

Université de Montréal

Does just war theory need to get with the times?

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Abstract (Français)

La théorie de la guerre juste a fourni les principes qui forment la base de nos intuitions concernant l'éthique de la guerre pendant plus de mille ans. Cependant, la nature de la guerre a changé drastiquement dans les derniers 50 ans. Avec les avancés technologiques, tous les aspects de la guerre, du champ de bataille aux armes utilisées, sont aujourd'hui très différents. Ce qui est proposé dans ce texte est que les principes de *jus in bello* sont malgré tout encore adéquats pour les guerres contemporaines.

Spécifiquement, en utilisant une analyse historique, ce texte argumentera contre la *condition de l'urgence suprême* de Michael Walzer pour proposer une approche qui laisse les principes de bases du *jus in bello* intacts. Ce texte suggère que les théoriciens de la guerre juste se penchent sur la question des armes prohibées pour avoir un impacte positif dans le domaine de l'éthique de la guerre.

Mots Clés : Armes, Urgence Suprême, *Jus in Bello*, Histoire de la Guerre, Philosophie

Abstract

Just war theory has been provided the basis for thinking about the morality of war for the past thousand years of Western history. However, the nature of warfare has dramatically altered in the last 50 years alone. With the advent of new technologies all aspects of warfare from the nature of the battlefield to the types of weapons used have changed. What this paper will argue, through a historical analysis of these technological changes, is that the principles guiding actions taken in war, the principles of *jus in bello*, are well equipped to deal with these changes. More specifically, this paper will argue against Michael Walzer's famous *supreme emergency condition* and suggests instead that just war theorists should instead be concerned with weapons prohibitions, not in undermining the established principles of *jus in bello*, in order to have a favourable impact on contemporary warfare.

Key Words: Weapons, Supreme Emergency, *Jus in Bello*, History of Warfare, Philosophy

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Introduction

To say that technology has drastically altered the ways in which we engage in every facet of our daily lives is such an obvious statement that it doesn't even deserve qualification. Unless you live an intentionally detached a hermetic life in the woods your life is constantly touched by modern technology and ways of being. Nowhere is this more apparent than in the ways we engage in warfare. In the last half-century alone, warfare has dramatically changed in nature. We have gone from battlefields and trench warfare spanning a few hundred meters to autonomous robotic warriors capable to flying themselves across numerous international borders and returning to home base in one refuelling. Given the changes in the ways modern warfare is waged an obvious question comes to mind: Do our moral theories regarding just conduct in war have the capacity to deal with these changes in the nature of warfare?

The history of just war theory spans the last thousand years of Western civilization and, not surprisingly, many changes to the original principles have happened over this time period. Notably, the idea that the authority to engage in war is granted by God to a sovereign has been altogether abandoned in modern secular societies.¹ However, what is somewhat surprising is that the first aspect of just war theory to be developed, the principles governing the actual practice of war, *jus in bello*, have been its most stable components. The two principles that have been reiterated time and time again (stated in their most abstract forms) are *discrimination*: the distinguishing between those targets that are allowed and those that are prohibited, and *proportionality*: the use of minimal force for achieving a military goal. Different authors have argued for different interpretations of these rules, but no just war theorist, religious or secular, has argued for a version of just war theory that did not include these two basic principles. The foundations of just war theory seem to have survived through so many technological and cultural innovations that they are now solidly engrained in our common morality. However, with Michael Walzer's most recent and highly influential revival of just war theory in the 1970's

¹ James Turner Johnson, "Just War, as It Was and Is," *First Things* (2005): 14.

certain additions to *jus in bello* may risk undermining the applicability of the foundational principles of proportionality and discrimination. This paper is, very generally, arguing for a traditional reading of the basic principles of *jus in bello*, while at the same time arguing that changes to just war theory should come at the level of more practical considerations. More concretely, just war theory needs to take new technologies, which affect the ways in which wars are fought, into account, while preserving the place of the basic tenets of *jus in bello*. In so doing the basic spirit of just war theory will be maintained, that of limiting the destructiveness of war, while remaining relevant in the future.

Organization

In order to argue persuasively that the basic principles should be safeguarded a cursory look at the history of warfare will be undertaken. Obviously the last thousand years have seen many changes in the ways wars have been fought but for the purposes of this project a more limited timeline has been set at the end of the 19th century. The choice of any specific date is arbitrary in the sense that no date can be plausibly set for the start of the changes that would drastically alter the nature of warfare from those changes that preceded them. However, the beginning of the 20th century and WWI more specifically seems a good time to start our investigation as it corresponds roughly to the start of the industrial revolution, which would initiate our reliance upon mechanization and automation in all spheres of life, beginning with the way we fight wars. The first chapter of this paper will introduce the basic concepts of just war theory focusing on the principles of *jus in bello*; then part one will move on to deal with the changes to warfare that were the direct result of the industrial revolution and focusing on the two World Wars.

The changes that are the focus of part one took place in many different spheres including agriculture, communications and transportation as well as weaponry but they were all due to technological advancement in some way, for the first time, large armies were able to attack one another with long distance weapons. It is not surprising that the first attempts at

international cooperation with the aim of establishing a body of laws that would be directed at warfare were developed during this time period. The Hague (1899) and Geneva (1864) conventions, which have been modified and combined since their first inceptions, were developed when the first consequences on modern weaponry were being felt on battlefields across Europe. It should be noted that the attempts at codifying humanitarian laws in the international community are not a direct reflection of the intellectual/academic attempts at establishing the moral principles related to warfare, although they overlap on many key points. This paper will focus on the moral literature and not on the significant body of international law that has been developed and discussed at length by legal scholars and law makers.

Chapter 2 will deal more specifically with new developments in weapons technologies that built upon existing technologies used in the two World Wars, notably: smart bombs (precision guided munitions), biological weapons, non-lethal weapons, robotic warriors, and others. These new weapons technologies force us to reconsider our moral evaluation of weapons as such, weapons have traditionally not been banned in just war theory (although they have been subject to bans in international law); instead, their use has been restricted to legitimate targets. One problem with leaving weapons regulation out of the debate within just war theory is that the types of weapons available determine to a large extent how and which wars are fought. New weapons, it will be argued, should be subject to critical debate regarding their admissibility in warfare but looking at new weapons has a secondary importance for just war theorists because this debate forces us to pay attention to new questions regarding who is a legitimate target in war and what rights we accord to non-traditional combatants. These debates will be more directly addressed in part four.

Before turning to these interesting questions in part four, part three will address the contemporary debates in just war theory regarding who is a combatant and whether or not it can ever be justifiable to directly attack non-combatants. This literature is important for the question of restricting weapons because those who support the possibility of attacking non-combatants

cannot argue convincingly against the development of indiscriminate weapons. This section will mostly be concerned with countering Michael Walzer's argument for what he terms the "Supreme Emergency Condition" in order to argue that his proposed amendment of just war theory undercuts the principles of discrimination and proportionality and, consequently, leaves *jus in bello* open to abuse making it less useful as a guide to our actions. Once this element of Walzer's theory has been successfully argued against² the questions of the contemporary application of just war theory to problems like terrorism and guerrilla warfare are taken up in part four. This section's aim is to test how the principles apply to actual cases of warfare against non-state aggression that does not fit easily into the mould of traditional warfare. Questions such as: who is a legitimate combatant in these cases and how a state may counter non-state actors who pose a threat to the security of its citizens will be addressed. This debate will bring the question of weapons back to the forefront of the discussion because the current developments in weaponry are focused on these types of threats and our moral assessment of the attempts to deal with these cases will determine what kinds of weapons are continued to be developed and produced in the future.

With the threat posed by war mounting as our ability to kill one another improves we cannot afford to be complacent on these issues. Our politicians speak the language of just war saying that such and such a campaign was unjustified for certain reasons. Therefore, it is imperative that we arm just war theory with the tools necessary for guiding policy makers in our society so that the threat of war becomes less rather than more acute.

Part 1: History

1.1 What is Just War Theory?

² It should be noted that only Walzer's position relative to weapons prohibitions and the Supreme Emergency are at issue in this paper. His stance on just war theory more generally is accepted.

The history of humanity is littered with wars of all sorts that were carried out for a host of different reasons, resulting in death and destruction that has rightly shocked the consciousness of mankind. The realists among us exclaim that humans are naturally violent beings who will conduct war as long as we exist and deny any attempts at creating peace in our world. The pacifists, on the other side of the coin, recognize in humanity a desire for peaceful cohabitation and decry the use of war to solve political problems. In between these two extremes are just war theorists. The latter embrace both the peaceful and violent sides of human nature and try to reconcile them by limiting the potential resorts to war and limiting its destructive capacity. In other words, as the Catholic Church has been saying for over a thousand years since the time of St. Augustine of Hippo, just war theory begins with a “presumption against war”, which can only be overturned if certain conditions are met.³

While the Church has always been concerned about what Christians can morally do to other Christians, in order for just war theory to have any force in the international realm with its various religious groups a secular version of just war theory was needed. The first secularization of just war theory came with Hugo Grotius’ publication of three books, *On the Law of War and Peace*, in 1625. This began the move for a system of international laws binding all states regardless of religious affiliation. Since the time that Grotius was writing in the 17th century warfare has dramatically changed and continuously offers up new challenges to the just war theorists who attempt to limit its destructive capacities. The 20th century alone provides a huge array of wars for study and analysis starting with traditional wars of standing armies facing each other on open battle fields, moving to the trench warfare of the first and second world wars and progressing through to the jungles of Vietnam and Korea . The 21st century has seen yet another technological leap that was unconceivable even 15 years ago with the proliferation of new “smart” bombs and other methods of targeted killing used in the “war on terror”. So, while the history of warfare provides a huge arena for analysis this paper will focus on the relevance

³ Johnson, "Just War, as It Was and Is," 18.

of just war theory as applied to the 20th century and beyond, which in itself provides far too much material for the scope of this paper. The ensuing analysis of the history of warfare in this period will focus on the technological advances that characterized the move from one form of warfare to the next. Hopefully, what will come out of this discussion is material that will show that although the basic principles of just war have been around since the 17th century in their secular form, they are still useful tools for the 21st century and beyond.

An obvious question at this point is, what are the principles of just war theory and how do they work to limit the negative effects of war? The modern theory of just war comprises three distinct but related areas that work together to determine which types of war are justifiable (*Jus ad Bellum*), which acts of war are permissible (*Jus in Bello*), and finally how to re-establish peaceful coexistence once war is over (*Jus post Bellum*). The moral rules of war are expressed as positive rights that states possess. So, for example, a state has the right to defend itself and its citizens against attack from an aggressor. This right stems from the state's duty to protect the life and liberty of its citizens. In this way just war theory is not simply a list of rules that states agree to follow based on some kind of consensus. In other words, it is not based on a consequentialist calculation that judges that following the rules is in everyone's best interests, even if this turns out to be the case. Just war theory does not depend on states coming to an agreement the way they might sign other international agreements in favour of, say, free trade. The rules of just war would be applicable morally even if no one else obeyed them because they are based on fundamental values, such as freedom, and sovereignty, that all nations need in order to function justly. The question remains as to whether sub-state groups and inter-state players have the same rights given they do not always act for the protection of a community. These questions will be addressed subsequently. For the moment we will turn to the basic rules of engagement that constitute *Jus in Bello*.

1.2 *Jus in Bello*: Discrimination and Proportionality

For now we will leave aside the interesting debates that surround *Jus ad Bellum* and *Jus post Bellum* and focus on the moral principles that underlie how wars are actually carried out. In laying out the principles of *Jus in Bello* most authors agree that which side is just and which is unjust in having resorted to war (if this is even something that can be determined) is irrelevant to applying the rules of engagement. The two basic principles that apply to both sides are discrimination and proportionality. The principle of discrimination, defined primitively, makes it immoral for a military campaign to target people who are not actively engaged in warfare. Who is defined as “actively engaged in warfare” will change depending on the situation, but the basic principle respects the immunity of at least some members of the society engaged in war. For example, at the very least children and babies cannot be held responsible for the actions of their government whom they did not elect and do nothing to support. This first criteria for conducting a just war campaign is absolute in its condemnation of attacks against people who pose no threat to the opposing forces. What counts as a “threat” will be addressed in part 4.

The second principle of *jus in bello* is consequentialist in nature. It says that whatever series of actions are judged necessary to the winning of the war these should be achieved with the least possible damage to the opponent’s forces and infrastructure. In other words, given military objective ‘A’ choose among the various options ‘x, y, z,’ for achieving this objective the one that will cause the least amount of damage overall, both to your own troops and infrastructure and the opponent’s. But proportionality is not just about creating the least amount of destruction for its own sake. Proportionality also respects the fundamental reason for having a unified just war theory in the first place. Without proportionality there would be no condition that took into consideration the desire to have fewer and less destructive wars in general and the desire to have peaceful international relations after the end of the fighting. If one side decimates the other so totally that there is no other side to speak of at the end of the conflict, then the spirit of just war has been violated, even in the unlikely scenario that total decimation creates a much shorter war with fewer overall casualties.

If discrimination and proportionality were the only principles affective in *jus in bello*, characterizing which tactics are allowed and which are prohibited would already be a complex task. There would already be room for debate about who is considered a legitimate target in war and who is a combatant. These debates will be addressed later on when discussing actual cases and how just war theory is applied to them. However, the complexity does not end at this level of theory. Secondary principles have been proposed by just war theorists to allow for certain breaches of the primary principles in specific circumstances. The reason for allowing these breaches to take place is due to concerns of applicability to actual cases of warfare. If proportionality and discrimination separately were the only principles at work, then it would be virtually impossible to fight a war justly. This is due to the absolute nature of the principle of discrimination. If the application of the principle of discrimination remained absolute, then only instances of war in which we could be certain that no “innocent” civilians were harmed would be justifiable; as such only wars in totally uninhabited areas (the ocean, the desert) would be possible. In order to get around this limitation the doctrine of double effect is applied to the principle of discrimination.

1.3 The Doctrine of Double Effect (DDE)

The doctrine of double effect (DDE) recognizes the fact that sometimes engaging in an action has positive effects, which are desired, as well as negative ones, which are foreseen but not desired. The DDE allows the action to be performed even with the foreseen consequences of the negative effect in the condition that four criteria are met. 1. The action performed is morally permissible in general. 2. The agent only intends the good effects of his actions and not the bad ones. 3. The bad effect is not a means to the good. 4. The good effect is proportional to or greater than the negative effect, incorporating the principle of proportionality into discrimination. As Brian Orend points out the DDE may seem “fishy” due to its technical nature, but, he reminds us, “it is an idea rendered complex by the complexity of the situation it

deals with.”⁴ An example will help to clarify this concept. Imagine a case in which a legitimate military target, say a munitions factory, is located in an industrial area of a city. Attacking the military target, which is normally permissible (criteria 1), will have the foreseen effect of destroying nearby factories and injuring or even killing factory workers. In this case criteria 2 and 3 are met because only the destruction of the factory is desired and not the collateral damage and the collateral damage is not the means to destroying the intended target. Criteria 4 may be harder to justify because it requires weighing the positive effects against the negative ones. The question that must be answered is whether the target’s elimination can justify the collateral damage inflicted on innocent civilians and non-military installations. This will depend on the amount and type of destruction caused. If the target is very important and the damage minimal, then it may well be justifiable.

The DDE is very important in that it allows modern warfare to take place in populated areas where destruction of property and life is always a foreseen effect of war. The technologies and means of fighting that have developed over the last century have had a dramatic effect on civilian populations during wartime. As Igor Primoratz notes:

At the outset of the twentieth century, the number of civilians killed in war was low relative to the number of soldiers killed: one civilian per every eight soldiers. By the end of the century, the ratio had been reversed: now eight *civilians* get killed for every soldier that falls in battle.⁵

This dramatic change in the proportion of civilians killed in wartime may lead just war theorists to question any leeway granted to the principle of discrimination such as the DDE. This problem will be addressed later, but for now let us turn to an examination of the wars that

⁴ Brian Orend, *The Morality of War* (Toronto: Broadview Press, 2006), 115.

⁵ Igor Primoratz, ed. *Civilian Immunity in War* (Oxford: Oxford University Press, 2007), 4. (Author's emphasis)

forever changed the ways of conducting battles in the technological age that is the twentieth century.

2.1 Modern Warfare: World War I contrasted with 19th century warfare

Although it would be artificial to claim that the First World War by itself marked a distinct change in the way of carrying out war there are, nonetheless, several key factors that distinguish WWI from earlier European wars. Moreover, there is an obvious reason for this change, namely, the industrial revolution. Along with key changes in society that are still being felt over a hundred years later, such as a reconfiguration of society from a mostly agricultural and rural one to an urban consumer one,⁶ warfare and the reasons for going to war would forever be changed. Max Boot in his book entitled *War Made New* describes the shift that took place in the late 1800's and early 1900's and he points out four closely related factors that changed how wars were carried out. The first of these factors was conscription, which increased the size of armies making it necessary to adopt new and stricter codes of conduct within the army itself. The second is the use of the train (widespread in Britain by 1840) and steamship to transport these troops across long distances, making it possible to wage wars more effectively in remote locations. The third is the use of the telegraph (invented in 1837) to coordinate movements of troops. And the fourth and probably the most important to the shift in war tactics was the development of new weapons such as repeating rifles and machine guns.⁷ The accuracy and range of the artillery used in WWI would have been unimaginable only a few decades earlier during the Franco-Prussian war (1870-71). The advent of machine guns made frontal attacks virtually impossible and forever changed the dynamics and destructiveness of warfare in the modern age.

⁶ Max Boot, *War Made New: Technology, Warfare, and the Course of History, 1500 to Today* (New York: Gotham Books, 2006), 110.

⁷ *Ibid.*, 196.

Two of the innovations that changed warfare are fairly straight forward, the technological innovations of the steam engine and the telegraph made it easier to move and communicate making it possible for large bodies of people to be controlled more effectively. Prior to these inventions conscript armies did exist but their effectiveness was limited by their ability to coordinate their actions. The combination of the large armies, able to be supplied with weapons and food at a rate hitherto unthinkable, and the weapons that these fighters were using made warfare in the 20th century bloodier and more destructive than ever before. The slaughter that was the First World War was so unprecedented that it is no surprise that it came as a shock to those who fought it; it is these men that we will be concerned with. The morality of war is not determined by the weapons being used, so let us now look at the impact of the one human change that characterizes the industrial revolution in warfare, conscription.

Prior to WWI armies relied heavily on cavalry to speed across battlefields and assault the opposing forces, followed by large bodies of infantry. With machine gun fire crossing the battlefield became impossible for troops and horses alike creating a “no man’s land” between the opposing forces. This type of weaponry also created an indiscriminate manner of killing compared to earlier techniques. The physical distance between troops on opposing sides of a battlefield widens dramatically with the increasing range of artillery firing capabilities. The type of soldiers engaged in battle along with this physical distancing would have a profound effect on the character of fighting.

It may be a romantic idealization of warfare prior to WWI to think of soldiers as chivalrous men acting based on a code of virtues in warfare. However, there is evidence to suggest that this is not an entirely false categorization; for example, even when machine guns were available “generals were intensely suspicious of these industrial death machines that upset traditional military doctrines and seemed to leave little room for individual feats of valour.”⁸ Soldiers prior to the mechanized era wore colourful uniforms distinguishing one side from the

⁸ Ibid., 152.

other. The idea of camouflage uniforms would have been unthinkable in an age when being dressed in this way could easily get you killed by your own side in hand to hand combat situations. The tactics of warfare have been forever changed by machine guns and further technological improvements resulting in the need to hide from the opposing side as opposed to confronting it openly. This hiding and lack of visibility of the opposing side leads to a dehumanization of the opponent. If you cannot see the other side and cannot witness the suffering being experienced firsthand, then you will be less likely to act in a way that minimizes this suffering. The choice to minimize suffering no longer resides in the hands of the individual soldier, as it did in closer proximity, but in the hand of the commander who chooses the target. This change will be addressed in greater detail in part 2 with the developments of new weapons. In the new ethic of the larger army soldiers cannot second guess the decisions of superiors or they risk the efficiency of the military complex as a whole. There are further psychological changes that have an impact on the way wars are fought in the 20th century.

Firstly, the new conscript armies needed to defend positions across a long perimeter such as the trenches of the First World War are not engaged in the same sort of fighting. The conscript soldier and the professional soldier of the previous century are not of the same breed. The conscripted men may in certain cases be people moved by a desire to protect their country, but since they are not given the choice of whether or not they wish to join the military, they are more likely to have divergent opinions on the benefits of going to war. The military must therefore present the war as one that is absolutely necessary for the survival of the country as they know it or the conscript will be a less effective killing machine. This is not to say that the knight did not recognize the horror of going to war, but generally these men were not sent to certain death on the front lines and they had something concrete to gain by heading out into battle.

Before WWI and the need for large conscripted armies those who went to war had something concrete to lose if they did not fight. Landowners tended to go to war in the cavalry

and bring along with them men from the general population as infantrymen equipped by the richer aristocracy. If the army failed the men risked damage to their personal property and families. Conscripts sent overseas do not have this type of direct motivation for going to war. In order for them to be convinced they must believe in the causes for the war. As Michael Walzer says, “it is the success of coercion that makes war ugly.” Without the ability to conscript a huge number of soldiers they would not have died in the trenches of WWI. Walzer argues that “soldiers die by the thousands at Verdun and Somme simply because they were available, their lives nationalized, as it were, by the modern state.”⁹ This is one instance where the principles of *Jus ad Bellum* become very important for the purposes of actually fighting a modern war. The justification of the war by the government and the armed forces becomes essential to troop retention and success in the war effort overall. That is not to say that convincing troops of the validity of the war they are fighting only became important in the 20th century. To the contrary, this was among the major motivations for the creation of the just war doctrine, as it was laid out by St. Augustine, in the first place. For Augustine the just war doctrine “was intended to be a workable ethical guide for the practicing Christian who also had to render unto Caesar his services as a soldier.”¹⁰ In a sense the just war doctrine was created in order to permit wars to take place in a religious context where they normally would have been disallowed. In the modern context the concern is not with allowing wars to take place but in limiting the recourse to war, as they are an unfortunate reality of our international relations.

WWI was important because it delivered brutality of a scope unheard of in the previous centuries of warfare and it necessitated a re-examining of the need to restrict the reasons for recourse to war as well as the actual methods employed in these wars. The creation of the League of Nations after WWI was surely an attempt by the international community to come to terms with the horror of the First World War. Whether the League Covenant was in line with the

⁹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 1977), 34-35.

¹⁰ Lynn H. Miller, "The Contemporary Significance of the Doctrine of Just War," *World Politics* 16, no. 2 (1964): 255.

traditional just war doctrine or not is of little importance. What is significant in the creation of the League and its Covenant is the fact that the issue of just war was finally being discussed in the international arena after a hiatus of over two centuries.¹¹ However, these discussions did nothing to restrict the violence that was to occur during the next World War. This is where the technologies only tested in the First World War would finally see the light of day and change the face of warfare as we knew it.

Before moving on to the next stage of technological changes that would change warfare let us take a moment to review the effects of the industrial revolution on the applicability of the basic principles of *jus in bello*. The basic principles of discrimination and proportionality are already becoming more difficult to apply with the distancing of opposing sides. This is not to say that they are impossible to apply, just that they need to be adopted into the mentality of the growing military complex by the different levels of command. Instead of individual soldiers making moral decisions on a case by case basis, commanders need to be aware of the effects of their decisions on the morality of war. Take discrimination, when the individual soldier can no longer see his target the chance that the discrimination principle is being violated augments. That is not to say that it is necessarily being violated and the same thing goes for proportionality. It is still possible to fight a mechanized war with only the minimal amount of force and destruction possible, however, this task becomes more difficult when a stalemate occurs between the opposing sides and new techniques need to be adopted to push through the no man's land of the trenches. What we mean by proportionality seems to have changed when comparing the battles of the pre-industrial age with industrial ones. The amount of destruction tolerated has changed with the methods of fighting. In WWI alone eight million soldiers were killed with twenty-two million wounded and millions more in civilian deaths.¹² Unfortunately these shifts were only the beginning, with the destructiveness of the Second World War far outstripping the First.

¹¹ Ibid.: 254.

¹² Boot, *War Made New: Technology, Warfare, and the Course of History, 1500 to Today*, 198.

2.2 World War II: The Second Industrial Revolution

Many of the inventions of the beginning of the 20th century would have a profound impact on the fighting of World War Two. They would build on and transform former methods of communication; transportation and targeting that were only touched upon in the First World War. Among these inventions are: “electrical generators, internal combustion engines, motor vehicles, airplanes, radios, telephones, radar,”¹³ etc. during this time Germany and Japan were harnessing these new technologies and building “the most advanced armed forces in the world” in order to reach their goals of domination.¹⁴ All the while, during the war interim period, the other major world powers (England, France and the United States) were more concerned with developing these technologies for commercial and individual uses.

Obviously with so many new inventions coming to the fore during this period there are many effect and not all of them can be touched upon in detail for the present purposes. For example the widespread use of the radio and television as methods of spreading propaganda would have an effect on the duration of the war effort despite extreme civilian death tolls and property loss. Without these tools motivating people to rally behind the war effort would have been very difficult. For our purposes here we will focus on the two technological leaps that had the greatest impact on the actual fighting of the war, differentiating it from the stalemate that characterized WWI; these being the tank and the airplane.

2.21 Tanks

With the First World War’s Western Front proving to be virtually impervious to frontal attack armies now needed a replacement for the age old “knight in shining armour.” They would get this replacement in the form of the tank. The first models tested during WWI were so fragile and prone to mechanical failure that they were not able to serve their intended purpose.

¹³ Ibid., 210.

¹⁴ Ibid., 211.

However, by the time Germany was invading France in 1940, Hitler had built up an impressive tank division with a commander at its head. The tanks in this division were worlds away from the WWI models and took advantage of other technologies of the day, including radio transmitters in every one to control strategic movements in the heat of battle. Although the allies had developed tanks themselves, in fact they were the first to develop them; they were not in preparation for a battle and were concerned more with building up fortifications than with offensive weaponry. The politics of appeasement and defensive strategy proved a fatal error for the French who saw their defensive system breached in what they thought would be a stalemate similar to that of 1914. The German conquest of France over a six week period in 1940 was not achieved due to their superior material resources; rather it was due to “their decisive edge in doctrine, training, planning, coordination and leadership.”¹⁵

The swift takeover of France had the effect of dramatically reducing the number of casualties suffered by the Germans compared to their experience in WWI. By the time of the French armistice in June 1940 the Germans had suffered 150,000 killed, wounded and missing soldiers. This number was equal to only one third of the casualties of a single battle fought in France during the First World War. However, the effects on the allied forces and the civilian population whose villages were being trampled by tanks was opposite in nature. Over 2.2 million allied soldiers suffered casualties during this period.¹⁶ In retrospect, although the Second World War would account for more wartime deaths than ever in the history of modern warfare up until that time, what makes it such a terrible massacre has little to do with military deaths and casualties. The percentage of soldiers killed in the Second World War actually declined in comparison with its earlier counterparts. The horror of the 55 million deaths of WWII stems from the number of civilian dead in comparison to earlier wars.¹⁷ These deaths

¹⁵ Ibid., 234.

¹⁶ Ibid., 233.

¹⁷ Ibid., 299.

were not the direct result of fighting per se but of targeted air raids carried out on civilian centers. It is to the development of fighter planes and heavy bombers that we turn next.

2.22 Airplanes

The major technological development that would shape fighting in the Second World War was the invention and amelioration of the fighter plane. Although the first airplanes were developed at the very start of the 20th century they were still in their infant stage during the First World War and were not effective enough to make a contribution to this war effort although they were being improved upon during this time. As Boot reports:

In 1914 the typical airplane was a biplane or triplane made of wood, cloth and wire. By the war's end in 1918 all-metal monoplanes were being produced that were recognizably modern in their design. Top speed of airplanes increased from 126 miles per hour in 1913 to 171 mph in 1920.¹⁸

Obviously, the usefulness of the airplane was not lost to military strategists and they were improved upon greatly throughout the interim period. "By 1939 the record was up to 469 mph."¹⁹

However, it was not the mere development of the airplane as a machine of war that makes it noteworthy for the purposes of just war theory. What distinguished the airplane as a weapon of war were the particular uses it was put to. As McKeogh notes: "Weapons themselves are not (usually) unlawful in and of themselves."²⁰ What counts is how they are used with respect to the principle of discrimination. The first models of air bombers were not capable of precision targeting and may not have been just weapons, but leaving this possibility aside (as

¹⁸ Ibid., 208.

¹⁹ Ibid.

²⁰ Colm McKeogh, "Civilian Immunity in War: From Augustine to Vattel," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), 99.

they would quickly improve making precision bombing possible by 1944) the major concern with airplanes is that they were used by both the allies and the Germans to target civilian populations in the hopes of quashing the morale of the population and hampering the efficiency of the opposition's military. As was mentioned earlier, troop morale, drafting and retention is essential in modern warfare, so that if a civilian population does not support the war effort it is impossible to carry on for a long period of time. By 1941 Britain began embarking on a series of air strikes against the German populace with the hopes that "citizens would demand an end to war in the instinct of self-preservation."²¹ The effects of this strategy were staggering causing an estimated 500,000 German civilian deaths with another million suffering serious injury and approximately 3 million homes destroyed.²² In this case not even the pretence of following the rules of just war was made. Churchill argued that "'it was necessary to do unto others as they were doing to Britain' in order to maintain the nation's morale."²³ Despite the brutality of these attacks no charges were laid upon the British prime minister at the war's end when so many others were being tried for violating the rules of engagement. What is so paradoxical about the adoption of this technique by Britain is that it countered the very values that it was fighting for in the first place. As Garrett notes: "Britain was fighting to maintain values of respect for dignity and integrity of each single individual but adopted a method of war so destructive as to threaten the very cause for which she was fighting."²⁴ Attempts have been made to justify these attacks through the creation of a new condition within just war theory: the supreme emergency condition. This condition was developed by Michael Walzer as a direct response to the British air raids. The next section will review the supreme emergency condition and assess its worth as a tool within the just war tradition. For the moment, however, we will briefly turn to the most significant technological innovation to come out of the Second World War, although as we will

²¹ Stephen A. Garrett, *Airpower and Non-Combatant Immunity: The Road to Dresden*, ed. Igor Primoratz, *Civilian Immunity in War* (Oxford: Oxford University Press, 2007), 163.

²² *Ibid.*, 180.

²³ *Ibid.*, 171.

²⁴ *Ibid.*, 180-81.

see, this innovation would prove less controversial for the purposes of just war theory. This innovation is the atomic bomb.

2.23 Atom Bombs

When the first atom bombs fell on Hiroshima and Nagasaki on August 6th and 9th 1945 the results were immediate. The total dead in the hours following the bombings amounted to 220,000 people with thousands more dying of exposure to radiation long after the initial attack. The vast majority of those dead were civilians. The bombings provoked such an intense fear around the world that no nuclear bombs have been dropped since that time. There is consensus in the international community that nuclear weapons are unjust by their very nature, this is significant because typically just war theory does not make pronouncements on a weapon's development and use, judging them instead on whether they respond to the criteria of discrimination and proportionality. Despite the International Court of Justice's refusal to ban the use of nuclear weapons outright there "exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under international control" in international law.²⁵ The Hague and Geneva conventions also ban the use of chemical and biological weapons, excessively injurious weapons and those which alter the natural environment.²⁶ Nuclear weapons clearly respond to the two last conditions even if they are not mentioned explicitly. This international consensus makes nuclear weapons less troubling for just war theorists than traditional air raids because they seem to be totally immune from justification. There is not only an effort to ban the use of nuclear weapons but also their proliferation and the threat of their use.²⁷ Now let us turn to Walzer's supreme emergency condition to see how air raids are typically justified within just war theory.

²⁵ Judith Hippler Bello and Peter H. F. Bekker, "Legality of the Threat or Use of Nuclear Weapons " *The American Journal of International Law* 91, no. 1 (1997): 127.

²⁶ Orend, *The Morality of War*, 120.

²⁷ Bello and Bekker, "Legality of the Threat or Use of Nuclear Weapons ".

Part II: Newer and Better Weapons?

3. Smart Bombs

So called “smart” bombs differ from their “unintelligent” predecessors in that they are able to be controlled once they have been fired. Previous projectiles, like the ones developed and used in WWII, were subject to the laws of gravity and ballistics once they left the bomb bay and, as such, they were not very accurate. This made firing bombs very costly both for the armies developing and producing the planes and bombs as well as the targets on the ground who suffered large amounts of devastation when they were missed. However, smart bombs change the playing field altogether and, it may be argued, that they can benefit both sides in a struggle. The air force dropping the bombs suffers far fewer casualties because it can send out a much smaller number of planes and pilots to attain the same ends in addition, the people on the ground suffer fewer casualties because the bombs dropped hit their targets much more accurately than they did before. As Max Boot explains, the changes in technology have been drastic since WWII:

During World War II, an average B-17 bomb during a bombing run missed its target by some 2,300 feet. Therefore, if you wanted a 90 percent probability of having hit a particular target, you had to drop some nine thousand bombs. That required a bombing run of one thousand bombers and placed ten thousand men at risk. By contrast, with the new weaponry one plane flown by one man with one bomb could have the same level of probability. That was an improvement in effectiveness of approximately ten-thousand-fold.²⁸

Having fewer soldiers fighting in wars may be a good thing when looking back at the great wars of the past century. With the advent of new precision-guided weapons the age of total war was ended. As George and Meredith Friedman recount:

²⁸ Boot, *War Made New: Technology, Warfare, and the Course of History, 1500 to Today*, 328.

Suddenly, inexpensive missiles carried by a small ship, a few planes, or by infantrymen proved themselves capable of shattering the behemoths of the reigning military culture. Giant warships, massive tanks, invulnerable bridges, all suddenly fell before a handful of simple and relatively inexpensive weapons.²⁹

Equally positive results occurred on the side of those being targeted, so long as the actual targets are morally permissible ones that follow the rule of discrimination, the advances in technology mean far fewer deaths due to collateral damage. Bombs that use the new precision-guided technology enabled by Global Positioning Systems (GPS) rarely, if ever, miss their targets. So that by the time of the second Iraqi war “the ordinary citizens in Baghdad frequently went about their business even as bombs were falling.” The bombs were so accurate that the citizens “had quickly become accustomed to bombs hitting their intended military targets-so much so that when one went astray and landed in a residential area, they were incensed.”³⁰ Although these results may at first seem spectacular in that they do not have any obviously negative effects a closer look reveals certain moral difficulties. These difficulties come at two stages, the first at the level of the principles of *jus in bello* and the second at the level of on the ground application. We will look at the latter first.

3.1 Discriminate Compared to What?

One problem with so called “smart” bombs is that they are typically not judged as discriminate independently but only as compared to traditional projectiles, as the above citation regarding effectiveness suggests. What this type of reasoning takes for granted is that the original bombs in question were able to meet the requirements of discrimination and proportionality and this is not obviously the case. There are two possible ways that bombs can be judged, either taking into consideration their actual usage in the context of their development, or independently. I would like to argue that given the nature of warfare what we care about is

²⁹ George Friedman and Meredith Friedman, *The Future of War: Power, Technology, and American Dominance in the Twenty-First Century* (New York: St. Martin's Griffin, 1996), 116.

³⁰ Richard T. De George, "Post-September 11: Computers, Ethics and War," *Ethics and Information Technology* 5 (2003): 186.

whether a weapon can actually be used in a rule abiding manner given the contemporary landscape and not some abstract set of conditions. Brian Orend argues contrary to Walzer that weapons should be judged individually in their customary usage in order to determine whether they can meet the requirements of *jus in bello*. Walzer argues that weapons, with the exception of nuclear weapons³¹, are not just or unjust in and of themselves but that they can only be judged as such in each individual situation. Following Orend, I believe that this allows too much because it does not take into consideration the effects of weapons proliferation in the world. In effect what Walzer is condoning is the development of new technologies of destruction but then after the fact he says to those who have developed them to only use them in the right ways, if this is within the realm of possibility. Orend contends that condemning certain weapons is within the basic spirit of just war theory because it seeks to limit the destructiveness of warfare.³²

There are obviously certain technologies that have already been judged as incapable of meeting the requirements of *jus in bello*. Notably, weapons of mass destruction, which even Walzer agrees cannot be permitted to proliferate. The question is then; do traditional bombs potentially meet these criteria? Looking at the evidence from WWII the types of battlefields and targets that were available did not lend themselves to discriminate and proportional aerial bombings. With bombs missing their targets by an average of 2,300 feet you could just as easily hit your own troops in situations of combat making it an ill advised choice for cases where discrimination is not really at issue. In situations where discrimination is an issue, near civilian centers, the probability of actually hitting your target was so low that the technique was certainly not discriminate. Enter the DDE, does it allow the use of conventional bombs near residential areas in order to destroy an acceptable military target, say a munitions factory? The munitions factory is an uncontroversial military target, but it seems a stretch to consider it a “target” of aerial bombings. As we have seen, in order for the DDE to be applied successfully the operation

³¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 277.

³² Orend, *The Morality of War*, 119-21.

must meet 4 requirements at once, one of which is proportionality; the good (and intended) results must be greater or at least proportional to the bad (unintended) ones. With the amount of collateral damage that traditional bombs caused it would be a stretch to say that the vast majority of bombings that took place were in conformity even with the conditions of the DDE.

Conventional bombs were never banned in international law yet their questionable moral standing is evident from the standpoint of just war theory. Walzer attempts to justify their use through the development of the “supreme emergency condition”, which will be discussed later. Europeans who experienced the devastation associated with bombings understood the dangers of fighting wars on their soil and have done everything necessary since the Second World War to ensure that no wars take place on their territory again; with great success it should be noted. Fighting what are known as “limited wars”, based on the pre-industrial model of warfare that we characterised earlier, is no longer possible because of a number of factors. However, the most important of these factors, the means of modern warfare, has dictated recourse to other methods of international problem solving. As Westerners we may want to view ourselves as diplomatic peoples capable of solving our problems without fighting, but a look our history reveals that this method was only employed when fighting wars became too costly and dangerous to undertake. Since the Second World War, Western powers have engaged in many wars but only when they believed that the war effort would be quick and decisive and when it would not implicate their own citizens on their own territory. With the Western nations developing ever newer and more expensive methods of killing it is imperative that these new weapons be judged and treated in international law so as to limit the proliferation of arms in the world. It may be true that smart bombs are better than their traditional counterparts but if they create a need to develop ever newer technologies to combat them then they simply add to the destructive capacities of world powers, which goes against the spirit of just war theory. Far from having a moral imperative to develop smart bombs, what De George calls a “morally

obligatory smart arms race”,³³ there should be a moral imperative against the proliferation of highly destructive weapons, smart bombs included in this category with their outmoded successors.

De George, in offering up the argument for a “morally obligatory smart arms race” is proposing a typical consequentialist argument for a particular tactic being used instead of another, in this case he is advocating the use of particular kinds of weapons as opposed to others. At first glance there is nothing special about condemning a weapon or group of weapons that makes this kind of moral imperative any less consequentialist than condoning the use of another type of weapon. In effect, the reasons behind the moral judgement remain the same and the difference of opinion between those who would ban a smart bomb and those who would support its proliferation comes at the level of on the ground application. The basic idea being reformulated as a statement: if *x* is allowed then the consequences will be worse than if *y* were used in its place. However, it seems unintuitive to have such an important moral judgement rest on these flimsy and easily manipulated grounds. If there is something morally reprehensible about a certain weapon being developed and spread throughout the world, then it seems we would want a stronger argument against its development than “it creates more harm than another harmful weapon”, what we want is a good reason that can stand the test of time against the use of this weapon. Based on what has been said up until now regarding precision-guided munitions it is not obvious that there is a stronger moral imperative than the consequentialist one against their use. However, as we will see in later sections, there are further reasons for believing that these weapons ought to be banned that are grounded in a rights-based approach to ethics.

In *War and Ethics*, Nicholas Fotion argues that the principles of just war theory can be justified in a variety of ways and that the grounds of their justification are of little importance so long as they yield the right principles. He thinks that “because the principle can be justified in more ways than one, how it is justified does not appear to be an important consideration. What

³³ De George, "Post-September 11: Computers, Ethics and War," 186.

seems important is that the principle itself is in place in the theory.”³⁴ However, it seems that we should care about the justification of our principles because they will have farther reaching implications if they are grounded in a rights-based approach than by a consequentialist calculation, even if the calculation always, or almost always, yields the results that we find intuitively plausible. The reasons for this will become clearer as we consider possible violations of the initial principles that take place when we consider more extreme examples as described by Michael Walzer in order to justify his “supreme emergency condition”.

3.2 Smart Bombs and the Doctrine of Double Effect

Another problem facing proponents of smart bombs is that they do not obviously meet the requirements of the doctrine of double effect (DDE). As we have seen before, in order to characterize an act of war as just its foreseeable but unintended consequences must be at least proportional to the military objective in question. What this means, practically speaking, is collateral damage is tolerated up to a certain point. There are practical reasons for allowing a certain degree of collateral damage within just war theory for without this allowance it seems modern warfare would become impracticable. The realist within the just war theorist is aware of the fact that war is a dirty business and that sometimes the results will be sub-optimal. In order to save the lives of a greater number of people on both sides sometimes another smaller group of people will be unintentionally harmed or killed. In the abstract the DDE seems like an acceptable principle but its application comes at the level of individual decisions and the problem with precision-guided munitions is that we do not think of them as creating “collateral damage” at all.

³⁴ Nicolas Fotion, *War and Ethics: A New Just War Theory*, ed. James Garvey and Jeremy Stangroom, Think Now (New York: Continuum, 2007), 23.

If the DDE was adopted due to the inaccuracy of previous generations of munitions, then the advent of smart bombs should, theoretically, do away with the need for such a clause in just war theory. If you can know, with almost 100% accuracy, what targets will be hit by an air assault, which were statistically the most likely to produce unforeseen casualties as compared with ground attacks, then the idea that there are “unforeseen” results of the attack is put into question. The category “unforeseen” falls to mistakes in identifying targets in the first place, or misinterpreting information, not in the carrying out of the attack itself. If the target that was hit was the intended target, the one identified for destruction by intelligence sources, but it turns out not to be what the intelligence said and many innocent people are killed, they were the intended targets and not victims of “collateral damage”. The problems that stem from the processing of information in modern warfare are no small matter. Having access to more and better information is a good thing only if this information can be processed and disseminated in a reasonable time delay. This was obvious even right after the first Iraq war and the problems with data processing have only gotten worse since then. In 1996, George and Meredith Friedman were already reporting on the problems of the data revolution that was in its initial stages:

Imaging, the Defense Support Program, signal intelligence, electronic intelligence, and all other types of reconnaissance platforms, in space and elsewhere, collect vast amounts of data—all of it, in its raw form, useless. The endless stream of digital material is incomprehensible unless some system turns the data into information, analyzes the information, and then distributes that information to people who are making decisions or fighting wars.³⁵

Having the technological capacity to hit intended targets accurately is one thing, having the information necessary to carry out this same attack is quite another. If there is a moral imperative to develop precision guided munitions then this imperative carries with it a second,

³⁵ Friedman and Friedman, *The Future of War: Power, Technology, and American Dominance in the Twenty-First Century*.

less obvious but equally important moral imperative, to develop the information processing capacity necessary to deploy the precision guided weapons properly.

The DDE becomes even more problematic as time goes on and technology advances there are ever more reasons to assume that it will become less and less relevant for the purposes of just war theory. These reasons will become evident as militaries around the world opt for unmanned military vehicles and aircraft. There are moral implications of keeping both the DDE and of allowing precision-guided munitions to be used. First, as was mentioned, referring to the victims of a precision-guided attack as collateral damage masks the fact that in essence these people were targeted for attack with a particular military goal in mind. If civilians are targeted with a military goal in mind then this is a direct violation of the principle of discrimination and the DDE cannot be applied. If this is the case each and every time a precision-guided weapon is fired then the DDE is theoretically incompatible with this type of weapon. However, removing the DDE from just war theory poses other problems, notably it creates two sets of rules for militaries or groups with different technological capacities. If, as De George argued, there is a requirement to use and develop these types of weapons this development comes at the price of sacrificing the DDE, which seems like a good thing. But if the enemy does not have these same weapons systems, either because of lack of funds or by choice, then an asymmetrical relationship has been created. One in which the more technologically advanced military is held to higher standards than the less developed one. In other words, the less developed nation can legitimately carry out attacks that it knows will kill many civilians while the more advanced is required to carry the burden of having sacrificed the DDE. Seeing as how no military power is going to willingly equip its potential enemies with the latest in weapons there seem to be some serious problems with the proliferation of new weapons that go beyond a simple calculation of how many people are likely to be harmed. Here we are concerned not only with volume but with who is being targeted and how we judge each side in the conflict once the war comes to an end. Given the scope of this paper it will not be possible to go into these problems here but

what has been said about “smart bombs” will be relevant in the next sections when considering even newer technologies that widen the gap between what different militaries are capable of.

4. Robots at War

Excitingly or frighteningly, depending on how you look at these things, what was once the stuff of science fiction is now part and parcel of how we conduct real wars and live our everyday lives. Robot vacuum cleaners are only the tip of the iceberg when you consider all of the dirty and dangerous jobs that would be best done by a non-human agent. Today, we are developing robots capable of adapting to their environment and making decisions without recourse to a human controller. Robots currently in use in the military require only minimal human control. These machines are already revolutionising the way armies fight wars. Fighter jets are now capable of taking off on their own, flying to a site to collect data for reconnaissance and of determining whether any targets are present, then returning to base and landing. The moral implications of weapons developed in the two World Wars are still being debated in international law so these state of the art technologies are not even on the radar of the international community. What this means is that there is a kind of moral vacuum that exists when it comes to regulating new weapons systems. Robotic actors are not like human agents, they have to be programmed to respond in certain ways when confronted with certain predictable elements in the environment. As humans we have an innate ability to respond in novel ways to new situations, this is part of what makes us human and not automatons. Without getting into the complex philosophical debate about what constitutes free-will let us assume for argument’s sake that humans are not predetermined and are capable of acting in novel ways. Robots, at least the current models and likely all robots cannot be considered moral or immoral, they are simply acting the way they were programmed to act. This raises important moral questions for the humans developing and using robots for the purposes of waging war. As a military expert at Human Rights Watch, Marc Garlasco, emphasized, there is a profound

difference between humans and robots: “The human has morality, has an empathetic response. The human has the capability to make complex decisions; they can draw on their humanity.” Moreover, this humanity is not easily mimicked. “You can’t just download international law into a computer. The situations are complicated; it goes beyond black-and-white decisions.”³⁶

4.1 Who is Responsible for a Robot’s Mistakes?

One of the moral questions that becomes important in this context is: who do we hold responsible for the mistakes of robotic weapons systems? It is notoriously difficult to program robots to do even the simplest human tasks. They have even been called “ridiculously stupid” because “they lack the common sense of a two-year-old.”³⁷ And this is important for ethics because our human morality is grounded in this ability to use common sense. As P.W. Singer recounts in *Wired for War*, many examples can be found that illustrate the computer’s inefficiency when it comes to making common sense judgements, even when they are capable of retaining “literally trillions of points of data”. An example of this is what Singer calls the “Apple-Tomato test”, he explains:

For a computer to tell the difference between an apple and a tomato is actually quite tricky. It could resort to all sorts of visual analyses, comparing the size, shape, and colour. But soon the machine would find that in certain cases there would be overlap, so any and all tests, no matter how rapid, would be inconclusive. It would next proceed to taking samples, such as capturing its chemical makeup via a smell test, and then comparing the data to other known test subjects. Ultimately, it could only be sure beyond any doubt with a DNA sample, which would occupy a massive part of its processing power. By comparison, pretty much any two-year-old human instantly “knows” that an apple is not a tomato, without any calculation.³⁸

³⁶ P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (New York: The Penguin Press, 2009), 389.

³⁷ *Ibid.*, 76.

³⁸ *Ibid.*

That is not to say that it is impossible for a robot to make these practical judgements, but it requires a huge degree of complexity and will be liable to make mistakes that a human would be unlikely to make. For example, a human soldier has no trouble distinguishing enemy troops from a group of school children. What happens when the robot mistakes one group for the other? Who do we hold responsible for this mistake? The soldier who works alongside the robot? The general who authorized the attack? The robot's developer? These are important questions for the international agencies charged with charging agents with war crimes and more generally, those interested in *jus post bellum*. More disturbing is that in the current climate of war it is often difficult for human soldiers to tell the difference between an enemy insurgent and a civilian. An enemy who has hidden weapons and is not distinguishing himself as a combatant is extremely difficult to pick out in a crowd. If discrimination is to remain plausible in this context and the robots are being designed precisely in this context in order to carry out missions that human soldiers cannot do, then we have a serious moral concern on our hands.

This moral concern is distinct from the related problems that we discussed in part 1 of enlarging the battlefield or the dehumanization of the opponent that we saw with previous technological innovations from ancient times until the 20th century. These problems were of varying degrees depending on the proximity of the attacking sides and with each step farther away there was a related degree of precision that was lost. That is, until the limitations of the human body could be surpassed by getting rid of the human agent altogether. The goal is still to eliminate the opposing side's troops, but now this task can be carried out by a non-human agent that does not have any morality inherent within it. This is a very important change for just war theory because this theory takes for granted that those engaging in battle are equipped with the tools necessary to apply the rules that it establishes. Morality is hallmark of human agents and has to be "programmed" into robotic warriors if we hope to salvage any part of just war theory. In other words, just war theory is based on a certain conception of human nature and what humans are generally capable of. This theoretical grounding need not be highly idealised, but even the minimal conditions, such as being able to empathize with others, even in a limited way,

must be present to some degree in order for just war theory to be applicable in the real world. This moral sensibility that guides the construction of the rules of *jus in bello* is likely to not apply to robots, no matter what their computing capabilities are. Even if this were the motivating factor guiding robot programmers is it likely that they will ever be able to discriminate and act in proportionate ways?

Assuming for the time being that the robots' programmers are concerned with abiding by rules of war to begin with there remain many obstacles to actually carrying out this task. If the principles of just war theory reflect our moral intuitions regarding what should and should not be allowed within the sphere of war, then robots will have to be programmed so as to be able to discriminate and make judgements that take proportionality into account. As was mentioned above, discrimination is problematic for robots, but let us assume for argument's sake that they can be perfected so as to be able to distinguish between combatants and non-combatants reliably; there remains the issue of proportionality. Proportionality is already a notoriously difficult thing for humans to calculate and it is not obvious what tacit intuitions are at work when we determine whether or not to engage in a certain action. We can, it seems, establish hard and fast rules when it comes to discrimination, even if they are not agreed upon by everyone, but when it comes to proportionality each situation is so complex that it is unlikely we could ever anticipate how to program a robot so as to make it act in proportionally even most of the time. This is major obstacle to allowing robot warriors that are capable of autonomous actions.

If robots act of their own accord how can we ever claim that rules of just war were violated. In order to be violated they had to have been violated by someone and robots do not obviously fit the description of a "someone" capable of moral actions. At best we can claim that some human agent was in control up the chain of command but it is not obvious that this is actually ascertainable.

4.2 Do Robots Make War More Likely?

If the goal of developing these costly systems is to put fewer soldiers in positions of risk in the context of fighting wars, then robotic fighters allow wars to be carried out with fewer casualties, but only on the side of the more technologically advanced nations who can afford to produce and maintain these systems in the first place. This may not seem like a particularly bad result when looked at from this point of view. But what it creates for the opposition is a situation in which they are not confronted with a human enemy. Typically wars in the 20th century ended when one side was no longer able to suffer the consequences of continuing in the war effort, when too many soldiers or civilians had been killed or wounded and the civilian population would no longer support the war effort. This was the case in Vietnam and many other wars in the 20th century. With robotic warriors fewer soldiers may be dying, which is a good thing, but it also takes fewer soldiers to cause exponentially more damage than it used to, which means that wars become more sellable to a population not afraid of losing a large component of its young people when fighting a war. The soldiers fighting wars today may not be in the vicinity of the fighting at all. One unmanned plane currently in use by the U.S. air force is the Global Hawk. It has significant benefits that make it much better than traditionally piloted bombers, like the U-2 spy plane of the cold-war era. A pilot's "physiological factors" limited the amount of time that the U-2 pilots could fly missions (that is, they would pass out from fatigue, boredom, or a buildup in their kidneys)." That is obviously not the case for unmanned aircraft. "In contrast, Global Hawk can stay in the air up to thirty-five hours." And that is not its only virtue. "Powered by a turbofan engine that takes it to sixty-five thousand feet, the stealthy Global Hawk carries synthetic-aperture radar, infrared sensors, and electro-optical cameras." What these two things in combination mean is that "the drone can fly some three thousand miles, spend twenty-four hours mapping out a target area of some three thousand

square miles, and then fly three thousand miles back home.”³⁹ All with the only human controllers sitting safely at some military base out of harm’s way.

If the goal of just war theory is to limit the recourse to war as well as its destructiveness, then robots seem to run contrary to both these goals. This is by no means a result that has come to be simply by the advent of robotic warriors. As history has progressed we have found better and better ways of killing each other more efficiently, robots simply take the next step towards justifying ever more destructive wars. For example, as Singer recounts:

The modern-day bomber jet has roughly half a million times the killing capacity of the Roman legionnaire carrying a sword in hand. Even within the twentieth century, the range and effectiveness of artillery fire increased by a factor of twenty, antitank fire by a factor of sixty. These changes in capabilities then change the way we fight. For instance, exponentially more lethal weapons helped to lead to equivalent exponential “stretching” of the battlefield. In antiquity, when you divided the number of people fighting by the area they would typically cover, on average it would take a Greek hoplite and five hundred of his buddies to cover an area the size of a football field. This is why in movies like *Spartacus* or *300* you can see the entire army during a battle. By the time of the American Civil War, weapons had gained such power, distance, and lethality that roughly twenty soldiers would fight in that same space of a football field. By World War I, it was just two soldiers in that football field. By World War II, a single soldier occupied roughly five football fields to himself. In Iraq in 2008, the ratio of personnel to territory was roughly 780 football fields per one U.S. soldier.⁴⁰

Even if the new technologies outlined in the last two sections have been justified by their developers and users as better than older counterparts in that they are more discriminate as we have seen there is evidence that suggests that there remain reasons for banning or at the very least limiting the proliferation of these newer and “smarter” weapons systems. However, some modern technological advances have been put to the task of limiting civilian deaths. The next

³⁹ Ibid., 36.

⁴⁰ Ibid., 100.

two sections will examine computer warfare and non-lethal weapons; two types of weapons that have been justified because they can potentially limit civilian suffering.

5. Computers at War

Computers are what allowed many of the weapons that are now in use in the military to be developed. In and of themselves computers are not a threat to anyone's personal security and their ability to make our lives better in so many ways certainly justifies their existence, morally speaking. However, computers may be used in technologies that are not so positive, as we have seen with precision guided munitions and unmanned drones. What this means is that although computers can be used as weapons they should not be banned or restricted in any outright way, since they have all sorts of good uses. The following section will attempt to deal with the moral implications of computers when they are used for destructive ends. One way in which computers can be used on their own as weapons is through the disruption or hacking into a system that controls essential services or information. With the use of computers for controlling everything from street lights to water treatment plants, our industrial cities are particularly vulnerable to attacks and disruption via hacking. The moral question that stems from this use of computers is whether a government can be justified in disrupting the water supply or electricity to a city in order to force the enemy into a position of surrender.

5.1 Who is a Legitimate Military Target?

The defenders of this type of attack on essential services might claim that it is better than carpet bombing a city to reach the same objective, which is surely true, but that in itself does not justify the attack on civilians. Simply temporarily disrupting communications or electricity in a city would surely not be devastating enough to force an enemy to surrender, which is why weapons have been developed that are capable of burning out all electrical circuits in a targeted area. These so called "weapons of mass disruption" are direct energy weapons which produce microwaves that deliver "thousands of volts of energy that destroy electronic

devices and melt semi-conductors.”⁴¹ While hacking in itself may be directed against justifiable targets, such as those producing munitions on an assembly line direct energy weapons are much less predictable and have farther reaching consequences for civilian populations dependent on electronics for all sorts of daily activities. DeGeorge warns that:

To deprive [a city like New York] of electricity would be to paralyze it. And if all the circuits were burned out and had to be replaced, the task would be enormous. Add to that the destruction of the communications systems, the transportation system, and all the private business computers. The city would stop functioning except on the most primitive level, and hence the effect on innocent civilians would be devastating.⁴²

DeGeorge does not see direct energy weapons as benign simply because they do not produce any direct physical harm to people. He considers that the only morally justifiable use of these weapons would be on the battlefield, where they could be used against an enemy’s weapons systems with the goal of reducing loss of life. However, this argument presupposes that a battlefield is an identifiable space removed from cities. More and more this is becoming a fictional throwback to the pre-industrial world, as we have seen with the “stretching” of the concept of battlefield itself. With the computers being used to control unmanned drones in remote locations (such as Nevada) the likelihood that direct energy weapons could be used in an ethically viable way are slim indeed. More disturbing perhaps, is that even if they had no effect on civilian populations and only targeted enemy weapons systems, an attack of this sort would “leave enemy troops at the mercy of virtually unopposed bombing, shelling, destruction, and the massacre of troops”, creating not fewer but more deaths.⁴³ Obviously, within the conditions of proportionality this would be an unacceptable result.

5.2 What is the Definition of a War?

⁴¹ De George, "Post-September 11: Computers, Ethics and War," 187.

⁴² Ibid.: 188.

⁴³ Ibid.

Other moral problems arise with respect to the use of computers for fighting wars; particularly since September 11 and the declaration by the US of the war on terror. In this context the state of war is ongoing, and although it is currently being directed against particular countries, namely Afghanistan and Iraq, the possibilities are literally endless, as any country suspected of harbouring terrorists or of funding them is liable to attack. On September 20, 2001 George W. Bush addressed congress stating that:

We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime.⁴⁴

In the interest of homeland security the United States Government has implemented the Patriot Act, which contains laws that allow it to observe any citizens in its territory through tapping phone lines and hacking into personal computers without a warrant. The idea being that any activity that threatens the country and its citizens will be detected before the potential perpetrators have the chance to put their plan into action; the burden of proof for getting a warrant being too strict to allow this strategy to be effective. These laws in combination with those that state that a suspected terrorist can be held without trial for an unlimited amount of time means that innocent people are being held prisoner in the interest of national security. What is so alarming about these changes is that they reduce important civil liberties to citizens of the state extending the boundaries of the global war on terror to the very people whom the war should be aiming to protect. If the potential enemy can be living within your own territory, then the definition of war itself has been altered. The state does have a right to protect its citizens from potential threats that reside within the country itself. The problem is that the jurisdiction responsible for this is the police, not the army; these institutions are not subject to

⁴⁴ Quoted in Steven R. Ratner, "Predator and Prey: Seizing and Killing Suspected Terrorists Abroad," *The Journal of Political Philosophy* 15, no. 3 (2007): 251. Available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

the same rules and guidelines. As Steven R. Ratner cautions, “these norms can offer different guidance on the legality of tactics against suspected terrorists.”⁴⁵ Claiming that there is an ongoing armed conflict is dangerous for a number of reasons because it puts people who would normally be treated as criminals as combatants, and as we know combatants have far fewer rights than citizens. If the potential combatants live within the country at war this is especially frightening. The right of citizens to their civil liberties should not be so callously overridden for potential political benefits.

While computers cannot inflict bodily harm on their own the preceding discussion shows how if they remain unregulated and continue to be treated as outside the realm of moral regulation the consequences can be drastic. Computers and their use in all sorts of high-tech devices make it possible to target people and whole communities while the global war on terror extends the traditional meaning of war and its limited nature. These two conditions acting together render the possibility of fighting unending wars in the future highly likely unless we aim to conscientiously restrict the domain of war to a more traditional definition.⁴⁶

6. Non-Lethal Weapons

Non-lethal weapons (NLWs), as their name suggests, are weapons that inflict harm without killing and they come in many shapes and forms. They can range from “stun guns and stun grenades...[which] temporarily subdue the intended target without inflicting permanent damage” to “tranquilizers and sleeping gas...[whose] purpose is to incapacitate the target for a longer period of time.”⁴⁷ Two types of non-lethal weapons are morally significant for the purposes of just war theory. A NLW can be developed for two distinct purposes, either they can

⁴⁵ Ibid.: 255.

⁴⁶ For a discussion of how attack on computer networks alter the nature of warfare see: Michael N. Schmitt, “Wired Warfare: Computer Network Attack and *Jus in Bello*,” *IRRC* 84, no. 846 (2002).

⁴⁷ Chris Mayer, “Nonlethal Weapons and Noncombatant Immunity: Is It Permissible to Target Noncombatants?,” *Journal of Military Ethics* 6, no. 3 (2007): 224.

be used so as to incapacitate the enemy combatant, or they can be used to target those who would normally be inadmissible under the condition of discrimination. We will examine both possibilities in order to draw out how just war theory deals with these different possibilities.

6.1 Non-Lethal Weapons directed against soldiers

Soldiers are admissible targets of attack under just war theory because they have forfeited their right to not be attacked by being in a position to attack the enemy. They are trained to kill and accept, willingly or unwillingly, to be targets themselves. If it is permissible to target soldiers, then does this mean that it is permissible to attack them using any weapons available, or should some weapons be banned because they are worse than others? Given a utilitarian calculation in which death is the ultimate bad consequence and anything short of death is preferable to this finality NLWs would necessarily rank as better, morally, than weapons that are designed to kill. However, this may be overstating the matter. Given the choice between an instantaneous death and a life plagued by incapacitating wounds many would prefer a quick and painless death to a life of suffering and pain. It should be noted that many versions of utilitarianism would likely get this calculation right. This accounts for the various legal treaties banning weapons that are excessively injurious, such as chemical weapons, which leave victims with permanent health problems. The International Committee of the Red Cross distinguishes “four pillars of international humanitarian law on weapons.” In judging NLWs two of the four pillars are particularly important. First, “weapons that cause unnecessary suffering are prohibited” and second, “any other weapons that the international community decides are abhorrent for some other reason are prohibited.”⁴⁸ It is interesting to note the legal limbo that most new technologies are subject to. So long as a weapon is not judged to be excessively injurious by the international community it can continue to be used for years without consequence. For example, “Chemical weapons were first introduced in World War I, but they

⁴⁸ Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century*, 384.

weren't fully banned until eighty-two years later."⁴⁹ Other NLWs that have been on the radar of the international community for years are land mines. Land mines are particularly horrifying for a number of reasons. First, because they are notoriously hard to disarm and remain a threat to civilians decades after war's end and second, because they were developed so as to injure, but not kill an enemy combatant so that more resources, in terms of man power would have to be used each time a soldier was hit. The rationale goes as follows, one dead soldier is a good result, but one injured soldier who has to be carried out of harm's way and receive ongoing medical treatment uses up more of the enemy's time and man power. Luckily, in the 1990's the international effort to ban land mines met with success and the effort to find and disarm all remaining mines is still underway, although it will likely never be completed successfully. This is one job that robots are particularly well suited to doing and a number of models have been developed to do just this dangerous task.

6.2 Non-Lethal Weapons and Civilians

Some NLWs remain permissible when applied to enemy soldiers such as new weapons which emit extreme light or sound in order to disorient the enemy. Since they do not cause any permanent damage and so long as they are not followed up by a massacre of these same temporarily debilitated soldiers they appear to pass the Red Cross' conditions for the admissibility of weapons. The question to ask then is should we permit these NLWs to be directed against enemy civilians in times of war?

NLWs may not kill or even inflict lasting damage as we have seen but there are still moral reasons for disallowing their use against civilians. The restriction against targeting civilians go far beyond the duty to not kill these people who pose no threat, this restriction means extending rights to civilians, including the right to live but also the right to live freely. As Mayer stresses, "non-combatant immunity does not simply protect the non-combatant from

⁴⁹ Ibid., 387.

death, but it directs military forces to treat non-combatants differently from soldiers.”⁵⁰

Walzer’s formulation of non-combatant immunity states that non-combatants have a right to life and liberty; meaning that you cannot coerce an enemy civilian into doing something that he or she would not do if it were not a time of war. This includes forcibly displacing people, even if this will have the effect of saving their lives. Walzer explicitly states that soldiers are required to minimize the harm done to enemy civilians, “even if this means incurring greater risk to themselves.”⁵¹ It may be tempting to base non-combatant immunity on a consequentialist calculation in which it can be bargained away for fewer casualties to other non-combatants but, as Mayer argues, this goes against the basic concept of non-combatant immunity. According to Mayer non-combatant immunity is much more than not permanently harming civilians; it means allowing:

Non-combatants to live life, as much as possible, as they did before the war; this includes allowing them to make their own choices. There may be good reasons why the non-combatants choose to remain next to the command bunker or munitions factory. Whatever their reasons are, non-combatants do not owe an explanation to the enemy. Not allowing non-combatants to make their own choices constitutes harm in itself, and this harm is intentional as it is employed to get a clear shot at the legitimate military target. The purpose of non-combatant immunity is to safeguard the basic rights and status of non-combatants and identify them as spectators, not participants, of the war. Attacking and causing harm to non-combatants to save them from an unintended greater harm, even when using NLWs, is still a violation of non-combatant immunity.⁵²

Mayer goes one step further and even denies the use of NLWs in the case of munitions factory workers who may have a reduced claim to non-combatant immunity. While they are not posing a direct threat to the enemy they are indirectly involved in the war effort and as such they may be attacked while they are at work (although not when travelling to or from work or at home it seems). Even in this case if using NLWs would cause these civilians to leave a factory allowing

⁵⁰ Mayer, "Nonlethal Weapons and Noncombatant Immunity: Is It Permissible to Target Noncombatants?," 229.

⁵¹ *Ibid.*: 223.

⁵² *Ibid.*: 227.

it to be bombed, this should not be done according to Mayer. Although the factory worker may have a reduced claim to non-combatant immunity he or she is not a combatant. The opposing forces have a responsibility to create the least amount of harm as possible according to the principle of proportionality and, as such, they should be concerned with the people in the factory, even if to a lesser extent than the people in the surrounding area. The problem in this case is that using NLWs requires a separate military attack on the workers themselves, which treats them as though they were combatants liable to attack. According to Mayer, a proper response to this problem would be to attack the factory when it was closed so as to minimize harm to non-combatants.

6.3 Non-Lethal Weapons Gone Bad

A more practical problem with NLWs is that although they may have been developed and used with the intention of harming but not killing targets they are subject to defects, which often turn fatal. Mayer mentions two examples of NLW mishaps. The first happened when Russian Special Forces decided to use a sleeping gas to rescue hundreds of hostages. Unfortunately, the gas had the effect of killing over one hundred hostages and many of the terrorists holding them. A second case happened in New York City when the police used a stun grenade to subdue a suspected drug-dealer. In this case the stun-grenade caused the woman stunned to have a heart attack and die hours later in hospital, and she wasn't even the intended target of the grenade.⁵³ Singer describes even more impressive NLWs with equally disturbing side-effects. One that has been tested in Iraq is nicknamed the "pain ray" and the other the "artificial fever". The first acts by emitting concentrated microwaves that penetrate the top layer of the skin and heats up the water inside creating a burning sensation. Once the ray is turned off the pain instantly goes away without leaving a trace. The artificial fever instantly heats up the core body temperature of any human in range causing the person to fall unconscious. The danger with these directed energy weapons is that being off by only a few degrees you can kill your intended targets instead of rendering them unconscious. As Singer warns, "the line from

⁵³ Ibid.: 224.

nonlethal to lethal is a fuzzy one."⁵⁴ In other words, even if you reject the idea that targeting civilians with NLW's is wrong, there are still reasons to be sceptical as regards their practical use in this context.

In the next section we will examine a new breed of weapons that have the potential to be used as either lethal or non-lethal weapons. Unlike many of the new-age weapons we have looked at up to now they are not very advanced, technologically speaking. These potential weapons are biological agents.

7. Germ Warfare

Germs may not seem like weapons in the traditional sense of the word, up until very recently they could not be called weapons at all. Viruses and bacteria have plagued all manner of plants and animals since the dawn of life and they were, up until the last few decades, amoral life forms acting according to their own genetic programs (or so goes the story according to the presupposition that there is no higher purpose at work in the universe). In order for the pathogen to survive it had to adapt and infect its host in various new ways over the course of history. Some pretty remarkable events occurred at the "hands" of various viral outbreaks over the centuries, such as the Black Death, yet these outbreaks were not the subject of moral outrage or even questioning (except by those who believed they were being punished by God), they were simply the results of natural processes. Even as we speak many viruses are thriving in their human and animal hosts, notably AIDS, malaria, Ebola and others, infect and kill a huge number of humans every year. New biological threats differ significantly from their traditional counterparts in that they are conscientiously manipulated by humans to achieve their lethal results.

Unlike other technological advances that we have been looking at, such as aircraft, the ability to alter diseases was first motivated by a desire to eradicate disease, not to spread it in

⁵⁴ Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century*, 84.

new ways. Aircraft may have been developed with the aim of transportation in mind but the impetus to develop these technologies came from the military complex and not from the desire for new modes of transportation. With germs, scientists had been working at curing diseases long before the military complexes around the world took an interest in developing germs into weapons. The Cold War was the main impetus for developing germs into weapons, what with the threat of nuclear war Americans and Russian scientists were trying to stay on pace with the technologies that would allow them to dominate the other power. Since this time, scientists have been at work perfecting a new range of “super-bugs” capable of infecting people and animals, viruses that are immune to known vaccines and treatments. What is more, the viruses themselves are not the only things being modified. Scientists are also at work on delivery systems capable of infecting the largest number of people possible in a single area, making the potential hazards of a bio-attack all the more threatening. The lethality of these new super-bugs is hard to estimate given their variety and how they are spread but one thing that is certain is that there are moral implications involved in developing these new technologies. Germs are such a great threat to the survival of humanity that some people in the field have likened bio-warfare to nuclear warfare, despite the fact that “only a handful of groups have attempted biological attacks and fewer still have succeeded.”⁵⁵ Nonetheless, as Miller, Engelberg and Broad report:

The contrast to nuclear weapons illustrates why many call germ weapons the “poor man’s atom bomb.” A nation that obtains plans for a crude nuclear device is at the beginning of a complex technical challenge that requires staggering, easily detectable investments in mines, factories, and nuclear reactors. But scientists...say they could teach a terrorist group how to make devastating germ weapons from a few handfuls of backyard dirt and some widely available lab equipment.⁵⁶

⁵⁵ Judith Miller, Stephen Engelberg, and William Broad, *Germs: Biological Weapons and America's Secret War* (New York: Simon and Schuster, 2001), 315.

⁵⁶ *Ibid.*, 316.

The effect of dropping an anthrax bomblet on a densely populated area would not destroy the physical structures in place, but would have a devastating effect on the human population with results that are very difficult to quantify.

What is important for the purposes of just war theory is to discover whether germ weapons are a legitimate way for a state to engage its enemy? If the answer is no, then the question of why this particular way of fighting an enemy is worse than other ways of achieving similar deadly results must be answered. In order to get at the heart of this question we will start by seeing what our moral judgements are in the controlled environment of the battlefield. Next we will examine the legislation that currently exists banning these weapons in order to see why they are more problematic than they seem at first glance.

7.1 Germs, Proportionality and Discrimination

While the threat of a pandemic being unleashed on the world's population is within the realm of possibilities when we are discussing the new super-bugs being developed in laboratories there may be reasons to believe that germs being used as weapons would not have these catastrophic results. For example, germs could be altered so as to sicken but not kill individuals, weakening an enemy's ability to continue fighting, thereby saving the lives of soldiers on both sides of the conflict. If the germ being spread had no long term side-effects, like the flu, then spreading this virus may in fact be permissible within the confines of *jus in bello* as per the principle of proportionality. The germ would have to be delivered so as to affect only military combatants, in order to satisfy the principle of discrimination, but imagining that this requirement were met, there is nothing about the use of *all* germs as weapons that seems to blatantly contradict either discrimination or proportionality in theory.⁵⁷

⁵⁷ Proportionality and discrimination are defined in section 1.3

An example of a virus that causes short term effects but is not lethal in adults is Venezuelan equine encephalitis (VEE). VEE is well known in tropical climates where it is carried by host mosquitoes who then infect humans. A microbiologist working on the US military's bio-defence program at Detrick army base in Maryland described the virus' effects after an accidental outbreak caused fifteen members of his crew to fall ill: "it's not lethal...it just makes you want to die. Your eyes want to pop out of your head."⁵⁸ Seeing as the virus is only fatal in less than 1 percent of the adult population its use against combatants (whom we will assume for these purposes are all adults, given the commonly accepted injunction against child soldiers despite their prevalence in some 20th century wars) it is relatively innocuous and has no known long-term effects to speak of. If the military goal in question were to temporarily incapacitate the enemy so as to be able to end the war quickly and with fewer deaths than a full frontal assault a consequentialist reckoning would surely judge the use of this virus as a weapon to be permitted. Moreover, the legal conventions banning the use of certain excessively injurious weapons do not seem to directly apply to these non-lethal weapons. As such, is there any empirical evidence that would lead to the banning of biological weapons? Brian Orend, in line with the 1972 treaty banning biological weapons development, argues that there are independent reasons to prohibit the development and use of these kinds of weapons. Orend objects to biological weapons (and other weapons like land mines) on the grounds that "they are more than likely than not to have serious spillover effects on civilians, and thus run afoul of discrimination."⁵⁹

The reason why biological weapons cannot be used, even against combatants, is that we have no way of controlling the effects of a germ agent once it is released. The fear that these microbial agents would negatively affect innocent civilians and potentially people in

⁵⁸ Miller, Engelberg, and Broad, *Germs: Biological Weapons and America's Secret War* 50.

⁵⁹ Brian Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer," *Law and Philosophy* 20, no. 1 (2001): 121.

neighbouring nations, or the whole world motivated the adoption of the 1972 treaty. For this reason, the 1972 treaty banning the development of germ weapons was explicit in stating that:

Each state party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) Microbial or other biological agents, or toxins whatever their origin or method of production, *of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes*; (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict." Those emphasized words set out the general purpose criterion that the treaty uses to define its scope: the device whereby peaceful applications of pathogens (for example in vaccine production) are not obstructed by the BWC.⁶⁰

However, there are those who believe that the treaty was too vague in its definition of what is permitted within the sphere of defence. As Miller, Engelberg and Broad explain:

The treaty was maddeningly vague, and [US] government lawyers had spent years trying to translate its provisions into practical rules. Government experts agreed that the pact allowed a broad range of experiments with germs and toxins, as long as the aim was defensive and the quantities of agents small. Studies of weapons were more problematic...The government's legal experts had never formally wrestled with whether a country could buy, steal, or manufacture a germ bomb and use it to establish standards for testing vaccines or other defences. Some experts believed such experiments were acceptable, as long as they were not intended for war. Other government officials contended that a weapon was, by definition, meant to inflict harm and was therefore out of bounds, even for defensive studies. A bomb was a bomb was a bomb, they would say.⁶¹

For the same reasons we examined with respect to non-lethal weapons in the preceding section, any weapon that will, whether intentionally or unintentionally cause civilians to be targeted and treated as though they were combatants is condemned as unjust by the principle of discrimination. Moreover, the statutes of existing international regulations go farther than

⁶⁰ "The Biological and Toxin Weapons Convention", <http://www.fas.harvard.edu/~hsp/biologic.html>.

⁶¹ Miller, Engelberg, and Broad, *Germ: Biological Weapons and America's Secret War* 288.

condemning the use of biological weapons, they also condemn any stockpiling of these weapons; far more than what is required of nuclear weapons, which are not directly banned by any piece of legislation. In many ways biological weapons are far more threatening than nuclear weapons because they are easier to acquire, and the results of their use are so difficult to predict with any accuracy. Moreover, holding a state or an individual responsible for unleashing a biological agent is extremely difficult when the outbreak follows the same pattern as a normal epidemic. With the threat of being caught minimized germs are a likely weapon of choice for untraditional combatants like terrorists and guerrilla fighters, who lack the funds and support necessary to carry out traditional wars. These facts in combination are disheartening to say the least and this threat is “magnified by a unique feature of germ weapons-uncertainty.” This is not the case with all the other weapons we have examined up to now. For example, “explosive bombs leave few doubts about their toll. But in a biological attack, city officials would not immediately know the source and nature of the outbreak or the true number of victims.”⁶² This makes germ warfare more likely and difficult to control. Of all the weapons we have looked at they have the potential to drastically change the nature of warfare in the 21st century. As such, any theory of just war will have to come to grips with this potential expansion of the meaning of war.

8. New Weapons and the Same Just War Theory

In the last section we have looked at some modern technologies that have made their appearance in the latter half of the past century. If we consider the history of just war theory and these new developments together it seems clear that the principles of discrimination and proportionality limit what kinds of weapons are allowable in warfare. This, of course, is not a statement in favour of less advanced methods of killing. As we have seen technology can have some good effects on both the duration and lethality of warfare and these technologies should be developed in line with the general spirit of just war theory. However, the arguments against

⁶² Ibid., 317.

certain uses of weapons that are either not discriminate or proportionate enough does not end here. In order to truly pass judgment on these new weapons they must be considered in light of recent changes to just war theory, as well as the geopolitical realities of the 21st century. In the sections that follow we will confront these new weapons with Michael Walzer's "supreme emergency condition", which augments the measures that can be taken against certain types of enemies and in certain situations of war. Next, we will determine whether the emergence of guerrilla warfare and terrorism as threats to the global world order justify different responses than were typically allowed when just war theory developed in light of more traditional wars between states.

Part III: Adaptations of Just War Theory

9. Walzer and McMahan on Discrimination

In the preceding section the judgements that were made regarding the permissibility of certain classes of weapons were based on the principles of discrimination and proportionality. If certain classes of weapons are to be judged impermissible it is because they cannot meet the basic requirements of *jus in bello*. Moreover, there may be certain technologies that we should aim to develop because they are better at achieving the goals of discrimination and proportionality. That is of course, if these principles are taken as absolute as they are in the traditional outlining of just war theory that has been presented. However, not all theorists of just war agree as to the nature of the principles of *jus in bello* and the changes brought to these conceptions may have an effect on the way weapon prohibitions are viewed.

The first variation of *jus in bello* that will be taken into consideration is Jeff McMahan's subsuming of *jus in bello* to *jus ad bellum*. If McMahan is correct then the principles of discrimination and proportionality do not apply equally to all combatants. Adopting this version of just war theory would no doubt make it easier to justify a ban on indiscriminate weapons. However, what will be argued is that his adaptation of just war theory places the burden of the

responsibility for aggression at the wrong place and that McMahan unintentionally commits himself to pacifism. If the traditional distinction between *jus in bello* and *jus ad bellum* maintains, as most theorists assume, then there are still those who, agreeing with Walzer, claim that there are moments in which the principles of discrimination and proportionality must be put aside for practical reasons. This adaptation of just war theory poses a direct threat to weapons prohibition attempts as it justifies certain indiscriminate attacks on civilians. If these attacks are sometimes justifiable, then arguing for a prohibition of the weapons capable of these kinds of attacks is not desirable. The following section will argue against Walzer's adaptation of just war theory that would allow for the putting aside of the principles of discrimination and proportionality in order to argue against his position on weapons prohibitions.

9.1 McMahan's integration of *jus ad bellum* and *jus in bello*

In his essay "The Ethics of Killing in War", Jeff McMahan argues against the traditional theory of just war by claiming that the separation of *jus ad bellum* and *jus in bello* cannot be justified. What this means is that once you have determined who is acting on the side of justice through the principles of *jus ad bellum*, these judgments carry over into the sphere of *jus in bello*, allowing the just war theorist to make moral judgments that take these judgments into account. In doing so, he challenges the idea that discrimination means only distinguishing between combatants and non-combatants. McMahan argues for an even more inclusive principle of discrimination. One that distinguishes combatants fighting on the side of justice from those he calls "unjust combatants". What this means for just war theory, more practically speaking, is that if country *x* attacks country *y*, then *y* has the right to defend itself against its attackers and the soldiers doing this defending cannot be held morally accountable for their actions, so long as they respect the principles of *jus in bello*: proportionality and discrimination. The initial attackers, however, are not in the same moral position. The initial attack was unjust and so each subsequent use of force is not defensible. The soldiers who do not have justice on their side, the "unjust combatants", are committing murder when they attack, irrespective of who

they are aiming their weapons at, be they combatants or non-combatants.⁶³ While this position has gained in popularity with just war theorists there are some problems with this characterization.

First, Walzer has argued, quite convincingly, that the “moral equality of soldiers” means that soldiers, no matter which side of the struggle they are on, are not held morally responsible in the same way that murders are. Because soldiers are coerced into their situations and are in a position where necessity reigns, they cannot be said to be acting completely autonomously. As Walzer says war is “a social practice in which force is used by and against men as loyal or constrained members of states and not as individuals who choose their own enterprises and activities...the soldiers would almost certainly be non-participants if they could.”⁶⁴ What this means is that in separating *jus ad bellum* from *jus in bello* you are holding the right people accountable for the actions they have freely chosen. The political leaders are responsible for deciding to engage in battle and they are charged with war crimes when they act aggressively in violation of the principles of *jus ad bellum*. Soldiers and even more likely, generals and commanding officers, are held responsible when breaches to the rules of *jus in bello* are made. The soldiers themselves are not held responsible merely because they went to war, they are judged on the individual actions that they actually had a chance to control in some way.

McMahan points out the fact that “a single war can have numerous aims, either serially, simultaneously, or both” and that “some of these may be just while others are unjust.”⁶⁵ Based on this conception of just cause as potentially transient, he then goes on to argue that “this understanding of just cause tends to erode the traditional theory’s distinction between *jus ad bellum* and *jus in bello*. For on this understanding, the requirement of just cause applies not just

⁶³ Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004).

⁶⁴ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 30.

⁶⁵ McMahan, "The Ethics of Killing in War," 713.

to the resort to war, or to the war as a whole, but also to individual acts of war.”⁶⁶ But if it is the individual acts of war that are being judged, then it must be that the individual combatants carrying out these actions must be the ones who are ultimately held responsible. However, given that soldiers are often coerced, whether they are professionals or draftees, holding them responsible for the global workings of political systems seems to be placing the blame for the war at the wrong place. This, of course, does not mean that individual acts of war cannot be judged unjust, traditional just war theory has always made these kinds of judgements by referring to the rules of engagement as they are laid out in *jus in bello*. It is also true that soldiers sometimes can and do make judgements as to a war’s justice and refuse to participate in wars that they consider to be unjust. But this ability depends on a number of factors including the basic foundations of the society in which the soldier is living. For example, a draftee living in a totalitarian society would have no choice as to whether or not to go to war and even in the most liberal democracies soldiers are placed in situations that significantly limit their ability to make decisions autonomously.

A good example of this is the vaccination of soldiers against anthrax; in 1998 the US army started vaccinating its troops against anthrax after a long battle to have the vaccine approved by the FDA. But the problems did not end when the vaccine was approved. By 1999 several hundred soldiers had refused to accept the vaccine and a lawsuit to defend the soldiers had begun. Despite the fact that this was a small percentage compared those who had accepted the vaccine the cases were high-profile enough to bring attention to the matter. The military tried to court-martial those who disobeyed the orders given them. Although this example does not bear on a refusal to fight it reveals the fact that soldiers are often coerced into obeying commands that they would otherwise have potential reasons to resist. It also reveals the fact that a relatively small percentage of people are willing to fight against authority when the time comes to do so, as well as, the fact that those who are willing to do so are usually higher up the

⁶⁶ Ibid.

chain of command to begin with.⁶⁷ If we apply these findings to a situation of actual fighting the orders coming in on the ground would be least likely to be contested by those actually carrying them out. To insist that soldiers bear the brunt of the responsibility for crimes in war would be to relegate entire classes of people to the category of criminals when they do not necessarily bear any direct responsibility for the actions they engage in; an unintuitive result for just war theory. We will come back to other cases where the defence of civil liberties will come into conflict with just war theory when we consider the treatment of terrorists and guerrilla fighters under just war theory in part 4. For now we will continue to examine McMahan's proposed revision of just war theory.

No doubt, McMahan's proposition has the aim of limiting how wars can be fought and justified, and is therefore in line with the general aim of just war theory. However, it seems that judging individual acts of war as just or unjust based on the terms of *jus ad bellum* simply complicates matters to the point of making nearly every act of war unjust in some sense. The problem with this position is not that it is theoretically impossible; rather, the problem is that McMahan claims to occupy a different position in the spectrum than the one he is defending. In other words, if McMahan is right that individual acts of war should be judged based on the criteria of *jus ad bellum*, then he seems to have committed himself to a type of pacifism, which he claims to be opposed to. McMahan considers himself to be a just war theorist and not a pacifist and says quite clearly that "there must, unless pacifism is true, be legitimate targets for just combatants."⁶⁸ Following Benjabi it seems likely that McMahan has unintentionally committed himself to a kind of pacifism while claiming to argue for a new version of just war theory.

Why is this the case? Let us imagine what war would look like if McMahan's criteria were put in place by applying his conception of just war theory to an abstract illustration. If a

⁶⁷ Miller, Engelberg, and Broad, *Germans: Biological Weapons and America's Secret War* 264.

⁶⁸ McMahan, "The Ethics of Killing in War," 718.

country *a* attacks another country *b* for aggressive and expansionist reasons then there is no contest as to which side is on the side of justice and which side is not. *Jus as bellum* clearly prohibits using war for aggression and country *b* is then granted the right to protect its sovereignty and citizens from the aggressive attackers of country *a*. In this case country *b* can use any means of repelling *a* that are necessary so long as these are not in violation of the principles of *jus in bello*. According to McMahan the soldiers of country, being engaged in a war of aggression, *a* would only have the *right* to attack the soldiers of country *b* if the latter did something to violate *jus in bello*, such as attack its civilian population. This polarization of the soldiers on opposing sides is counterintuitive. Even if the initial attackers wanted to stop fighting they would be facing an army of counter-attacking soldiers, making stopping very risky indeed. Moreover, if the attackers suddenly came to the realization that they were not justified in their attack this would mean that there were soldiers willing to carry out an initially unjust attack on another country but who would then realize that the war they were fighting in was unjust and refuse to continue once the soldiers on the side of justice started repelling the attack. This is an unlikely situation because the same soldiers who were willing to start the fighting are also those who would have the burden of recognizing that the war they are engaged in is unjust and stopping the fighting. In traditional just war theory this problem does not arise because the soldiers are not the ones making the decision to go to war or to continue the war. No matter what side they are fighting on they are not ultimately responsible for the war and its duration. Let us imagine for argument's sake that the soldiers of country *a* are aware that by fighting they will be engaging in a war of aggression and refuse to fight in the war. Whether or not they would be held personally responsible the moralist would expect this result in such a clear cut example with the absence of coercion. If this were the case then war would not be a possibility as the soldiers on the side of justice would have no one to fight against.

Now, if coercion were in place, as it usually is, and the soldiers themselves were unaware of the nature of the war thinking that they were on the side of justice, then they would not abstain from engaging in their aggressive actions not believing that they would be held

responsible. In this case we would have a war where both sides believe that they are on the side of justice and the individual acts of war get carried out with only the principles of *jus in bello* having an effect on the nature of the fighting. In other words, we are back at square one, where the soldiers on both sides are equal as far as justice is concerned. The third and final possibility arises when soldiers fighting on one side are aware of the fact that they are fighting in, what others at least, consider an unjust war and continue fighting nonetheless in the absence of coercion. Although an unlikely scenario, we would not expect these soldiers to be particularly concerned with the laws of war and just war theory more generally if they would be willing to totally ignore the basic principles of just war theory. For example, in a case where the combatants were aware that they were fighting in a war of aggression we would not expect them to be concerned with fighting proportionally or discriminately to begin with. Given the three possibilities, that the soldiers not on the side of justice are being coerced, that both sides believe that they have justice on their side, and that the unjust combatants are willingly fighting in an unjust war, only in the last scenario would we want to hold the unjust combatants responsible, but not necessarily for their breaches of *jus ad bellum*, but for their disregard for the rules in general, specifically the rules of *jus in bello*. Had McMahan's integration of *jus ad bellum* and *jus in bello* been desirable then the principles of *jus in bello* would have only applied to the combatants on the side of justice, seeing as the "unjust" combatants would have been judged responsible for crimes whether they attended to the principles of *jus in bello* or not. No doubt they would have been judged more harshly for violating these principles in addition to the fundamental *jus ad bellum* principles, but these subsequent violations would have been of less importance than the initial agreement to take part. In this case what sort of incentive would combatants have to respect the rules of *jus in bello* if by doing so they are accepting greater risks for themselves when they will be judged responsible either way.

If the unlikely situation arose in which only those on the side of justice fought to re-establish peace the consequences would be great for just war theory. Those on the side of justice are likely to be concerned with discrimination and proportionality and would not want to harm

enemy civilians as this would go against the goal of re-stabilizing the political order. However, given the arguments against the likelihood and applicability of this theoretical position we are still left in a position where combatants have an equal moral standing in *jus in bello*. Next we will examine Walzer's supreme emergency condition which also introduces an inequality between combatants on either side of a struggle in order to temporarily relieve those on the side of justice from the requirement of obeying the rules of *jus in bello*.

9.2 Examining Walzer's Supreme Emergency Condition

Given that McMahan's proposed of fusing the requirements of *jus ad bellum* and *jus in bello* seems to yield unintuitive results it appears that the traditional separation of the two spheres is desirable. As such, in maintaining the place of the principles of *jus in bello* intact there remains the possibility that these principles could be put aside given the right circumstances. Walzer maintains the traditional separation of these two spheres of just war theory for all situations that conform to what he considers "normal" warfare. But there are situations that he considers so extreme that the rules of *jus in bello* need to be put aside in favour of ridding the world of some evil that "is unusual and horrifying"⁶⁹. Walzer's paradigmatic example of a case where the decision to forgo the principles of discrimination and proportionality was justified is the situation of the British facing the Nazi's in WWII. According to Walzer, the Nazi's posed a threat to the British that was so great as to compromise the very nature of civilization as we know it. In other words, allowing the Nazi's to win the war was something that no moral person would accept, so any measures necessary to making sure that this outcome did not present itself were justifiable. As Walzer puts it:

Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation,

⁶⁹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 253.

immeasurably awful. We see it-and I don't use the phrase lightly-as evil objectified in the world, and in a form so potent and apparent that there could never have been anything to do but fight against it.⁷⁰

This argument depends on the idea that any justification that would normally go into determining if an action is legitimate or not is no longer taken into consideration. It requires us to give up on any rights based approach to morality but more importantly it requires putting aside consequentialist calculation. Discrimination and proportionality together represent both types of moral reckoning: a rights based approach with discrimination, irrespective of the consequences you must respect the rights of citizens to not be attacked, and a consequential approach with proportionality, use only the necessary amount of force to reach your goals. What the supreme emergency allows for, according to the model put forward by Walzer, is the putting aside of discrimination and proportionality in that order. First and foremost, you are morally justified in attacking civilians for the sake of terrorising the population and seeing as the objective is to spread fear, which is an intangible attribute of people and not a tangible military objective, no proportional calculations can come into play in this situation. This reading of Walzer goes against some of his commentators who see him as putting aside the rights based approach to morality and substituting it for a consequentialist one. However, if we want to take Walzer's supreme emergency condition as he puts it I believe we have to see it as a putting aside of all morality. As he puts it, in a situation of supreme emergency "I accept the burdens of *criminality* here and now."⁷¹

In order to understand how and when Walzer believes the supreme emergency condition comes into play we must examine his paradigmatic example more closely. Walzer is well aware of the fact that making an argument like the one in favour of the supreme emergency condition is dangerous and as he puts it, "a great deal is at stake here, both for the men and women who

⁷⁰ Ibid.

⁷¹ Ibid., 260. Emphasis added.

adopt such measures and for their victims, so we must attend carefully to the implicit argument of ‘supreme emergency.’”⁷² When Churchill described Britain’s situation in 1939 as a “supreme emergency” Walzer takes this to mean that he was making an implicit argument as to both the imminence and the nature of the danger that she was facing. The argument takes the following form: “if we don’t do *x* (bomb cities), they will do *y* (win the war, establish tyrannical rule, slaughter their opponents).”⁷³ But all fighting in war time (except for the final action that finally ends the war) takes this form, if we do *x*, they will do *y*, so the conditions that allowed Britain to attack German citizens must have had some particular moral standing. What must these conditions be? Walzer says that what was so horrible about the situation facing Britain was that the Nazis would 1. Win the war, 2. Establish tyrannical rule, and 3. Slaughter their opponents. Walzer must mean these three conditions taken together are what make the prospect of not bombing German cities inconceivable. Why must all three conditions obtain? According to just war theory the very fact that the aggressor nation will win the war does not justify forgoing the rules of engagement. If this were the case then whoever had justice on his or her side could always ignore the rules of *jus in bello* in order to win the war more quickly and with less risk to himself. Even McMahan, who thinks that those on the side of justice have special rights compared to the aggressors, does not think that the rules of *jus in bello* can be put aside by just combatants. On the contrary, those on the side of justice have a disproportionate moral responsibility compared to the aggressors.

The second condition requires that the aggressor nation impose tyrannical rule upon those conquered. This is clearly a very bad consequence indeed that we would naturally want to avoid, even at a very great cost. However, the only problem with this condition is that it is hard to imagine an aggressor nation that does not intend to impose a form or another of tyrannical rule on those it has taken over. In other words, it is natural that those just conquered will not submit willingly to a ruler who has just taken over by force after waging war with that aggressor.

⁷² Ibid., 251.

⁷³ Ibid., 267.

It is natural to expect that the aggressor will enforce his rule by force in order to maintain control, at least for the beginning of his rule. Walzer is clear that there is a difference between a war whose goal is the seizure of territory compared with the annihilation of a portion of the population for ideological reasons. In the case of mere territorial expansion no appeal to the supreme emergency condition obtains. In these cases the problem is not with the way of governing once the war is over. The real problem with the aggressor nation winning the war comes if condition three is met. If the aggressor nation wins the war, imposes tyrannical rule and the tyrannical rule takes the form of slaughtering all opposition, then the conditions become such that we cannot stand to live with the consequences of this takeover and must avoid it at all costs, even if this means going against the rules of *jus in bello* pre-emptively.

It is the slaughter of all opposition that is so horrifying that it requires us to act so as to avoid this murderous carrying out its plans of mass murder. In the case of the Nazi regime its record of conquest was such that we can be sure that had the Nazi's been allowed to win the war against the British in 1939 they would have continued on the path of murder that had been set up long before the war even began. This fact in and of itself does not seem to justify the resort to the actual tactics employed by the British in 1939 or at any point after. The tactic of carpet bombing German cities did nothing to address the problem of the mass murders being perpetrated by the Nazis and nothing, meanwhile, was done to combat these evils.⁷⁴ If there is a justification for the actual program of aerial bombardment then it must be justified by the intended effects of this campaign.

9.3 Justifying Aerial Bombardment: Retribution and Necessity

When the British adopted the decision to bomb German cities in 1939 a terrifying precedent was set for the future of battles waged in World War Two and beyond. As Walzer

⁷⁴ For an account of the extermination of the Jews of Europe and what was not done to address the ongoing genocide see Raul Hilberg, *The Destruction of the European Jews*, 3rd ed., 3 vols., vol. 3 (New Haven: Yale University Press, 2003). And Theodore S. Hamerow, *Why We Watched: Europe, America and the Holocaust* (New York: W. W. Norton and Company, 2008).

reports, “as a direct result of the adoption of a policy of terror bombing by the leaders of Britain, some 300,000 Germans, most of them civilians, were killed and another 780,000 seriously injured.”⁷⁵ The precedent is terrifying not because of the number of lives lost and people injured but because of the policy that was adopted to kill civilians indiscriminately with the direct aim of terrorising the population into submission. The people killed in the raids were not victims of collateral damage, they were the targets. One potential way of justifying these indiscriminate attacks is through the use of the principle of retribution. The Germans had previously attacked London in the same indiscriminate manner, and the only way to avoid a continued assault on British cities was to do the same to the Germans. The idea being that if the Germans had to suffer the same fate as the British, they would relinquish their use of this method. However, this justification fails on two counts, first because this is an unlikely solution to the problem; retaliation usually leads to escalation not retreat. And second, because even if this were an effective solution retribution is not a viable moral option. If Germany bombing London was morally reprehensible, then Britain bombing Germany’s cities is equally reprehensible; it does nothing to right the moral wrong that was committed in the first place; this action simply creates more suffering. As Stephen A. Garrett maintains, “Britain was fighting to maintain values of respect for dignity and integrity of each single individual but adopted a method of war so destructive as to threaten the very cause for which she was fighting.”⁷⁶

The second argument for the bombing of German cities makes direct use of the idea of necessity. Walzer puts the argument in the following way:

Given the view of Nazism that I am assuming, the issue takes this form: should I wager this determinate crime (the killing of innocent people) against that immeasurable evil (a Nazi triumph)? Obviously, if there is some other way of avoiding the evil or even a

⁷⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 255.

⁷⁶ Garrett, *Airpower and Non-Combatant Immunity: The Road to Dresden*, 180-81. For further arguments against retribution as a possible moral response in warfare see: Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (Cambridge: Cambridge University Press, 2009).

reasonable chance of another way, I must wager differently or elsewhere. But I can never hope to be sure; a wager is not an experiment. Even if I wager and win, it is still possible that I was wrong, that my crime was unnecessary to victory. But I can argue that I studied the case as closely as I was able, took the best advice I could find, sought out available alternatives. And if all this is true, and my perception of evil and imminent danger not hysterical or self-serving, then surely I must wager.⁷⁷

Making an argument of this type is very dangerous for just war theory because it superimposes two levels of necessity on top of one another. War is always a last resort undertaken only in situations of necessity, but this necessity is still in conformity with the rules of engagement. The supreme emergency comes and brings a second level of necessity into play, one in which we can forego the rules of engagement. The problem here lies in the fact that there is no clear-cut way to tell which situation we are facing in a time of war. The second type of necessity is simply allowed because of a matter of degree, the threat is more imminent, more horrifying, but every war has its horrifying and tense moments; the risk with the supreme emergency condition is that it provides a whole range of excuses to those who would go against the principles of *jus in bello* for their own personal gain. Walzer is clearly aware of this danger as he states in *Arguing About War* that: “a state of supreme emergency may be morally convenient for leaders who wish to dispense with prohibitions and taboos” and also that “we are morally bound to work against the persistence [of the supreme emergency], to look for a way out, lest we be thought to view our dirty hands with less abhorrence.”⁷⁸ Orend argues that Walzer’s supreme emergency condition goes against his justification of a state’s legitimacy in going to war in the first place. A state’s right to go to war stems from the individual’s right to self defence, yet in personal morality we do not think it morally possible to sacrifice a third party in order to save yourself.⁷⁹ Walzer does not make any convincing argument as to why this element of personal morality should not

⁷⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 259-60.

⁷⁸ Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), 48.

⁷⁹ Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer," 26.

translate into the public sphere. So Walzer opens just war theory up to the possibility of the supreme emergency, all the while being aware of the potential abuses this allowance may lead to. This is not to say that we do not feel bad for those who are faced with particularly difficult situations and then justify their otherwise immoral actions by making a plea from necessity. As Christopher Toner following Aristotle puts it: “we do not concur with those who are overwhelmed by evil, but pity them. To be sure, we should not be quick to condemn those who have given in to such a temptation. But not to condemn is far from condoning: appeal to ‘necessity’ cannot grant moral justification, but only a plea for leniency.”⁸⁰

Toner may be right but an appeal to necessity in just war theory is necessary if we are to distinguish just war theorists from pacifists. Without an appeal to necessity just war theory could never get off the ground as every resort to war is a resort that is made based on the idea of necessity. However, as was argued above, the risks associated with going to war in the first place are ones that we can live with as political communities due to the fact that the rules of *jus in bello* are in place to protect us from the worst consequences of war. The superimposition of the second level of necessity on the first is a step we should not be willing to take if the prohibition against the indiscriminate killing of the innocent is to be maintained in morality. If Walzer were only committed to *not condemning* the indiscriminate actions of those faced with a supreme emergency we could come to terms with the effects of this allowance. However, Walzer’s addition of the supreme emergency condition to just war theory is much more than that and what is worse; it is particularly frightening when is combined with his stance on weapons prohibition.

9.4 Supreme Emergency and Prohibited Weapons

As we have seen, Walzer’s stance on weapons is that they should be judged according to how they are used and not based on the nature of the weapon itself. As he says discussing

⁸⁰ Christopher Toner, "Just War and the Supreme Emergency Exemption," *The Philosophical Quarterly* 55, no. 221 (2005): 554.

nuclear deterrence, “the crucial distinction in the theory and practice of war was not between prohibited and acceptable weapons but between prohibited and acceptable targets.”⁸¹ The only exception to this rule that he would potentially accept is a ban on nuclear weapons, although he presents arguments that could defend the use of nuclear weapons on a limited scale.⁸² Given that this reality was impossible at the time of his writing he concludes that “nuclear weapons are politically and militarily unusable only because and insofar as we can plausibly threaten to use them in some ultimate way.”⁸³ This stance is perplexing because there is no reason to accept a ban on nuclear weapons while refusing to allow a ban on other weapons, such as chemical and biological weapons, that are also indiscriminate and can have equally damaging results. Walzer’s position is only tenable given that the supreme emergency condition exists, for the following reason. If a supreme emergency can compromise the continued existence of my society, or my ally’s society, and the only way to stop this from happening is through the use of indiscriminate means, then maintaining a stockpile of weapons capable of responding to this type of crisis is justifiable. I would maintain, even if these weapons are nuclear weapons, which is an undesirable result for Walzer. It is interesting to note that the American Society of International Law based its decision to not ban nuclear weapons on the possibility of requiring these weapons in a situation of extreme emergency. The Society stated that:

The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, but that in view of the current state of international law and the facts before the Court, it could not conclude definitively whether the threat or use of

⁸¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 276.

⁸² It is interesting to note that a ban on nuclear weapons has not passed in international law, despite the fact that they are widely acknowledged to be amongst those weapons most likely to violate the principle of discrimination. Bello and Bekker, "Legality of the Threat or Use of Nuclear Weapons".

⁸³ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 278.

nuclear weapons would be lawful or unlawful *in an extreme circumstance of self-defence, in which the very survival of a state would be at stake*.⁸⁴

However, if there is no situation that would justify the use of indiscriminate means of waging war, then what justification could there be for developing and stockpiling these weapons. As a test of our intuitions regarding the supreme emergency condition, Daniel Statman asks us to imagine the following hypothetical situation:

Let us assume that the “Manhattan Project,” which started as a response to the German atomic program, had been completed a year or so earlier than it actually was. That’s not a wild assumption. Let’s further assume that had the United States dropped two or three atomic bombs (of the sort later used against Japan) on Berlin, that would have ended the war immediately. None of Hitler’s shelters in Berlin or around it could have protected him from the effects of these bombs. Finally, had the war come to its end this way, with a German defeat in 1944, the lives of millions would have been spared, including close to a million Hungarian Jews who were murdered in 1944-45 and all the Allied casualties incurred in the invasion and in the last phases of the war.⁸⁵

If the Supreme emergency is to be taken seriously, then it is hard to see how Walzer can argue against the use of the atomic bomb in this hypothetical situation. What is so much worse about using the atomic bomb in this situation compared to the bombs that were actually dropped on Germany? “It is estimated that more than 500,000 German civilians lost their lives to Allied bombing. Perhaps another million received serious injury. Around 3 million homes were destroyed.”⁸⁶ If Walzer is against not the idea of nuclear weapons but the results of their being used, how can he seriously maintain that the use of another weapon to get the same results is justifiable, while using an atomic weapon is not?

⁸⁴ Bello and Bekker, “Legality of the Threat or Use of Nuclear Weapons”: 127. Emphasis added.

⁸⁵ Daniel Statman, “Supreme Emergencies Revisited,” *Ethics* 117 (2006).

⁸⁶ Garrett, *Airpower and Non-Combatant Immunity: The Road to Dresden*, 180.

If the supreme emergency is not viable, then maintaining or developing indiscriminate weapons is not justifiable as they could never be used in the context of a just war. Given the above arguments against the supreme emergency condition it seems that we must give up the traditional claim that weapons be judged only as they are used and not based on their characteristics. Why is this the case? This is the case because weapons are not benign in their effects on which wars are fought and how they are fought. The weapons available for use change the nature of which wars we are willing to fight. As Hugh White states, “Western countries now have options to achieve military objectives at far less risk and cost to themselves. This has been a major factor in encouraging them to resort to armed force more often, for less reason.”⁸⁷

In the following section we will look at how the supreme emergency condition has been used to justify certain wars against untraditional combatants (notably terrorists and guerrilla warriors) and the civilian populations that get caught in the line of fire. If these situations are described in terms of the supreme emergency condition and this condition justifies attacks on civilian populations the combination of this factor with the new technologies described in part 2 could have disastrous effects on the lives of those who intentionally, or not, harbour untraditional combatants.

Part IV: Unconventional Combatants, New Weapons and the Supreme Emergency

10. Old and New Wars

As we have ascertained up to this point the principles of *jus in bello* depend on the distinction between combatants and non-combatants. Without this categorical distinction

⁸⁷ Hugh White, "Civilian Immunity in the Precision-Guidance Age," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), 185.

between groups just war theory does not even get off the ground. However, just war theory has traditionally been thought of as pertaining to inter-state conflicts and the occasional civil war wherein the opposing sides in whatever conflict is in question are legitimate military targets. In other words, whether the soldiers fighting are volunteers, paid professionals or draftees they fight on behalf of a distinguishable social group. They fight on behalf of the group whose interests they are representing and can be distinguished from this group by a number of factors including uniforms and other means of identification. However, as Eric Patterson outlines in his paper "Just War in the 21st Century: Reconceptualising Just War Theory after September 11" new wars differ from traditional wars in a number of ways. 1. The scope of the battlefield has changed, 2. Old wars were fought by legitimate political entities, 3. Old wars were fought by combatants and those not distinguishing themselves as such were criminals subject to capital punishment, 4. Old wars were fought away from civilian centers, and 5. New weapons are capable, not only of reaching farther and killing more efficiently, they also have (sometimes unintended) consequences on the natural and economic environments they touch.⁸⁸ Given all these changes to the conditions of warfare (which have been extensively covered in parts 1 and 2), we are required to accept certain amendments to traditional just war theory that allow non-traditional fighters to protect their interests when they are threatened and that also allow states to target enemies who refuse to distinguish themselves from whatever group they claim to be acting on behalf of. Patterson makes the distinction that has been taken for granted up to this point explicit saying that discrimination is different from non-combatant immunity in that, "discrimination simply means making a choice about who constitutes an active threat as distinguished from those who do not."⁸⁹

While this distinction between non-combatant immunity and discrimination may seem obvious, it raises several questions regarding how far we are willing to push the idea of

⁸⁸ Eric Patterson, "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11," *International Politics* 42, no. 1 (2005): 119-20.

⁸⁹ *Ibid.*: 124.

discrimination. Given that the traditional distinction between combatant and non-combatant is no longer tenable, which of the so-called “active military” threats are we willing to target and with which kinds of weapons? Is it true, as Patterson claims, that “the Sunni girl carrying munitions to insurgents is a threat, whereas the Pashtun male protesting against the government is not”?⁹⁰ And if this is the distinction that we wish to maintain, what underlying principle justifies this distinction? Our answers to these questions will have a profound impact on just war theory as they can potentially strip the principle of discrimination of most or all of its weight.

10.1 Guerrilla Warriors

Guerrilla fighters occupy a special place in just war theory as they often rely on tactics that go against traditional rules of engagement, such as wearing distinguishing uniforms or identification. However, guerrillas do not necessarily go against the more fundamental rules of discrimination and proportionality, and thus they can be regarded as just combatants. In cases where the only form of resistance available is guerrilla tactics we do not judge those who would otherwise be taken over harshly. Despite the fact that guerrillas do not distinguish themselves from civilians they, nonetheless, as Walzer stresses, “stress the moral quality not only of the goals they seek but also of the means they employ.”⁹¹ They are embroiled in the language of just war and use it to justify their actions. The guerrilla fighter, like the traditional soldier in uniform, must have some claim to legitimacy beyond the fact that he respects the principles of discrimination and proportionality. Like the traditional soldier, he must derive his legitimacy from the fact that he actually represents the population on whose behalf he is fighting. As Walzer emphasises: “Guerrilla war is ‘people’s war,’ a special form of *levée en masse*, authorized from below”, which means that the guerrilla “is not a solitary fighter hiding among the people” but a member of a nation at war because they do not have an army capable of

⁹⁰ Ibid.

⁹¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 180-81.

defending them.⁹² If a nation is allowed to defend itself against attack by sending in its army, then surely a nation invaded but without an army capable of resisting the attack and defending its people is allowed to resist in any way available.

This way of characterising guerrilla warriors implies that these fighters are always fighting with just cause and that this is the feature that grants them their legitimacy. However, this need not be the case. We can easily imagine cases in which a group of citizens take up arms against a minority within or outside their borders and that the subsequent attack upon them by an allied nation's army is just. The guerrillas in this imagined scenario would be the aggressors with the traditional army defending. The critical attribute of guerrilla warriors that grants them their status as legitimate warriors is the fact that they act as traditional armies do, their aims are limited politically in that they have set goals that can be achieved through military engagement, whether these aims are just or not. Given the nature of international politics and the fact that not all nations are capable of the same kinds of defence, granting the rights of soldiers to guerrilla warriors is desirable, even if granting these fighters means taking more risks from the point of view of the traditional soldiers. When we make judgments as to the morality of these groups of people we have to look at what they actually do in fighting as individuals. If they are respecting the rules, then how can they be judged immoral? To be sure, fighting a war against an enemy who is harder to pin down makes the job of the traditional soldier more difficult, but this is not a condition that alters the nature of warfare. There are still identifiable fighters and civilians who do not pose a threat to the opposition. Because the guerrilla is not posing a threat to the traditional distinctions of just war theory he can easily be assimilated into the most important principles of *jus in bello*: proportionality and discrimination. The identities of the guerrillas and their political goals are what separate them from other untraditional combatants like terrorists. Terrorism is a much greater threat to just war theory as it completely alters the nature of wars

⁹² Ibid., 180.

and how they are fought. We will now turn to examining terrorism and its implications for just war theory.⁹³

10.2 Terrorism

Terrorism is such a loaded term since the start of “the war on terror” began after the attacks on the World Trade Center in 2001 that it is now impossible to make reference to terrorism without implying lone Muslim extremists bombing city busses and metro stations. However, terrorism was not invented on September 11, 2001, nor is it used only by individuals for religious/ideological reasons. Defined broadly, terrorism is any action taken with the aim of inspiring fear in an adversary. Taken as such, it does not matter who is responsible for the action, an army, a band of guerrillas, or an individual who belongs to a network of other likeminded people operating across international borders. Orend defines terrorism as “the use of random violence-especially killing force-against civilians with the intent of spreading fear throughout the population, hoping that this fear will advance a political objective.”⁹⁴ Thus, the British air strikes on Dresden in WWII, Pinochet’s overthrow of the Chilean government on September 11, 1973,⁹⁵ as well as more recent bombings, such as the attacks of September 11, 2001 all fit the mould of terrorism. Obviously the principle of discrimination prevents the use of terrorism as a legitimate military activity, so long as the supreme emergency condition is not a moral possibility. The use of terrorism as a tactic of democratic states is only likely to be permitted if the people tolerate its use. In other words, any arguments put forward condoning the use of terrorist measures, such as those for the supreme emergency condition, make it that much harder to get a majority of people in a democratic society to militate against it.

⁹³ For a discussion of how combatants gain their legitimacy see: Stanley Hoffmann, "States and the Morality of War," *Political Theory* 9, no. 2 (1981).

⁹⁴ Orend, *The Morality of War*, 69.

⁹⁵ For a discussion of the use of terror and the doctrine of “shock and awe” in Chile in the 1970’s see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto: Alfred A. Knopf, 2007), 87-115.

Even if just war theory and international law expressly condemned terrorist activities there are still problems that terrorism brings about for just war theory. Since terrorism is so effective a strategy, and so cost effective, it is likely to remain a principle strategy for those unable (either for economic or ideological reasons) to wage traditional wars. Given the reality of this situation, any just war theorist must grapple with defending against and engaging in counter attacks against terrorists. Terrorism is a tactic; however, it appears to make a difference who is employing the tactic, not from the standpoint of the morality of the action itself, but from the standpoint of reactions to these tactics. Defending against an attack, be it terrorist or other by a recognizable entity, such as a military or guerrilla group is obviously not as difficult as attacking an enemy who ceases to exist as soon as the attack is over. When a terrorist tactic is employed in the context of an already ongoing war those responsible for the attacks must take responsibility for their actions. In a sense there is no “war on terror”, as “terrorists” do not behave like any other warring faction. They do not have determinate political goals that can ever be said to have been met. The so called “war on terror” is not like any traditional war because there is no determinate beginning and end to the fighting. If this “war” is granted the status of a traditional war, then it is not at all obvious how to outline the principles of proportionality and discrimination so that the rules of engagement make sense ethically.

Discrimination is already difficult to apply in situations against any untraditional combatants because they tend to disappear as soon as a particular raid or operation has taken place, disguised either by the natural landscape or the civilian populations who support them. In the case of “terrorists” who operate across international borders locating these “suspects” is notoriously difficult and the people being targeted do not fit easily into our working definition of combatant. According to convention a combatant is someone who poses a direct threat to the opposition. A person who has bad intentions or feelings towards another group of people and who may even be planning to attack said group still doesn’t fit the definition of combatant. On Orend’s definition: civilians, “whatever their *internal* attitude, are not in any *external* sense dangerous people. So they may not be made the direct and intentional objects of military

attack.”⁹⁶ The “terrorists” who are the objects of attack in the “war on terror” go about their daily lives as normal civilians do. They are not “*demonstrably engaged in military supply or military activity*” and are, therefore, “*immune from direct attack.*”⁹⁷ The “terrorist” resembles a criminal who can be charged with a crime. His crime may be one directed against another country but judicial procedures exist that can deal with these kinds of crimes. If he is a criminal who conspires to commit horrible crimes, then ostensibly there is evidence that could be used against him in a court of law. The placing of “terrorists” into the same category as combatants strips them of their right to due process and other legal rights protected by other principles in areas unrelated to war.

While the ongoing wars in Afghanistan and Iraq that are part of “the war on terror” can be easily fit into traditional just war theory because these nations harbour people responsible for attacks on the United States (a claim which is not uncontroversial) other actions taken by the US in this war are not so easily defensible. Some of the ongoing tactics employed include: “the targeting, followed by the seizure or even killing of persons outside the zones of armed conflict in Afghanistan and Iraq whom the US government suspects of terrorist activity.”⁹⁸ In other words, the US government has been performing what have come to be known as “extraordinary rendition” and “targeted killing”. Whether these tactics are morally justifiable depends on whether we view terrorists as combatants in a war or as criminals in peacetime. As Ratner puts it, we can view the attacks of September 11, 2001 through two different lenses; the first being the lens of *law enforcement* and the second being the lens of *armed conflict*. If September 11, 2001 can be seen through the lens of law enforcement, then:

The hijackings and crashes were criminal acts-under US law, foreign law and international criminal law. This perspective also suggests that the response to them

⁹⁶ Orend, *The Morality of War*, 113. Author’s emphasis

⁹⁷ *Ibid.*, 114. Author’s emphasis

⁹⁸ Ratner, “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad,” 252-53.

should be undertaken through law enforcement processes. These techniques involve traditional methods of police and judicial cooperation among countries at peace—extradition, sharing of intelligence, cooperation on prosecution, and diplomacy, including the employment of carrots and sticks to gain the cooperation of recalcitrant states. The goals of such processes are prevention and punishment, and these techniques are often focused on building a case for a criminal trial.

On the other hand if the lens of armed conflict is employed,

The September 11 events constituted an armed attack on the United States, albeit one by non-state actors. As a result, the United States with the aid of its allies is entitled, under article 51 of the UN charter, to engage in self-defense against those actors (and perhaps some states as well). The current situation is an armed conflict with Al Qaeda, one not necessarily confined to the territory of Afghanistan. The United States is thus permitted to deploy a full array of military capabilities against terrorist targets; it can capture and kill terrorists without having to rely upon law enforcement techniques of arrest and prosecution.⁹⁹

If terrorists are viewed under the lens of armed conflict this opens up the possibility of secretive, and unending war, which is obviously an unappealing result for a just war theory whose goal it is to limit the duration and negative effects of said wars.

What kind of evidence is there to suggest which lens terrorist attacks should fall under? If the scale and threat of terrorism in its most recent form is indeed grave enough, then states may well be justified in their resort to war to counter it. If, however, it can be shown that judicial process is adequate in countering terrorism, then this is the strategy that should be adopted for both moral and practical reasons. This is the position that will be argued for, following Paul Robinson's argument put forward in his article "The Ethics of the Strong against

⁹⁹ Ibid.: 254-55.

the Tactics of the Weak". What Robinson argues, in his own words, is that "the military gain of action against terrorists is often outweighed by the harm to the political strategy."¹⁰⁰ Why is this the case? Firstly, Robinson notes, there have been numerous cases that suggest that police forces worldwide have been very successful in combating terrorist threats. To cite only one example, the British government successfully employed counter-terrorist measures against the Northern Irish terrorists in the 1970's. They observed the laws regarding legal evidence required for arrest and conviction of suspects within the normal standards of legal evidence. While these same suspects might have been treated as combatants and attacked with military force and without any attention to due process. This obviously makes a big difference in a society committed to principles of legality. Working within the confines of the laws set up with the protection of the citizens in mind legitimizes the actions of the British in this case. If the state were legitimized in casting aside the procedures and laws of due process whenever so called "terrorists" acted, the trust and stability in the government would be put into question; quite a consequence for the seizure of a small group of people. This is political and practical evidence. However, we also have moral reasons to favour policing.

In just war theory much debate has surrounded the reasons underlying the acceptability of targeting combatants. Why is it not considered murder when a soldier is killed. The typical reasoning behind this view (adopted by anyone but the pacifist) is that the soldier relinquishes his right to not be attacked by personally posing a threat to the opposition. The soldier does something to lose his right even if he is coerced into his position. Therefore, depending on the identity of the terrorist he will have a different status; that of combatant or civilian. As Kretzmer puts it, "if members of terrorist groups are regarded as 'unlawful combatants', they may be targeted at any time, as if they were combatants; if as civilians, only when actually involved in carrying out a terrorist attack."¹⁰¹ Some may argue that the terrorist has, like the traditional

¹⁰⁰ Paul Robinson, "The Ethics of the Strong against the Tactics of the Weak: A Response to Kasher and Yadlin's 'Military Ethics of Fighting Terror'," *Philosophia* 36 (2008): 198.

¹⁰¹ David Kretzmer, "Civilian Immunity in War: Legal Aspects," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), 94-95.

soldier, been trained to kill and is prepared to kill those on the opposition, so he is open to military attack. However, a further constraint on the right to kill soldiers legitimately rests on their actual status at the time of their attack, so that even if we regard the terrorist as a combatant based on this criterion we may still object to him being attacked under certain circumstances. According to Walzer, in order for a soldier to be attacked justly he must be metaphorically “dressed” as a soldier. In other words, he must be engaging in the task of posing a threat to the opposition. In traditional wars, Walzer notes several cases in which soldiers were unwilling to fire on so called “easy targets”. The reluctance to shoot at a soldier who is unaware he is under attack rests on the fact that the “naked” soldier does not pose a direct threat to those who have the power to take his life away. In an amusing passage Walzer quotes a passage from George Orwell’s military diary, which states that:

At this moment a man, presumably carrying a message to an officer, jumped out of the trench and ran along the top of the parapet in full view. He was half-dressed and was holding up his trousers with both hands as he ran. I refrained from shooting at him. It is true that I am a poor shot and unlikely to hit a running man at a hundred yards ... Still, I did not shoot partly because of that detail about the trousers. I had come here to shoot at “Fascists;” but a man who is holding up his trousers isn’t a “Fascist,” he is visibly a fellow-creature, similar to yourself, and you don’t feel like shooting at him.¹⁰²

The man with his trousers half on in Orwell’s example does not fit into the category of combatant, someone who can legitimately be aimed at, suggesting that the suspected terrorist who is at home, or working at his civilian job, cannot be a target either. No wonder we are relying more and more heavily on unmanned drones to carry out targeted killings in the “war on terror.” If a human soldier were sent to do the job it is a question whether he would be able to carry out his mission.

¹⁰² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 140.

Even in cases, like the wars in Afghanistan and Iraq, where the military is openly deployed it has been noted that taking direct action against terrorists simply increases support for the group in question. Robinson cites a report by senior army officials in Iraq who stated that:

The task force concluded that erosion of enemy influence thought direct action...*only* led to one confirmable conclusion-you ultimately pushed those on the fence into the insurgent category ... Kinetic operations would provide the definable short-term wins we are comfortable with as an Army, but, ultimately, would be our undoing.¹⁰³

This suggests that military operation is not the ideal way of countering terrorism. Not only is it not ideal it is also morally problematic as the externalities of this type of campaign are very difficult to justify given the nature of the threats that the military and society at large are facing.

11. Justifying the “War on Terror” using the Supreme Emergency

Although our fascination with “terrorism” as a concept has only peaked since September 11, 2001, there is evidence that suggests that the actual incidence of terrorist attacks has been on the decline in the world since the 1980’s, when they were at their height.¹⁰⁴ This is not the picture that those supporting the “war on terror” would promote. Although 9/11 was the most lethal terrorist attack on US soil in the history of the country’s existence it was by no means an attack that threatened the very existence of the country, nor was it uniquely threatening (the Oklahoma City Bombing comes to mind). The possibility that the “war on terror” is a supreme emergency must be taken into consideration as this seems to be the type of justification for the targeting of civilians that is open to use by those who support the “war”. Hopefully at this point the arguments against the supreme emergency condition presented subsequently are still sounding convincing. However, for the purpose of this section we will take for granted that the

¹⁰³ Robinson, "The Ethics of the Strong against the Tactics of the Weak: A Response to Kasher and Yadlin's 'Military Ethics of Fighting Terror'," 197.

¹⁰⁴ Ibid.: 196.

theoretical arguments against the supreme emergency condition were not put forward in order to show that in the present political climate there are real practical reasons for arguing against the supreme emergency. If the current tactics being employed in the “war on terror” are only justifiable in the case that it constitutes a supreme emergency, then the arguments against targeting the terrorists when they are in their civilian roles disappears.

Taking the position that Walzer proposes, that the supreme emergency condition is necessary in certain cases, but that it must be used with extreme caution, we will look at whether the “war on terror” can constitute a supreme emergency based on Walzer’s criteria. Although Walzer has gone on record saying that: “it is our self-interest to deny that it can ever be justified to kill you and me and people like us--and, since most people are like us, it’s in everyone’s self-interest to deny that terrorism can ever be justified.”¹⁰⁵ This is not a particularly strong stance to take against the deliberate killing of civilians. The fact that it is not in our self-interest as a global community to engage in terrorism does not suggest a universal a-historical condemnation of terrorism; it suggests only a limited refusal to condone such tactics when the consequences of going against the general rule. In the case of Nazi Germany, Walzer clearly thinks that engaging in terrorism is justifiable because of the nature of the threat that Germany posed to the rest of civilization as we know it. Does the 21st century’s “war on terror” constitute such an exception to the rule? Based on what our politicians have been saying and authorizing in the name of this war it should correspond to a very grave threat indeed. The response to September 11, 2001 has been “the largest scale use of force by any state since the Persian Gulf war over a decade ago.”¹⁰⁶ With our liberal politicians and thinkers claiming that the “war on terror” will require “lesser evils” and “dirty hands”¹⁰⁷ we can clearly distinguish our society’s debt to Walzer, who

¹⁰⁵ Michael Walzer, "Michael Walzer on Just War and Terrorism," <http://bigthink.com/michaelwalzer/michael-walzer-on-just-war-and-terrorism>.

¹⁰⁶ Steven R. Ratner, "Jus Ad Bellum and Jus in Bello after September 11," *The American Journal of International Law* 96, no. 4 (2002): 905.

¹⁰⁷ Irfan Khawaja, "Do We Have to Get Our Hands Dirty to Win the War on Terrorism? And What Does That Mean, Exactly?," *History News Network*(2004), <http://hnn.us/articles/4997.html>. Michael Ignatieff has repeatedly made these claims.

has repeatedly argued for tactics that go against our common morality in particularly trying times.

Walzer himself does not apply the supreme emergency condition to the “war on terror” but he does condone the use of real and not only metaphoric *war* in order to combat terrorism in certain cases. Walzer says that in the case of the various forms of terrorism “we should oppose them all, but the different engagements will have to be considered one by one. We should imagine the “war” as including many possible engagements. “War” is a metaphor here, but real war is a necessary part of the metaphorical “war.”¹⁰⁸ And as such the principles of just war theory must apply in these cases where war is the only way of countering terrorism. Walzer is quick to caution using war to counter terrorism as our new technologies have the ability to replicate terrorism abroad. When trying to counter terrorism he says that we should not rely too heavily on new technologies that alleviate the risks associated with mounting the attacks. If not we risk killing innocent civilians in order to save the lives of other innocent civilians. Walzer is clear that:

In fighting against terrorists, we must not aim at innocent people (that’s what the terrorists do); ideally we should get close enough to the enemy, or to his supporters, so that we are quite sure not only that we are aiming at them but also that we are hitting them. When we fight from far away, with planes and missiles, we have to get people in, on the ground, to select the targets, or we have to have very good intelligence; we must avoid overestimating the smartness of our bombs.¹⁰⁹

But what would Walzer say is justifiable if the terrorist threat were to become so important as to constitute a threat to a civilization or humanity as a whole? Is there any way that the “war on terror” could conceivably justify the supreme emergency exemption allowing for the wholesale slaughter of civilians in order to squelch terrorism? It is likely that Walzer would be

¹⁰⁸ Walzer, *Arguing About War*, 136.

¹⁰⁹ *Ibid.*, 136-37.

sympathetic to the claim that the supreme emergency condition could obtain in any situation of war although he has been quick to caution its use and has not called any conflict other than Britain's situation in WWII at a specific interval a supreme emergency. Nevertheless, we must take this possibility into consideration if we are to consider the full range of possibilities open to defenders of the "war." What would happen if the terrorists got nuclear arms and threatened to drop them on New York or LA? What civil liberties and doctrines of international law would we be willing to sacrifice in order to stop the attacks from occurring? The answers to these questions are very difficult, even when taken from the standpoint of a seemingly universal moral doctrine, such as just war theory. That is not to say that just war theory cannot make pronouncements based on these difficult situations. To claim in the face of these problems that our moral understanding cannot take them into account or that our traditional accounts have failed, or even worse that all moral theories are relativistic and historicized would be to miss the point of just war theory entirely.

That is not to say that just war theory cannot and should not change in any way, we may very well have to argue for amendments to the secondary principles that inform our moral decisions. However, our moral convictions that have been shown to stand the test of time, those principles that have endured over a thousand years of debate and examination have likely endured for good reason. We should be wary of what Margolis cautions is "one of the most stubborn political dangers of our time: namely the advocacy, against all opposing factions, of an exclusively right way to understand moral/political norms and values in universalist terms"¹¹⁰ but we should be equally wary of those who would justify their particular strategy in the face of long standing principles. Some compromise between the two strategies in moral theory building must be obtained if we hope to have just war theory remain influential in the 21st century. What has been recommended throughout this paper is the continued use of the basic principles of *jus in bellum*; namely discrimination and proportionality, while we may very well have to modify

¹¹⁰ Joseph Margolis, "The Trouble with Terror," *Metaphilosophy* 38, no. 5 (2007): 560.

some existing rules concerning bans on weapons in order to maintain a hold on the fundamental goal of just war theory. In other words, in order to limit the destructiveness of war we may have to ban certain weapons, including their stockpiling and development, when previous versions of just war theory merely banned their use in certain situation.

Conclusion

In response to the title of this paper, does just war theory need to get with the times?, the answer that has been argued for is at once yes and no. No, first because the principles that were developed to limit the destructiveness of war were developed with an appreciation for the fact that technologies and political climates change. The basic principles remain useful no matter what period of time we are seeking to describe. However, previous generations of theorists could not foresee the changes that were going to happen with regards to weapons technologies, as such they did not think it important to prohibit certain ways of killing, how could it matter how you were going to die if the final result was always the same. These authors could not conceive of weapons capable of altering not only the state of the individual soldier being attacked but the physical environment surrounding the soldier for hundreds or even thousands of square kilometres. Therefore, we have to be aware of these facts and recognize that evaluating which weapons are permitted will have a profound effect on which wars and what kinds of wars get fought. This is the approach taken in international law, as was mentioned, but this is also the approach in civil society. It has been recognized that allowing certain types of weapons in civil society is dangerous and that there should be limits to what kinds of weapons are permitted. For example, automatic weapons are not legal for purchase by regular civilians in Canada. Just war theorists should not remain silent on these issues but should be actively pushing for those weapons that are capable of meeting the requirements of discrimination and proportionality. This discussion will have an impact on all areas of just war theory.

The focus of this paper throughout has been on the effects of technology on different aspects of *jus in bello* because this is the area of just war theory that is most directly affected by these types of changes. However, just war theory is a united theory that comprises three areas that have been separated theoretically for the purposes of analysis, when in reality it is not always so easy to make the divisions cleanly. Despite the critiques that were addressed against McMahan's attempt to join *jus in bello* to *jus ad bellum* it is obviously true that the different areas of just war theory are not able to stand alone. In order to have a coherent just war theory all three areas have to be taken into consideration. Given more space one interesting way of expanding this project would be to look at the effects technology and new ways of fighting have had on which wars have been fought (which was only briefly touched upon) as well as the effects on the promise of lasting peace. How we choose to fight in the present clearly has a effect on how fighting ends and what kinds of positions communities on the ground are left in for years after the fighting is over. All kinds of problems relating to reconstruction and what is owed to devastated communities could be reduced or augmented depending on the types of weapons that are used in a war effort. Given that only *jus in bello* was addressed directly, these and other interesting topics were left out of the discussion including the essential point regarding the root causes of current struggles. It is likely that these too have changed over time given the changed international climate. This topic intersects with work that is currently underway in other areas of political philosophy, specifically in the politics of identity.¹¹¹ Hopefully these topics will be addressed in the future.

¹¹¹ I am thinking particularly here of Amartya Sen's work on the politics of identity: Amartya Sen, *Identity and Violence: The Illusion of Destiny*, ed. Henry Louis Gates, Issues of Our Time (New York: W. W. Norton, 2006).

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