

Jus Ad Bellum After 9/11: A State of the Art Report

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Introduction

In the aftermath of the September 11, 2001 attacks on the World Trade Center and Pentagon (9/11), the U.S. government declared that it would take the lead in waging a new “Global War on Terrorism” (GWOT). The official policy guiding this war, widely known as the “Bush Doctrine,” announced that no distinction would be made between terrorists and the “rogue states” that sponsor or harbor them.¹ Hence, a new form of world war has commenced which seeks not only to interdict the activities of transnational sub-state terrorist networks, but also to conquer and reconstruct at least some of the terrorist-affiliated states that the U.S. has designated as belonging to an “Axis of Evil.”² The wars that have since ensued in the name of counter-terrorism and humanitarian/democratic regime change have ignited an explosion of interest in just war theory (JWT). The purpose of this essay is to describe the patterns of JWT that have unfolded in the nascent post-9/11 era, and to assess how well just war theorists have so far addressed the issues raised by new modalities of counter-terrorism warfare. By focusing on a GWOT that hinges upon American power, and by drawing largely upon Anglo-American theoretical discourse, I shall be neglecting numerous questions and various modes of just war thinking that are of singular importance in other contexts. In particular, I shall neglect, as much of the recent literature has largely neglected, the special ways in which issues of just cause and right authority tend to play out in all-too-numerous domestic civil war contexts. Also, by addressing the notion of humanitarian intervention only from a counter-terrorism tangent, I shall neglect much of the full breadth and complexity of related issues. But a narrower focus on modes of JWT

¹ White House, *National Security Strategy*, September 2002, p. 5. Downloadable as of 6/6/07 from <http://www.whitehouse.gov/nsc/nss.pdf>.

² U.S. President George W. Bush, White House, “State of the Union Address,” January 29, 2002. Downloadable as of 6/6/07 from <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>

that have arisen in direct response to 9/11, however limiting, may at least have the advantage of shedding some light on a constellation of related problems, which, if not truly hegemonic, at least currently occupies global center stage.

Just war theorists have traditionally concerned themselves with questions about ethical grounds for going to war in the first place (*jus ad bellum*), questions about ethical conduct in the course of battle (*jus in bello*), and questions about the ethics of post-conflict settlements (*jus post bellum*). I shall focus here on the first class of questions, paying special attention to how *jus ad bellum* principles of just cause, discrimination, necessity and proportionality apply to the very idea of a just GWOT, and to the kinds of interstate wars that have recently been heralded as worthy of this mantle. Although I shall offer my own dovish critical comments along the way, my primary aim is not so much to provide decisive answers as to give adequate formulations of the salient questions and to point out neglected areas of theoretical discussion.

A few words about the general nature of the discourse of JWT are warranted at the outset in order to warn against certain standard simplifications, and in order to atone in advance for the heuristic simplifications that I shall introduce here. Broadly conceived, JWT is not a firmly established set of conventional criteria that can be applied mechanically to every conceivable instance of armed conflict. As Jean Bethke Elshtain has recently noted, “the just war tradition does *not* present a series of boxes to check, and, should you get more than a given number, then war it is.”³ Instead, JWT is the discursive practice of systematic public reflection and argument about how best to distinguish between ethically justifiable and unjustifiable warfare.⁴ In this broad sense, it includes a wide array of approaches to the ethics of war and peace, ranging from contingent pacifism to self-righteous militarism.⁵ The familiar principles of JWT are double-edged swords or, ideally, the common materials of many and varied conceptual plowshares. These principles are not names for timeless truths first discovered by moral or spiritual founding fathers. Instead, they are elements of a persistently contestable and evolving shared vocabulary of ethical justification and restraint. There is no monolithic just war

³ Jean Bethke Elshtain, “Jean Bethke Elshtain Responds,” *Dissent*, Summer 2006.

⁴ For a presentation and defence of this definition of just war theory, along with many samples of the varieties of work in the field that give evidence of the appropriateness of this broad definition, see <http://www.JustWarTheory.com/>.

⁵ For a recent account of Hugo Grotius’ *The Laws of War and Peace* (1625) as presenting a just war theory that is tantamount to pacifism under most circumstances, see Larry May, “Grotius and Contingent Pacifism,” *Studies in the History of Ethics*, February 2006. Downloadable as of 6/6/07 from <http://www.historyofethics.org/022006/022006May.html>.

tradition, but at best competing traditions of just war theorizing.⁶ Every age from which recorded examples have been preserved has yielded distinctive patterns of just war thinking and as many different theories as original theorists. The best examples are those we judge by our own lights to offer the most important insights into how the use of arms might be restrained, made more humane, and ultimately directed towards the aim of establishing lasting peace and justice.

1. Conventional and Revisionist *Jus ad Bellum* Principles

It will be helpful in analyzing the theoretical ramifications of 9/11 and the ensuing GWOT to bear in mind a heuristic distinction between two types of JWT. Conventional expository JWT works within the ambit of a Westphalian understanding of public international law in an effort to reveal the principles that constitute its internal morality.⁷ Accordingly, conventionalists embrace principles of strong sovereign immunity from foreign aggression and intervention. And they conceive of just wars as wars of self-defense that are waged for the cause of resisting international aggression. Punishment of an aggressor once it has been repulsed is sometimes added as a purely derivative auxiliary just cause.⁸ Other subsidiary just causes for warfare – such as adjuvant defense on behalf of others who are resisting foreign aggression, invited counter-intervention in foreign civil wars, and possibly, but more contentiously, preemptive self-defense against imminent aggression⁹ – are to be understood as legitimate exceptions that are

⁶ Rather than attempting to state what JWT is, David Rodin argues in *War and Self-Defense* (Oxford: Clarendon Press, 2002, p. 103) that “it is more accurate to talk of the ‘just war tradition’ . . . for it includes a large number of diverse yet related positions.” To my mind, it would be even better to talk of competing traditions. For one central cleavage in the “tradition,” see Anthony Coates, “Humanitarian Intervention: A Conflict of Traditions,” *Humanitarian Intervention: Nomos XLVII*, Terry Nardin and Melissa S. Williams eds. (New York: New York University Press, 2006), pp. 58-83. In contrast, Terry Nardin sees “much internal agreement” in just war theory, but only in comparison with the relatively high degree of disagreement among theorists in the younger field of global or international distributive justice. See Nardin, “International Political Theory and the Question of Justice,” *International Affairs*, Volume 82, Number 3, 2006, pp. 454-455.

⁷ Michael Walzer’s *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000) is easily the most influential version of a largely conventional just war theory. The features outlined here are characteristic of his “legalist paradigm.” It is a testament to Walzer’s influence that his views are so often taken to stand for what is conventional in JWT. For example, see Allen Buchanan and Robert O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” *Ethics & International Affairs*, Volume 18, Number 1, 2004, pp. 1-22; & Jeff McMahan, “Just Cause for War,” *Ethics & International Affairs*, Volume 19, Number 3, Fall 2005(a), p. 1. Many systematic treatments of JWT do not fall neatly into either side of the heuristic distinction that I am employing here. For example, in *The Morality of War* (Peterborough, ON: Broadview Press, 2006), Brian Orend presents his version of JWT as both a means of explaining public international law (p. 33) and a means of justifying many exceptions to it (pp. 68-101).

⁸ Walzer (2000), op. cit., pp. 62-63.

⁹ It is worth noting here that the legality of the supposed right of states to preempt imminent aggression is highly controversial. See Michael Byers, “Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change,” *The Journal of Political Philosophy*, Volume 11, Number 2, 2003, pp. 171-190. Many

ultimately grounded in a global legal order of non-aggression among sovereign states. In contrast, unconventional critical JWT is revisionist in relation to the Westphalian paradigm of public international law,¹⁰ and sometimes exceptionalist in championing the prerogatives of just warriors unilaterally to flout prevailing legal principles.¹¹ Revisionists seek to expand just causes for the deployment of military forces beyond mere self-defense against ongoing or imminent attacks to include (1) a humanitarian right to override conventional immunities of state sovereignty in order to provide armed protection for innocents abroad against certain grave harms,¹² and/or (2) a right to wage preventive wars against the (less than imminent) threat that “rogue states” might equip sub-state terrorist organizations with weapons of mass destruction (WMD).¹³ Moreover, since rogue states not only export terrorism, but they also oppress and brutalized their own citizens, some revisionists would combine (1) & (2) in the construction of (3) a liberal cosmopolitan right to engage in interstate wars of forced democratic regime change.¹⁴

The principle of just cause is prior to other *jus ad bellum* considerations in the sense that a war cannot be, or is exceedingly unlikely to be discriminating,

suppose that customary international law gives states the right to resort to arms preemptively on the basis of “a necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment for deliberation.” Yet, the details of the *Caroline* incident on which this standard is based reveal that it sets a standard for repelling particular threats, but not for commencing war against the state from which these threats originate. This standard leaves open the possibility of withdrawal and apology on the part of the threatening state before a condition of outright war is reached.

¹⁰ Jeff McMahan, “The Ethics of Killing in War,” *Ethics*, Volume 114, July 2004, pp. 693-733; & Allen Buchanan, “Institutionalizing the Just War,” *Philosophy and Public Affairs*, Volume 34, Number 1, 2006, pp. 2-38.

¹¹ McMahan (2004), op. cit.; & Jean Bethke Elshtain’s *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2004).

¹² Terry Nardin, “On The Moral Basis of Humanitarian Intervention,” Anthony F. Lang ed., *Just Intervention* (Washington, D.C.: Georgetown University Press, 2003), pp. 11-27; Kok-Chor Tan, “The Duty to Protect,” Terry Nardin and Melissa S. Williams eds., *Humanitarian Intervention, NOMOS XLVII*, NYU Press, 2005, pp. 84-116; Carla Bagnoli, “Humanitarian Intervention as a Perfect Duty: A Kantian Argument,” Nardin & Williams eds., op. cit., pp. 117-140; & Gillian Brock, “Humanitarian Intervention: Closing the Gap Between Theory and Practice,” *Journal of Applied Philosophy*, Volume 23, Number 3, 2006, pp. 277-91. Brock argues that “the responsibility to protect” and the corresponding right of humanitarian intervention are conventional elements of public international law. Most theorists, however, see this as an emergent norm of a conventional legal order that is currently undergoing revision. Hence, I associate this kind of just cause with revisionist JWT.

¹³ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004); Eric Patterson, “Just War in the 21st Century: Reconceptualizing Just War Theory after September 11,” *International Politics*, Volume 42, 2005, pp. 122–123 & 127; & Whitley Kaufman, “What’s Wrong with Preventive War? The Moral and Legal Basis for the Preventive Use of Force,” *Ethics & International Affairs*, Volume 19, Number 3, Fall 2005. Kaufman’s argument is qualified as only applying to the UN Security Council.

¹⁴ Elshtain (2004), op. cit., p. 169; Buchanan (2006), op. cit.; & Fernando Tésón, “Ending Tyranny in Iraq,” *Ethics & International Affairs*, Volume 19, Number 2, 2005. Although I include Tésón here among the revisionists, it is worth noting that he also argues in *Humanitarian Intervention*, 3rd ed., (Ardstley, N.Y.: Transnational, 2005) that the war in Iraq was legal.

necessary or proportional in the absence of a just cause.¹⁵ It is conventionally understood that the presence of a just cause for war is a necessary condition, but not a sufficient condition, for justifying recourse to arms.¹⁶ As a logical revision of this conventional approach, Fernando Téson embraces an alternative hermeneutic understanding of JWT principles as considerations that “incline” judgment, rather than as strict necessary and jointly sufficient conditions. But according to both the analytic and the hermeneutic approach, the principle of just cause imposes a basic constraint (or constraining pressure) on what kinds of aims may be pursued by means of the resort to arms. To have just cause is to have an ethically legitimate aim of a kind that can sometimes be justifiably pursued by means of war – but not always. One might have a just cause that is nevertheless too trivial to justify war. Since having a just cause is “not a matter of scale,” whether a proposed war is a just means of pursuing a particular just cause is also a question of discrimination, necessity and proportionality.¹⁷ But these questions must be framed in relation to specific just causes.

A just war must also be discriminating at the outset. This consideration imposes further important constraints upon estimations of necessity and proportionality. If one has just cause C against X, but not against Y, then war against Y can neither be necessary nor proportional. Thus, there is arguably a second *jus ad bellum* principle of discrimination. This may seem surprising to those who are familiar with the recent literature. Recently promulgated lists of conventional JWT principles typically mention *jus ad bellum* principles of necessity (or last resort) and proportionality, but no *jus ad bellum* principle of discrimination. The importance of discriminating between ethically legitimate and illegitimate enemies/targets is typically mentioned only as a *jus in bello* consideration. Why? The distinction between *jus ad bellum* and *jus in bello* principles of JWT is commonly understood to coincide with the distinction between, on the one hand, the general “theater” level of national war planning and, on the other hand, the consequent and subsequent

¹⁵ McMahan (2005a), op. cit., p. 5-6; David Mellow, “Counterfactuals and the Proportionality Criterion,” *Ethics and International Affairs*, Volume xx, number xx, 2006, pp. 239-254. McMahan argues, further, for the unconventional claim that no *jus in bello* standards of just warfare can be satisfied in the absence of just cause. Since I am focusing on *jus ad bellum* considerations alone, I won’t address this claim here.

¹⁶ Téson (2005), op. cit., p. 3; Orend (2006), op. cit., p. 32.

¹⁷ McMahan (2005a), op. cit. Note that if just causes are necessary but non-sufficient conditions for war, then it is a mistake to distinguish between “sufficient” and “contributing” just causes, as McMahan and Robert McKim did in “The Just War and the Gulf War,” *Canadian Journal of Philosophy*, Volume 23, 1993, pp. 512–13. Although McMahan is in many ways a revisionist, his mature view of just causes as necessary but non-sufficient conditions for war does not appear to be inconsistent with conventional JWT. Perhaps his most striking revision, which harkens back to Grotius, is his insistence upon distinguishing between guilty and innocent in all phases of JWT.

contexts of military maneuver that are proper to specific brigades and individual soldiers.¹⁸ Why should we follow recent standard enumerations of JWT principles in supposing that theater level war planners need not distinguish between ethically legitimate and illegitimate enemies/targets?

Perhaps the reason for this standard omission is the assumption that the principle of just cause essentially or necessarily involves a triadic relation: "Agent A has just cause C against legitimate enemy/target X." If the principle of just cause is necessarily triadic – if, in other words, there is a conceptual connection between having a just cause and delimiting the range of legitimate enemies/targets against whom one has it – then the issue of discrimination is always implicit in the principle of just cause, and there is no need to introduce discrimination as a separate *jus ad bellum* principle. Alternatively, if just cause is not necessarily triadic – if, as I have suggested, just cause is simply a matter of having an ethically justifiable aim which may or may not be sufficient grounds for war against anyone – then issues of discrimination (between guilty and innocent, responsible and non-responsible, combatant and non-combatant) may arise independently of the question of just cause at the *jus ad bellum* phase of ethical deliberation about warfare. To complicate matters, the analytic question about the grammar of just cause can only be answered in relation to specific just causes, and these carry different implications for *jus ad bellum* identification of legitimate enemies/targets. A punitive just cause is necessarily triadic. The same is not the case, however, for the most basic conventional just cause of self-defense. That identifying legitimate enemies/targets is analytically distinct from having just cause for armed self-defense is revealed in the traditional issue that Grotius raises immediately after enumerating just causes (and long before his systematic treatment of *jus in bello* discrimination). As a qualifying addendum to the just cause of self-defense, he raises the question of whether, in defending oneself, one is permitted to kill someone who is an innocent obstacle to the achievement of one's end.¹⁹ A timelier and more difficult question of *jus ad bellum* discrimination is the question of whether it is ethically justifiable for purposes of self-defense against terrorism to treat foreign states that harbor terrorists as enemies on par with the terrorists themselves. If it makes sense to raise these questions at the theater level of war planning, then it makes sense to speak of

¹⁸ Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs*, Volume 33, Number 1, 2005, p. 35; McMahan (2005a), op. cit., p. 6; & Orend (2006), op. cit., p. 31-2.

¹⁹ Grotius, op. cit., II.i.4. I am indebted to Cecile Fabre for prompting me to expand upon, and to supply scholarly warrant for the idea that issues of discrimination may arise at the *jus ad bellum* phase of military deliberations.

discrimination as a *jus ad bellum* principle analytically distinct from the principle of just cause.

Issues of discrimination are epistemically loaded in every context of military decision-making, but the burden of proof is especially weighty in *jus ad bellum* contexts in which the available time for deliberation is plentiful. The identification of legitimate enemies/targets calls for painstaking exactitude because mistakes on this point are morally momentous. The conventional right to defend oneself in response to aggression ought to be discriminating in the sense that it is a right to defend oneself against the aggressor(s). To wage war against any others is to become an aggressor oneself. The judgment that a proposed war effort will place one on the just side of the divide between aggressor and defender should therefore be the conclusion of careful ethico-historical analysis and argument. Although it seems reasonable to suppose that similar considerations of *jus ad bellum* discrimination may be applied to other, revisionist just causes, there may be exceptions. If the threats to a vulnerable population are shifting, haphazard or merely potential, then it may make sense to exempt armed humanitarian intervention from a strict application of the *jus ad bellum* principle of discrimination. In contrast, it is difficult to imagine conditions under which a similar exemption could reasonably be allowed for a putatively just war of humanitarian regime change. Such a war should target only those elements within a rogue government that are clearly responsible for making it corrupt and oppressive. A similar, and perhaps even a greater degree of exactitude in discrimination should apply to putatively just preventive counter-terrorism warfare. If this type of warfare may legitimately target rogue states, it would need to be clearly established and well known in advance of a preventive resort to arms that the regimes in question have both the capacity and the active determination to arm terrorists with WMD. In the post-9/11 JWT literature, there has been perhaps too little discussion of *jus ad bellum* issues of discrimination (even as implicit issues of just cause), and little discussion of what exactly the epistemic standards for these issues should be. For example, is proof beyond a reasonable doubt of direct material support of terrorism necessary for just preventive war against a rogue regime? Or is it enough that a preponderance of the evidence should suggest such support? Or does this novel modality of warfare require for its justification the construction of a novel standard of evidence?

A just war, conventionally understood, must also be necessary as a last resort in the sense that no other available means will suffice for the successful achievement of effective self-defense. This standard may also be applied to other revisionist just causes. Accordingly, taking up arms is necessary as a last resort when no other available means short of war will suffice to prevent non-imminent but massively destructive attacks, to protect others from grave harms, or to reform rogue regimes. Warfare becomes necessary as a last resort when no other available means are sufficient to the task of successfully prosecuting a just aim or cause.²⁰ This conventional way of understanding the principle of last resort as a doctrine of military necessity does not require that all other available means of attempting to achieve a just cause must actually be pursued and exhausted. Such a standard would be impossible to satisfy; for, as Michael Walzer notes, “There is always something more to do: another diplomatic note, another UN resolution, another meeting.”²¹ The conventional understanding of last resort also makes this principle independent of estimations of proportionality. It does not merely stipulate that warfare, in order to count as a necessary last resort, must be marginally more economical (in terms of relevant costs and benefits) than alternative non-military means of achieving the same end. Rather, a just war must be the only available means of succeeding in the achievement of a discriminating just cause or aim. Since the nature of an aim determines what is necessary for its achievement, a discriminating just cause will largely determine the conditions for satisfying the principle of last resort. For example, the resort to arms is far more likely to be necessary for purposes of self-defense against ongoing aggression than, say, for purposes of preventive counter-terrorism or humanitarian regime change. Ongoing military aggression has rarely been repulsed by means short of war. But there are many effective non-military means of preventing terrorist attacks and promoting democracy abroad.

According to Thomas Hurka’s revisionist approach to JWT, the principle of last resort does not impose a strict standard that war should be the “only available sufficient means” of achieving a just cause. Instead, on his account, the principle of last resort is reducible to the principle of proportionality.²² War becomes rationally necessary, on his approach, if it is the optimal course of action from the standpoint of a relevant cost-benefit analysis. In other words, if warfare is the most

²⁰ For the notion that the principle of last resort requires that war be a necessary means, see Richard Falk, *The Great Terror War* (Brooklyn, NY: Olive Branch Press, 2003); Neta C. Crawford, “The Slippery Slope to Preventive War,” *Ethics and International Affairs*, Volume 17, Number 1, 2003, p. 31.

²¹ Walzer (2000), op. cit., p. xiv.

²² Hurka (2005), op. cit., pp. 37-38.

proportional means of effectively achieving a just cause, among a range of alternatives including those short of war, then the military option simply is the last resort. The rationally necessary means of pursuing a just cause is the most proportional means available. This revisionist way of reducing the principle of last resort to the principle of proportionality is more permissive than the conventional approach because it does not require that warfare be the *only* sufficient means available, but only requires that warfare be marginally more effective than the non-military alternatives.

According to conventional approaches to JWT, the military means of prosecuting a just cause must not only be the only effective option available, but it must also be proportional (a) in the sense that the benefits to be achieved by war must outweigh the harms that it inflicts,²³ (b) in the sense that the use of arms should not be “excessive,”²⁴ or (c) in the sense that “a minimum of force” should be employed.²⁵ The less harmful the occasion for just cause – e.g., the less harmful the ongoing aggression, non-imminent threat, humanitarian crisis, or rogue regime – the more stringent the proportionality requirement becomes.²⁶ Estimations of proportionality also become more or less stringent depending upon the kinds of just cause under consideration. On the first, most common construction (a), the principle of proportionality requires a cost-benefit analysis, albeit one that is embedded within a principled, rights-based JWT. The rights-based qualification of cost-benefit analysis places certain limitations on the kinds of costs and benefits that can count towards the estimation of the proportionality of a just war. Hurka gives a clear illustration of how the principle of just cause imposes such a restriction. Imagine a nation that is mired in an economic recession and has just cause for warfare. It has good reason to believe that waging this war will help to alleviate its economic woes. Even so, the economic benefits of the war “surely cannot count toward its proportionality,” because profiteering is not a just cause for war.²⁷ Other things being equal, a profitable war may be better, more desirable than an unprofitable war; but the

²³ Jagger, “What is Terrorism, Why is it Wrong, and Could It Ever Be Morally Permissible?” *Journal of Social Philosophy* 36, No. 2, Summer 2005, p. 214; David Mellow, “Iraq: A Morally Justified Resort to War,” *Journal of Applied Philosophy*, Vol. 23, No. 3, 2006(b), p. 303; Whitley Kaufman, “What’s Wrong With Preventive War? The Moral and Legal Basis of the Preventive Use of Force,” *Ethics & International Affairs*, Volume 19, Number 3, Fall 2005, p. 24; & Buchanan (2006), op. cit., p. 27.

²⁴ Michael L. Gross, “Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defense?,” *Journal of Applied Philosophy*, volume 23, number 3, 2006, p. 325.

²⁵ Patterson (2005), op. cit., p. 119.

²⁶ Jeff McMahan, “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues*, Volume 14: *Normativity*, 2005(b), p. 401.

²⁷ Hurka (2005), pp. 40-41.

benefits of profiteering do not make a war more just. Such economic benefits are therefore ethically irrelevant from the standpoint of JWT. For the conventionalist, only increased security from the harms of aggression can count in favor of the proportionality of war. Hence, the harms that would likely result from alternative responses – e.g., appeasement, surrender, resistance short of war, etc. – must outweigh the harms that would likely result from the resort to armed self-defense.

Some revisionist just war theorists allow that additional “contributing” just causes may increase the level of justifiable harm that satisfies the requirement of proportionality in wars fought primarily for the cause of self-defense against aggression.²⁸ Accordingly, a hybrid defensive-humanitarian war would be proportional if and only if the harms likely to result from measures short of war would exceed the harms likely to result from defensive war less any net harms associated with humanitarian efforts. In this way, the availability of additional revisionist just causes, over and above the conventional just cause of self-defense, may “contribute to a war’s proportionality” by increasing the amount of harm that may count as proportional.²⁹

2. 9/11 & Conventional *Jus ad Bellum*

With these broad principles and issues in mind, let us now revisit 9/11 and its aftermath. I shall help myself, without detailed supporting argument, to the premise that al-Qaeda’s attacks were unjust. If, contrary to this assumption, al-Qaeda’s attacks were ethically justifiable, then it would follow, from a conventional JWT precept that can be traced back at least as far as the work of Hugo Grotius, that the U.S. could have no just cause in response to 9/11. According to this precept, “with regard to the act itself, a war cannot be just on both sides, any more than a lawsuit can be.”³⁰ At most, Grotius allows that there are exceptional instances (he mentions the Peloponnesian war) in which both sides to a conflict may be said to fight permissibly, owing to an unavoidable and “good faith” ignorance of where the just cause lies. In such cases, enemies may mutually declare a “formal” or “legal” war under the law of nations.³¹ In contrast, according to some revisionist versions of JWT warfare can easily be just on both sides, if an initially just war is waged by

²⁸ Hurka (2005), pp. 41-43.

²⁹ Hurka (2005), p. 42.

³⁰ Hugo Grotius, *The Laws of War and Peace*, II.xxiii.13, Francis W. Kelsey trans., Oxford: Clarendon Press, 1925.

³¹ Grotius, op. cit., III.iii.7.

unjust means.³² On this alternative, even in the conduct of a war prosecuted for a just cause, violations of *jus in bello* standards may suffice to give just cause to the other side. Accordingly, even if al-Qaeda did have a discriminating just cause for proportional war against the U.S., the *jus in bello* indiscriminate nature of the 9/11 attacks may still have sufficed for a revisionist claim of just cause for U.S. war efforts in response. Assuming that al-Qaeda's 9/11 attacks lacked *jus ad bellum* justification, however, the question of just cause becomes a one-sided issue.

There were, of course, no "ongoing" terrorist attacks after 9/11; but there was good reason to suppose that there would be ongoing al-Qaeda efforts to orchestrate further attacks. So, the U.S. was often said to have faced the kind of aggression that qualifies as a conventional just cause for self-defensive war against al-Qaeda. On this point, it matters little that al-Qaeda is not a member of the world society of sovereign states. As Brian Orend rightly notes, "there is nothing, in just war theory or international law, which says that aggression can only be committed by states."³³ Supposing the U.S. had just cause to defend itself with the force of arms after 9/11, it nevertheless remains an open question of *jus ad bellum* discrimination whether it had just cause against any entity other than al-Qaeda. In particular, did the U.S. have just cause to defend itself against any foreign states? It was surely conceivable that U.S.-led counter-terrorism efforts in Afghanistan could have targeted al-Qaeda elements without also endeavoring to topple the Taliban government. On this alternative, Taliban forces might have been left alone so long as they did not attempt directly and forcibly to obstruct military operations against al-Qaeda. Yet, there was little or no discussion of this possibility in the weeks after 9/11 in the U.S. public sphere. Instead, the cause of counter-terrorism was immediately shoehorned into the prevailing Westphalian framework of interstate warfare. Were there sufficient grounds for this move?

From the standpoint of conventional JWT, interstate warfare in response to a sub-state aggressor is an awkward fit. One prominent way of attempting to assimilate 9/11 into a conventional interstate framework has been to claim that the al-Qaeda attacks represented a new form of terrorism, or "mega-terrorism," which resembled Pearl Harbor more than it resembled previous acts of sub-state terrorist

³² McMahan (2005a), op. cit., p. 1; Orend (2006), op. cit., p. 43.

³³ Orend (2006), op. cit., p. 71.

organizations.³⁴ In this way, 9/11 was construed as an attack on the order of conventional international aggression. The key analogy is open to dispute, however. Unlike Pearl Harbor (and especially unlike the Pearl Harbor of popular memory) 9/11 did not come as a surprise attack without precedent or prior declaration.³⁵ The previous 1993 car bombing of the World Trade Center, the 1998 fatwa of the World Islamic Front, the 1998 embassy bombings in Kenya and Tanzania, and the 2000 bombing of the *USS Cole* made it immediately and painfully clear that 9/11 was not the start of a new war, but the continuation of an old one. From the standpoint of conventional JWT, 9/11 is more accurately described as a wildly successful but indiscriminate transnational attack in an ongoing sub-state Islamist insurgency against U.S. military predominance and political influence abroad. So, if the U.S. had just cause for war with al-Qaeda, it had it at least since 1993.³⁶ In 1998 it acted accordingly in conducting simultaneously one intuitively proportional bombing raid against known al-Qaeda targets in Afghanistan, and one intuitively disproportionate and indiscriminate missile strike on a Sudanese pharmaceutical factory that was dimly and erroneously suspected of al-Qaeda affiliation.³⁷ Viewed in this context, 9/11 looks nothing like Pearl Harbor. It was part of an ongoing transnational conflict.

Conventionally construed, 9/11 therefore did not present a *jus ad bellum* moment at all. It was a *jus in bello* moment preceded by others similar in kind. When compared with previous attacks, there was nothing novel about the location, nor anything novel about the kind of harm inflicted. Al-Qaeda had already launched an attack on U.S. soil, and it had already killed indiscriminately abroad. So, from the standpoint of conventional JWT, 9/11 did not create a new just cause for war. It may have increased by a substantial increment the amount of force required for a proportional defensive response; for al-Qaeda had not previously killed indiscriminately on U.S. soil, nor did any of its prior acts inflict harm on such a

³⁴ Richard Falk, *The Great Terror War* (Brooklyn, NY: Olive Branch Press, 2003), p. 1; & Orend (2006), op. cit., pp. 1 & 71. To his credit, Falk tells me that he no longer thinks this claim is warranted, and he would substantially revise *The Great Terror War* if he were inclined to rewrite it.

³⁵ Falk (2003), op. cit., notes that the question of whether Pearl Harbor was truly a surprise attack is controversial among historians. See Charles Lutton, "Pearl Harbor: Fifty Years of Controversy," *The Journal of Historical Review*, volume 11, number 4, pp. 431-467.

³⁶ The 1993 bombing was funded in part by Khaled Shaikh Mohammed, a known al-Qaeda member.

³⁷ The missile strikes on the al-Shifa pharmaceutical factory were based upon unsubstantiated claims about evidence that, even if confirmed, were insufficient to justify destroying the leading source of Sudanese medicines. See Michael Barletta, "Chemical Weapons in the Sudan: Allegations and Evidence," *Nonproliferation Review*, Fall 1998, pp. 115-36. The fact that the U.S. prevented a United Nations investigation into the case of al-Shifa shows how little confidence it had that any evidence would be found to substantiate its putative grounds for the strike.

massive scale. Understood in this way, 9/11 need not have changed the terms of the war in a way that left conventional JWT behind. To the conventionalist, the indiscriminate nature of the 9/11 attacks makes them war crimes, which are presumptive occasions for international law enforcement against sub-state actors by means *short* of war. But in the absence of law enforcement cooperation from abroad (e.g., from the Taliban or from Pakistan), if the U.S. had just cause to employ proportional instruments of armed self-defense against al-Qaeda in 1998, then it still had the same right in the fall of 2001. The only difference would be that after 9/11, the U.S. would also have new grounds for escalating the kind of “targeted” (discriminating) attacks that it made against Afghani al-Qaeda facilities in 1998. 9/11 clearly raised the threshold of proportionality as al-Qaeda proved itself to be a more dangerous enemy than previously imagined. A conventionally justifiable military response would have involved targeted transnational attacks that would have crossed borders to reach responsible or affiliated sub-state actors; but in the absence of direct hostilities from the Taliban such attacks could not justifiably become interstate attacks between sovereign entities. From the standpoint of conventional JWT, it is inherently indiscriminate to commence interstate warfare as a means of combating the war crimes of sub-state actors.

In the months prior to 9/11 the Bush administration had already departed from the precedent set by the Clinton administration by declining to launch targeted retaliatory strikes in response to the bombing of the *USS Cole*. According to Condoleeza Rice, the reason for this change in strategy was that President Bush was “tired of swatting flies” (despite never having tried it).

There is a question of whether or not you respond in a tactical sense or whether you respond in a strategic sense, whether or not you decide that you are going to respond to every attack with minimal use of military force . . . on a kind of tit-for-tat basis . . . [or] . . . *not* doing this tit for tat, doing this on a time of our choosing.³⁸

The line that Rice draws between tactical and strategic response is significant. It distinguishes the maneuvers of specific brigades and individual soldiers from the “theater” level of national war planning. As explained above, in conventional JWT,

³⁸ National Commission on Terrorist Attacks Upon the United States, “Testimony of National Security Advisor, Condoleeza Rice,” Thursday, April 8, 2004. My emphasis. Downloadable as of 6/6/07 from http://www.9-11commission.gov/archive/hearing9/9-11Commission_Hearing_2004-04-08.htm.

this division of military labor corresponds to the distinction between *jus in bello* and *jus ad bellum* principles.³⁹ Thus, the Bush administration's frustration with "minimal" (proportional in the third (3) sense above) *in bello* tactics was expressed in the form of a desire to wait for a new *jus ad bellum* moment – "a time of our choosing" – when the scope of just cause and the grand strategy of the conflict could be redefined. Accordingly, after 9/11 the Bush administration immediately claimed to have just cause for a new and more expansive interstate war, despite the strangeness of finding it in a *jus in bello* violation.

3. 9/11 & Revisionist *Jus ad Bellum*

The dominant alternative and revisionist way of finding just cause for interstate warfare in the 9/11 attacks hinges largely upon the Shultz Doctrine. This doctrine holds that if states have just cause for armed self-defense against sub-state terrorist organizations, then they also have just cause to use such arms against "states that support, train, and harbor terrorists."⁴⁰ In recent years, revisionist Anglo-American just war theorists have tended to embrace this doctrine very quickly and uncritically. For instance, in a first rate treatment of JWT that is sure to become a classroom standard, Orend asserts the Shultz Doctrine without any critical discussion of specific reasons for or against it.⁴¹ Similarly, Hurka invokes the doctrine as if it were self-evident.⁴² Shultz, Orend and Hurka may be right, of course. Their position has been supported over the course of the last twenty years by the United States, Israel, the United Kingdom and Australia. But there is clearly room for debate here, given that the doctrine is not an accepted element of international law, and given that it has been rejected by most other nations of the world, including such European powers as Spain, Germany and France. If strong norms of state sovereignty are the best protections that weak states have against the dominance of strong states, then in many quarters of the globe the Shultz Doctrine may reasonably appear to be a menacing innovation of imperial law.⁴³ From a cosmopolitan perspective, it may seem to contain an overly lax interpretation of the *jus ad bellum* principle of discrimination. And it may seem designed to benefit those in positions of military power in greater proportion than their demonstrable contribution to the

³⁹ Orend (2006), op. cit., p. 31-2; McMahan (2005a), op. cit., p. 6; & Hurka 2005, p. 35.

⁴⁰ U.S. Secretary of State, George P. Shultz, "Address to the National Defense University, Washington, D.C., January 15, 1986," *International Legal Materials*, Volume 25, 1986, pp. 206.

⁴¹ Orend (2006), op. cit, pp. 73-4. Orend's *The Morality of War* is easily the most accessible, comprehensive, and up-to-date introduction to JWT currently available on the textbook market.

⁴² Hurka (2005), p. 42.

⁴³ See Byers (2003), op. cit.

global common good. In the absence of an international consensus establishing a meaningful cosmopolitan definition of “terrorism,” terrorists tend to be in the eye of the beholder. Under such conditions, many cautious thinkers worry that it may be too easy for powerful states to invoke the Shultz Doctrine as a rationale for illegitimate aggression as well as legitimate self-defense.

When we compare the Shultz Doctrine to conventional principles of JWT that are rooted in “the domestic analogy,”⁴⁴ it becomes apparent that it represents a loosening of the *jus ad bellum* principle of discrimination in a way that substantially erodes the degree of restraint that it has traditionally placed upon recourse to arms. In terms of responsibility for the harms of war, there is a significant difference between attacking another state and giving safe harbor to sub-state organizations that directly carry out such attacks.⁴⁵ We do not treat the families and friends of murderers as if they were murderers themselves.⁴⁶ And even if the support that they give rises to the level of aiding and abetting in the commission of the murder, we do not treat them as accessories to murder with the same severity reserved for the murderer proper. It would therefore be exceedingly difficult to defend the Shultz Doctrine by analogy with domestic norms of liability to suffer lethal measures of force. Since drawing some such domestic analogy has been the dominant conventional method of argument among just war theorists, revisionists who find the Shultz Doctrine intuitively attractive will need to show alternative grounds for justifying the discrepancy between domestic and international norms of responsible agency and liability to lethal attack. This element of revisionist JWT calls for serious critical thinking about the threshold of liability that might make some forms and degrees of direct state sponsorship of sub-state terrorism tantamount to terrorism itself. Successful defense of this revisionist approach to *jus ad bellum* discrimination also calls for the construction of a reasonably cosmopolitan conception of ‘terrorism’ capable of addressing worries about self-serving hegemonic bias (see section 4 below).

The Bush Doctrine incorporates and further elaborates the Shultz doctrine. It conceives of sub-state terrorist organizations as the “clients” of an alliance or “axis” of rogue states that wish to disrupt a U.S.-dominated global political order.⁴⁷ These states personify evil and are activated by settled dispositions of hostility inasmuch

⁴⁴ Walzer (2000), op. cit., pp. 58-63.

⁴⁵ Neta C. Crawford (2003), op. cit., p. 31.

⁴⁶ I am indebted to Kirstie McClure for bringing home the relevance of this point.

⁴⁷ White House (2002), op. cit.

as they “reject basic human values and hate the United States and everything for which it stands.”⁴⁸ Here the notion of American exceptionalism is invoked to identify the enemies of the U.S. as the enemies of humanity. If the U.S. is the champion of “basic human values,” then its enemies must be the enemies of everyone, everywhere. For a hegemon that is truly exceptional in its degree of ethical virtue, there is no strategic contradiction in embracing unilateralist means of pursuing the putatively multi-lateral aims of global counter-terrorism. Terrorism may be in the eye of the beholder, but according to supporters of Bush Doctrine exceptionalism U.S. perceptions are ethically authoritative for the world community.⁴⁹ The most obvious problem with this position, which critics of U.S. policies have been eager to point out, is that the mixed record of history does not adequately support the U.S. claim to exceptional virtue.⁵⁰

The Bush Doctrine goes well beyond the Shultz Doctrine by advancing the notion that global terrorism is sponsored by a conspiracy of rogue states known as the “Axis of Evil.”⁵¹ The “9/11 Commission Report” found no evidence that the al-Qaeda attacks were funded by any foreign state.⁵² But sponsorship comes in many forms. Although al-Qaeda members were not exactly the “irregular troops”⁵³ of the Taliban, they were part of a well-established cooperative alliance. Like Pakistan, al-Qaeda gave financial, technological and professional support to the Taliban’s efforts to resist the Tajik and Uzbek insurgency of the Northern Alliance from 1996 to 2001. In return, the Taliban gave safe haven to al-Qaeda and rebuked U.S. requests for cooperation in international law enforcement. If, contrary to the objections raised above, the Shultz Doctrine is defensible, then the U.S. had compelling grounds for viewing the 9/11 attacks as expanding a previously existing just cause to include a discriminating just cause for interstate war against the Taliban. Beyond Afghanistan, the idea that 9/11 was an act of a multi-state-sponsored terrorist

⁴⁸ Ibid.

⁴⁹ John C. Yoo, “Using Force,” *University of Chicago Law School*, Vol. 71, Summer 2004; & Eric A. Posner and Alan O. Sykes, ‘Optimal War and *Jus Ad Bellum*,’ The Chicago Working Paper Series, April 2004.

⁵⁰ Noam Chomsky, *9/11* (New York: Seven Stories Press, 2002).

⁵¹ White House (2002), op. cit. Downloadable as of 6/6/07 from <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

⁵² The “9/11 Commission Report” of The National Commission on Terrorist Attacks Upon the United States found no clear evidence of state funding of al-Qaeda. Downloadable as of 6/6/07 from <http://www.9-11commission.gov/report/911Report.pdf>.

⁵³ Norman Podhoretz employs the “irregular troops” characterization in “Is the Bush Doctrine Dead?” *Commentary*, September 2006. The White House’s characterization of al-Qaeda as a “client” of the Taliban is more accurate. Better still is Jeffrey Record’s image of a “symbiotic relationship” between the two in “Collapsed Countries, Casualty Dread, and the New American Way of War,” *Parameters*, Summer 2002, p. 5.

conspiracy has been kept alive by the perception of common causes and connections between al-Qaeda and other militant Islamist groups, some of which were known or suspected recipients of direct support from Iraq, Iran and Syria. The conspiracy theory implicit in the Bush Doctrine's claim that these states belong to an Axis of Evil is crucial for imagining that 9/11 provided just cause for an interstate GWOT beyond Afghanistan. Yet, the underlying imputation of conspiracy between these states might be even more dubious than the oft-derided moral Manicheanism of the Axis of Evil idea. Only a pan-Arab nationalism oddly allied with Persian nationalism could overcome the deep sectarian divisions that exist between al-Qaeda, Hizbollah, Hamas, etc.; and only a pan-Islamic alliance could overcome existing tensions between Syria, Iraq, Iran, etc. Even supposing that each of these entities harbors settled malice towards the U.S. and its allies in the GWOT, the divisions between them make them somewhat unlikely (though not impossible) co-conspirators. How much evidence of menacing cooperation between these states is sufficient to satisfy the *jus ad bellum* principle of discrimination and widen just cause for armed self-defense such that the entire Axis of Evil should become a legitimate enemy/target?

The Bush Doctrine also adds to the Shultz Doctrine a highly controversial right of preventive war that substantially lowers the standard for claiming just cause in the first place. The incompatibility of this element of the Bush Doctrine with the principles of conventional just war theory has been duly noted in the critical literature. The most prevalent form of counter-argument maintains that, according to conventional standards, unilateral preventive military operations are in principle unjust.⁵⁴ A second form of objection stresses that a defensible right of preventive warfare would have to satisfy the highest standards of evidence in order to avoid the pitfalls of the slippery slope that leads from just prevention to anarchical aggression and numerous fruitless wars.⁵⁵ And a third, empirically contingent objection holds that were wars of preventive self-defense ever justifiable in principle, it would have to be under conditions that include the existence of an effective and morally reliable

⁵⁴ Paul W. Schroeder, "Iraq: The Case Against Preemptive War," *American Conservative*, October 2002, pp. 8–20; Joseph M. Schwartz, "Misreading Islamic Terrorism: The 'War Against Terrorism' and Just-War Theory," *Metaphilosophy*, Volume 35, Number 3, April 2004, pp. 273-302; Tom Rockmore, "On the So-Called War on Terrorism," *Metaphilosophy*, Volume 35, Number 3, April 2004; Dale T. Snauwaert, "The Bush Doctrine and Just War Theory," *The Online Journal of Peace and Conflict Resolution*, Volume 6, Number 1, Fall 2004, pp. 121-135; & Steven Lee, "A Moral Critique of the Cosmopolitan Institutional Proposal," *Ethics and International Affairs*, Volume 19, Number 2, September 2005, pp. 99-107.

⁵⁵ Paul W. Schroeder, "Iraq: The Case Against Preemptive War," *American Conservative*, 21 October 2002; Crawford (2003), op. cit.; David Luban, "Preventive War," *Philosophy & Public Affairs*, Volume 32, 2004, pp. 207–48; & Lee (2005), op. cit.

set of international institutional safeguards imposing penalties for spurious campaigns.⁵⁶ Given the unconventional permissiveness of a preventive just cause, it would seem reasonable to suppose that, as a counterpoise to the threat of licentious militarism, the corresponding evidentiary standard of discrimination should be unconventionally high. For instance, it might seem reasonable to suppose that a discriminating just cause for fighting preventive wars on every front of the Axis of Evil would have to rest on evidence that proves the combined foreign menace well beyond any reasonable doubt.

To many minds, even if the members of the Axis of Evil are not co-conspirators, the prospect that any one of these states might alone make WMD available to al-Qaeda or some similar anti-American or anti-Western terrorist group raises the stakes well above what would make an alternative, international law enforcement approach seem like a good gamble. The potential transfer of such weapons threatens noncombatant immunity and makes estimations of the imminence of attacks radically uncertain.⁵⁷ The U.S. has a tremendous capacity for enacting strategies of military deterrence. Yet, terrorist martyrs are not readily deterred. It therefore makes better *strategic* sense to focus on deterring leaders of states that might otherwise act on their sympathies for, or common interests with, Islamist terrorist organizations. Again, whether this approach is also ethically justifiable depends in part upon whether a reasonably revised construction of the *jus ad bellum* principle of discrimination can incorporate a standard of liability to attack that is more permissive than domestic norms. Revisionist just war theorists need to give greater attention to this standard than has so far been given. We do not ordinarily hold arms merchants liable for crimes committed with the weaponry that they make available on an open market. So, why should states be liable to preventive attacks on grounds that they are likely (how likely?) to enter into similar transactions?

Even granting that, as the Bush Doctrine maintains, the U.S. had just cause for preventive self-defense against al-Qaeda and its supporters, it remains an open question whether warfare was a necessary and proportional means of prosecuting this cause. The necessity and proportionality of the wars that ensued after 9/11 depend largely upon whether less bellicose alternatives would have sufficed (on a conventional construction), or would have sufficed as efficiently (on Hurka's revisionist construction) to contend with the al-Qaeda threat. It is therefore

⁵⁶ Buchanan and Keohane (2004), op. cit.

⁵⁷ Eric Patterson, "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11," *International Politics*, Volume 42, 2005, pp. 122–123 & 127.

important for theorists of a just GWOT to consider the strategic literature. Frequently noted in the critical literature on the Bush Doctrine's approach to global counter-terrorism is the evident strategic contradiction of embracing unilateralist means of promoting the putatively multilateral benefits of counter-terrorism.⁵⁸ Accordingly, many prominent critics of post-9/11 U.S. security strategy have called for a shift towards genuine or increased multilateralism,⁵⁹ while others have recommended the attenuated force of international "balancing"⁶⁰ or greater investment in "soft power" strategies.⁶¹ Surprisingly, the critical literature has less frequently noted that, as Richard Falk recently put it, the "the great unlearned lesson of 9/11" is that conventional military superiority is a poor guarantor of human security in an age of sub-state transnational terrorism.⁶² It is worth reminding ourselves that the 9/11 attacks were carried out with weapons no more menacing than box-cutters. This fact, far more than the strategic contradiction inherent in a unilateral GWOT, provides a powerful reason for thinking that effective counter-terrorism should be implemented primarily, if not entirely, through legal methods of global governance.

If the Shultz doctrine alone did not justify expanding the ongoing war against al-Qaeda to include war against the Taliban, or war against Iraq, then putatively humanitarian aims were sufficient, for some just war theorists, to fill the normative gap.⁶³ The "responsibility to protect" and the corresponding "right of humanitarian intervention" are controversial innovations of emergent public international law and revisionist just war theory. The 2001 *Report of the International Commission on Intervention and State Sovereignty* was designed to forge the basis for a new

⁵⁸ John L. Hammond, "The Bush Doctrine, Preventive War, and International Law," *The Philosophical Forum*, Volume 36, No. 1, Spring 2005, p. 101; Robert Jervis, "Why the Bush Doctrine Cannot be Sustained," *Political Science Quarterly*, Volume 120, Number 3, Fall 2005, p. 352. Again, as I intimated above, the cogency of this imputation of strategic contradiction depends upon a general premise of political realism, or a specific premise of U.S. moral fallibility or moral viciousness.

⁵⁹ Robin Blackburn, "The Imperial Presidency, the War on Terrorism, and the Revolutions of Modernity," *Constellations*, Volume 9, Number 1, 2002, p. 23-24; James Steinberg, "The Bush Foreign Policy Revolution," *New Perspectives Quarterly*, Volume 20, Number 3, Summer 2003, pp. 13-14; Donald C.F. Daniel, Peter Dombrowski, Rodger A. Payne, "The Bush Doctrine is Dead; Long Live the Bush Doctrine," *Orbis: Foreign Policy Research Institute*, Volume 49, Number 2, Spring 2005, p. 208-10; G. John Ikenberry, "Why Bush Grand Strategy Fails," *Princeton Project on National Security*, working paper, August 10, 2005. Downloadable as of 6/6/07 from http://www.wws.princeton.edu/ppns/groups/GrandStrategy/papers/gj_i_kenberry_strategy_fails.pdf.

⁶⁰ Stephen M. Walt, *Taming American Power: The Global Response to U.S. Primacy* (New York: W. W. Norton, 2005).

⁶¹ Joseph S. Nye, Jr., "Soft Power and American Foreign Policy," *Political Science Quarterly*, Volume 119, Number 2, Summer 2004, pp. 255-70; Francis Fukuyama, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy* (New Haven, CT: Yale University Press, 2006).

⁶² Richard Falk, "The Moral Architecture of the Planet," 2nd annual Burke Lecture, Oakland University, November 13, 2006.

⁶³ For the case for war against the Taliban, see Falk (2003), op. cit. For the case for war against Iraq, see Elshstain (2004), op. cit.

international legal consensus on the question of when states, unilaterally or multilaterally, may justifiably take military action against another state for the purpose of protecting its people.⁶⁴ The potentially consensus-building impact of this report was eclipsed, however, by the terrorist attacks of 9/11 and the ensuing debate over the justifiability of a GWOT.⁶⁵ The prospect for international consensus on humanitarian military intervention is now no better than it was in 1994 when the world community stood idly by as genocide unfolded in Rwanda. And the UN Security Council has offered few signs of a willingness to embrace the terms of the proposed consensus as the basis for innovation in public international law. Yet, despite this impasse in the emergence of international legal consensus, the foreign policy establishment of the U.S. executive embraced and promulgated the idea of humanitarian military intervention with unprecedented vigor after 9/11. Although the Bush Doctrine's GWOT is fundamentally a military policy of strategic national self-defense, it incorporates an explicitly compassionate and particularly aggressive commitment to humanitarian intervention as an auxiliary aim. Intervening compassionately on behalf of refugees and other victims of state repression is said to be an indirect way of fighting terrorism and the rogue regimes that sponsor it. "Our creed is to intervene early and intervene often, if that is what it takes to reduce suffering and thwart terror."⁶⁶ In this context, aims of humanitarian intervention are not treated as an independent just causes for the deployment of armed forces abroad. Instead, such aims are championed as secondary just causes that contribute to the overarching aim of preventive self-defense against terrorism. Accordingly, goals of humanitarian intervention have been invoked as contributing just causes for the otherwise defensive U.S.-led GWOT campaigns in both Afghanistan and Iraq. Indeed, given the absence of the weapons of mass destruction (WMD) that were invoked as the central grounds for a putatively just war of preventive self-defense in Iraq, the last ethical justification standing for continued military occupation of that

⁶⁴ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Center, December 2001. Downloadable as of 6/6/07 from <http://www.iciss.ca/pdf/Commission-Report.pdf>.

⁶⁵ Gareth Evans, "The Responsibility to Protect and September 11," UNU/Canadian Government Seminar on the Responsibility to Protect, December 16, 2002. Downloadable as of 6/6/07 from <http://www.crisisgroup.org/home/index.cfm?id=2281&l=1>.

⁶⁶ Arthur E. Dewey, Assistant Secretary of the U.S. Department of State, "Motives for Humanitarian Intervention," Lewis and Clark International Affairs Symposium, April 5, 2004. Downloadable as of 6/6/07 from <http://www.state.gov/g/prm/rls/37930.htm>.

unfortunate nation is the humanitarian aim of providing security for a stable transition from dictatorship to sustainable democracy.⁶⁷

The ethical aim of humanitarian-democratic regime change raises a hornets' nest of issues. But I am only concerned here to address briefly certain neglected issues of JWT that arise from the way in which this radically revisionist just cause dovetails with claims of just self-defense against terrorism. Critical attention to the interplay of humanitarian and self-defensive just causes in general has tended to focus largely on the problem that Alan Buchanan calls "goal substitution," wherein states wage non-humanitarian wars under cover of humanitarian concern.⁶⁸ This is indeed an important problem. Yet, recurrent humanitarian pretexts for non-humanitarian wars soon wear thin and become unconvincing in the long run. So, there is a sense in which goal substitution cannot become a chronic problem. Rationally self-interested states can only gain advantage from duplicity in the long run by at least occasionally re-establishing credit.⁶⁹ The result is selective and opportunistic humanitarianism. Hence the most common complaint about the principle of humanitarian intervention concerns its inconsistent application.⁷⁰ Underlying this all-too-familiar pattern of ethical inconsistency is the deeper problem of political weakness of the will. States recognize the responsibility to protect, but fail consistently to act in accordance with this norm for lack of regular incentives of national self-interest. They tend to act responsibly when ulterior prudential motives are available, as was arguably the case with the NATO intervention in Kosovo. But when they ought to intervene even in the absence of compelling self-interested reasons, they tend to muster insufficient political will, as in the case of Rwanda. The first special problem that I wish to point up here is that a revisionist JWT that would consistently drag the principle of humanitarian intervention at the wheels of the counter-terrorism chariot can only exacerbate this troubling pattern of selective humanitarian action.

As a second note of caution, it is worth pointing out that the proliferation of contributing just causes in revisionist JWT may promote good faith acceptance of inflated standards of proportionality that are likely to be exceeded in practice. As we have seen, the principle of just cause constrains the grounds upon which states can

⁶⁷ Fernando R. Teson, "Ending Tyranny in Iraq," *Ethics & International Affairs* 19(2), 2005.

Downloadable as of 6/6/07 from http://www.cceia.org/resources/journal/19_2/special_issue/5190.html.

⁶⁸ Buchanan (2006), op. cit., pp. 29-32.

⁶⁹ Jon Elster (1989), "Social Norms and Economic Theory," *Journal of Economic Perspectives* 99 (3).

⁷⁰ As C. A. J. Coady points out in "The Ethics of Armed Humanitarian Intervention," *Peaceworks* 45, July 2002, pp. 24-25 (downloadable as of 6/6/07 from <http://www.usip.org/pubs/peaceworks/pwks45.pdf>), this complaint is only warranted if humanitarian intervention is an obligation-discharging right, and not merely a permissive right.

wage proportional warfare. Hence, the proliferation of contributing just causes may efface or substantially weaken this constraint. By combining preventive self-defense with the aim of humanitarian-democratic regime change, revisionist JWT inflates the amount of harm that can be said to satisfy the principle of proportionality. To be sure, this increase in permissible harms is in theory offset by the benefits of humanitarian regime change. But in practice, the benefits of regime-change warfare, inasmuch as they are deferred to an envisioned future state of democratic governance, will typically be radically uncertain. Hence, this form of warfare involves substantial risk of accepting too much predictable short-term harm for the sake of unpredictable future benefits. Moreover, since warfare tends to engender more warfare, standards of proportionality appropriate to the most modest of military campaigns are difficult to meet in practice.⁷¹ Accordingly, it should be even more difficult in practice to meet the inflated standards of proportionality implicit in the more ambitious aims of trying to further the cause of counter-terrorism through forced regime changes.

A third problem that is worth mentioning here is the problem of ethical cross-purposes that arises from empirically insensitive or uncritical ways of combining the cause of humanitarian-democratic regime change with the cause of preventive counter-terrorism. There is a deep proportionality quandary lurking at the heart of the Bush Doctrine and like-minded JWT because the amount of harm that is proportional with respect to the aim of deterrent self-defense will, in many cases, exceed the amount of harm that is proportional with respect to the aim of humanitarian intervention. If the measure of force that is proportional for one's humanitarian cause will not suffice for purposes of self-defense, and the measure of force required for deterrence will exceed what is proportional for humanitarian purposes, then one cannot possibly wage a proportional war with a view to achieving both causes. In such cases, one must choose whether to sacrifice the interests of others for the sake of self-defense or risk one's own security in order to benefit others. In principle the Bush Doctrine clearly chooses the first option, but in practice it has impaled itself on the ethical contradiction of compassionate deterrence. This contradiction (not to be confused with the strategic contradiction of unilateral multilateralism) is perhaps best illustrated by the "Shock and Awe" phase of the invasion of Iraq. This highly public spectacle of mass destruction appeared to

⁷¹ Henk W. Houweling & Jan G. Siccamo, "The Epidemiology of War, 1816-1980," *The Journal of Conflict Resolution*, Vol. 29, No. 4. (Dec., 1985), pp. 641-663.

be designed to serve the aim of deterrence as a means of preventive counter-terrorism. It visibly demonstrated the overwhelming superiority of American military capabilities, and it made of Hussein's Iraq an object lesson that other rogue regimes would not soon forget. Yet, this initial phase of the Iraq war was demonstrably indiscriminate in its effects, and it consequently undermined efforts to sell the idea that the invasion and occupation were designed to serve a genuinely humanitarian cause. Even supposing the cogency of each independent just cause in this case, the aim of just deterrence and the aim of just humanitarian intervention clearly operated at cross-purposes. One might attempt *a priori* to reconcile tensions between these aims by stipulating that the relationship between their independent measures of proportionality is to be treated as additive. But such an empirically insensitive approach is ethically unattractive. It would simultaneously blind us to the reality of conflicting aims and guarantee inflation in the level of violence that qualifies as proportional. For these reasons, just war theorists wishing to emphasize either ethical restraint, or reality-based military planning, or both, should consider the proposition that it might be better, other things being equal, for states to invoke and act upon simpler, unitary just causes for military action. In sum, insofar as JWT "is not pro-war," insofar as it "seeks to minimize the reasons for which it is permissible to fight,"⁷² just war theorists should be exceedingly cautious about multiplying and aggregating just causes.

4. Terrorism & Just Counter-terrorism Warfare

Even if a just GWOT cannot reasonably be assimilated into to a conventional framework of interstate self-defense, it might nevertheless be conceived as a new justifiable form of 'targeted' transnational warfare waged only against those who are actively engaged in terrorism, or directly responsible for it. Central to the task of conceptualizing the aims and limits of a just GWOT, to be fought by means *short* of interstate war, is the issue of defining a form of political behavior that could both provide just cause and serve to identify legitimate targets for appropriately discriminating military operations. Setting aside the Shultz Doctrine's contentious refusal to discriminate between sub-state terrorist organizations and states that support them, it is worth examining here the issue of whether it is practicable to conceive of "terrorists" as the primary enemy of a more targeted just GWOT.

⁷² Orend (2006), op. cit., p. 31.

Much of the theoretical literature on terrorism sets out, first, to define the concept and, second, to determine if and when the corresponding form of activity may be justifiable.⁷³ This is a strange approach to the subject given that there is far more agreement about the condemnatory connotation of ‘terrorism’ than there is about its empirical, sociological denotation. Perhaps, as David Rodin suggests, the essential task is, instead, to explain why terrorism is wrong.⁷⁴

One well-known study, published eighteen years ago, canvassed 109 different social-scientific definitions of the term.⁷⁵ More recently the scope and complexity of conceptual variance has dramatically increased, and the legal process of producing an international consensus definition has stalled. Yet, despite all the conceptual disagreement, remarkably few just war theorists have hesitated to condemn the 9/11 attacks as terrorism. This remarkable convergence of judgment in the midst of conceptual contestation would appear to be due to the fact that nearly every candidate definition of ‘terrorism’ includes some reference to the indiscriminate killing of civilians, innocents or non-combatants as its primary effect. Perhaps al-Qaeda’s particular wrongdoing was therefore not the crime of international aggression as conventionally conceived, but a violation of the *jus in bello* principle of discrimination according to just about any sensible construction of it. The official response was a declaration of counter-terrorism warfare. Thus, the central question that this declaration raises for contemporary revisionist JWT concerns whether it is morally appropriate and practicable to see the principle of discrimination not only as a side constraint in the conduct of war, but also as a *jus ad bellum* principle that both furnishes just cause and identifies legitimate targets of warfare. Jeff McMahan has cogently argued that unjust conduct in either just or unjust wars may provide the other side with just cause for necessary, proportional and discriminating war efforts.⁷⁶ If this form of argument is supportable, then the 9/11 attacks might be construed as providing just cause for war against al-Qaeda independent of the question of whether these attacks constituted an act of international aggression.

⁷³ Andrew Valls, “Can Terrorism Be Justified?,” in Andrew Valls (ed.), *Ethics in International Affairs: Theories and Case* (Lanham, MD: Rowman & Littlefield, 2000), pp. 65-79; Lowe, Scott C., “Terrorism and Just War Theory,” in Margaret Breen (ed.), *Understanding Evil: An Interdisciplinary Approach* (Amsterdam: Rodopi, 2003); Gabriel Palmer-Fernandez, “Terrorism, Innocence, and Justice,” *Philosophy and Public Policy Quarterly* 25, No. 3 (Summer 2005), p. 24; & Virginia Held, “Terrorism, Rights and Political Goals,” in R. G. Frey and Christopher W. Morris (ed.), *Violence, Terrorism, and Justice* (Cambridge: Cambridge University Press, 1991), pp. 65-72.

⁷⁴ David Rodin, “Terrorism without Intention,” *Ethics* 114 (July 2004), p. 753.

⁷⁵ Alex P. Schmid and Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (Amsterdam: North-Holland Publishing Company, 1988).

⁷⁶ McMahan (2005b), op. cit.

Some thinkers have recently raised important doubts, however, about how much work the traditional principle of discrimination can do in distinguishing between justifiable and unjustifiable warfare. Virginia Held, for example, has argued that, apart from “small children,” it is often unclear “who the ‘innocent’ are as distinct from the ‘legitimate’ targets.”⁷⁷ In her view, it is especially difficult to discriminate between legitimate and illegitimate targets when the enemy is a democratic polity “where citizens elect their leaders and are ultimately responsible for their government’s policies.”⁷⁸ A related worry might be raised about citizens whose stock portfolios include investments in corporations that are directly involved in the business of warfare. Held challenges the principle of discrimination in order to show that conventional warfare may sometimes be morally worse than terrorism. Joseph Margolis similarly claims that no stable meaning can be ascribed to the traditional distinction between combatants and non-combatants. But he does so in arguing for a bolder conclusion. Without a workable principle of discrimination, we lack the conceptual resources for distinguishing between justifiable and unjustifiable warfare in the present context of world affairs. Just counter-terrorism warfare is strictly inconceivable. On this view, which may be called strict GWOT pacifism, there can be no such thing as a just GWOT.⁷⁹ It follows from this conclusion, however, that there can also be no such thing as an *unjust* GWOT. If the Bush Doctrine is ethically condemnable, from this perspective, it can only be condemned for the cosmopolitan consequentialist reason that its global effects have been more harmful than beneficial to humanity, albeit with the odd qualification that no rights have thereby been violated.

Is the presumptive human right of non-combatant immunity so easily relinquished by virtue of a citizen’s participation in democratic decision-making, or by virtue of holding minor shares of stock in war-making private enterprises? Most just war theorists think not. One of the noteworthy points of broad agreement in recent JWT is Walzer’s stricture that the task of a theory of discrimination is not to identify conditions under which people *merit* the right not to be killed, but to identify conditions under which people may *lose* or *forsake* this weighty presumptive right.⁸⁰ We should not look for legitimate targets wherever degrees of innocence and harmlessness fall short of those associated with small children.

⁷⁷ Virginia Held, “Terrorism and War,” *The Journal of Ethics* 8 (2004), p. 66.

⁷⁸ Held (2004), op. cit., p. 67.

⁷⁹ Joseph Margolis, “Terrorism and the New Forms of War,” *Metaphilosophy*, Volume 35, Number 3, April 2004, pp. 403-4.

⁸⁰ Walzer (2000), op. cit., pp. 30 & 146.

Instead, we should start with paradigmatic instances of *non-innocent combatants* (NICs) and exercise extreme caution in expanding the range of legitimate counter-terrorism targets beyond these agents. If “terrorism” is ordinarily understood to be a term of condemnation, then “counter-terrorism” is a term of praise that ought to be applied only to the most discriminating of military operations. Most just war theorists also agree to something more or less like the following: NICs are those persons who are directly engaged in or directly responsible for conducting the business of warfare.⁸¹ This includes not only those who do the fighting, but also those who make controlling decisions about when, where, how, and with whom the fighting will be conducted. Voters in democratic polities and minor shareholders in war-profiteering corporations *per se* do not appear to belong to this class of persons. Hence, it is at least in principle possible to define the ‘terrorist’ recursively as an indiscriminate and therefore unjust NIC.⁸²

The concept of a NIC obviously applies to a diverse array of actors. In an age of civilian-embedded irregular forces and privatized military companies, a principled distinction between NICs and “civilians” cannot be upheld. NICs are not necessarily uniformed soldiers. Nor are terrorists necessarily irregulars associated with sub-state organizations. Accordingly, the recent theoretical literature has almost unanimously corrected for the popular prejudice (which is also official U.S. policy) that “terrorist” violence is always the business of sub-state actors.⁸³

For the vast majority of just war theorists what sub-state terrorism and state terrorism have in common is the *deliberate* or *intentional* killing of innocent non-combatants.⁸⁴ According to this orthodox view, state terrorism is exemplified in such phenomena as the “disappearances” of Argentina’s Dirty War or Saddam

⁸¹ Walzer (2000), op. cit., p. 135; McMahan (2004), op. cit., p. 695; Rodin (2004), op. cit., p. 757; Orend (2006), op. cit., p. 107.

⁸² The idea of an unjust NIC is similar to the notion of an “unjust combatant” found in McMahan (2005b), op. cit.

⁸³ Jeremy Waldron, “Terrorism and the Uses of Terror,” *The Journal of Ethics* 8 (2004), pp. 5-35; Virginia Held (2004), op. cit., pp. 59-75; Douglas Lackey, “The Evolution of the Modern Terrorist State: Area Bombing and Nuclear Deterrence,” in *Terrorism: The Philosophical Issues*, Igor Primoratz ed. (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2004), pp. 128-40; Igor Primoratz, “State Terrorism and Counter-terrorism,” in Primoratz ed. (2004), pp. 113-127; C. A. J. Coady, “Terrorism and Innocence,” *Journal of Ethics* 8 (2004), pp. 37-58; Alison Jaggar (2005), op. cit., pp. 202-217; Samuel Scheffler, “Is Terrorism Morally Distinctive?,” *The Journal of Political Philosophy*, Volume 14, Number 1, 2006, p. 1-17; Rodin (2004), op. cit., p. 752-771; & Orend (2006), op. cit., p. 69. Exceptions to this overwhelming trend include Maryann Cusimano Love, “Globalization, Ethics, and the War on Terrorism,” *Notre Dame Journal of Law, Ethics & Public Policy* 16, No. 1 (2002), p. 66; & Joseph Boyle, “Just War Doctrine and the Military Response to Terrorism,” *The Journal of Political Philosophy* 11, No. 2 (2003). But Boyle departs from the consensus view only “for simplicity.”

⁸⁴ For example, Michael Walzer, “Five Questions about Terrorism,” *Dissent* 49 (2002), pp. 5–10; Coady (2004), op. cit.; Igor Primoratz, “Civilian Immunity in War,” *Philosophical Forum* 36, No. 1 (Spring 2005), pp. 41-58; Jaggar (2005), op. cit.

Hussein's bombing of Kurdish Iraqis.⁸⁵ Yet, the same epithet does not apply to the "collateral damage" of, for example, Shock and Awe. To some dissenting, revisionist just war theorists, however, the theoretical abstractions of the conventional doctrine of double effect seem unduly to discount or erode sympathy for the unintended but foreseeable innocent victims of conventional warfare.⁸⁶ Hence, the concern that collateral damage may in some instances and degrees qualify as terrorist violence is reflected in the recent theoretical literature on this topic. Rodin, for example, has cogently defended a conception of terrorism that encompasses indiscriminate killing of innocent non-combatants that is "*deliberate, negligent, or reckless*."⁸⁷ This construction allows for a more even-handed application of the condemnatory force of the "terrorist" label in contexts of asymmetric conflict. The worry is that restricting the condemnatory force of "terrorism" to instances of *deliberate* killing of innocent non-combatants unduly biases ethical judgment in favor of the powerful.⁸⁸ In contrast, broadening the definition of terrorism to include a wider variety of subjective conditions accommodates the judgment of Rodin, Held, Ted Honderich, and many others who perceive that the unintended but predictable indiscriminate killing involved in conventional warfare is often at least as terroristic and condemnable as deliberate attacks on innocent non-combatants.⁸⁹ Other things being equal, such as the number killed and the degree of their innocence and harmlessness, deliberate terrorism is surely worse than negligent or reckless terrorism. But the notion that only a direct intention to kill innocent non-combatants is condemnable as terrorism places too much weight on a subjective condition that is altogether too easy to conceal within complex bureaucracies of military decision-making. Yet, Rodin's revisionist definition of terrorism also suggests that, "we should be extremely cautious about extending the rules of *jus ad bellum* so as to include terrorism as a just cause for war."⁹⁰ Throughout human history, conventional warfare has rarely served to minimize harms suffered by innocent non-combatants. Accordingly, many

⁸⁵ Orend (2006), op. cit., p. 69, considers the Terror of the French Revolution to be the paradigmatic case of state terrorism because he sees the "propaganda of the deed" as an essential part of terrorist tactics. But most contemporary forms of state terrorism, such as the "disappearances" of Argentina's Dirty War, seek to avoid publicity. Silent terrorism is typically the preferred strategy of indiscriminate state repressions.

⁸⁶ Peter Temes, *The Just War: An American Reflection on the Morality of War in Our Time* (Chicago: Evan R. Dee, 2003), pp. 155 & 160-1; Rockmore (2004), op. cit., p. 397; Coady (2004), op. cit., pp. 52 & 57; & Rodin (2004), op. cit.

⁸⁷ Rodin (2004), op. cit., p. 756.

⁸⁸ Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2002).

⁸⁹ Held (2004), op. cit.; & Honderich (2002), op. cit.

⁹⁰ Rodin (2004), op. cit., p. 770.

dissenting just war theorists would agree with Tom Rockmore's argument that, while a just GWOT may be conceivable in theory, the wars in Afghanistan and Iraq have not been sufficiently limited to the targeting of unjust NICs to qualify as genuine counter-terrorism. Instead, this putative just cause has largely served as "a convenient pretext for American imperialist ambitions."⁹¹

Let us suppose, however, that certain forms of targeted warfare against terrorist organizations such as al-Qaeda may be conducted in ways that are discriminating and proportional. If so, the prospects for successful militarized counter-terrorism must still be estimated in light of realities of the strategic landscape. To this end, it is important to understand the strategic aims of terrorist organizations like al-Qaeda. Many theoretical conceptions of terrorism see it as a form of political violence that is necessarily invested in the production of fear.⁹² How we understand this strategic investment is especially important for assessing the prospects of successful counter-terrorism by conventional military means. Perhaps the greatest danger in succumbing to the *terror* of terrorism arises from the fact that, as Cicero and Grotius observed, fear is the basest of political motives and the principal cause of wrongful warfare.⁹³ Significantly, this is also the central psychological insight behind Petr Kropotkin's oft cited theory of terrorism as "propaganda of the deed." As this theory would have it, the long-term aim of rational, counter-hegemonic terrorist violence is to embolden a sympathetic audience.⁹⁴ Frightening an antipathetic audience is merely a short-term means to this end. After all, as Rodin emphasizes, panic episodes tend to be short-lived: "Shocking as the attacks may be, ordinary people generally get on with their lives."⁹⁵ Fear quickly spreads, but thereafter predictably subsides. Thus, the ultimate aim of strategically rational terrorism cannot be, as Samuel Scheffler puts it, to maximize "the numbers of people who identify with the victims," and thereby "to maximize the spread of fear."⁹⁶ The rational, patient terrorist does not rely on the spread of fear as the

⁹¹ Rockmore (2004), p. 386.

⁹² Maryann Cusimano Love, "Globalization, Ethics, and the War on Terrorism," *Notre Dame Journal of Law, Ethics & Public Policy* 16, No. 1 (2002); Jeremy Waldron, "Terrorism and the Uses of Terror," *The Journal of Ethics* 8 (2004), pp. 5-35; Virginia Held (2004), op. cit., pp. 59-75; Jaggard (2005), op. cit., pp. 202-217; Scheffler (2006), op. cit., pp. 1-17; & Orend (2006), op. cit., p. 69.

⁹³ Marcus Tullius Cicero, *On Duties* I.vii.24; Grotius, op. cit., II.i.5(1) & III.i.10(3).

⁹⁴ Robin Blackburn, "The Imperial Presidency, the War on Terrorism, and the Revolutions of Modernity," *Constellations*, Volume 9, Number 1, 2002, p. 3; Waldron, op. cit., p. 26.

⁹⁵ Rodin (2004), p. 761. Rodin also makes the important observation that the official aim of Japan's Aum Shinrikyo cult is not to terrorize but to awaken the target population. Thus terrorists sometimes conceive of the violence that they inflict as a form of shock therapy for populations too inured to whatever perceived evil the terrorist purports to be fighting.

⁹⁶ Scheffler (2006), op. cit., p. 10. Despite my objection to this feature of Scheffler's account of terrorism, I find his central thesis to be characteristically incisive: what is morally distinctive about

primary means of inducing the desired coercion (or collapse) of the targeted social system. Instead, she anticipates that the enemy regime will panic and overreact, or see the panic of the populous as an opportunity for unprincipled, indiscriminate and “savage” (i.e. disproportionate) repressions.⁹⁷ The strategically rational aim of deliberate, counter-hegemonic terrorism is to prompt the opposition to commit acts of negligent or reckless terrorism. Thus, the rational terrorist hopes to seduce the enemy regime into eroding its own claim to be engaged in genuine “counter-terrorism.” As even the consummate realist Carl von Clausewitz recognized, “moral forces are amongst the most important subjects in war.”⁹⁸ Thus, if the terrorism of 9/11 belongs to a rational strategy of geopolitical *real politik*, it is perhaps best understood as designed, in the long run, to sap the moral forces that lend legitimacy to the dominant political order. The ultimate aim of its deliberately indiscriminate political violence is to maximize the numbers of people who identify, not with the victims of that violence, but with the victims of the (predictably greater?) reciprocal violence of the would-be hegemon. The rational insurgent’s hope is that this form of identification, coupled with the successes of counter-hegemonic violence, will ignite and embolden the settled resentments of the oppressed. Accordingly, insofar as we can understand *deliberate* terrorism as a rational political tactic designed to coerce or undermine stable forms of governance, we should be very wary of the rush to war, we should make cool-headed assessments of the most moderate and measured responses, and we should chastise fear-mongering politicians for aiding the enemy’s cause.

The greatest threat to the rational terrorist’s strategy is the dominant order’s capacity for effective and humane legal governance. Accordingly, in order to maintain the high moral ground, the leaders of a just GWOT should resort to conventional military operations only in exceedingly rare circumstances. The first and best circumstance is the all-too-rare one in which terrorists may be targeted in areas isolated from civilian populations, such as the Tora Bora bunker complex in Afghanistan. The employment of targeted or “named” military strikes also appears, at first blush, to be a justifiable tactic for a just GWOT. Accordingly, the airstrike that killed Abu Musab al-Zarqawi, the leader of al-Qaeda in Iraq, has been lauded as

terrorism, as compared with other *prima facie* evils, is that it “treats the primary victims as means to a means” (p. 14).

⁹⁷ “The Spirit of Revolt,” *Kropotkin’s Revolutionary Pamphlets*, Roger N. Baldwin ed., (Seattle, WA: Vanguard Press, 1927).

⁹⁸ Carl von Clausewitz, *On War*, J. J. Graham trans. (London: N. Trübner, 1873), III.iii.

an exemplary instance of just military counter-terrorism.⁹⁹ Yet, the efficacy of such strikes may be questionable on grounds that would-be martyrs are not readily deterred by the prospect of militarized extra-judicial execution. This concern has led some strategists and ethicists to worry that such “named killings” might actually fuel the cycle of reciprocal violence. Michael Gross, for example, has recently argued, on the basis of data from Israel’s experiments with targeted military killings, that there are at least substantial grounds for caution about the prospects for success in reducing terrorist violence by such means in contexts of intractable armed conflict.¹⁰⁰ This “targeted” way of employing the instruments of conventional warfare is intuitively discriminating and, in some cases, proportional; but it remains an open question, at this point, whether it is likely to succeed in effectively combating the threat of deliberate counter-hegemonic terrorism.

⁹⁹ Anthony Dworkin, “An Acceptable Case of Targeted Killing,” *Crimes of War Project*, June 8, 2006. Downloadable as of 6/6/07 from <http://www.crimesofwar.org/onnews/news-zargawi.html>.

¹⁰⁰ Gross (2006), op. cit., p. 333.