PROCEEDINGS FROM
THE 7TH CANADIAN CONFERENCE ON ETHICAL LEADERSHIP

The War on Terror - Ethical Considerations

EDITED BY: DR. DANIEL LAGACÉ-ROY AND COLONEL BERND HORN

VOLUME 1

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FOREWORD

It gives me great pleasure to introduce *The War on Terror: Ethical Considerations*. This publication is another book released through the Canadian Defence Academy Press and represents an important contribution to both leadership and ethics bodies of literature. The significance of this publication is particularly interesting since it is the first volume of proceedings from the 7th Canadian Conference on Ethical leadership (CCEL) held at the Royal Military College of Canada (RMC) on 28-29 November 2006. The second volume is entitled *Ethical Decision-Making in the New Security Environment* and it will follow shortly. More importantly, this current volume focuses on terrorism, which is a critical topic in today's contemporary security environment.

In recent years, the world has experienced the full spectrum of what terrorism entails. The methods used for targeting objectives, the unconventional attacks, their savagery and the unprecedented violation of international conventions has created an era of fear characterized by constant threats and terror. In response to these violations of human rights, and the asymmetric methodology by which they are conducted, the international community entered in a Global War on Terror (GWOT), which represents various military, political, and legal actions taken to eradicate terrorism.

The topics presented in this book provide a good opportunity for military members to challenge and reflect on key themes related to the fight against terrorism. The present Canadian Forces operations are carried out in an environment in which extremes are present, and men and women in uniform are required to be well-informed about the demanding environment in which they find themselves. Furthermore, this publication, along with others in the Strategic Leadership Writing Project series, captures a range of subjects that contribute to the advancement of knowledge in the area of military leadership. Books within this project serve not only as a means for personal development but also as educational tools in the context of training and educational settings.

In closing, I wish to reiterate the importance of this book, as well as all others in the Strategic Leadership Writing Project series. At the Canadian Defence Academy, we hope that our efforts at providing well-

researched, relevant and authoritative books on key operational topics both enlighten and empower those who serve in, and who interact with, the profession of arms in Canada.

Major-General J.P.Y.D. Gosselin
Commander, Canadian Defence Academy

PREFACE

The Canadian Forces Leadership Institute (CFLI) of the Canadian Defence Academy (CDA) is pleased to introduce *The War on Terror: Ethical Considerations*. This publication is the first volume of proceedings from the 7th Canadian Conference on Ethical Leadership (CCEL) held at the Royal Military College of Canada (RMC) on 28-29 November 2006. A second volume focusing on ethical decision-making in the contemporary security environment will follow shortly.

The theme of the 2006 conference, "Ethical behaviour in an environment of chaos and complexity," captured the reality of today's world. Since 11 September 2001 (9/11), the world changed forever and we have entered into an epoch of fear characterized by a constant state of threat and terror. The fight against terrorism, commonly referred to as the Global War on Terror (GWOT) is an initiative embraced by many countries, in particular the United States, Great Britain and Canada, in response to this state of affairs. The end result is an attempt to eradicate terrorism and to establish a global state of stability and order.

The conference papers presented in this book address issues related to responses in fighting terrorism. It is not meant to be prescriptive or act as doctrine. It is merely a vehicle to share information and engage in dialogue. As such, we at CFLI believe that the *The War on Terror: Ethical Considerations* is a must read, as it will provide topics for discussion and engage the debate on understanding the current environment of terror. It can also serve as an educational tool for preparing military members to recognize and comprehend the complexity that they will face in operations. In the end, this publication is presented as part of CFLI's continuing effort to assist with the development of effective military leaders.

Editors

INTRODUCTION

Throughout time there have always been cataclysmic events that have changed history. Most would argue that the tragic occurrences of 11 September 2001 (9/11), when terrorists hijacked fully fuelled commercial airliners and used them as munitions to attack the Twin Towers of the World Trade Center in New York, as well as the Pentagon in Washington D.C., was such an event. In fact, the influential *Economist* magazine called 9/11 the day the world changed.

This dramatic description is not undeserved. Aside from the approximately 3,000 deaths and the billions of dollars in damages, 9/11 set off a chain of actions that have changed the face of the global security environment. Its impact ranged from new threats, to clear responses to both the real and perceived perils that nations, particularly those in North America and Europe, faced. Although terrorist acts were not unknown, the sheer savagery and magnitude of the attack of 9/11and its complex planning indicated that terrorists were prepared to utilize new and innovative weapons of mass destruction. Moreover, the suicide bomber now provided the ultimate smart munitions – capable of deciding how, when and particularly whom to strike.

The dramatic events of 9/11 created (dramatic) changes for Western military organizations and their allies. The western militaries already reeling from major paradigm shifts that resulted with the "fall of the wall" in 1989, faced a major challenge departing from the relatively stable and secure template, predictable Cold War model based on large, symmetrical mechanized forces, within the context of high intensity warfare. In retrospect, the Cold War model, in existence for almost 50 years, was a very comfortable environment for everyone. The world was clearly delineated – the enemy was easily identified and understood and the anticipated battlefield was fully comprehensible to the point where exercises, particularly in Europe, were practically dress rehearsals for the potential conflict. With the collapse of the Berlin Wall in December 1989, which represented the collapse of the Warsaw Pact and the Soviet Union, the rigidly controlled bi-polar world tumbled into a free fall. An economic and political power vacuum was created as the superpowers disengaged from many areas around the world. Very quickly failed and failing states mushroomed around the globe. Exacerbating

the situations were other significant problems such as ethnic violence, narco-trafficing, transnational crime and conflict over resources.

In the 1990s, things went from bad to worse. With only a single global superpower, the United States, the West began a series of selective interventions that would have been inconceivable in the Cold War. Often without the necessary mandates, international agreements, participant sanction, political will or resources. Moreover, often intervention was launched before the conflict or belligerents were clearly ready for such interference.

In this context, the landscape for militaries also dramatically changed. The belligerents were no longer clearly identified or well understood. Indeed, operations in the 1990s contained a monumental leap in complexity. Antagonists ranged from military, to para-military forces, to warlords, to criminal organizations and gangs, to armed mobs. In addition, military forces now had to deal with other governmental departments and organizations, as well as non-governmental agencies and an ever present press. By 1993, United States Marine Corps commandant, General Charles Krulak, articulated the new security environment within the context of the "three block war." He described an operational concept, or contingency in fact, in which soldiers conducted operations spanning humanitarian assistance to peacekeeping and/or mid-intensity combat all in the same day and all within three city blocks.

Militaries scrambled to meet the requirements of the new environment, one that required both warfighting and soft (e.g. mediation, negotiations, working with other non-military actors) skills. More emphasis was placed on lower levels of leadership. The old mass army concept that relied on senior leadership to make decisions and deal with the public or press was no longer relevant or effective. The concept of the "strategic corporal," where the tactical decisions or errors made by junior members on the ground in the glare of media cameras can become strategic issues as they are beamed across the globe by the media in real time and influence or incite negative and often violent reactions, required a more de-centralized leadership approach.

Just as militaries began to cope with the new environment, 9/11 shattered any level of comfort that may have developed. It unleashed a Global War On Terror (GWOT) that engulfed the Americans and their international

allies in a deadly struggle in Afghanistan, Iraq and around the world. The unchallenged military prowess of the United States dictated that hostile elements had to adopt asymmetric approaches.[1] Importantly, easily accessible technology, international communications and information technology fuelled well-financed, extremely mobile and lethal terrorist networks capable of striking around the world.

Within the ambiguous, complex and volatile new security environment, terrorism became a major threat component to all nations, but particularly the industrialized West. Although terrorism is by no means a new phenomenon, it has become a centre piece of attention for most western countries, particularly the United States. Much of this is due to the savagery and scale of attack, as well as the symbolic nature of the strike on North American soil that 9/11 presented. As such, international terrorism and the growing threat of "home grown" terrorists has become a major agenda item.

The GWOT is somewhat of a misnomer. Terrorism is not a cause. It is a tool, an instrument, a tactic to achieve specific objectives. One can even argue it is a form of struggle, albeit an illegitimate one. Ariel Sharon, a former prime minister of Israel stated "there is no good terrorism or bad terrorism. There is only terrorism."[2]

The concept of terrorism itself has numerous definitions. Walter Laqueur, a well known expert on terrorism and insurgency asserts that "terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted."[3] Similarly Benjamin Netanyahu, a former special operations soldier and prime minister of Israel, defined terrorism as "the deliberate and systemic assault on civilians to inspire fear for political ends."[4] In a similar vein, Brian Jenkins stated, "Terrorism is the use or threatened use of force designed to bring about political change."[5] Finally, scholar Michael Walzer explained, "Terrorism is the random killing of innocent people, in the hope of creating pervasive fear." He added, "The fear can serve many political purposes. Randomness and innocence are crucial elements in the definition."[6]

The American Federal Bureau of Investigation (FBI) definition states, "Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[7] The

US Departments of State and Defense define terrorism as "premeditated, politically motivated violence perpetrated against a noncombatant target by sub-national groups or clandestine state agents, usually intended to influence an audience."[8] With the context of NATO, terrorism is defined as "the unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives."[9]

Clearly, there are many different definitions. More importantly, these definitions all have core, central components to the concept of terrorism:

- it is unlawful;
- it is politically (and ideologically) motivated (not criminal i.e. for personal financial gain);
- it is premeditated (not an impulsive act of rage);
- it is directed against innocents;
- it is meant to cause fear and terror;
- the violence is actually directed to impact others (i.e. not specifically the victims); and
- its actions are decidedly outside the accepted limits imposed on the use of force in warfare (i.e. the targeting of non-combatants). This gives rise to its asymmetric nature.

In the end, the general purpose of terrorism is to alter behaviour and attitudes of specific groups. However, this is not to rule out the use of terrorism to achieve immediate objectives that assist in achieving larger goals (e.g. for example taking hostages for ransom, to force the release of prisoners, to gain publicity, to instill fear and panic, to force the government into draconian and repressive actions that will alienate society and cause a loss of popular support, or to create the impression of anarchy and a state incapable of protecting its citizens). As such terrorism is purposeful. Those agents practicing it intend to achieve specific outcomes, which may follow a carefully designed campaign plan intended to meet short, mid and long-term objectives. The end purpose, as already mentioned, is to change the political or decision-making framework of the respective

target state or community. The use of terrorist tactics, or asymmetric approach, is a direct result of the imbalance in power and military means between the antagonists. Nonetheless, terrorism is intended to erode the psychological support of the targeted regime by instilling fear (if not terror) into the population, government officials, as well as domestic and international supporters.

Terrorism in the new security environment, despite all of the efforts to prevent it, has endless possibilities. Globalization, particularly the explosion in communications, international travel and financing, as well as easy access to information and information technology has made it easier for terrorists to operate. At one point, American intelligence estimated that Al-Qaeda had the support of approximately 7,000,000 radical Muslims across the globe with more than 100,000 martyrs prepared to die for the cause. Moreover, they believed al-Qaeda had about 1,000 sleeper cells in the United States and Europe.[10]

Although terrorism is not a new tactic, many scholars now argue that the motives of terrorists have changed. Where prior to 9/11 many terrorist groups conducted acts to seek publicity and support for their cause, without necessarily trying to inflict massive casualties on civilians, actions in the new millennium have increasingly focused on exactly that. Arguably, a major motive for terrorists in the new security environment is not only to mobilize support for a cause but also to punish those deemed responsible for perceived injustices, whether economic, ideological, political or religious. "The primary motive now seems to be to strike major damaging physical and psychological blows against their enemies, not just to defeat a regime outright or to compel them to meet the terrorists' demands," insists Professor David Charters, "Rather it is to punish the target for being wrong."[11]

As such, this volume based on a number of selected papers presented at the 7th annual Canadian Conference on Ethical Leadership (CCEL), "Ethical Behaviour in an Environment of Chaos and Complexity," provides a number of perspectives on the ethics of fighting terrorism. The volume begins with a chapter on the challenges of military ethics in fighting terrorism by the Israeli philosopher Dr. Asa Kasher. His chapter is a contribution to the development of a Doctrine of Just War on Terrorism (DJWT). Kasher argues that responses to new forms of terrorism do not meet the criteria of the classical Doctrine of Just War (DJW). In fact, he

insists that some aspects of that doctrine must be reassessed in order to develop a more applied approach to fighting new threats.

Kasher begins his chapter by defining terms such as "terrorism" and "military ethics." He introduces a "working definition" of an "act of terrorism" that delineates terrorism from activities carried out by individuals and organizations but not of states. This definition serves as the foundation of Kasher's argument throughout his chapter. He then moves on to recognize the necessity to reconsider the Principle of Distinction by including criteria that target directly the nature of a person's involvement (i.e., "scale of involvement") in terrorist activities and the priorities (i.e., "scale of priorities") of those activities. According to Kasher, the requirement for applying these two "scales" is an indication that the fight against terrorism has set new parameters that are challenging the application of the DJW.

Christopher Penny then addresses, in Chapter 2, the legal content and the moral ramifications of the plea of superior orders, illustrating the complexities and risks of justifying criminal behaviour on this basis. He mentions, "Just following orders" is often argued by military defendants accused of committing war crimes or other serious violations of international humanitarian law. This argument is based on the fact that armed forces are structured on the immediate obedience of orders by subordinates, and significant penalties can and do result from disobedience.

In articulating the complexity of this argument, Penny explains that contemporary international law addresses this situation by mitigating the criminal responsibility of soldiers in some circumstances by virtue of their obligation to follow the commands of superior officers. However, Penny states that the *Rome Statute* provision allowing superior orders as full defence to War crimes charges before the International Criminal Court (ICC) is problematic as it runs counter to the historical legal evolution of this doctrine and is difficult to maintain on moral grounds. Unable to capture the nuances of human behaviour, this defence as currently envisaged, will allow individuals who should bear responsibility for their actions to escape criminal sanction, a situation that is particularly problematic in our current "chaotic and complex environment." Penny recognizes that the superior orders defence has already been included in the Rome Statute and argues that the application of this doctrine must be limited to ensure that it does not reward soldiers who consciously refuse to even consider the moral ramifications of their actions.

In Chapter 3, Davida Kellogg argues that the use of torture is morally and strategically wrong. She explains that the utility of the practice of torture in extracting intelligence in the context of highly politicized warfare (i.e. in light of the CNN effect), in which public perception of our actions is "way ahead of everything else" is counter-productive. Simply put, any advantage derived from the coerced, often questionable information derived by torture is overshadowed by the loss of public domestic and international support, as well as credibility. Torture quite simply removes any moral authority to speak to the conduct of others. To make her argument, Kellogg utilizes a system of Jominian-type Principles of War (i.e. mass, objective, security, surprise, manoeuvre, offensive, unity of command, simplicity, and economy of force), updated and specifically adapted to the morally, as well as strategically asymmetrical, terror warfare as a useful lens through which to focus initial analysis. In the end, she insists that it is in the "domains of perceived worthiness and its direct effects on the morale and support of our own and allied civilian populations, as well as the international community that is crucial". Kellogg believes that to prevail in the GWOT "a vast and unbridgable moral and legal gap [must] exist between ourselves and those who wage terror warfare on all our peoples." Only then, she asserts, can we succeed. As such, critical to creating this gap is the end of the use of torture.

In the next chapter, Lieutenant (Navy) Michael J. Lawless tackles the issue of terrorism as an international crime. His central thrust is that since terrorism constitutes an international crime, the international community should therefore act as a collective group in the prevention of terrorism and the sanction of individuals perpetrating acts of terrorism. He posits that 11 September 2001 provided the opportunity for nations to push the anti-terrorist agenda. Lawless argues that the subsequent international war on terror, which was seemingly sanctioned by the United Nations, made it possible for the crime of terrorism, as the act of a non-governmental organization, to become a part of the universal responsibility of nations to prosecute. Specifically, it argues for the establishment of an international institution such as the International Criminal Court for prosecution and subsequent sanction of those accused and found guilty of conducting terrorist acts. He further asserts that the lack of an internationally accepted definition of terrorism, while not justified, has indeed stymied the necessary international effort at combating terrorism. In the

end, he firmly argues that no success in the war on terror is possible until the international community addresses this issue.

In Chapter 5, the philosopher Marc Imbeault presents an interesting debate in regard to what he calls a "noble end." This end can be used to justify disinformation, lying and corruption, not to mention more serious moral faults. Terrorists do not hesitate to defend the most extreme measures, nor do they have any respect for the most fundamental human rights. As the author points out, "They believe [terrorists] that the end justifies the means."

According to Imbeault, this moral justification creates an ethical dilemma for those (e.g., Western countries, especially the United States) whose duty it is to fight terrorism. Can they adopt a comparable stance and use morally reprehensible means such as disinformation or torture? While Imbeault recognizes the different arguments in justifying torture, he advances that a political perspective is often regarded as a "critical reason" for adopting torture. However, he cautions the reader that the use of torture as a means to achieve "political arsenal" comes with a high cost that cannot be underestimated.

In Chapter 6, Alexander Bellamy and Shannon French identify the need to establish a framework for introducing normative judgments on responses to terrorism. Bellamy and French are concerned with the legitimate response before (*jus pro formidonis*), during (*jus per formidonis*) and after (*jus post formidonis*) a terrorist attack. They argue that a developed framework will address the questions of legitimacy from both legal and moral perspectives, asking not only, "What does the law allow?" but also, "Should the law allow more or less than it currently does?" in order to be consistent with internationally accepted fundamental principles and values.

By exploring the case of torture from *jus pro formidonis* and briefly compare it to a threat assessment from *jus per formidonis*, the authors demonstrate that there are many intriguing and complex issues concerning ethical responses to terrorism that are not adequately addressed by the Just War Tradition alone. The example of the "ticking bomb terrorist" provided by the authors illustrates that complexity and the difficulty to resolve it by applying the principles of the Just War Tradition. According to Bellamy and French, this complexity should not be overshadowed by

the need to balance the arguments for and against torture. Furthermore, the authors stress the fact that there is a great risk of slippage and erosion of fundamental values if cases of legitimate responses to terrorism are not addressed according to an ethical framework that provides moral grounds for thinking seriously about forcible measures to prevent imminent terrorist attacks.

The book concludes with Major, Dr. Richard Walker's chapter on Quarter and *Jus In Bello*. In this chapter Dr. Walker argues that central to the ambiguity of the asymmetrical battlespace is a degree of the soldier fear borne from uncertainty. Fighting a savage, merciless enemy, Walker insists that their perceived vulnerability in the ambiguous, chaotic and lethal new environment, particularly as a result of the asymmetric nature of the fight (e.g. suicide bombers, jihadists mixed in with the local population), the soldiers will increasingly find themselves in a quandary in regards to taking the right ethical decision. He argues that their ability to make the correct ethical decision is in direct proportion to the degree of uncertainty they experience in operations within the asymmetrical environment.

To make his point, Major Walker critically examines the origin of the key components of the ethical uncertainties realized so far within the war on terror and offers mitigating strategies for reconciling the discontinuities of no quarter or loss of restraint with the traditional warrior ethos. Similarly, his thesis explains how that ethical uncertainty is symptomatic of an inherently flawed decision process by NATO nations in the post-Cold War era that put too great an emphasis on Enabled Warrior Digitization at the expense of larger standing conventional forces. In short, he bemoans the transformation to smaller conventional forces that rely on the perceived force multiplier effect of digitization. In the end, he explains that the requirement to better prepare the individual soldier to handle the altered combat state within an asymmetrical battlespace that is distorted along the spatial, functional, and moral dimensions is key. The paradox, he argues is that although NATO nations have a structural myopic fixation with technology, the sectarian enemy that we face, has targeted the human dimension or social capital of Western armies as our centre of gravity and our ethical uncertainty as reflective of our will to fight as our *Achilles heel*.

In sum, this volume captures perspectives and insights into the murky world of countering terrorism. Although terrorism represents a significant threat to our democratic ideals and societies, the approach taken to counter this threat must remain ethical and within our western values and ideals.

Endnotes

1 American strategist Steven Metz explained that "In the realm of military affairs and national security asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be political-strategic, military-strategic, operational, or a combination of these. It can entail different methods, technologies, values, organizations, time perspectives, or some combination of these. It can be short-term or long-term. It can be deliberate or by default. It can be discrete or pursued in conjunction with symmetric approaches. It can have both psychological and physical dimensions." Steven Metz and Douglas V. Johnson II, "Asymmetry and US military Strategy: Definition, Background, and Strategic Concepts," US Army War College, Strategic Studies Institute, January 2001, 5-6. Doctrinally, an asymmetric threat is a concept "used to describe attempts to circumvent or undermine an opponent's strengths while exploiting his weaknesses, using methods that differ significantly from the opponent's usual mode of operations." See Colonel W.J. Fulton, DNBCD, "Capabilities Required of DND, Asymmetric Threats and Weapons of Mass Destruction, fourth draft, 18 Mar 01, 2/22. Dr. John Cowan explained, "the asymmetry arises in part from our lack of preparedness for such threats, but also because the asymmetric techniques exploit fundamental freedoms in the target societies which are viewed in every other context as strengths, not weaknesses." Dr. John S. Cowan, "The Asymmetric Threat," unpublished paper presented to the Canadian Defence Scientific Advisory Board (DSAB), March 2003.

2 Quoted in Andrew Sinclair, *An Anatomy of Terror* (London: Pan Books, 2003), 362.

3 Barry Davies, *Terrorism. Inside a World Phenomenon* (London: Virgin, 2003), 14.

4 Benjamin Netanyahu, *Fighting Terrorism* (New York: Noonday Press, 1995), 8.

5 Barry Davies, 14.

6 Michael Walzer, "Terrorism and Just War," *Philosophia*, Vol 34, No. 1 (January 2006), 3.

7 Roger W. Barnett, *Asymmetric Warfare* (Washington D.C.: Brassey's Inc, 2003), 16.

8 John P. Holms, *Terrorism* (New York: Pinnacle Books, 2001), 20.

9 NATO Allied Administrative Publication 6, 2002, quoted in *Joint Doctrine & Concept Centre, Countering Terrorism. The UK Approach to the Military Contribution* (London: MOD, no date), 7.

10 Quoted in Andrew Sinclair, *An Anatomy of Terror* (London: Pan Books, 2003), 367.

11 David Charters and G.F. Walker, After 9/11. *Terrorism and Crime in a Globalised World* (Fredericton: Centre for Conflict Studies, 2004), 15.

CHAPTER 1

Problems in Military Ethics of Fighting Terrorism

Asa Kasher

Introduction

The aim of this chapter is to contribute to the development of a Doctrine of Just War on Terrorism (DJWT). For many centuries, the general Doctrine of Just War (DJW) has served warriors, military forces and states, whether as a form of a theological conception, an international convention or an applied moral theory. As such, it is only normal to turn to classical DJW as a solution when the life, the independence or the well-being of citizens of a state are faced with a new form of danger, or when the sovereignty or nature of the regime of the state itself is under a new kind of a threat as a result of activities carried out by mainly foreign individuals or organizations.

The various forms of terrorism that we have witnessed in recent decades, and that we are now accustomed to, involve such a new form of danger and a new type of threat that it poses a menace to the actual sovereignty of nations. As a result, countries have made attempts to apply the classical DJW, however, they have turned out to be rather difficult or not applicable to these various forms of terrorism. In the end, important problems have emerged and fundamental solutions are required.

This chapter is an effort to describe some of those problems and outline recommendations on how to resolve them within a new DJWT, one that has been conceptually developed and applied in the context of the Israeli Defense Force (IDF).

Problem 1: What is Terrorism?

The first step in any systematic attempt to develop a concept related to military ethics in regard to fighting an enemy of a certain type, such as terrorists, is to identify and define the specific type of enemy. "What is

terrorism?" seems to be the preliminary question to ask under the circumstances of our present project. However, for many years it has been impossible to reach a globally accepted answer to that seemingly simple question.

About 70 years ago (1937), within the framework of the League of Nations, the following definition was presented but not accepted:

> All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.[1]

More recently, a United Nations General Assembly resolution added an important aspect when it reiterated that:

> …criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.[2]

Such definitions have not been internationally accepted because of an interesting mixture of two views. First, we have the generally accepted "pejorative connotation" of the term "terrorism". Secondly, any proposed definition concerns activities of some organizations under circumstances of a clear political or religious significance. Naturally, such organizations, with their supporters and friends, reject any proposed definition of "terrorism" that classifies them as terrorists.

While such a situation may appear "normal" at the international level, it may cause unreasonable circumstances at the national level. If the notion of DJWT has to rest on an internationally accepted definition of "terrorism", within a setting in which terrorists and their allies have managed to hinder all attempts to reach international agreement with respect to the definition of "terrorism", we cannot have a justifiable DJWT. Since we need a DJW whenever we have to fight an enemy of any type, we cannot be expected to wait in vain for an international definition of "terrorism" to emerge from somewhere else. Therefore, we submit that we are justified in having our own working definition of "terrorism".

A working definition of "terrorism" is one that would capture the essence of the phenomenon we face, specifically in relation to our particular circumstances. It is possible that our working definition accommodates our circumstances but cannot be applied in other circumstances or social contexts. In other words, the working definition is shaped for the type of terrorists that we have been fighting. However, the definition delineates also "terrorism" from activities of organizations or individuals but not of states.

And so, the following is the working definition of "an act of terrorism" that will be applied for the subsequent discussion:

> An act, carried out by individuals or organizations, not on the behalf of any state, for the purpose of killing or otherwise injuring persons, insofar as they are members of a particular population, in order to instill fear among the members of that population ('terrorize' them), so as to cause them to change the nature of the related regime or of the related government or of policies implemented by related institutions, whether for political or ideological (including religious) reasons.

This working definition has several implications that should be pointed out. First, acts of states are not considered to be acts of terrorism. The practical reason for this is that if a state would carry out such actions, we would able to apply the standard conception of DJW (i.e. the International Laws of Armed Conflict, which involves states) to those acts.

Second, acts against combatants can be regarded as acts of terrorism when they are intended to terrorize the population where the combatants are from. However, acts that are intended and carried out in an attempt to obstruct military activities of those combatants will be regarded as acts of guerrilla warfare. The case of the Hezbollah shows an organization that can be involved in both terrorism and guerrilla activities.

Third, this working definition seems to be "just" and "reasonable" because it is formulated in a general manner rather than a particular way, and is applicable to a variety of circumstances rather than being restricted to specific instances.

Finally, an appropriate working definition of "terrorism" can constitute a significant step in contributing to the creation of international law with respect to military activities concerning counter-terrorism. Moreover, the application of such a working definition involves the whole spectrum of working definitions of "terrorism" as it applies to states that carry out activities in fighting terrorists.

Problem 2: What is Military Ethics?

The nature of military ethics, as a discipline is not as clearly understood as it should be, at least within the areas of military instruction and education. For example, some textbooks represent military ethics as a subset of general ethics applied to military affairs. Such an approach seems convenient because it fulfills the need for general ethics by combining the expertise of philosophy and moral theory with the required information on military affairs that comes from the experience and expertise of armed forces' officer corps. In other word, you simply "apply" the information to case studies provided by philosophers and officers. Unfortunately, this is a misleading depiction of military ethics that contains two major flaws.

First, the philosophical development of moral theory does not belong to a single and commonly accepted moral framework. It is thus no wonder that textbooks on military ethics dedicate a fair amount of "space" to the presentation of Virtue ethics, Kantian or Utilitarianism approaches, or all of them. Given the variety of theories, and assuming that they are not "disguised variants" of each other, how can someone formulate a practical decision in regard to military activity? Should one try to find a justification for all different philosophical grounds, or rather adopt one philosophical theory and apply it? If we try to find "what is justifiable" in all philosophical grounds, we commit ourselves to embrace not only Kant's and Mill's moral theories but also behaviours derived from those approaches. However, if every theory of moral philosophy is in a position to veto an action of the individual, then the burden of moral deliberation is going to make the process of military decision-making ineffective and impossible. Furthermore, if such a method is applied, it raises the question whether this "right to veto" could be granted to every soldier in a brigade in respect to all commands.

Second, an attempt to apply a given moral theory to particular circumstances of military activities can and often does overlook normative

aspects of those activities that are neither moral nor technical, but rather ethical. For example, should soldiers risk their lives in order to recover the remains of a fellow combatant? Comradeship, as a military value, extends beyond what moral considerations would specify. In a nutshell, the concept of "ethics", as employed in expressions such as "military ethics" and other professional ethics, is not the same concept of "ethics" as used in moral philosophy.

Military ethics is not a moral theory applied to military affairs, though the two are related. Military ethics is a model for proper behaviour in military activity. Such a model rests on three components/central tenets of proper behaviour. The first component specifies a person as a professional within an organization. This tenet addresses the ethical achievement of an assigned mission and the understanding of the legitimate sanctioned processes used to accomplish it. In other words, this type of behaviour is directly linked to what is required of a professional individual. The second tenet refers directly to the behaviour as a member of a particular profession (e.g., combatants or commanders). The expression of courage and perseverance is an example of what is involved in the professional self-identity as combatants. The expression of comradeship is another example of what is considered as proper behaviour within a unit of combatants. The third component focuses on proper behaviour of a person as a citizen of a democratic state, such as Canada or Israel. The illustration of such proper behaviour, for example, can be articulated in the respect for human dignity. It is here that morality becomes part of the "picture of ethics". The adherence to the principle of respecting human dignity, including the protection of human rights, is the observance of moral principles that are embodied within the practices of a democratic society. In fact, instead of applying a specific moral theory, we have an adherence to morally significant principles of a democratic way of life.

In essence, military ethics in a democratic setting rests on an idea of being a professional within the framework of an organization; on a formal conception of the professional identity of combatants and the organizational identity of the military forces; and on an acceptable adherence to values and norms that constitute a democratic society.

Problem 3: Facing Terror: Why Military Ethics?

When a state encounters acts of terrorism committed by some organizations, but not by a state, inevitably we quickly see the state's military forces engaged in fighting them. In the development of military ethics it is important to understand why military forces play such a major role in fighting acts of terrorism. Three different answers are apparent, but only one of them seems to be "right" in our thinking or acceptance of military forces being used to combat a criminal activity.

One possible explanation is that military forces are engaged in fighting terrorism because such an activity is within their sphere of professional expertise and not within the sphere of expertise of any other professional organizations. However, when we become aware of what is required in fighting terrorism, this argument is not sufficient. For example, imagine a unit of service members in uniform approaching a house in a residential area in order to capture an armed terrorist who may be a resident or may hide in that neighbourhood. Furthermore, the neighbours are not cooperating in the capture of that terrorist, especially when they are asked to collaborate.

When you examine this example, you expect that the service members would approach the house in order to arrest the suspect or stop him from committing a crime, in the same fashion as the police. In essence, the point is that the search and possible arrest of a suspected terrorist by military members appears to be more of a police matter than that of military forces from the standpoint of expertise, processes and accepted practices.

Another possible answer to the question of why military forces in the fight against terrorism is that military forces are the only forces that can be called upon by their government because they are easily deployable and expected to be effective. However, being easily deployable and relatively effective is not equivalent to being the best possible and justifiable forces for that type of activity. For example, they are not necessarily trained or equipped to respond to the disruption caused by train drivers on strike. Would it be reasonable to think that military forces can replace the train drivers and operate the train system effectively? Clearly, under almost all circumstances, it would be utterly wrong for a government of a democratic society to use the military forces in this instance. Therefore, the rationale of availability and deployability is invalid in its own right.

The third answer to our question addresses the complexity of terrorism. Military forces are called to fight terrorism because the classical distinction between military and police "situations" or jurisdiction is blurred. The nature of terrorist acts places those activities or portions of them in both domains. As a result, to be justifiable and effective, the activity against the terrorist organization must involve both a "military-like" force and a "police-like" force. The terms "military-like" and "police-like" are used intentionally because this distinction takes into consideration the fact that a military force can include a "police-like" force unit and that a police force can include a "military-like" force. In addition, the distinction is ethical and not organizational. While some components of the activity of fighting terrorists are guided by military ethics, others are pursued by police ethics, and additional components can be conducted by either set of ethics. The capture of an armed terrorist in a residential area is a police procedure, while setting an ambush in order to capture a terrorist outside of a village or town can be a proper mission of either military combatants or members of police forces.

In summary, the ethics of fighting terrorism is an appropriate combination of ethical elements, some borrowed from common military ethics and others from common police ethics. Further in this chapter, we will consider an example in more detail.

Problem 4: What is the *Jus ad bellum* / *Jus in bello* distinction?

A major aspect of the classical DJW is the distinction between two levels of ethical and legal considerations related to war. One is the level of "justice *of* war", which pertains to decisions in taking part in a war, while the other is the level of "justice *in* war", which applies to actions carried out during a war.

Several classical principles of *Jus ad bellum* delineate the sphere of just wars independently of the classical principles of *Jus in bello*. The principles of Legitimate Authority, Just Cause, Good Intention, and Last Resort apply to circumstances under which a king, a war cabinet or a congress, deliberate the possibility of waging a war. When a war is conducted by officers and troops, these principles do not impose restrictions on the tactical aspects of that war. The principles of *Jus ad bellum* can be followed even if the principles of Distinction and Proportionality, which are the

classical principles of *Jus in bello*, are violated by the military forces when conducting operations.

The apparent mutual independence of the normative levels of "justice *of* war" and "justice *in* war" has two significant results. First, political decision-makers who are engaged in the "justice *of* war" discourse should not be blamed for atrocities committed by military forces in war. Second, officers and troops should not be blamed for being engaged in a war of aggression, one that violates some principles of "justice *of* war". As a result, there is mutual moral independence of political actions and military actions related to the same war.

The distinction between "justice *of* war" and "justice *in* war" serves as a major factor in the Laws of Armed Conflict; nevertheless it is morally inconsistent when applied to classical cases of war and more so when applied to circumstances of fighting terrorism. Consider the chain of command; from the first links, which involve considerations and decisions with respect to the "justice *of* war" to the very last links, which involve considerations and decisions with respect to the "justice *in* war". In a long chain, the relationship between the first and the last link makes sense (e.g. starts with the decision-maker [king or a political leader] in some European city and ends with the private in a combat zone somewhere in a remote part of Europe, even Asia or America). However, when you think of the relationship within a long chain of command, between adjacent links the distinction between the righteous cause of going to war and the ethical conduct of waging war becomes dubious. For example, there seems to be a moral relationship between the decision of a king to wage a war and the plans prepared by his generals and colonels to execute it.

In a case of a short chain of command, the moral independence of what happens between the first and the last link is hard to define. When we consider a terrorist organization we do indeed encounter a short chain of command. For example, at the first link, a command decision is made to send a suicide/homicide bomber to a crowded location during a certain period of time. In that case, there is a command issued without a formal transmission of a strategic decision into operational and tactical objectives. It is nothing more than setting some parameters of the command (i.e. decision-makers/ planners) in order to carry it out. As a consequence, this type of operation illustrates that, for example, a targeted killing operation against a terrorist in the upper level of the chain of command is

not an assassination, in the sense of killing a prominent person for political reasons, but rather it is a military operation to pre-empt an offensive strike by the enemy, or arguably an act of self-defence.

Problem 5: What is the Principle of Distinction?

A Principle of Distinction is a pillar of the *jus in bello* component associated with any variant of DJW. The Principle of Distinction introduces first, a crude distinction between combatants and non-combatants; and second it identifies those individuals or groups that are involved within these two categories. For example, on one hand, you have people who operate an ammunition factory in service of the military forces that belong to the combatant category, whether they are in uniform or not. On the other hand, you have Prisoners of War (POWs) that belong to the non-combatant category, even though they are in uniform. The moral target is clear, but the distinction itself remains crude and morally problematic, even when applied to classical wars.

In the following, we outline a different approach to the Principle of Distinction, especially in the circumstances of fighting terror. Our approach is more detailed and we consider it to be much more coherent. This "new" Principle of Distinction replaces the classical distinction, between combatants and non-combatants, even when ramified (i.e., people involved with them) by a "scale of involvement" in terrorist actions or activities. The classical distinction enforces ethical and practical restrictions of "justice in war" based in terms of the notions of "combatant" and "non-combatant" (as well as of some additional understanding of those who are involved with them). Combatants are regarded as ethically legitimate targets in military activity, regardless of where their present military activities are. In other words, there are no ethical additional distinctions that should be observed between different types of combatants (except, for example, POWs or medical personnel).

Our proposed Principle of Distinction rests on a "scale of involvement" in the hostilities, namely terrorist actions or activities. The ethical restrictions "imposed" on military activity depend on a person's position on the scale. To be more precise, it depends on the nature of a person's involvement in terrorist action and activity. Our notion of "a scale of involvement" is a primary example of the need to incorporate elements from police ethics into the military ethics of fighting terrorism. While

the ethics of classical battles between military forces rests on the idea that forces are entities fighting each other, the ethics of fighting terrorists rests, under most circumstances, on a notion of an enemy perceived as having an individual entity close to what police forces call a "criminal." A terrorist is not going to be treated by the military the same way a criminal is treated by the police, but the "police-like conception" of an individual should be adopted by military forces when fighting terrorists.

The "scale of *direct* involvement" in terrorist actions or activities is presented, in descending order, from relative to less imminent danger:

1) Individuals that *represent* an immediate danger (e.g., a bearer of an explosive belt);

2) Individuals that *provide* an immediate support (e.g., a driver, a guide) to persons who represent an immediate danger;

3) Individuals that *dispatch* other persons who represent an immediate danger;

4) Individuals that *prepare* devices for acts or activities of terror (e.g., an "engineer,'" that produce explosive belts, or the director of a "laboratory" of such production);

5) Individuals that *provide* essential "pieces" of devices of terror (e.g., a "pharmacist," that deliberately supply major "parts" of explosives, or a person who lends crucial funds);

6) Individuals that *plan* an act or activity of terror (e.g., the operational idea or practical details);

7) Individuals that *recruit* other persons to carry out acts or activities of terror;

8) Individuals that *make* operational decisions to carry out a planned act or activity of terror;

9) Individuals that *make* general operational decisions related to acts or activities of terror (e.g., a decision to adopt a policy of making attempts to carry out acts or activities of terror, or grant permission for certain women to participate in an activity of terror and bear explosive belts).

In conclusion, any person associated in acts or activities of terror that meet the criteria (i.e. items 1 to 9 above) would be considered as directly involved in terror. However, the recognition of these acts of terror should be grounded on reliable and updated evidence that it must be realized, often may be probable rather than certain.

Individuals implicated in terrorism in any other way are regarded as being indirectly involved in terrorism. Examples of such "*indirect* involvement" in terror would be:

10) Individuals that *praise* past suicide bombers in a mosque;

11) Individuals that *supply* payments to families of past suicide bombers as long as those payments are not intended for acts or activities of terror; and

12) Individuals that *exercise* political, social or religious leadership of an organization that supports terrorists without having any personal involvement in the decision-making processes directly related to actions or activities of terrorism.

"Scales of involvement" in hostilities of any type, such as terrorism, guerrilla or classical war, are never sufficient for formulating decisions under practical circumstances. We recommend another "scale of involvement" as an additional decision-making tool within the framework of our Principle of Distinction. This decision-making tool is a scale called "packages of duties," which indicate a state's disposition vis-à-vis individuals under different conditions and according to the rapport between the state and them.

The "heaviest package" defines individuals as citizens, which includes, in a broad sense, residents, foreign workers, tourists, etc. A slightly "lighter package" is structured when individuals reside in a territory that is under effective control of the state. The belligerent occupation of a territory replaces the sovereign power by a military commander of the force that controls it, for as long as the occupation lasts. Sovereignty, even if temporary, involves duties of the authorities, including protection of human life and well-being of individuals, in particular when they are not in any way involved in terrorism. The residents under belligerent occupation are not considered terrorists.

The third "package of duties" is significantly lighter than the previous ones. A state is responsible for the protection of human life and well-being of its citizens and of any other person who resides under its effective control. A state does not bear responsibility for regular effective protection of persons who are neither its citizens nor under its effective control. The package is lighter, but not empty, for two reasons. First, a state has duties when its activities affect persons, even though they are not under its effective control. Second, a state has a responsibility not to turn a blind eye to extreme hardship when it is in a unique position to help within the commonly held practices for the "division of international labour."

Finally, there are the lightest packages, related to persons *indirectly* involved in terrorism and to persons *directly* involved in terrorism. When under consideration, these persons are neither citizens of the state, nor do they reside in a territory that is under its effective control.

The last component of our proposed Principle of Distinction is a "scale of priorities," to be used when practical decisions have to be made during military action against terrorists. This element of the principle constitutes the most practical component. It has been used under different conditions. As such, the following articulates the "scale of priorities," when human life is under consideration:

1) Minimum injury to the lives of citizens of the state who are not combatants during combat;

2) Minimum injury to the lives of other persons (outside the state) who are not involved in terrorist activity, when they are under the effective control of the state;

3) Minimum injury to the lives of the combatants of the state in the course of their combat operations;

4) Minimum injury to the lives of other persons (outside the state) who are not involved in terrorist activity, when they are *not* under the effective control of the state;

5) Minimum injury to the lives of other persons (outside the state) who are indirectly involved in terrorist activities;

6) Injury as required to the liberties or lives of other persons (outside the state) who are directly involved in terrorist acts or activities.

Three aspects of the present "scale of priorities" should be emphasized. First, if a conception of "justice in war" is to be applied to all real circumstances of fighting terrorism, we must set a "scale of priorities" of one kind or another. A dilemma has to be solved, one way or another, and its solution has to be justifiable on the grounds of some principles that are both practical as well as morally and ethically acceptable. Our "scale of priorities" provides military decision makers and their civil superiors with such required principles.

Second, our "scale of priorities" does not rest on a distinction between populations, but rather on a distinction between the "packages of duties" that a state shoulders with respect to different populations. A distinction between such "packages of duties" is part and parcel of the common conception of a state's sovereignty, democratic responsibility and international relationships.

Third, our scale of priorities gives preference to considerations of minimizing casualties among combatants of the state, in the course of their combat operations, over considerations of minimizing collateral damage among non-combatants who are neither involved in terrorist activities nor are under the effective control of the state.

As much as this preference is reasonable, it is not self-evident. According to the common understanding of the classical Principle of Distinction, the "package of duties" of a state with respect to non-combatants is always given more priority than its "package of duties" with respect to combatants, including its own forces. We reject such an understanding of the distinction, both in general and in the particular circumstances of fighting terrorism.

A combatant is a citizen in uniform. In Israel, more often than not, he (and sometimes, she) is a conscript or on reserve duty. Their blood is as red and precious as the blood of a citizen not in uniform or a non-citizen. We reject the idea that since the combatant is permitted to kill, he is thereby a target of a lesser significance. The combatant is permitted to kill under some circumstances, and he is an expert in carrying out

missions that involve killing under such particular circumstances. However, it would be immoral to assume that he has forfeited his fundamental civil rights. It would be utterly immoral to send a combatant to jeopardize his life in order to protect the life of the human shield of a terrorist. While we do not argue for a total rejection, on moral grounds, of the classical Principle of Distinction, we do plead for a thorough reconsideration of the human dignity of the combatant. Our "scale of priorities" includes one consequence of such reconsideration.

Conclusion

This chapter has been an attempt to show that a new DJW should be developed with respect to fighting terrorism. The problems we have just discussed pertain to major issues of fighting terrorism and of the DJW. Additional problems should also be discussed on grounds of a novel understanding of major notions of DJW. For example, the notion of "military necessity" should play a much more important role in ethical and moral considerations of military activities of fighting terrorists. Instead of serving as grounds for exemption from certain ethical and moral obligations, during combat, it should serve, in a strict sense, as grounds for every military operation against terrorists in the vicinity of people not involved in terrorism.

Similarly, and this is an example that has been brought to light during the recent operation in Lebanon, the notion of "victory" should be either reinterpreted or discarded. We know what it means to gain victory in a war between states. It is much less clear what it means to gain victory in a clash with a guerilla brigade engaged in terrorist activities. Professional notions of military success in the accomplishment of given missions of fighting a guerilla or terror organization should be developed and applied, replacing the naïve notion of "victory".

Endnotes

1 www.unodc.org/unodc/terrorism_definitions.html.

2 General Assembly 51/210, 1999.

CHAPTER 2

Amoral Automatons: A Moral Critique of Superior Orders as a Defence to War Crimes Charges Before the International Criminal Court

Christopher Penny

Introduction

The plea of 'just following orders' is often raised by military[1] defendants accused of committing war crimes or other serious violations of international humanitarian law. This is not surprising. One would expect low-ranking soldiers to invoke superior orders frequently in justification of (otherwise) criminal behaviour committed during armed conflict. Armed forces are structured on the immediate obedience of orders by subordinates, and significant penalties can and do result from disobedience. In fact, compliance with orders is an inherent part of being a soldier.

Contemporary international law addresses this situation by relieving soldiers of criminal responsibility in some circumstances by virtue of their obligation to follow the commands of superior officers.[2] However, the *Rome Statute*[3] provision allowing superior orders as a full defence to war crimes charges before the International Criminal Court (ICC) is problematic as it runs counter to the historical legal evolution of this doctrine and is difficult to maintain on moral grounds. Unable to capture the nuances of human behaviour, this defence as currently envisaged will allow individuals who should bear responsibility for their actions to escape criminal sanction. Ideally, limiting superior orders to consideration in mitigation of sentence, following conviction, would provide sufficient scope for addressing the legitimate obedience required of soldiers, while in extreme circumstances duress would continue to provide a full defence to war crimes charges where soldiers had no moral option but to comply.

The following chapter addresses the legal content and the moral ramifications of the plea of superior orders, illustrating the complexities and

risks of justifying criminal behaviour on this basis. Following this introduction, Part 1 outlines the general legal obligation for soldiers to obey orders, while the legal content of the doctrine of superior orders is established in Part 2. This is followed in Part 3 with a study of the significant moral ramifications of allowing this unique plea by defendants, and the moral distinctions resulting from its treatment as a full defence or as a factor in mitigation of sentence. The concluding section summarizes the legal and moral issues raised in the preceding analysis, concluding that consideration of superior orders by courts is justifiable, but for moral reasons should in all circumstances be confined to a principle of sentencing. Recognizing in practice that the defence of superior orders has already been included in the *Rome Statute*, the paper concludes that the legal content of this doctrine must be modified to ensure that the Court does not reward soldiers who consciously refuse to even consider the moral ramifications of their wartime actions.[4]

Obligation to Obey

National armed forces are invariably organized as rigid hierarchies, where subordinates are under a strict obligation to obey the commands of their superiors. In fact, without the imposition of this duty on individual soldiers, military organizations would not be able to fulfill their national responsibilities. Battle often requires commanding officers to order soldiers into situations in which their lives will be at serious risk. At times, the death of soldiers will be the inevitable result of compliance with their orders, yet strategic considerations necessitate that soldiers comply with such orders without hesitation. Military training emphasizes the importance of obedience, and soldiers generally recognize this obligation as part of their duty.[5]

Obedience is further ensured with the imposition of a legal duty backed by formal sanction. For example, in Canada, the *National Defence Act*[6] (NDA), s. 83, prescribes the offence of insubordination as follows:

> [e]very person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

Many other provisions of the NDA reiterate this general obligation, in specific defined circumstances.[7] Other armed forces necessarily impose

upon their soldiers similar legal obligations of obedience to superior orders. Punishments for disobedience can be severe. In Canada, the NDA prescribes a maximum life sentence for insubordination.[8] Many other states retain the death penalty in such circumstances.[9]

Nonetheless, militaries generally recognize that a soldier's obedience cannot and should not be absolute, incorporating into their policies and training a qualification that no-one is required to follow a clearly illegal order.[10] Courts have played a key role in formulating this limitation, qualifying the obligatory nature of obedience. For example, the United States Military Tribunal (USMT) at Nuremberg asserted in 1948 that:

> [t]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery.[11]

Realistically, however, the lower a soldier's position in a military hierarchy, the less ability he or she will have to effectively question orders (and the more orders there will be to obey).[12] Although a soldier is required to disobey an obviously illegal order, in almost all circumstances a clear presumption in favour of obedience remains.[13]

Plea of Superior Orders at International Law

While obedience of orders by subordinates is a necessary characteristic of any military force, a difficulty arises when soldiers are ordered to act in a manner that leads to the commission of a crime. In such circumstances, it is not unusual for soldiers charged with a criminal offence to argue that their obedience to orders should reduce or even negate their individual criminal responsibility. The following section outlines the plea of superior orders, addressing the historical evolution of this doctrine and illustrating the circumstances under which contemporary international law relieves soldiers of individual criminal responsibility for acts undertaken pursuant to orders.[14]

Before turning to an analysis of the substantive content of this doctrine, two cautions are in order. First, though at all times recognized as a valid legal doctrine, the plea of superior orders has received varying political acceptance over the course of the twentieth century. While superior orders was accepted as a full defence in the wake of the First World War, its

application was restricted significantly in the trials conducted by the Allied powers following World War Two. National and international trials conducted in the latter half of the twentieth century generally followed this limitation, confining superior orders to consideration in sentencing as a mitigating factor. In contrast, the *Rome Statute* has once again expanded the application of this doctrine to permit the invocation of superior orders as a full defence to criminal charges in some circumstances.[15]

Second, one must understand that superior orders are – or at least should be – conceptually distinct from duress, although the two doctrines have much in common. Superior orders would serve no positive purpose if its content mirrored duress, suggesting only that a valid hierarchical military relationship could in some circumstances equate with duress. Instead, the doctrine of superior orders should recognize the more limited scope of moral action available to soldiers generally required to follow orders, while leaving situations involving the coercive abuse of this relationship by superiors to be properly characterized as duress having no connection to a legitimate order or military hierarchy. Nonetheless, national and international judicial decisions often appear to confuse and commingle these concepts.[16]

In the event that a plea of superior orders is rejected by a court, duress may remain open to a defendant. The USMT at Nuremberg recognized in the *Einsatzgruppen Case* that:

> If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order.[17]

This proportionality requirement has been maintained in the contemporary international law conception of duress[18] which is now recognized as a full defence to all crimes within ICC jurisdiction.[19]

Underlying the plea of superior orders is a valid hierarchical relationship based on legal obligations,[20] whereas this is not necessarily the case with duress, which instead suggests the temporary existence of undue or illegitimate influence. A claim of duress implies that the individual would have acted differently but for the negative outside influence.[21] This is not necessary for the plea of superior orders. As the following analysis illus-

trates, if an order is not manifestly illegal there is no effective requirement for a soldier to have even put his mind to the legitimacy of the act in question.[22] Indeed, the doctrine as currently formulated may actually serve to discourage such an examination.

Late Nineteenth and Early Twentieth Centuries. The defence of superior orders has a lengthy historical pedigree.[23] However, the classic British formulation is found in *R. v. Smith*,[24] a 1900 decision involving the intentional killing of a South African native by a soldier during the Boer War. In addressing the soldier's claim of obedience to superior orders, the Court concluded that although "it is monstrous to suppose that a soldier would be protected where the order is grossly illegal," the alternative argument:

> [that he] is responsible if he obeys an order [that is] not strictly legal ... is an extreme proposition which the Court cannot accept.... [E]specially in time of war immediate obedience ... is required.... I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.[25]

This case introduced the objective conception of manifest illegality to the defence of superior orders.[26]

In trials of German sailors following the First World War the content of the doctrine of manifest illegality further approached its current formulation. Two cases before the German Supreme Court in Leipzig served to illustrate the limits of this concept, helping to draw a line between acceptable obedience of orders and criminal behaviour. Both cases, *The Dover Castle*[27] and *The Llandovery Castle*,[28] involved the sinking of British hospital ships by German submarines.

In the first case, a German submarine commander faced trial for sinking the British hospital ship *Dover Castle*. He argued that his action resulted from obedience to superior orders. At the time of the sinking the German Admiralty had concluded that the British were illegally using hospital ships for military purposes, in violation of the laws of war

governing the use of protected symbols such as the red cross. The German Supreme Court, while refusing to comment on the validity of the German Admiralty position, found that in light of this information the commander was justified in viewing his attack as a legitimate reprisal, rather than the illegal sinking of a protected ship. As a result, the Court accepted his defence and ordered his acquittal.

The case of the German submariners involved in the attack on the hospital ship *Llandovery Castle* stands in sharp contrast. Following the torpedoing of the *Llandovery Castle* the submarine commander ordered his junior officers to open machine gun fire on survivors as they climbed into lifeboats. Although the commander evaded capture after the war, the junior officers responsible for carrying out his order faced trial for their part in this attack. In their defence, these men argued obedience to the orders of their superior officer. Commenting on the horrific nature of the acts in question, the court in *The Llandovery Castle* concluded that attacking men as they clamoured into lifeboats was an "offence against the law of nations" and that "international law, which is here involved, is simple and is universally known".[29] As a result, it concluded that the junior officers could have had no confidence in the legality of the order to open fire, rejecting the defence of superior orders "if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law."[30]

World War II. The doctrine of superior orders received further extensive judicial treatment in the wake of the Second World War, although as noted above the Allied powers limited its application to a mitigating factor in sentencing, rather than a full defence.[31] Nonetheless, these trials built upon earlier judicial treatment of superior orders, providing further legal content to the doctrine and expanding upon the concept of conduct 'universally known' to be, or 'manifestly', illegal.

Addressing the conduct of wartime extermination squads operating in occupied territories, the USMT in the *Einsatzgruppen Case* concluded that:

> [t]he subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead Superior Orders in mitigation of his offence. If the nature of the ordered act is manifestly beyond the scope of the supe-

> rior's authority, the subordinate may not plead ignorance of the criminality of the order...[32]

Other postwar tribunals applied similar tests regarding manifest illegality.[33] However, these postwar trials often focused on the existence of moral choice, effectively treating superior orders as a military-specific doctrine of duress.[34] Expressions of opposition to the order in question furthered the mitigating effect of superior orders.[35]

Recent Judicial Treatment. In 1973, the United States Court of Military Appeals addressed the concept of manifest illegality in the context of the Vietnam War, during the trial of Lieutenant William Calley for his role in the My Lai massacre. Here, however, the Court adopted a lower standard for manifest illegality than that applied in earlier international precedent. Consistent with historical practice, the Court recognized both subjective and objective elements to the doctrine of superior orders; however, it concluded that the concept of manifest illegality applied to an order that "a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to be unlawful".[36]

Other states have retained a more exclusive definition of manifest illegality. For instance, in the 1994 trial of Imre Finta, a former Hungarian gendarme accused of aiding the deportation of thousands of Hungarian Jews to Auschwitz during the Second World War, the Supreme Court of Canada adopted the test that a manifestly unlawful order is one that:

> offends the conscience of every reasonable, right-thinking person, it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong.[37]

The District Military Court of Israel adopted a similar high standard in *Ofer v. Chief Military Prosecutor*,[38] providing clear and colourful content to the concept of manifest illegality:

> The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by

> legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

The standard for manifest illegality established in the latter two cases is extremely high. If this standard is applied only the most egregious and obvious violations of international law will be captured.

In establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY), and its sister tribunal for Rwanda (ICTR), the United Nations Security Council followed postwar precedent and expressly rejected superior orders as a complete defence.[39] Judicial treatment of superior orders has been infrequent in these tribunals, but has generally built upon historical precedent established in postwar jurisprudence.[40]

International Criminal Court (ICC). The *Rome Statute* expressly accepts superior orders as a complete defence to international criminal charges in certain circumstances. Article 33 provides:

> (1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.

In keeping with historical precedent, the *Rome Statute* thus incorporates both objective and subjective tests. An accused may only be exonerated for conduct undertaken pursuant to orders that he did not know were illegal; regardless of the existence of a valid superior/subordinate relation-

ship, if an accused subjectively knew his conduct was unlawful a defence cannot rest on the existence of superior orders.

Given the recent establishment of the ICC, the concept of manifest unlawfulness has not yet been tested in this forum. Nevertheless, despite its acceptance as a full defence, significant limitations already exist to its practical application by this Court. In particular, article 33(2) provides that "[f]or the purposes of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful." Thus, at present, the defence of superior orders is effectively restricted to war crimes charges only.[41]

It is expected that any further elucidation of this doctrine by the ICC will build upon the national and international precedent discussed above. As a result, it is only in the most extreme cases that manifest illegality will preclude acceptance of the plea of superior orders. In light of current case law, the existence of moral choice for the accused will be the deciding factor in all other cases involving a *prima facie* crime committed pursuant to superior orders.

Moral Ramifications of the Plea Superior Orders

Morality, like law, is not rendered irrelevant with the outbreak of armed conflict. In undertaking one of the first efforts to codify the laws of war in 1863, Franz Lieber recognized that "[m]en 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."[42] Nonetheless, the horrific nature of war, coupled with the existence of obligatory command structures, renders individual morality in war significantly different in appearance and content from its peacetime counterpart. War by its very nature involves conduct that, if committed in peacetime, would be both immoral and criminal. The laws of war recognize this distinction, providing legal immunity for lawful combatants who kill or commit other violent acts in accordance with the accepted rules of wartime conduct.

A moral examination of the conduct of individual soldiers in war is complicated by the hierarchical nature of contemporary armed forces. During conflict, otherwise autonomous beings effectively delegate[43] their decision-making capacity to their commanding officers. This deference is necessary for the efficient and effective functioning of any military force.

Assuming that in at least some circumstances a moral justification may be advanced for an individual's decision to join the armed forces[44] – and for the use of armed force by the state itself[45] – it is difficult to support a blanket moral condemnation of participation in such a hierarchical structure.[46]

The defence of superior orders involves further specific moral complexities, arising as it does when actual crimes are committed against the laws and customs of war pursuant to the order of a commanding officer. Here the hierarchical military relationship has been perverted towards illegal, and often immoral, ends, and in many circumstances international law supports the proposition that this situation is one for which the subordinate should bear reduced responsibility. In fact, the contemporary defence of superior orders may serve to fully absolve soldiers who have committed illegal acts simply because they were so ordered. It may even apply when the soldier in question had serious subjective doubts concerning the legality of his acts.

The following part outlines the significant moral ramifications involved in defending soldiers' otherwise criminal conduct on the basis of superior orders, addressing the moral effects both of denying and accepting this plea. This is followed by an analysis of the differing impact of treating superior orders as a defence versus a factor in mitigation of sentence, illustrating the profound dangers of accepting superior orders as currently understood as a complete defence to war crimes charges.

Rejection of Defence. The defence of superior orders may be rejected for either subjective or objective reasons. As the following discussion illustrates, the relative moral merits of rejecting the defence will vary dramatically depending on which of these standards the accused fails to meet.

Subjective Wrongdoing. The defence of superior orders is not available to soldiers who knew that their conduct was illegal. Insofar as this principle prevents the application of this defence to conscious and deliberate wrongdoers who willingly defy the laws of war, this is not controversial. In essence, the criminal act in question has not arisen as a result of the issuance of orders, but rather from the criminal preference of the accused. In some respects the order may thus be viewed as the initiation of a criminal conspiracy, rather than the imposition of a duty on an unwilling actor.

The rejection of the defence of superior orders on the basis of subjective knowledge of wrongdoing may also arise in circumstances where soldiers do not consciously desire to act contrary to the law, with vastly different moral consequences. It is certainly conceivable, even likely, that a soldier may know his conduct to be wrong and feel remorseful after the fact, yet be unable or unwilling to make the difficult and costly decision to disobey the orders of his commanding officer. That such situations of moral weakness could arise is not surprising, especially in times of war, given the clear presumption in favour of obedience in the structure and training of armed forces and the severe penalties applicable in the event of insubordination.[47]

Though such weakness may be understandable, the rejection of the defence of superior orders in cases involving manifestly unlawful acts by morally weak actors is not necessarily contradictory or unjust. One needs look no further than the Second World War to see the potentially horrific result of obedience to obviously immoral orders on the basis of fear or awe instilled by a powerful hierarchy. Absolute and unquestioning obedience of illegal orders, even if based on cowardice, must be viewed as morally unacceptable and worthy of condemnation even in situations where the soldier in question knew his conduct was wrong.[48]

In extreme circumstances a defence of duress remains open to an accused soldier facing such pressures.[49] Justifying knowingly illegal conduct on the explicit basis of fear of severe consequences to the accused (or a third party), rather than on the validity of adherence to a military hierarchy, provides an effective method to address such conduct fairly without condoning or encouraging the commission of illegal acts under orders. This approach removes the defence from a claim of simply following orders to one where the accused knew his action to be wrong but was coerced into acting contrary to his beliefs through illegitimate pressure. Accepting that the order itself played a role in eliminating responsibility leaves open an unacceptable potential for abuse and encourages others to simply follow orders in such circumstances without making their opposition known.

The rejection of the defence of superior orders on the basis of subjective criteria raises a concern that this doctrine could actually serve in some way to discourage the moral and legal questioning of orders by soldiers. That is, in the event that a soldier ultimately follows the illegal order,

could the very act of previously questioning its validity provide evidence of subjective knowledge of illegality? Is it better to have objected to an illegal order and then followed it anyway, or to have remained silent from the beginning?

The appropriate balance between questioning and obedience has been attempted in advance by some armies. For example, the QR&O governing the conduct of the Canadian Forces establish that:

> [u]sually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful.[50]

The *CF Code of Conduct* instructs soldiers that in cases of doubt the "first step of course must be to seek clarification."[51] Given the practical, and arguably moral, basis for maintaining the integrity of the hierarchical structure of armed forces in all but the most extreme circumstances, this default position in favour of obedience is understandable. In a situation involving a questionable though not manifestly illegal order, initial objection or asking for clarification should not, and would not appear to, rise to the level of subjective knowledge of illegality. International law should encourage rather than punish the questioning of doubtful orders by soldiers engaged in the application of deadly force.

Objective Wrongdoing. The concept of manifest illegality also raises moral concerns, introducing as it does an objective element into the examination of superior orders in a context where denial of the defence will lead to labelling as a war criminal.[52] On the basis of this principle, a soldier may be denied the defence of superior orders because he "should have known" that his conduct was wrong, whether or not he had any actual knowledge of wrongdoing. This criteria serves to criminalize not simply the conduct of conscious wrongdoers, whatever their motivation, but also captures actors who place obedience to orders over all other concerns, whether out of an overwhelming sense of duty or a failure to consider any moral alternatives.[53]

The incorporation of meta-ethical principles into this area is not surprising, given the focus of international criminal law on acts frequently

involving mass atrocities, namely genocide, crimes against humanity and war crimes.[54] As such, the application of this objective component will in many instances be uncontroversial. For example, there are few who would balk at denying this defence to those involved in the use of machine guns against the helpless crew of the hospital ship *Llandovery Castle* as they attempted to gain the safety of lifeboats. The same can no doubt be said with respect to genocide and most, if not all, crimes against humanity.[55]

With respect to certain war crimes, however, the denial of the plea of superior orders solely on the basis of objective factors may be more problematic given the nature of these offences.[56] This will depend, in large part, on the nature of the test applied to determine manifest illegality. Greater moral concern arises the lower the standard that is applied in any given case. The standards adopted by the Supreme Court of Canada in *Finta*[57] or the District Military Court of Israel in *Ofer*[58] incorporated an extremely high bar, one that precludes findings of manifest illegality in all but the most horrific of circumstances. Reduced standards such as that proposed in *Calley*[59] lead to greater moral questions.[60]

In light of the limited practical ability of soldiers to question orders, a high standard for manifest illegality is justifiable on moral grounds, even though it will more frequently support the acceptance of a plea of superior orders.[61] This is especially true given the often exceedingly difficult task of assessing reasonable conduct through the fog of war. To these issues one might also add the potential confusion engendered by the often dire ramifications of obedience to entirely legal commands; that is, unpalatable and potentially disastrous consequences for third parties do not provide an effective or accurate benchmark for measuring the morality of conduct in a wartime context, a function that such measurements do generally fulfill with respect to peacetime civilian actions. In practice it may therefore be extremely difficult for soldiers to distinguish permissible and impermissible conduct during war.

Acceptance of Defence. Paradoxically, significant moral intricacies also arise in situations where the plea of superior orders is accepted by courts. In all such cases the soldier benefiting from the claim must have committed an act that would lead to individual criminal responsibility but for the existence of the order in question, otherwise the plea itself would be unnecessary.

As noted above, the defence will not be available to an accused who was consciously aware of the wrongfulness of his actions, or in situations involving the commission of manifestly unlawful acts.[62] Nonetheless it will apply to many different types of actors who commit illegal acts without full consciousness of their wrongfulness, in circumstances where the acts in question do not rise to the level of manifest unlawfulness. Unfortunately, the implications of accepting the plea of superior orders in such circumstances can be dramatic and distasteful.

In the absence of manifest illegality, the plea of superior orders remains available to a soldier who has placed obedience to orders above all else, choosing as his entire moral framework compliance with the decisions of his superiors, so long as he fails to examine the validity of his conduct beyond its conformity to such orders and thus has no subjective knowledge of its illegality. While at some level understandable, given the practical military pressures in favour of obedience, acceptance of the defence of superior orders in such circumstances involves the wholesale rejection of the conception of soldiers as individual moral agents. In effect this supports the absolute delegation of decision-making capacity to others, rewarding individuals for failing to examine the moral validity of their own actions.

As a result, a morally negligent actor may be excused from liability for conduct undertaken pursuant to orders which were not examined at all beyond the existence of a superior/subordinate relationship. This is an extreme variation of the philosophy of "my country, right or wrong," where the orders of the state (represented by the superior officer) play the deciding role in moral decision-making. For the same basic reasons, acceptance of superior orders as a defence may also serve to legitimize amoral or indifferent conduct by soldiers. As long as an accused soldier can point to the existence of an order requiring the conduct in question, and there is neither manifest illegality nor subjective knowledge of illegality, the plea of superior orders remains available regardless of whether the individual ever turned his mind to the morality or legality of the act or its consequences for third parties. Honest belief in the requirement to obey is not a high standard to meet in such circumstances, given the presumption in favour of obedience to orders that are not manifestly unlawful.[63]

In all of these latter cases, where the plea of superior orders is accepted, it is only the moral luck of having a superior who does not issue manifestly

illegal orders that prevents these actors from committing heinous criminal acts for which they would indeed bear individual responsibility. All of these individuals would commit manifestly illegal acts if so ordered, as a result of their total failure to consider any moral ramifications of their actions beyond conformity to orders. Although as a matter of law an individual should not be punished for acts they may have, but did not commit, a valid moral doctrine cannot, or at least should not, rely solely on luck to assess individual responsibility. Here it is important to remember that when the plea of superior orders is accepted, although the conduct in question may not have reached the level of manifest illegality it necessarily remains a *prima facie* war crime, usually with its own profoundly negative ramifications.[64]

Full Defence v. Mitigation of Sentence. Acceptance of superior orders as a defence cannot effectively address these unpalatable ramifications, serving instead to grant legal absolution for horrific acts when it is not morally warranted. As a result, a strong argument may be advanced that the existence of superior orders should remain available to defendants only as a factor in mitigation of sentence. This provides a valid mechanism for reducing the potentially unreasonable impact of assessing full individual criminal responsibility in specific cases, while preventing the absolute exoneration of illegal conduct based on unquestioning obedience of orders.[65]

Mitigation of sentence is an appropriate method of addressing this distinction. In light of the expectation of obedience, and the severe practical consequences of disobedience, it may be that a morally weak individual should be treated less harshly than his malicious counterpart, particularly following an initial expression of doubt concerning the act in question, as should an individual who has not expressed opposition due to an honest belief in the moral validity of the particular order. The same argument cannot be made to limit the responsibility of those individuals who consciously avoid any moral consideration of their actions beyond conformity with orders.[66] In the latter case an individual involved in the application of deadly force has failed to give any consideration at all to the wider moral consequences of his actions. This is clearly a situation that cannot be tolerated when the decisions at issue may literally have life or death consequences for innocent third parties.[67] Duress provides a mechanism to allow for full absolution where an otherwise criminal act results from illegitimate and overwhelming coercion by the superior officer that overcomes the initial refusal of a moral soldier.[68]

Questioning and outright refusal of orders by soldiers is difficult, as significant external pressure is exerted upon soldiers to comply. This is compounded by a natural human inclination to obey when placed in hierarchical relationships, as exemplified in experiments conducted by Stanley Milgram.[69] In fact, profound attitudinal shifts may result from the hierarchical relationship, leading to a situation where:

> the person entering an authority system no longer views himself as acting out of his own purposes but rather comes to see himself as an agent for executing the wishes of another person. Once an individual conceives his action in this light, profound alterations occur in his behavior and his internal functioning. These are so pronounced that one may say that this altered attitude places the individual in a different state from the one he was in prior to integration into the hierarchy.[70]

Even absent of any pronounced outside coercion, these experiments highlighted the disturbing ease with which a "substantial proportion" of otherwise normal individuals would inflict pain at the behest of a superior, even one with very little actual power.[71]

Nonetheless, this should not serve as a basis for the complete absolution of individual soldiers from any moral or legal responsibility for two principle reasons. First, although Milgram noted that disobedience was difficult, it was not impossible, and not all experimental subjects obeyed the immoral commands of their superiors. Sadly, however, Milgram observed that:

> [t]he price of disobedience is a gnawing sense that one has been faithless. Even though he has chosen the morally correct action, the subject remains troubled by the disruption of the social order he brought about, and cannot fully dispel the feeling that he deserted a cause to which he had pledged support. It is he, and not the obedient subject, who experiences the burden of his action.[72]

Eliminating superior orders as a full defence serves in part to reallocate this burden, shifting it to those responsible for the commission of criminal acts.

Second, for those individuals that did obey immoral commands, Milgram's experiment resulted in significant feelings of responsibility and remorse when they were finally removed from the hierarchy in question. In contrast to absolute acquittal, punishment and atonement provide a method to overcome this result, allowing for the full and effective reintegration of the individual into society.[73] Absolving individuals who have committed *prima facie* war crimes is not necessarily in their own best interests, let alone those of society as a whole. Treating superior orders as a factor in mitigation of sentence allows for the reflection of various levels of moral blameworthiness in such an accounting process.

Conclusion: Reconciling Law and Morality

The moral and legal regulation of conduct during wartime is fraught with the difficult and distasteful requirement of compromise between peacetime values and military necessity. Unique factors, such as formal hierarchies backed by severe criminal sanction, require the conduct of soldiers to be judged in context. As a significant factor in any such contextual determination, superior orders must be given consideration in the determination of appropriate sanctions for individual criminal conduct during armed conflict.

However, although included within the *Rome Statute*, the current legal possibility of basing a complete defence to war crimes charges on the existence of such orders cannot be justified on a moral basis. For over half a century the plea of superior orders has been limited to a factor to be considered in mitigation of sentence upon conviction. This nuanced approach allowed for appropriate societal condemnation of the criminal actions in question, while retaining the potential for moderating individual sanctions to reflect actual moral blameworthiness in cases of weakness or mistaken but honest belief. Ideally, superior orders should be viewed in this light, with duress serving as the mechanism to fully exonerate moral individuals who objected to illegal superior orders and would have acted differently but for the application of overwhelming coercive force.

The *Rome Statute* has altered this historical balance, establishing a situation in which an accused whose conduct is not manifestly unlawful may be fully acquitted simply on the basis of superior orders, regardless of the individual's actual moral blameworthiness. The difference between a morally weak and culpably compliant soldier cannot be captured by treating

superior orders as a defence, nor is it answered within the framework of moral choice, at least as the doctrine is currently formulated. In contrast to variations in sentencing available to a court following conviction, an accused cannot be partially acquitted. In certain respects, establishing superior orders as a full defence may actually *encourage* soldiers to act as automatons, blindly accepting the validity of their orders, by serving to reward unquestioning obedience unless the conduct in question surpasses the extremely high threshold of manifest illegality.

Nonetheless, the ICC is required to consider and accept superior orders as a full defence to at least some war crimes charges, in some circumstances. As a result, this doctrine must be modified to reflect the moral ramifications of its new context. In conformity with historical precedent and general moral principles, superior orders will never absolve or mitigate manifestly illegal conduct, a principle recognized in the *Rome Statute*. In most circumstances, this plea should be retained as a consideration in mitigation of sentence, with little to no effect when an accused unquestioningly complies with an illegal order in a military context, and greater mitigating value where a doubtful order was questioned and reiterated prior to compliance. If a soldier is ordered to act in conformity with an illegal order under express pain of punishment, following refusal to obey, only then should the full defence apply, as only then has the order overcome the initial moral reluctance of the soldier in a manner analogous to duress.

Appendix I

Statute of the International Criminal Court[74]

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the

population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and

those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of

violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Endnotes

1 For ease of reference, this paper uses terminology focusing on the plea of superior orders within military hierarchies. However, while judicial treatment of this doctrine has historically occurred within this context, as a matter of international law the invocation of superior orders is not confined to military personnel. Instead, this plea is available to any defendant under a legal obligation to obey the commands of a superior. Similar expansive definitions may be found in certain national criminal law systems. For example, subs. 32(2) of the Criminal Code of Canada, R.S.C. 1985, c. C-46 as am., makes the defence of superior orders available to law enforcement personnel engaged in the suppression of riots.

2 The plea of superior orders recognizes the limited ability of soldiers to act contrary to their orders. This does not mean that international law allows the commission of criminal acts with impunity. Instead, through the doctrine of command responsibility, responsibility for criminal acts is placed further up the chain of command, on the individuals who ordered or were otherwise responsible for the commission of the offence in question. While beyond the scope of this paper, the doctrine of command responsibility is an important counterbalance to the plea of superior orders. It recognizes that individual criminal responsibility may attach to a person in *de jure* or *de facto* command of others whose actions involve the commission of an offence. See, e.g., *Rome Statute*, infra note 3, art. 28 ('Responsibility of commanders and other superiors').

Nonetheless, even individuals in very senior military positions have at times sought refuge in the plea of superior orders, albeit usually without success. For example, Alfred Jodl argued obedience to superior orders in answer to charges of war crimes, crimes against humanity and crimes against peace before the International Military Tribunal (IMT) at Nuremberg. Throughout the Second World War, Jodl held the position of Chief of the Operation Staff of the High Command of the German Armed Forces. In spite of this powerful position, he claimed that he was simply following the orders of his head of state, Adolf Hitler. The Tribunal found him guilty on all counts, and rejected his plea of superior orders in mitigation of sentence. Trials of Major German War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Judgment and Sentences, 41 Am. J. Int'l L. 172 (1947). On 16 October 1946 Jodl was hanged. If the IMT had accepted Jodl's argument this plea would have been available to virtually every citizen of Nazi Germany. This realization formed the basis for the Allied statutory denial of superior orders as a full defence, as discussed infra note 30.

3 *Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998) [*Rome Statute*].

4 While the conclusions of this working paper appear broadly consistent with those of Mark J. Osiel, providing a similar "nudge" toward the evolution of legal doctrine relating to superior orders, future iterations of this paper will engage more directly with Osiel's arguments and

conclusions. *Obeying Orders: Atrocity, Military Discipline and the Law of War* (New Brunswick, USA: Transaction Publishers, 1999), 358.

5 The Supreme Court of Canada (SCC) characterized this hierarchical structure in *R. v. Finta* as follows:

> [t]he whole concept of military organization is dependent upon instant, unquestioning obedience to the orders of those in authority. ... Military tradition and a prime object of military training is to inculcate in every recruit the necessity to obey orders instantly and unhesitatingly. This is in reality the only way in which a military unit can effectively operate. To enforce the instant carrying out of orders, military discipline is directed at punishing those who fail to comply with the orders they have received. In action, the lives of every member of a unit may depend upon the instantaneous compliance with orders even though those orders may later, on quiet reflection, appear to have been unnecessarily harsh.

[1994] 2 S.C.R. 701 at 828-9 [*Finta*]. Emphasis added.

6 R.S.C. 1985, c. N-5 as am. [NDA].

7 For example, reiterations of this obligation are found in the following sections of the NDA: 74(f), failing to use "utmost exertion" to carry out orders relating to operation of war in presence of enemy; 76(a), being made a prisoner of war by want of disobedience of orders; 106(1), disobedience of captain's orders when in a ship; and, 110(1), disobedience of captain's orders when in an aircraft.

8 The NDA also provides for a maximum life sentence of imprisonment for all of the related offences detailed above.

9 The death penalty is no longer applicable to any military offences in Canada, following its revocation from the NDA in 1998. For civilian criminal offences, the death penalty was abolished over twenty years earlier, in 1976. This dichotomy serves to illustrate the differences between conceptions of appropriate criminal sanctions for soldiers versus civilians, where soldiers are subject to separate and often more severe punishments for the same acts by virtue of the need to maintain discipline.

10 For instance, this limitation is enunciated in NDA, s. 83, above. It is reiterated in art. 19.015 of the *The Queen's Regulations and Orders for the Canadian Forces* (QR&O), enacted pursuant to the NDA. This is consistent with international law standards addressed in more detail in Part 2 below.

11 *In re Ohlendorf and others,* US Military Tribunal, Nuremberg, 10 April 1948, (1953) Ann. Dig. 566 at 665-6 [*Einsatzgruppen Case*]. Two years earlier, the IMT had rejected the "mythical requirement of soldierly obedience at all costs" in the trial of Alfred Jodl. Supra note 2.

12 See, e.g., *Finta*, supra note 5 at 838.

13 For instance, the *Code of Conduct* of the Canadian Forces provides:

> All lawful orders must be followed. All orders you receive from your superiors should be lawful, straightforward and require little clarification. If, however, you receive an order that you believe to be questionable, your first step of course must be to seek clarification. Then, if after doing so the order still seems to be questionable you should obey the order - unless - the order is manifestly unlawful.

Code of Conduct for CF Personnel, Doc. B-GG-005-027/AF-023 [CF Code of Conduct] at A-41.

14 For an overview of the historical evolution of the plea of superior orders see, e.g., L.C. Green, "Superior Orders and the Reasonable Man," *Essays on the Modern Law of War* (New-York: Transnational, 1999), 245; and, M.R. Lippman, "Humanitarian Law: The Development and Scope of the Superior Orders Defense," 20 Penn St. Int'l L. Rev. 153 (2001).

15 Despite these variations, however, the judicial treatment of the legal content of the plea of superior orders has been relatively consistent throughout the twentieth century, whether con-

sidered as a full defence or in mitigation of sentence. As a result, the precedential value of these decisions remains high. However, in reading these historical cases one must remember that in many circumstances acting upon superior orders was expressly limited to a mitigating factor in sentencing.

16 See, e.g., post-World War Two decisions incorporating the concept of 'moral choice' and the opinion of the International Criminal Tribunal for Yugoslavia (ICTY) in *Erdemovic*, infra note 18. This issue is discussed in greater detail below.

17 Supra note 11.

18 See, e.g., *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, Judgment, Appeals Chamber, 7 October 1997 [*Erdemovic*]. It appears difficult if not impossible to support such a claim when the soldier committing war crimes, crimes against humanity or genocide is facing nothing more than a prison sentence for disobedience.

Circumstances may nonetheless arise when the penalty for disobedience is significantly greater than imprisonment. For example, in *Erdemovic* the International Criminal Tribunal for the Former Yugoslavia [ICTY] was faced with a defendant soldier who admitted killing dozens of innocent civilians in the 1995 Srebrenica massacre of Bosnian Muslims. In uncontested evidence, he submitted that he would have been killed himself, alongside the victims, had he not participated in the slaughter as ordered. He initially refused to follow this order, submitting only when faced with the stark choice of either lining up with the victims or the executioners.

While upholding the validity of considering duress in mitigation of punishment, the ICTY rejected its application as a full defence to Erdemovic on the ground that his case involved killing innocent third parties, which in the Tribunal's view was not supported by international law and could never be justified on moral grounds. See, e.g., para. 75. This opinion resulted in a strongly argued response by Judge Stephen, which recognized the rationality of Erdemovic's choice under the circumstances, given that his victims were going to be killed whether or not he participated in the massacre. The only question was whether Erdemovic would die as well. *Erdemovic*, Separate and Dissenting Opinion of Judge Stephen, para. 54.

19 Duress is recognized as a full defence in art. 31(1)(d) of the *Rome Statute*, where it is limited to circumstances in which involve the threat of "imminent death" or "continuing or imminent bodily harm" to the defendant or a third party. This defence is in theory available with respect to all crimes within the Court's effective jurisdiction, namely, war crimes, crimes against humanity and genocide, although the majority opinion in *Erdemovic*, ibid., will severely constrain its application in practice given that these crimes often - if not usually - involve the killing of innocents. In many respects such a limitation is similar to the rejection of superior orders in cases of manifest unlawfulness, as discussed below.

20 This type of relationship has nevertheless been characterized by at least one defendant as "act[ing] on the orders of his superiors and under hierarchical duress." *Prosecutor v. Goran Jelisic* ("*Brcko*"), Case No. IT-95-10-T, Judgement, Trial Chamber I, 14 December 1999, para. 12 [emphasis added]. This approach also appears to unnecessarily confuse the doctrines of duress and superior orders.

21 The necessary implication of this doctrine is that the accused would not otherwise have been inclined to act in the manner alleged, in this or in any other circumstance, although this does not appear to be a formal requirement of duress at international law. See, e.g. discussion of duress at K. Kittichaisaree, *International Criminal Law*, Oxford, 2001 at 263-4. However, such a requirement would be consistent with some domestic law iterations of this defence which require the existence of pressure sufficient to *overcome* the resistance of a person of reasonable firmness.

22 The defence of superior orders requires that the individual not actually know that his actions were illegal. See, e.g., Rome Statute, art. 33(1)(b). While an honest belief in the legality of the order is in theory required, as a matter of Canadian law, this position is somewhat difficult to reconcile with the Supreme Court of Canada conclusion in *Finta*, supra note 6, that the defence remains available to an accused who does not testify on his own behalf.

23 For example, in 1474 Peter von Hagenbach, the Governor of the Upper Rhine appointed by Charles, Duke of Burgundy, was placed on trial for using methods such as murder and rape to force the submission of the town of Breisach. He argued obedience to superior orders, submitting that he "had no right to question the order which he was charged to carry out, and it was his duty to obey." Hagenbach then asked, "[i]s it not known that soldiers owe absolute obedience to their superiors?" This defence was rejected and Hagenbach was sentenced to death. See discussion of this and other historical cases in *Finta*, supra note 5 at 830.

24 (1900), 17 S.C. 561 (Cape of Good Hope) (per Solomon J.).

25 Ibid. at paras. 567-8. Edited and cited by the Supreme Court of Canada in *Finta*, supra note 5 at 831.

26 *Finta*, ibid., relying on Leslie C. Green, "Superior Orders and Command Responsibility," (1989) Can. Y.B. Int'l. L. 167 at 174-5.

27 Germany, Reichsgericht, 16 Am. J. Int'l. L. 704 (1921), cited in *Finta,* ibid. at 832.

28 Ibid., 832-3.

29 Ibid.

30 Ibid.

31 Article 8 of the *Charter of the Military Tribunal at Nuremberg*, annexed to the *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, London, 8 August 1945 [*London Charter*] expressly prohibited the invocation of superior orders as a defence, limiting it to a factor applicable in mitigation of sentence only. See, e.g., *In re Von Leeb and Others*, US Military Tribunal at Nuremberg, Germany, 28 October 1948 (1953) 15 Am. Dig. 376 [*High Command Case*], discussing the nature of Hitler's authority in Nazi Germany as the rationale for the Allied denial of superior orders as a full defence.

As early as 1943 the scholar Edwin Dickinson noted that a failure to limit this defence would mean that the "only war criminals available for punishment [would be] Hitler and Tojo, neither of whom is likely to be available alive when the victory is finally won." Cited in Lippman, supra note 14 at 172. See also Kittichaisaree, supra note 17 at 266. Interestingly, Joseph Goebbels himself rejected superior orders as a full defence in 1944, arguing that:

> it is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare.

Lippman, Ibid., at 176.

32 Supra note 11. Note the reference to mitigation, given the bar to consideration of superior orders as a full defence before the post-World War II tribunals.

33 In a number of instances high-ranking officials from Nazi Germany attempted, without success, to seek shelter behind this doctrine. See, e.g., discussion of Alfred Jodl, Chief of the Operation Staff of the High Command of the German Armed Forces, supra note 2. See also *High Command Case*, supra note 31.

34 Lippman, supra note 14 at 184, 203-4.

35 Ibid., at 204.

36 *United States v. William Calley, Jr*. 22 C.M.A. 534, 48 C.M.R. 19 (A.C.M.R. 1973), aff'g 46 C.M.R. 1131 (A.C.M.R. 1973), rev'd sub nom. *Calley v. Callaway,* 382 F. Supp. 650 (M.D. Ga. 1974), verdict reinstated, 519 F.2d 194 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976). While the Court did not expressly adopt this conception of the doctrine of superior orders as its own, it did not comment negatively on the ruling of the trial court in this regard. Ibid. at 541-2. This result is consistent with the standard established in *United States v. Kinder,* 14 C.M.R. 742 (1953). See, e.g., Lippman, Ibid., at 215-6.

37 *Finta*, supra note 5 at 834. The Court at 838 recognized the availability of moral choice as a key element in accepting superior orders as a defence, effectively viewing it in the same light as duress.

38 *Ofer v. Chief Military Prosecutor*, (the *Kafr Qassem* case), Appeal 279-283/58, Psakim (Judgments of the District Courts of Israel), vol. 44, at 362, cited in Finta, ibid. at 835.

39 See, respectively, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 7(4) and *Statute of the International Criminal Tribunal for Rwanda*, art. 6(4), restricting consideration of superior orders to a mitigating factor in sentencing.

40 Although, as noted supra note 18, the ICTY decision in *Erdemovic* appears to have unnecessarily confused the concept of superior orders with that of duress.

41 Given its express inclusion in the Rome Statute, it is logical to conclude that the full defence of superior orders must apply to at least one crime currently within the jurisdiction of the ICC. With the effective exclusion of genocide and crimes against humanity pursuant to article 33(2), the only remaining candidate is war crimes. These crimes are enumerated in Appendix I.

Although the Rome Statute includes jurisdiction over aggression, which is also not deemed manifestly unlawful, the ICC will not be able to exercise jurisdiction over this crime until a definition is accepted by the States Parties, in 2008 at the earliest. In any case, the defence of superior orders does not appear applicable to charges of aggression, however this crime is ultimately defined, given the historical judicial restriction of individual criminal responsibility for aggression (crimes against peace) to persons in policy-making positions. See, e.g., *High Command Case*, supra note 30. That said, such a position did not prevent Jodl from arguing obedience to superior orders, albeit unsuccessfully, as discussed supra note 2.

42 Presidential General Orders No. 100 (1863), art. 15.

43 The moral distinction, if any, between the wartime obedience of orders by a volunteer and a conscript is beyond the scope of this paper.

44 A strong argument may be advanced that, in at least some circumstances, subservience of individual values and goals for the protection of the collective is a moral choice when faced with the potential overthrow of one's state. Protection of family or of personal liberty may also form a moral basis for enrolment or enlistment in national armed forces, along with pecuniary concerns (the morality of which would vary between individuals). It is recognized that different moral implications will result for soldiers volunteering for the armed forces of a state acting in an aggressive and immoral manner, particularly with their subjective knowledge of this illegality or immorality, although this issue remains beyond the scope of the current analysis.

45 It is beyond the scope of this paper to address issues relating to the morality of war itself, although it is difficult to rationally refute the current need for, and legitimacy of, state resort to armed force in at least some circumstances given the geopolitical realities of the early twenty-first century. In any event, contemporary international law draws a bright-line distinction between *jus ad bellum* and *jus in bello*, where the latter standard applies irrespective of the legality of the war in question.

46 In fact, one may simply view this structure as an extreme version of the moral compromises all individuals must make to participate in any given society. Although an individual may choose his society on the basis of general agreement with its moral and legal principles, absolute correlation with personal moral values will be unlikely; nonetheless, the individual typically remains bound by the systemic values even in cases where these conflict with his own personal beliefs and desires. This appears to be the founding moral principle of any national system of criminal justice.

47 This is particularly true in times of war, where a failure to obey orders immediately and without question may result in serious threats to the soldier's comrades or to national security. However, knowing compliance with manifestly illegal orders under these circumstances is not an example of weakness but rather the adoption of a different moral standard by the soldier, in which less weight is given to compliance with the laws of war than to these other considerations.

48 Section 3.3 below addresses the argument that moral weakness is nonetheless different from preference-based choice, recognizing that this distinction should properly be taken into account in mitigation of any resulting sentence.

49 See the discussion of *Erdemovic*, supra note 18 for an analysis of the content and limitations of this doctrine.

50 Note (B) to QR&O, art. 19.015. This obligation is reiterated by the Office of the Judge Advocate General in the *CF Code of Conduct*, supra note 13. As L.C. Green notes, however, these provisions are silent with respect to the ramifications if a solider complies with an order in such circumstances "and it transpires that it was in fact illegal." Supra note 14 at 248.

51 Ibid.

52 *Smith*, supra note 23 recognized the objective nature of the concept of manifest illegality, and its application in cases where an accused "must or ought to have known that they were unlawful." However, as with this case, an element of subjectivity nonetheless remains in the test for manifest illegality applied in many of the later historical precedents cited above. For example, the USMT in the *Einsatzgruppen Case*, supra note 11, focused on execution of a criminal order by a soldier "with malice of his own." Similarly, the Leipzig Court decision in *The Llandovery Castle* addressed conduct "universally known to everybody, *including the accused*, to be without any doubt whatever against the law." Supra note 28, emphasis added.

53 War crimes may also result from actors complying with particular criminal orders not out of duty but rather out of a sense that the order in question is consistent with their own (flawed) moral philosophy. Conscious participation in pogroms by rabidly anti-Semitic actors who believe in the rightness of their cause might exemplify this position.

54 Although enumerated in many sources, the *Rome Statute*, arts. 5-8 provides detailed contemporary definitions for all three categories of international crime.

55 Although the deeming of genocide and crimes against humanity as manifestly unlawful by art. 33(2) of the *Rome Statute* appears unnecessarily to have established a two-tiered moral hierarchy, drawing a significant distinction between these acts, on the one hand, and war crimes, on the other. This formal dichotomy is counter-intuitive for a court established specifically to address only "the most serious crimes of concern to the international community as a whole". See, e.g., *Rome Statute*, Preamble.

56 In contrast to genocide and crimes against humanity, war crimes are often somewhat technical and specific, relating to the actual conduct of hostilities in addition to treatment of non-combatants. See, e.g., *Rome Statute*, art. 8, attached as Appendix I below, in particular conduct of hostilities crimes such as: "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (art. 8(2)(a)(iv); or, "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" (art. 8(2)(b)(xiii), international conflict, and 8(2)(e)(xii), non-international conflict). Arguably, a moral distinction may lie between war crimes committed against civilians and other persons hors de combat and those concerning the conduct of hostilities between opposing belligerent forces.

57 Supra note 5.

58 Supra note 38.

59 Supra note 36.

60 In addition, the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, seeks to limit the precedential value of *Finta*, broadening the circumstances in which the plea of superior orders will be denied to an accused. Although it directly incorporates the language of the *Rome Statute* concerning superior orders, this Act then places further significant restrictions on the application of this defence in Canadian courts by providing in s. 14(3) that:

> [a]n accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.

This provision places further limits on the defence of superior orders than does the *Rome Statute*. For example, an accused may act on a belief concerning an 'identifiable group of persons' yet not commit a crime against humanity (which requires widespread or systematic conduct directed specifically against that group) or an act of genocide (which requires specific intent to destroy the identified group in whole or in part).

61 Here one must remember that a successful defence of superior orders may relieve the individual soldier of criminal responsibility but it does not (necessarily) lead to impunity for the acts in question. The doctrine of command responsibility will place liability on the person(s) further up the chain of command responsible for issuing the orders in question. See supra note 2 for a brief discussion of this related international criminal law doctrine.

62 Thus, the defence will never be available to conscious wrongdoers, assuming of course that actual evidence exists to prove their subjective knowledge of illegality; this assumption may prove extremely problematic in the context of wartime practice. Furthermore, for reasons discussed below, although initial questioning of illegal orders by soldiers should be viewed as a mitigating factor, in many circumstances such questioning may also provide the only practical evidence of subjective knowledge of wrongdoing.

63 This may explain the reasoning of the SCC in *Finta*, supra note 5 that the defence of superior orders may remain available to an accused deciding not to testify on his own behalf at trial.

64 If the actions in question did not involve the *actus reus* necessary for characterization as a war crime, the defence of superior orders would not be required. It may, for instance, involve the indiscriminate shelling of targets in a civilian area or an attack that leads to excessive collateral damage to civilians or civilian infrastructure. See Appendix I for a complete enumeration of the war crimes jurisdiction of the ICC.

65 The exclusion of obedience to manifestly illegal orders from any consideration, whether in defence or mitigation, is clearly justified.

66 That is, the morally negligent or indifferent should not benefit from legal protection on the basis of their failure to consider the moral ramifications of their actions.

67 None of these actors could be considered a victim in any meaningful sense of the term. As such, attribution of criminal responsibility appears entirely consistent with the republican arguments advanced by Kyron Huigens in "Virtue and Inculpation," 108(7) Harvard L. Rev. 1423 (1995).

68 Accepting a Kantian view of moral responsibility, punishment should always result from the killing of innocents, even when resulting from duress involving threats to the life of the soldier. See discussion of this issue in *Erdemovic*, supra note 17.

69 *Obedience to Authority: An Experimental View* (New York/London: Harper Perennial, 1974). Milgram suggests at page 131 that overcoming individualism is necessary for any hierarchy to function, arguing that:

> [b]ecause people are not all alike, in order to derive the benefit of hierarchical structuring, readily effected suppression of local control is needed at the point of entering the hierarchy, so that the least efficient unit does not determine the operation of the system as a whole.

70 Ibid., 133.

71 Ibid., 189.

72 Ibid., 164.

73 See Garvey, "Punishment as Atonement," 46 UCLA L. Rev. 1801 (1999) for an analysis of the need for both punishment and atonement following the commission of a criminal act.

74 UN Doc. A/CONF.183/9 (1998).

CHAPTER 3

When Honour and Strategic Advantage Converge: A Jominian Argument for Abandoning Torture as a Tactic Intended to Contribute to Security in the Altered Strategic Landscape of Terror Warfare

Davida Kellogg

The most basic of the principles of war is the need to constantly challenge, re-evaluate and modernize all of them. The job is never done.

Brigadier-General Charles J. Dunlap

Introduction

When American military thinkers talk about a "revolution in military affairs," the image of dissention from high within the officer corps does not ordinarily come to mind. Individual American generals (perhaps most famously, General Douglas MacArthur) have disagreed with their commanders-in-chief over the prosecution of our wars. But that no less than six retired general officers who held recent commands in the war in Iraq have come forward this year to call for the resignation of the Secretary of Defense because of his insistence on what they consider a defective strategy for the Global War on Terror (GWOT) in general and the Iraq campaign in particular,[1] is unprecedented.[2] Nor are these American leaders alone in their misgivings. Perhaps the most substantially delineated criticisms of the current overwhelmingly kinetic strategy in Iraq so far have come from a commander of the British army, Brigadier-General Nigel Aylwin-Foster, who served with the Coalition in Iraq throughout 2004.[3]

Based on his observations in the field, Aylwin-Foster urged that we take a more "hearts and minds" approach in Iraq. Whether the American

leaders act on his, or other, recommendations will depend on the results of a thoughtful re-evaluation of Coalition strategy.

Despite allegations that any probing of areas of weakness in the Iraq strategy indicated by the critical generals plays into the hands of the largely anti-war political Left,[4] party politics is *not* what truly matters here. However one may feel about the morality, legality, or strategic wisdom of concentrating the military efforts in Iraq, what is at stake in regard to making the right (or at least a satisfactory) choice of a strategy for the greater GWOT is at its core a matter of the utmost ethical consequence. It is nothing less than that most basic of human rights, the inalienable natural and legal right of innocent non-combatants of all civilized nations to keep their own lives.

The old soldiers' truism to the effect that "no battle plan survives contact with the enemy" is in fact simply a reminder that all strategies, even those that have so far been successful, require re-evaluation from time to time. The so-called "dissident" generals, a loaded term that does them a disservice, have only confirmed what those of us who follow the news from Iraq already strongly suspected: that the United States (US) current strategy is not producing the necessary results to secure the security and safety of the American people or those of their allies. Whether or not one agrees with retired US Marine Corps Major-General Anthony Zinni that we've already "wasted three years" losing ground in Iraq, the time for a rigorous re-evaluation the US strategy, there and in the greater GWOT, has arrived.

The aim in writing this chapter is to begin this process, if only on a small scale, by reassessing the utility of the practice of torture in extracting intelligence in the context of highly politicized warfare in which public perception of the military actions, if not everything, is "way ahead of everything else." To that end, it seemed to me that a system of Jominian-type Principles of War, updated and specifically adapted to the morally, as well as strategically asymmetrical, terror warfare, specifically the "neo-strategicon" system proposed by Brigadier-General Charles Dunlap,[5] might serve as a useful lens through which to focus an initial analysis of the concerns raised by the retired generals on questions of what we stand to gain and what we would have to sacrifice in order to take their advice, and whether it is worth doing, or to bet on other strategies, or to take another tack altogether.

The Jominian system of nine principles of war, originally intended to provide a "scientific" framework for planning and evaluating French strategy and tactics for the Napoleonic Wars, was taken up by American officers with such enthusiasm that it used to be said of West Point graduates that they rode into battle with a sword in one hand and a copy of Jomini in the other. The nine classic Jominian principles still prominently displayed on classroom walls at the US Military Academy in the early 1990s were indelibly etched on the minds of generations of West Point graduates and ROTC commissioned officers alike in the form of the acronym MOSS MOUSE, which stood for mass, objective, security, surprise, manœuvre, offensive, unity of command, simplicity, and economy of force. It is to these principles that Major-General John Batiste was referring when he "homed in on [Secretary of Defense] Rumsfeld's leadership style and decision-making," warning that "When decisions are made without taking into account sound-military decision-making, sound planning, then we're bound to make mistakes... When we violate the principles of war with mass and unity of command and unity of effort, we do that at our own peril."[6]

Of course, not all nine principles are of equal importance in every military engagement. No general ever has all of them working in his favor; they may even conflict, as they in fact often do. The "art" of war may be said to lie to a considerable extent in knowing where and when to sacrifice the benefits of employing one principle in favour of others in order to maximize strategic gains. And though the nine original principles may be deeply ingrained in the American military consciousness, other considerations may also apply. In the 1980s, there was some discussion at Leavenworth at least, of adding morale and exploitation to this list of principles. Additionally, the necessity of ensuring adequate logistics has also been famously counseled by both Sun Tzu and Napoleon.

Finally, the British military recognizes a principle of flexibility. This principle is reflected in both Dunlap's principle of adaptability and Aylwin-Foster's repeated urging the willingness to consider changing the strategy in Iraq from a kinetic approach focused on destroying terrorist organizations and their leadership to a "hearts-and-minds" approach aimed at isolating terrorists from their civilian supporters. The need to reassess and re-cast not only the strategy but the bases for making strategies is clearly a "node" of agreement.

The perception, stemming from the frustrations with guerrilla warfare in Vietnam, that a system of principles of war specifically developed for Napoleonic-era linear warfare is ill-adapted and, what is more, inadaptable to modern "irregular" or "asymmetric" styles of war has been refuted by Brigadier-General Dunlap who has applied a more creative strategic imagination. The approach taken by Dunlap was to define eight new principles – perceived worthiness, informed insight, strategic anchoring, durability, engagement dominance, unity of effect, adaptability, and culminating power – specifically adapted to modern irregular warfare, but each of which retains the kernel of one or more of the original Jominian principles (adaptability, for instance, is intimately related to security, with which the next section will be specifically concerned).

The Altered Strategic Landscape of Irregular Warfare

The approach taken in this section addresses the strategic problems posed by terror warfare from an oblique angle to Dunlap's. Nonetheless, the approach converges on the same strategic issues and leads to many of the same conclusions. This section (from a geologist's point of view) envisions differing styles of war as presenting sometimes very different "strategic terrains" over which opposing armies must manoeuvre. When one party to a conflict radically alters its style of war, it is as though its war planners had sterilized a great sand table and rebuilt it with strategic hills and valleys and fords so located as to improve their side's likelihood of prevailing.[7] The more asymmetrical the approach, the more surprising, the stranger, the more "foreign," and even, as in the case of terror warfare, morally repulsive the altered style of war is to the opposing side. However, that being said, often, the more asymmetric the approach, the greater is the strategic advantage that accrues to the side that has initiated the shift.

The one constant in this shifting strategic landscape is that its contours are controlled by the relative "weight" given in a particular style of warfare to the various considerations captured by the principles of war, and how that weight is applied or countered. That is, different styles of warfare place different amounts of emphasis on the core elements of different strategic principles. The "high ground" one must seize and hold to the last man in one style of war, may be so different in another that strategic planners may not at first even recognize it.

For example, the "take away" lesson of the Vietnam Conflict may well be that the contours of the strategic terrain of modern irregular warfare is fundamentally different from that of conventional war, and what constitutes effective manoeuvre is determined by the nature of that altered terrain. Air Mobility was a highly sophisticated technological solution to the logistical problem of manoeuvre over Vietnam's difficult geographic terrain, but it was no solution at all to the problem of manoeuvre over the political and psychological landscape presented by highly sophisticated enemy propaganda campaigns that undermined our morale and will to fight.[8] It is a lesson not yet fully absorbed, and that failure to appreciate the nature of the altered strategic landscape presented by terror warfare has put the US at a dangerous and unnecessary disadvantage in the conflict with terrorist organizations and their sponsor states.

The first step, therefore, to effective strategic planning for this conflict would be to accurately locate the domains, or areas of influence of particular principles of war, in which the high ground lies in terror warfare; not where one would expect them to lie from our successful experience with conventional and even cold war, or would have them lie to facilitate the prosecution of the kinetic style of war we favor, but where the *enemy's* style of warfare has relocated it. In terror warfare it lies in the political, that is primarily in the domains of objective and morale. Specifically, it lies in Dunlap's principle of perceived worthiness (or lack thereof) of the Coalition campaign in Iraq, not only among the Iraqi civilian population but in the American population, the allies and prospective allies as well.

If a perceived lack of a clear objective for the current phase of the war in Iraq has sown confusion among the military leaders and troops, as Aylwin-Foster maintains (and it does seem that the greatest threats are emanating from Iran and Syria and from terrorist organizations such as Hezbollah and Hamas, which have assumed the roles of *de facto* governments in Lebanon and the would-be Palestine), it has left the civilian population back home wondering what we are doing in Iraq in the first place – i.e. rebuilding Baghdad city infrastructure while New Orleans still lies in ruins.

Perceptions that the war in Iraq is just some venal grab on the part of the American government for oil and influence in the Middle East, or a racist "Crusade" against Muslims are widespread. These bear no recognizable relationship to the American true overarching strategic objective to

cause (by legal and moral, but not necessarily non-violent means) terrorist enemies to cease and desist from committing the crimes against civilian non-combatants that are the very defining elements – the *sine qua non* – without which logically and operationally there can be no such thing as terror warfare.[9]

Allegations that the war in Iraq is both immoral and illegal, and accusations (a few justified, most not) of "war crimes" leveled against the American troops are uninformed by any demonstrable knowledge of either thousands of years of Just War Tradition or the corpus of International Law of Armed Conflict (LOAC). Nevertheless, such negative perceptions of both the methods and means of war have a ripple effect impinging on the domains of several other principles of war, chief among them mass, manœuvre, and security. In Dunlap's terms, the creation and spreading of such negative perceptions about the Coalition's methods, means, and reasons for fighting the GWOT is "strategically anchored" to terror warfare.

Mass

Given conditions of a small, supposedly "expansible" all-volunteer army, almost entirely dependent on recruitment and retention because of perceived widespread voter resistance to a draft and the challenge of a widespread and multifaceted war, mass becomes a – possibly *the* – critically limiting factor to the ability to achieve the overarching objective. As missions proliferate and the number of boots on the ground stay the same or even decline, recruitment shortfalls present a real possibility for disaster as attrition, rotation, and retirement relentlessly thin our "lines."

The sort of misconceptions about the morality and legality of the conduct in Iraq discussed above is intimately linked to the shortfalls being experienced in military recruitment and retention. As an example, at the University of Maine, members of the "peace action" committee have set tables next to the military recruiters and heckled students who stop by. The hecklers assail the potential recruits with arguments against joining up, normally emphasizing that the war in Iraq is illegal and immoral. Such arguments are highly emotional, thoroughly irrational and utterly uninformed by LOAC or Just War tradition.[10]

Their viewpoints and even flimsier arguments from the perspective of political correctness are, however, plausible enough sounding to an

uninformed and uncritical student body to effectively sabotage vital recruitment and retention efforts on college and university campuses. Cases in point are those of:

1. Jeremy Hinzman, absent without official leave (AWOL) from the U.S. Army, paratrooper, who recently applied for refugee status in Canada on the grounds that returning to duty with his unit would oblige him to participate in actions which would render himself and his fellow soldiers criminally liable for the deaths of Iraqi civilians and, thereby, war criminals; and

2. Some of the nation's most prestigious law schools, which have denied the Judge Advocate General (JAG) Corps recruiters access to their third year students on the grounds that the military's contentious "don't ask, don't tell" policy towards gays violates university nondiscrimination policy.

Hinzman's appeal was denied by the Canadian Immigration and Refugee Board, and rightly so, on the grounds that he had not demonstrated that the U.S. Army had any such institutional policies towards Iraqi civilians as he alleged. But his case, which is now in the process of appeal, has encouraged other troubled and confused enlisted men to file cases of their own, and is championed on university campuses, where he is widely viewed as a something of a martyr to the cause of "peace in Iraq."

A recent Supreme Court ruling now requires universities to allow military recruiters equal access to their students or risk loss of government funding. But the controversy over "don't ask-don't tell" has already done considerable damage to our efforts to recruit JAG officers. These officers are responsible for determining whether proposed targets are legal under the LOAC and advising commanders and decision-makers on other legal matters such as the treatment of "high value" prisoners that have become crucial to the ability to defuse the moral and legal claims leveled against the US by apologists for terrorism. As such, these officers are especially needed in the context of the highly sophisticated style of political war presented by terror warfare that Dunlap termed "Lawfare."[11] The posting of this new generation of "warrior lawyers" to the right hand of commanders in the field is the closest thing to a desperately needed "Lawfighting" doctrine[12] so far devised.

While the Supreme Court decision has been condemned in certain circles as institutionalizing prejudice against gays in the military, it nevertheless rationally prioritizes the greater necessity for all citizens to make personal sacrifices in time of war for the common defense over insisting on such individual "goods" as a right to open sexual self-expression in a military setting. And being law of the land, it must take legal precedence over individual university policy.

But even though the Supreme Court's decision has resolved the issue of equal access for recruiters for the time being, the pressing problem of convincing young people to join up is unresolved. As mission creep, attrition and retirement take their toll, the military cannot afford to have recruiters simply disengage (e.g., a practice at the University of Maine) and end up routinely not making their vital mission. Therefore, I propose that, for reasons of mass and manoeuvre, we arm our recruiters with a solid basic understanding of Law of War and Just War theory that would enable them to overcome protesters' arguments in private conversation with potential enlistees and cadets (not direct confrontation with protesters, which would be futile, off-mission, and non-contributory to the overall objective).

In the end though, the US is not the only one threatened by terrorism. Other nations including Britain, France, Spain, and Russia have suffered too at terrorist hands, or have been credibly threatened. The success of the GWOT lies in the ability to make it truly global. For that, there is a to convince allies, and potential allies (the real powers of this day) in Europe, Asia, and on this continent that knuckling under, as Spain did after the terrorist bombing of its commuter rail lines, to the blackmail of terrorist threats will only guarantee more (and ever more outrageous) blackmail demands, and that it is in the best interest of all free and independent peoples to join the US in presenting an implacable, united, and overwhelming front to terrorist organizations and their sponsor or enabling states. That is where the bulk of the mass in the war against terrorism ought to come from. And that is where it might most effectively direct the bulk of the "hearts and minds" efforts, at least until the mass is built up.[13]

To convince these understandably nervous peoples to stand with the US against terrorist organizations and sponsor states, the US should be able to reassure them that more can be done for them in the way of providing security and neutralizing terrorists' ability to carry out their threats than

terrorists can do to them in the way of harm. And, perhaps even more important, to convince them of the worthiness of our cause.

This is no small challenge in an intellectual climate of post-1960s cultural relativism that has left a highly vocal segment of a society reluctant to acknowledge the necessity for going to war, even against an enemy that has committed unspeakable atrocities specifically named as war crimes in Additional Protocol I of the Geneva Conventions. Moreover, an enemy that continues to threaten to commit more such outrages against civilian populations, because of a post-1960s societal taboo against "judging" the motives and actions of other "cultures."

Followed to its logical conclusion, such unreasoning political correctness would have the US standing like the proverbial deer in the on-coming headlights, wondering uselessly (since there is little that can be done about ingrained cultural and religious prejudices of sworn enemies) "why do they hate us so?" Whatever the answer, religio-socio-economic resentments (the so-called "root causes" for terrorism), can neither morally nor legally justify the commission of the atrocities and crimes against humanity that are the defining characteristics of terror warfare.[14] For while unfair conditions may exist[15] that may call for some form of reasonable remediation, *nothing* gives *anyone* the moral or legal right to deliberately and with malice aforethought *murder* innocent non-combatants. No such right exists in either the Just War Tradition or modern LOAC.

The simple ignorance of Just War theory and the LOAC can be overcome by education, without which the civilian voting citizenry cannot adequately fulfill its constitutional obligations inherent in civilian control of the military. But, even with vital citizenship education in the public schools of tomorrow, it will be years until an adequately educated cohort of voters is of age to influence US policy. Here, the media could be of great national and international humanitarian service in helping to unmask and de-legitimize terrorism, *if* the media profession could be convinced to regulate itself merely insofar as to see to it that war correspondents were competent to report knowledgeably on military matters as a condition of their being embedded with the military forces.

Colonel Ralph Baker[16] has gone so far as to consider information operations (IO) as occupying crucial battlespace in the emerging strategic landscape of terror warfare. Baker's policy was not to allow journalists

to spend the night on his base unless they were willing to be embedded "long enough to understand the context of what is going on around them and to develop an informed opinion before printing a story." This policy worked well for him, perhaps because of his evident native diplomatic skills. But any impetus towards imposing such really quite minimal requirements on an institution that has always jealously guarded its independence must come from inside the profession or almost assuredly be loudly and dramatically misinterpreted as an attempt to deprive it of its constitutionally guaranteed freedoms, and should always be handled with the same delicacy as one would high explosives.[17]

Manoeuvre

In conventional warfare, an army's ability to manœuvre over geographic terrain is limited by the number of troops that can be deployed to its various areas of operation. And the limiting factor in securing sufficient mass to prosecute global war on terrorist organizations and sponsor states is public opinion. The sort of wilful ignorance that actually has educated Americans seriously suggests they adopt a more "sophisticated European" attitude, and learn to live with terrorism (an abomination of an attitude that plays directly into the enemy's politically skillful hands) is even harder to counter. But it is both widespread and deeply held in certain strata of Western society. It is imperative to find a way to reach the remainder of the civilian population, the allies, as well as Coalition troops and convince them of reality. This cannot be achieved with clumsy attempts at propaganda like transparent out-sourced advertising campaigns that are rejected out of hand by a public grown as mistrustful of government. Rather, it must be done with a clear, honest, rational, and convincing deconstruction of terrorist apologists and the public unmasking of terrorist methods, means, and objectives. It is important to demonstrate the terrorist messages and actions for what they are: hypocritical hate propaganda and the cause of untold civilian death and suffering.

For it is here, in the domains of perceived worthiness and its direct effects on morale (on American' and allies' civilian populations and of Coalitions troops) that the controlling high ground in the strategic terrain delimited by political warfare lies. It is in convincing the civilized nations of the world that the last best chance for taking this high ground resides in the understanding of the vast and unbridgeable moral and legal gap that exists between them and those who wage terror warfare.

The (mis)perceived worthiness of terrorist war aims[18] is the *only* principle of war that the terrorists have. But it is a powerful one, most especially in the strategic terrain of terror warfare. And apologists for terrorism have so far proved far more adept at exploiting it, which is at getting their viewpoint across to civilian supporters in the Middle East and abroad, than civilized nations have so far been at debunking their twisted rhetoric.[19] And radical philosophies tend to carry the weight of religion with their adherents.

Consider this lesson from the American recent military history. Although the Vietnam conflict was at its core about access to land (read wealth in that largely agrarian society), the "hearts and minds" strategy with its pigs and chickens, and vaccinations against childhood diseases, simply could not cover the same socio-economic-political terrain as the Communist promise of land redistribution.

The problem in Iraq is even more complicated by old and deeply felt religious sectarian differences than it was in Vietnam. And, any strategic Devil's advocate worth his brimstone must ask: if the Vietnamese were willing to sacrifice the lives of over a million guerrilla fighters for a functional secular religion that deconstructs to mere Marxist economic ideology of economic redistribution, what would the Iraqis and others in the Middle East not do for the sake of their genuine religious contentions?

After all, the objective of the terrorism currently coming out of the Middle East is all about a struggle for religious hegemony, something that the US seems not to fully appreciate, perhaps because the American people have been raised to believe, to the foundations of their national identity, that religion is a matter of personal choice and public tolerance.[20] There *really* is, if not a "clash of civilizations," then a quite possibly unbridgeable gap between Islamic and Western culture. For instance, witness the capital charges recently brought against an Afghani convert to Christianity, for which crime of apostasy, unknown to modern Western courts, Sharia law would have sentenced him to death by beheading. The fact that those charges were dropped and he was allowed to immigrate to Italy would appear to demonstrate just how vulnerable fundamentalist Islamist states and organizations are to the threat of withdrawal of international public support. And they are exquisitely vulnerable there, in the heart of their greatest if not only strength, because of the demonstrable, inherent, and,

therefore, irremediable illegality and immorality of their methods and means of war. Subversion of terrorism's supporters in the domain of perceived worthiness of the terrorist way of war contributes to the strength in the Jominian principle of objective.

Objective (Aim)

Aylwin-Foster urges a "hearts and minds" approach to gain the willing co-operation of the Iraqi people[21] in attaining the objective of neutralizing radical Islamic terrorist organizations operating out of the Middle East by convincing them that the US understands and appreciates their point of view on the major conflicts in the area. And there is undeniable advantage to be gained in "knowing your enemy," as Sun Tzu advised. But there is an ideological "tipping point" at which "understanding" other people's motivations slides over into tacitly approving of, making excuses for (as in the flawed and dangerous "root causes" arguments for terrorism ably deconstructed by Elschtain), or even actively adopting it (what the British Army in India used to call "going native").

The agreement to step over this point and adopt an Islamist point of view towards Middle Eastern conflicts may well turn out to be the price demanded for a positive response to the American efforts at reconstruction. And, that is a price that the US cannot, and should not pay! For one thing, there is no single Islamic, Arab, or even Iraqi viewpoint, but a vicious religious conflict between Sunnis and Shiites almost as old as the religious conflict between Muslims and "Infidels" (adherents to every other faith). So deep are these divisions that the vast majority of Iraqi civilians killed almost daily in Iraq are the direct and intended victims of sectarian violence, and not collateral, much less directly targeted casualties (as apologists for terrorism so hypocritically claim) of conventional Coalition warfare, which honour binds its practitioners to minimize any possible harm to non-combatants, even at increased peril to their own lives.

In this religio-political atmosphere, any rapport achieved with leaders of one sect would almost certainly be taken as making a common cause with their enemy by the other. Therefore, strict neutrality would be called for, but there is little chance that either side would not demand that the US actively takes part in return for its co-operation. Morally, there is little to choose between them; both sides have innocent blood on their hands up to their elbows. Politically, Sunnis are the majority in Iraq. But the more

threatening reality is that although the Shiites might be Iraqi by nationality, their (stronger) religious sectarian loyalties may lie across the border in Iran, which is shaping up to be a far more formidable (nuclear capable) enemy than Iraq ever was.

The topic of religious intolerance introduces an important point. The US foreign policy towards Israel should be altered to facilitate, or at least turn a blind eye to, the achievement of plainly stated Palestinian and more worrying Iranian objectives in the Middle Eastern conflict.[22] Primary among these is the "removal of Israel from the map of the Middle East." The legal term for a war aim such as this is "ethnic cleansing." This euphemism describes, not a reasonable objective in the Just War Tradition, but a crime against humanity under international law to which the US cannot be associated, neither afforded to imagine, that the Palestinian (and now, Iranian) clamour for such ends is only overwrought ethnic rhetoric full of idiomatic overstatements, which are misinterpreted literally and taken too seriously.

The US should ask what is to gain in the Middle East by allowing the destruction of the most reliable ally in the region in order to win over an unproven one. Certainly there will be negative international political and strategic consequences for demonstrating anything that might be interpreted by European allies and potential allies as untrustworthiness or lack of moral fastidiousness in making alliances in Iraq and elsewhere in the Middle East. The US needs to convince European and potential allies, along with moderate Islamic states like Indonesia according to Ralph Peters,[23] to join the GWOT and present an implacable, united, and overwhelming opposition to terrorist organizations and sponsor states. The US should avoid losing more ground in the domain of security and keep in mind the fact that the key to victory lies in *taking* the terrorists' most valuable high ground which lies in the domain of perceived worthiness and associated morale. Own that ground, undermine support and sympathy for terrorist means and methods of war, and terrorist mass and ability to manoeuvre collapses; security will follow. This view is closely linked to Dunlap's interpretation of principles of war.

Security

Restoring security for the American civilian population is what this chapter is addressing. The US national grand strategic objective in waging

the GWOT is to neutralize the threat of terrorist organizations and their sponsoring and enabling states. But in order to accomplish this objective, the US needs the co-operation and earns the confidence of allies and potential allies worldwide, the civilian populations of moderate Middle Eastern states, and the American civilian population. For the civilized nations of this world, the best chance for security lies in solidarity and a credible counter-threat of overwhelming kinetic force made possible by the mass and materiel of combined military forces.

Once that mass is achieved, the aim of providing security for those in the Middle East who would take our side except for fear of terrorist reprisals like the targeting of Iraqi men queuing up to apply for jobs with the new Iraqi police force or to enlist in their own country's military. The need for sufficient mass to supply such security is one reason for my advocacy of a "Europe first" policy for our application of a "hearts and minds" strategy in the war on terrorist organizations and their sponsor states.

Towards that end, we and our allies in the UN might do well to launch a very public diplomatic effort to have the UN explicitly declare acts of terrorism crimes against humanity, and begin trying apprehended terrorists in the ICC, out in public where such trials arguably belong and can do the most to bring the worthiness of our stance *re* terrorism before our own and our allies' civilian populations. For although military tribunals do have certain advantages (such as a greater level of security for HUMINT providers and the possibility of hearing cases relatively quickly and cheaply overseas in the war zone where the alleged criminal activity took place and witnesses reside), the more valuable advantages in public perception to be had from transparency is sacrificed.

Whether these aims can be achieved is almost immaterial, as the international discussion that would be opened in the media, if kept focused on the international legal issues, would serve the greater objective of forcing the civilian public to confront the demonstrable immorality and illegality of terrorism. This "public relations" dividend is the objective of this manoeuvre in the strategic terrain created by political war.

The US cannot hope to achieve this advantage if allies and potential allies are not convinced that *both* strategic aims and the tactics employed to achieve them are *worthy*. Half measures will not be sufficient to this purpose, but will be interpreted in the media and many domestic and for-

eign civilian quarters as attempts to deceive. A case in point was President Bush's signing the Military Commissions Act of 2006. The media reported: "this legislation says the president 'can interpret the meaning and application' of international standards for prisoner treatment, a provision intended to allow him to authorize aggressive interrogation methods that otherwise might be seen as illegal by international courts."[24]

The issue of security at home is even more fraught, because the American civilian population demands security, but is deeply suspicious of any measures that smack of "racial profiling." Even such individual-focused security practices as "behavioral profiling" may be spun as racial or religious profiling. At the same time, the Americans are vehemently resentful of security measures that would subject all citizens and foreigners alike to equally stringent scrutiny. Just how unwilling they are to give up some measure of privacy for increased security may be illustrated by the significant number of civilian volunteers who have left the Coast Guard Auxiliary (the lead civilian organization in the Department of Homeland Security) rather than submit to security screening before being allowed to participate in direct operational support of Coast Guard activities.

Such an understandably touchy issue as infringement on personal liberties for the sake of tightened security must be handled with the proverbial kid gloves. The announcement of the Dubai ports deal at the same time that an extension of the contentious Patriot Act was under consideration in Congress was nothing if not politically clumsy. The recent decision to send funds for humanitarian aid to Lebanon, where they will no doubt be disbursed to the local populations by Hezbollah representatives, may well turn out to be another cause for resentment among the taxpaying public. Any such arrangements must in the future be made transparently and subject to public debate, if not ultimate public approval.

A problem perhaps not fully appreciated is that what may constitute an area of relatively high ground that may be occupied to advantage in the domain of one of the original or revised principles of war may at the same time constitute an area of strategic disadvantage, or relative lower ground, in the domain of another principle. The problem is to determine in the domain of which principle, or constellation of principles, the key terrain to occupy in order to achieve the national grand strategic objectives lies. This may necessitate the sacrifice of advantageous terrain in the domain of other principles. A case in point is that while manoeuvring for

the high ground of security the use of certain techniques for intelligence gathering that have been widely condemned as torture or other maltreatment of prisoners of war. It has opened the US to counter charges of *tu atque* that have provided terrorist apologists with a smokescreen behind which to hide the unbridgeable moral and legal differences between their way of war and the American way of war. It has weakened any charges of violation of the Torture Convention of 1990 that the US might wish to bring against them for mistreatment of any Americans they may take captive. It has stranded the US in an area of negative strategic advantage with respect to the domains of morale and perceived worthiness, where the controlling or key terrain in the kind of highly sophisticated political warfare actually lies.

The question of whether the use of torture, which may contribute to intelligence (an area of high ground in the domain of security), should be discontinued or not should be addressed. It is a strategic trough with respect to the key terrain of political warfare that lies in the domain of perceived worthiness. We must also keep in mind when considering any strategy that in this age of "television warfare" we can no longer keep anything our military does from public scrutiny.

The resort to torture may not be all that efficacious in delivering usable intelligence. Recent critics have pointed out that intelligence extracted under extreme duress may be unreliable because pain either clouds the memory of subjects who actually do know something valuable, or causes those who do not, to lie in order to avoid further pain.[25] Those able to tolerate the pain of low-grade to moderate torture may still lie and the application of a heavier hand may result in death. Furthermore, the "breaking" of a subject's will to withhold intelligence by disrupting his diurnal biorhythms, keeping him isolated and in the dark, or exposing him to painfully loud rap "music," takes time. In some cases, such as the details of an impending terror attack, that time is limited. Research into so-called "truth sera" may hold out the greatest possibilities for extracting timely and reliable intelligence. But no drug, even aspirin, has zero probability of causing death or life-threatening side effects, and psychoactive agents may so loosen the subject's hold on reality that he produces little more than useless psychedelic ravings.

Prohibiting the most aggressive of interrogation techniques now in use (water boarding, for instance) and scaling down the intensity of those

remaining will probably not result in any significant improvement in the "perceived worthiness rating." What would a society so alien to making finely shaded value judgments that it categorically calls almost every interaction the military has with suspected terrorists "torture" consider acceptable interrogation techniques anyway — harsh words?

All levity aside, it does not seem likely that anything Western society would sanction would have much utility in extracting intelligence from a hostile and unwilling subject. More importantly, any use of torture techniques will almost assuredly be used as justification for the reciprocal use of the same or even harsher techniques on any of the American military personnel who are taken captive, or on kidnapped reporters, contractors, and other US civilians.

If there is one thing preventing the torture and murder of hostages or prisoners at the hands of their captors, it is that the ground terrorists would lose in the domain of perceived worthiness if their actions were exposed before their European supporters by a blameless US. The US would probably do far better to concentrate on scrupulously legal and narrowly targeted surveillance, infiltration, and the turning and cultivating of informants. Although these measures too would be subject to the special pleading of apologists for terrorism, any case they could make in mitigation of acts of terror would be far weaker and more transparent in the absence of any evidence of torture on the part of the US. More importantly, they would put terrorist organizations and sponsoring and enabling states on an untenable defensive with regard to their own resort to torture.

Although circumstances in which the threat posed to innocent noncombatants is so great and so imminent that the moral case for torturing a subject known to be in possession of critical intelligence would outweigh moral and legal prohibitions on torture could conceivably arise, torture under less fraught conditions is an advantage decimator in the strategic landscape created by highly political terror warfare. Furthermore, the moral and legal threshold beyond which torture might be justified could be lowered with the escalation of terror warfare.

In the context of the present situation, the contours of the high ground in the domain of the principle of security defined by intelligence gathered by resort to torture appear to be relatively low in comparison to the elevation

of the high ground in the domain of morale and perceived worthiness currently occupied by terrorists and their apologists. This ground is key to victory in the GWOT. However, before claiming victory, a scrupulously "clean up act" is necessary and part of that process may be abandoning torture outright.

Exploitation

It is not suggested, by advocating the abandonment of torture, that the GWOT should be pursued without the benefit of intelligence. This approach considers shifting the greater part of the intelligence gathering efforts from techniques, which have become a hindrance to manoeuvring in the politicized strategic landscape presented by terror war, to more effective means including HUMINT and (scrupulously legal)[26] use of electronic and other surveillance techniques. The continuing resort to torture is moot in any case. Even if torture were demonstrably more effective in rendering reliable and timely military intelligence, the American public believes that torture should be abandoned, and according to the constitutionally established civilian control of the military, strategic planners and Military Intelligence personnel are oath-bound to accept it.

It seems that the question of choice – if applicable – is debatable because strategic analysis appears to argue for the abandonment of torture. This is where the art in the "art of war" resides: in having the fineness of judgment to perceive the relative strategic value of the high ground in the domains of competing principles of war, the sheer strategic guts to relinquish the advantages of one principle for greater advantage in the domain of another more crucial principle, *and* the quickness of wit to exploit that advantage to the fullest.[27] Even a cursory perusal of American military history would reveal that Americans do not have much of a track record when it comes to effective use of the principle of exploitation. But in renouncing torture, The US has the opportunity to gain strategically controlling high ground in the domain of the enemy's most effective principle of war. The question is not whether to take that ground or not, but how to exploit the advantages holding it will provide in the domain of perceived worthiness. The message should be sent – very fast – across the American nation, the allies, and the enemies' population alike.[28]

Those words should be congruent with actions, so that anybody with eyes can see that *we* (Americans) are the ones fighting for a just and hu-

mane cause in a just and humane manner. But here, at long last, is the one thing American officer cadet students most desire: fighting even a dishonourable enemy honourably, *and* with a fighting chance to prevail. The strategy of fighting a lawless, immoral, and demonstrably merciless enemy according to the precepts of the Just War Tradition and International Law of War is counterintuitive at first thought. Only consider this possibility: what if *we* (Americans) have fortuitously been driven, like the Union troops on the first day of the Battle of Gettysburg, not into helplessness and defeat, but onto the finest fighting ground on the altered strategic battlefield of terror war, one that may be made to suit the Americans preferred methods, means, and aims of warfare far better than it suits those of the enemy. Would not the exploitation of such a possibility be worth considering?

Endnotes

1 David Cloud and Eric Schmitt, "More Retired Generals Call for Rumsfeld's Resignation," *The New York Times*, April 14, 2006.

2 Hendrik Hertzberg, "Rummyache," *The New Yorker* (January 5, 2006).

3 B.G. Nigel Aylwin-Foster, "Changing the Army for Counterinsurgency Operations," *Military Review* (November-December, 2005).

4 Charles Krauthammer, "Dissident Generals Suit the Anti-War Left," *Bangor Daily News*, April 21, 2006.

5 Brigadier-General Charles Dunlap Jr., "Neo-Strategicon: Modernized Principles of War for the 21st Century," *Military Review* (March-April, 2006).

6 Sean Naylor, "Retired Generals Blast Rumsfeld," *Army Times* (April 24, 2006).

7 In a similar vein, Major-General (retired) Robert Scales likened this transformation in style of warfare to the "moving of tectonic plates." In "Clausewitz and World War IV," *Armed Forces Journal* (July 2006).

8 What Scales has aptly termed "psycho-cultural" war.

9 Davida Kellogg and Major Michel Reid, "Terror Warfare, Perfidy, and the Geneva Conventions," IUS Conference on Transformation and Convergence: Armed Forces and Society in the New Security Environment, Oct. 1-3, 2004, Toronto.

10 This point was demonstrated by Kellogg and Reid.

11 Colonel Charles Dunlap Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," 2001, at www. duke.edu/pfeaver/dunlap.pdf.

12 Davida Kellogg, "International Law and Terrorism," *Military Review* (September-October 2005), 50-57.

13 This is actually an economy of force argument, which is closely related to mass.

14 Jean Bethke Elshtain, *Just War Against Terror* (New York: Basic Books, 2003).

15 Michael Radu noted in his FPRI talk on teaching 9/11 that "the theory that people join

terrorist organizations out of poverty, injustice, etc. is losing ground." Radu's point is supported by the fact that the would-be plane bombers thwarted this August came from relatively comfortable British circumstances.

16 Colonel Ralph Baker, "The Decisive Weapon: A Brigade Combat Team Commander's Perspective on Information Operations," briefing to Information Operations Symposium II, Ft. Leavenworth, December 15, 2005.

17 Kenneth Payne goes much further in designating the media – "ostensibly non-state actors" – as "instruments of war," in the context of terrorism's highly politicized war of words. He further calls for greater control of the media by the military, and even for the modification of existing International Law of War specifying the non-combatant status of journalists and media buildings and installations in view of the effective military nature of such terrorist apologists as Al Jazeera and Al Manar. In "The Media as an Instument of War," *Parameters* (Spring 2005), 81-92.

18 Emblematic of this misperception is the frequently cited equation of "one man's terrorist," who murders civilian non-combatants in suicide bombings and decapitates captives or forces their religious conversions literally at sword's point, with the "freedom fighter" of a civilized people whose soldiers do everything within their power (even to their own detriment) to spare civilians, and who, when abuses do come to light, try and punish the perpetrators

19 "In which murderers are renamed 'martyrs,' to deliberately cause the deaths of innocent civilians becomes to do the 'will of God,' and all efforts at self-defence by those targeted by terrorists becomes 'aggression," Davida Kellogg, "On the Need for Moral Armoring of our Soldiers in the Rhetoric Wars of Terrorism," Canadian Conference on Ethical Leadership, 2002.

20 "Throughout most of the 1990s, intelligence personnel were not quite forbidden to consider religion as a strategic factor, but the issue was considered soft and nebulous – as well as potentially embarrassing in those years of epidemic political correctness." Ralph Peters, "Rolling Back Radical Islam," *Parameters* (Autumn 2002), 4-16.

21 Baker especially dislikes this term because he feels that it gives his troops an unrealistic understanding of their mission as making friends with the Iraqis they encounter – a dangerous and ultimately impossible goal. What he advocates is the cultivating of certain influential persons who command the ear of some target segment of the Iraqi population. Such tactics have in fact netted him successes in IO operations and the acquisition of valuable HUMINT, but it is questionable as to whether we can make a strategy of cultivating – or even find – enough leaders to discredit acts of terror in a sufficiently large segment of the worldwide Muslim population to bring about the cessation of terror warfare. That probably being the case, I contend that the credible threat of overwhelming force from the civilized nations of the world might suffice as a deterrent and serve our strategic purposes as well, if not longer and more reliably.

22 Such thinly veiled objectives were recently broached by former Iranian president Khatami, who urged that the US alter its foreign policy in the Middle East to achieve some measure of rapprochement with a determinedly nuclear Iran.

23 Since, as Peters asserts that "much of the Arab world has withdrawn into a fortress of intolerance and self-righteousness as psychologically comfortable as it is practically destructive. They are, through their own fault, as close to hopeless as any societies and cultures upon the earth." In "Rolling Back Radical Islam," *Parameters* (Autumn 2002), 4-16.

24 Nedra Pickler, " Bush Signs Bill for Terrorist Trials," *Bangor Daily News*, October 18, 2006.

25 At a Department of Defence (DOD) news briefing on a new Field Manual 2-22.3 on human intelligence (HUMINT) collector operations that "establishes the DOD-wide interrogation standard consistent with law, the Geneva Convention and DOD policy"(CQ Transcripts Wire, "Defense Department News Briefing on Detainee Policies," *The Washington Post* (September 6, 2006)), no less an authority than L.G. John Kimmons, Army Deputy Chief of Staff for Intelligence, stated the following:

"No good intelligence [obtained through "interrogation" defined here as "getting *truthful* answers to time-sensitive questions on the battlefield] is going to come from abusive practices.

I think history tells us that. I think *empirical evidence* of the last five years, hard years, tell us that. Moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of *questionable credibility,* and additionally it would do more harm than good when it *inevitably* became known that abusive practices were used. And *we can't afford to go there*. Some of our most significant successes on the battlefield have been – in fact, I would say all of them, almost categorically all of them, have accrued from expert interrogators using mixtures of authorized humane interrogation practices in clever ways" [italics mine]. His views were seconded in a letter to Senator Arlen Specter and Patrick Leahy of the Senate Committee on the Judiciary arguing that "proposals now before Congress concerning how to handle detainees suspected of terrorist activities run the risk of squandering the greatest resource our country enjoys in fighting the dictators and extremists who want to destroy us – our commitment as a nation to the rule of law and the protection of divinely granted human rights" written by a group of "experienced intelligence and military officers who have served in the frontlines in waging war against communism and Islamic extremism," including 15 CIA officers, a retired Director of Defense HUMINT Services, and the Deputy Coordinator of the Office of Counter Terrorism Department of State).

26 The recent foiling of a relatively large-scale plot to smuggle the components of bombs in liquid form on board several England to US commercial flights reportedly provides some proof that these methods can work indeed though hard evidence to back this statement up has not yet been released. William Rashbaum, "Subway Terror Case to Offer Insight into the use of Moles," *The New York Times* April 24, 2006.

27 One case in point is our failure so far to fully exploit the recent Islamic radical strategic blunder in capturing two Western journalists and converting them, literally at sword's point. Plainly and truthfully presented in all its details, without editorializing or spin, this truly offensive violation of the religious freedoms of these civilian members of the fourth estate would make the international furor raised by offended Muslims that threatened freedom of the press worldwide over a few supposedly insensitive cartoons in a Danish newspaper appear silly in comparison, and focus public attention on the illegal and immoral nature of the methods, means, and evident aims of terror warfare.

28 Baker had some very interesting ideas about how to accomplish this on a Brigade Combat Team scale. While leafleting is probably not applicable to the US population, ways of implementing his policies of relentlessly telling the truth about the consequences of each act of terror in terms of human costs, and not covering up our own transgressions but swiftly moving to correct and/or punish them, deserve serious consideration.

CHAPTER 4

Terrorism: An International Crime

Michael J. Lawless

Introduction

The 21st century has seen a marked increase in the prevalence of failed and failing states and an equally significant increase in acts of terrorism at the domestic and international levels. The challenge at the present time is for the international community of nations to adopt a common approach to the treatment of terrorism as an international crime. This chapter addresses the development of International law as a construct of the law of nations and seeks to place terrorism into the continuum of international crimes. As such, this chapter will trace the development of international law and in particular the law of war to the modern era with the development of "war crimes" and international criminal sanction of those individuals tried and convicted of having committed "war crimes."

The central premise of this chapter is that terrorism is an international crime and, therefore, requires the international community to act in the prevention of terrorism and the sanction of individuals perpetrating acts of terrorism. In this respect, the events of 11 September 2001 (9/11), have presented an opportunity for internationalist forces to come to the forefront of the global political agenda. With an international war on terrorism being seemingly sanctioned by the United Nations (UN) it may be possible for the crime of terrorism, as the act of a non-governmental organization, to become a part of the universal responsibility of nations with that responsibility further delegated to an international institution such as the International Criminal Court (ICC) for prosecution and subsequent sanction.

It is generally accepted that "international crimes" are crimes that are considered so heinous that any of the "community" of nations may prosecute the offender. An early example of a crime deemed to be universal and for which any nation may claim jurisdiction is piracy. Other international

crimes of universal jurisdiction and at which international conventions have been aimed include slavery, war crimes, hijacking and sabotage in civil aircraft, and genocide.

Much as piracy developed into an international crime obligating each state to take positive steps to prevent piratical acts, states are equally charged in the modern world circumstance to take positive steps to prevent terrorism and to effect sanction upon convicted terrorists. This obligation extends to the requirement for states to either bring purported terrorists within the sphere of domestic criminal law or to turn over those accused of terrorism to the international community of nations for trial and sanction (upon conviction) before the ICC or similar judicial institution.

In advancing this argument it will be necessary to first identify the foundation of international law and the concomitant duty of states to act in accordance with the provisions of that law. Once this has been established, examples of both piracy and war crimes will be presented to trace the development of international criminal law and demonstrate the ability of the international community to act in concert to prevent, deter, and even sanction those that breach the provisions of international criminal law as distinct from national criminal law.

A discussion of the current status of terrorism as an international crime will then complete the analysis. In this respect, a review of the existing treaties and conventions dealing with discrete elements of terrorism will be presented followed by the identification of the definitional problem of what exactly constitutes terrorism. Thereafter, the chapter will conclude with a review of the current state of international criminal law. In this regard, it is argued that the lack of a precise agreed upon definition of terrorism in the international community does not detract from the criminality of the act but rather simply provides an excuse for states to avoid meeting their obligations under the law.

An Introduction to International Law

Law at its core defines "a body of rules for human conduct established for the ordering of a social group and enforceable by external power."[1] Much as national laws seek to regulate the conduct of persons and organizations within the state, international law seeks to regulate the conduct of international actors in their relations with each other during times of

peace and war. The goal of international law may be seen as the creation of predictable conduct *vis-à-vis* the interaction of those international actors on the global stage. As such, "international law is most appropriately and accurately defined as a set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties."[2]

Thus, states and non-state actors, as both the object and subject of international law are constrained in their actions by coexistent obligations and rights. International law, as a functional legal system, has developed on the basis of both customary practice and treaties between sovereign states. "International law was neither created nor guaranteed by a higher authority. It was formed by members (states) of an international community on the basis of mutual recognition of each other as equal legal subjects."[3] In effect, treaties define the nature of specific relationships between two or more signatory states while customary international law seeks to fill the void between states' treaty practices and also between states having no established treaty practice. The Statute of the International Court of Justice has been generally accepted to be a codification of the sources of international law.[4] Article 38(1) of that statute states:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

   (b) International custom, as evidence of a general practice accepted as law;

   (c) The general principles of law recognized by civilized nations.[5]

The Statute, enacted concurrently with the adoption of the Charter of the UN, recognizes explicitly that international law is not the proclamation of any international legislature but rather is a composite of treaties, customary practice, and the principles of law generally accepted by civilized nations. Each of these sources is an equally valid foundation for international law, though the interrelationship between these multiple sources can be a source of tension when an apparent conflict between these

sources is perceived to arise. The binding authority of a treaty lies in state adherence to the *maxim pacta sunt servanda*. This rule of law "embodies a widespread recognition that commitments publicly, formally and (more or less) voluntarily made by a nation should be honored."[6] The practical necessity for nations to accept this maxim is evident for it provides that a treaty can be relied upon by signatories to that treaty.

Similarly, the binding force of customary international law is significant. "By virtue of a developing custom, particular conduct may be considered to be permitted or obligatory in legal terms, or abstention from particular conduct may come to be considered a legal duty."[7] It is this following of a customary practice out of the perceived sense of legal obligation as expressed in the doctrine *opinio juris sive necessitatis* that lies at the core of the binding authority of customary international law. In some respects customary international law is the ultimate foundation for the law of nations with treaties acting simply to codify or otherwise define the then existing customary practice of nations.[8]

Although the most common sources for international law are the customs of international state practice and international (law-making) treaties, a third source, "the general principles of law recognized by civilized nations" is also recognized as forming part of the existing law of nations.[9] The determination of what constitutes "the general principles of law recognized by civilized nations" is fraught with difficulty, perhaps more so than the challenge of determining customary practice. It has been asserted that:

> ... a major problem would arise in seeking to ascertain just what is meant by the 'general principles of law recognized by the community of nations'… The difficulty lies in determining what are 'general principles of law' and what percentage of the world's states constitutes a sufficient proportion to be considered 'the community of nations.' Does this collection have to include every major power or be representative of all the leading legal systems of the world?[10]

In sum, the determination of what is and is not properly part of the body of international law is a most challenging question for it requires an objective assessment of a plainly subjective concept. The use of law-making treaties may assist in the clarification of the law of nations but the

practice of nations is an equally compelling foundation for international law. So too, the generally accepted practices of civilized nations form a foundation for the assertion of international duties and obligations between states. Thus, international law is a composite of treaties, convention, and generally accepted principles and is applicable to state and non-state actors alike in respect of their actions outside of a purely domestic forum.

International Crimes: Piracy and War Crimes

While the primary actor on the international stage is the state, the object of international law is both the state and individuals. In cases where an individual is acting as the agent of the state, the state may be found to have breached its obligations under international law. However, it may well be that the individual may have committed an international crime even when acting as a state agent. Two examples of how individuals are the object of international criminal law are readily apparent. The first lies in the international crime of piracy and the second under the larger and more generalized heading of war crimes.

Piracy is generally held to be a crime of universal jurisdiction, committed by individuals on the high seas where there is no specific state authority to act. However, over the course of centuries, nations agreed that any action on the high seas that interfered with commerce or communications that was not initiated and directed by a state was piracy (if it was initiated or directed by a state it was an act of war) and all nations were both obligated and authorized to act against the pirates. In most cases this involved the execution of the pirate for having committed the now accepted international crime of piracy. In this respect, pirates, having been found to be "*hostis generis humani*, or enemies of humanity," were subjected to criminal sanction by the international community.[11]

In contrast, a war crime is a breach of the internationally accepted code of conduct applicable during times of war or armed conflict between nations. War crimes may be broadly defined as violations of the international laws of war (or armed conflict) by a country, its citizenry, or its military personnel. Thus the perpetrator of a war crime could be an individual, thereby continuing the application of international law to individuals when their conduct is in breach of their obligations to the international community. With the increased prevalence of internal armed conflict, the definition of war crimes has expanded to include the conduct of individ-

uals during an armed conflict even when the opposing groups function entirely within the boundaries of a single state.[12]

Much as the prohibition on piracy developed over time, the international law of war has developed over the centuries as nation states determined how to deal with each other during times of war and in times of peace. These laws are contained both in treaties signed by various nations, and are further defined by customary international law and the generally accepted practice of civilized nations. Thus, war crimes and crimes against humanity are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly, as befits an international prescription, against the actions of states. They are acts universally recognized as criminal according to general principles of law recognized by the community of nations. While some of these crimes have been given a considerable measure of definition in international documents, as a whole they have not been reduced to the precision one finds in a national system of law. Crimes against humanity, in particular, are expressed in broad compendious terms relying broadly on principles of criminality generally recognized by the international community.[13]

While piracy as an international crime can be committed during times of both peace and armed conflict, war crimes are committed only during times of armed conflict or war. (The act of commencing an armed conflict or war is considered a crime against peace and can be committed by a state or an individual when the states conduct in commencing the armed conflict is found to have lacked justification in international law).[14] Thus, international law as it relates to the application of criminal law to individuals is well established. For centuries the international community of nations has treated individuals who commit acts of piracy or who commit war crimes as criminals and sanctioned them.

The absence of an international forum for the trial of individuals accused of these acts does not derogate from the authority or legitimacy of the international prohibition on these types of conduct. In fact, the development of International Courts or Tribunals has been both a recent and infrequent occurrence.

The modern foundation for international courts is clearly the International Military Tribunal (IMT) that tried the major German war criminals at

the conclusion of the Second World War (WWII). This tribunal was a composite of the four major Allied powers that tried the major German war criminals for the commission of war crimes, crimes against peace, and crimes against humanity. Following the decision of the IMT at Nuremberg, the UN unanimously passed a resolution directing the International Law Commission to formulate the principles of law identified in the judgment of the IMT.[15] In 1950, the International Law Commission completed the task of formulating the principles arising out of the trial of the major war criminals and defined seven principles of international criminal law, the so called 'Nuremberg Principles.'[16]

The effect of the proclamation of the Nuremberg Principles was to formally entrench the judgment and principles of law defined by the IMT in international law.[17] The Nuremberg Principles codify international law to such a comprehensive degree that many of the defences put forward by the accused at Nuremberg are now foreclosed from future dispute. Chief among these attempted arguments were the defence of superior orders, and the claim that the individual cannot be held criminally responsible for conduct as an agent or officer of the state.

Since WWII, the international community has seen fit to establish two distinct ad hoc courts for the trial of individuals alleged to have committed offences against international criminal law. The International Criminal Tribunal for the Former Yugoslavia (ICTY) is the first international tribunal established through the application of the Nuremberg Principles. The ICTY has its judicial seat at the Hague and has jurisdiction over individuals alleged to have been responsible for the commission of genocide, war crimes, and crimes against humanity in the former Yugoslavia since 1 January 1991.

Like the ICTY, the International Criminal Tribunal for Rwanda (ICTR) was established by way of a resolution of the UN Security Council following the genocide in Rwanda that had led to the murder of more than one million people.[18] Officially created on 8 November 1994, the ICTR has jurisdiction over the crimes of genocide and crimes against humanity committed in Rwanda between 1 January 1994, and 31 December 1994.[19] The ICTR is predicated on the Security Council's determination that, despite being restricted to the internal territory of Rwanda, the atrocities committed "constitute a threat to international peace and security", and as such constitute an international crime.[20]

As with the ICTY, the ICTR finds its jurisdiction defined in part by the Charter of the IMT and the Nuremberg Principles and is a direct judicial descendant of the IMT. Perhaps the greatest contribution the ICTY and ICTR have made is in clearly demonstrating that international judicial bodies "play a critical role for both international humanitarian law and also international criminal law."[21]

Ultimately, in recognition of the need to create a permanent international criminal court, the UN hosted a conference in Rome in 1998 with the express purpose of establishing a framework for the creation of this permanent institution. At the completion of the conference, 120 nations voted in favour of the Rome Statute, which is the source document for the new International Criminal Court.[22] By December 2000, the Rome Statute had received the signature of 139 nations. On 1 July 2002, upon the ratification of the statute by the 60th state, the ICC was formally created.

As a result, the ICC has jurisdiction over war crimes, crimes against humanity, and the crime of genocide when committed within the territory of any state that is a party to the Rome Statute after the creation of the Court. Arguably, the ICC also has jurisdiction over the crime of terrorism as an aspect of "aggression". However, while the Rome Treaty declares "aggression" to be criminal and makes that crime subject to the jurisdiction of the ICC, no definition of "aggression" is provided for in the Statute; a fundamental impediment to the ICC addressing terrorism.[23]

Although there may be numerous legitimate critiques of how and under what circumstances individuals will be subject to international legal institutions, it is clear that the international community has continued to apply international criminal law to individuals. Further, it is clear that the international community has effectively established both ad hoc and permanent judicial institutions for the trial and sanction of individuals found to have breached international criminal law. The outstanding issue at the present time is to assess the current international position on terrorism as a crime under international law and the effect of any such determination of criminality.

The Current State of International Law Prohibiting Terrorism

At the present time there are 13 international conventions or protocols that prohibit specific acts of terrorism. These agreements have been

developed and are maintained under the auspices of the UN and stand as the expressed will of the world community.

The first of the modern conventions to address the problem of terrorism, the Tokyo Convention of 1963, sought to address behaviour onboard aircraft that could affect in-flight safety. It was followed in 1970 by the Hague Convention which specifically made it an offence for any person onboard an aircraft to attempt to seize or exercise control of the aircraft whether by threat, force, or intimidation.

The 1970 Hague Convention was developed in direct response to the 1968 hijacking of an *El Al* Boeing 707 en route from Rome to Tel Aviv which event is generally considered to have been the "principal initiator of the deadly continuum of international terrorist attacks" that have continued into the present.[24] The terrorist nature of this hijacking was apparent from the target: the airline was the Israeli national airline and as such a symbol of the Israeli state. Moreover its hijacking required the state to deal directly with the terrorists who were seeking to trade the passengers for the release of Palestinian terrorists imprisoned in Israel. The entire situation was exacerbated by the close proximity of the media which allowed the terrorists to make a "bold political statement."[25]

Thus, the international community, when faced with the developing threat of terrorism within the confines of international airspace, has acted to make it a criminal offence for any person or group to interfere with aircraft. In fact, this prohibition is not merely applicable in international airspace but extends to and is effective within national airspace given the determination of the international community that any such act, whether done within national boundaries or not, are of such a nature as to require a consistent international response. Other international conventions address specific acts committed against air travelers whether onboard aircraft or at airports, acts against shipping and a specific prohibition on hostage taking.

Each of these conventions imposes a duty on a state party to either extradite or prosecute an individual or organization alleged to have contravened a convention. The duty to prosecute or extradite in these conventions is generally stated as: The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was

committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[26] In effect, the conventions adopted by the UN with respect to terrorism provide an obligation upon each party to the conventions to ensure that individuals alleged to have committed acts of terrorism are brought to account for that conduct before a court of law.

Arguably, the obligation to prosecute or extradite is binding upon all states and not just those that have become state parties to the convention given the general acceptance by the international community of the provisions of these conventions. Further, international law itself imposes a positive duty on all states to obey international law.[27] In the case of terrorism that duty to obey requires and compels states to either prosecute or extradite and precludes states from taking no action against an individual or group alleged to have breached international law. However, in the absence of an international judicial institution that could prosecute alleged terrorists, individual states have lacked the impetus in many cases to try accused terrorists nationally or to extradite to another nation state.

The obligation to prosecute imposed on states has not been entirely ineffective. Following the initial declarations of the UN against terrorism in the 1960s and 1970s, some nations began to pursue the prosecution of suspected terrorists with greater vigour. However, in the absence of an international consensus on how to bring terrorists to justice the impetus for such efforts quickly dwindled.

Between January 1972 and January 1974, European police forces apprehended 50 suspected Arab terrorists. Of those 50, only seven saw the inside of a prison. Thirty-six were released without trial, including the surviving members of the Palestinian terror squad that murdered the Israeli Olympic team at Munich in 1972.[28]

In such circumstances, it is no wonder that there was little if any deterrent effect on terrorists. If anything, the failure to adequately cause alleged terrorists to be subjected to judicial sanction weakened efforts at the national and international level for a coherent international judicial institution within which to deal with terrorists. The message sent to the terrorists was clear: carry on with your activity as there is little risk of sanction to cause you to consider other means of achieving your political objectives. Ultimately, the incidence of terrorism increased throughout the 1970s and

into the present time with terrorists becoming increasingly sophisticated and capable of committing larger and more devastating acts of violence.

In specific response to the increased prevalence of terrorism across the globe, the UN General Assembly, in 1997, enacted a convention declaring universal jurisdiction over the unlawful and intentional use of explosives in public places. Known as the International Convention for the Suppression of Terrorist Bombings, this convention was followed in 1999 by the International Convention for the Suppression of the Financing of Terrorism that requires nations to prevent and counteract the financing of terrorists and to prosecute individuals and organizations that provide any such financing. Through this Convention, the UN has declared the crime of financing terrorism, as well as the crime of terrorism, to be international in nature and so the subject of universal jurisdiction.

In declaring terrorism to be the subject of universal jurisdiction, the UN has made a statement to all non-state actors that resort to violence as a means of securing political change (terrorists) that no longer would the terrorist solely be subject to sanction when they were caught within the territorial jurisdiction of the state where they committed the offensive act. Rather, the perpetrator of a terrorist act would be liable to criminal sanction wherever and whenever captured by a lawful national authority.

In general, universal jurisdiction is granted to any nation that obtains control over the perpetrator of certain offences considered especially harmful to humanity generally.[29] Thus, under the Terrorist Bombing Convention a nation can assert jurisdiction even though there has been no effect on the territory, security or sovereignty of the asserting state, and allows any state to obtain jurisdiction over any person who has been responsible for the bombing of a public place anywhere in the world.

In addition to the 13 noted international conventions that address specific acts of terrorism, following 9/11, the UN General Assembly and the UN Security Council have each adopted resolutions that speak directly to the criminality of terrorism. In particular, Security Council Resolution 1373 (2001) of 28 September 2001:

> *Declares* that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century;

> *Further declares* that acts of international terrorism constitute a challenge to all States and to all of humanity;
>
> *Reaffirms* its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whoever committed;
>
> *Stresses* that acts of international terrorism are contrary to the purposes and principles of the Charter of the UN, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.[30]

In the immediate aftermath of the World Trade Center attack, the UN again acted in response to the manifest threat of terrorism and once again defined terrorism to be criminal in nature. This Declaration of the UN was not without precedent. Rather the contrary is the case, the UN has, since its inception, consistently declared terrorism to be criminal and has sought to have individual perpetrators of terrorist acts brought to justice. The UN General Assembly, in 1995, imposed a positive obligation on state parties to the Charter of the UN as follows:

> 5. States must also fulfill their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:
>
> …b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law.[31]

In this regard, it is clear that terrorism has been the subject of significant debate in both the General Assembly and the Security Council of the UN. The result of these debates has been the promulgation of various anti-terrorism declarations that have consistently found terrorism to be criminal and obligate states to bring terrorists to justice. A clear example

of this can be seen in a 1997 Declaration of the UN General Assembly which reaffirmed an earlier Declaration from 1994 and stated again the obligation for states to ensure that terrorists are either prosecuted by national institutions, or extradited to an appropriate state where such a trial can take place.

Specifically this Declaration states in Article 5:

> The States Members of the United Nations reaffirm the importance of ensuring effective cooperation between Member States so that those who have participated in terrorist acts, including their financing, planning or incitement, are brought to justice; they stress their commitment, in conformity with the relevant provisions of international law, including international standards of human rights, to work together to prevent, combat and eliminate terrorism and to take all appropriate steps under their domestic laws either to extradite terrorists or to submit the cases to their competent authorities for the purpose of prosecution;[32]

Most recently, the UN Security Council has once again declared that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security" and further that "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians."[33] In sum, it is simply not possible to assert that terrorism is not prohibited by the international community or that terrorism is not an international crime. On the contrary, it is abundantly clear that the UN has deliberated over the course of many years on the topic of terrorism and the ultimate result of those deliberations has been the creation of a comprehensive prohibition on terrorism as a means of effecting political change, irrespective of any laudatory purpose or change sought by the terrorist. It is unfortunately accurate to say that prior to the attack on the World Trade Center and the clear demonstration of the devastating effect a single coordinated terrorist attack could have, there was little impetus for the international community to do more than declare terrorism to be an offence against international law. However, following 9/11, it became abundantly clear that it was necessary to do more than simply declare terrorism to be contrary to law, it became necessary to deal with the issue on a global basis.

International law is clear: terrorism is a crime. The importance of this determination of terrorism as a crime is that it tends to diminish the stature of the terrorist to that of common criminal, building a wall of *illegitimacy* between the act and its perpetrator and the broad psychological push toward political objectives that the terrorist seeks. Effective attribution and prosecution furthers the isolation of terrorists, enhances the full set of retribution efforts, and also enhances confidence (while further dispelling the element of fear) in the target population.[34]

Consequently, the failure of the international community to effectively create a legal regime with the requisite judicial organs to address terrorism necessarily contributes, albeit passively, to the increasing prevalence of terrorism across the globe. Clearly, "whether they are brought to justice by the international community or by the course and tribunals of individual countries may matter less than the fact that perpetrators know that at some point in the future their actions will have consequences and that they will not be able to act with impunity."[35] In failing to treat the terrorist as a criminal, and so subject the terrorist to the same legal consequences as the common criminal, the international community continues to reinforce the political purpose of the terrorist by drawing a clear distinction between the criminal, who is prosecuted and incarcerated, and the terrorist, who knows no international consequence.

Terrorism – the Problem of Definition

One of the fundamental problems faced by the international community in addressing terrorism is the difficulty in coming to an agreed upon definition of terrorism. "Hundreds of definitions of terrorism are offered in the literature. Some focus on the perpetrators, others on their purposes, and still others on their techniques."[36] Consequently, while there are a number of specific treaties that prohibit acts that are of a type that would generally be considered terrorist, there is no specific definition from which it would be possible to draft an independent "anti-terrorist" treaty or convention.

In essence, the international community had focused its efforts on the prohibition of specific acts of terrorism. However, with the attack on the World Trade Center, the international community was rudely and dramatically reminded that terrorism is a significant global problem that must be dealt with in such a way as to deter future attacks. In fact, the

extent of the world response to 9/11 can be seen in part through "the evident willingness of certain state sponsors of terrorism [Libya, Syria, and others] to distance themselves from extremist groups that they had supported in the past or from international terrorism generally."[37]

Similarly, other nations responded within the domestic sphere. In the immediate aftermath of the World Trade Center attack, various nations imposed legislation to counter terrorism or threats of terrorism. The United States passed the *Patriot Act*, Canada passed the *Anti-Terrorism Act*, and the United Kingdom passed the *Terrorism Act*. In each case, the nation defined terrorism or terrorist act in a different way, further showing the variety of interpretations available. Additionally, there has been a significant increase in the impetus for nations to ratify existing international anti-terrorism conventions. In fact, following 9/11, the Convention for the Suppression of Terrorist Bombing saw ratifications increase from 28 states to 115. Similarly, the Convention for the Suppression of the Financing of Terrorism saw ratifications increase from six states to 117 in the wake of the World Trade Center attacks.

In the specific case of Canada, there has been a significant response both domestically and in terms of Canada's ratification of international conventions dealing with terrorism. Internationally, Canada has ratified both the Convention for the Suppression of Terrorist Bombing and the Convention for the Suppression of the Financing of Terrorism.[38] Domestically, the *Anti-Terrorism Act* represents a "massive and permanent change to Canadian criminal law with respect to terrorism" as it criminalizes not only acts of terrorism, whether executed or merely planned, but also criminalizes many forms of financing or facilitation of terrorism.[39]

However, while massive, this change is not unduly reactionary. Rather, it is an appropriate response to the clear demonstration of the massive scale upon which terrorists may now act. In this respect, Canada's response to the events of 9/11 can be seen as "deliberate, thorough, and balanced."[40] The passage of this type of national legislation is clear evidence of the ability of disparate groups of legislators to come to an agreement on an acceptable definition of terrorism.

That the UN has been unable to do so is more a product of a lack of will than any true impediment to determining an appropriate definition of terrorism. In failing to agree on an effective definition of terrorism, it may

be argued that the lack of a comprehensive international legal regime to address terrorism is a result of the existence of "great uncertainty and controversy among jurists and other specialists on the role and effectiveness of law and legal systems in combating terrorists."[41] In effect, the international community has abdicated its responsibility to the promotion and creation in international peace and security on the basis of a lack of agreement on the effectiveness of an international judicial institution capable of sanctioning terrorists. However, this argument fails to recognize the fact that there has never been a comprehensive international ant-terrorism structure that has failed: there has never been one at all.

Further, in looking to national level structures it is fair to say that it is not truly possible to assess the effectiveness of any domestic anti-terrorism regime as it is not possible to determine the number of terrorist incidents that have been either prevented or not attempted given the existence of that regime. Ultimately, the existence of a comprehensive international anti-terrorism regime including judicial institutions can only assist in the fight against terrorism and cannot be said to be either harmful or an impediment to that cause. As such, the creation of such a structure ought to be at the forefront of the international community's agenda to address global terrorism.

In seeking to develop an international judicial structure to address terrorism clearly, a definition of terrorism must first be adopted and thereafter applied by the new institution. However, to date, the international community has been unable to agree on such a definition. Notwithstanding the various definitions of terrorism seen in national legislation around the globe, there are certain common themes that can be used to distil a rudimentary definition of terrorism, and from which the international community could effectively act against the problem of terrorism.

It seems clear that terrorists variously seek change to the status quo through the application of violence against states and individuals. As such, any effective definition of terrorism must recognize the inherently political purpose of terrorism. Further, the definition must acknowledge that the terrorist specifically acts against civilian populations or targets as opposed to the presumably more legitimate target of state institutions or military forces that can allow the actor to claim status as a lawful combatant. The most basic definition is one that has three distinct elements, namely violence, a non-state actor, and a political purpose. Accepting

these three constituent elements, the definition of terrorism becomes the unlawful threat or act of violence committed for a political purpose by a non-state actor.

With this definition in place it would be possible for an international judicial institution (most appropriately the ICC) to assume jurisdiction over the offence of terrorism and, on behalf of the world community, dispense justice on those found to have committed the international crime of terrorism. The value of a simple definition is that it permits a wide range of actors, whether individual or group, to be subject to the definition and therefore liable to sanction. Similarly, the intention of the accused is a necessary characteristic of the definition for the act of violence against a non-combatant without political purpose is simply assault or perhaps murder but in either case it is not terrorism. Such an act may be a crime, but it is a crime under domestic law and not the international crime of terrorism for it seeks any political goal or outcome.

That this definition does not focus on the target of the attack does not impair the effectiveness of the definition as it is the characteristic of the actor as either state or non-state that leads to the application of either the law of armed conflict (state actor) or international criminal law (non-state actor). Thereafter, the establishment of a political purpose will lead to the third part of the definition being the threat or use of violence in order to affect that political purpose. Only when all three elements are present, and only when no valid defence is raised can the individual or group be found to lie within the ambit of the proposed definition and so liable to judicial sanction.

In essence, where the accused "terrorist" can show that they have acted as a lawful combatant, then the impugned actions may be found to have been committed lawfully and so not be criminal. After all, an effective definition of terrorism must recognize the distinction between legitimate non-conventional actors (variously described as revolutionaries, freedom fighters, and the like) and illegitimate non-conventional actors (the terrorist). A fundamental difference between these two distinct groups is their choice of target. For the terrorist, the indiscriminate targeting of the civilian population is preferred, whereas the revolutionary specifically targets the institutions and personnel of the state authority they are in conflict with and not the general civilian population.

"Guerilla," for example, in its most widely accepted usage, is taken to refer to a numerically larger group of armed individuals who operate as a military unit, attack military forces, and seize and hold territory, while also exercising some form of sovereignty or control over a defined geographical area and its population. Terrorists, however, do not function in the open as armed units, generally do not attempt to seize or hold territory, deliberately avoid engaging enemy military forces in combat and rarely exercise any direct control or sovereignty either over territory or population.[42] On the importance of the choice of target in defining the conduct as terrorist, Benjam Netanyahu notes:

> What distinguishes terrorism is the *willful and calculated* choice of innocents as targets. When terrorists machine-gun a passenger waiting area or set off bombs in a crowded shopping centre, their victims are not accidents of war but the very *objects* of the terrorists' assault.[43]

Similarly, in the debate over the distinction between the terrorist and the "freedom fighter" it is clear that there exists a relatively clear difference between the circumstance under which an individual or group can be considered a "freedom fighter" rather than a terrorist. Therefore, on the basis of this argument, it is legitimate for non-state actors to use force when the sovereign has either dissolved (Somalia) or been unjustly overrun by a foreign power (wartime France). In the former case, there is no authority with the jurisdiction to raise public war. As a result, the authority to wage war may be devolved to people who are able to command the loyalty of significant parts of the community. In the latter case, an individual's inherent right to self-defence extends to the formation of resistance movements.[44]

Fundamentally, the complaint that one person's terrorist is another's freedom fighter does not create a valid argument against defining terrorism and placing the crime of terrorism alongside the other crimes that are within the jurisdiction of the international Criminal Court. The freedom fighter may have a claim to legitimacy in his or her conduct by solely targeting the institutions of the state rather than the civilian population in order to secure political change. More importantly, by choosing a state rather than civilian target, the freedom fighter, whether individual or group, secures the ability to claim status as a freedom fighter rather than a terrorist.

Should such a claim be accepted by any international judicial institution then the criminal offence of terrorism would simply not be proven and the accused acquitted. However, it is certainly possible to define terrorism in such a way as to restrict the application of international criminal law to attacks that are directed against a civilian population for the purpose of effecting political change. In effect, an accused terrorist would have a defence to the charge of terrorism through the demonstration of how their conduct complied with the requirements of the law of armed conflict rather than international criminal law. In other words, so long as the individual or group acts as lawful combatants and does so in compliance with the law of armed conflict they will not be subject to international criminal law. In this respect, it is important to recall that Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions provides that individual civilians and the general civilian population are not combatants and therefore not legitimate targets during an armed conflict. This prohibition is generalized into a blanket prohibition on any attack upon the general civilian population for any reason. This proposition is further confirmed by the ICTY that held:

> The Trial Chamber recalled that Article 51(2) confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities and pointed out that the prohibition against attacking civilians stems from a fundamental principle of international humanitarian law: the principle of distinction. This principle is set out, among other places, in Article 48 of Additional Protocol I which states that the warring parties must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[45]

Furthermore, Additional Protocol I of the Geneva Convention accepts that in certain circumstances it may not be possible for individual actors in an armed conflict to exhibit each of the characteristics of a lawful combatant. Specifically, Article 44.3 provides:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall

retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Thus, it is clear that international law specifically contemplates a degree of flexibility in determining the status of an individual as a lawful combatant. However, in cases where the individual or group is unable to demonstrate adherence to the law of armed conflict and so ensure the granting of lawful combatant status then the individual or group will be found to be subject to the proposed definition of terrorism and to sanction under international criminal law. In effect, the person or group is required to satisfy a court of competent jurisdiction that they should be afforded status as lawful combatants on the basis that they have met the criteria for such status. In such a case the person or group will not be found to have committed acts of terrorism and so be subject to international legal sanction; although they may still face domestic sanction from the state within which they acted. In this respect the international community's reluctance to move forward with a definition of terrorism is no longer viable as the argument against such a definition as it relates to the "freedom fighter exception" cannot be substantiated on juristic grounds.

A Requirement to Act

It is clear that terrorists act outside of the boundaries of the law (whether national or international) through their application of indiscriminate violence against civilian populations. However, the present state of international law is such that the absence of a clear definition of terrorism precludes any international legal institution from taking effective action to combat terrorism. This in turn leads to the complete inability of the international community to deter terrorists and other like-minded individuals (and groups). Although domestic law invariably prohibits terrorism and may criminally sanctions terrorists, the lack of a coherent international legal regime creates an environment in which the terrorist can act with seeming impunity. That the international community to date has failed to create an appropriate judicial institution is a product of a lack of will and not the result of any lack of capacity to do so.

In domestic legal systems, punishments are imposed upon those who do not follow the rules after a procedure that determines that the rules have been violated. The international realm is different because it lacks a clearly defined central authority to determine violations and impose sanctions. Yet, the lack of a central authority does not mean sanctions are not possible.[46] Since the end of the WWII, the international community has seen fit to create a number of international legal institutions through which individuals alleged to have breached international law have been tried and sanctioned criminally.

Furthermore, with the creation of the ICC, the world community has created a permanent legal institution with the capacity to subject individuals to trial and sanction for the commission of criminal acts. That there exists a broad spectrum of international agreements and treaties prohibiting specific acts of terrorism is simply insufficient in the current context where terrorists have the capacity to inflict large-scale harm and mass casualties in a single attack. The lack of an accepted common definition of terrorism that could become the basis upon which to create a comprehensive international legal regime to combat terrorism is more excuse than legitimate impediment. At present, it appears at the international level that "terrorism's criminal law policy implications are sometimes overlooked and high level pronouncements are favoured over a focus on concrete achievable results."[47]

Ironically, the pursuit of broad declarations of criminality and prohibitions on terrorism by the UN, which have been the primary vehicles through which the UN has addressed the problem of terrorism is not in keeping with the stated intention of the UN itself. Of note, Kurt Waldheim, when Secretary General of the UN, declared that "the UN should not remain a 'mute spectator' to the acts of terrorist violence then occurring throughout the world but should take practical steps that might prevent further bloodshed."[48]

Unfortunately, the UN has not followed through with this call for action and has defaulted into simply issuing periodic declarations of both the criminality of terrorists and the need for the international community to address terrorism. While these declarations have had the effect of criminalizing terrorism under international law, they fail to prevent or deter terrorists or other like-minded individuals from committing terrorist acts. In this respect, the lack of an effective and accepted definition

of terrorism is a barrier to effective deterrence for it precludes the development of appropriate international judicial institutions through which terrorists can be brought to justice.

It is apparent that "one of the fundamental *raisons d'être* of international terrorism is a refusal to be bound by such rules of warfare and codes of conduct."[49] As such, the conduct of the terrorist is clearly and manifestly criminal as it fails to respect the rule of law and must be dealt with swiftly and severely through appropriate judicial institutions. When the international community fails to adequately address terrorism through judicial institutions and instead relies on the ad hoc treatment of terrorists by national level actors it is clear that the deterrent effect of judicial sanction will be missing and with it one of the tools available to the world community to prevent terrorism globally.

Additionally, it is evident that in order to be successful in countering and deterring terrorism certain basic principles must be adopted to form the foundation of an effective policy against terrorism. These should include:

1. Firm, unwavering opposition to terrorists;
2. Maintenance of the rule of law;
3. No surrender to demands;
4. No deals or concessions;
5. Bring terrorists to justice; and
6. Never allow terrorists to hijack the moral or political agenda.[50]

These principles appear at first glance to be self-evident, but the acceptance of these principles and their translation into effective international law enforcement has been lacking. The greatest area of failure has of course been the complete absence of effort at the international level to ensure suspected terrorists are brought to justice and so made subject to the rule of law.

Although an argument may be made as to the presence or absence of Iraq's weapons of mass destruction, no argument can be made that the failure of the International community to act in response to Iraq's continued defiance of international law contributed to the continuation of

Iraq's non-compliance with the requirements of international law. In retrospect it is clear that the international community made a grave error in ignoring Iraq's acts of chemical terrorism. Saddam continued his weapons programs relatively unimpeded. Lack of reprisal for his early transgressions seems to have contributed to his impression that future violations would also be ignored.[51] Plainly, the value of deterrence cannot be understated.

Arguably, where no effective mechanism exists through which an individual or group may be sanctioned for a breach of international (or domestic) law, those individuals and other like-minded individuals are more likely to continue to act in defiance of the law. On the other hand, where an effective institution exists to impose sanction for such a breach, the likelihood of a breach of the law is reduced. Therefore, the international community must create and implement an institutional mechanism through which to provide both specific and general deterrence to terrorists and to support the rule of law. While it is necessary for nations to maintain their own independent domestic anti-terrorism regimes, those regimes must be complemented by the existence of an international judicial institution that can address terrorists as criminals who act contrary to the established and accepted rules of conduct and so become *hostis humani generis*.

In this respect, "success in the struggle against terrorism will to a large extent depend also on the continued, and continually strengthened, international cooperation" – which is obligatory under international law.[52] Where states fail to comply with their international obligations, terrorists are, if not empowered to act, certainly not deterred from continuing to breach international law themselves. As such, it is imperative that the international community do more than make abstract pronouncements condemning terrorism as an international crime. It is only when the international community of states act as a collective group, as they are obliged to do under international law, coupled with the creation of a legitimate judicial institution to address worldwide terrorism, that there will be any prospect of deterring others from pursuing terrorism to secure some political purpose.

At the present time, with the increased prevalence of non-state actors that have the capacity to act on the international stage, the application and enforcement of international law, including international criminal law, on non-state actors has become even more important. Based on the current

state of international law, it is clear that a wide range of acts can be categorized as terrorist and so criminally prohibited. However, the absence of an international judicial institution simply precludes international criminal law from being effective to deter and sanction terrorists. The solution to this problem is simple and compelling. The international community must adopt a simple definition of terrorism if it is to begin to address the burgeoning problem of international terrorism. The failure to adopt such a definition will simply ensure that the terrorist is able to plan and carry out attacks against the civilian population of the world without concern or regard for the possibility of international criminal sanction. With the acceptance of an effective definition of terrorism it will then be necessary to grant jurisdiction over the offence of terrorism to the ICC (or other suitable judicial body) to try individuals and groups alleged to have committed terrorist acts contrary to international criminal law.

Conclusion

The definition of terrorism proposed in this chapter will allow the international community to act effectively against terrorists while ensuring that adequate protections are afforded to lawful combatants to avoid being found to be terrorists (though only to the extent that they continue to act as lawful combatants and comply with the requirements of the law of armed conflict). The proposed definition of terrorism as 'the unlawful threat or act of violence committed for a political purpose by a non-state actor' will ensure that all non-state actors that resort to violence for an unlawful purpose will be properly subject to international law. That a more refined definition of terrorism may be useful or arrived at in the future is simply insufficient reason for failing to act in the present to develop an effective definition with which an international judicial institution could act to sanction individuals found to have committed the international crime of terrorism. Until and unless such a definition of terrorism is accepted and jurisdiction granted to an international judicial institution it is clear that there will remain no effective deterrent effect on terrorists and so the world community will fail in the fight to combat terrorism. The penalty for this failure is the price to be paid in continued terrorist attacks and the cost in terms of both the loss of life and the harm to our global society as a whole.

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CHAPTER 5

Noble Ends: Torture and the Ethics of Counter-Terrorism

Marc Imbeault

"Let us leave aside all speculation about princes and look only at the realities." [Translation]

Niccolò Machiavelli, *The Prince*, XV

Introduction

The issue central to this chapter can be summarized in the following question: "What is the value of the moral justifications for the use of torture in the fight against terrorism?" The enemy facing the West has clearly stated that he would not shrink from using any means to achieve his ends. In a videotaped message broadcast just after the attacks of September 11, 2001, Osama Bin Laden explicitly threatened to destroy America. The many attacks that followed show that this warning must be taken seriously. It would accordingly be a serious mistake to minimize the threat that looms over America and over the West in general, in order to oppose the exceptional security measures taken by Western countries in the wake of 11 September.

Terrorist organizations do not hesitate to justify the use of the most violent means, and they have no respect for the most fundamental human rights: for them, the end justifies the means.[1] The issue is whether Western countries, and specifically the United States, are justified in adopting a comparable stance and using morally reprehensible means such as disinformation, lies, corruption or torture to defend themselves. We will limit our discussion here to a single aspect of this issue: the use of torture in the interrogation of individuals suspected of terrorism.

For the moment, the legal definitions of torture are left aside. Discussion of these definitions may be useful and important, but does not concern

ethics as such. Ethical principles outweigh, if one can use the term, legal principles, and their field of application is broader. In this chapter, the word "torture" is used in the context of interrogation sessions during which physical or psychological pain is inflicted on someone in order to obtain important information.

The ethical justification for the use of torture in counter-terrorism

The justifications of torture generally have to do with the exceptional nature and urgency of the situation.

The exception. The exceptional nature of the fight against terrorism can be examined on two levels. The first concerns individual members of a terrorist organization. The second concerns the overall situation created by the use of terror.

Through membership in a terrorist organization, individuals place themselves in an exceptional situation in which the rights normally granted to prisoners of war cannot apply. Terrorists are not part of a regular army, and their operations are closer to those of spies than those of soldiers.[2] This is why terrorists are not considered combatants within the meaning normally used in the treaties and conventions banning torture. It would thus be normal for them to be treated differently from other combatants when captured. According to this approach, the type of action undertaken by terrorists – subversive strikes – excludes them *de facto* from the protection of treaties such as the Geneva Conventions. The same type of action, however, justifies the claim that they cannot receive the legal protection normally enjoyed by citizens in a state founded upon law. Terrorism itself is deemed to have created the global context that justifies the suspension of suspects' rights. Individuals suspected of being part of terrorism, or of assisting it in any way, thus no longer belong to humanity. It is therefore possible – and at times even necessary – to torture them if that makes it possible to obtain information.

Urgency. The prevention of terrorist attacks is also a matter of urgency. It may be that the investigators do not have much time to interrogate a suspect and that the use of torture is deemed to be the only way of obtaining information quickly. The example most often used is that of the ticking time bomb. In such a case, a serious, imminent threat would clearly jus-

tify the use of torture. It is important to prevent a bomb from exploding if it could kill thousands of people.

Many authors have used the rationales of urgency and of the exceptional nature of the fight against terrorism to justify torture. Here, I will discuss the argument used by a characteristic representative of this approach: "An Ethical Defense of Torture in Interrogation" by Fritz Allhoff.[3] In the same vein as Michael Levin and Alan Dershowitz, who justify torture when it is the only way of averting a serious, imminent threat, Allhoff offers a process of reflection on the conditions which can morally justify the use of this practice.[4]

In his article, Allhoff first maintains that torture must be placed in the context of a dilemma between the rights of the individuals being interrogated and those of the people one is trying to protect. To illustrate his idea, Allhoff asks us to imagine a police officer in a face-off with a gangster who is on the point of killing the five witnesses to one of his crimes. The police officer would be justified in opening fire on the gangster to save the witnesses, since the rights of the gangster are outweighed by their rights. This example clearly indicates that, in Allhoff's view, it is at times necessary to violate one right in order to defend another. In his view, the same is true in cases of the rights of terrorism suspects in relation to the rights of their potential victims.

> Therefore, I think that a strong case can be made for the idea that torture can be justified, even if it entails rights violations, so long as we find ourselves in such a quandary that rights will end up being broken whether torture occurs or not. In these situations, some rights violation is bound to occur regardless, so we might as well either serve the greater good or else aim to minimize the overall violation of rights…. Either goal suggests the permissibility of torture.[5]

Once torture in general is justified as a lesser evil in certain circumstances,[6] Allhoff wonders under what specific conditions it can be used. He identifies four which, if they are all met, could justify torturing a suspect in order to obtain information. He summarizes this contention as follows:

> I think that the conditions necessary to justify torture are: the use of torture aims at acquisition of information, the

> captive is reasonably thought to have the relevant information, the information corresponds to a significant and imminent threat, and the information could likely lead to the prevention of the threats. If all four of these conditions are satisfied, then torture would be morally permissible.[7]

In order to be able to assert that torture is legitimate, it must thus be used solely to obtain important information that would make it possible to forestall an imminent strike. It is also stated that there must be good reason to believe that the suspect who will be tortured does indeed have the information. Allhoff concludes this development with a description of a paradigmatic example:

> For example, imagine that we have just captured a high-ranking official with an internationally known terrorist group and that our intelligence has revealed that this group has planted a bomb in a crowded office building that will likely explode tomorrow. This explosion will generate excessive civilian casualties and economic expense. We have a bomb squad prepared to move on the location when it is given, and there is plenty of time for them to disarm the bomb before its explosion tomorrow. We have asked this official for the location of the bomb, and he has refused to give it. Given these circumstances (which satisfy all four of my criteria), I think that it would be justifiable to torture the official in order to obtain the location of the bomb.[8]

After identifying the conditions under which the use of torture is justified, the only remaining question is to specify what type of torture is acceptable. The principle that guides Allhoff here is that exaggerated means should not be used. He states, for example, that if merely depriving someone of a meal is enough to make him talk, it is not necessary – not morally acceptable – to pull out his nails. The rest is appropriate.

The excesses of abstract knowledge

The type of argumentation advanced by Allhoff has the value of highlighting the dilemma which could potentially be faced by current Western political leaders. However, the method he uses does not support conclusions of any kind regarding the morality of torture. This method is

founded essentially on imagination and has validity only in an abstract world where theoreticians can define data as they wish, without referring to actual historical events other than in anecdotal form. Not that anecdotes are worthless; on the contrary, they may draw attention to an important aspect of a problem and in this sense play a not inconsiderable heuristic role.

Abstract scenarios also have the drawback of catching a thought "in a trap," so to speak, and dragging it to conclusions which run counter to the most fundamental intuitions, such as the revulsion we feel regarding the use of torture. To return to the examples put forward by Allhoff, it is clearly difficult to maintain that a police officer would be refused permission to shoot a gangster who was on the point of murdering five innocent people in a cowardly way. It is also difficult to claim that a high-ranking terrorist should not be tortured if he has crucial information that would prevent large-scale attacks. However, although it is possible to imagine such examples, they do not have much connection with reality. Allhoff's reasoning is accordingly valid from the point of view of pure logic, albeit fragile in terms of applied ethics. It presupposes that we know *a priori* (before the fact) what we in reality know only *a posteriori* (after the fact). We are routinely confronted with this confusion when we hear that such and such an incident could have been – and thus should have been – avoided. The police are often criticized for not having arrested a criminal before he or she committed a crime. However, the same police are equally often blamed for abusing their powers by making arbitrary arrests. The truth is that one cannot arrest everyone who poses a *threat* of committing an offence. (In other words, maybe everyone?) This is why the work of the security services more often resembles art than science. Basing ethical considerations on a "thought experiment" which is rooted as much in the imagination as in reality thus appears to be a risky undertaking, from both a theoretical and a practical standpoint.[9]

Let us take a concrete example which is familiar to everyone and has the advantage of being real: that of the attacks of September 11, 2001. Once they had occurred, it was fairly easy to demonstrate that they could have been avoided and to criticize the American security services as incompetent, stupid or naïve – to the point that some propagandists maintain that the attacks were *desired* by the American authorities themselves. Preventing them would in fact have been so easy that there was no explanation for how they could have occurred, other than with the complicity of the

CIA or the FBI! Here, however, we must be careful not to confuse what is *possible* with what is *real*. The fact that something is a possibility does not make it a reality: that something is possible does not necessarily imply that it exists. The possibility that al-Qaeda was conspiring to bring down the towers of the World Trade Center was serious; the fact that some people were taking flying lessons but had no interest in landing manoeuvres was not, *prior to September 11, 2001*, a sufficient reason to arrest them. It must not be forgotten that the success of this operation lay precisely in the unheard-of nature of the attack and accordingly its *element of surprise*. The same attack would probably not be possible today, due to the simple fact that passengers on a hijacked aircraft no longer react as they reacted then to an attempted hijacking, precisely because of the attacks of September 11.

But even if torture is morally unjustifiable, could one not maintain that it may be politically justifiable, if one admits – and this is a theory that I endorse – that the political sphere is separate from the moral sphere?

The rejection of torture on the grounds that it is immoral does not mean that states must automatically prohibit the practice thereof. It is in fact impossible to reduce political activity to morality alone. There are specifically political imperatives under which the use of torture can be examined in a different light and, generally speaking, the use of morally repugnant expedients, such as lies, misinformation or corruption. Let's now conclude these thoughts in order to put into perspective what we have just asserted from a moral standpoint.

Violence: the quintessence of politics?

Analyzing the issue of torture from a political perspective means evaluating its relevance in terms of costs and benefits to society. Torture may then become one of the means used by power to achieve its ends. Is not violence central to politics?[10] There is truly a paradox between the specific means and the ends of politics: between *peace* or concord, which is the aim of politics, and the *violence* it uses to achieve that end.[11] The Prince, as Machiavelli said, must learn "to be evil, and use or not use this art, depending on necessity." [Translation][12] He must be at times a lion and at times a fox, meaning that he must use force and trickery wisely depending on the circumstances.

Drawing on the lessons of the past, Adam Roberts summarizes the current situation in the following passage:

> All societies encounter problems when fighting an invisible, brutal enemy who may have numerous secret sympathizers. Under such circumstances, most states, even democratic ones, use some form of imprisonment without trial. This entails serious risks: first, the risk of arresting and detaining the wrong people; second, that detainees are mistreated. In both cases, the danger lies in creating martyrs and thus feeding terrorism [Translation].[13]

As we have seen here, the analysis of torture benefits from being placed in a historical perspective. Alfred McCoy demonstrates convincingly in his book *A Question of Torture*[14] that this practice yields significant results only on a large scale. The Battle of Algiers provides a well-known instance of this. In 1957, the French army and intelligence services tortured thousands of people in the Algerian capital and managed to obtain sufficient valid information to nullify the attempted strikes by the terrorist organizations that were active at the time. These results were obtained by amassing substantiating information obtained through torture. It would undoubtedly have been possible to achieve this through other means, but that would have required the work of interrogators who were skilled, well trained and educated, whereas practitioners with very ordinary abilities proved sufficient to handle the traditional techniques characteristic of so-called "robust" interrogation. From this point of view, the use of torture is tempting and appears, at least at first sight, to be relatively inexpensive.

In order to correctly assess the cost of torture, however, both the short term and long term costs must be considered. In the short term, with the exception of doctors who can supervise the process and prevent premature death, torture can be carried out by personnel with little training and cheap instruments – such as the infamous *gégène*. The cost of torture is thus relatively low compared to the cost of training sophisticated interrogators and analysts who do not use such means to obtain information. It should not be forgotten, however, that torture comes with a high political cost. In the long term, the use of torture can have severe consequences for the troops of a country that engages in it, on those of the enemy and on public opinion.

Let us begin with the impact on the troops of the country concerned. It is pointless to authorize only a few individuals to carry out torture, for a limited period of time and with limited methods. Such authorizations have invariably presaged the swift generalization of torture throughout security systems, without which it is ineffective. The generalized use of torture, however, has a devastating effect on troops, the main problem being that the enemy, who is no longer regarded as a human being, is initially despised and then inevitably underestimated. This is one of the worst catastrophes that can befall a fighting organization.

Among the enemy, the use of torture intensifies the process of fanaticization that feeds the war. It is not difficult to understand the reaction of a people whose "children" are tortured. In the case of the Battle of Algiers, torture had the effect of dramatically exacerbating the resentment felt by Algerians toward *all* French people and broke off the last channels of communication which might perhaps have led to a moderate negotiated solution.[15]

Ultimately, the most serious consequence of the use of torture is its effect on public opinion. The favourable light in which America was viewed by world public opinion in the wake of the September 11 attacks has given way to mistrust, even hatred, since the mistreatment to which prisoners have been subjected at Guantanamo in Cuba and at Abu Ghraib in Iraq became known. Controlling public opinion is not easy, and America is having difficulty refurbishing its image, despite the expenditure of millions of dollars. The same was true for France after the Battle of Algiers. Even today, the dishonour of the French torturers casts a shadow over the country's reputation.

While torture can accordingly not be excluded from the political arsenal, its very high cost in the medium and long term must be emphasized. The fact that the techniques used do not entail excessive expense masks the high cost associated with the political consequences of its use. Torture accordingly cannot be recommended, even from a strictly political standpoint. The first great counter-terrorism expert, Joseph Fouché, Duke of Otranto and Chief of Police under Napoleon, explicitly advised against it. On the other hand, unalloyed idealism can no more lead effectively to victory than can cynical realism. What is essential is the ability to manipulate both and to maintain a sense of proportion. Security systems that are based exclusively on benevolent humanism will be swiftly subverted

by the enemy and they will be unable to anticipate threats or to neutralize them. It is thus essential to find a middle way between the two extremes, one of which would be a policy totally devoid of moral principles and the other a policy totally devoid of flexibility.

Endnotes

1 The scenes of decapitation broadcast over the Internet demonstrate the barbarism of which terrorist organizations are capable. It should be noted that this behaviour is nothing new among those who engage in terror. The heads of the enemies of the French Revolution were displayed to the crowd after they had been guillotined. In the late 1980s, a CIA agent, William Buckley, was filmed being tortured to death by Hezbollah in Beirut. The videotapes were subsequently sent to U.S. embassies.

2 Tony Pfaff, for example, supports the idea that those who decide to play the terrorists' game must expect to suffer the consequences, and that this anticipation itself constitutes the basis for a justification of the methods employed by the security services. Pfaff does not, however, go so far as to explicitly justify the use of torture. "Bungee Jumping off the Moral Highground: Ethics of Espionage in the Modern Age," in Jan Goldman and Martin Gordon, eds., *Ethics of Spying* (Toronto: The Scarecrow Press, 2006), 66-103.

3 Fritz Allhoff, "An Ethical Defense of Torture in Interrogation," in Jan Goldman and Martin Gordon eds., *Ethics of Spying* (Toronto: The Scarecrow Press, 2006), 126-40.

4 Richard Posner advocates an interpretation of the U.S. Constitution that opens the door to the use of torture in the counter-terrorism context. He maintains that it may be justifiable from a moral and political standpoint. Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 9-10.

5 Fritz Allhoff, 132.

6 In the same vein, there is the article by Michael Ignatieff entitled "Lesser Evils," available on the website of the John F. Kennedy School of Government, www.ksg.harvard.edu.

7 Fritz Allhoff, 134.

8 Ibid., 134.

9 The argument based on a probability of a future good is also inherently based on a serious ethical problem. In an article entitled "Of a claimed right to lie out of humanity," Kant answered one of his critics, Benjamin Constant, who maintained that duties were not absolute and that exceptions were necessary in order to make life in society possible. Constant maintained, a little like Allhoff, that brigands should not have the same rights as others, specifically with regard to the truth. He accordingly suggested that it was acceptable to lie to one of them if the lie could avert a greater evil – such as murder. Kant rightly notes that telling the truth to a criminal would not necessarily entail a crime, whereas the fact of lying – to anyone – always constitutes wrongdoing. The obligation to tell the truth is a categorical imperative of universal validity. Kant continues that lies are themselves a crime and that the fact of trying to justify one by hypotheses about what will happen if it is not committed has no moral value. He concludes by affirming that the fact of lying ruins a community's trust, which is basic to all contracts and that it accordingly destroys society instead of making it possible, as Constant recommended. This conclusion has the advantage of being clear and simple. Emmanuel Kant, "D'un prétendu droit de mentir par humanité," translated into French by Luc Ferry, *Œuvres philosophiques*, Bibliothèque de la Pléiade (Paris: Gallimard, 1985), Vol. 3, 433-41. For a more detailed discussion

of this volume, see Marc Imbeault, "Emmanuel Kant: La morale du devoir," in Yvon Pillé, ed., *Philosophie: Éthique et politique* (Laval : Études Vivantes, HRW, 1999), 102-103.

10 This question refers to a statement to that effect by Julien Freud in *L'essence du politique* (Paris: Sirey, 1965).

11 Paul Ricœur, "Le paradoxe politique" *Histoire et vérité* (Paris: Seuil, 1955), 260-85.

12 Niccolò Machiavelli, *Le Prince*, translated into French by Jean Anglade (Paris: Livre de Poche, 1972), 80.

13 Adam Roberts, "La 'guerre contre le terrorisme' dans une perspective historique, " in Gilles Andréani and Pierre Hassner, eds., *Justifier la guerre ? De l'humanitaire au contre-terrorisme*, (Paris : Presses de la fondation nationale des sciences politiques, 2005), 162.

14 Alfred W McCoy, A *Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006).

15 We have discussed elsewhere the causes and consequences of the Algerian war and the justifications of violence generated by that war. See Marc Imbeault and Gérard A. Montifroy, *Géopolitique et pouvoirs* (Lausanne: L'Âge d'Homme, 2003). Also : Marc Imbeault and Yves Trottier, *Limites de la violence* (Quebec City : Presses de l'Université Laval, 2006).

CHAPTER 6

Ethical Responses to Terrorism: Establishing a Framework

Alexander Bellamy and Shannon E. French

Introduction

This chapter represents the first expression of a much larger project, the principal purpose of which is to classify and engage the ethical dimensions of responses to terrorism. What are the ethical challenges presented by terrorism? What dilemmas do those charged with protecting others from terrorist attack confront? Might effective responses require suspending normal moral and legal rules? Does responding to terrorism call actors to renegotiate ethical categories and distinctions such as those between combatant and non-combatant, intention and foresight? Since 9/11, a number of studies have sought to address these, and other, ethical questions surrounding responses to terror. None have done so consistently or in great depth. This project aims to do both. The goals are, first, to develop an ethical framework for thinking about and evaluating the choices actors confront as they respond to terrorism, and second, to explore the specific ethical dilemmas relating to responses to terrorism.

This chapter focuses on responses to large-scale terror attacks against civilians in nations not currently engaged in combat operations on their own soil or under foreign occupation. Some examples of the kinds of acts we have in mind include the sarin gas attack in the Tokyo subway, the Oklahoma City bombing, the terrorist attack on the twin towers of the World Trade Center on 11 September 2001 (9/11), the Madrid train bombing, the London subway and bus bombings, and theoretical attacks such as a dirty bomb or nuclear explosion, the release of a deadly pathogen in a populated area (biological attack), the destruction of key bridges and tunnels, etc. In analyzing responses, questions of legitimacy from both legal and moral perspectives are considered. The question of what counts as legitimate ethical arguments in this context will be raised, as well as the issue of how such arguments can work in practice to provide real-world

guidance for the military, law enforcement, and policy makers. Thus, legal constraints and the realities of human psychology will be relevant to the analysis, as will some basic physiological facts about how the human body responds to threatening situations and extreme stress.

The chapter introduces new terms that are both related to and distinguished from similar categories in the Just War Tradition. These are *jus pro formidonis,* or right/justice before terror; *jus per formidonis*, or right/justice during terror; and *jus post formidonis,* or right/justice after terror.[1] This chapter identifies some of the critical questions relating to the first two of these three categories – before and during a terrorist attack. Finally, this chapter explores the case of torture from *jus pro formidonis* and briefly compares it to a threat assessment case from *jus per formidonis*.

Jus pro Formidonis

In the wake of 9/11, the idea that it is important to think about forcible measures to prevent terrorist attacks is widely accepted.[2] In light of what we now know about how far terrorists are prepared to go, there are at least four good reasons for thinking seriously about forcible pre-emption or prevention. First, on prudential and consequentialist grounds, there is a good argument that prevention is better than cure. In hindsight, Clinton's decision not to take firmer action against Osama bin Laden between 1996 and 1998 was a bad misjudgement.[3] By this logic, the way societies think about the ethics of acting preventively must be refashioned to place fewer costs on political leaders who wish to take earlier action against would-be terrorists. Second, whereas conventional wars are preceded by clear warnings, most obviously troop mobilizations and deployments, such clear indicators do not usually precede mass casualty terrorist attacks.[4] It is virtually impossible for a liberal democracy to guard against terrorism at all times and in all places. There is widespread agreement, therefore, that the best way to reduce the threat of terrorism is to take the offensive and adopt a proactive strategy of prevention.[5] Third, the potential for mass casualty terrorism renders a reactive strategy imprudent at best. If one accepts Vattel's insistence that self-defence is the sacred duty of states, a reactive strategy in the face of such a threat may even be immoral. Finally, although deterrence still has an important role to play in world politics, particularly in relation to so-called "rogue states," its ability to constrain the type of terrorism witnessed on September 11 in the short-term is limited.[6] Part of Israel's counter-terrorism strategy has been

to demolish the homes of the families of suicide bombers as a deterrent reprisal and, to date, there is little evidence of this strategy helping to deter would-be bombers. For the purposes of this chapter, these four reasons provide moral grounds for thinking seriously about forcible measures to prevent *imminent* terrorist attacks. Whether or not they constitute a case for a broader doctrine of preventive war, as some members of the Bush administration have argued, is beyond the scope of this chapter paper.

The moral case for acting pre-emptively also finds support within the classic Just War tradition. However, we also find two important sets of restrictions within that tradition. Classic Just War writers tended to permit a limited right of pre-emption in the face of an imminent threat but expressly rejected the morality of preventive war, viewing it as tantamount to aggression. Grotius listed as the first "just cause" of war "an injury not yet done which menaces body or goods." In cases where one is "menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor…as a matter of self-protection."[7] This right, however, was limited by necessity: "the right of self-defence exists only when necessary: where the danger can be avoided, delay is proper to allow recourse to other remedies."[8] Likewise, Samuel Pufendorf agreed that a man may kill an aggressor once "the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose" and "has gotten into the position where he can in fact hurt me."[9] Like Grotius, Pufendorf also sought to limit the right, insisting that force could only be used in the absence of viable alternatives (such as escape).[10]

Vattel was a little more permissive than the others insisting that:

> When once a state has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbours, whose duty it is to stand on their guard against her…[O]n occasions where it is impossible or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption.[11]

However, he insisted that if there were reasonable doubts about these proofs, states should take care "not to act upon vague and doubtful suspicions lest it should run the risk of becoming itself the aggressor."[12]

For classic Just War thinkers, therefore, the right to pre-empt attack was conditioned by two factors. First, the actor in question must be sure about the imminence of the threat. Acting forcibly in the absence of a demonstrably imminent threat, they agreed, was unjust. Indeed, it may even constitute grounds for the Just War on the part of the opponent. Second, the permission to use force only extends as far as removing the anticipated threat and the right to act pre-emptively does not relieve the actor of his/her responsibility to satisfy other moral and legal responsibilities. This includes the responsibility to arrest, detain, charge and justly try terrorist suspects wherever possible. In other words, political leaders and security forces do not have a blank cheque when it comes to the prevention of terrorism.

In practice, imminent terrorist attacks might be prevented in one of two ways. First, those conspiring to commit an attack might be identified and either apprehended or, if that is not possible, forcibly engaged. Second, where security forces are unable to locate the conspirators but are convinced about the possibility of an attack, they might seek to deter an attack by threatening reprisals. Reprisals may involve anything from financial measures against a terrorist organisation's state sponsors through to threats of armed reprisal or, in a scenario often portrayed in fictional drama, threats against members of the suspected terrorist's family. What both strategies require, however, is good information about the nature of the terrorist threat. Because it has proven difficult to elicit such information, governments have traditionally used a variety of coercive measures often culminating in the torture of terrorist suspects.

Torture and the Acquisition of Information

The question of torture speaks directly to the central theme of this chapter: namely, the tension between fundamental rights and the perceived necessities of responding to the threat of terrorism. On the one hand, some moral absolutists insist that it is never right to breach fundamental rights such as the right to life, the right to freedom from arbitrary detention, and the right not to be tortured. According to Ebeling and Hornberger, success in the war on terror "will be a hollow victory if we lose our liberty in the process and learn nothing from our own mistakes."[13] On the other hand, writers more inclined towards utilitarianism suggest that the greater good must override concerns about individual rights.[14]

That torture is widely used against terrorist suspects is now documented. Indeed, US Vice-President Dick Cheney has gone on record defending the use of one well-established form of torture. Typically, two sets of arguments are used to justify the use of torture to extract information from terrorists. The first, semantic, argument is that the methods used are not torture. A 2002 Defense Department memorandum argued that the administration of drugs to detainees would only violate the prohibition of torture if it was calculated to produce "an extreme effect."[15] Likewise, a memorandum written by the Assistant Attorney-General, Jay Bybee, insisted that to count as torture, a prisoner's treatment must inflict more than just moderate or fleeting pain. According to Bybee, "torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[16]

This argument, used today by the American and British governments to justify "coercive interrogation" is easy to dismiss on two grounds. First of all, when put to the test in a court of law it has been found wanting. In the 1955, the French government responded to public outcries about the use of torture in Algeria by commissioning Roger Wuillaume to conduct an investigation. Wuillaume concluded that techniques such as the use of electric shocks and the so-called "water technique" – holding the victim's head under water until he/she almost drowns – were "not quite torture."[17] In 2002, however, one of the key perpetrators and advocates of torture in Algeria, Paul Aussaresses, was found guilty of being an "apologist for war crimes." Whilst his punishment was minor (a mere €7,500 fine), the judgment was crucial because the Court in effect rejected Wuillaume's argument and found that the interrogation techniques used by the French in Algeria constituted "war crimes."[18]

In 1971, the Compton Committee was established to investigate claims that British authorities in Northern Ireland had tortured and abused suspected IRA terrorists.[19] The committee investigated allegations relating to forty prisoners who were subjected to one or more of five methods of treatment: 1) heads covered with a black hood except when interrogated alone; 2) continual monotonous noise; 3) sleep deprivation; 4) diet of bread and water; 5) forced stress-positions.[20] Much like Wuillaume, the Compton committee concluded that although the five techniques constituted "ill-treatment" they did not equate to "physical brutality" because the interrogators did not take pleasure from inflicting pain and ill treatment was only used to extract information.[21] The Republic of Ireland then

took up the case in the European Commission on Human Rights. The Commission found that although, individually, each of the techniques did not constitute torture or degrading treatment, taken together they amounted to "a modern system of torture falling into the same category as those systems which had been applied in previous times as a means of obtaining information and confessions."[22]

In both the French and British cases, the claim that certain techniques were permissible because they did not constitute torture was rejected either on the grounds that they *were* torture or that regardless of whether or not they were, they certainly constituted "cruel and degrading" treatment, which was also forbidden. The point here is that the contemporary claims that certain acts designed to cause physical and/or mental pain for the purpose of extracting information does not constitute torture has been articulated before and found wanting.

If we reject the idea of a moral distinction between torture and other forms of "coercive interrogation," what arguments are levelled to justify it? The most common defence of torture rests on act-utilitarianism. The act-utilitarian case, first put forth by Jeremy Bentham, insists that torture is permissible when cost-benefit analysis reveals that more lives are likely to be saved by resorting to torture than by choosing not to do so.[23] To satisfy Bentham, a potential torturer must pass two tests. First, it must be clear that the *purpose* behind the mistreatment of prisoners is the acquisition of information likely to save civilians. As Bentham put it,

> [f]or the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practising or about the be practised, should refuse to do so?[24]

Bentham clearly believed that in such cases the greater public good required that the prisoner be tortured. The second requirement is that the torturer be sure that the victim *has* the necessary information. No benefit is accrued by torturing those who do not. Thus, for Bentham the torture of one guilty person for the purpose of saving more than one innocent person satisfies the cost-benefit ratio and is therefore justifiable.

The problem with Bentham's act-utilitarianism, even for those sympathetic to his case, is the lack of guidelines for making these cost-benefit judgments. How many civilians need to be at risk to make torturing a suspect permissible? Simple cost-benefit analysis would put that figure at one or more, making torture permissible in a large number of cases. What level of proof is required that the victim holds the knowledge necessary to save lives? How does an authority employing the Benthamite system avoid the slippery-slope that "once torture is permitted on grounds of necessity, nothing can stop it from being used on grounds of expediency?"[25] In addition, Bentham's position – and that of other advocates of torture – rests on the proposition that "torture works," that it is possible to extract life saving information in this way. This view is deeply contested even among law enforcement agencies. The consequentialist argument cannot therefore simply override other arguments.

To avoid these problems most contemporary advocates put forth the example of the "ticking bomb" terrorist in order to make a form of "supreme emergency" argument. The scenario, oft-repeated, is as follows: a bomb has been planted that is likely to kill large numbers of non-combatants (in one story arc on the torture-ridden television series *24*, the bomb was nuclear). At the same time, the security services have apprehended a suspect who it believes played a part in planting the bomb and therefore knows its whereabouts. It is worth quoting Israel's Landau Commission at length on this point as it is pivotal to the ticking bomb case:

> The deciding factor is not the element of time, but the comparison between the gravity of the two evils—the evil of contravening the law [prohibiting torture] as opposed to the evil that will occur sooner or later…To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.[26]

The answer is self-evident because the assumptions underlying the hypothetical case prejudge the outcome, a point we will discuss below. When applying the "lesser evil" test, the Commission found that the salient fact

was not the *actual* evil threatened, but the evil that the relevant actor reasonably *believes* is imminent.[27] One final point we should notice in the above statement is the slippage between the background assumptions (a bomb has been planted and may go off at any time) and the Commission's judgment (locating an arm's cache is sufficient justification). In the first scenario, the tortured suspect has a measure of control over a direct threat to non-combatants that has not diminished owing to his incarceration. The extraction of information from this suspect is *necessary* and sufficient to remove the threat. In the second scenario, the extraction of information about the location of weapons caches is *expedient* but not sufficient to prevent the threat.

What, then, are the arguments against the use of torture to secure information thought necessary for the prevention of terrorist attacks? That there is common agreement that torture is wrong is beyond doubt. Torture is expressly prohibited in an extensive range of human rights conventions and is widely considered a "crime against humanity."[28] Almost all of the world's states are party to one or more conventions forbidding torture.[29] Article 5 of the Universal Declaration of Human Rights declares that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment." Common Article 3 of the 1949 Geneva Conventions insists that all those not taking an active in hostilities be treated humanely. The article goes on to specifically prohibit "violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment of any kind." Both torture and cruel and inhumane treatment were expressly forbidden in the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted in 1984 (it came into force in 1987), to which the United States (US) is a signatory. Torture is also prohibited by regional human rights treaties such as the European Convention on Human Rights (1950), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987, entered into force 1989), the African Charter on Human and Peoples' Rights (1969), the American Convention on Human Rights (1969) and the Inter-American Convention to Prevent and Punish Torture (1985). Torture is prohibited by the International Covenant on Civil and Political Rights (1966, entered into force in 1976), the Genocide Convention (1948), the Supplementary Convention on the Abolition of Slavery

(1956), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

The legal prohibition of torture is widely understood as a peremptory rule: derogation is impermissible even in times of emergency. The International Covenant on Civil and Political Rights insists that no derogation from the prohibition on torture is possible even in times of 'public emergency which threatens the life of the nation' (Article 4). Both the European and American Conventions on Human Rights prohibit derogation even in times of war and public emergency, and even when those emergencies threaten the survival of the state (common Article 15). The idea that the ban on torture is a peremptory rule is also commonly accepted amongst legal practitioners.[30] Thus, as the International Committee of the Red Cross (ICRC) insisted in its commentary on the 1949 Convention: "no possible loophole is left; there can be no excuse, no attenuating circumstances" in which torture may be permitted.[31] Finally, in the General Assembly debates that preceded its Declaration against Torture in 1975, no state defended the use of torture.[32]

But what is it about torture as opposed to simply killing someone in war that makes it so wrong? Typically, four types of moral argument are levelled. David Sussman argues that torture is uniquely wrong because its ultimate goal is to force its victim into colluding against himself. The victim thus simultaneously experiences powerlessness yet is forced to be "actively complicit in his own violation."[33] This is wrong, Sussman argues, because it not only violates its victim's agency and autonomy, but actively perverts it.[34]

The second type of moral argument against torture is that it involves the use of violence against defenceless people and therefore violates the principle of non-combatant immunity.[35] In principle, as Henry Shue argues, torture could be justified in precisely the same way as other forms of political violence. Commonly this involves one of two approaches. The first, popular among secular theorists, is the individual self-defence analogy: an individual is entitled to defend himself/herself from unjust attack, even to the point of killing her assailant, so long as the killing is necessary and proportionate. Extrapolated upwards, political communities—which are amalgams of individuals—logically enjoy a collective right of self-defence.[36] Second, one of the basic ideas of the Just War

tradition is that killing is justified for the common good so long as it is conducted with right intentions. According to Shue, these types of argument could be used to justify torture in cases where the victim holds information that could save civilian lives.

There is one critical difference between torture and killing in the two circumstances identified above: unlike a soldier on a battlefield, the victim of torture does not pose a threat to the torturer. In other words, once someone is captured he/she ceases to be a combatant and becomes a non-combatant and therefore inviolable.[37] This, however, presents the issue of the "ticking bomb" terrorist. In those cases, the argument goes that when a bomb has been planted and the interrogator believes that the terrorist knows its location but is refusing to divulge that information, the terrorist cannot be properly considered a non-combatant.[38] This is a dangerous idea, however, because it could logically be expanded to cover soldiers taken captive during hostilities. As the soldier would undoubtedly have knowledge about the on-going operation that could save lives, he could plausibly be labelled a combatant for the duration of the operation and tortured. There are therefore good reciprocal grounds for denying the use of torture.

The third type of moral argument is deontological. This position holds that torture is wrong because it violates fundamental principles of humanity. For some, torture is an affront to the most basic of human rights that derive from a person's very humanity. As Joel Feinberg put it, "there is…no objection in principle to the idea of human rights that are absolute in the sense of being categorically exceptionless. The most plausible candidates, like the right not to be tortured, will be passive negative rights, that is, rights not to be done to by others in certain ways."[39] Casting an eye at the international legal status of torture it is reasonable to conclude that there is broad global consensus about the deontological prohibition.

The fourth moral argument against torture is a rule-utilitarian argument that emphasises the role of reciprocity and importance of moral consistency. Rule-utilitarians argue that the greatest good is achieved by observing a rule prohibiting torture. There are at least two good reasons to suppose this. First, the historical record demonstrates that torture is used for pernicious reasons far more often than not because it is most frequently used to silence government opponents. The prohibition of torture is therefore central for the preservation of democracy and liberal government. Sec-

ond, the principle of reciprocity means that we all benefit from a rule prohibiting others from potentially torturing us at some time in the future. If an enemy can be tortured to provide life-saving information, then surely we must admit that our own soldiers, if captured, could also be tortured in order to save the lives of our enemies. Rule-utilitarians argue that the greatest good is achieved by maintaining the general prohibition on torture.[40]

From this brief discussion, it appears that there are no good grounds for supporting the use of torture against terrorist suspects in order to acquire information about an imminent terrorist attack. There remains, however, the problem of the ticking bomb terrorist, a supreme emergency type scenario where the likelihood of attack is very imminent. Given the centrality of the ticking bomb analogy to contemporary debates about terrorism, it is worth taking the time to focus specifically on this case.

The Ticking Bomb Terrorist

Despite its omnipotence, this chapter has uncovered only one recorded case of a ticking bomb terrorist. In 1957, Paul Teitgen, the Secretary-General of the Algiers Prefecture was confronted with precisely this dilemma. The Chief of Police requested that Teitgen authorise the torture of Fernand Yveton, an insurgent caught in the act of planting a bomb at a gasworks. The Chief of Police believed that Yveton had planted a second bomb and feared that if it exploded it would cause a gas explosion, killing potentially thousands of civilians. Teitgen refused to authorise the torture. According to his own account he "trembled the whole afternoon. Finally the bomb did not go off. Thank God I was right. Because if you once get into this torture business, you're lost."[41]

Notwithstanding the proposition that in the single recorded case of a ticking bomb terrorist, torture was not authorized and no bombs exploded, it is fair to suggest that the hypothetical scenario is designed to prejudge the moral outcome. In this hypothetical case, only pacifists would deny the resort to torture. The ticking bomb scenario relies on four conditions being satisfied: 1) the interrogators must be sure that they are holding the right person; 2) they must be sure that the suspect holds information sufficient to avert an imminent threat and save lives; 3) they must be sure that that the use of torture will help the interrogator secure the necessary information; 4) the information elicited must be reliable.[42]

The hypothetical case certainly highlights an instance in which lesser evil considerations may dictate breaking the prohibition on torture, but that is precisely what the assumptions are intended to do. It is worth quoting Henry Shue at length:

> I can see no way to deny the permissibility of torture in a case *just like this*…But there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics. If the example is made sufficiently extraordinary, the conclusion that the torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situation described become more likely, the conclusion that the torture is permissible becomes more debateable.[43]

Certainly none of the alleged instances of torture that have emerged since the US opened the war on terror have come close to the ticking bomb scenario. Given this, the use of the ticking bomb terrorist scenario to defend a broader right to torture is moral casuistry at its worst.

A further problem with creating an exception to the ban on torture in cases of "ticking bomb" terrorists is slippage: in a particular campaign torture may be initially reserved for extreme and exceptional cases but as the practice becomes normalised the threshold for its use drops from the need to extract information necessary to save lives to the desire to extract expedient information. There is circumstantial evidence that this has already happened in the "war on terror." Whereas at the outset torture was reserved for "high value" Al-Qaeda figures who, it was believed, would be able to divulge Al-Qaeda's future plans, the President's authority to use all necessary measures has been used to cover the torture of suspects who were unlikely to have any such information.[44]

More detailed evidence of slippage is available in the Algerian case. In that case, torture was justified as a rare measure to prevent imminent attacks on civilians but spread "like a cancer" until it became normal practice. Shue argued that "the problem is that torture is a shortcut, and everybody loves a shortcut."[45] According to one account, the practice began as a clandestine method of interrogation utilised by the police. At the beginning of the war, in 1955, the police rounded up people suspected of

collaborating with the nationalists and tortured many of them. Gradually, torture became a "state institution."[46]

In other words, whereas torture was initially viewed and still justified as an exceptional measure it had become a core tactic. Recall the dilemma that confronted Paul Teitgen, discussed earlier. After police powers were assigned to the military, Teitgen was obliged to sign at least 24,000 confinement orders and by his own reckoning at least 3,024 of those people disappeared – victims of either torture or summary execution. Teitgen resigned in protest on 12 September 1957.[47]

The French experience in Algeria therefore provides a salient warning about the dangers of slippage and normalisation. During the course of war torture "infected" the police, army and judiciary, first as an exceptional measure only rarely used but by 1957 as a routine part of interrogation. Paul Teitgen's experience offers a seminal example. At first, as noted earlier, Teitgen refused to sanction the torture of even a ticking bomb terrorist. By the time he resigned in September 1957, however, over 3,000 "disappearances" had occurred as a result of arrests he had sanctioned.

As mentioned earlier, there is circumstantial evidence that slippage and normalization are occurring in the war on terror and evidence from Israel, the United Kingdom (UK) and elsewhere suggests that in normative contexts where the judiciary is prepared to tolerate torture, its use spreads and the scale and gravity of abuse worsens. Moreover, as the Algerian case demonstrates only too well, there is a real danger that by permitting or excusing torture in the ticking bomb scenario, it becomes easier to justify torture in cases that fall just short of this scenario: we can torture suspects who may know where the arms cache is; where the plans are laid; what the training techniques were; how the rebels organise themselves. Over time, it becomes permissible to torture terrorist suspects simply because they *are* terrorist suspects. To paraphrase MacMaster, torture invariably goes hand in hand with the fatal corruption of the rule of law and constraints on the conduct of war.[48]

This, though, still leaves us with the thorny question of the ticking bomb terrorist. What should interrogators and political leaders do when faced with this tragic choice in a situation *precisely* like the one set out in the scenario? Creating an exception to the prohibition on torture, or even permitting torturers to plead necessity in mitigation is dangerous because

it leads to slippage. If a torturer successfully levels a mitigation argument, this sets a precedent and has the effect of changing the moral prohibition of torture by, in effect, creating an exception to the general prohibition. Once the exception becomes the norm, the possibility is opened for other types of mitigation pleas that fall short of the ticking bomb scenario. In its *Northern Ireland* ruling, the European Commission on Human Rights attempted to overcome this problem by drawing attention to the limits of mitigation. As the Commission put it:

> It is not difficult, to take a hypothetical situation, to imagine the extreme strain on a police officer who questions the prisoner about the location of a bomb which has been timed to explode in a public area within a very short while…any strain on the members of the security forces cannot justify the application on a prisoner of treatment amounting to a breach of Art. 3. On the other hand, as a matter of fact, the domestic authorities are likely to take into account the general situation as a mitigating circumstance in determining the sentence or other punishment to be imposed on the individual …for acts of ill-treatment… However, where a penalty has been so mitigated by the domestic judicial or disciplinary authorities, having due regard for the severity of the acts involved and *the necessity of preventing their repetition*, this fact cannot in itself be regarded as tolerance on the part of these authorities.[49]

This is a sophisticated argument because it insists that not only should authorities take the extreme circumstances into consideration, they should also be guided by the *necessity* of preventing further occurrences—and slippage—in making their judgments about the legality of torture in particular cases. The desire to mitigate must be balanced against the necessity of preventing slippage.

The value of this argument is that it captures the problem that by elevating torture in ticking bomb cases to the status of a universal principle we risk tacitly legitimizing torture. In cases *exactly* like this, interrogators may be forced by "the unavoidable brutal urgency of the moment" to torture the suspect. This is a desperate and tragic choice. The sense of tragedy is captured by the Commission's insistence that not only does the utilitarian justification fail to excuse the crime, in any given case the

weight of circumstance as a mitigating factor must be balanced against the requirement to prevent further violations of the law. Thus, when forced by the desperate urgency of the moment to torture a suspected ticking bomb terrorist, the interrogator cannot know the extent to which the circumstances will mitigate the punishment he will receive for the wrong he is about to commit. Of course, in genuinely 'urgent' situations, the interrogator will not have time to make such calculations.

The Human Rights Commission's findings are dependent on a number of factors not normally present in contexts where torture is being administered. This in itself provides a valuable test. The Commission assumes that all suspects have access to the law, that cases of torture will be reported, and that the judiciary exercises effective and independent oversight. However, torture thrives when it is placed beyond the law; when basic rights such as habeas corpus are suspended; where judicial authorities and defence lawyers are unable to oversee imprisonment and interrogation; where the hierarchy of judiciary, executive and military/police authority becomes blurred.

This is precisely what happened in Algeria, and there are strong parallels between this and US policies such as "extraordinary rendition," detention without trial, the denial of independent legal representation, and denial of access to regular courts.[50] It is inescapable that such measures go hand in hand with normalised torture and encourage slippage. A useful first test in evaluating a specific ticking bomb terrorist case therefore is to ascertain the normative context in which it takes place. A reasonable balance between the exceptional circumstances and the necessity of prevention depends upon the preservation of a normative context hostile to torture. Where rights associated with detention begin to be eroded, the state concerned cannot reasonably claim to be fulfilling its moral and legal duty to prevent torture.

Beyond that, the Commission's recommendation forces the interrogator and those that authorize torture to get "dirty hands" in the fullest sense. As Walzer puts it, the doctrine of "dirty hands" insists that political and military leaders "may sometimes find themselves in situations where they cannot avoid acting immorally."[51] By not stipulating the considerations that may be considered in mitigation and by insisting that the urge to mitigate be balanced against the necessity of preventing recurrence, the Commission's formula, though crafted in legal terminology, provides a

useful moral framework by introducing uncertainty. Those who torture ticking bomb terrorist suspects cannot know beforehand whether their actions will be legitimated or not. The decision of whether to do so depends on a wider balance of factors.

How are such judgments to be made? On the one hand, there is the case in hand. To what extent did the interrogator have grounds for reasonably believing the suspect to be a ticking bomb terrorist? The hypothetical case suggests near certainty and this seems to be a reasonable expectation. Only if there are very good reasons, that can be later subjected to public scrutiny, to believe that the suspect knows when and where the bomb will explode can he be tortured. We also need to ask about the gravity of the threat. Are non-combatants at risk? How many? Can the risk be averted in any other way (such as evacuation)?[52] This, in a sense, is the proportionality criterion: is the threat sufficiently grave to create the desperate need to torture the suspect?

These considerations need to be balanced against the *necessity* of preventing further recurrences of torture. Torturers may still be condemned, for instance, if there is a risk of precedent setting. Alternatively, if the torturer does not consider himself guilty of a grave wrong or attempts to justify the act through act-utilitarian arguments, the need to prevent may override the mitigating circumstances in shaping the moral and legal response to the case. Similarly, the individual case needs to be situated within a wider context. Is the case under scrutiny part of a pattern or is it genuinely unique? Has a normative context conducive to torture been created? Is it copying similar earlier cases? Was the interrogator trained in torture techniques?

For all the reasons outlined above, we should avoid the temptation to permit the torture of the ticking bomb terrorist just as much as we should avoid the temptation to rule it out in all cases. Moral and legal uncertainty guards against slippage and normalisation whilst not prejudging the outcome of individual cases. Instead, in each case the mitigating circumstances need to be balanced against the broader necessity of preventing torture. It is important that the torturer and those that authorise torture do not know the moral and legal assessment of their action beforehand. Such uncertainty forces them to accept dirty hands: to realise that their own society and the wider world may regard them as immoral and criminal for what they are about to do.

Jus per formidonis

There are several unique areas of concern that need to be addressed in a thorough exploration of legitimate responses *during* a terrorist attack. These *jus per formidonis* issues, like the related *jus pro formidonis* issues discussed in the previous section, have both legal and ethical dimensions. And, once again, the realities of human psychology are relevant to our analysis, as are some basic physiological facts about how the human body responds to threatening situations and extreme stress.

It is useful to cluster *jus per formidonis* issues according to the agents involved. Many issues concern the risks and responsibilities born by "First Responders" who are obliged to react to a terrorist attack as it occurs. Other issues involve so-called "good Samaritans" who voluntarily attempt to render some sort of assistance during or immediately after a terrorist attack. Finally, there are issues concerning the key decisions facing leaders and policy-makers while a terrorist attack is on-going. For the purposes of this paper, we will have to limit our focus to issues concerning First Responders, and we will only consider one area – threat assessment – in any depth.

Some aspects of the *jus in bello* tradition will be applicable to our discussions of *jus per formidonis*, such as the commitment to restraint guided by rules of proportionality and discrimination, the doctrine of double effect, and the principle of forfeiture. However, because *jus per formidonis* also involves agents who are neither members of the military nor heads of state or policy makers, the overlap with *jus in bello* is by no means complete. We will have to look beyond the framework of the existing Just War tradition for guidance.

The focus of this section will be on response decisions that must be made during a terrorist attack (or close sequence of attacks). There will be some overlap with questions of *jus pro formidonis* and *jus post formidonis*, as it will be necessary at times for the sake of coherence to blend the moments immediately before an attack and those of the immediate aftermath into the discussion. We will begin by examining the role of First Responders.

First Responders generally include law enforcement, members of fire and rescue units, and emergency medical personnel. Most of the time, these individuals will be local to the scene of an attack, not part of any cen-

tralized government agencies or organizations. However, in some cases, due to the nature or location of the attack, First Responder units may be national, rather than local, and may even include members of the Armed Services.

It is helpful to divide the ethical and legal issues regarding First Responders into categories that roughly chart a temporal progression, as follows:

1. Threat assessment
2. Warning and evacuation
3. Interrupting a sequence of attacks
4. Containing the threat
5. Managing the crime scene
6. Providing critical care and supplies
7. Search and rescue
8. Hazardous clean-up

Within each category, we will attempt to lay out a number of concerns and provide some limited analysis. A few of these concerns are more familiar and have already produced considerable discussion elsewhere. But a number of them have been largely overlooked by scholars. Some of the remaining issues were identified at an Advanced Research Workshop on the topic of *Catastrophic Terrorism and First Responders: Threats and Mitigation* held by NATO in May of 2004. Forty-four experts from fourteen countries participated in this workshop. Their assessment produced a series of long- and short-term recommended actions "to strengthen the protection of First Responders against… acts of terrorism."[53]

Threat Assessment. In the initial stages of a terrorist attack, it often falls to First Responders to identify the specific nature of the threat and in some cases even to recognize it as a terrorist attack. Many Americans remember watching the news on the morning of September 11th, 2001, and hearing about a plane that had crashed into one of the Twin Towers of the World Trade Center. At first, few suspected terrorism. Most assumed that a small, private jet had veered off course and struck the building – that

it was a tragic, but hardly catastrophic event. Air traffic controllers and others on the "inside" had the information that a full-sized passenger plane had been hijacked at least twenty minutes before American Airlines Flight 11 collided with the North Tower. Yet they were unable to recognize the true nature and scope of the attack because it was unlike any previous terrorist activity involving airplanes.

Even the flight attendants on American 11 assumed that they were the victims of a more traditional hijacking, for which they had been trained not to resist the hijackers. Apparently, one passenger on that first flight – Daniel Lewin – assessed the threat differently and did attempt to fight the hijackers.[54] Sadly, his effort was unsuccessful. According to the 9/11 Commission Report, "…passenger Daniel Lewin, who was seated in the row just behind Atta and Omari, was stabbed by one of the hijackers – probably Satam al Suqami, who was seated directly behind Lewin. Lewin had served four years as an officer in the Israeli military. He may have made an attempt to stop the hijackers in front of him, not realizing that another was sitting behind him."[55]

The most obvious tension in the area of threat assessment is between jumping to incorrect conclusions and failing to react quickly enough to interrupt an attack. On November 21, 2006, "six imams were removed from a commercial airline flight in Minnesota for what they said was nothing more than trying to say evening prayers."[56] They have charged that they were humiliated and their civil rights were violated. Minneapolis, Minnesota airport authorities defended the action, saying that, "the airline asked airport police to remove the six men from the Minneapolis to Phoenix flight because their actions were 'arousing some concerns' among both passengers and crew," and that that imams exhibited "peculiar behavior."[57]

A more extreme example occurred in July of 2005, when British police shot and killed a suspected suicide bomber at a London Underground train station. The threat assessment in this case was tragically mistaken, and the suspect turned out to be an innocent 27-year old Brazilian electrician. When asked about the policy, Metropolitan Police Commissioner Ian Blair said, "I think we are quite comfortable that the policy is right, but of course these are fantastically difficult times." He was then asked if the instructions were to shoot to kill if police believed a suspect was a suicide bomber, he said, "Correct. They have to be that." He commented

further that, "It's still happening out there, there are still officers having to make those calls as we speak. …Somebody else could be shot."[58]

As in the torture case from our *jus pro formidonis* section, the rationale for such a policy can only be consequentialist in nature. The argument must be that when a possible suicide bomber is detected, it is better to have police officers risk shooting an innocent individual than to delay their response in order to seek a greater degree of certainty, and in so doing risk a larger number of innocent casualties. There may also be a perceived deterrence benefit; namely, that if the published policy of a particular nation's law enforcement is to shoot to kill suspected suicide bombers before they can detonate their devices, some potential bombers might decide to seek targets in other jurisdictions, where they might have a better chance of seeing their missions through to the end.

Even taken for what they are, these arguments are unpersuasive. It might be possible to offer a weak consequential justification for violating some civil rights in the interest of security, as in the first case of the six imams who were harassed for their "peculiar behavior," if (and only if) the harm done is sufficiently minor (e.g. embarrassment and travel delays) that full and fair compensation and reparations could be made to any victims of the policy discovered to have been unjustly targeted. In the case of the use of lethal force, as in the London Underground shooting, the cost of making a mistake is an intolerable violation of the most basic rights of the individual. The victim cannot be restored after an error is revealed; the damage is permanent and absolute. And the consequences of government agents doling out death sentences among the civilian population without even the pretense of due process may be more damaging to citizens' sense of security than the consequences of such agents failing to prevent or deter a suicide attack.

Any serious attempt to justify the use of lethal force to prevent or deter a suicide attack has to rely on the same reasoning we encountered in the "ticking time bomb" scenario. However, it follows that it must also then be subjected to the same manner of tests and constraints. We argued that torture could not be contemplated even in a "ticking time bomb" scenario unless four conditions were satisfied: 1) the interrogators must be sure that they are holding the right person; 2) they must be sure that the suspect holds information sufficient to avert an imminent threat and save lives; 3) they must be sure that that the use of torture will help the

interrogator secure the necessary information; 4) the information elicited must be reliable.[59] Parallel conditions for the use of lethal force to stop a suspected suicide bomber might be: 1) law enforcement officials must be sure that they have correctly identified the individual as an imminent threat; 2) they must be sure that killing the individual will stop the threat (that it would, for example, actually prevent a bomb's detonation in a populated area). A third necessary condition, derived from Just War principles of proportionality and economy of force, as well as the Natural Law principles of forfeiture and the doctrine of double effect, could be that all non-lethal options must be exhausted or established as having no potential to be effective in stopping the threat. Clearly, these would not be easy conditions to meet in the real world. And the bar could be set even higher for the use of lethal force against suspected terrorists than for the use of torture if death is seen as worse than torture (perhaps because some degree of reparation could be offered unjustly tortured victims).

The likelihood of overreactions and the use of excessive force is heightened by the First Responders' knowledge of – and in some cases even first-hand experience of – previous terror attacks. This only strengthens the argument *against* setting in place a policy that openly permits the use of lethal force against suspected suicide bombers found among the civilian population. The potential effects of post-traumatic stress disorder (PTSD) on First Responders make the individual responsibility of split-second life-or-death decisions in accordance with such a policy an enormous burden to impose upon them. In the normal course of their duties, police officers may be given the authority to employ lethal force, but such authorization is always tightly bound by strict guidelines that require them to seek non-lethal alternatives, even if doing so puts them at greater physical risk. Their rules of engagement are significantly less focused on force protection than those of the military.[60] This follows from the defensive nature of their mission to protect and serve the public. Their role is that of the guardian.

During a critical incident, the rush of adrenaline and other chemicals to the brain can produce physical effects such as time compression, tunnel vision, and the so-called "fight, flight, or freeze" response. Under such conditions, the odds of a police officer making a mistake – even a lethal one – increase dramatically. The best way to counterbalance this is extensive training in the use of non-lethal methods and equipment.[61] Individuals who may be placed in such situations must be repeatedly drilled on what lengths they may go to in order to neutralize a threat.

A policy that appears to actively encourage the use of lethal force against a potential suicide bomber undermines this essential training and increases the chances of the loss of innocent life. This is a damning indictment of a policy that rests its primary justification on the preeminence of the preservation of innocent lives. As in the case of torture, there may be some room for mitigation if First Responders resort to the use of excessive force under conditions of extreme stress (as during an on-going series of terror attacks). Yet, again as in the torture example, there is too great a risk of slippage and the erosion of fundamental values if the option of mitigation is presented before the event. First Responders who take it upon themselves to employ deadly force against a potential suicide bomber must do so with the full acceptance of "dirty hands" and the willingness to face prosecution and punishment for that action, should their suspect prove to be an innocent victim. It is unfair to the First Responders themselves to issue them "blank checks," and to do so would present too great a threat to human rights.

Conclusion

Hopefully, this chapter has served to demonstrate that there are many intriguing and complex issues concerning ethical responses to terrorism that are not adequately addressed by the Just War tradition alone or by existing laws and that therefore demand their own focused study. Yet the present discussion has only scratched the surface here. Some of the other issues that require immediate attention include the legitimacy of pre-emptive offensive military strikes, acceptable economic responses to terrorism, equality of treatment during evacuations, the need for clear and rapid communication among relevant parties during threat assessment, acceptable options for interrupting a sequence of attacks in-progress, just methods for containing a threat (including quarantine cases and information control), management of crime scenes, security for and just distribution of critical care and supplies, rules for search and rescue, and rights and protections for those involved in hazardous clean-up following a terror attack. These issues will be addressed in the subsequent stages of this project.

Endnotes

1 We are open to suggestions on how to amend these terms for maximum clarity.

2 See Allen Buchanan and Robert O. Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics and International Affairs*, Vol. 18, No. 1 (2004), 1-22 and James Gow, *Defending the West* (Cambridge: Polity, 2005).

3 See Richard A. Clarke, *Against all Enemies: Inside America's War on Terror* (New York: Free Press, 2004), 101-204.

4 Ivo Daalder, "The Use of Force in a Changing World: US and European Perspectives." Unpublished paper.

5 See Richard K. Betts, "The Soft Underbelly of American Primacy: Tactical Advantages of Terror," *Political Science Quarterly*, Vol. 117, No. 1 (2002), 33 and Steven R. David, "Israel's Policy of Targeted Killing," *Ethics and International Affairs,* Vol. 17, No. 1 (2003), 119.

6 On the enduring logic of deterrence see Lawrence Freedman, *Deterrence* (Cambridge: Polity, 2004), 121-3. The four reasons for rethinking pre-emptive self-defence are partly drawn from Ikenberry, "America's Imperial Ambition," *Foreign Affairs*, Vol. 81, No. 5 (September/October 2002), 31 and Eyal Benvenisti, "The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies," *European Journal of International Law*, Vol. 15, No. 4 (2004), 684.

7 Hugo Grotius, *De Jure Belli et Pacis* (Washington : Carnegie Institution, 1913), 206-10. The following section draws on insights from Abraham D. Sofaer, "On the Necessity of Pre-emption," European Journal of International Law, Vol. 14, No. 2, 2003, 216, notes 24-6.

8 Hugo Grotius, 210.

9 Samuel Pufendorf, *De Jure Naturae et Gentium* (New York/London: Wildy & Sons, 1964), 264.

10 Abraham D. Sofaer, 216, note 25.

11 Emmerich de Vattel, *The Law of Nations* (Brooklyn, NY: Ams Pr Inc., 1975), 308.

12 Ibid., 130.

13 Richard M. Ebeling and Jacob G. Hornberger, eds., *Liberty, Security and the War on Terrorism* (Fairfax, Virginia: Future of Freedom Foundation, 2003), xv.

14 This argument was first put forward by Jeremy Bentham in the Nineteenth Century. It has resurfaced into public discourse in the US especially since 11 September 2001 and was put forth in a sustained fashion by Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002).

15 Cited by Lewis in "Making Torture Legal," *New York Review of Books*, Vol. 51, No. 12, 2.

16 Ibid.

17 Wuillaume Report, 2 March 1955, Appendix, 169-179. See P. Vidal-Naquet, *Torture: Cancer of Democracy* (Harmondsworth: Penguin Books, 1963), 50-1.

18 See Neil McMaster, "Torture: From Algiers to Abu Ghraib," *Race & Class*, Vol. 46, No. 2 (2004) 9.

19 The Compton Report of the Enquiry into Allegation Against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the August 1971.

20 Michael O'Boyle, "Torture and Emergency Powers under the ECHR: Ireland v. the United Kingdom," *American Journal of International Law*, Vol. 171, Issue 4, (October 1977), 675.

21 For a discussion, see Ian Brownlie, "Interrogation in Depth: The Compton and Parker Reports," *Modern Law Review*, Vol. 35, No. 3 (1972) 501-7 and John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (New York: Alfred A. Knopf, 2000), 3-10.

22 Report of the European Convention of Human Rights, *Ireland v. United Kingdom*, application no. 5310/71, 25 January 1976, cited by O'Boyle, 695.

23 See Mika Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture* (London: Routledge, 2003), 3.

24 Cited by W. L Twining and P. E. Twining, "Bentham on Torture," *Northern Ireland Legal Quarterly*, Vol. 24, No. 3 (1973), 347. My discussion of Bentham draws primarily on this article.

25 Nigel S. Rodley, *Treatment of Prisoners Under international Law* (Oxford: Clarendon Press, 1987), 76.

26 Report on the Commission of Enquiry into the Methods of Investigation of the General Security Service regarding hostile Terrorist Activist, Part 1 (Jerusalem: Government of Israel, 1987), Para 3.15.

27 Ibid., para. 3.16.

28 See the various contributions to Philip Setunga and Nick Cheeseman, eds., *Torture: A Crime Against Humanity* (Hong Kong: Asian Human Rights Commission, 2001).

29 Nigel S. Rodley, 45.

30 According to Cedric Thornberry, "the use of torture against prisoners is absolutely illegal and…cannot, under international law standards, be justified", cited in British Institute of Human Rights, *Detention: Minimum Standards of Treatment* (London: Rose, 1975), 65. Michael O'Boyle, in his article "Torture and Emergency Powers Under the European Convention of Human Rights: Ireland vs. United Kingdom," described torture as a specific example of a peremptory norm of general international law. 687.

31 Jean Pictet, ed., *The Geneva Conventions of 12 August 1949—Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 39.

32 Nigel S. Rodley, 20.

33 David Sussman, "What's Wrong with Torture?" *Philosophy and Public Affairs*, Vol. 33, No. 1 (December 2005), 4.

34 Ibid., 30.

35 This view is put forward by Henry Shue, "Torture," *Philosophy and Public Affairs,* Vol. 7, No. 2 (1978), 124-143.

36 One of the best recent treatments of this position is offered by David Rodin, who ultimately rejects the upwards extrapolation and therefore concludes that political communities do not have an automatic right of self-defence. David Rodin, *War and Self-Defense* (New York: Oxford Univeristy Press, 2003).

37 Henry Shue, 127-130.

38 Ibid., 141.

39 Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), 88.

40 For an expression of the rule-utilitarian argument against torture see Fritz Allhoff, "Terrorism and Torture," *International Journal of Applied Philosophy*, Vol. 17, No. 1 (2003), 107. Allhoff himself rejects this argument on the grounds that rules require exceptions but in this case an exception would undermine the entire rule-utilitarian project.

41 The episode is recounted in Alistair Horne, *A Savage War of Peace: Algeria 1954-62*, 2nd edition (London: Macmillan, 1987), 204. Though General Paul Aussaresses later wrote the Yveton was tortured anyway: "Gevaudan later told me that they had to use torture to force Yveton to talk, in spite of the fact that Paul Teitgen had expressly forbidden it, for fear of risking the destruction of twenty-five percent of Algiers itself." Paul Aussaresses, *The Battle of the Casbah: Counter-Terrorism and Torture* (New York: Enigma Books, 2005), 107.

42 These four conditions are a slightly revised variant of the conditions outlined in Jonathan Allen, "Warrant to Torture? A Critique of Dershowitz and Levinson," *ACDIS Occasional Paper* (January 2005), 9.

43 Henry Shue, 141-142. Emphasis in original.

44 Daniel Moeckli, "The US Supreme Court's 'Enemy Combatant Decisions:' A 'Major Victory for the Rule of Law'?" *Journal of Conflict and Security Law*, Vol. 10, No. 1 (2005), 75-99.

45 Cited by Eyal Press in "In Torture we Trust?" *The Nation Magazine* (March 31, 2003), 3. In this sense, torture is very much like terrorism.

46 Vidal-Naquet, 29-33.

47 This case was recounted in detail by Peter Benenson, *Persecution* (Harmondsworth: Penguin, 1961), 7-28.

48 Neil MacMaster, 6.

49 *Yearbook of the European Convention on Human Rights* – Ireland vs. United Kingdom, 764-766. Emphasis added.

50 For contrasting views on the legitimacy of these measures see, Derek Jinks, "International Human Rights Law and the War on Terrorism," *Denver Journal of International Law and Policy*, Vol. 31, No. 1 (2003), 101-112; Laura A. Dickinson, "Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law," *South California Law Review*, Vol. 75 (2002), 1407-1492; and Daniel Moeckli, "The US Supreme Court's 'Enemy Combatant" Decisions: A 'Major Victory for the Rule of Law'?" *Journal of Conflict and Security Law*, Vol. 10, Issue 1 (2005). 75-99. It is worth noting that none of these works raise the question of whether these measures create a normative context that permits torture to thrive.

51 Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004), 45-46.

52 We are grateful to Sara Davies for this point.

53 Friedrich Steinhausler and Frances Edwards, eds., *NATO and Terrorism: Catastrophic Terrorism and First Responders – Threats and Mitigation* (Dordrecht, The Netherlands: Springer Publishers, 2005), XV.

54 AAL transcript, telephone call from Nydia Gonzalez to Craig Marquis, Sept. 11, 2001; Obituary: "Daniel Lewin," *The Washington Post*, September 22, 2001, B7.

55 National Commission on Terrorist Attacks Upon the United States, Final Report, Section 1, "We Have Some Planes," subsection 1.1, "Inside the Four Flights," archived at http://www.9-11commission.gov/report/911Report_Ch1.htm.

56 Michael Conlon, "US Muslims outraged after imams kicked off plane," *The Washington Post*, November 21, 2006 (from the Reuters News Service).

57 Ibid.,

58 Reuters News Service, "UK police defend shoot-to-kill mistake," July 24, 2005.

59 These four conditions are a slightly revised variant of the conditions outlined in Jonathan Allen, 'Warrant to Torture? A Critique of Dershowitz and Levinson', *ACDIS Occasional Paper,* January 2005, 9.

60 See Larry F. Jetmore, *The Path of the Warrior: An Ethical Guide to Personal and Professional Development in the Field of Criminal Justice* (New York: Looseleaf Law Publications, 2005).

61 Interviews with Sergeant Bill Reckert, Indiana State Police, Training Division, Program Manager: Leadership, ICS, Officer Survival, Use of Force, January-April, 2005.

CHAPTER 7

Quarter and *Jus in Bello*: Meeting the Challenge of Ethical Uncertainty within the Asymmetrical Battlespace

Richard J. Walker

In any military organization there is no surer way to disaster than to take what has been done for many years, and to go on doing it – the problem having changed.

Field-Marshal Viscount Montgomery of Alamein

Introduction

While the elusive peace dividend promised with the demise of the Cold War may or may not have been realized by individual NATO governments, the theme of "right-sizing" military forces has proven problematic to all. In this enthusiasm to spurn conventional force structure, reflect New World thinking, and rationalize their corporate existence, Western armies sold their respective governments on a transformational and metaphoric model of a slimmed-down corpus (fewer personnel), an enlarged brainpan (technological investment) and the unlimited operational flexibility promised by the Revolution in Military Affairs (RMA). This Faustian bargain may be based on the spurious calculus that smaller, but more technologically efficient forces, can manage the plethora of *operations other than war* while still being able to wage actual war if required.

While the jury may be out on the holistic nature of the debate, armies, dogged by a growing community of humanitarian oversight, adaptively tinker with existent conventional military structure, culture, and operational concepts; essentially carrying forward old ideas into the context of asymmetric warfare, or as observed by Sir Basil Liddel Hart in his *Thoughts on War:* "The only thing harder than getting a new idea into the military mind is to get an old one out."[1]

While Major-General Dick Applegate may define the multi-dimensional battlespace as diffused non-contiguous cellular islands of non-linear forces, he does so within a clinical, theoretical and empirical modelling construct.[2] While theorists wax zealously on a spatial and functional battlespace comprised of the six dimensional facets of: surface, sub-surface, air, electromagnetic spectrum, time and cyberspace, they fall short on addressing the combat frailties and the inherent uncertainties of the human dimension as the proverbial fly in the ointment.[3] Analogous to the physical limitations of the pilot being the principal constraint in enhanced fighter aircraft design, the fact that war is still an emotive human enterprise tends to muddle assumptions that enhanced situational awareness is a panacea for the fog of war, or that this calculus may simply take the soldier for granted.

As Field Marshal Montgomery pointed out, "the problem has changed" for both the Western group of armies and the Law of Armed Conflict (LOAC) proponent agencies. Woe betide the military planner who believes the asymmetry of the modern battlespace is solely limited to the change-management components of the Three Block War (i.e. simultaneous humanitarian operations, peacekeeping and warfighting all in a given area) or the synergistic processes of networked operations. Or more important, the field commander who fails to appreciate that unlike "operations"– War is, as Clausewitz affirmed, "the realm of physical exertion and suffering. These will destroy us unless we can make ourselves indifferent to them, and for this birth or training must provide us with certain strength of body and soul." Getting a Dutch Battalion to and from Srebrenica was a highly successful facet of an operational planning process, but having them fight to the death – now that would have been an act of war. Similarly strained, are the agents and proponents of the 20th century (1907-1992) LOAC conventions that have yet to appreciate that their problem has also changed and that they are now faced with the demise of the primacy of "The High Contracting Parties."

The aim of this chapter is to demonstrate that central to the ambiguity of the asymmetrical battlespace lies the soldier's natural state: fear, based on uncertainty. Their perceived vulnerability, as *jus in bello* moral agents or soldiers able to do the ethical thing, is in direct proportion to the degree of uncertainty they experience in operations within the asymmetrical environment. Based on this thesis, this chapter will examine the origin of the key components of the ethical uncertainties realized so far

within the war on terror and offer mitigating strategies for reconciling the discontinuities of no quarter or loss of restraint with the traditional warrior ethos.

Similarly, this thesis will posit that ethical uncertainty is symptomatic of an inherently flawed strategic thrust, which claims that the transformational era of Enabled Warrior Digitization validates the post-cold war decision by NATO countries to dramatically downsize their standing armies. The ultimate goal of western military transformation being, therefore, the adaptation of smaller conventional forces that rely on the perceived force multiplier effect of digitization. This flies in the face of the requirement to better prepare the individual soldier to handle the altered combat state within an asymmetrical battlespace that is distorted along the spatial, functional, and moral dimensions. The paradox being that incidental to our structural myopic fixation with technology, the sectarian enemy has targeted the human dimension or social capital of Western armies as our centre of gravity and our ethical uncertainty as reflective of our will to fight as our Achilles heel.

While soldiers armed with either a values-based or rules-based ethical code function predictably within the safety of operations other than war, it is the crucible of death and destruction that defines what the soldier will do or fail to do individually or within the cohesion of the small group that sustains them. As Michael Ignatieff explained, "The decisive restraint on human practice on the battlefield lies within the warrior himself, in his conception of what is honourable or dishonourable for a man to do with weapons."[4]

As the success of operations is defined by the elimination of tactical uncertainty, so too is the moral dimension of asymmetrical warfare dependent on the reduction or elimination of any systemic cultural uncertainties that lead to ethical failings. Ethical and tactical certainties are conjoined and are inextricably linked facets of fear management. As we train for tactical certainty so too must we train for ethical certainty. The moral asymmetry of the modern battlespace threatens to compound the uncertainty of war exponentially. If soldier uncertainty cannot be mitigated then the ethical and moral collapse of the human dimension may be the predictable result. Ethos and culture are the malleable correctives in shaping ethical certainty, but first must come the sober determination of where we presently are within the moral dimension of the asymmetrical battlespace and

to fix our resolve to bring a corrected ethos and culture into play to meet the challenges now realized.

The Legacy of "Conventional" Uncertainty (How we got here)

Though the modelling of the "unconventional" three-block war continues to adapt on the fly in ongoing operations in Iraq and Afghanistan, it is clear that our response to the emergent "a state of armed conflict" remains conventional in our values-based struggle to assert and rationalize the Just War theory, the universality of the LOAC, and the rights and obligations of the Geneva Conventions. Notwithstanding the rhetoric claiming operational adaptation, military forces have not evolved to meet the ideological threat and are culturally still "come as you are" armies. Moreover, as residual products of the legacy of conventional operations, we continue to train to fight the last war. For example, still schooled in the LOAC credo of "reciprocity of expectations," soldiers arriving in theatre suffer cognitive dissonance and ethical surprise within a battlespace where the moral and physical differentiation of friend or foe is asymmetrical and where there is no expectation of reciprocity in humane treatment. As the Democratic Representative from Pennsylvania, John Murtha, bemoaned, "I continue to be concerned with the fact that our military men and women fighting in Iraq often tell me they do not know who the enemy is… They do know whom they can trust…One day the Iraqis are smiling and waving at them on the streets; the next day the same people are throwing grenades at them."[5]

Similarly, there remains our reciprocal expectation of honourable practice, which sustains, within our military culture, the moral ascendancy of the warrior's code. With confusion over reciprocity, the loss of battlefield honour, or the collapse of home nation support may come the ethical paralysis and officer cover-up reminiscent of the Canadian Somalia scandal, the Abu Ghraib revelations and the ongoing Haditha murder investigation.[6]

Within this legacy of conventional war culture, the soldier now faces a variety of discontinuities unrelated to the direct defence of the state. Firstly, ill-defined state interests may fail to substantiate the *jus in bellum* or moral justification for combat operations; particularly within a context of national political uncertainty, war denial, and risk aversion.

This lack of mission clarity under the obtuse rubric of "peace support" implies to the soldier a "limited war," which may falsely assume an end state and an exit strategy, all buttressed against a volatile degree of public support for the expedition. Since emergent NATO doctrine is premised on the multi-tasking of fewer available forces, then overriding issues such as force protection become a destabilizing element of soldier uncertainty. Though force protection lapses may be compromised in uncontested "operations," a determined enemy will simply exploit them in war. The old dichotomy of maximum force (soldier) versus minimum force (constabulary) brings the degree of force protection back into debate. The singular role of "close with and destroy the enemy" has correspondingly morphed to subsume non-specific militarized tasks based on the hierarchical assumption that since a soldier is trained to kill he should be qualified to handle a multiplicity of lesser tasks. Or, as Lieutenant-General Peter W. Chiarelli, Deputy Commander in Iraq, inferred following his investigation into the Haditha killings, "US soldiers are too keen to kill. They should be reminded that it is standard counter-insurgency practice to use the minimum force, to capture prisoners and treat them well."[7] While multi-tasking may on the surface appear to be a reasonable expectation, the lack of maximum command supervision as a result of Adaptive Dispersed Operations (ADO) and variances within Rules of Engagement (ROE) that may fail to define when a soldier is actually under attack, tends to complicate the issue; as the Haditha defendants and their civilian lawyers now argue. All of which brings the vagaries of the "use of force" within the three-block war paradigm into sharp focus.

That concept of operations, as envisaged by the former commandant of the United States Marine Corps, General Charles Krulack, warns of the necessity to function at graduated levels of operational intensity and simultaneously multi-task within the same asymmetrical battlespace. As ambitious a training goal as this may be, when put into practice against a determined enemy it simply ensures that all block functions will be contested simultaneously and that there is no safe "rear area," other than the "protected hamlets" of the floating islands of forces now reliant on technology and air power to dominate "no man's land." As noted by the British in defence of Helmand province in Afghanistan, this concept may not transition well from theory to practice when these "floating islands" are surrounded and under constant attack by the Taliban. Combat stress, in this context, is continuous and may contribute to either

adaptive behaviours or dysfunctional behaviours. As one British commander quipped when harkening back to the perils of World War I, "At least back then troops were rotated out from the front line every 12 days. In one of Helmand's districts, the Gurkhas were only relieved after more than three weeks of intensive fighting."[8]

Unlike the high water mark of the Geneva Conventions during World War II (WWII), fewer soldiers in today's operational force packages means less supporting infrastructure and a vastly reduced tail to tooth ratio. The critical battlefield tasks, which have not diminished, must now be rationalized and the "conventional" needs for rear area security, constabulatory and refugee functions, and prisoner of war handling are by necessity minimized or abrogated. This is where the lessons of history now prove inconvenient and George Santayana's oft quoted; "Those who cannot remember the past are condemned to repeat it" proves problematic.

For example, during the Allied advance across Europe in 1944, armies functioned on a tail to tooth ratio of between 7-to-10: 1 in forces required for critical battlefield functions. In stark contrast, while Operation Desert Storm dazzled the world with its overwhelming combat power, the international community observed the ignominy of defeated Iraqi soldiers attempting to surrender to helicopters or being summarily paroled and they simply walked into no-man's land. This self-imposed absolution of national detaining or capturing power status under the Geneva Conventions, simply as a result of a lack of manpower, served as the harbinger of the rear area chaos and vulnerability observed during Operation Enduring Freedom.

This conundrum continues with Canadian Forces (CF) in Afghanistan who have chosen to deflect their status as a detaining power through a problematic bilateral agreement with the host Afghan National Army (ANA); based on, if nothing else, the pragmatism that the additional 20,000 soldiers needed to reprise WWII type force ratios is simply unsustainable. However, this is problematic, in that the agreement on the transfer of prisoners has not only been challenged in the Press as a breech of the Geneva Conventions, but when juxtaposed against the ANA policy of summary field execution for alleged Taliban membership it may also pose a serious public relations challenge. It also imposes critical demands on the ethical certainty of the Canadian soldier and questions if any form

of reciprocity of expectations is possible with a sectarian enemy who reflects no facet of our conventional western military culture.

In contrast to our fixation on the technology of the RMA to offset spatial asymmetry, it is now the nature of the enemy's determination to dislocate our moral intentions, which will define our operational effectiveness within the asymmetrical battlespace. In the past, when engaging a state-sponsored, secular, and politically rational combatant who followed a traditional military ethos, both the legal and moral components of the Laws of Armed Conflict and the rights and obligations of the Geneva Conventions were obviously in play. The 1942 example of the Canadian prisoners of war (POWs) at Dieppe being used as pawns in a British/German tit-for-tat shackling of POWs, in contravention of the Geneva Conventions, reinforced the traditional role of the International Committee of the Red Cross (ICRC) intervention and the expectation of reciprocity, as eventually demonstrated by both High Contracting Parties to the conflict. Yet, when engaging an ideologically-centric combatant, who does not share our culture or match our behavioural assumptions, past practice indicates that the tenure of the battlefield can descend to staggering levels of animus and brutality.

The Pacific war against Japan may prove illustrative of any such ideological vilification. The Japanese xenophobic disregard for human life as reflected in the Bushido code, the ritual decapitation of prisoners of war and the murder of millions of civilians, in concert with the *divine wind* of Kamikaze martyrs led directly to the home front slogan that "the only good Jap is a dead Jap"; or as clarified officially by Admiral William F. Halsey at a 1944 press conference, "The only good Jap is a Jap who's been dead for six months."[9] Though emotive in its effect today, the facts are that the Japanese never signed the Geneva Conventions, that such ideals were alien to their military ethos, and as claimed by historians, they slaughtered approximately 30 million people in the name of the superior Yamato (Japanese) race.

While fanning the flames of racism, one can see that it was largely the cultural and ideological disparity that separated the European "good German/bad Nazi" theory from the Asian "good Jap" characterization. As Ernie Pyle, the famous war correspondent told millions of readers in no uncertain terms, "In Europe, we felt that our enemies, horrible and deadly

as they were, were still people, but out here, I soon gathered that the Japanese were looked upon as something subhuman and repulsive; the way some people feel about cockroaches and mice."[10] The Japanese example diverges seriously from the present sectarianism in that the Yamato race was state-based and when the Emperor directed national surrender, millions of potential guerrilla warriors and suicidal bushido martyrs melded into a docile, malleable, and compliant population.

Yet, the resulting choice to offer no quarter to Japanese soldiers and the decision to drop the atomic bomb may have had much in common when contesting an ideologically driven enemy prone to martyrdom or suicide. More to the point, is that Western military tradition still presumes the existence of a Warrior's Code of Honour, which ascribes a universal base-level respect for an "honourable foe"; a cultural construct alien to contemporary sectarian forces. This need to respect and show empathy to the surrendered soldier underpins the assumed reciprocity of expectations reflected in the LOAC.

In stark contrast, the recent kidnapping and murder of U.S. servicemen Thomas Tucker and Kristian Menchaca negates any warrior respect for the "Muj", and brings the issue of payback in the form of no quarter for a "disrespected" enemy into focus, where, the battlefield penalty for defiling "a mate" may be death. As hinted by Iraq's Defence Ministry representative, "The torture was something unnatural. The corpses were so mutilated that they could only be positively identified through DNA testing."[11] Similarly, the fact that martyrdom supplants surrender and is akin to victory means that the sectarian warrior will be metaphorically at either the soldier's neck or at his feet. While capture is possible, the sectarian neither seeks nor expects quarter, and remains a perpetually life-threatening detainee. Like any perpetually dangerous offender, he can never be repatriated or released – posing a quandary for Western governments.

The legacy of conventional warfare and its transition to the moral dissonance of asymmetrical combat poses some uncomfortable questions: are all combatants and potential POWs of equal value, do they all, no matter how vile, merit equal consideration under the LOAC, and are protections under the LOAC a mutually agreed "privilege" between High Contracting Parties or are they in fact universal human and legal rights? Or, perhaps the more disturbing revelation is that like conventional mili-

tary doctrine, the LOAC has failed to evolve to address the challenge of operational asymmetry – with the problem having changed.

Correspondingly, the ownership, relevance, and viability of the LOAC can now be challenged by state policies. Such state policies seek to maintain the "spirit" of the LOAC in response to the non-state, irrational, ideological, and sectarian "soldier of God" who demonstrates no respect for human life – their own, yours, or any infinite number of their own or other populations in their martyred rush to the gates of heaven. One simply cannot exaggerate the impact of this paradigm shift to an amoral enemy to whom the degree of battlefield carnage, enemy body counts, or the potential toll of civilian casualties has a propaganda impact but is of no operational significance.

While the diverse agendas of those within the International Human Rights community may strain to classify the dedicated jihadist as a protected and empowered citizen within the context of the global village, state policies accept that the solitary suicide bomber represents much more than the deranged in pursuit of his promised 72 renewable virgins. The sectarian enemy is neither a nationalist fanatic, nor fundamentalist extremist. He is, on the other hand, an ideological zealot best modelled against the Wahhabi Warrior cult ostensibly in the guise of a highly sophisticated militia, such as the Taliban or the Iranian Revolutionary Guard Corps (IRGC), and their proxy agents Hezbollah and Hamas. So, just how are soldiers, who are products of a conventional military culture and ethos, expected to cope with the new asymmetry within the spatial, functional, and moral dimensions, when faced by an enemy armed with the certainty that human slaughter is both business and religious fulfillment?

Reaping the Uncertainty We Sow (Where we are now)

What is distinctive about previous examples of asymmetric combat stressors is the historical continuity that reciprocity does matter. Be it the U.S. Marines venting on the Japanese, the My Lai mentality of Vietnam, or the savagery of the Soviet Afghan failure transitioned to Chechnya, battlefield uncertainty leads to brutality and, if unrestrained, brutality begets brutality. Recent allegations of atrocities committed by British and American forces in Iraqi identify "soldier uncertainty" as the key cultural variable and officer cover-up as the common denominator. Such inherent political, social, and cultural uncertainties, ranging from the strategic

to the operational and tactical levels, present themselves, to the enemy as an institutional weakness and the Achilles heel of our military effort. Juxtaposed against the ideological certainty of the Wahhabi influence, as reflected in the systemic brutality of the Taliban warrior or the focused zeal of the IRGC, we appear to lack the unity of effort, strength of belief, and the perseverance necessary to prevail in a conflict which has no delineating boundaries or rules.[12]

The interesting irony when examining the moral dimension of war within an Islamic context is that, as Hyder Gulam points out in his work *Islam, law and war*, the Quran not only articulates a coherent concept of acceptable war for Islam but also enumerates how prisoners of war are to be treated: "Fight in the Way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits."[13] Similarly, Islamic scholars concur that the Prophet instructed his followers to "never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His messenger for your guidance."[14] None of this, however, squares with observed practices within Iraq or Afghanistan, such as the case of the mutilations of Menchana and Tucker, where the Mujahedeen Shura Council (linked to Al-Qaeda) crowed: "We announce the good news to our Islamic nation that we executed God's will and slaughtered the two crusader animals we had in captivity."[15]

It is the fact that modern Islamic warfare has been politicized by not what the Quran actually says but by an intentional misdirection of interpretation. Of the over 6,000 verses of the Quran, the "sword verse" [9.5] offers the greatest scope for wilful manipulation by luminaries such as Osama bin Laden and the Ayatollah Khomeini. Osama bin Laden for example, opened his "Declaration of War" of October 2006, with the sword verse command to "kill the associators wherever you find them, and take them, and confine them, and lie in wait for them at every place of ambush."[16] Or as historian John Wansbrough discovered, the Sword Verse "became the scriptural prop of a formulation designed to cover any and all situations which might arise between the Muslim community and its enemies."[17] The notoriety of Osama notwithstanding, the quintessential model of manipulation, as reflected by the Ayatollah Khomeini on an epic scale, confirms that to the puppeteers, human slaughter serves both political and religious fulfillment.

With typical euro-centric conceit Western military culture has internalized its response to asymmetric warfare, (conventional Cold-War modelling) and simply ignored the fact that asymmetrical warfare as reflected in the strategic superpower failures of Vietnam, Afghanistan, and Chetnya has been the norm for the later half of the twentieth century. Even more myopic has been the western military tendency to ignore the Islamitization of war, as modelled by the Iran-Iraq War (1980-88), as the harbinger of the new battlespace. When the "conventional" capabilities of the attacking Iraqis were stymied by the ideological asymmetry of the Iranian Revolutionary Guard, the traditional soldier "certainty" of western military culture ended. To offset, dislocate, and destabilize the differential in conventional combat power, Khomeini turned to the asymmetrical strategy, which highlighted his antipathy for human life. As a result he created the Basiji, a 450,000 strong but untrained militia "of the oppressed" made up of boys between twelve and seventeen and men over 45 years of age.

Armed with nothing more than blood red headbands that designated them for martyrdom and one of the 500,000 small yellow plastic keys "to the gates of heaven", (ordered from Taiwan); and with Khomeini's cynical and gross distortions of the Quran's verses on their lips, approximately 100,000 Basiji went enthusiastically to their own destruction. As reported in the *Frankfurter Allgemeine*: "The young men cleared the mines with their own bodies… It was sometimes like a race. Even without the commander's orders, everyone wanted to be first."[18] Or as emoted by an Iraqi officer who complained in the summer of 1982: "They came towards our positions in huge hordes with their fists swinging… You shoot down the first wave and then the second. But at some point the corpses are piling up in front of you, and all you want to do is scream and throw away your weapon. Those are human beings, after all!"[19] Well, are they indeed? The key point being sold to the Basiji (as the new-age sectarian combatant) is that human life is worthless and death is the beginning of genuine existence.

The natural world, as explained by Khomeini, "is the lowest element, the scum of creation… and that it is the divine world, that is eternal…and accessible to martyrs." To those many thousands duped by Khomeini's theological sophistry, "Their death is no death, but merely the transition from this world to the world beyond, where they will live on eternally and in splendour." The message of "certainty" to the "soldier of God" – is that "Whether the warrior wins the battle or loses it and dies a martyr – in

both cases, his victory is assured: either a mundane or a spiritual one."[20] The fact that the President Ahmadinejad of Iran, served as a Basiji instructor during the war, and now sits at the head of an IRGC buttressed by nine million Basiji (12 percent of the Iranian population) should give the architects of the three-block war model pause in reconsideration of their operational definition of "swarming."[21]

The obvious exportation of Khomeini's martyr culture to jihadist fighters on all fronts means that the cultural and moral certainty of our soldiers values-based ethos is being parried by an antithetical ideology – alien to notions of humanitarian law, long-standing treaties, western conventions, (less, of course, the opportunity to exploit their inherent weaknesses as tactical restraints) – aimed at "slaughtering the crusader animals."[22] All of this sectarian certainty simply contrasts the geo-strategic "uncertainty" of conventional military cultures that will commit expeditionary forces for the indirect or coalition-based defence of the state but will neither declare war as a matter of state policy nor in doing so assert the political resolve and the requisite certainty of public support assumed when deploying expeditionary forces. For example, according to the Minister of National Defence, Canada is not at war in Afghanistan. Yet, while soldiers fight and die, lawyers, who perhaps are more focused on legality and optics, coach them not to use the words "war" or "combat" in personal correspondence, though the expression "state of armed conflict" is permissible. Similarly, Canadian national ambiguity over the intent and nature of the Afghan mission, as reflected in slumping poll numbers is analogous to a common Western-European inability to articulate a *jus ad bellum* moral or "just war" legitimacy for a concept as nebulous as the War on Terror.

If a modern volunteer army is a mirror reflection of the society it represents, then might not a degree of national ambiguity impact on military leadership. Or, in the words of Captains Abraham and Robillard (U.S. Army) in their work "The Moral Dilemma of an Unjust War: A Junior Officer Perspective": "If I, as a uniformed member of the armed forces, find myself taking part in a conflict that does not meet traditional just war criteria for *jus ad bellum*, what do I do?"[23]

This degree of moral uncertainty is reflected in the case of First Lieutenant Ehren K. Watada (U.S. Army), one of only a handful of Army Officers who faces court-martial for refusing to serve in Iraq,[24] and in the similar case of British Flight Lieutenant Malcolm Kendall-Smith of

the Royal Air Force (RAF) who was sentenced to eight months in prison and dismissal from the service for the same offence. In his defence, Kendall-Smith argued that since Iraq had not attacked Britain or one of its allies, there was no *jus ad bellum* or lawful reason to invade and that he had refused an unlawful order.[25] These may appear to be isolated cases, but it would be prudent not to take the uncertainty of modern soldiers for granted. The Pentagon is reporting that more than 5,500 servicemen have deserted since the Iraqi war began, and *The Sunday Times* reported that more than 5,370 British infantry soldiers have been buying themselves out of the army in the past three years rather than be posted back to Iraq or Afghanistan.[26]

Consistent with this public uncertainty is the perplexity generated by the vast number of competing non-government organizations (NGOs) and humanitarian committees claiming legal jurisdiction and the right to challenge state policy in the conduct of ongoing military organizations. The voice of the ICRC as the official organ of the LOAC has been to a large degree marginalized by the phalanx of other competing humanitarian agencies, alternatively decrying "war crimes" in advancing the primacy of their selective agendas. For example, the 1987 Treaty Convention Against Torture (the centerpiece of international human rights law) was sponsored by the United Nations (UN) and not the ICRC. All of which masks the fact that the credibility and applicability of the LOAC is solely codified in the treaties and the customary practices of the signatory nations.

The lack of LOAC influence in post-WWII conflicts is as notably linked to the absence of accountable state-based adversaries as the combat now witnessed in Iraq, Afghanistan, and Lebanon is remarkable for the absence of any sectarian concept of humanity. Such conflicts engaged in by non-state (ergo non-signatory) combatants reflect an amorality that defies the original sources of law within LOAC documentation dating from 1907 to 1992. Logically, states may claim that the privileges (not legal rights) that may be extended to sectarian combatants are based on the reciprocity of expectations inherent in the adherence to the LOAC, and that sectarian combatants who do not so abide forfeit their entitlement to said privileges. If this were not the case, then the original purpose of the selected conventions would be rendered nonsensical. Similarly, with a shift of "ownership" of the LOAC away from state practices and the ICRC, as in the case of the Ottawa Treaty on Land Mines or the creation

of the International Criminal Court, and towards politicized UN and other NGOs, states may rightfully query who owns the Laws of War and challenge their inherent uncertainty and relevance within this new age of sectarian amorality.

This reality supports the argument of Kenneth Anderson and his query, "Who Owns the Rules of War?" and his thesis that "the war in Iraq demands a rethinking of the international rules of conduct. The outcome could mean less power for neutral, well-meaning Human Rights Groups and more for big-stick-wielding states. That would be a good thing."[27] This equally supports an argument that today's combat environment tacitly assumes and permits the weaker side to systematically violate the LOAC while holding the stronger side to a higher and legally accountable standard. Based on the example of the internationalist bias imbedded by humanitarian rights organizations into the 1977 Protocol (1), which allows irregular forces (sectarian forces operating without uniforms) to hide amongst the civilian population, one can argue Anderson's point that "The trend of the last twenty years which has shifted 'ownership' of the laws of war – the ability to shape and interpret them – from leading militaries to international NGOs has gone too far, and 'ownership' of the laws of war and their meaning needs to shift partly back to the 'state practices' of leading democratic sovereign states that actually fight wars."[28]

Similarly, Britain's Defence Minister, John Reid, grasped the nettle in April of 2006 when he suggested that it was time to re-examine the Geneva Conventions and the LOAC. "If we do not," said Reid, "we risk continuing to fight a 21st century conflict with 20th century rules."[29] He pointed out that the West was beset with an outdated legal system that simply cannot address an enemy that actively targets civilians as a modus operandi and asserted that "all the conventions, declarations, laws, rules and protocols created after World War II…are inadequate to cover the world that exists now."[30]

Reid highlighted three key areas of uncertainty, which transcend all operational levels of command. The first is the challenge of the concept of imminence, which permits the use of pre-emptive force in self-defence against imminent attack and the second revolves around the thorny issue of military intervention for humanitarian purposes. While Machiavelli stated in *The Prince* (1513), "a necessary war is a just war," both concepts of pre-emptive self-defence and militant humanitarianism strain the

"conventional" raison d'être for the deployment of military forces and challenge the *jus ad bellum* of an expeditionary force intent on combat. Reid's third point, which has served as a rod for the British government's own back, is the ubiquitous issue of the status of captured sectarians. Unlike prisoners of war in the Geneva sense, they do not conduct operations in accordance with the laws and customs of war, but do promote self-destruction and amorality as military strategy; posing the need for a new special status of "dangerous" captive, either under the rubric of "unlawful combatant" or possibly "enemy combatant," but most certainly requiring an innovative definition of legal status, rights, treatment, and even more perplexing-disposition.[31]

The British case is illustrative of the moral dilemma within western armies because it demonstrates how multiple uncertainties can lead to ethical and tactical paralysis on the battlefield. At the same time that Reid was challenging the status of combatants, he was ordering an urgent review of whether the Ministry of Defence (MOD) was fulfilling its duty of care to the soldiers facing numerous criminal charges for their actions in Iraq. Senior army doctors have warned the government that troops in Iraq are suffering levels of battle stress not experienced since the Second World War because of fears that if they open fire on an insurgent they will end up in court. As *The Sunday Times* explained, "The unpopularity of the war at home and a belief that firing their rifles in virtually any circumstances is likely to see them end up in court are sapping moral." Troops in Basra were faced with clear warnings by the Royal Military Police (RMP): "They make it clear that any and every incident will be investigated. It is also made clear that if you shot someone, you will face an inquiry that could take up to a year."

It was the high profile collapse of many of these courts-martial that led to Reid's action in the face of damaged morale and the charge that senior military and political leadership were betraying the soldier for careerist or political optics. In the words of Corporal Scott Evans, the most senior of the paratroopers acquitted of such charges: "We've been badly hung out to dry. The Army is your family, isn't it? You expect your family to look after you through thick and thin, but they betrayed us. It seems that in the army's eyes you are guilty until proven innocent."[32]

The full implications of this sense of moral and ethos betrayal are beyond the scope of this chapter, but suffice it to say that the specious prosecution

of British soldiers triggered a grass-roots movement to federate the British Army. As historian, Richard Holmes makes clear, "Politicians control what senior officers say more than they did in the past. They simply can't say what the problems might be. Someone has to do it. I am an unlikely rebel – I served 36 years – but I do think there is a vacuum and it needs filling in a responsible way."[33] The fact that the vaunted British Army may unionize as a direct result of the uncertainty of who advocates for the soldier in both peace and war indicates that no western military culture is immune from the impact of this type of operational dislocation.

Operational dislocation may serve as the generalized term, which best expresses the challenges to the moral dimension – fear and uncertainty – which pervades the asymmetrical battlespace. Media releases are replete with numerous ethical failures from Abu Ghraib to the latest revelations of the Haditha killings, and feature allegations of torture, rape, murder and the abuse of prisoners and non-combatants. The common themes of fear and uncertainty link each of these cases, and serve to query the veracity of a military ethos espoused, though not universally practiced, by western armies.

One finds little clarity for example, in the belated direction by General Peter Pace, Chairman of the Joint Chiefs, that in the wake of the Haditha killings, U.S. Marines be given ad hoc lectures on ethics and values, which he suggested, "should provide comfort to those looking to see if we are a nation that stands on the values we hold dear."[34] Or, one finds little comfort in the testimony of the Haditha accused who contend that they believed themselves to be under a concerted attack, and entitled under their ROE to use lethal force in the form of shooting men of military age running away from the site of an improvised explosive device and in using the technique known as "clearing by fire;" which as one accused asserted, "You've got to do whatever it takes to get home. If it takes clearing by fire where there's civilians, that's it."[35]

The Abu Ghraib imbroglio equally confirmed that though armies may contain yahoos, a consistent pattern of officer cover-up dispels the theory of a few bad apples and implies that failings in military ethos are systemic. *The Jones Report*, for example, which found numerous officers "responsible" for Abu Ghraib but not legally "culpable" serves as exemplar of a careerist collapse in the espoused concepts of command responsibility. Similarly, the recent case of U.S. soldiers having allegedly murdered three

Iraqi prisoners using a direct order from their Commanding Officer, Colonel Michael Steele, of *Black Hawk Down* fame, to "kill all military-age men" as their ROE defence, challenges the assumptions we presently hold about the moral ascendancy of our military ethos.

It also focuses the legal spotlight on the often opaque and variable ROE exercised differently by coalition armies within the asymmetrical battlespace.[36] Equally complex is the fact that Sergeant Lemus, who has not been charged with the killings, said, when asked why he did not try to stop the killings, replied "simply that he was afraid of being called a coward." He stayed quiet, he said, because of "peer pressure, and I have to be loyal to the squad."[37] This reflects the equally difficult question of misplaced group loyalties that collides with the critical unit cohesion, which sustains soldiers during the rigours of combat.

Of the numerous facets of ethical uncertainty within the asymmetrical battlespace none has proven as problematic as the contentious issue of ROE. They are now a double-edged sword – on the one hand they serve to hold individual soldiers accountable for their actions, and on the other hand, the imprecision of ROEs are being used by civilian lawyers to defend soldier clients. The difficulty is that the concept of such "Rules" has transcended the divide between *Operations Other Than War,* within which it has a clear function, and combat operations, within which ROEs inherently compete with command authority. This generates ethical and tactical uncertainty as this rules-based pocket card serves to devolve all responsibility for consequences from Commanding Officers, upon whose delegated authority a soldier acts, to the lowest levels of command.

While there is no refuting the place of ROE, the difficulty is articulating, if not differentiating political control and direction of the military. The challenge is that while political and military ROE considerations may align at the strategic level, friction is inevitable if there is a political attempt to micro-manage at the operational or tactical level. As Simon Lunn, Secretary General of NATO, pointed out in a recent address, "One of the areas where political and military considerations can frequently collide are in the definition of 'rules of engagement' (ROE) for operations in which military forces are involved. ROEs are guidelines for the armed forces, which define their scope of action in carrying out their mission, taking account of the political context. Many of the caveats that restrict

the operational effectiveness of Alliance forces in operations like Afghanistan derive from ROEs imposed by individual nations."[38]

The problem is that ROEs have become the purview of lawyers focused on legalities and political optics, and the imposition of a morass of conflicting international legal and jurisdictional distinctions linked to ROE. Simply issuing a soldier an ROE pocket card will do little to fix the problem of violations of the LOAC, but it does, as the British soldiers discovered in Iraqi, assist in fixing the blame.

As witnessed to date, alleged violations of ROE will be assessed as a matter of law, by lawyers who know nothing of combat, and without any contextual discrimination such as in the *Doctrine of Double Effect* (unintended consequences). This legal perspective will likely focus, as in the case of Abu Ghraib, on legally culpable and not on the onus of command responsibility. Are Canadian soldiers, for example, individually accountable to the International Criminal Court for war crimes or crimes against humanity? What takes jurisdictional primacy: ROEs, the National Defence Act, Criminal Code of Canada, or prosecutions under the LOAC? Like the British or American experiences in Iraq – might not the Canadian government hang their soldiers out to dry? While not a problem in non-combat operations, in the asymmetric battlespace all tactical and ethical uncertainty must be dispelled in the certainty of the commander's responsibility and accountability for issuing tactical orders and the opening fire policy. This transition has yet to occur in Afghanistan as Canadian soldiers are not permitted to patrol with American forces because of a legal concern over variances in ROEs, and as coalition headquarters struggle to align different national ROEs, while, in the midst of combat, posing the awkward question of who is responsible for the training for ROE – is it a legal or a leadership function?

A Road Map To Hell and Back Again (Structuring and Training for Ethical Certainty)

General William Tecumseh Sherman is often credited with the admonition that "War is Hell." If we accept responsibility for sending our sons and daughters into Hell then we owe it to them to provide an ethical road map to get them back again. History tells us that everyone exposed to war is scarred to some degree and risks moral damage fighting on our behalf. It behoves us to ensure that we fully comprehend the ethical challenges

facing soldiers within the moral dimension of asymmetrical warfare and shape that environment through structure and training so as to minimize ethical uncertainty in its many guises. We must arm our soldiers with an ethos, which in the face of horrific evil remains a living spirit – one that finds full expression through the essential unity and ethical certainty of values, beliefs, expectations, and conduct. Establishing an ethical culture is a fundamental precondition to the perpetuation of such a military ethos.

At the national level, structuring ethical certainty and trust in senior political and military leadership begins with the social contract between the soldier and the state. These social contracts tend to be implicit, unbalanced, and one-sided. Volunteer members of Western armies enlist with the understanding of unlimited liability in the defence and service of the nation. It is essentially a bargain struck between the soldier and the government, which no one discusses openly since the end of the Second World War; it has been a bargain honoured more in the breech than the observance. While the soldier knows his duty, the Government implicitly undertakes not to put him or her into impossible situations, to equip them adequately for the tasks selected, to train them to face the anticipated challenge of modern war, and to properly and successfully sustain them with the reinforcements and materials they require. It also promises to care for them in perpetuity if they are wounded and to assist their families if they are killed in the service of the nation.

The *realpolitik* of the asymmetrical battlespace, as debated over strategic vision, manpower shortages, faltering public support, and soldier disquiet over cultural failings in ethics and leadership now brings these issues, as government moral obligations, into sharp focus. This presents an opportunity to reassess the social contract and, since trust in government is now a soldier issue, advance that social contract to an explicit or written form that will clearly articulate the ethical values and beliefs that serve as the bond between the defender and the defended. Such a written contract will not only codify and specify the support obligations to the soldier, but it will also establish the soldier as the direct agent of the state and establish a clear line of ultimate responsibility between the execution of state policy (an expeditionary force) and the citizenry whom the soldier explicitly represents (those who sent it). Unlike the Vietnam veterans who were dislocated from their society, a written social contract would ensure a returning soldier either a thank you or an apology.

The essence of this shared sense of national responsibility is found, for example, in the text of the Israeli Defense Force (IDF) "The Spirit of the IDF: Values and Basic Principles." This document contains the "identity card" of every member of the Israeli Defense Forces, which articulates the values, ethical code, and the commitment of the IDF to the national ethos. While other nations, such as Canada, have their associated publications, (*Duty with Honour: The Profession of Arms in Canada*), the Israeli text is unique for its unequivocal focus on combat, as found within the *Purity of Arms*, provision: "The IDF serviceman will use his weapon and his force only for the purpose of subduing the enemy to the extent necessary. He will restrain his use of force so as to prevent unnecessary harm to human life and limb, dignity and property." Or their statement on individual responsibility to act: "The IDF serviceman will be involved in no conspiracy to cover up any offence or mishap, and will not accept any proposal to be party to such a conspiracy. When confronted with an offence or mishap, the serviceman will act as is reasonable and lawful to correct the aberration."[39] With the implicit nature of these specific values having failed publicly in Iraq, it is now time to clearly articulate the key facets of a military ethos needed to meet the challenge of moral asymmetry.

At the operational level, state and NGO policies must re-align with respect to the new realities of the asymmetrical battlespace. As discussed previously, the "letter" of the LOAC needs to be revised by its official agent, the ICRC, to reflect the ambiguities of 21st century warfare and to accommodate the new categories of sectarian combatant so that the humanitarian "spirit" of the LOAC is not lost. The existent friction generated by the uncertain status of enemy combatants has a corrosive effect on ethical climate and it degrades unit cohesion and operational effectiveness. The absence of a redefined "dangerous combatant" category or any reciprocity of POW expectation needs to be addressed urgently, for the past offers a clear warning of the dangers of fighting an amoral enemy who intentionally violates our values.

Canadian soldiers in Afghanistan are intimately aware of this disparity in quarter offered and expected and have assessed their survivability as a Taliban captive as negligible; to the point of committing their comrades to ensuring that they not be taken alive. This perception of "field justice" raises the spectre of the abandonment of restraint, repri-

sals, and battlefield atrocities. The saving grace is that the warrior code acknowledges that any such dishonour leads to moral degradation. The warrior ethos will not fundamentally permit killing with impunity for it corrupts character. As pointed out by Shannon E. French: "Warriors need the restraint of a warrior's code to keep them from losing their humanity and their ability to enjoy a life worth living outside of the realm of combat."[40]

This moral degradation is also intimately linked to post-traumatic stress disorder (PTSD). Psychiatrist Jonathan Shay, in his work on Vietnam veterans, stresses the importance of understanding "the specific nature of catastrophic war experiences that not only cause lifelong disabling psychiatric symptoms but can ruin good character."[41] His findings indicate that the most severe cases of PTSD are the result of wartime experiences, which are not simply violent but also reflect the betrayal of "what's right". From this work we can project that veterans who believe that they were directly or indirectly party to dishonourable behaviour – perpetuated by themselves, their comrades, or their commanders "will be tortured by persistent nightmares and, may have trouble discerning a safe environment from a threatening one; may not be able to trust their friends, neighbours, family members, or government; and will have problems with alcohol, drugs, child or spousal abuse, depression, and suicidal tendencies."[42] The sobering paradox is that fighting for one's country can render one unfit to be its citizen. Recent American studies showed that 60 percent of Iraqi veterans who screened positively for generalized anxiety, depression, and PTSD had not sought treatment; a fact which bodes ill for all coalition forces, and a reaffirmation that a healthy ethical climate is an operational imperative.[43]

For all its inhumanity, war is a profoundly human enterprise which bonds soldiers together in supporting group structures in direct proportion to their level of fear and uncertainty. In peacetime, militaries encourage this type of cohesion, which is often expressed as group loyalty, as an assumedly beneficial and transferable contribution to unit cohesion in war. As in the earlier, Sergeant Lemus "I must be loyal to the squad" claim, such misplaced group loyalties are tantamount to turning a blind eye to wrong doing under the rubric of – my buddies right or wrong. This bond of "loyalty" is considered by many to reflect a timeless battlefield condition referred to romantically as the "band of brothers" effect; often quoting

Shakespeare's Henry V: "We few, we happy few, we band of brothers; for he to-day that sheds his blood with me Shall be my brother." Without, of course, quoting the final line – "be he ne'er so vile;" while Shakespeare may have believed that a selfless commitment to the crucible of combat would serve to redeem the vilest of men, we know from past experience that such a failure to act simply reflects the lack of a healthy ethical climate as the supporting precondition whereby soldiers display the morale courage to act by "doing the right thing."

Quite simply, be it peace or war military ethics is universally about right and wrong – and doing what is right. Most armies have, at the very least, codified a moral expectation of action in light of wrongdoing, but inaction through fear of reprisal is the norm. As the cover-ups and belated values-training linked to the Haditha killings testify, most Western armies assume that their training systems have correctly inculcated the necessary value-sets without the additional requirement for a separate and structured ethics programme. Though the Canadian Army makes it a legal imperative to act and a chargeable offence for failing to do so, the Somalia scandal and the disbandment of the Canadian Airborne Regiment demonstrates that we are not immune from this assumption, and we have subsequently moved to correct this cultural shortcoming. Yet, the reality is that "soldiers always know" and no garrison or battlefield impropriety goes unnoticed. The tragedy is that any connection to the "dishonourable behaviour," emotionally scars both the perpetrator and the collaborators for having violated the warrior code.

Similarly, the needs of the warrior code are focused specifically on the soldier's conviction that he is not only participating in an honourable event, but also that he needs to respect those he fights. Though commonly seen in Europe in WWII, it was not the case against the Japanese. Jonathan Shay links this 'need to respect" with his argument that restoring honour to the enemy is an essential step in recovery from combat PTSD. "While other things are obviously needed as well, the veteran's self-respect never fully recovers so long as he is unable to see the enemy as worthy. In the words of one of our patients, a war against subhuman vermin 'has no honor'. This is true even in victory; in defeat, the dishonouring absence of human themis [shared values, a common sense of 'what is right'] linking enemy to enemy makes life unendurable."[44]

The complicating factor is that restoring honour to an amoral enemy, within a morally asymmetrical battlespace, is easier said than done; and visualizing this type of sectarian enemy as "worthy" will be a challenge. The secret is that in this potential void of asymmetric morality, soldiers must be buoyed by a vibrant ethical culture and sustained by an aggressive ethical training regime. This highly structured and training-focused ethical culture must be shaped to ascribe mutually supporting standards of conduct, while accepting the imposition of inequitable and unreciprocated battlefield restraints. This supportive ethical culture empowers soldiers to know – what right looks like – and encourages them to 'honour their enemies' as best they can, in a process of "hating the [evil] act but not [retaliating against] the [captive] man." This provides a values-based lifeline whereby soldiers can withdraw from war and reintegrate themselves into society. The warrior's code and the ethical certainty which underpins it, continues to grant nobility to a warrior profession operating in an asymmetrical battlespace, while still allowing the soldier to retain their self-respect and the respect of those they guard.

Can This Effect Be Achieved? (In search of a way ahead)

Based on an all-fronts critique on the war on terror, there is little cause for optimism at the strategic or operational levels. Yet, at a tragic cost, Secretary of Defense Donald Rumsfeld's failed tinkering with the American "Way of War" in Iraq has reaffirmed Napoleon's maxim that "God sides with the big battalions" and the Soviet Cold War credo that "quantity has a quality all its own." While removing the combat stressor of under-manning and multi-tasking through an injection of additional forces would vastly improve individual soldier security, resolve, and certainty; presently, it appears probable that NATO expeditionary forces are more likely to endorse operational withdrawal and the strategy of military isolation than generate any revival of large standing armies. Notwithstanding that eventuality, the principle lesson re-learned is that in war you cannot trade manpower for technology for they are inextricably linked. Technology can neither hold ground nor can the inherent asymmetry of sectarian "total" warfare be countered by a politically measured "limited-war" response; which by its nature, simply exposes the soldier to heightened uncertainties, ethical challenge, and as our *centre of gravity*, positions the soldier for defeat.

At the geo-political level, the moral crises of asymmetrical warfare indicates a requirement for Alliance or individual State policy to re-assert itself in the face of the plethora of competing NGO structures claiming quasi-legal status, moral authority, and threatening sanctions over the LOAC. This would require Western military nations to shun the many disparate and politicized human rights agencies emergent under the aegis of the United Nations et al. In addition to revising all facets of LOAC documentation to meet 21st century realities, exclusive LOAC ownership and management authority must be reasserted also and universally mandated within the IORC. Failing this, State expeditionary force policies, which affirm the original goals, spirit, and intent of the Geneva Conventions, but which reflect the reality of the asymmetrical sectarian battlefield, such as the possible designation of "dangerous detainee" over "prisoner of war," need to be declared and actioned independently. At this point in time, NATO partners do not appear to have the political will, unity, or clarity of vision to innovate a 4th generation war strategy.

The greatest scope for innovation rests at the tactical level, where military ethics training can be tailored to meet the challenge of ethical uncertainty of the asymmetrical battlespace and the soldier correctly positioned for operational success. Military ethics is the glue that holds all facets of an Army's *Social Capital* (human dimension) together. Yet, as such, it constitutes the Achilles heel, the will to fight, and *Centre of Gravity* of Western military culture; and remains the focus of sectarian attack. The Canadian Army Ethics Programme is designed to meet that operational threat by creating an ethical adjunct to the Canadian way of war, which articulates an internalized combat ethos (Warrior's code) that defines how we fight-no matter "how vile" the enemy or how amoral the battlefield. To do anything less is to accept demoralization, defeat on the battlefield; and a dysfunctional return to Canadian society.

In concert with the new demands of expeditionary force employment, historically, armed forces have worked hard to assert their professionalism and cultural relevance to the State by serving as a mirror reflection of the society they represent. Unfortunately, the dawning of the new century has made public in Canada major ethical crises in all strata of social elites such as government, corporate business, professional sports, universities, the Church, and the Canadian Forces. Similarly, the graphic lessons from the Somalia scandal and the ethical uncertainties inherent in the

asymmetrical battlespace confirms that while ethical leadership and a healthy ethical climate remain the critical pre-conditions to unit cohesion and operational effectiveness, we can no longer assume that our military ethos (values and beliefs) is being naturally inculcated within our Army culture nor can we take for granted that all members of our civilian-military team: comprehend equally their ethical obligations and responsibilities, have the morale courage to act ethically – free from the fear of reprisal, or enjoy an ethically supportive culture whereby doing the "right thing" is universally expected, recognized, and rewarded.

The Canadian Army Ethics Programme (AEP) came into effect under the authority of the Chief of Land Staff (CLS) in April 2006. While it is designed to comply fully with both the spirit and the letter of the Canadian Forces Defence Ethics Programme (DEP), it has been specifically customized to meet the unique cultural and workplace demands faced by members of Land Force Command (LFC). Similarly, the AEP has been "operationalized" to address the enhanced ethical challenges faced in both garrison and while on operations. The detailed governance and accountability framework for the AEP is articulated in Land Force Command Order (LFCO) 21-18.[45] The programme aims of the AEP can be visualized in the following hierarchy: ethical awareness, ethical decision-making, the obligation to act, and demonstrable ethical leadership.

Be it peace or war, military ethics is about right and wrong and doing what is right. Like Diogenes who, with his lamp went through the streets of Athens in search of honest men and women, the AEP is the medium through which Canadian soldiers are to be "drawn to the light – of doing right."

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The War on Terror: Ethical Considerations is the first volume of selected papers drawn from the 7th Canadian Conference on Ethical Leadership held at the Royal Military College of Canada on 28-29 November 2006. This volume provides a range of perspectives and insights into the murky world of countering terrorism. To that end, this book offers challenging topics intended for discussion in preparing military members to recognizeand understand the complexity of operating in the contemporary security environment with regards to terrorism. Despite the non-discriminate, savage methodology of terrorism, a key theme that resonates in this volume is the requirement for nations to counter this threat within democratic values and ideals, as well as in an ethical manner.

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