS AQUINAS, *SUMMA THEOLOGIAE*, II, II, q. 64, art. 2. This statement occurs in the course of an inquiry into whether it is ever lawful to kill sinners, and the specific reference is to a "man who is dangerous and infectious to the community on account of some sin." *Id.* The justification Aquinas offers, however, focuses not on the personal moral guilt of the individual, but on the defense of the common good against an attack that is not objectively justified.

¹¹ *Id.*

¹² See *id.* at II, II, q. 64, art. 6. ("[T]he slaying of the sinner becomes lawful in relation to the common good.") Although the focus is on the defense of the community rather than on personal guilt or innocence, not every danger to the community justifies the use of lethal force against the person posing the threat. Although persons who have SARS represent a threat to the community, it is not a threat that is objectively unjust, and the authorities would not be justified in killing them as if they were civet cats.

¹³ See *id.* at q. 40, art. 1.

i.e., intentional, killing of enemy combatants is permissible¹⁴ as a means of defending the community against injustice.¹⁵

Individual enemy soldiers may be killed because being a combatant in an army which is waging an unjust war makes a man dangerous and harmful to the community against which he is fighting, and therefore "non-innocent" in the relevant sense, independent of personal moral guilt or innocence.¹⁶ As Regan puts it, "It is the wrong that enemy personnel are committing, not their individual moral responsibility for it, that justifies the victim nation's use of killing force against them."¹⁷

Modern just war theorists follow Augustine and Aquinas in focusing on the defense of the common good and the analogy to self-defense to justify the deliberate killing of enemy combatants. Potter, for instance, argues:

We live by the presumption that men must do no harm to their neighbors. That presumption can be overridden when it is necessary to restrain wrongdoers from inflicting harm. Only the necessity can grant to anyone an excuse to kill Only those immediately and actively engaged in the bearing of hostile force in an unjust cause are properly subject to direct attack.¹⁸

¹⁴ See *id.* at II, II, q. 64, art. 7. ("[I]t is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe." See also Richard Shelly Hartigan, *THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN* 47 (1982). ("Aquinas in this respect does not add anything to Augustine's position, but he does state unequivocally what Augustine had implied but hesitated to state as clearly: The enemy may be killed directly as a means to the end of preserving or defending the common good."); See also ALAN DONAGAN, *THE THEORY OF MORALITY* 163 (1977); BERNARD T. ADENEY, *JUST WAR, POLITICAL REALISM, AND FAITH* 39 (1988).

¹⁵ See *SUMMA THEOLOGIAE*, II, II, q. 40, art. 1. (Public authorities may have recourse to war in "defending the common weal against external enemies.")

¹⁶ "In line with its etymological derivation from the Latin *nocere* ('to harm'), 'innocent' in this context means 'harmless' rather than 'blameless.'" COATES, *supra* note 4, at 235. Walzer concurs: 'innocent' is a "term of art which means that [the innocent persons] have done nothing, and are doing nothing, that entails the loss of their rights." MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 146 (1977). The combatant does not enjoy the immunity to violence which noncombatants enjoy "because he already is a fighter. 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." *Id.* at 145.

¹⁷ See REGAN, *supra* note 9, at 87.

¹⁸ Ralph B. Jr. Potter, *The Moral Logic of War*, in *WAR IN THE TWENTIETH CENTURY: SOURCES IN THEOLOGICAL ETHICS* 198, 208 (Richard B. Miller ed., 1992).

Murphy puts it as follows:

If one believes (as I do) that the only even remotely plausible justification for war is self-defense, then one must in waging war confine one's hostility to those against whom one is defending oneself, i.e. those in the (both causal and logical) chain of command or responsibility or agency all those who can reasonably be regarded as engaged in an attempt to destroy you.¹⁹

This moral justification of killing enemy combatants depends on the fulfillment of the *ad bellum* conditions. It is only in a war in which one is justified and the enemy objectively unjustified that one may rightly kill enemy combatants. Only the defense of the community against unjust danger provides the moral justification for the direct killing of enemy combatants.²⁰

See also G.E.M. ANSCOMBE, *THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE: VOL. 3: ETHICS, RELIGION AND POLITICS* 53 (1981). ("What is required, for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or – the commonest case – should be unjustly attacking him. Then he can attack them with a view to stopping them."); Similarly:

[T]he core of the concept of innocence in common morality's precept forbidding the killing of the innocent is non-liability to capital punishment, not moral guiltlessness. The behaviour of enemy combatants threatens just social order, and was readily assimilated to the behaviour of those guilty of capital crimes. While they may be neither morally nor legally guilty, they are like the legally (capitally) guilty in the threat they pose. Thus, killing them is considered justified, and so they are not called "innocent."

JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY AND REALISM* 88 (1987).

¹⁹ See Murphy, *supra* note 6, at 350. Alan Donagan holds that:

[R]espect for man as rational forbids using force at will upon others. Yet the immunity to violence to which everybody consequently has a moral right is obviously conditional; and perhaps its most obvious condition is that one not further one's own ends by resorting to violence or threatening it. If anybody, in furthering his own ends, resorts to violence or threatens it, he ceases to satisfy the condition of his right to immunity and may be forcibly withstood. By violating the immunity of others, he forfeits his own. In general: *It is permissible for any human being to use force upon another in such measure as may be necessary to defend rational creatures from the other's violence.* (emphasis in original).

See Donegan, *supra* note 14, at 84-85.

²⁰ COLM MCKEOGH, *THE POLITICAL REALISM OF REINHOLD NIEBUHR: A PRAGMATIC APPROACH TO JUST WAR* 165, n.25 (1997). Specifically:

[I]n war, even in a justified war of self-defense, the killing (even when it is necessary and the last resort) is the means to the achievement of the good effect. Killing is not unintended nor is it causally independent of successful defense. Catholic just war theorists get out of this problem by claiming that the intentionality on the part of the attacker, being itself evil, removes the right to life that he otherwise has. This is the crucial role

According, then, to those just war theorists who stop to answer the question, deliberate killing of enemy combatants in a just war is morally acceptable because their participation in an unjust attack on others means that they are not innocent human beings whose killing would be immoral. They may not be personally guilty from a moral or legal point of view, but their role in an unjust attack deprives them of the kind of innocence that would make targeting them immoral.

III. *IUS AD BELLUM*. WHEN IS RECOURSE TO WAR JUSTIFIED?

Just war theory establishes four conditions which must be met in order for a war to be considered justified: A) There must be a just cause; B) The war must be declared by a lawful authority; C) There must be an appropriate proportion between the goals sought and the costs, both physical and moral; and D) War must be the last resort. The following four subsections will explore each of these conditions.

A. *Just Cause*

In medieval and early modern just war theory, the question of what goals could justify a war—generally referred to as just cause—was paramount. From the 18th century until fairly recently, it lost prominence. Since World War II, the question of just cause has reclaimed the attention of scholars, received considerable attention in positive international law, and has become the subject of sometimes passionate public debate. This section will first lay out the general theory of just cause, (subsection 1) and then examine two issues which have received special attention in recent years: humanitarian intervention (subsection 2) and preemption (subsection 3).

1. *What Causes Are Sufficient to Justify War?*

Medieval just war theory generally recognized three goals that could justify recourse to war: defense against attack, re-

played by the *ad bellum* requirement of a 'wrongful aggressor'. A person's right to life is inviolable but, once he chooses to do evil, he is held to lose this right and can thus be treated as a means to an end. If one party, in lawfully pursuing his aims, infringes on those of another, the latter party cannot treat the former as an aggressor. There must be the moral evil of a choice to do human evil.

covery of something wrongfully taken, and punishment of evil.²¹ The goal of punishing evil loomed large in medieval theory, to the point that, for Thomas Aquinas, it was the principal justification of war.²² Modern theorists have abandoned punishment for moral guilt as a justification of war, stressing instead the righting of objective wrongs,²³ including the defense of human rights.

In the nineteenth century, the great European powers (and the United States in the Caribbean) frequently resorted to war to protect the economic interests of their citizens or to resolve territorial disputes, especially in their dealings with what we now call developing countries. Although injury to the economic interests of nationals and territorial disputes²⁴ may give one nation a just claim against another, the contemporary consensus is that the enormously destructive character of modern warfare, even when carried out only with conventional weapons, makes war an inappropriate instrument for resolving such questions.²⁵ In one sense, this is a question of "proportionality" rather than just cause, but because the conclusion is that the means are *always* disproportional to the end, it seems clearer, as well as briefer, to say that neither economic injury to the interests of nationals nor claims to lost territory constitute just

²¹ See James Turner Johnson, *Just Cause Revisited*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY 3, 8 (Elliott Abrams ed., 1998).

²² See ALFRED VANDERPOL, LA DOCTRINE SCHOLASTIQUE DE LA DROIT DE GUERRE 250 (1919) (cited in JOHNSON, *supra* note 21, at 6); See also HARTIGAN, *supra* note 14, at 41-43.

²³ The righting of objective wrongs was not entirely absent from medieval theory. It received more attention in the work of the canonists than in that of the theologians. The canonists stressed the recovery of wrongfully taken goods. In so doing, they talked more about the objective wrong involved than about the subjective guilt of the party who had taken the goods. See HARTIGAN, *supra* note 14, at 43. The theologians tended to stress subjective guilt. Aquinas, for instance, views even a war to regain goods wrongfully taken as primarily involving punishment of the wrong committed, namely the refusal to return what has been wrongfully taken, rather than as a means of forcing restoration of an objective order of things. See *id.* at 41-42.

²⁴ In speaking of territorial disputes, I refer to recovery of territory that has been held by the opposing power for a considerable period of time, rather than an effort to resist an invasion or to undo a recent occupation. Resisting invasion and attempting to eject forces that have recently occupied a territory may fall into the category of defensive war, which modern theorists see as a just cause for war.

²⁵ See REGAN, *supra* note 9, at 56-63.

cause for war. This is not to say that the claims themselves are not grounded in justice, but only that they are not sufficient to justify resort to war.

Many contemporary just war theorists limit just cause exclusively to defense.²⁶ This approach began in the nineteenth century, in response to the growing destructiveness of war caused by technical developments such as the repeating rifle and machine gun, and by the vastly increased size of armies made possible by the *levee en mass*, which in turn reflected the spread of nationalism and revolutionary fervor. The horrific experience of World War I lent new strength to the movement to eliminate war altogether, or at least to limit the justifiable causes of war to defense against armed aggression. Immediately after World War I, the Covenant of the League of Nations expressed the signatories' desire "to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war."²⁷ Members of the League took on obligations to submit various types of disputes to arbitration, judicial settlement, or enquiry by the League Council,²⁸ and renounced the right to go to war against any state that accepted the outcome of those processes.²⁹

²⁶ Within the just war theory, few authors make any systematic effort to explore the reasoning which justifies defensive war. Self-defense is usually taken as the starting point of analysis, with the question being not whether it is justified, but whether other causes can also justify war.

A few authors have explored the justification of defensive war. Walzer outlines what he calls "the theory of aggression" as a justification of defensive war. His argument can be summarized as follows: There is an international society of states. Its law establishes the rights of its members, above all territorial integrity and political sovereignty. Any use of force by one state against the territorial integrity or sovereignty of another constitutes aggression. Aggression is a criminal act that justifies both individual and collective defense. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 61-63 (1977). Orend offers a Kantian justification of defensive war. He argues that to deny a state the right to protect its people from aggression would be unreasonable and unfair, and would ignore the responsibility of the aggressor. The right of self-defense, he continues, is essential in a world in which there are no reliable or effective international mechanisms for guaranteeing the rights of states and in which as a last resort armed force is the most effective and reliable form of self-defense. See BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 177-180 (2000).

²⁷ THE LEAGUE OF NATIONS COVENANT, Preamble.

²⁸ See *id.* art. 12 & 13.

²⁹ See *id.* art. 12, 13 & 15.

In 1928, the signatories of the Kellogg Briand Pact "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy in the relations [of the parties] with one another."³⁰ They "agree[d] that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."³¹ Neither the League Covenant nor the Kellogg Briand Pact included any effective enforcement mechanism, but each reflected a growing international consensus against war as a legitimate instrument of national policy.³²

The enormous carnage of World War II further increased revulsion toward war. As a result, the drafters of the United Nations Charter limited the circumstances in which recourse to war would be legal to defense against active aggression.

Article 2(4) of the Charter establishes as a general principle that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."³³ The Charter charges the Security Council with making recommendations and deciding how to meet "any threat to the peace, breach of the peace, or act of aggression."³⁴ In addition to economic and diplomatic boycotts,³⁵ the Security Council is authorized to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."³⁶

The UN Charter's only explicit exception to Article 2(4)'s prohibition against the use of armed force by individual states not acting as agents of the Security Council is Article 51 which

³⁰ Kellogg-Briand Pact, Aug. 27, 1928, 94 L.N.T.S. 57, art. I. More than 50 countries joined the pact by 1929.

³¹ *Id.* art. II.

³² A thorough study of the pact is found in ROBERT H. FERRELL, *PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT* (1952).

³³ U.N. CHARTER, art. 2, para. 4.

³⁴ *Id.* art. 39.

³⁵ *Id.* art. 41.

³⁶ *Id.* art. 42.

recognizes "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."³⁷ Even this right of individual and collective self-defense survives only "until the Security Council has taken measures necessary to maintain international peace and security."³⁸

Until fairly recently, the majority view was that under the UN Charter, the only remaining legal justifications of war were individual and collective self-defense.³⁹ According to this view, under the Charter, all recourse to force in international relations necessarily fell into one of three categories: crimes, self-defense (whether individual or collective), and sanctions undertaken or authorized by the Security Council.⁴⁰ The significance of this position depends to a large degree on how broadly or narrowly the concept of self-defense is read. The wording of the Charter's provision on self-defense ("if an armed attack occurs") seems to suggest a very narrow reading,⁴¹ although highly respected international lawyers have made arguments for relatively broad readings.⁴²

In the writings of philosophers, theologians, and other just war theorists, stress on "defense" as the only or primary justification of war has led to a subtle but very important shift in just

³⁷ *Id.* art. 51. Collective self-defense can be understood in two quite different ways. Under one view, one state may aid another only when the attack on the first state presents a threat to the security of the state offering assistance. Under the other view, any group of states is free to treat an attack on any member of the group as an attack on all the members. The latter vision is built into, for instance, the Rio Treaty which obliges all members of the Organization of American States to come to the aid of any member state who is attacked. This approach is especially likely to condone intervention in a conflict and to discourage recourse to the procedures of the United Nations. See TOM J. FARER, *THE LAW OF WAR 25 YEARS AFTER NUREMBERG* 67 (1971).

³⁸ U.N. CHARTER, art. 51.

³⁹ See, e.g., WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 23 (1981); FARER, *supra* note 37, at 27. Recent experiences of humanitarian interventions not carried out directly by the UN, but enjoying greater or lesser UN approval have suggested the possibility of such actions being compatible with the Charter.

⁴⁰ FARER, *supra* note 37, at 27.

⁴¹ See Brad Roberts, *NBC-Armed Rogues: Is There a Moral Case for Preemption*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY 83, 91 (Elliott Abrams ed., 1998).

⁴² See FARER, *supra* note 37 at 30-36 (discussing various broad readings of the self-defense provision of the Charter).

war theory. The starting point in classic just war theory was an injustice that needed to be remedied, and war was viewed as a potential way of remedying that injustice. Classic just war theory paid little attention to who fired the first shot. During the twentieth century, war — far from being viewed as a potential tool for remedying injustice — came to be seen as the problem that needed to be solved.⁴³ The goal became not so much establishing or reestablishing justice as lowering the incidence of war, and if possible, eliminating it altogether. Many hoped that this could be accomplished by condemning all “aggressive” recourse to war as unjust and limiting the situations in which recourse to war could be justified to “defensive” responses. Contemporary discussions thus tend to focus not on an injustice to be remedied but on “aggression,” identified as the first use of force. In this mode of analysis, the rights and wrongs of the underlying conflict that caused the war have little importance: the significant factor is the first use of force.⁴⁴

Several factors underlie this shift in focus. First, the destructiveness of modern warfare. Experience of the vast loss of life and destruction caused by World War I and World War II, and fear of the even greater carnage and destruction that strategic nuclear warfare would entail, make modern warfare seem

⁴³ See Johnson, *supra* note 21, at 17.

⁴⁴ Addressing the UN General Assembly on the Suez Crisis, Secretary of State Dulles, for example, said:

[I]f we were to agree that the existence of injustice in the world, which this organization so far has been unable to cure, means that the principle of renunciation of force is no longer respected and that there still exists the right wherever a nation feels itself subject to injustice, to resort to force to try to correct that injustice, then . . . we would have, I fear, torn this Charter into shreds and the world would again be a world of anarchy.

See ROBERT W. TUCKER, *THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE* 13 (1960) (quoting John Foster Dulles, Address to the United Nations, (Nov. 1, 1956) (Department of State Bulletin, xxxv, 752)). Mr. Justice Jackson, setting forth the American position on the responsibility of Nazi leaders in 1945 stated: “we must not allow ourselves to be drawn into a trial of the causes of war, for our position is that no grievances or policies will justify resort to aggressive war.” See *id.* at 12 (quoting Statement by Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals (Aug. 8, 1945) (Department of State Bulletin, XII, 228)). In his opening statement before the International Military Tribunal in Nuremberg, Jackson was even more explicit: “whatever grievances a nation may have, however objectionable it finds that status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions.” See *id.* at 12 (quoting Robert H. Jackson, *TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 149 (1947)).

disproportionate to any good that might be achieved.⁴⁵ Second, admitting that a state might be justified in initiating a war would hinder efforts to outlaw war altogether.⁴⁶ Third, for those who aspire to see the United Nations develop into a supra-national community with real authority to resolve disputes among nations, it is important to try to concentrate power in the hands of supra-national decision makers and to limit the scope and authority of individual states.⁴⁷ Fourth, limiting justified war to defense against armed attack serves the interests of states and their leaders who want to preserve the status quo.⁴⁸ Finally, the dominance of the state system, with its corollaries of state sovereignty and non-intervention, has undermined the traditional just war conception that in waging war a nation might be vindicating not only its own parochial interests but the well-being of the universal community of mankind. If what is at stake in war is limited to the well-being of a particular community, the reasons for mistrusting its judgment that it is justified in going to war increase.⁴⁹

The shift from "just cause" to "defense" has been embraced by recent Popes and other official exponents of Catholic just war teaching.⁵⁰ Unilateral stress on defense has, however, been re-

⁴⁵ See, e.g., ROBERT L. PHILLIPS, *WAR AND JUSTICE* 26 (1984); COATES, *supra* note 4 at 156.

⁴⁶ See PHILLIPS, *supra* note 45 at 26.

⁴⁷ See John Courtney Murray, S.J., *Remarks on the Moral Problem of War*, in *WAR IN THE TWENTIETH CENTURY: SOURCES IN THEOLOGICAL ETHICS* 247, 252-53 (Richard B. Miller ed., 1992). Thus as early as 1931, in light of the Covenant of the League of Nations and the Kellogg Briand Pact, a distinguished group of theologians reasoned that, "a war declared by a State on its own authority without previous recourse to the international institutions which exist cannot be a lawful social process." Conclusions of the Conventus of Fribourg, in JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* 340 (1981).

⁴⁸ See JOHNSON, *supra* note 21, at 17.

⁴⁹ See COATES, *supra* note 4, at 156-57.

⁵⁰ Pius XII (1939-1958) rejected war as a "legitimate solution for international controversies and a means for the realization of national aspirations." John Courtney Murray, S.J., *supra* note 47, at 252. "All wars of aggression, *whether just or unjust*, fall under the ban of moral prescription." *Id.* at 252. However Pius XII reluctantly admitted the possibility of just wars of self-defense against very grave injustices. *Id.* at 252-54.

John XXIII (1958-63) asserted that "it no longer makes sense to maintain that war is a fit instrument with which to repair the violation of justice." John XXIII, *Pacem in Terris*, Encyclical Letter on Establishing Universal Peace in TRUTH, JUSTICE, CHARITY, AND LIBERTY, n. 127, April 11, 1963, available at <http://www>.

vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_jxxiii_enc_11041963_pacem_en.html. Taken out of context, the statement could be read as embracing pacifism, but in context it seems to refer primarily or perhaps exclusively to strategic nuclear war and to leave room for going to war to "repel an injustice that is being perpetrated, but is not yet accomplished." PAUL RAMSEY, *THE JUST WAR* 208 (1968) (discussing John XXIII's statement.) Thus John XXIII continued in the line of Pius XII in rejecting altogether offensive use of force but sanctioning in some cases defensive war short of all-out nuclear war. Paul VI (1963-78) ardently longed for a world order free of war. Cf. Paul VI, Speech to the United Nations, Oct. 4, 1965. ("never again war, never again!"). Nonetheless, he accepted – however reluctantly – that nations continue to need defensive weapons. Cf. Paul VI, Speech to the United Nations, Oct. 4, 1965. ("As long as man remains weak, changeable and wicked . . . defensive arms will, alas! be necessary.")

John Paul II (1978-2005) continued the line of thought begun by his recent predecessors and took it further. While continuing to reject pacifism and to admit a right to armed self-defense, he passionately urged rejection of war and commitment to peace. On innumerable occasions he extolled peace and called on his hearers to work for it. See, e.g., his annual messages on World Peace Day (January 1). He described war as "*a defeat for humanity*," John Paul II, Message for the Celebration of the World Day of Peace, (January 1, 2000), at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_08121999_xxx-iii-world-day-for-peace_en.html. (Italics in original). He has also warned that war breeds more war and rarely solves problems:

The twentieth century bequeaths to us above all else a warning: *wars are often the cause of further wars* because they fuel deep hatreds, create situations of injustice and trample upon people's dignity and rights. Wars generally do not resolve the problems for which they are fought and therefore, in addition to causing horrendous damage, they ultimately prove futile.

Id. (Italics in original.)

John Paul II was not a pacifist who saw no role for force in human life. He did, however, distinguish sharply war between states from international uses of force in the service of justice. Given the state of international relations, he recognized that at times individual states may be justified in going to war "in the case of legitimate defense against an aggressor." (Pope John Paul II, Message to Military Chaplains, (Mar. 24, 2003), at http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/march/documents/hf_jp-ii_spe_20030325_cappellani-militari_en.html. He sees, however, no other justification for war between states. *Id.*

Central to John Paul II's thought was the hope that humanity can move beyond the stage of disorganization which is the only justification of wars among individual states. "Just as the time has finally come," he said, "when in individual States a system of private vendetta and reprisal has given way to the rule of law, so too a similar step forward is now urgently needed in the international community." Pope John Paul II, *Centesimus annus*, section 52 (May 1, 1991), at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html. Even such progress would not, however, mean that force would never be needed. International authorities may need to use force when other means are inadequate. It is highly significant that when negotiation and mediation have failed to put an end to genocide and other grave crimes against humanity, John Paul II even called on the international community to take "concrete measures to disarm the aggressor." Pope John Paul II, Message for the

jected by some prominent just war theorists. They reject the distinction between first and second use of force as “morally sterile.”⁵¹ Aggression, they argue, “does not consist in the use of force *as such* (regardless of whether the use be offensive or defensive), but in the *unjust* use of force.”⁵² “Why must it be

World Day of Peace, “Dialogue Between Cultures For A Civilization Of Love And Peace” (Jan. 1, 2000), at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_20001208_xxxiv-world-day-for-peace_en.html.

Although recognizing the role of force in human life, the overall thrust of John Paul II’s thought is clearly marked by a profound skepticism about the justifications for war and a passionate commitment to promoting peaceful solutions to international conflicts.

The extent to which official Catholic teaching on just war – and concretely on just cause – has evolved in recent decades can be seen in the Second Edition of the official *Catechism of the Catholic Church*, approved and promulgated by John Paul II in 1997. It recognizes that “as long as the danger of war persists and there is no international authority with the necessary competence and power, governments cannot be denied the *right of lawful self-defense*, once all peace efforts have failed” CATECHISM OF THE CATHOLIC CHURCH (1994) 2308, (emphasis added). It offers, however, no hint that war might ever be justified except in case of self-defense. Although it offers a summary of what it describes as “the traditional elements enumerated in what is called the “just war’ doctrine” that list makes no mention of just cause. *Id.* at 2309. Clearly there has been a sea change in official Catholic thinking on just war. See J. Bryan Hehir, *Just War Theory in a Post-Cold War World*, 20 J. RELIGIOUS ETHICS 237, 248-52 (1992) (discussing the changed approach of Catholic teaching on war).

The subject of this article is just war theory, and I have deliberately focused in this section on the narrow issue of whether anything other than defense against aggression constitutes a just cause for war. The Popes, however, especially John Paul II have not addressed just war theory on its own terms, but have rather focused their attention on a much broader context of peace, the development of international institutions, justice in the relations between nations, development as a solution to many of the conflicts that lead to war, respect for life, forgiveness, skepticism about the ability of war to solve problems, and appreciation for non-violent approaches to problem solving. None of these factors taken singularly, nor all of them taken together, eliminate the need to answer at times the questions which just war theory is designed to help answer, but they do require us to think about a much wider range of issues and may at times lead to a different answer than we would reach if our only concern were the question of whether or not we could justify going to war. Cf. Drew Christiansen, S.J., *Hawks, Doves, and Pope John Paul II*, AMERICA, Aug. 12, 2002, available at <http://www.americamagazine.org/gettext.cfm?textID=2438&articleTypeID=1&issueID=398&search=1> (explaining how John Paul II “has set the stage for a reformulation of Catholic thinking about war, peace and non-violence”); William L. Portier, *Are We Really Serious When We Ask God to Deliver Us From War? The Catechism and the Challenge of Pope John Paul II*, 23:1 COMMUNIO: INT’L CATHOLIC REV. 47-63 (1996), available at <http://www.ewtn.com/library/ISSUES/FROMWAR.TXT> (commenting on the extent to which John Paul II has modified Catholic teaching on war).

⁵¹ COATES, *supra* note 4, at 159.

⁵² *Id.*

wrong," they ask, "to strike the first blow in a struggle? The only question is who is in the right, if anyone is."⁵³ While conceding that a just war must be "normatively defensive," in the sense that it is a response to an unjust threat to a state and its people, they contend that its tactics may be "empirically offensive" when it is a response to a credible, grave, and imminent threat for which there is compelling evidence.⁵⁴

In summary, there is general agreement that defense against armed aggression constitutes just cause for war. Just war theory is, however, currently in a state of flux regarding other possible justifications for war between individual states. Both international law and many just war theorists have moved toward rejecting all other justifications for war between individual states. Some theorists, however, continue to argue that a wider range of circumstances justifies having resort to war, and the status of international law on the issue is not entirely clear. In recent decades, attention has focused especially on the issues raised by humanitarian interventions and preemptive attacks. The next two subsections deal with these topics.

2. *Humanitarian Intervention*

Many contemporary just war theorists include among the causes that may justify armed intervention in the affairs of a state the reestablishment of "an order necessary for decent human existence."⁵⁵ This implies some willingness to accept the use of armed force in what has become known in recent decades as "humanitarian intervention," i.e., interference in the internal affairs of a state by another state or group of states (or by the international community represented by the United Nations) to protect human rights in situations involving gross violations of those rights or radical state break-down.

⁵³ G.E.M. Anscombe, *Mr. Truman's Decree*, in *WAR IN THE TWENTIETH CENTURY: SOURCES IN THEOLOGICAL ETHICS* 237, 252 (Richard B. Miller ed., 1992). See also, JOHNSON, *JUST WAR TRADITION*, *supra* note 47, at 359 ("When the emphasis is put on priority of resort to force, the question of justice, which has moral priority, is obscured."); JOSEPH L. ALLEN, *WAR: A PRIMER FOR CHRISTIANS* 36-37 (1991) ("It is not necessarily wrong to initiate a war. Protecting people from an unjust attack may sometimes be justified.").

⁵⁴ See OREND, *supra* note 26, at 182.

⁵⁵ See Potter, *supra* note 18, at 200. See also ALLEN, *supra* note 53, at 36.

Acceptance by authors within the just war tradition of the protection of human rights as justification for armed intervention in the affairs of a state reflects a much wider contemporary consensus among the educated public, political theorists, and international lawyers on the importance of human rights.⁵⁶ Since the United Nations Universal Declaration on Human Rights (1948),⁵⁷ the belief that human rights are not entirely matters of domestic concern of individual states has posed a challenge to the Westphalian system of sovereign states and non-intervention.⁵⁸

Nonetheless, all contemporary just war theorists recognize that caution and restraint are called for in the area of humanitarian interventions. Restraint is called for, in the first place, because humanitarian interventions represent overt violations of the sovereignty of states and respect for sovereignty still lies at the base of the international system and still protects from chaos an international order which has no effective centralized authority.⁵⁹

Some authors working within the just war tradition justify violations of sovereignty in extreme cases of human rights violations by invoking the pre-Westphalian “assumption of a universal community of mankind, transcending particular polities.”⁶⁰ In this conception, “the good of that community [has] moral primacy, and [is] the ultimate measure of the justice or injustice of war.”⁶¹ Professor James Johnson, for instance, argues for “a conception of international order in which the responsibilities of states do not stop at their own borders or with their own interests as defined by political realism, but may extend to interven-

⁵⁶ See, e.g., Edward Rubin, *International Law and Social Movements: Towards Transformation*, 97 A.S.I.L. PROC. 296, 297 (2003).

⁵⁷ See Universal Declarations of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf>.

⁵⁸ See Hehir, *supra* note 50, at 244

⁵⁹ *Id.*

⁶⁰ COATES, *supra* note 4, at 156-157. At the end of the 16th century, Alberico Gentili wrote in *DE IURE BELLI*, a seminal work on the law of war: “the subjects of others do not seem to me to be outside that kinship of nature and society formed by the whole world.” David M. Barnes, *Intervention and the Just War Tradition* at n. 22 available at <http://www.usafa.af.mil/jscope/JSCOPE00/Barnes00.html> quoting ALBERICO GENTILI, *DE IURI BELLI*.

⁶¹ COATES, *supra* note 4, at 157.

tion into the territories of other states in situations where there are major violations of justice and grave humanitarian need.”⁶²

Other authors solve the tension between humanitarian intervention and respect for sovereignty by arguing that a state which grossly violates the human rights of its citizens, forfeits its right to be treated as sovereign.⁶³ Finally, some authors argue that, despite the systemic value of the principles of sovereignty and non-intervention, the need to protect human rights against gross violations calls for a cautious modification of those principles. They would allow intervention in a set of circumstances that includes more than genocide, but is still carefully circumscribed.⁶⁴

Another reason for caution in humanitarian interventions is that, beyond formal recognition of sovereignty, state boundaries should normally be respected because they represent the

⁶² James Turner Johnson, *Thinking Morally About Intervention*, PACEM 2-1999, available at <http://www.pacem.no/1999/2/intervensjon/johnson/>. In his Message for the Celebration of the World Day of Peace, January 1, 2000, John Paul II expressed the same idea:

[A]n offense against human rights is an offense against the conscience of humanity as such, an offense against humanity itself. The duty of protecting these rights therefore extends beyond the geographic and political borders within which they are violated. Crimes against humanity cannot be considered an internal affair of a nation. (Italics in original).

John Paul II, Message for the Celebration of the World Day of Peace, (January 1, 2000), at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_08121999_xxxiii-world-day-for-peace_en.html.

See also, Nico Krish, *Legality, Morality, and the Dilemma of Humanitarian Intervention*, 13 EUR. J. INT'L L. 323, 326 (2002). (noting the movement of international discourse toward “solidarist” positions); NIKOLAOS K. TSAGOURIAS, *JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION* (2000) (advocating a legal interpretation of humanitarian intervention based on human dignity); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000) (arguing that a view of international relations based on solidarity justifies humanitarian interventions of single states and criticizing the rejection of such intervention on pluralist grounds as reflecting moral bankruptcy).

⁶³ See PHILLIPS *supra* note 45, at 21. (“[I]f it consistently fails to protect the ‘life, liberty, and property’ of its inhabitants, one might very well argue that the sovereignty is dissolved anyway and there therefore there is no intervention in the affairs of a sovereign state.”); See Wheeler, *supra* note 16, at 90-91 (arguing that states must satisfy minimal requirements of respect for human rights to be entitled to the protection which the principle of non-intervention affords to sovereign states).

⁶⁴ See, e.g., Hehir, *supra* note 58, at 8.

boundaries of communities.⁶⁵ The gross violations of human rights that justify humanitarian intervention, however, indicate that there is no functioning community.

Finally, just war theorists recognize that there are powerful systemic reasons for caution in justifying armed intervention in the internal affairs or civil war of a country:

First, there may be fundamental international disagreement about the standard of justice to be applied. Second, there may be fundamental international disagreement about the application of a universally accepted standard of justice to particular cases. Third, intervention may prove very costly in human lives if the dominant local or regional population perceives it to be politically, economically, or ethnically motivated. Fourth, assuming that individual nations and the world community would be unable or unwilling to prevent or remedy every violation of human rights, on what basis could they or should they choose to intervene in particular cases? Fifth, interventions avowedly to prevent or remedy human rights violations could easily mask, or be transformed into, intervention to annex territory or dismember the affected nation. Sixth, nations might seek to manipulate U.N.-sanctioned intervention for their own political, economic, or ethnic advantage rather than to alleviate human suffering. Lastly, intervention for humanitarian reasons in the internal affairs or civil war of a major power might provoke a major war.⁶⁶

Different authors within the just war tradition give varying degrees of weight to these factors which caution against intervention. They generally conclude, however, that, provided the other just war criteria are met,⁶⁷ humanitarian motives can jus-

⁶⁵ MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 90-91 (1977). Those just war theorists who accept the liberal commitment to self-determination as one of the most significant factors in human well-being, also tend to see outside intervention in the affairs of a community as paternalistic and contrary to the community's right to self-determination. See PHILLIPS, *supra* note 45, at 22.

⁶⁶ REGAN, *supra* note 9, at 69-70. Cf. PHILLIPS, note 45, at 21 ("states ought not to interfere in the affairs of sovereign states for three reasons: (1) such intrusions risk escalation to nuclear war, (2) they impede the establishment of an international order, and (3) they abrogate the obligation of peoples to sort out their own political and social problems.").

⁶⁷ This caveat is extremely important and raises numerous issues about proportionality (See *infra* notes 120-130 and accompanying texts), prospect of success (See *infra* notes 121-125 and accompanying text), last resort (See *infra* notes 131-140 and accompanying text), and perhaps most importantly proper authority (See

tify war, at least in cases of what one author calls "supreme humanitarian emergencies,"⁶⁸ i.e., extreme violations of human rights, such as genocide and ethnic cleansing.⁶⁹

3. *Preemption*

Treating defense as the only just cause for war and equating first use of force with aggression, closes the door on preemptive use of force. By contrast, since the time of Augustine, the just war tradition has accepted, at least implicitly, the use of force to preempt an imminent unjust attack.⁷⁰

The Dutch legal scholar Hugo Grotius (1583-1645), who played a pivotal role in the development of just war theory, explicitly approved preemptive strikes, finding justification for war in "an injury not yet inflicted, which menaces either persons or property." He was quick, however, to clarify that the "danger [of being attacked] must be immediate,"⁷¹ and criticized as "much mistaken" those who hold that "any degree of fear ought to be a ground for killing another, to prevent his supposed intention."⁷²

According to Grotius, preemptive attacks are justified only when it is certain that the other party will attack.⁷³ He rejects as sufficient grounds for war "fear with respect to a neighboring power . . . for in order that a self-defence may be lawful it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbor, but also regarding his intention; the degree of certainty required is that which is accepted in morals."⁷⁴ Grotius criticizes as "repugnant to every

infra notes 89-115 and accompanying text). The issue of proper authority raises the question of who is authorized to carry out such interventions: single states, coalitions of states, or only the United Nations.

⁶⁸ WHEELER, *supra* note 62, at 34.

⁶⁹ See, e.g., PAUL RAMSEY, JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 19-41 (1968). Phillips, *supra* note 45, at 21-22 (1984); David M. Barnes, *Intervention and the Just War Tradition*, available at <http://www.usafa.af.mil/jscope/JSCOPE00/Barnes00.html>; RICHARD *supra* note 9, at 72-73; JAMES A. BARRY, THE SWORD OF JUSTICE: ETHICS AND COERCION IN INTERNATIONAL POLITICS 80-87 (1998); POTTER, *supra* note 18, at 202-203.

⁷⁰ See JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 30 (1981).

⁷¹ *Id.* at 63.

⁷² *Id.*

⁷³ See Johnson, *supra* note 21, at 13-14.

⁷⁴ GROTIUS, ON THE LAW OF WAR AND PEACE 549 (A.C. Campbell trans., James Brown Scott, ed., 1925). He goes on to say: "We can in no wise approve the view of

principle of justice” the doctrine that “the bare possibility that violence may be some day turned on us gives us the right to inflict violence on others.”⁷⁵ It is not permissible, he urges, “to take up arms in order to weaken a rising power, which, if it grew too strong, might do us harm.”⁷⁶

Later authors within the just war tradition, building on Grotius’ insights, distinguished between *preempting* an attack which was certain and imminent, and launching a *preventive* attack to head off a danger, which was feared might develop in the future if measures were not taken now. A preventive attack, they said, could not be justified,⁷⁷ because “the danger to which it alludes is not only distant but speculative, whereas the costs of a preventive war are near, certain, and usually terrible.”⁷⁸ But a genuinely preemptive attack could be justified in the “rare circumstances . . . when an unavoidable attack is likely to be imminent and the threat is grave.”⁷⁹ Walzer, for

those who declare that it is a just cause of war when a neighbor who is restrained by no agreement builds a fortress on his own soils . . . which may some day cause us harm.” *Id.*

⁷⁵ See *id.* at 184.

⁷⁶ See GROTIUS, *supra* note 74, at 184.

⁷⁷ See, e.g., COATES, *supra* note 4, at 159-160. Writing in 1960, and presumably thinking about massive nuclear attacks on the Soviet Union, Tucker described official and popular American opinion as totally opposed to preventive war: “A policy of preventive war, the prevailing official and private sentiment has insisted, scarcely bears discussion, since from every point of view it must be seen as immoral and wicked.” See Tucker, *supra* note 44, at 105. More recently the former Catholic Archbishop of Denver, Cardinal James Francis Stafford, addressing the situation in Iraq, insisted that a war could be justified only by a threat that is “clear, active and present, not future.” Cardinal J. Francis Stafford, *The Prospect of War Between Iraq and the United States*, NAT’L CATHOLIC REPORTER, available at http://www.natcath.org/NCR_Online/documents/stafford.htm; Cardinal Edward Egan of New York echoed that analysis in declaring – again with reference to Iraq – that no war “may be declared or pursued without clear and certain knowledge of clear and certain danger.” John Norton, *Cardinal Egan Says Inspectors Must Determine if Iraq War is Justified*, NC Catholic Online—Catholic News Service Jan. 30, 2003 available at <http://www.nccatholic.org/news.php?ArtID=786> (quoting Cardinal Edward Egan, Statement during intercontinental web cast organized by the Vatican, Jan. 28, 2003).

⁷⁸ Michael Walzer, *No Strikes: Inspectors Yes, War No*, THE NEW REPUBLIC, Sept. 30, 2002, at 19.

⁷⁹ John Kelsey, *Just War: The Details*, CHICAGO TRIBUNE NOV. 10, 2002 at C1; See also OREND, *supra* note 54, at 190-192 (empirically offensive tactics may be justified as a response to a credible, grave, and imminent threat for which there is compelling evidence.); AmericanValues.org, *Pre-emption, Iraq, and Just War: A Statement of Principles*, Nov. 14, 2002, available at <http://www.americanvalues.org>.

instance, asserts that a preemptive strike may be justified when there is

a manifest intent to injure, a degree of active preparation that makes the intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk. . . . Instead of previous signs of rapacity and ambition, current and particular signs are required; instead of an "augmentation of power," actual preparation for war; instead of the refusal of future securities, the intensification of present danger.⁸⁰

Regan agrees, "it is as much an act of self-defense to initiate hostilities to prevent imminent attack as it is to respond to hostilities already initiated by an aggressor."⁸¹ He argues that it not necessary to wait until the would-be aggressor is immediately poised to attack or has stockpiled nuclear or chemical weapons, but he requires "practical certainty, no reasonable doubt (better than 90% probability)" that aggression will take place if not preempted.⁸²

In recent years, some just war theorists have dedicated special attention to the justification for preemptive attacks to prevent "rogue" states⁸³ from acquiring nuclear, biological or

org/html/1b__pre-emption.html ("preemption can be morally justified only in rare circumstances – when the attack is likely to be imminent, the threat is grave, and preventive means other than war are unavailable."); William V. O'Brien, *The Challenge of War: A Christian Realist Perspective*, in JUST WAR THEORY 169, 226 (Jean Bethke Elshtain ed., 1992) ("anticipatory self-defense is a legitimate form of self-defense if there is a clear and present danger of aggression.").

⁸⁰ See Walzer, *supra* note 26, at 81. Walzer asserts, however, that aggression, which justifies preemptive use of force:

[C]an be made out not only in the absence of a military attack or invasion but in the (probable) absence of any immediate intention to launch such an attack or invasion. The general formula must go something like this: states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence. . . . [T]here are threats with which no nation can be expected to live. And that acknowledgment is an important part of our understanding of aggression.

Walzer, *supra* note 26, at 85. On these grounds, Walzer argues that Israel's 1956 attack on Egypt was justified. See *id.* at 81-85.

⁸¹ REGAN, *supra* note 9, at 51.

⁸² *Id.* at 51-52.

⁸³ The practice of justifying special treatment of rogue states began at least as early as the 1980s when President Ronald Reagan labeled Qaddafi an outlaw. See Meghan L. O'Sullivan, *Les dilemmes de la politique américaine vis-à-vis des*

chemical weapons of mass destruction.⁸⁴ They argue that what constitutes morally acceptable preemptive use of force must be revised to take into account the vast destructive force of weapons of mass destruction and the rapidity with which they can inflict tremendous damage. They assert that these factors, combined with rogue states' lack of respect for common norms of domestic and international behavior, make it unnecessary, and

'Rogue' States, POLITIQUE ÉTRANGÈRE, Spring 2000 (citing President Ronald Reagan, 1 PUB. PAPERS 563, May 7, 1986). An English translation of this article can be found at <http://www.brookings.edu/dybdocroot/views/articles/osullivan/2000springIFRI.htm>. President Clinton's National Security Advisor, Anthony Lake, employed the term rogue states in an influential article in Foreign Affairs, and the term has since gained wide currency. Cf. Anthony Lake, *Confronting Backlash States*, 73 FOREIGN AFF. 45, 45-55, (1994). In Lake's usage, a rogue state is a country which seeks to challenge the system of international norms and international order. See *id.*

⁸⁴ The question of preemption has attracted attention not only because of the Second Gulf War, but also because The National Security Strategy of the United States, published in Sept. 2002, announced that preemption had become an important part of American strategy:

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

....

Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.

....

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

National Security Strategy of the United States, 2002, p. 15.

indeed in many cases irresponsible, to wait until an attack is imminent.⁸⁵

In addition to disregarding or modifying the requirement of an immediate threat, the proponents of an expanded justification for the preemptive use of force also invoke threats to stable

⁸⁵ The most vigorous and prominent proponent of this view is George Weigel, who has used it to justify the United State's attack on Iraq. Weigel's argument is worth reproducing at some length:

As recently as the Korean War (and, some would argue, the Vietnam War), "defense against aggression" could reasonably be taken to mean a defensive military response to a cross-border military aggression already underway. New weapons capabilities and outlaw or 'rogue' states require a development of the concept of "defense against aggression." To take an obvious current example: it makes little moral sense to suggest that the United States must wait until a North Korea or Iraq or Iran actually launches a ballistic missile tipped with a nuclear, biological, or chemical weapon of mass destruction before we can legitimately do something about it. Can we not say that, in the hands of certain kinds of states, the mere possession of weapons of mass destruction constitutes an aggression-or, at the very least, an aggression waiting to happen?

This "regime factor" is crucial in the moral analysis, for weapons of mass destruction are clearly not aggressions waiting to happen when they are possessed by stable, law-abiding states. No Frenchman goes to bed nervous about Great Britain's nuclear weapons, and no sane Mexican or Canadian worries about a preemptive nuclear attack from the United States. Every sane Israeli, Turk, or Bahraini, on the other hand, is deeply concerned about the possibility of an Iraq or Iran with nuclear weapons and medium-range ballistic missiles. If the "regime factor" is crucial in the moral analysis, then preemptive military action to deny the rogue state that kind of destructive capacity would not, in my judgment, contravene the "defense against aggression" concept of just cause. Indeed, it would do precisely the opposite, by giving the concept of "defense against aggression" real traction in the world we must live in, and transform.

George Weigel, *Moral Clarity in Time of War*, FIRST THINGS, Jan. 2003, 20, 25, available at <http://www.firstthings.com/ftissues/ft0301/articles/weigel.html>. See also, George Weigel, *Pope John XXIII Lecture: The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689, 706 (2002); George Weigel, *Just War and Pre-Emption: Three Questions*, Oct. 2002 available at http://www.eppc.org/news/newsID.1407/news_detail.asp (Oct. 2, 2002).

Roberts offers an extended discussion of preemption in just war theory. Roberts, *supra* note 41, at 83. He argues that acquisition of weapons of mass destruction:

[C]an confirm an intent to injure, create a positive danger, and raise the risks of waiting. . . . Their dispersal in time of crisis would certainly signal preparation for war. But to acquire such weapons and to prepare for thier use is not the same as . . . 'actual preparation for war' or 'the intensification of present dangers'—these are qualities that have to do with the nature of the regime itself. . . . Rogue regimes have already established their aggressive intent—this is the essence of their characterization as "rogue" or "backlash."

Roberts, *supra* note 1, at 83.

world order – rather than to the more immediate interests of a particular state – as a justification for preemptive strikes. Roberts, for instance, argues that rogue regimes threaten not just their neighbors but

the order that is the foundation of long-term sovereignty. They may pose threats to regional peace Rogue regimes may also pose threats to the global order [D]efending the stability of the [international] system is in the national interest of many states. The world-order argument thus creates an additional moral justification for preemption. Protecting world order is long-term self-defense.⁸⁶

Others working within the just war tradition have rejected this attempt to broaden the circumstances under which a preemptive attack can be justified. A group of professors recently criticized the Bush administration's adoption of a policy of preemption on the grounds that "within the framework of just war theory, pre-emption can be morally justified only in rare circumstances – when the attack is likely to be imminent, the threat is grave, and preventive means other than war are unavailable."⁸⁷ Similarly, Professor Griffiths has criticized those who expand the definition of imminent threat. He says they are attempting "to eliminate one of the constraints of just war theory."⁸⁸

⁸⁶ Roberts, *supra* note 41, at 92-94. George Weigel has commented: International terrorism . . . is a deliberate assault, through the murder of innocents, on the very possibility of order in world affairs. That is why terror networks must be dismantled or destroyed. The peace of order is also under grave threat when vicious, aggressive regimes acquire weapons of mass destruction . . . That is why there is a moral *obligation* to rid the world of this threat to the peace and security of all.

George Weigel, *Moral Clarity in Time of War*, 128 FIRST THINGS, Jan. 2003, at 24

⁸⁷ Statement by David Blankenhorn, Jean Bethke Elshtain, Francis Fukuyama, William A. Galston, John Kelsay, Robert Putnam, Theda Skocpol, Max L. Stackhouse, and Paul C. Vitz (Nov. 14, 2002) Pre-emption, Iraq, and Just War: A Statement of Principles, November 14, 2002, at http://www.americanvalues.org/html/1b__pre-emption.html.

⁸⁸ Joe Feuerherd, *Preemption, Aggression and Catholic Teaching*, NATIONAL CATHOLIC REPORTER, Oct. 25, 2002, available at http://natcath.org/NCR_Online/archives2/2002d/102502/102502a.htm. In a similar vein, Cardinal Stafford, after summarizing the just war tradition, stressed recently that "legitimate public authority cannot decide for war unless the nation or community of nations has undergone prior damages from an aggressor or is actually under a very imminent threat." Cardinal J. Francis Stafford, *The Prospect of War Between Iraq and the United States*, NAT'L CATHOLIC REPORTER available at <http://www.natcath.org/>

The question of preemption is a troubling one and unlikely to be definitively resolved. It has always involved prudential judgments about how imminent is imminent enough, but the pressure on answering those questions correctly has been vastly increased by the availability of weapons of mass destruction. Furthermore, under contemporary conditions, it is inextricably entwined with the ambiguous position of the United States as a country which has special responsibilities for maintaining world order, but which also has parochial interests, which can easily be cloaked in world-order rhetoric. For this reason, it raises the question of lawful authority, which is the subject of the next section.

B. *Lawful Authority*

For centuries we have been accustomed to the concept that war is the province of sovereign states. In revolutionary situations and civil wars we may be uncertain about where to draw the line between private violence and war, but in most other situations we distinguish easily between war on the one hand and brigandage or other forms of private violence on the other. In the just war tradition, this difference depends on the authority by which war is declared and in whose name it is waged.

During the middle ages, the requirement that war be waged by, "authority of the sovereign,"⁸⁹ reflected above all the need to keep minor nobles and their private armies from waging wars that led to social chaos.⁹⁰ "Peace among mortals," says Aquinas quoting Augustine, "demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."⁹¹

The foundations of the requirement that war be waged only by sovereigns was not, however, merely pragmatic. It reflected

NCR_Online/documents/stafford.htm (Posted February 11, 2003). Professor John Kelsey argues that even in the contemporary world, "pre-emption can be morally justified only in rare circumstance—when an unavoidable attack is likely to be imminent and the threat is grave." John Kelsey, *Just War: The Details*, CHICAGO TRIB., Nov. 10, 2002, at C1.

⁸⁹ THOMAS AQUINAS, *supra* note 10, II, II, q. 40, a. 1.

⁹⁰ See ALLEN, *supra* note 53, at 38.

⁹¹ THOMAS AQUINAS, *supra* note 10, II, II, q. 40, a. 1, *quoting* AUGUSTINE, CONTRA FAUST. xxii, 75.

what Johnson has called "the moral component of authority."⁹² As one author has put it:

The state's *right* to war derives not from its *de facto* or 'coercive' sovereignty . . . but from its membership of an international community to the common good of which the state is ordered and to the law of which it is subject . . . [T]o be authoritative [a state's] act of war must retain a public and legal character When states employ force in defense of their particular interests they are justified in so doing only to the extent that, at the same time, their actions can be convincingly construed as a defense of the international order and a securing of the international common good.⁹³

Beginning in the 17th century, this moral conception of just authority was lost from view and became "entirely subordinated to the concept of state sovereignty."⁹⁴ Just authority was displaced by *competence de guerre*, seen as a "formal requirement or accompaniment of state sovereignty."⁹⁵ Authors working within the just war tradition mentioned the requirement of just authority, but gave it little importance.

In recent decades, three factors have refocused attention on the requirement of lawful authority: 1) the increasing importance of intra-state conflict; 2) the desire to eliminate or lessen the frequency of armed conflict between states by limiting the right to use force to the United Nations; and 3) the growing importance of humanitarian intervention.

The period since the end of World War II has been marked by frequent and often highly destructive armed conflict within

⁹² JOHNSON, *supra* note 70 at 170. Aquinas, for instance, writes: [A]s the care of the common weal 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. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Rm. 13:4): "He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil"; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Ps. 81:4): "Rescue the poor: and deliver the needy out of the hand of the sinner."

THOMAS AQUINAS, *supra* note 10, II, II, q. 40, a. 1.

⁹³ COATES, *supra* note 4, at 126-27.

⁹⁴ *Id.* at 125.

⁹⁵ *Id.* at 126.

countries. As early as 1993, the increasing importance of internal conflict compared to external or interstate warfare led the distinguished military historian John Keegan to conclude that the most important future wars would consist of "a fight for civilization – against ethnic bigots, regional warlords, ideological intransigents, common pillagers and organized international criminals."⁹⁶

We seem to be returning in some sense to the situation of the Middle Ages in which it was not possible to take for granted the public monopoly on the use of force.⁹⁷ This lends new urgency to the requirement of lawful authority as a means of distinguishing private violence from legitimate uses of armed force to protect the common good of society.⁹⁸

The contemporary trend toward limiting just cause for war to defense against armed invasion⁹⁹ is intimately linked to the question of just authority. In fact, although the discussion of defensive war is usually cast in terms of just cause, all just war theorists – and indeed all non-pacifists – concede that the United Nations is justified in using armed force in other situations. This suggests that the real question is not whether only

⁹⁶ *Id.* at 125.

⁹⁷ *Id.*

⁹⁸ It would be easy to convert the requirement of lawful authority into a justification for government violence against all efforts to change the social order by imposing on the opponents of established governments impossibly high burdens of legitimacy, and there can be no doubt that the requirement has been so used by social conservatives. See, e.g., FARER, *supra* note 37, at 48-51. (criticizing McDougal and Feliciano for in practice denying legitimacy to all revolutionary movements). On the other hand, advocates of revolutionary change easily dismiss the requirement of lawful authority and attribute to all revolutionary groups a degree of legitimacy which they may often lack. See, e.g., COATES, *supra* note 4 at 137-39. (criticizing Farer and other proponents of liberation theology for their willingness to grant legitimacy to revolutionary movements which in fact have little popular support). The difficult issue of the justification for the use of violence in revolutionary situations and specifically the question of when revolutionaries can be considered to represent a lawful authority falls outside the scope of this essay, and to a significant degree outside the province of just war theory. Just war theory's requirement of lawful authority does, however, at least indicate that in addition to considering the tactics employed in efforts to overthrow or sustain established governments (terrorism and counter-terrorism, attacks on civilians, etc.), it is necessary to consider the degree to which both established governments and revolutionary groups actually represent the society they purport to lead and can rightfully claim that their use of violence is a public one directed toward the common good.

⁹⁹ See *supra* notes 26-54 and accompanying text.

defense justifies the use of armed force, but rather whether individual states are justified in using force in any other circumstance.

Thinkers within the just war tradition differ with each other over the moral value of the prohibition against the use of armed force by individual states outside the context of immediate self-defense. Their differences reflect, above all, the degree of their commitment to moving toward a new international order in which war between states would be an anachronism. In some ways, the current debate about who has the authority to wage war outside cases of defense against armed aggression is reminiscent of the medieval debate over who could rightly declare and wage war. The argument of medieval just war thinkers that only the sovereign could rightly wage war reflected an aspiration rather than a political fact. So too, today, those who argue that individual states may not morally have recourse to armed force except in self-defense base their position more on a desire to see the United Nations become an effective guardian of peace and justice between nations than on a conviction that it is in fact such an institution.¹⁰⁰ On the other hand, those who argue that individual nations may morally have recourse to armed force in a broader range of circumstances tend to highlight the defects and shortcomings of the UN as it exists today.¹⁰¹ The debate over the proper role of the United Nations,

¹⁰⁰ In 1983, the National Conference of Catholic Bishops argued that: Just as the nation-state was a step in the evolution of government at a time when expanding trade and new weapons technologies made the feudal system inadequate to manage conflicts and provide security, so we are now entering an era of new, global interdependencies requiring global systems of governance to manage the resulting conflicts and ensure our common security.

See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE: A PASTORAL LETTER ON WAR AND PEACE* 101 (1983). See also MURRAY, S.J., *supra* note 47, 252-53, (Richard B. Miller ed., 1992) (explaining that the focus of Pius XII's statements on war is much less to determine what might be just in the actual situation of an unorganized humanity than to promote a genuine international organization capable of eliminating war, because the juridical reason for the right of war is the unorganized state of international life).

¹⁰¹ See, e.g., Weigel, *supra* note 85, at 26. ("the manifest inability of the UN to handle large-scale international security questions suggests that assigning a moral veto over U.S. military action on these fronts to the Security Council would be a mistake."); Eugene V. Rostow, *Competent Authority Revisited*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY 39, 59

and of individual states and groups of states, has focused during the last decade primarily on preemption¹⁰² and humanitarian intervention.¹⁰³

Regarding preemption of threats to international order, the justification for forcible UN action is relatively clear. The more difficult issue is whether individual countries – and concretely the United States – can justifiably respond with armed force when there is no immediate threat to their particular interests. As one author has put it, with regard to preemptive attacks by the United States on “rogue states,” the question is: “[W]hat makes it America’s fight?”¹⁰⁴

Authors working within the just war tradition have given sharply contrasting answers to this question. George Weigel asserts: “The United States has a unique responsibility for leadership in the war against terrorism and the struggle for world order; that is not a statement of hubris but of empirical fact. That responsibility may have to be exercised unilaterally on occasion.”¹⁰⁵

Roberts, on the other hand, although recognizing that the US has a unique role to play in defending peace and international order, notes that it is also the prime beneficiary of maintaining the status quo.¹⁰⁶ When it portrays itself as engaging in “preemptive actions with a world-order purpose,” others will be tempted to believe that “though wrapped in world-order rhetoric, [those actions] are in the service of primarily U.S. interests.”¹⁰⁷ Therefore, he concludes that the United States cannot claim to have the moral authority to act unilaterally for the good of the international community.

(Elliott Abrams ed., 1998) (arguing in favor of reliance in the quest for peace on regional groupings of states and ad hoc alliances rather than on the UN on the grounds that the “quest of peace must continue, but on a more realistic legal footing, one compatible with the nature of the state system as it has evolved historically.”)

¹⁰² See *supra* notes 70-88 and accompanying text.

¹⁰³ See *supra* notes 55-69 and accompanying text.

¹⁰⁴ Roberts, *supra* note 41, at 97.

¹⁰⁵ Weigel, *supra* note 85, at 26. Weigel acknowledges that “Defining the boundaries of unilateral action while defending its legitimacy under certain circumstances is one crucial task for a developing just war tradition.” *Id.* In practice, however, he seems much more interested in defending the legitimacy of unilateral US action than in defining its boundaries.

¹⁰⁶ Roberts, *supra* note 41, at 97-98.

¹⁰⁷ *Id.* at 98.

Roberts suggests that UN approval should be required for preemptive actions that involve protecting the international community or a region rather than the defense of the US or of countries to which the US is bound by treaty. He is aware of the obvious shortcomings of the UN, but he argues that, "its normative attributes redress the competent-authority shortfall,"¹⁰⁸ because it "aspires to represent the interests of the whole community of nations"¹⁰⁹ and thus has "strong moral authority in purporting to defend those interests."¹¹⁰ He suggests that endorsement by a majority of the Security Council – even if one or more vetoes prevent approval – would greatly bolster the moral case for a specific act of preemption.¹¹¹

The question of lawful authority is also raised by humanitarian interventions, which have attracted increasing attention during the last decade. There can always be some international spillover from acts of genocide, ethnic cleansing, or other massive violations of human rights, and that spillover may give rise to a plausible claim by one or more neighboring states that intervention is called for on grounds of an expanded concept of self-defense. If humanitarian crises are considered in themselves, however, they represent a call to the international community, but not to any single country in particular, to intervene in defense of human rights. Many international lawyers contend that no individual state has authority to intervene on its own to solve a humanitarian crisis.¹¹² Others, however, con-

¹⁰⁸ *Id.* at 102.

¹⁰⁹ *Id.* at 101.

¹¹⁰ *Id.* at 101-102.

¹¹¹ See *id.* at 102. Cf. Daniel Brennan, *No Just War Outside the Law*, THE TABLET, Feb. 22, 2003, available at http://www.thetablet.co.uk/cgi-bin/archive_db.cgi?tablet-00711 (arguing that wars can legitimately be undertaken to preserve international peace and security only with the support of the international community expressed through the Security Council). In the case of a specific threat to the US or one its allies, Roberts is more willing to dispense with any requirement of UN approval on grounds that self-defense is an inherent right of sovereign states. See Roberts, *supra* note 41, at 104. Relying on a similar distinction, Falk distinguishes the U.S.'s attack on Afghanistan, which can be plausibly justified in terms of self-defense, from its attack on Iraq, which he considers to have no such justification. See RICHARD FALK, *THE GREAT TERROR WAR* 119-120 (2003).

¹¹² See Nico Krisch, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 322, 325 (2002), available at <http://www.ejil.org/journal/Vol13/No1/br1.pdf> (citing S.D. MURPHY, *HUMANITARIAN INTERVENTION* (1996)); M. PAPE, *HUMANITÄRE INTERVENTION* (1996); WHEELER, *supra* note 62. SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTER-*

tend that state practice during the last decade constitutes an acceptance of unilateral intervention.¹¹³

The disagreement between those who argue that humanitarian interventions by individual states are permissible and those who reject them is often presented as a clash between those who value human rights more highly than state sovereignty and those who defend sovereignty even in the face of massive violations of human rights.¹¹⁴ In fact, however, the dispute involves not so much differing estimates of the importance of human rights as contrasting assessments of who has authority to intervene to protect those rights. A fairly widespread consensus exists that the United Nations can properly intervene in severe humanitarian crises.¹¹⁵ The dispute as to whether unilateral intervention is also justified thus seems to involve not so much a clash between human rights and sovereignty (which would be violated equally by a UN-backed intervention) as a clash between human rights and the peace and international order which would be placed in danger by admitting a right to unilateral humanitarian intervention.¹¹⁶

A final question about lawful authority with regard to humanitarian intervention is the status of interventions carried out by groups of countries without the formal sanction of the United Nations.¹¹⁷ In light of the difficulty of obtaining Security Council approval of armed interventions in humanitarian crises, some authors believe that groups of states may be justified in intervening even if a single state would not be justified in doing so.¹¹⁸ Certainly the participation of a sufficiently large

VENTION AND INTERNATIONAL LAW (2001); and CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000).

¹¹³ See Krisch *supra* note 112, at 325 (citing F.K. ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* (1999)).

¹¹⁴ See Krisch, *supra* note 112, at 329.

¹¹⁵ See *id.* at 331 (citing Frowein and Krisch, 'Article 39', in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (B. SIMMA ET AL. EDS., 2002)).

¹¹⁶ See *id.* at 331. Hehir argues that "[i]n a revised ethic of intervention, multilateral authorization should be the norm." Hehir, *supra* note 58, at 9.

¹¹⁷ The best-known case is, of course, NATO's intervention in Kosovo, which was subsequently ratified by Security Council Resolution 1244. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

¹¹⁸ See Brennan, *supra* note 111, quoting Antonio Casesse as maintaining that there is "an emerging consensus in international law" that such interventions are justified when the Security Council has failed to take action to stop crimes against humanity committed by a state, when all peaceful means to solve the crisis have

and diverse group of states assuages some of the concerns caused by unilateral intervention and offers some guarantees that the intervention is actually prompted by humanitarian concerns rather than narrow national interests. The stress here, however, should be on diversity. Although an intervention backed by NATO is certainly somewhat less suspect than one backed only by the United States, if that intervention takes place in, for example, an oil-rich Muslim country, there may still be considerable grounds for suspicion about the *bona fides* of the proffered humanitarian justification.

C. *Proportionality*

For a war to be justified, there must be a proportional relationship between the good to be achieved and the costs of the war. This might seem at first to be simply a common sense observation that one should undertake only actions whose expected benefits exceed their expected costs. Within the just war tradition, however, several factors make the principle more interesting and less obvious. In the first place, the global outlook, which characterizes the just war tradition, requires taking into account the costs and benefits to all belligerents (not merely to oneself) and even the costs and benefits to the international community.¹¹⁹ In addition, the calculation should take into account not merely material benefits (recovery of lost territories, control of resources, etc.) and costs (money, physical deaths, destruction of property), but also the moral benefits (protection of freedom, the way of life of a people, religious values, etc.) and moral costs (the curtailment of the rights of citizens, the inevitable crimes and injustices that every war entails, the disruption of family life, the forcing of ordinary citizens to take up arms against other human beings).¹²⁰

been exhausted, the force used is proportionate to remedy the wrong, and the group of intervening states has the actual or tacit support of most countries.

¹¹⁹ See COATES, *supra* note 4, at 179. See also OREND, *supra* note 26, at 61.; O'Brien, *supra* note 79, at 227-28.

¹²⁰ See Murray, S.J., *supra* note 47, at 255-56 (Richard B. Miller ed., 1992) holding:

The standard is not a "eudaemonism and utilitarianism of materialist origin" which would avoid war merely because it is uncomfortable, or connive at injustice simply because its repression would be costly. The question of proportion must be evaluated in more tough-minded fashion, from the viewpoint of the hierarchy of strictly moral values. It is not enough sim-

Although some authors list "probability of success" as an independent criterion for judging whether a war is just,¹²¹ it can also be thought of as part of proportionality.¹²² There does not seem to be any practical difference between the two approaches. If the goals a nation wishes to pursue have little or no chance of being achieved through a war, they can hardly justify the physical and moral costs of the war.¹²³

In considering probability of success a nation may legitimately weigh not only the likelihood of military victory, but also factors such as "witnessing to values."¹²⁴ On the other hand, military victory may not necessarily equate to success if military victory does not lead to achieving the objectives of the war.¹²⁵

ply to consider the 'sorrows and evils that flow from war.' There are greater evils than the physical death and destruction wrought in war. And there are human goods of so high an order that immense sacrifices may have to be borne in their defense.

Id.

¹²¹ See, e.g., OREND, *supra* note 26, at 196.

¹²² See, e.g., ALLEN, *supra* note 53, at 42.

¹²³ See COATES *supra* note 4, at 179. ("[I]f the prospects of military success are extremely slim or remote, . . . [t]he harm that war inflicts will . . . , it seems, not only outweigh the good to be obtained, but will be wholly without the moral compensation afforded by a potential benefit."); See also James F. Childress, *Just-War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria*, in WAR, MORALITY, AND THE MILITARY PROFESSION 256, 264 (Malham M. Wakin ed., 1986).

¹²⁴ Childress, *supra* note 123, at 265. See also OREND, *supra* note 26, at 196-197. ("There may also be considerations of self-respect that come into play in this criterion, according to which victims of aggression ought to be permitted at least some resistance, should they decide to do so, as an expression of their strong objection to the aggression and as an affirmation of their rights"); A.C. Grayling, *Fighting is a Last Resort; Aquinas Defined the Just War: Few Conflicts Have Ever Met His Criteria*, NEW STATESMAN, Aug. 12, 2002, at 10. ("The problem with transforming this prudential consideration [proportionality] into a moral one is that it seems, by contrast, rather immoral, not to say spineless, to avoid engaging in an otherwise just war because it threatens to be too costly. When the Polish cavalry galloped towards Hitler's Panzers in defense of their homeland, they were going futilely to war, but their courage gave them a moral victory, and proved an inspiration to others.")

¹²⁵ The Popes' increasing skepticism about the justification for war other than in cases of defense against armed aggression already in course, (see *supra* note 50 and accompanying text), probably responds to their increasing skepticism about the ability of war to accomplish the long range aims of restoring peace and order. See William Bole, *Bush's 'First Strike' Threat: Can It Be Justified?* OUR SUNDAY VISITOR, June 23, 2002, at <http://www.georgetown.edu/centers/woodstock/publications/article18.htm>.

Judgments regarding proportionality and probability of success can be analyzed into four elements: (1) value judgments about the worth of the goals to be pursued in the war; (2) factual judgments about the war's probable costs in terms of casualties and economic and physical costs; (3) factual and value judgments about the war's probable moral costs; and (4) a value judgment about the balance between the goals to be pursued and the likely costs.¹²⁶

Many of these judgments will be fraught with uncertainty. In August 1914, for instance, no one would have thought that the conflict we have come to call World War I would lead to 8.5 million soldiers killed, 21 million wounded and, 6.5 million civilian deaths.¹²⁷ This is one of the reasons why proportionality is a factor to be considered not only at the moment of deciding whether to go to war, but needs to be reassessed throughout the conflict.¹²⁸

Even if the facts could be clearly known, it would always be difficult to weigh the goals being sought against the economic, physical and moral costs of war. The difficulty of making these judgments is not, however, unique. Much statesmanship and many ordinary moral judgments involve similarly difficult tasks.¹²⁹ Just war thinkers admit the difficulty of making good judgments in this area, but argue that:

it is better to calculate consequences the best we can, however imperfectly, than not to do so at all. People are apparently guided by that belief in private life. We often ask of an act, like changing

¹²⁶ See REGAN *supra* note 9, at 63 (1996). ("Due proportion involves three elements: (1) a value judgment about the worth of the cause that purports to justify recourse to war; (2) factual judgments about the war's likely casualties and costs; (3) a value judgment about the proportional worth of the war's cause in relation to its likely casualties and costs.") Regan's three-element test could easily be read to count only the casualties and economic costs of war, but within the just war tradition, moral costs must also be taken into account.

¹²⁷ See Military Casualties of World War One, at <http://www.firstworldwar.com/features/casualties.htm> (last visited February 12, 2004).

¹²⁸ Walzer points out that in the course of a war, even the ends sought may change, and that there is a tendency to "redefine initially narrow goals in order to fit the available military forces and technologies." WALZER, *supra* note 16, at 120. He argues that in assessing proportionality, it "is necessary to hold ends constant," but admits that this is difficult to do. *Id.*

¹²⁹ As Orend observes, "[j]udgments about the worth of desired ends, and the costs of the means of achieving those ends, are of the very essence of practical rationality." OREND, *supra* note 26, at 198.

jobs, or buying a car, or enlisting in the military, "What might happen if we do that?" Best that we do ask that, even though our forecasts are far from perfect.¹³⁰

D. *Last Resort*

The just war criterion of last resort expresses "the primacy of peace over war in just war thinking."¹³¹ It requires nations to assess "all means available to meet a particular threat," and to choose among "those deemed *sufficient* to do so [giving] a prefer-

¹³⁰ ALLEN, *supra* note 53, at 48.

¹³¹ COATES, *supra* note 4, at 189. See Lisa Sowle Cahill, *Christian Just War Tradition*, in TENSIONS AND DEVELOPMENT, IN THE RETURN OF THE JUST WAR 74, 78-79 (Aquino, et. al. eds., 2001). ("The presumption against war is suggested by St. Thomas' title of his discussion of war, 'Is it Always a Sin to Wage War?' The very prospect of war is introduced as an offense against Christian love, which is why it is taken up in his treatise on charity. His statement of the problem creates a strong presumption against going to war as a way to resolve social problems, for he implies that war is *usually* a sin.")

In 1983, the American Catholic Bishops wrote: "The Church's teaching on war and peace establishes a strong presumption against war which is binding on all; it then examines when this presumption may be overridden, precisely in the name of preserving the kind of peace which protects human dignity and human rights." *Id.* The bishops not only stress the presumption against war. They assert that it "stands at the beginning of just-war teaching." The U.S. Bishops' Pastoral Letter on War and Peace, *The Challenge of Peace: God's Promise and Our Response*, para. 70. (1983), available at <http://www.osjspm.org/cst/cp.htm>. During the debate on the war in Iraq, Weigel and other just war theorists who favored the war vigorously criticized the bishops for asserting that the just war tradition *begins* with a presumption against war, arguing that the just war tradition begins with a presumption not against war but in favor of justice – which may be advanced by war. See George Weigel, *Moral Clarity in a Time of War*, FIRST THINGS, Jan. 2003, at 20, 22-23.

It is abundantly clear that the just war tradition views war as something to be avoided – although not at all costs – and thus contains a rebuttable presumption against war. If there were no presumption against war, there would be no need for a theory to justify it under certain circumstances. Weigel himself had written earlier that "the presumption is always for peace, and the burden of moral reasoning lies with those who argue for the justness of a particular resort to war." GEORGE WEIGEL, *TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE* 37 (1987). Possibly the debate over whether this presumption lies at the beginning of just war theory reflects a conviction that the bishops and others who talk about the presumption against war as the starting point of just war theory give the presumption so much weight that it is in fact un rebuttable, thus turning just war theory into a closet form of pacifism.

ence [to] means other than war.”¹³² Put negatively, it requires that war be the “option least to be preferred.”¹³³

The last resort criterion does not mean that nations may have recourse to war only when no other possible alternative is available. Understood in that fashion, last resort would mean that war is never justified since one can never say that every alternative has already been tried.¹³⁴ Neither does the last resort criterion mean that nations may morally go to war only “as the terminal point of a lengthy series of nonmilitary alternatives.”¹³⁵ The criterion of last resort “requires a considered judgment about whether some imagined alternative has a good chance of avoiding war. It does not require that every idea actually be pursued to the end of the line.”¹³⁶ To express this idea, one author has proposed renaming the criterion and calling it the requirement to avoid the precipitate recourse to force.¹³⁷

In deciding whether to go to war or try some other alternative, nations will need to consider the potential costs of waiting. For example, it is clear in hindsight that Britain and France

¹³² See Roberts, *supra* note 1, at 83.

¹³³ Michael Quinlan, *The Just War Litmus Test*, THE TABLET, at http://thetablet.co.uk/cgi-bin/archive_db.cgi?tablet-00571 (last visited Feb. 4, 2005). As Coates puts it, “a just recourse to war should be marked by a sense of moral tragedy.” COATES, *supra* note 4, at 189. See John Paul II, Address to the Diplomatic Corps, Jan. 13, 2003, section 4. (war is always “a defeat for humanity,”) at http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030113_diplomatic-corps_en.html. Some authors suggest that the criterion of last resort applies only to the party that initiates the war. A country that has been invaded has, they say, an immediate right of armed resistance. See, e.g., John Lanagan, *The Just-War Theory after the Gulf War*, 53 THEOLOGICAL STUDIES 95, 98 (Mar. 1992). This approach seems to be based on an understanding of last resort as a chronological criterion.

¹³⁴ See OREND, *supra* note 26, at 194. In recent years, a number of avowed pacifists have criticized US actions on grounds that its resort to war was not the last resort. In the hands of a pacifist, however, last resort is a purely rhetorical weapon, since the pacifist believes that war is never justified. Within just war theory, war may be justified if it is the last resort in the sense explained above and the other just war criteria are satisfied. See COATES, *supra* note 4, at 194-95.

¹³⁵ Ramesh Ponnuru, *Just Carter*, NAT’L REVIEW, Mar. 10, 2003.

¹³⁶ ALLEN, *supra* note 53 at 39. See REGAN, *supra* note 9, at 64. (“Nations are not justified in resorting to war as long as they have reasonable hope that means short of war can prevent or rectify wrong . . . [Other means] may offer a reasonable alternative to war. The key word is reasonable, and [other means] will be a reasonable alternative to war only if nations wronged or about to be wronged have probable cause to believe that [the other means] will lead to the prevention or rectification of the wrong, not merely that [they] may do so.”)

¹³⁷ See OREND, *supra* note 54, at 195.

should have challenged Hitler much earlier than they did, and that doing so would have avoided or greatly lessened the scope and intensity of the ensuing war.¹³⁸ In our own time, many just war theorists consider that the probability that an opponent will acquire and eventually use weapons of mass destruction must be weighed in deciding whether further delay is appropriate.¹³⁹

It is also necessary to weigh not only the probability of success, but also the human costs of apparently non-violent alternatives to war, especially economic sanctions. Although economic sanctions do not involve the dramatic violence of war, they are a more subtle form of violence that may result in as many deaths as a war.¹⁴⁰

IV. *IUS IN BELLO*: THE JUST CONDUCT OF WAR

If something so horrible as a war is justified at all, it may seem counterintuitive to impose limits on what can be done to win it. General Sherman responded to the critics of his tactics of indiscriminate destruction in the course of his march to the sea: "If the people raise a howl about my barbarity and cruelty, I will answer war is war . . . War is cruelty, and you cannot refine it."¹⁴¹ Air Marshall Harris, who was responsible for Britain's bombing of German cities, adopted much the same tone in his own defense: "There was nothing to be ashamed of, except in the sense that everybody might be ashamed of the sort of thing that has to be done in every war, as of war itself."¹⁴² Yet the very fact that Sherman and Harris felt obliged to defend them-

¹³⁸ See COATES, *supra* note 4, at 190-92.

¹³⁹ See *supra* notes 83-85 and accompanying texts. See Roberts, *supra* note 1, at 87. (Discussing the potential costs of waiting until weapons of mass destruction have been acquired).

¹⁴⁰ See OREND, *supra* note 54, at 195. A recent UNICEF study concluded that "if the substantial reduction in child mortality throughout Iraq during the 1980s had continued through the 1990s, there would have been half a million fewer deaths of children under-five in the country as a whole during the eight year period 1991 to 1998." Press release, UNICEF Information Newslines: Iraq Survey Shows Humanitarian Emergency, U.N. Doc. CF/DOC/PR/1999/29 (Aug. 12, 1999), available at <http://www.unicef.org/newsline/99pr29.htm>. While not all the increased mortality of children and infants was due to economic sanctions, a significant proportion probably was.

¹⁴¹ See COATES, *supra* note 4, at 27.

¹⁴² See *id.*

selves against criticism testifies to a widespread sense that even in the midst of a war, moral restraints are called for. That sense underlies the just war tradition and has been enshrined in international law governing the conduct of war.¹⁴³

There are two principle restraints on how war may be waged: 1) the immunity of civilians from direct attack, and 2) the principle of proportionality. They will be discussed in subsections A and B.

A. *Civilian Immunity/Principle of Discrimination*

The most important limitation on the way in which war may be waged is usually referred to in just war theory as civilian immunity. In modern international law, it is known as the principle of discrimination. It prohibits direct attacks on civilians or, more exactly, on noncombatants.

When just war theory was taking shape in the Middle Ages, civilian immunity from direct attack was reflected in codes of chivalry and customary practices. It was based less on moral arguments than on the nature of warfare, which consisted at the time primarily of combat between heavily-armored mounted knights and their supporting infantry. There was little or no military advantage to be gained by attacking anyone other than the knights and their retainers, and anyone who did so was viewed as lacking in chivalry.¹⁴⁴

In the early modern period, when international law began to take shape as something distinct from theology and cannon law, civilian immunity continued to be based on the nature of warfare, which consisted at the time of struggles between professional armies who fought each other in wars of maneuver. Armies were typically isolated from the larger society, and the wars they fought were generally perceived as contests between

¹⁴³ The Hague Convention of 1907 states: "The right of belligerents to adopt means of injuring the enemy is not unlimited." Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, art. 22, 36 Stat 2277, T. S. 539, 1 Bevans 63. Half a century later, Protocol I to the Geneva Convention of 1949 reiterated the same idea in almost identical language: "In any armed conflict, the right of the Parties to the conflict to choose means or methods of warfare is not unlimited." Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of the Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 19.

¹⁴⁴ See O'Brien, *supra* note 79, at 143, 169; ADENEY, *supra* note 14, at 39.

princes rather than struggles between whole societies.¹⁴⁵ Under these conditions, there was little incentive to attack civilians.¹⁴⁶

All of this changed radically with the advent of modern total warfare, which mobilizes entire societies for war and draws on all available resources for struggles that are perceived as involving life or death issues for the entire country. Beginning with the wars of the French Revolution and proceeding through the American Civil War and World Wars I and II, the lines between combatants and noncombatants were blurred in practice. Military necessity – or simple military advantage – began to dictate attacking civilian populations on many occasions. Civilians could no longer rely on utilitarian considerations to protect them, and violations of civilian immunity became so frequent and so massive that they called into question the willingness, and even the ability, of nations involved in modern wars to spare the lives of noncombatants.

Some authors were led by these developments to assume that war could no longer be waged effectively without gross systematic violations of the rights of noncombatants.¹⁴⁷ This led them to conclude that modern war – at least on a large scale – cannot be waged justly and, therefore, to embrace *de facto* pacifism.¹⁴⁸

Despite the frequency and scale of attacks on civilians, the principle of civilian immunity continues to loom large both in just war theory and in international law. The theoretical argument in favor of civilian immunity is simple and straightforward. It rests squarely on the principle that it is never permissible directly to kill or do violence to the innocent. In the context of just war theory, the relevant sense of innocence is “not involved in doing violence to others.” Combatants may be justly killed, because they are doing violence to others, or at least are directly involved in the apparatus which makes it possible for one country to do violence to another.¹⁴⁹ But, as Murphy puts it, one must

¹⁴⁵ See GEOFFREY BEST, HUMANITY IN WARFARE 53-67 (1980).

¹⁴⁶ See O'Brien, *supra* note 79, at 43.

¹⁴⁷ See COATES, *supra* note 4, at 236.

¹⁴⁸ See *id.*

¹⁴⁹ See *supra* notes 4-20 and accompanying text.

confine one's hostility to those against whom one is defending oneself, i.e. those in the (both causal and logical) chain of command or responsibility or agency – all those who can reasonably be regarded as engaged in an attempt to destroy you. If one does not do this, then one cannot be said merely to be defending oneself. And insofar as one is not defending oneself, then one acts immorally in killing one's fellow human beings.¹⁵⁰

Just war theorists agree that even under conditions of modern warfare, there are people who should be considered noncombatants. At a minimum, infants, the elderly, and people who spend their time caring for them, are excluded from the category of those against whom a society may defend itself because they are engaged in attacking it. A decrepit old man may write letters that help keep up the morale of his grandson in the army, but just war theorists reject the contention that his connection with the war effort is sufficiently close to make him a legitimate object of direct attack.¹⁵¹

This is not to say that combatants are limited to those who carry weapons or even to those in uniform. "Civilians can be combatants as well as soldiers, not in the sense that they engage in actual fighting, but in the sense that they provide the means and instruments of combat."¹⁵² Munitions workers and civilians, who perform tasks like transporting war material that soldiers would otherwise have to perform, qualify as combatants.¹⁵³

What about the farmer who grows crops, some of which are used to feed soldiers? Regan argues that it is legitimate to attack workers producing any type of supplies for the army, even

¹⁵⁰ See Murphy *supra* note 6, at 350, *The Killing of the Innocent, in WAR, MORALITY, AND THE MILITARY PROFESSION* 341, 350 (1986). Nagel expresses the same idea from a slightly different perspective. Hostile treatment of a person can only be justified, he says, in terms of "something about that person which makes the hostile treatment appropriate. Hostility is a personal relation, and it must be suited to its target. One consequence of this condition will be that certain persons may not be subjected to hostile treatment in war at all, since nothing about them justifies such treatment." Thomas Nagel, *War and Massacre, in WAR AND MORAL RESPONSIBILITY* 3, 13 (Thomas Nagel, et al. eds., 1974). See also Regan *supra* note 9, at 87 ("Enemy nationals not engaged in the war or contributing to waging it are committing no wrong against the victim nation, and so the victim nation has no just cause to target such nationals.").

¹⁵¹ See, e.g., REGAN, *supra* note 9, at 91.

¹⁵² See COATES, *supra* note 4, at 237.

¹⁵³ See, e.g., *id.*

if they are ordinary items of consumption such as food, but not those who produce the same items for civilian consumption.¹⁵⁴ Although the distinction might be workable in some cases—a facility producing Meals Ready to Eat for the Army and a facility producing baby food—in other cases it would seem quite unworkable: which farmer's grain will be consumed by soldiers and which by infants?

Most authors adopt a different approach, arguing that those whose activities merely support life and existence, providing items which would be needed whether the society was at war or not, should be considered innocent noncombatants who may not be directly attacked.¹⁵⁵ Murphy makes the following argument:

The enemy can plausibly be expanded to include all those who are "criminal accomplices" But it cannot be expanded to include all those who, like farmers, merely perform actions causally necessary for the attack—just as in domestic law I cannot plead self-defense if I kill the one (e. g. the wife or mother) who feeds the man who is engaged in an attempt to kill me.¹⁵⁶

Just war theorists disagree in their assessment of where to draw the line between combatants and noncombatants, but they agree that the deliberate targeting of noncombatants is immoral. They also agree that certain acts intrinsically involve

¹⁵⁴ See REGAN, *supra* note 9, at 90.

¹⁵⁵ See, e.g., ANSCOMBE, *supra* note 18, at 53; Allen, *supra* note 55, at 44 ("Non-combatants include all those whose roles are to serve the needs of the person as person, rather than the needs of military actions as such Bakers who deliver food to an army are noncombatants, because people must eat whether they are in uniform or not.").

¹⁵⁶ See Murphy, *supra* note 6, at 350. Walzer articulates this position in the following terms: "The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight, and those who make what they need to live, like all the rest of us." See WALZER, *supra* note 16, at 146. Some authors sympathetic to revolutionary movements expand the range of legitimate targets to include virtually the entire population that does not support the revolution. Charles Curran, for instance, supports civilian immunity in inter-state conflicts. He believes that modern conventional warfare between states is at least *prima facie* immoral because of the frequency with which it violates civilian immunity. See COATES, *supra* note 4, at 132 (citing CURRAN, POLITICS, MEDICINE AND CHRISTIAN ETHICS 124 (1973)). In revolutionary situations, however, he condones attacks on peaceable civilians, which he justifies on grounds that their involvement in supporting and benefiting from unjust social structures involves "structural violence and makes them "truly combatants" subject to attack. *Id.* at 133.

direct attacks on noncombatants, even though the attackers may regret injuring the noncombatants. Thus, for example, if a sniper is barricaded in a house with a number of children, a decision to blow up the house could not be justified on grounds that the foreseeable deaths of the children were merely regrettable unintended consequences of an act designed to eliminate the sniper. One might legitimately call in a sharpshooter to attempt to shoot the sniper, even though there is some danger that some of the children may be killed or injured, but blowing up the building is an indiscriminate attack on the children as well as the sniper.¹⁵⁷ Similarly, the destruction of entire cities – Dresden, Tokyo, Hiroshima – involves the deliberate killing of many who must be considered noncombatants if that term is to retain any meaning.¹⁵⁸

The fact that just war theorists agree on these points, however, does not mean that there is a consensus over whether such actions can ever be justified. Positions on saturation bombing of cities and similar tactics depend on whether the person making the judgment considers the prohibition against killing noncombatants an absolute moral norm whose violation can never be justified, or rather holds that it reflects an important value which must be given great weight in our deliberations, but which must on occasion give way to other values. Those who think that the prohibition against deliberate targeting of noncombatants is absolute and admits no exceptions, conclude that the deliberate destruction of cities is murder, no matter what

¹⁵⁷ See Johnson, *supra* note 70, at 363.

¹⁵⁸ Ford argues, for instance, that in the obliteration bombing of German cities during World War II, the military targets the cities contained were “destroyed incidentally, as part of a great civil disaster, rather than vice versa. It is a case of the good effect coming with or better after and on account of the evil, instead of a case where the evil is incidental to the attainment of the good.” John C. Ford, S.J., *The Morality of Obliteration Bombing*, in *WAR IN THE TWENTIETH CENTURY: SOURCES IN THEOLOGICAL ETHICS* 138, 159 (Richard B. Miller ed., 1992). See also G.E.M. Anscombe, *The Justice of the Present War Examined*, in *WAR IN THE TWENTIETH CENTURY: SOURCES IN THEOLOGICAL ETHICS* 125 (Richard B. Miller ed., 1992), 134 (“it is a different thing, while making one group of persons a target, to kill others by accident, and to make a group of persons a target, in order – by attacking them all – to attack some members of the group who are persons who may legitimately be attacked. [. . .] The second involves murder and is not an example of double effect.”).

the circumstances.¹⁵⁹ Those who hold that the protection of innocent human life is only one value—albeit an extraordinarily important and basic one—weigh the values at stake in each case and form their opinion accordingly,¹⁶⁰ rejecting deliberate attacks on the civilian population in some cases, but justifying them in others.

Individual theorists' position on the status of the prohibition against killing innocent human beings generally reflects their views on the basic moral question of whether there are any actions that are always and everywhere wrong.¹⁶¹ That question far exceeds the scope of this essay but it is important to be aware that it explicitly or implicitly underlies much of the discussion of noncombatant immunity and more generally of the norms governing the conduct of war.¹⁶²

¹⁵⁹ See, e.g., PHILLIPS, *supra* note 45, at 63-67; COATES, *supra* note 4, 259-63; McKEOGH, *supra* note 20 at 87-90; DONAGAN, *supra* note 14, at 156-57; Anscombe, *supra* note 53, at 240. ANSCOMBE's position is all the more striking in that she defended it publicly in England during World War II despite intense public pressure to support Britain's war against Germany war and despite her own moral repugnance for Nazi Germany.

¹⁶⁰ See, e.g., O'Brien, *supra* note 79, at 44-50; TUCKER, *supra* note 44, at 88-92 (1960) (arguing that the aims sought in a war determine what means are permissible. Atomic bombing of Hiroshima and Nagasaki cannot "be criticized on moral grounds, if the purpose of unconditional surrender is once sanctioned." *Id.* at 91, n.83); James P. Sterba, *Reconciling Pacifists and Just War Theorists*, in JUST WAR, NONVIOLENCE AND NUCLEAR DETERRENCE: PHILOSOPHERS on War and Peace 35 (Duane L. Cady & Werner Richard eds., 1991); Thomas Nagel, *War and Massacre*, in WAR AND MORAL RESPONSIBILITY 3 at 16-17 (Marshall Cohen, et. al. eds, 1974).

¹⁶¹ See REGAN, *supra* note 9, at 92.

¹⁶² Perhaps the most interesting defense from a natural law and Christian perspective of the existence of absolute moral prohibitions is John Paul II's encyclical *Veritatis splendor*. John Paul II, *Veritatis splendor* (Aug. 6, 1993) available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html. See also, CHARLES E. RICE, FIFTY QUESTIONS ON NATURAL LAW (1999). Immanuel Kant's deontological ethics offer a somewhat different path to the conclusion that there are acts which we may not perform no matter how good the consequences they may bring. See IMMANUEL KANT, KRIK DER PRAKTISCHEN VERNUNFT [Critique of Practical Reason] (Mary J. Gregor ed., Cambridge University Press 1997) (1788). The conclusion that there are no absolute moral prohibitions, most frequently responds to a consequentialist ethic which holds that the moral character of an act comes not from the properties of the act itself but from the consequences it produces. The classical citation for this position is JOHN STUART MILL, UTILITARIANISM (George Sher, ed., 2001). Mill's theory in its original formulation has been subjected to intense criticism. A well-balanced discussion of the criticisms and of attempts to respond to them in JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY, 90-103 (1986).

Although the number and severity of the violations committed by many countries during World War II led some commentators to conclude, in the aftermath of the war, that the principle of discrimination had disappeared from international law,¹⁶³ since the mid-1960's the international community has strongly reaffirmed its adhesion to the principle.

In 1968, the UN General Assembly voted 111 to 0 in favor of a resolution affirming the principle of discrimination.¹⁶⁴ The principle also forms the nucleus of the 1977 document known to international lawyers and other specialists in the law of warfare as Protocol I.¹⁶⁵ This addition to the Geneva Convention has been ratified by 161 of the 191 members of the United Nations, although not by the United States.¹⁶⁶

¹⁶³ Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 401 (1993) (citing CHARLES G. FENWICK, INTERNATIONAL LAW 550-551 (4th ed. 1965) and Lester Nurick, *The Distinction between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680 (1945)).

¹⁶⁴ G.A. Res. 2444, U.N. GAOR, 23rd Sess., Supp. No. 18, at 164, U.N. Doc. U.N. Doc. A/7128 (1968). reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 264 (D. Schindler & J. Toman rev. 3d eds, 1988). The resolution provides "(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

¹⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144 (1977), 1125 U.N.T.S. 21 [hereinafter, Protocol Additional]. In order to insure "respect for and protection of the civilian population and civilian objects," the Protocol Additional requires the Parties to "distinguish between the civilian population and combatants" and to "direct their operations only against military objectives." Protocol Additional, art. 48, *supra* note 165. The Protocol declares that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." *Id.* More explicitly, it forbids "acts or threats of violence the primary purpose of which is to spread terror among the civilian population." *Id.* In addition, it prohibits "indiscriminate attacks," a category which includes attacks not directed against a specific military objective, those which use means that cannot be directed at specific military objectives, and those which "strike military objectives and civilians or civilian objects without distinction." *Id.* art. 51, para. 4. Descending to greater detail, the Protocol proscribes as indiscriminate any "attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects." *Id.* art. 51, para. 5.

¹⁶⁶ See International Committee of the Red Cross, "States party to the main treaties" (includes Geneva Conventions and their Additional Protocols), at <http://>

Neither civilian immunity nor the principle of discrimination is a prohibition of all injury to or killing of civilians. If they were, there could be no just war because noncombatants will inevitably be killed in any war.¹⁶⁷ Both just war theory and international law permit the indirect killing of civilians—what we now refer to with the distastefully sterile term “collateral damage”—subject to the limitations of proportionality which will be discussed in the next subsection.

B. *Proportionality*

We have already seen that a reasonable proportion between the goals sought through war and the physical and moral evils war will bring with it is a factor that must be weighed in deciding whether a country may justly resort to war.¹⁶⁸ Just war theorist return to the theme of proportionality in discussing how war may be waged justly: in any given action, one must refrain from causing harm that is disproportionate to the objective of that action.

[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf). Other non-signatories include India, Indonesia, Iran, Iraq, Israel, Pakistan, Singapore, and Turkey as well as 21 smaller countries.

¹⁶⁷ Many just war theorists simply take for granted that some civilians may justly be killed provided they are not directly targeted. Those just war theorists who ask why this is permissible generally have recourse to some form of the principle of double effect. Double effect is a general moral principle or method of analysis. It applies not only to war but to a broad range of situations in which the pursuit of a good result leads to undesired consequences which would be morally reprehensible if the actor deliberately aimed to produce them. The principle of double effect holds that one may perform an action which has some foreseen evil consequences provided that four conditions are met: 1) the action one performs must be in itself morally good or at least morally neutral; 2) the actor must intend the morally good consequences, not the evil ones; 3) the morally evil effect may not be the means of achieving the good effect; and 4) the morally good effect should outweigh the morally evil effect. An overview of the principle of double effect can be found in NEW CATHOLIC ENCYCLOPEDIA vol. 4, p. 880 (2nd ed. 2002). See also, Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527 (1980); J. MANGAN, AN HISTORICAL ANALYSIS OF THE PRINCIPLE OF DOUBLE EFFECT, THEOLOGICAL STUDIES 40, 61 (1949). For a critique of the principle, especially as applied to war, see HOLMES, *supra* note 8, at 193-203 (1989). For a reply to Holmes's critique see Mark Vorobej, *Double Effect and the Killing of Innocents*, in JUST WAR, NONVIOLENCE AND NUCLEAR DETERRENCE: PHILOSOPHERS ON WAR AND PEACE 25 (Duane L. Cady & Werner Richard eds., 1991).

¹⁶⁸ See *supra* notes 120-130 and accompanying text.

In bello proportionality requires that "only minimum force consistent with the aim be used."¹⁶⁹ In assessing the costs of a particular operation, just war theory requires combatants not simply to minimize costs to their own forces but rather to try to achieve their objectives with the least destruction possible for all concerned.¹⁷⁰ In fact, just war theorists generally require armies to accept some increased risk to themselves in order to reduce the number of civilian casualties.¹⁷¹

In addition, proportionality requires asking whether the immediate objective being sought (for example, capturing a particular enemy position) is sufficiently important to justify tactics that will cause a given amount of death and destruction.¹⁷² In the view of those authors who view the prohibition against direct attacks on civilians as absolute,¹⁷³ *in bello* proportionality comes into play only once the principle of discrimination has been applied. If an action is prohibited altogether, there is no room for asking whether the evil effects it produces are outweighed by its good effects. "As one does not rightly ask how many people it is proportionate to torture, so one does not ask whether it is proportionate to attack a schoolyard full of children. Discrimination prohibits doing those things at all."¹⁷⁴

¹⁶⁹ See Roberts, *supra* note 1, at 88.

¹⁷⁰ See ALLEN, *supra* note 53 at 47.

¹⁷¹ See, e.g., WALZER, *supra* note 16, at 153-55; Jean Bethke Elshtain, *Conference: The Third Annual Grotius Lecture: Just War and Humanitarian Intervention*, 17 AM. U. INT'L L. REV. 1, Apr. 6, 2000. Not surprisingly, this aspect of just war theory has at times met with a hostile reception. The Israeli philosopher Assa Casher, for instance denies that there is any obligation to endanger the lives of soldiers to save enemy lives. See GROSS, TERRORISM; NON-COMBATANTS; CIVILIANS; INTERNATIONAL LAW at 473 (citing ASSA CAHSEER, ETIKA TZAVIT MILITARY ETHICS 158 (1996), cited in. The Commanding General of the United States Strategic Air Command testifying before a Congressional Committee in the 1960s said: "I get a little indignant with people who become very lofty in their thinking and do not want to kill a few of the enemy but would gladly risk additional American lives. My crews are more important to me than the enemy." House Subcommittee of the Committee on Appropriations Hearings, Department of Defense Appropriations 1960 (86th Cong., 1st Sess.) Part II, p. 388. Quoted in ROBERT TUCKER, THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE 88 (1960). Current American doctrine with its heavy stress on reducing American casualties seems to turn the traditional position on its head, transforming it into one of combatant immunity. See Elshtain, Grotius Lecture at 6.

¹⁷² See O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 38-42 (1981)

¹⁷³ See *supra* notes 159-162 and accompanying text.

¹⁷⁴ ALLEN, *supra* note 53, at 47. Cf. Michael Quinlan, *supra* note 133 (distinguishing the principle of discrimination and the principle of proportionality);

Since the middle of the 19th century, stress has been placed on avoiding unnecessary suffering of combatants. The movement to ban weapons that cause unnecessary suffering met with its first success in the St. Petersburg Declaration of 1868. The signatories to the declaration agreed "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."¹⁷⁵ Since this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their deaths inevitable,¹⁷⁶ they declared that the use of such arms would be "contrary to the laws of humanity."¹⁷⁷ Specifically, they renounced the use of small projectiles "which are explosive or charged with fulminating or inflammable substances."¹⁷⁸

The century and a half since the St. Peterburg Declaration has witnessed considerable development in the area of both customary and conventional international law reflecting the prohibition against causing unnecessary suffering. Among the most recent developments are the 1997 Ottawa Landmines Treaty,¹⁷⁹ signed by more than 140 countries and ratified by more than 120 (although not the United States), and the 1980 United Nations Convention on Certain Conventional Weapons,¹⁸⁰ whose four protocols deal with blinding lasers,¹⁸¹ incendiary weapons,¹⁸² landmines and booby-traps,¹⁸³ and weapons that injure with glass fragments or other substances that cannot be seen with x-rays, making the treatment of wounds exceptionally difficult.¹⁸⁴ These treaties banning certain weapons, whatever

JAMES TURNER JOHNSON, *CAN MODERN WAR BE JUST?* 59 (1984). (Applying the distinction between the principle of discrimination and the principle of proportionality to Israel's attacks on Lebanon).

¹⁷⁵ D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 102 (1988).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and On Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507

¹⁸⁰ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 19 I.L.M. 1524, (1980).

¹⁸¹ *Id.* at Protocol IV

¹⁸² *Id.* at Protocol III

¹⁸³ *Id.* at Protocol II

¹⁸⁴ *Id.* at Protocol I

their limitations and defects, bear witness to the belief of the international community that nations should show restraint in warfare and that not everything that can be done may be done.

Beginning with the Spanish Civil War (1936-39), the development of aerial bombardment made increasingly urgent not only the question of direct deliberate bombing of civilian targets, which we have already discussed,¹⁸⁵ but also the issue of acceptable levels of civilian casualties in attacks on legitimate military targets.¹⁸⁶ This concern is reflected in Article 35 of Protocol I Additional to the Geneva Convention. After setting forth the general principle that there are limits on the means that may legitimately be used in war,¹⁸⁷ the Protocol prohibits the employment of "methods of warfare of a nature to cause superfluous injury or unnecessary suffering."¹⁸⁸ In addition to prohibiting deliberate targeting of civilians, the Protocol requires belligerents to avoid civilian casualties that are disproportionate to the military objectives being sought. Specifically, it prohibits as indiscriminate "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."¹⁸⁹

Application of the principle of *in bello* proportionality requires judgment and prudence. Even if all the facts were known beforehand, it would be difficult to weigh casualties against the value of a military objective. The difficulty is compounded by the fact that decisions must often be made under battlefield conditions, with severely limited information. Proportionality does, however, provide a guide to decision-making and certain actions will clearly violate its precepts.

¹⁸⁵ See *supra* notes 159-162 and accompanying text.

¹⁸⁶ Article 51, Paragraph. 5 of Protocol Additional, for example, prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantages anticipated." Protocol Additional, *supra* note 165, art. 51, para. 5.

¹⁸⁷ Protocol Additional, *supra* note 165 at art. 35.

¹⁸⁸ *Id.* art. 35, para. 2.

¹⁸⁹ *Id.* art. 51, para. 5.

C. *In bello* Restraints and Military Necessity

International law acknowledges that the imperative of winning the war or the battle may justify attacks on legitimate military targets despite their consequences for civilians and civilian objects.¹⁹⁰ This doctrine of military necessity¹⁹¹ has come to play an important role in modern just war theory. In the view of some authors, military necessity reduces the *in bello*

¹⁹⁰ See Francoise Hampson, *Military Necessity*, in CRIMES OF WAR, WHAT THE PUBLIC SHOULD KNOW 251-252 (Roy Gutman & David Rieff, eds., 1999).

¹⁹¹ As first introduced by the Lieber Code, the concept of military necessity was designed to limit the tactics used in war. The Lieber Code defines military necessity as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." General Order 100, Instructions for the Government of Armies of the United States in the Field, generally known as the Lieber Code, U.S. War Department, General Orders No. 100, Apr. 24, 1863, art. 37 [Lieber Code], reprinted in *The Laws of Armed Conflicts* 3 (3rd rev. ed., Dietrich Schindler & Jiri Toman eds., 1988). This definition excludes the use not only of unlawful means but also of violence which is not "indispensable for securing the ends of the war." *Id.* The Lieber Code's treatment of military necessity incorporates indirectly the concept of civilian immunity. In fact, according to the Code, military necessity "admits of all direct destruction of life or limb of armed enemies," *Id.* but killing and maiming of other persons is permitted only if their destruction "is incidentally unavoidable in the armed contests of war." *Id.* art. 15. By implication, civilians may not be directly targeted and commanders must strive to avoid all injury to civilians which is not unavoidable. The Code explicitly states that military necessity does not justify torture, the use of poison, or the "wanton devastation of a district," (*Id.* art. 16) because "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God." *Id.* art. 15. For further discussion of the Lieber Code, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

Recent United States military doctrine reflects this conception of military necessity. For instance, a military manual published in the mid 1970s, Air Force Publication 110-31, defines military necessity as "the principle which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditure of economic and human resources. Department of the Air Force, Air Force Pamphlet 110-31, *International Law—The Conduct of Armed Conflict and Air Operations* 1-5-6. C (1976) (reported obsolete on the Air Force e-publications site at http://www.e-publishing.af.mil/pubs/obsolete_search.asp?Keyword=110-31). The authors of AFP 110-31 break down this definition into four basic elements: "(i) that the force used is capable of being and is in fact regulated by the user; (ii) that the use of force is necessary to achieve as quickly as possible the partial or complete submission of the adversary; (iii) that the force used is no greater in effect on the enemy's personnel or property than needed to achieve his prompt submission (economy of force); and (iv) that the force used is not otherwise prohibited." *Id.* at 1-6.

restraints to mere aspirations that can be ignored whenever necessary to achieve military objectives, or at least whenever required to achieve ultimate victory.¹⁹² There can be no doubt that recently, nations have frequently ignored the *in bello* conditions when they felt that military success required them to do so.¹⁹³ Taylor may be correct in saying that as a matter of law, when both sides in a conflict feel the need to ignore certain *in bello* conditions, those conditions will not be enforced even against the eventual loser—and thus cease in some sense to have the effect of law.¹⁹⁴

It remains true, however, that positive international law does not view military necessity as justifying any and all violations of the rules of warfare. Protocol I of the Geneva Convention, for instance, recognizes that military necessity may justify not observing certain minor prohibitions, including the prohibi-

¹⁹² See, e.g., Richard Wasserstrom, *The Laws of War*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 451, 455 (Malham M. Wakin ed., 1979); TUCKER, *supra* note 44, at 90-93; HOLMES, *supra* note 8, at 101-106 (1989). In general, this position rests ultimately on the belief that there are no actions which are always and everywhere wrong. See *supra* note 150 and accompanying text.

¹⁹³ To take just a few examples, both the allies and Germany targeted the civilian population of cities during World War II, and the United States dropped atomic bombs on Hiroshima and Nagasaki to break the resistance of the Japanese people. More recently, the United States' Christmas bombing of Hanoi appears to have been aimed not at destroying military targets but at forcing a political decision to negotiate. During the first Gulf War, Iraq launched Scud missiles against civilian targets, and recent wars in Africa have witnessed numerous cases of atrocities committed against civilians.

¹⁹⁴ See Telford Taylor, *War Crimes*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 426 (Malham M. Wakin, ed. 1979). (When the laws of war are violated because of military necessity, "no military or other court has been called upon, so far as I am aware, to declare such killings a war crime.") Taylor's focus is primarily legal rather than moral. Submarine warfare during World War II provides a striking example of this phenomenon. Article 22 of the Treaty for the Limitation and Reduction of Naval Armament (London Naval Treaty of 1930) among the United Kingdom, France, Italy, Japan, and the United States recognized that international law prohibited sinking merchant ships until their crews and passengers had been put in a safe place, which the treaty specified meant something more than in a lifeboat. Application of this prohibition would have made it impossible to use submarines against merchant ships. During World War II, rather than forego submarine attacks on merchant vessels, the signatories as well as other countries chose to ignore this provision of international law. See Holmes, *supra* note 8, at 108 (citing Taylor, *id.* at 375).

tion against interfering with the activities of relief personnel¹⁹⁵ and civil defense units.¹⁹⁶ However, it makes no exception for military necessity in the case of the majority of its most important provisions, including the prohibition against direct targeting of civilian populations and indiscriminate attacks.¹⁹⁷ Even more explicitly, the Protocol prohibits murder, torture, the taking of hostages, and collective punishments "at any time and in any place whatsoever."¹⁹⁸

D. *In bello* Restraints and Supreme Emergencies

Even if military necessity does not always or even normally justify violating the *in bello* restraints, Michael Walzer argues that it does, in what he has described as "supreme emergencies." Walzer argues vigorously that a just cause does not normally justify violating the laws of war.¹⁹⁹ Wars do not always involve ultimate values, and in wars that do not, even those who have justice on their side must be prepared to accept defeat rather than resort to unjust means.²⁰⁰

Nonetheless, he contends that it is appropriate to resort to unjust means when two conditions are met. First, there must be no other means available to avert disaster. If victory can be obtained by other means, even though it will be slower and more costly, those means must be employed.²⁰¹ Second, what is at stake must be "the survival and freedom of political commu-

¹⁹⁵ Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of the Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, U.N. Doc. A/32/144 Annex 1. Art. 71.

¹⁹⁶ *Id.* art. 68.

¹⁹⁷ *Id.* art. 51.

¹⁹⁸ *Id.* art. 75. This position is reflected in the writings of some modern commentators. Hampson, for instance, states that "military necessity cannot justify violation of the other rules of IHL [International Humanitarian Law]." François Hampson, *Military Necessity*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 251-252 (Roy Gutman and David Rieff, eds., 1999).

¹⁹⁹ See WALZER, *supra* note 16, at 252.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 261-262 (1977). Walzer finds that in the early years of World War II this condition was met. England, he argues, could not avert defeat except by indiscriminate attacks on German cities. See *id.* at 258-60. From 1942 to 1945, however, he believes this condition was no longer met and therefore British bombing of Dresden and other German cities in the latter days of the war was not justified. See *id.* at 261-62. Similarly, Walzer condemns the atom bombing of Hiroshima and Nagasaki. See *id.* at 263-68.

nities whose members share a way of life, developed by their ancestors, to be passed on to their children."²⁰²

Walzer argues primarily from the case of British resistance to Nazi Germany. He describes Nazism as "an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful."²⁰³ He clearly states, however, that any threat to the "survival and freedom of political communities" is sufficient to constitute a supreme emergency, even if the threat does not come from an enemy like Nazi Germany.²⁰⁴

Authors who believe that there are absolute moral prohibitions²⁰⁵ reject Walzer's position on grounds that no situation, no matter how dire, can justify acts like deliberately targeting civilians.²⁰⁶ Walzer does not argue that a supreme emergency justifies direct attacks on civilians or other infractions of the *in bello* limitations on combatants. Such infractions, he says, still violate the rights of their victims and thus remain immoral.²⁰⁷ Nonetheless, he believes statesmen and soldiers, in some sense, must commit them.²⁰⁸

²⁰² *Id.* at 254.

²⁰³ *Id.* at 253. He goes on to say, "We see it – and I don't use the phrase lightly – as evil objectified in the world." *Id.*

²⁰⁴ *Id.* at 254. Walzer's position has won support from John Rawls. See John Rawls, *Fifty Years After Hiroshima*, in JOHN RAWLS: COLLECTED PAPERS 565, 567 (Samuel Freeman ed., 1999) (civilians "can never be attacked directly except in times of supreme crisis."). Others have also adopted Walzer's position. See, e.g., JOHNSON, *supra* note 174, at 187 (supreme emergencies are "cases in which high values may . . . be preserved only at the cost of actions which temporarily themselves transgress those very values."); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions pertain to a War Waged by a Democratic State against Terrorism* 16 EMORY INT'L L. REV. 445, 481 (2002); Nagel, *supra* note 160, at 4-6, 16-17 (Marshall Cohen, et. al. eds, 1974). (There may be situations so extreme that one has no choice to do something terrible.)

²⁰⁵ See *supra* note 159.

²⁰⁶ See, e.g., Phillips, *supra* note 45, at 63-70.

²⁰⁷ See Walzer, *Political Action: The Problem of Dirty Hands*, in WAR AND MORAL RESPONSIBILITY 62, 68-70 (Marshall Cohen, Thomas Nagel, and Thomas Scanlon ed., 1974).

²⁰⁸ See *id.* at 254. ("Can soldier and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry. What choice do they have? They might sacrifice themselves in order to uphold the moral law, but they cannot sacrifice their countrymen. Faced with some ultimate horror, their

Walzer appears to be attempting to hold onto an absolutist moral position without being willing to accept all of its consequences. Nagel criticizes as "incoherent" the notion that "one might sacrifice one's moral integrity justifiably, in the service of a sufficiently worthy end."²⁰⁹ "If," he says, "one were justified in making such a sacrifice (or even morally required to make it), then one would not be sacrificing one's moral integrity by adopting that course: one would be preserving it."²¹⁰

V. CONCLUSION

The just war tradition rejects both the pacifist contention that war is always immoral and the realist contention that war stands outside the confines of moral judgment. It sees war as a human activity and therefore as subject to moral scrutiny. Moreover, it sees war as an instrument that statesmen can use under appropriate circumstances in the pursuit of justice.

Theoretical differences among contemporary strands of just war theory respond in most cases to differing judgments about issues that do not themselves fall within the purview of just war theory.

Differing stances over *ius ad bellum* issues within the just war tradition seem to respond in large part to differing assessments of the current state of the international system and of the direction of its probable and desired evolution. In fact, those within the just war tradition who assert that war can be justified only in cases of defense against active armed aggression generally mean that defense is the only justification for an individual country's resort to war. They are normally willing to admit that the United Nations – or perhaps a sufficiently broad and diverse coalition of states – is justified in using armed force

options exhausted, they will do what they must to save their own people. That is not to say that their decision is inevitable (I have no way of knowing that), but the sense of obligation and moral urgency they are likely to feel at such a time is so overwhelming that a different outcome is hard to imagine.")

In Walzer's thought, this position rests on a broader conviction that political actors must sometimes choose to do evil for the welfare of the society. When the right thing to do (in utilitarian terms) is morally wrong, national leaders may be required to do moral wrong in order to fulfill their obligations. See Walzer *supra* note 207 at 66.

²⁰⁹ Nagel, *supra* note 160, at 12.

²¹⁰ *Id.* at 12-13.

in a broader set of circumstances, including severe humanitarian crises. Their differences with those who believe that individual states are justified in declaring war in a wider range of circumstances respond less to differing assessments of what causes are sufficiently grave to justify war than to differing assessments of the desirability, probability and urgency of the development of a true supra-national authority. Similarly, recent debates within the just war tradition over the permissibility of preemptive actions against so-called "rogue states" seem to reflect not so much differences over the factors to be taken into account in determining when preventive actions are justified as differences over the role of the United States in the current international system.

Differences over *ius in bello* issues also depend on factors that lie outside the scope of just war theory, but here, the crucial differences involve not assessments of the state of the international system but rather fundamental moral theories. In fact, the status of the *ius in bello* restraints depends directly on whether one adopts an absolutist or consequentialist point of view in moral theory. For consequentialists, for example, civilian immunity is a weighty factor, but it does not amount to an absolute prohibition. In their view, when the stakes are high enough, direct attacks on civilians can be morally justified and may even be required. By contrast, moral absolutists treat civilian immunity as a flat prohibition; such attacks can never be justified no matter how great the benefits they bring with them.

For those who are looking for simple apodictic answers to the question of whether a particular war is just or not, these features of the just war tradition will prove disappointing. This is not, however, a valid criticism of the just war tradition. Questions as complex as those raised by the just war tradition rarely if ever admit irrefutably true answers and are never independent of our stance on broader questions. What we can expect from the just war tradition is not simple answers but a set of questions to guide us in making prudential judgments.