

New Wine in Old Wineskins—Twenty-First Century Ethical Challenges for the Just War Tradition

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ABSTRACT

Throughout western history the just war tradition has provided philosophers and practitioners of war the prevailing ethical framework for thinking about issues of war, peace, and justice. Although its principles have rarely been fully realized, its tenets established a foundation pertinent to discussions in disciplines such as ethics, law, international relations, political science, and religion. In the twenty-first century new challenges have arisen that question the validity of the just war tradition in an era of globalization and pluralist ethics. Questions regarding the role of military contractors, rise of child soldiers, employment of new technologies, inviolable state sovereignty, and integrated global economics are forcing reevaluations of this ethical model's continued viability. This paper addresses several of these issues, especially as related to business and law, arguing that while the challenges are significant, the tradition is flexible enough to accommodate them. However, responsible parties from all disciplines need to understand what is at stake and attempt to provide consistent, comprehensive, and non-contradictory enhancement of the tradition.

INTRODUCTION

How much flexibility is there in the just war tradition to accommodate new challenges? In an era of globalization, multiculturalism, and pluralist ethics, what are some of the challenges for the continuing relevance of the just war tradition? Will it continue to have credibility and influence in the twenty-first century, or will it become an example of trying to make something that is dated conform to an environment for which it is not suited ending in disappointment and disaster?¹ This essay argues that the just war tradition remains viable for present and future considerations of war.

The just war tradition is firmly and historically rooted in Christian thought and theology, western political thought and ethics as derived from ancient Greek and Roman philosophy and law, and the history of warfare in the West. It arose, not in a vacuum, but in the midst of the violence and values of western civilization as a fluid concept that has flowed throughout western history for more than fifteen hundred years with many tributaries of thought and practice.

When looking at the relationship of the tradition to present and future warfare, it is helpful to remember that the history of European and American warfare and the history of the just war

¹ This principle is articulated by Jesus in Matthew 9:17, "Neither is new wine put into old wineskins. If it is, the skins burst and the wine is spilled and the skins are destroyed. But new wine is put into fresh wineskins, and so both are preserved." (ESV)

tradition are not identical, nor even necessarily complementary. The Crusades, the Spanish Inquisition, the wars of religion during the sixteenth century, and wars associated with colonial expansion are only a few of the many violent episodes in European history that often failed to uphold the values and goals of the just war tradition.² It is indeed, an historical tradition, but the values that underlie it are ones that affect all people of all ages. Thus, James Turner Johnson, one of the most prominent of contemporary just war proponents and thinkers, argues:

The just war idea is not free-floating, to be given whatever content one may think appropriate in whatever context. Understanding its meaning means engagement with the tradition out of which it comes and entering into dialog with the classical statement of the just war idea within that tradition. . . . Just war tradition has to do with defining the possible good use of force, not finding exceptional cases when it is possible to use something inherently evil (force) for the purposes of good.³

Thinking about warfare within the just war tradition means wrestling with ideas and values that are upheld because they are considered greater than any individual, nation, or era. Therefore, every generation of diplomats, strategists, ethicists, business leaders, and military professionals must wrestle with the tradition and its applicability to contemporary technology and circumstances. Because the tradition is grounded in moral, legal, religious, political, and ethical values—values that transcend any given era or society—its viability as a framework for reducing conflict continues.⁴

JUST A WAR OR JUST WAR?

The just war tradition has three important functions. First, it seeks to limit the outbreak and devastation of war. Second, the just war tradition offers a common moral framework and language for discussing issues of war in the public arena. It provides a starting point for discussion of some of the most critical ideas and activities that a nation can promulgate and in which it and participate. Third and finally, the just war tradition gives moral guidance to individuals in developing their

² For recent evaluation of religion and European warfare, see Michael Burleigh's *Earthly Powers: Religion & Politics in Europe from the French Revolution to the Great War* and *Sacred Causes: Religion and Politics from the European Dictators to Al Qaeda*, New York: HarperCollins, 2005 and 2006 respectively.

³ James Turner Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (Lanham, MD: Rowman & Littlefield, 2006), 35, 36.

⁴ Thus, Johnson observes: "Although it has deep religious roots, and although there are specifically religious versions of it in use in contemporary moral reflection on war, this is emphatically not a tradition of holy war, war justified by religious cause and religious authority and fought accordingly." *The War to Oust Saddam Hussein*, 16

conscience, responsibilities, and response. It provides a framework for individual and collective ethical evaluation.

Throughout its long history proponents of the just war tradition continuously have addressed new developments in technology, tactics, political theory and international law in attempts to give ethical guidance for warfare—one of the greatest traumas humans experience and inflict on one another. Because issues of war and peace are literally issues of life and death, the tragedy of war must neither be forgotten nor minimized. Surely, conventional wisdom is not far from the mark in reminding us that the horrors of war are the closest approximation to hell on earth. War changes lives forever in otherwise unthinkable ways; here both secular and religious viewpoints agree.⁵

One structural development within the just war tradition and several trends and issues in contemporary conflict and warfare require attention and comment. Although these are not the only areas of concern for the tradition, they are among the most visible at present. The structural item is that of extending just war concerns into the postwar and post-hostility timeframe, *jus post bellum* in just war terminology, so that there is consistency among principle, policy, and practice throughout the time span of tension and conflict. The trends to be addressed are the use of private military companies, the rise of child soldiers, the use of robotics and non-lethal weapons, and increased attention to the environment in warfare.

JUST WAR CRITERIA AND THE PRINCIPLES OF WAR

Historically there have been two categories within which the criteria for a just war were articulated—*jus ad bellum* (“on the way to war”), in which the criteria determine *when* resort to war is justifiable *or* when to go to war, *and* *jus in bello* (“in the midst of war”), in which the criteria dictate *how war is to be justly conducted*. Within the two categories above there are seven principles or criteria for the just war.

⁵ As seen from a wider religious and Judeo-Christian perspective, war entails the death and killing of people who are fashioned in the likeness of their creator and who therefore possess inherent dignity and incalculable worth. Yet, the very same *Weltanschauung* affirms that war is sometimes necessary. Few (if any) world- or life-views eschew war in *all* circumstances, and no faith tradition is monolithic in its dogma and practice regarding war and peace. This is certainly the case with Judaism and Christianity, whose values have undergirded our own cultural tradition. Throughout its millennia-long history, the Judeo-Christian moral tradition has justified, rationalized, restrained, and informed war, and the conduct of warfare, as well as the conditions for peace. In various times and by diverse means, it has both upheld and departed from biblical standards, and both ecclesiastical as well as secular leaders have appealed to its teachings for national guidance and support.

The first five principles apply as a nation is “on the way to war” (*jus ad bellum*) and the final two apply to military forces “in the midst of war” (*jus in bello*). Articulation and evaluation of these principles is extensive.⁶ While there is some disagreement on particular aspects of the principles, acceptance of them is broad and normative. They are: just cause, just intention, last resort, formal declaration, limited objectives, proportionate means, and non-combatant immunity.

The interpretation and application of these seven principles is not easy in warfare. Nor is there any assurance that they will always receive strict adherence. Warfare is not clean or nice—it is tragic and horrible. These principles are used, not to promulgate war, but to contain it. They are principles of containment, not principles of conflagration. They are moral and ethical guidelines for attempting to minimize the death and devastation that always accompany war.

THE RISE OF *JUS POST BELLUM*

Within the last twenty years there has arisen a third category, *jus post bellum* (“law or justice after war”) in which criteria or principles for post-conflict actions (primarily by the victor) are articulated. As noted above, standard accounts of just-war theory focus on two categories of moral analysis—*jus ad bellum* and *jus in bello* considerations. Less attention has been paid to this third and critically important dimension of justice.⁷ If part of the moral efficacy of just-war thinking is right intention and a concern for the proper ends, then *jus post bellum* considerations are ethically mandatory.⁸

With regard to any conflict, however, one must ask: what is the overall aim for such conflict to be declared just? While the military strategist thinks primarily in terms of military victory over the enemy, just-war proponents seek to bring about, and help establish, a state or condition that is qualitatively *better* than that which existed prior to war. At the minimum, one might cite, in

⁶ Standard contemporary works on the tradition include: Alex Belamy, *Just Wars: From Cicero to Iraq*. Cambridge: Polity Press, 2006; Charles Guthrie and Michael Quinlan, *Just War*. New York: Walker & Company, 2007; James Turner Johnson, *Morality and Contemporary Warfare*. New Haven: Yale University Press, 1999; Oliver O'Donovan, *The Just War Revisited*. Cambridge: Cambridge University Press, 2003; Brian Orend, *The Morality of War*. Peterborough: Broadview Press, 2006; and Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992 and 4th ed., 2006.

⁷ Notable exceptions to this are Nathan Oren, ed., *Termination of War: Processes, Procedures and Aftermaths* (Jerusalem: Hebrew University Press, 1982); Walzer, *Just and Unjust Wars*, chapter 7; Brian Orend, *Michael Walzer on War and Justice* (Montreal/London: McGill-Queen's University Press, 2000), chapter 6; idem, “Terminating Wars and Establishing Global Governance,” *Canadian Journal of Law and Jurisprudence* (July 1999): 253-96; and Gary J. Bass, “Jus Post Bellum,” *Philosophy & Public Affairs* 32, no. 4 (Fall 2004): 384-412.

⁸ See Brian Orend, *the Morality of War* (Peterborough, Ontario: Broadview Press, 2006), 160-89.

positive terms, several things as requisite in the aftermath of war: the restoration, or imposition for citizens, of basic human and political rights that either did not exist or were eradicated from social life; compensation for victims who suffered from the prior regime; and affirmation of political sovereignty as well as territorial integrity. Negatively, justice requires that initiators of the aforementioned suffering and oppression be held accountable for the crimes they perpetrated that violated basic justice.⁹

Brian Orend, in thinking through the nature of the *post-bellum* task, utilizes the metaphor of radical surgery, which is an extreme yet necessary measure undertaken in the interest of a future greater good. He writes that

just war, justly prosecuted, is like radical surgery, then the justified conclusion to such a war can only be akin to the rehabilitation and therapy required after surgery, in order to ensure that the original intent is effectively secured – defeating the threat, protecting the rights – and that the “patient” in this case can only be the entire society of states.¹⁰

Similarly, James Turner Johnson argues that the just-war criteria of right intention and the aim of peace presuppose a readiness to engage in post-war nation-building.

In some cases, nation-building may be a necessary adjunct to the provision of humanitarian relief or protection of relief efforts or the endangered population. In such cases, the idea of military intervention should include the possibility of not only fighters but engineers, communications teams, military police, and civil affairs units, or of civilian teams that would fulfill these functions and others necessary to the rebuilding of a stable civil order.¹¹

Indeed, to walk away from any nation in a post-war scenario is to invite anarchy and thus, to contradict the very essence of original just-war principles.

To emphasize *post-bellum* nation-building is to take seriously the aims of justice and peace that have been declared from the start, before having entered conflict. Nothing less than justice is due a formerly oppressed people in order that they might flourish. From the standpoint of humanitarian intervention, the failure of a victorious nation to provide assistance in post-war reconstruction of another nation calls into question its claim to have waged a just war.¹²

⁹ See Walzer, *Just and Unjust Wars*, 109-23, and Orend, *Michael Walzer on War and Justice*, 138-39

¹⁰ Orend, *Michael Walzer on War and Justice*, 139.

¹¹ James Turner Johnson, “The Just-War Idea and the Ethics of Intervention,” in J. Carl Ficarrotta, ed., *The Leader’s Imperative: Ethics, Integrity, and Responsibility* (West Lafayette: Purdue University Press, 2001), 124.

¹² This is in agreement with Bass, whose argument for reconstructive efforts even in former genocidal states (“Jus Post Bellum,” 396-404) is compelling.

PRIVATE MILITARY CORPORATIONS—MERCHANTS OR MERCENARIES?

The growing presence of armed and unarmed civilian contractors in war zones has generated significant ethical, political, legal, and economic debate in recent years. The legal status of these contractors depends upon the nature of their work and nationalities with respect to that of the combatants and warring groups. The presence of private military corporations in theaters of war is an intersection for considering how we understand business and how we understand war in the twenty-first century. It causes reevaluation of the essences and functions of business and war. The numbers are staggering. In early 2009, estimates of the number of private military contract personnel in Iraq were 180,000.¹³ It is a multi-billion dollar business.

Governments privatize roads and road repair, prisons, hospitals, education, business security, transportation—is military privatization simply the next sphere to be affected in democratic and capitalistic societies (and some that aren't)? Is it the same, or is it different? How?

In his 2003 groundbreaking study *Corporate Warriors: The Rise of the Privatized Military Industry*, Brookings Institution analyst P. W. Singer observed that the “private military industry is no longer so small or obscure” and “for all its growth, our understanding of it still remains greatly limited.”¹⁴ Study of the industry is difficult in part because of the

relative newness of the phenomenon, its failure to fall neatly into existing theoretical frameworks, and, most important, the character of the business itself. Because these firms' operations are almost always controversial and secrecy is often the norm, research is difficult. . . . A number of these firms walk a fine line of legality, with potentially illegitimate clients, business practices, and employees with dark pasts. Some firms are also often at the center of dangerous covert or semicovert operations that many clients, including the U.S. government [and others], would rather not have discussed.¹⁵

There is also a spectrum of activity and services provided by different companies in the global market.

Part of any discussion of a private military firm (PMF) or private military corporation (PMC) or private security company (PSC) is whether or not its employees are functioning as

¹³ P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin Press, 2009), 9.

¹⁴ P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, N.Y.: Cornell University Press, 2003, rev. ed. 2008), viii. Other writers addressed the issue of private military firms prior to Singer, but the scope of the studies was primarily limited to professional, legal, and academic journals.

¹⁵ *Ibid.*, ix

mercenaries—something unilaterally rejected by such firms and contrary to the just-war tradition. International humanitarian law does not specifically address the legality of private military firms but, rather, addresses their activities. Under U.S. policy and practice, private military corporation personnel are considered civilians and are prohibited from participating in direct combat operations (but not security operations).¹⁶

The use of mercenary forces throughout European history prior to the twentieth century was very common, and just-war thinkers have addressed the topic of mercenaries since the Middle Ages.¹⁷ What changed over time was the nature of the mercenary as a professional soldier who was part of a larger military force acquired by warring states or princes. In American history, for example, one thinks of the 30,000 Hessian troops employed by the British during the American Revolution. Mercenaries are those who are foreign to the conflict, motivated primarily by financial gain, and participating directly in combat.¹⁸

More recent use of mercenary forces in the twentieth century is closely linked to human rights violations and has been an ongoing concern within the United Nations. The use of mercenaries in countries such as Zimbabwe, Angola, and Sierra Leone made conflicts in those nations (and beyond their borders) intractable and eluded international ethics norms of armed conflict. The use of mercenaries is contrary to international law and violates standards of the ethical and regulated pursuit of justice and peace in conflict. Mercenaries (and also, child soldiers) are not to be considered as part of the contemporary just war construct.

International understanding of the nature and definition of a mercenary is that a mercenary is a person individual who participates in an armed conflict in which he is not a national or a party to the conflict, and is “motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the

¹⁶ Christopher Thomas Mayer, “Opportunities and Risks for the Employment of Private Security Companies in Complex Contingencies,” (unpublished paper, U.S. Army War College, Carlisle Barracks, PA, 2008), 5, 8.

¹⁷ Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), 241-43, 303-304. For an overview of the use of mercenaries see, P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, rev. ed. (Ithaca, NY: Cornell University Press, 2008), 19-39, and also Janice Thompson, *Mercenaries, Pirates, and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe*. Princeton, NJ: Princeton University Press, 1994.

¹⁸ For an excellent overview on the history and use of mercenaries, see, Sarah Percy, *Mercenaries: The History of a Norm in International Relations*. New York: Oxford University Press, 2007. On recent trends and use of mercenaries see David Shearer, “Outsourcing War,” *Foreign Policy* 112 (Autumn 1998): 68-81.

armed forces of that Party.”¹⁹

If, after a regular trial, a captured soldier is found to be a mercenary, then he can expect treatment as a common criminal and may face execution. As a mercenary, an individual may not receive the status of a prisoner of war and cannot expect to be repatriated at the war’s end.

In 1989, the United Nations passed resolution 44/34, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It became effective in October 2001.²⁰ Known usually as the UN Mercenary, Article 1 contains the definition of a mercenary. Article 1.1 is similar to Article 47 of Protocol I. However Article 1.2 broadens the definition to include a non-national recruited to overthrow a “Government or otherwise undermining the constitutional order of a State; or Undermin[e] the territorial integrity of a State;” and “Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation...” Additionally, under Article 1.2 a person does not have to take a direct part in the hostilities in a planned coup d’état to be a mercenary. However, even this expanded definition has critics who argue that the convention and APGC77 Art. 47 are designed to cover the activities of mercenaries in post-colonial Africa and do not address the use

¹⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, (Protocol 1 Article 47.c), 8 June 1977. Cited above, the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, (Protocol 1), 8 June 1977 provides the most widely accepted international definition of a mercenary, though not endorsed by some countries, including the United States. It reads in part:

Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.
- For a combatant to be described as a mercenary under this definition according to the Geneva Convention, all the criteria (a - f) must be met. Because of the assumption that a mercenary is essentially motivated by money, the term "mercenary" frequently carries negative connotations, though that can be a compliment in some contexts. There is a blur in the distinction between a “mercenary” and a “foreign volunteer”, when the primary motive of a soldier in a foreign army is uncertain. For example, under the laws of war, members of the French Foreign Legion, and Nepalese Gurkhas are not mercenaries. They are not considered mercenaries because, although they may meet many of the requirements of Article 47 of the 1949 Additional Protocol I, they are exempt under clauses 47(a)(c)(d)(e)&(f).

²⁰ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, A/RES/44/34 72nd plenary meeting 4 December 1989, <http://www.un.org/documents/ga/res/44/a44r034.htm>, accessed 18 February 2008.

of private military companies by sovereign states adequately.

If individuals have not “in fact, taken a direct part in the hostilities” (APGC77 Art 47.b), these individuals are not mercenaries but civilians who have non-combat support roles and are entitled to protection under the Third Geneva Convention (GCIII 4.1.4).

Although they are not considered mercenaries, the employment of private military companies (PMCs), also known as private military firms (PMFs) and contractors since the 1990s has created further political, legal and ethical debate about the viability of mercenary forces and the blurring of the lines between mercenary forces and PMCs.

In some respects, the services of PMCs are indistinguishable from duties of conventional infantry soldiers, although they are thought to offer greater technical proficiency. Their employment by many nations, including the United States, has been seen as one way of reducing the cost of standing military forces, and as such these companies are not viewed as falling in the same category as mercenaries.²¹ PMCs between 1991 and the present have aided U.S. war efforts in numerous strategic areas, including logistics and technical training, operational support, and policing.²² Yet, the use of PMCs will continue to be the subject of debate. P. W. Singer observes:

In the post-Cold War era, . . . this cross of the corporate form with military functionality has become a reality. A new global industry has emerged. It is outsourcing and privatization of a twenty-first-century variety, and it changes many of the old rules of international politics and warfare.²³

The outsourcing of war is not new in western history, but it creates a complex legal and ethical environment at times in what is already a difficult arena.

The profit motivation of the PMC adds the dimension of business ethics to the field of military ethics and can also create an environment where just war concerns are no longer primary. What is certain is the need to understand this revived phenomenon in contemporary warfare. As Singer notes:

An overall global pattern is emerging, one of growing reliance by individuals, corporations, states, and international organizations on military services supplied not just by public

²¹ Shearer, “Outsourcing War,” 68-69.

²² See Deborah D. Avant, “Private Military Companies and the Future of War,” an April 2006 electronic publication of the Foreign Policy Research Institute, accessible at www.fpri.org/enotes/200604.military.avant.privatemilitarycompanies

²³ Singer, *Corporate Warriors*, 9.

institutions but also by the nonsovereign private market. The changes that this phenomenon portends are tectonic. The emergence of a privatized military industry may well represent the new business face of warfare.²⁴

This business aspect of war has advantages and disadvantages.

Benefits of private military and security services are multiple and include flexibility and quickness in response, diversity of service, specialized training and experience, and the potential for being politically less costly. Among its disadvantages are the lack of integration between private and military cultures, the cost of particular services rendered, and the lack of legal clarity (insofar as rights and responsibilities in the private and military culture differ greatly). Perhaps most significant is the issue of truly wanting hostilities to cease. In a profit-driven framework such a motivation is significantly decreased. The just war tradition seeks to limit the frequency as well as the intensity of war—the former may not be true of the private military corporation.

Because of the differences between private and military sectors as well as the motivations within each sector (and the different personal and professional ethics within each), the future of PMCs remains unclear. The use of PMCs is not prohibited by the just war tradition, but their use needs continued study with regard to the just war tradition.

CAUTION: CHILDREN AT WAR

The use of child soldiers is a flagrant violation of human rights, prohibited by international law, and contrary to accepted practices of warfare during the last four millennia. And yet it is on the rise.

A child soldier is defined under international law and common practice as any person under the age of eighteen who is “engaged in deadly combat or combat support of any armed force or group.”²⁵ It is estimated that there are more than 300,000 child soldiers around the globe today and they are participating in three out of every four conflicts.²⁶ P. W. Singer states:

There used to be no need to prohibit the use of children as soldiers. To send children into battle was once not only unconscionable but also unthinkable. However, this practice is now one of the dreadful realities of modern warfare. It is a new doctrine adhered to by a wide-ranging set of conflict groups spread across the globe. Indeed, the conflicts that have

²⁴ Ibid., 18.

²⁵ Singer, *Children at War*, (Berkeley: University of California Press, 2006), 7

²⁶ Singer, *Wired for War*, 9.

not seen children serving as fighters are now the rarity. A number of the wars fought by children are, in fact, even sustained by their very presence.²⁷

From a just war tradition perspective, the use of child soldiers is a willful violation of the distinction between combatants and non-combatants and forces the latter to become part of the former.²⁸

The idea of distinguishing between combatants and non-combatants is deeply embedded in the Western moral tradition and is also found in other traditions and cultures. The protection of non-combatants in warfare is of major importance, and the principle of non-combatant immunity (discrimination) is central to the *jus in bello* aspect of just-war thinking. As James Turner Johnson argues:

Moral reflection has to take seriously where to draw the line between those who may be directly, intentionally targeted and those who may not. Indeed, the question of how to ensure the protection of non-combatants is one of the most important moral issues posed by contemporary armed conflict.²⁹

This immunity is intended not only to protect non-combatants from attack, but also to prevent non-combatants from being used either offensively or defensively as hostages or human shields, or as combatants in the case of child soldiers.

Despite the longstanding tradition of non-combatant immunity in just-war moral reasoning, strengthening of the concept has been a much more recent development. It was only with the development of the Geneva Conventions and protocols beginning in the nineteenth century and the twentieth-century rise of international humanitarian law that non-combatant immunity became a legal right, even though it often has been ignored.³⁰ The principle of non-combatant immunity is a window into the heart of just-war moral reasoning and is important for many reasons.³¹ Yet, the

²⁷ Singer, *Children at War*, 208

²⁸ For a list of agreements and international laws prohibiting the use of child soldiers, see Singer, *Children at War*, 141, 142, and the Appendix: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 213-20.

²⁹ James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), 37-38.

³⁰ Hereon see the helpful historical overview by Johnson, *Morality and Contemporary Warfare*, pp. 36-37. See also, Alexander B. Downes, *Targeting Civilians in War*. Ithaca, NY: Cornell University Press, 2008 for historical analysis of civilian targeting in the twentieth century.

³¹ Among those identified by Colm McKeogh are: noncombatants have committed no wrong and are innocent, noncombatants are not participating in the fighting, noncombatants are defenseless, killing noncombatants is militarily unnecessary, maintaining noncombatant immunity reduces the casualties of war, sparing women, children, and others who perform essential peacetime functions permits survival, killing noncombatants is contrary to the laws of war. Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (New York: Palgrave, 2002), 5-13.

numbers of non-combatant deaths have continued to increase.

Throughout the twentieth century the proportion of civilians and non-combatants killed in war rose dramatically. There was often a complete breach of the principle of non-combatant immunity as limited warfare turned to total warfare, ethnic cleansing, and genocide. Additionally, as forced flight became ends as well as means in some wars.³² Such tactics, however, are completely beyond the boundaries and moral logic of just-war thinking.

Just-war thinking recognizes that in any war it is impossible not to have non-combatants die as a result of military actions. Such tragedies are inevitable but they are not *intentional*, and the fact that innocents will die in conflict does not *ipso facto* render that conflict unjust. Tragic though it is, the death of innocent people *in and of itself* does not render coercive force in the realm of international justice unjust. Justice, according to just-war moral reasoning, is predicated on right goals and right intention. Summarizing non-combatant immunity or the “civilian ethic,” Hugo Slim writes:

At its deepest point, the civilian ethic is built on a respect for all human life and the most ancient of moral injunctions that “Thou shalt not kill”. Although it may not necessarily always be wrong to kill in self-defence or in certain struggles for other moral goods, it is always bad to kill. It may be necessary but is never a good in itself. As we have seen, the great majority of civilian killing is wrongful killing. It is the deliberate killing of unarmed men, women, and children and is best described as murder. . . . The main idea behind limited war and its civilian ethic is, of course, that of limited killing. This argument reasons, that even in war, one should kill as little as possible. This is because every human being’s life is precious to themselves, to those who love them and, if one is religious, to God as well.³³

The loss of any human life is tragic and in warfare the death of non-combatants accentuates this tragedy. When child soldiers are used in warfare they become not only casualties of war when forced to become combatants, but “walking dead” even if they survive. They are forced to forego non-combatant status and are thrust into what has been called “the world’s most unrecognized form of child abuse.”³⁴

The use of child soldiers is ethically reprehensible and has far-reaching moral, individual,

³² Ibid., 140-41.

³³ Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2008), 260-61.

³⁴ “Stopping the Use of Child Soldiers,” *New York Times*, April 22, 2002, cited in Singer, *Child Soldiers*, 9.

institutional, and international consequences. Singer observes:

Children's recruitment and use in battle not only violates acceptable practices of war, but also makes conflicts more likely and more bloody. It results in higher levels of human rights violations and atrocities committed against civilians and the child soldiers themselves. It also can lead to a proliferation of conflict groups and warring parties. Almost any group is able to fight better and longer, for a wider variety of causes, many of them personalized, unpopular, or downright incoherent. Finally, the use of children as soldiers steals their very childhood, laying the groundwork for further strife³⁵.

Non-combatant immunity, with special reference here to child soldiers, is and should be an inviolable principle of warfare. Its prominence in the ethical framework of the just-war tradition supports justice and concerns for the innocent even in the midst of the tragedy and horror of war.

ROBOTICS AND NON-LETHAL WEAPONS

Current technology supports the just-war tradition by making the *jus in bello* criteria of discrimination and proportionality more feasible. Through the use of precision-guided munitions (PGMs), joint direct attack munitions (JDAMs), and similar technologies, avoidance of harm to non-combatants and unnecessary destruction are greatly facilitated. In short, current technology lends support for just-war moral reasoning and strengthens its viability for the future. Yet, the use of certain technologies can also create responses by opponents that complicate moral choices, since those against whom the weapons are used seek new defenses (for example, using human shields as a prevention against PGMs).³⁶

International humanitarian law prohibits weapons that cannot discriminate between civilian and military targets, as well as any weapons that the international community decides, must not be used.³⁷ Thus, for example, further development and use of lasers that blind combatants has been opposed by the International Committee of the Red Cross (ICRC). What has yet to be addressed is the issue of ethics with regard to unmanned systems and other developing robotic

³⁵ Singer, *Children at War*, 209

³⁶ See, Charles J. Dunlap, Jr., "Technology: Recomplicating Moral Life for the Nation's Defenders," *Parameters* (Autumn 1999): 24-53, and Norman Friedman, "Is Modern War Too Precise?" *Proceedings of the U. S. Naval Institute* 130, no. 12 (December 2004): 4, 6.

³⁷ P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin Press, 2009), p. 384. Singer's volume provides a good overview of current trends in weapons technology, especially with regard to robotics. For discussions of ethics see pages 382-427

systems.³⁸

It would be erroneous, however, to assume that technical and tactical developments in weaponry are only a more recent phenomenon. In truth, the dilemma of virtue in warfare is an ancient one. Moreover, significant changes in tactics or technology that might be taken for granted today have occurred throughout the centuries, just as just-war thinking has evolved and been re-applied in fresh ways. On an ongoing basis, land, naval, and aerial warfare have all been affected by technology. In addition, there is now the potential for space and robotic warfare.

In the last decades of the twentieth century, communications, targeting, ordnance, and surveillance systems were significantly enhanced, enabling nations with those technologies to have advantages previously unknown. In recent years there have been tremendous advances in the use of robotic technology in land warfare, on the sea, and in the air. Unmanned aerial vehicles (UAV) such as Predator, Global Hawk, Shadow, and Raven are complemented by ground systems such as PackBot, MARCBOT, Talon, CRAM, and SWORDS. At sea there is REMUS, a system used to clear mines and explosives. Each of these systems has saved lives and proven effective in recent conflicts. They can reduce casualties and save lives, but their use does not nullify ethical decision-making on the battlefield—it simply takes it to a new level. The fact of technical advancement superiority does not guarantee military supremacy, nor does it ensure that particular weaponry or technology will be used morally.³⁹ Equally concerning is the fact that international law does not keep pace with new technological developments (a problem that parallels civil law and technology issues). P. W. Singer notes:

While technologic change is speeding up exponentially, legal change remains glacial. Chemical weapons were first introduced in World War I, but they weren't fully banned until eighty-two years later. Even worse, if we look back at history, the biggest developments in law only came after some catastrophe. If one-third of central Europe's population hadn't been killed in the Thirty Years' War, Hugo Grotius probably wouldn't have written *On the Laws of War and Peace*. Or, if eleven million Jews, Roma, POWs, and political prisoners weren't killed in the Holocaust, there would be no 1949 Geneva Conventions.⁴⁰

³⁸ Ibid., 384-85.

³⁹ For an overview of the development of military technology, see Max Boot, "The Paradox of Military Technology" *The New Atlantis* 14 (Fall 2006): 13-31, and Boot's more extensive work, *War Made New: Technology, Warfare, and the Course of History, 1500 to Today* (New York: Gotham Books, 2006).

⁴⁰ Singer, *Wired for War*, 387

Summarizing the increasing use of robotics and “digital warriors,” Singer insightfully notes: “Man’s monopoly of warfare is being broken. We are entering the era of robots at war. . . War just won’t be the same.”⁴¹

Technology, like any instrumentality of power, has a neutral quality about it and can be used for either good or ill. Ultimately, the morality or immorality of any use of armed force is “not mainly a matter of the kind of force available but of who uses it, why, and how.”⁴² This is true also for non-lethal weapons.

Generally speaking, the just-war tradition supports the use of any weapon, lethal or non-lethal, that minimizes destruction or alleviates unnecessary pain and suffering. Non-lethal weapons are defined as being “explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”⁴³ They span the entire spectrum of technology and include such things as firearms that inflict blunt trauma but are not intended to be fatal (by using rubber and plastic bullets), tear gas or other noxious vapors such as CS or CN, sticky and slippery foams, pepper spray, acoustic rays, projectile netting, chemical calmatives, and directed energy heat ray systems. Unlike conventional lethal weapons that destroy their targets through blast, penetration, and fragmentation, non-lethal weapons do not destroy the target and usually have effects that are reversible.

Non-lethal weapons fit well within the just-war perspective in that their use is based on right intention. The goal in deploying them is to control damage, which has direct links to aspects of discrimination and proportionality. However, by doctrine, non-lethal weapons are never used without the support of lethal weapons.

Post-conflict concerns (*jus post bellum*) must also be figured into the context of conflict, and non-lethal weapons may, on occasion, provide an opportunity for ensuring future stability and peace. In this way, the use of non-lethal weapons is an effect of following the principle of

⁴¹ Ibid., 41. For a summary of recent developments see his “Introduction: Scenes from a Robot War,” 19-41.

⁴² James Turner Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (Lanham, MD: Rowman & Littlefield, 2005), 21

⁴³ *Policy for Non-Lethal Weapons*, United States Department of Defense, Directive No. 3000.3, 9 July 1996, cited in Nick Lewer, ed. *The Future of Non-Lethal Weapons: Technologies, Operations, Ethics and Law* (London: Frank Cass, 2002), 1. See also Department of Defense, Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*. 12 April 2001 (as amended through 17 September 2006), 376-77.

proportionality and has consequences across all levels of warfare—tactical, operational, and strategic. When possible, it avoids cataclysmic damage or destruction of critical infrastructure.⁴⁴

There is an extensive and strong body of international law governing armed conflict wherein there are prohibitions and restrictions on specific weapons, but, as with many aspects of the law, existing standards are inadequate for contemporary technologies and circumstances.⁴⁵ There is surely some irony in the fact that under the 1993 Chemical Weapons Convention, some non-lethal weapons were declared prohibited from military use yet permitted in domestic law enforcement.⁴⁶

The development and use of non-lethal weapons provides an enormous opportunity to limit the destructiveness of war. However, non-lethal weapons may also expand rather than limit the “just causes” for engaging in war, even though the lethality and destruction would be less than in other warfare.⁴⁷ While non-lethal weapons are not appropriate (or available) for all, or even most, circumstances in warfare, their development and use should be pursued vigorously for eminently moral reasons.⁴⁸

Digital warriors, robotic technologies, and non-lethal weapons are all part of contemporary warfare. They are not the future; they are the present. The responsibility for their ethical development, procurement, and usage is a multifaceted concern from which few are exempt. James Turner Johnson’s reminder regarding technology is quite appropriate: “The morality or immorality of any use of armed force is, finally, not mainly a matter of the kind of force available but of who

⁴⁴ Ibid., 29-30.

⁴⁵ See, e.g., W. Michael Reisman and Chris T. Antoniou, eds. *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict*. New York: Vintage Books, 1994. See also, Koplow, op. cit., pp. 35-53, for evaluation of specific laws and treaties pertaining to non-lethal weapons, and David P. Fidler, “‘Non-Lethal’ Weapons and International Law: Three Perspectives on the Future,” in Lewer, 27-37.

⁴⁶ Brad Knickerbocker, “The Fuzzy Ethics of Nonlethal Weapons,” *The Christian Science Monitor*, 14 February 2003, taken from the Internet <http://www.csmonitor.com/2003/0214/p02s01-usmi.htm> 23 August 2006. The desirability of using such weapons is understandable in instances of close-quarter combat where civilians, hostages, human shields, or non-combatants who are forced to take up weapons may be part of the mix. In such instances, the use of non-lethal chemical weapons to sort out combatants from non-combatants would be desirable. The counter-argument is that any aspect of chemical warfare is to be regarded as anathema. The reasoning here is that the use of chemical weapons to incapacitate the enemy could be the beginning of the slide toward the use of more lethal weapons. Historical precedent for this slippery slope is seen in World War I and the Iran-Iraq War. In these two conflicts we witness the two major uses of chemical weapons in the twentieth century; both started using tear gas and escalated to deadly chemicals.

⁴⁷ Here, see the argument by Fidler in “‘Non-Lethal’ Weapons and International Law,” 34-45.

⁴⁸ See Koplow’s ten recommendations for future U.S. policy in “Non-Lethal Weapons,” 142-65, for an overview of viable policy options

uses it, why, and how.”⁴⁹

WARFARE AND THE ENVIRONMENT

Speaking of the Roman way of waging war, Calgacus, a British tribal leader, declared: “they create a desolation and call it peace.”⁵⁰ The destructiveness of war reaches far beyond the pain, suffering, and death of combatants and non-combatants (and animals). It also has short-term and long-term effects on the environment. Ecological concerns are part of the ethical and operational considerations of leaders and commanders in any conflict in the West. International law addresses environmental protection in both *jus ad bellum* and *jus in bello*.⁵¹ This should also now be extended to *jus post bellum* so that there is accountability for environmental damages during conflict and appropriate endeavors to rejuvenate the environment. The traditional Hague and Geneva conventions and treaties contain provisions pertaining to the protection and destruction of the environment and additional international attention, provisions, protocols have arisen in the legacy of the war in Vietnam and the Gulf War. Concerns during and after the former pertained in part to defoliation from the use of the herbicide “Agent Orange,” and during and after the latter with atmospheric and marine pollution from the intentional polluting of the Persian Gulf through releasing millions of gallons of oil into the water and from setting fire to the Kuwaiti oilfields.

Among the principles of the just war tradition, there are several that apply to concerns regarding the natural environment. Just cause, right intention, competent authority, and discrimination potentially affect the environment. Additionally, one clear convergence of environmental concern and the just war tradition is in proportionality wherein a military action or operation substantially affects the environment as well as the enemy. Whether intentional or otherwise, the world’s militaries have enormous real and potential effects on the environment during war and peace. These effects entail a responsibility throughout a nation’s social, military, and political structure to consider the ramifications of military activity and to evaluate them politically and ethically.⁵² This can be accomplished within the just war tradition. Thus, Gregory M. Reichberg and Henrik Syse, state “the ethical vocabulary as well as the philosophical

⁴⁹ Johnson, *The War to Oust Saddam Hussein*, 21.

⁵⁰ Tacitus *Agricola*, 30

⁵¹ Sonja Ann Jozef Boelaert-Suominen, *International Environmental Law and Naval War* in *The Newport Papers* 15 (Newport, R.I.: Naval War College Press, 2000), 45-77.

⁵² Thomas G. Grassey, “The Natural Environment and the World’s Militaries,” unpublished paper, Naval War College, Newport, R.I., 2006, 11-12.

framework of the just war tradition have much to contribute to a strengthened consciousness about and possibly also an improved legal protection of the natural environment in wartime.”⁵³

SHORTCOMINGS OF THE JUST WAR TRADITION

The just war tradition is not a monolithic perspective with unanimous assent to all of its aspects by advocate through the centuries. Rather, it is a perspective that has undergone continuous refinement as new circumstances and technologies arose. In recent decades there has been a resurgence of the just war tradition, and this has created a variety of versions of the idea in secular and religious spheres.

When one looks at the literature of the just war tradition by proponents and critics, there is often critique of the core criteria of the framework and criticism of the application of the criteria.⁵⁴ Concerns about applying the framework to emerging aspects of contemporary warfare also force just war proponents to answer new questions such as the response to child soldiers when children have been assumed to have non-combatant status.⁵⁵ Other critiques have centered on the issue that the tradition privileges the state over the individual or that the tradition needs to be replaced completely.⁵⁶

Just war proponent Mark Evans notes five of the major objections faced by the just war tradition:

- 1) What counts as a “war” is far from clear-cut and therefore appropriate applicability of the just war theory will always be contestable.
- 2) Going to war, in which people will inevitably die or suffer serious injury, can never be morally justified.
- 3) Such is the nature of actual decision to go to war, and the decisions taken in the conduct of war, that the criteria of just war theory are not in fact going to be respected.
- 4) Just war theory is too abstract to deal with the brutal concrete particularities of conflict: reality is always far too messy.

⁵³ Gregory M. Reichberg and Henrik Syse, “Protecting the Natural Environment in Wartime: Ethical Considerations from the Just War Tradition,” in *Ethics, Nationalism, and Just War: Medieval and Contemporary Perspectives*, eds. Henrik Syse and Gregory M. Reichberg (Washington, D.C.: Catholic University Press of America, 2007), 216.

⁵⁴ See for example, Kateri Carmola, “The Concept of Proportionality: Old Questions and New Ambiguities” in Mark Evans, ed. *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press, 2005), 93-113.

⁵⁵ See Helen Brocklehurst, “Just War? Just Children?” in Evans, *Just War Theory: A Reappraisal*, 114-33.

⁵⁶ Charles Jones, “War within Reason,” *Cambridge* 57 (Feb. 2006), 10.

5) Judgments about “right” and “wrong”, “good” and “evil”, which just war theory enjoins us to make, are actually unhelpful in orienting appropriate responses to the events in question.⁵⁷

Each of these objections has answers (and Evans does respond) but the objections show that the just war tradition has not been without serious criticism.⁵⁸ Yet, the difficulty is not a matter of defects in the just war framework, but one of addressing new concerns appropriately from within the framework. This is what occurred during the Cold War with nuclear weapons and more recently with the rise of global terrorism. The tradition does not need to be replaced. Rather, it needs continuous refinement and expansion. Evans is correct when he concludes: “For all of its problems, the theory seems to raise all of the questions it is appropriate to raise about the morality of war and it organizes them in an integrated structure that it seems *hard* to better. But it is not obviously pointless still to try to do so.”⁵⁹

CONCLUSION

An ethical framework for thinking about the issues of war, peace, and justice needs to be one that is consistent, non-contradictory, and comprehensive. It must be consistent so that the principles and components of the system pursue the same goals and ends throughout it. If justice is the goal, then it must be central in considerations as preparations for going to war are pursued, as the war plans are executed, and in the aftermath of war when peace and reconciliation are sought. A framework must be non-contradictory in that the various components and principles must not contradict one another ethically. Finally, a system must be comprehensive so that it actually or potentially is able to address ethically the spectrum of warfare and developments that arise due to changes in technology and warfare. The just war tradition is capable of these challenges.

The just war tradition is a broad framework that has served as a guide for centuries. The central tenets of the tradition have been developed and refined in response to both unique and persistent issues of war. As the political contexts in which wars have been waged have changed along with developments in the technology and weapons of warfare, the tradition has accommodated such changes. Indeed, there is a moral obligation to wrestle with new issues and

⁵⁷ Mark Evans, “In Defence of Just War Theory” *Just War Theory: A Reappraisal*, 204-10.

⁵⁸ See also Gabriella Slomp, “Carl Schmitt’s Five Arguments against the Idea of Just War,” *Cambridge Review of International Affairs* 19:3 (September 2006), 435-47.

⁵⁹ Mark Evans, “In Defence of Just War Theory” in Evans *Just War Theory: A Reappraisal*, 220

problems. Part of the strength of the just war tradition is that it is an ongoing moral, legal, ethical, and religious dialogue that is centuries old. Just as the tradition responded to the nuclear age and wrestled with issues of weapons of mass destruction during the Cold War, so too, there has been more recently specific thought about the just war tradition and terrorism.⁶⁰

Those who prepare for war must do so not because they desire conflict, but because they desire peace and justice. In so doing, the just war tradition can continue to provide a necessary framework for ethical decision-making.

Though it stems in part from Christian values and a western heritage, the just war tradition is not limited to Christians. In an era of globalization, other faith traditions and secularists can also adhere to its principles.

The late political theorist Hannah Arendt was known for her oft-repeated comment “Politics is not the nursery.”⁶¹ It indeed can be a difficult world. As politicians, corporate leaders, ethicists, strategists, and others concerned with ethics encounter the convolution of contemporary values and respond to challenges to the just war tradition, they confront the reality of Arendt’s words. Theologian Carl F. H. Henry wrote: “Not to be fortified with good ideas is to be victimized by bad ones.”⁶² To the extent that those who, regardless of nationality, religion, ethnicity, or station in life, take ethics seriously can uphold the just war tradition, they will have done much to fortify themselves with a good and worthy idea.

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⁶⁰ See for example, Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World*. New York: Basic Books, 2003 and Neta C. Crawford, “Just War Theory and the U.S. Counterterror War.” *Perspectives on Politics* 1:1 (March 2003), 5-25. Though their views differ, they show that the tradition is not static.

⁶¹ Cited by Jean Bethke Elshtain, *Just War Against Terror* (New York: Basic Books, 2003), 2.

⁶² Carl F. H. Henry, *Twilight of a Great Civilization* (Westchester, IL: Crossway Books, 1988), 91

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