

JUST WAR, LEGITIMATE AUTHORITY AND NON-STATE ACTORS

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# JUST WAR, LEGITIMATE AUTHORITY AND NON-STATE ACTORS

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## ABSTRACT

In the classical just war tradition, legitimate authority is central to the just use of force. This tradition is consistent with the argument, as posited by Augustine and Aquinas, that legitimate authority is the guiding principle through which all standards of justice flow. With its exclusive right to employ force, legitimate authority is classically viewed in a positivist light: the securing of peace and the uplifting of good. Although conceived before the advent of the modern state system, the just war tradition has historically been used to attribute justice to the action of states. The statist paradigm of international relations is, however, being challenged by non-state actors engaging in the use of force with more frequency than that of states. Recent just war scholarship has attempted a reconciliation of the authority principle framed by Walzer's political community. These applications have, unfortunately, diluted the efficacy of one of just war's most important principles. Through an empirical examination using the standards of authority espoused by Augustine, Aquinas and others, this paper will attempt to build a framework for further debate in an effort to update the just war tradition to meet changes in international relations.

## APPROVAL PAGE

The faculty listed below, appointed by the Dean of the College of Arts and Sciences have examined a thesis titled “Just War, Legitimate Authority and Non-State Actors,” presented by Luke Bradley Campbell, candidate for the Master of Arts degree, and certify that in their opinion it is worthy of acceptance.

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## CHAPTER 1

### INTRODUCTION

Non-state actors (NSAs) play an increasingly prominent role in the use of armed force. The frequency with which NSAs engage in the use of force is alarming. Previously held realist observations that states have a monopoly on the use of force have quickly and tragically been undermined. Twenty-first century warfare is unique in that for the first time since the advent of the modern state system, the threat of real attack and a disturbance of international order do not come solely from other states. As the tragedy of 9/11 made clear, warfare has a new face. The wars in Iraq and Afghanistan are but one example of the realities of modern warfare. In each arena, the United States is fighting against an NSA, al-Qaeda in Iraq and the Taliban in Afghanistan.<sup>1</sup> Interestingly in these wars, the US employs more private military contractors, 19% more to be exact, than uniformed personnel.<sup>2</sup> Here we have an example of an NSA fighting an NSA. Consider also Hezbollah and Hamas. In the July 2006 conflict, Hezbollah launched some 150 rockets per day into Israel.<sup>3</sup> While Hezbollah is an officially recognized political party in Lebanon, the use of force in the July War was not representative of Lebanon as a state. Hamas is in a similar situation. While Hamas is a political party, the Palestinian Authority is technically not a state. Yet, Hamas

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<sup>1</sup> While the Taliban was the ruling political entity in Afghanistan, it was not widely recognized as a state on par with other states in the international system. With the exception of Saudi Arabia, the UAE, and Pakistan, the Taliban was considered a terrorist organization. CNN, *Taliban tightens grip, seeks world recognition*, <http://edition.cnn.com/WORLD/asiapcf/9809/28/afghanistan.01/index.html>.

<sup>2</sup> Congressional Research Service, “DoD Contractors in Iraq and Afghanistan: Background and Analysis,” 2 July 2010, <http://www.fas.org/sgp/crs/natsec/R40764.pdf>

<sup>3</sup> Eric A. Heinze and Brent J. Steele, eds., *Ethics, Authority, and War: Non-State Actors and the Just War Tradition* (New York: Palgrave Macmillan, 2009), 1.

has in the past engaged in the use of force, sometimes initiating conflict. The overarching reality in terms of international security and the ethics of warfare is that these entities are demonstrating a number of state-like military capabilities. The frequency and scale with which NSAs engage in the use of force is an alarming reality of a changing international system. Stability and order previously provided by balance of power (BOP) politics and the threat of mutually assured destruction (MAD) are being undermined by entities which do not play by these rules or respond in kind to these threats. As the label implies, NSAs operate largely independent of the sovereign jurisdiction of a state and are often motivated by ideology rather than state-like pragmatism.

This paper is an examination of the ethics of war, specifically in an era dominated by NSAs engaging in the use of force. The prevailing moral vocabulary about war remains decidedly statist. Clearly this is a problem; our current notions of morality in war are taken to apply to the conduct of states. Given this reality, how are these state-centric normative frameworks impacted by the presence of non-states? As classically conceived, these normative frameworks seek to place moral limitations upon those who attempt to use armed force. The conception of these frameworks predates the advent of the modern state system. In this regard, these precepts should be applicable to non-states. This is a foolish assumption. Although developed before the arrival of states as we know them, these normative frameworks applied to the prevailing governmental authority of the time.<sup>4</sup> The application of authority has thus been transitive. A testament to the strength of an accepted framework limiting the use of force is its adaptability. These conceptions of ethics and morality have been highly adaptive while, for the most part, retaining their efficacy. The current debate

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<sup>4</sup> Greek city-states, monarchies, etc.



over NSAs and the use of force is a major challenge to the integral role these frameworks must play in a conversation about ethics, morality and modern warfare. Clearly, there is something inherently important in the relationship between authority and the use of force. The idea that the prevailing governmental authority represents the only entity legitimately able to use force has survived. In fact, it has been codified as such in international law. Why is this so and what does it tell us about the modern debate? What I aim to suggest here is that the relationship of authority and the use of force goes well beyond a surface-level analysis of sovereignty. There are, as I see it, important moral responsibilities wrapped up in the legitimate authority to use force. This paper is an attempt to square the realities of modern warfare with the efficacy of classic normative frameworks limiting the use of force.

The prevailing normative framework seeking to place moral limitations on war for those who would undertake it is commonly referred to as the “just war tradition”. It is important, from the start, to distinguish between two different but often confused terms: just war theory and the just war tradition. A just war theory is a moral doctrine about the use of force. Just war theories can take many forms: secular, divine, legal, philosophical, and so on. By contrast, the just war tradition is the sum of the multifaceted theories and is fragmented and dominated by none in particular. However, divine, and particularly Catholic, theories are the most widely cited. Although defining what he calls “the war convention”, Michael Walzer conceptualizes the heart of the just war tradition as a “set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and

reciprocal arrangements that shape our judgments of military conduct...”<sup>5</sup> As was mentioned above, this tradition is quite old. The just war tradition has a rich history that has evolved over the centuries and represents an amalgam of many different just war theories. Alex J. Bellamy describes the just war tradition as a protracted normative conversation about legitimacy in the use of force which has been “adapted and refined by numerous subsequent commentators, each advancing related but distinct normative theories about the ethics of war.”<sup>6</sup> The result of centuries of conversation is that the tradition has crystallized around a number of accepted principles and theories. What emerges from this nearly two-thousand-year-old conversation are three over-arching principles limiting the use of force: *jus ad bellum*, the resort to war; *jus in bello*, the actual conduct of war; and recently *jus post bellum*, justice after war.<sup>7</sup>

Critics of a just war often ask a penetrating question: “If one is abhorred by war, why outline principles that seek to morally justify it?”<sup>8</sup> It is a fair question. The truth is that most just war theorists dislike war. Yet, just war theorists share with realists the ontological assumption that international life is essentially anarchic and dangerous. Unfortunately, war is a central feature of human civilization and will occur in spite of our feeble efforts to prevent it. This critical reality makes it necessary to adopt moral guidelines limiting the use

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<sup>5</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 2006), 44. Indeed, Walzer’s conversation about just war is considered one of the great secular arguments about morality in war.

<sup>6</sup> Heinze and Steele, *Ethics*, 4.

<sup>7</sup> Even more recently, just war scholars have been engaged in a conversation about the ethics of war termination which is a different ethical dilemma than justice after war.

<sup>8</sup> Heinze and Steele, *Ethics*, 3.

of force for those who would undertake it. War is tragic and should be undertaken as infrequently and humanely as possible. Yet, war is also, at times, necessary. Thus the employment of force needs to be limited by accepted moral principles. This is the role of the just war tradition. This is also why the tradition's enduring efficacy must be maintained.

A fundamental rethinking of the just war tradition must occur. Current conceptions of the just war tradition need to accommodate new and disparate international security challenges in order to update what remains an important framework for the ethical and practical use of force. The just war tradition has reached a critical juncture. At this seminal point, the possibilities for its adaptation are rich and many. What must be retained, however, in any conversation about the applicability of these principles to NSAs is the pivotal relationship between the responsibility of order, security and the use of force. While NSAs do demonstrate state-like military capabilities, I maintain they fail to advance the central principles of national security and political order. As I engage in the rethinking of the principle of legitimate authority, I will seek to elucidate how this principle can be applied to NSAs with the moral requirement of responsibility to maintain security and order.

My argument will proceed with a number of central presuppositions about international relations, security, and war. The examination of the classic just war tradition as conceptualized by its early thinkers will reflect these principles.

First, I maintain that security and order are the primary objectives of international politics. This is a decidedly realist assessment of international relations and the behavior of states. Yet, in contrast to what I will spell out in Chapter 1, the just war tradition should and does reflect this reality. The dueling principles of order and security ought to be of primary importance in international relations. Security and order represent the intersection of

morality and pragmatism, leading to a minimalist and effective twenty-first century just war theory. The argument within is based on the assumption, grounded in classical just war thought, that the basis of legitimate authority “acknowledges that governments and law are the foundation of the good life.”<sup>9</sup> The presumption of order and security necessitates that war must sometimes be waged by a legitimate authority in the defense of such; this is a moral concept. Pragmatically, a strong political order “is the basis for experiencing security and justice in everyday life.”<sup>10</sup> Security is the pragmatic side of this intersection in just war because it represents an opportunity for millions of people around the globe to better their families and rebuild their societies. Twenty-first century just war must return to its roots to advocate and defend political order and security as provided by states.

Second, a just war theory for the twenty-first century must be minimalistic in order to be effective. Historically, just war derived value from its realistic assessment of war and politics while at the same time advancing moral ideals. In order to appeal to policy makers today, just war should begin with the premise that the state has certain ethical and practical responsibilities which are not found in NSAs. The restricted notion of just war theory advocated by contemporary scholars is ineffective for dealing with twenty-first century threats. Two questions should guide policy makers today: “what is our responsibility to our citizens?” and “what is our responsibility to the international system?”<sup>11</sup> The second of these may be the most important in terms of the order states can bring to the international system.

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<sup>9</sup> Eric Patterson, *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats* (Lanham, MD: Lexington Books, 2007), 9.

<sup>10</sup> *Ibid.*, 9.

<sup>11</sup> *Ibid.*, 9.

This paper argues for a twenty-first century just war theory rooted in the classical notions of national security and political order. From this foundation, we can establish that the political ethic of responsibility to maintain these is found in states with the obligation to meet the challenges of twenty-first century threats.

CHAPTER 2

THE JUST WAR TRADITION:  
CONTEMPORARY (MIS)UNDERSTANDINGS

The just war tradition is an adaptive and accepted centuries-old conversation about moral limits on the use of armed force. As such, it has a rich history composed of a multitude of separate and distinct theories about the ethics of war. I mentioned above that these theories are representative of a number of unique approaches to this conversation—secular, divine, legal, philosophical and so on. In order to fully appreciate the breadth of work on this topic, it is helpful to start with current conceptions of the just war tradition before considering its historical origins.

With certain slight variations, the just war tradition centers on the following set of accepted principles, first concerning *jus ad bellum* (the resort to war):

1. Legitimate Authority: The individual or body authorizing the use of force must be a duly constituted authority widely recognized as having the right to wage war. This generally refers to the representative of a sovereign political entity; states, today. Also, the authorization to use force implies the ability to control and cease the use of force.<sup>1</sup>

2. Just Cause: The use of force may be employed for one or more just causes, sufficiently grave to warrant the resort to war.<sup>2</sup> The most common *casus belli* include: the punishment of evil, recovery of stolen property, righting a wrong, and self-defense against

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<sup>1</sup> James Turner Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (Lanham: Rowman & Littlefield Publishers, Inc., 2005), 38.

<sup>2</sup> Heinze and Steele, *Ethics*, 5.

aggression. Also included, especially in classic conceptions of just cause, is the responsibility for defense of the common good.<sup>3</sup>

3. Right Intention: The war must be waged in accord with the just cause and not for an ulterior or hidden reason most notably, territorial aggrandizement, intimidation, or coercion. Classically conceived, right intention lists evils to be avoided in war as well as the more positive end: the pursuit of peace.<sup>4</sup>

These three principles represent the traditional just war criteria. They are deontological in nature as they “impose duties on the person or people having ultimate moral responsibility for the good of the political community and for good relations among political communities.”<sup>5</sup> In addition to these three central principles, *jus ad bellum* has grown to include other prudential, or supportive, criteria. It is important to note, however, that these supporting criteria are not to be prioritized in the initial consideration of the morality of the resort to force. They are, by nature, consequentialist-providing a commentary on the wisdom of the resort to force in a war which has already met the other criteria. In other words, these supporting criteria, in and of themselves, are not sufficient to gauge the justness of a given war. The three most common prudential criteria are:

4. Proportionality of Ends: The overall good expected from war must be greater than the harm done as a result of war.

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<sup>3</sup> James Turner Johnson, *The War to Oust*, 38. Some commentators justify preemptive and even preventive force through this understanding.

<sup>4</sup> *Ibid.*, 38.

<sup>5</sup> *Ibid.*, 36.

5. Last Resort: As part of the determination to use force, all other non-violent means must have been exhausted. This principle is commonly and wrongly argued to be the most important of all jus ad bellum principles. In the classic just war literature, there is no grounding for this assumption. Despite this, the presumption against force, as it is often called, prevails in contemporary Catholic and indeed many secular circles.

6. Reasonable Hope of Success: A war should not be waged unless the initiator's goals can reasonably be expected to be achieved.

As this paper will primarily concern the principle of legitimate authority specifically and jus ad bellum more generally, a brief list of principles found in jus in bello and jus post bellum will be enough.<sup>6</sup> The jus in bello criteria include: proportionality of means and noncombatant immunity. Concerning jus post bellum, there is little consensus on these core principles. Some of the most commonly argued principles include: rights vindication, elimination of unjust gains, punishment and demilitarization and political rehabilitation.<sup>7</sup>

The historical development of the just war tradition will be considered in more detail below. As will be made clear, just war theories have been useful for nearly 2,000 years as guidelines for both philosophers and practitioners in their thinking about war. From Cicero to Walzer and the varying approaches in between, just war scholars have made lasting contributions because they either developed or adapted just war in a particularly formative context. Indeed, past just war scholars adapted the tradition into a practical policy guideline

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<sup>6</sup> My aim here is to show that, with the exception of jus post bellum, there is wide acceptability of the principles for the resort to war and the conduct of war. Even across the varying traditions of just war theories, these principles are recognized and accepted.

<sup>7</sup> Heinze and Steele, *Ethics*, 7.



for thinking through the dilemmas of international security. One eminent example is the transitive nature of the legitimate authority principle. Conceived at a time when Greek city-states were the primary governmental authority, “the proper authority to wage war...has typically been the purview of whatever conception of legitimate authority has prevailed at a given time.”<sup>8</sup> Unfortunately, the same cannot be said of late twentieth and twenty-first century just war scholarship. Most of the recent applications of just war theory, while attempting a reconciliation of the principle of legitimate authority, have instead tended to be doctrinaire, quasi-pacifistic and generally unhelpful in thinking about twenty-first century conflict. It has been, in effect, out of step with the historical tradition of legitimate authority and a failure to keep the tradition true to itself.

There are, as I see it, at least two problems with contemporary just war scholarship. First, and most importantly, divine and secular commentary on just war usually falls into two categories. This commentary either a) distorts the just war principles in such a way that they are stripped of any force or meaning and are no longer representative of the classic tradition or b) eschews them altogether in favor of a just war theory based on humanism or rights-based cosmopolitanism. Second, contemporary just war scholarship has failed to adequately accommodate or deal with changes in twenty-first century warfare. Both divine and secular writings are guilty of this. To illustrate these failings, I will examine important misconceptions of the just war tradition in general and problems with the idea of legitimate authority more specifically.

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<sup>8</sup> Heinze and Steele, *Ethics*, 10.

### *“Checklist” Just War Theory*

One of the most remarkably egregious examples of failing to account for the classically conceived notion of the tradition itself has been the adoption of “checklist” just war theory.<sup>9</sup> Checklist just war theory is essentially a legalistic ticking off of the principles one by one. The result is that if one cannot check off all of the principles, then the war in question is not just. Most commonly, this approach is applied to *jus ad bellum*. Also, recent just war scholarship has assigned more and more weight to the prudential criteria, sometimes inappropriately giving priority to one or more of these principles over the original, and most critical, criteria. For example, in the opening paragraph of an oft-cited cosmopolitan just war article, the author states that *jus ad bellum*, traditionally understood, teaches that “a war is just if, and only if, the harms it causes are outweighed by the goods it brings about...”<sup>10</sup> To begin a list of *jus ad bellum* criteria with the proportionality of ends principle is incorrect. Even when this does not happen, the net result is that the prudential criteria are judged as equal principles in the *jus ad bellum*. When checklist just war theory is thus applied, the *jus ad bellum* principles number six, making it a tall order to justify a war. One of the many examples of this is an essay written just prior to the 2003 invasion of Iraq. In examining whether or not the U.S. should invade Iraq, the author exhaustively considers each *jus ad bellum* criteria (prudential included) and assigns them equal weight in this moral exercise. Among his many reasons for deeming the invasion to be unjust, the author concludes the

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<sup>9</sup> Eric Patterson, *Just War Thinking*, 27.

<sup>10</sup> Cecile Fabre, “Cosmopolitanism, just war theory and legitimate authority,” *International Affairs* 84, no. 5 (2008): 963.

U.S. “was far from the moment of last resort.”<sup>11</sup> This suggests that even if all other criteria would have been acceptable, the violation of this one principle is, by itself, enough to question the justness of the resort to force. I challenge this approach to just war theory.

### *Presumption Doctrine*

Another contemporary mutation of the just war tradition is the “presumption doctrine”. As I mentioned above, the presumption doctrine prevails in contemporary Catholic and many secular just war circles. The presumption doctrine is the most widely cited misconception of the just war tradition and most likely contributes to mutations such as checklist just war theory. If not for the previously-held notion of presumption against the use of force, checklist just war theory might not have been adopted. The doctrine of a presumption against war is exactly what it implies. Proponents of this approach argue that first and foremost, there is an inherent presupposition that war is evil and should be avoided at all costs. Those who adhere to this understanding wrongly trumpet that the just war tradition begins with a strong presumption against the use of force. For them, the just war tradition then establishes the conditions and principles which must be met for this presumption to be overridden while also limiting the harms of war.<sup>12</sup> The reason for this is a quasi-cosmopolitan argument about the preservation of human dignity and human rights.<sup>13</sup>

One of the most important benchmarks in the development of the presumption doctrine and contemporary conceptions of just war was the publication of a 1978 article in

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<sup>11</sup> Patterson, *Just War Thinking*, 27.

<sup>12</sup> Eileen P. Flynn, *How Just is the War On Terror? A Question of Morality* (Mahwah: Paulist Press, 2007), 20.

<sup>13</sup> Johnson, *The War to Oust*, 30. More on Cosmopolitanism below.

the journal *Theological Studies* by James F. Childress. Childress argued that killing in war is morally problematic. In order to do so, justification would be needed to overrule a presumption against war: “because it is prima facie wrong to injure or kill others, such acts demand justification.”<sup>14</sup> For Childress, the just war criteria provide this justification.<sup>15</sup> Following the structure of Childress’s argument very closely, the U.S. Catholic Bishops published a 1983 pastoral letter, *The Challenge of Peace*. This letter described Catholic just war theory “as beginning with a general presumption against war and represented the jus ad bellum criteria as guidance for determining whether this presumption should be overruled in particular cases or not.”<sup>16</sup> This new just war theory, wrongly made into something different from the classical idea, was the result of two important exogenous factors prevailing at the time. The first was the very real threat of nuclear war. The buildup of nuclear arms undertaken by the Reagan administration had created MAD. An opposition to the use of nuclear weapons by the Catholic Bishops dovetailed nicely into a presumption against war in general. Second, there was a strong pacifistic sentiment among the members of the drafting committee and among the Catholic faithful more generally.<sup>17</sup> Appealing directly to the wider Catholic audience and in a volatile international climate, this conception of just war began to gain traction.

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<sup>14</sup> James F. Childress, “Just War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria,” *Theological Studies* 39, (1978).

<sup>15</sup> James Turner Johnson, *The War to Oust*, 28.

<sup>16</sup> *Ibid.*, 26.

<sup>17</sup> *Ibid.*, 28.

In order to mark the ten-year anniversary of the earlier pastoral letter, the Catholic Bishops issued a new statement. The 1993 publication was entitled *The Harvest of Justice is Sown in Peace*. While recognizing that the imminent threat of nuclear war was not driving just war conceptions in this publication, the Catholic Bishops repeated the call for a presumption against the use of force. Arguing for the need to update the just war tradition to reflect the challenges of the present and future, the Bishops once again wrongly offered the following interpretation of the tradition:

The just-war tradition begins with a strong presumption against the use of force and then establishes the conditions when this presumption may be overridden for the sake of preserving the kind of peace which protects human dignity and human rights.<sup>18</sup>

Ten years after the original conception of a presumption against force, the doctrine had been solidified in Catholic thought on the issue. While the threat of nuclear destruction played no part in this letter, the framework for the argument had already been set. Seeking to find a middle ground between the shrinking numbers of proponents of traditional Catholic just war thinking and “those Catholics who...had come to regard their faith as opposing war altogether...” the presumption doctrine was established as the central Catholic position on the issue.<sup>19</sup> The Second Vatican Council established a Catholic peace tradition which erased the distinction of the higher morality of the religious and the lower morality of the laity. Instead, this new tradition called for the “spirituality of the religious life to be expanded

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<sup>18</sup> “The Harvest of Justice is Sown in Peace,” unpublished manuscript for the National Conference of Catholic Bishops, November 17, 1993, 5.

<sup>19</sup> James Turner Johnson, “Just War As It Was and Is,” *First Things*, no. 1 (2005).

among the laity...” essentially extending the “traditional non-involvement in war of the religious to all faithful Catholics.”<sup>20</sup>

In 2002, the U.S. Conference of Catholic Bishops again issued a statement, this time on the proposed invasion of Iraq. Once again, this statement began by defining the just war tradition as a set of “strict conditions for overriding the strong presumption against military force.”<sup>21</sup> In addition to repeating the wrong presupposition of the just war tradition, the Bishops’ premature judgment of the Iraq war was distorted and selective. The Bishops used this statement to reject preemption and regime change, “to stress the legal necessity of a U.N. sanction for military action and to offer the judgment that military force could not be used against Iraq without indiscriminate and disproportionate destruction.”<sup>22</sup> This offering was clearly out of step with the criteria found in the classic just war tradition. Yet, the Bishops still attempted to retain the framework of the classic just war vocabulary. Furthermore, this letter was a far cry from the statements offered in 1983 and 1993 which at least listed the most important just war criteria.

What is clearly shown in these examples is the growing mutation of the just war theory toward a presumption against the use of force. Indeed, this idea has become increasingly dominant in just war conversations. For example, even President Obama got it wrong. In his Nobel Prize acceptance speech, Obama said that the tradition of the just war

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<sup>20</sup> Ibid.

<sup>21</sup> United States Conference of Catholic Bishops. “Statement on Iraq,” November 13, 2002. <http://www.ctbi.org.uk/intaff/iraq/uscath01.htm>, quoted in James Turner Johnson, *The War to Oust*, 31.

<sup>22</sup> Ibid., 32.

seeks to regulate war, justifying it only when certain preconditions are met, the first of which is last resort.<sup>23</sup> The official Catholic commentary on the issue has listed the requirements for a possible exception so restrictively and prejudicially that they have become virtually impossible to meet. In such cases that they could be met using the still wrongly conceived checklist theory, the Bishops seem to have developed standards of their own by which to judge the resort to war. In effect, the presumption against war has turned into a functional pacifism.<sup>24</sup> As will be shown below, a functional pacifism is inconsistent with the classical Catholic just war tradition.

Basing his judgment in the classical just war tradition, John Hymers argues for the preservation of a presumption against force in the tradition. Hymers couches his analysis in terms of a destabilization of order in the international system. Ironically, just war scholars in defense of a return to the classical interpretation of the just war tradition also argue that the principles of order and security and their preservation dictate that the use of force be employed judiciously but without the overriding restrictiveness of the presumption doctrine. Further, these same scholars argue that a presumption against war is, in fact, not found in readings of the classical just war doctrine. Nevertheless, Hymers argues the opposite.

Hymers ultimately shows that, after a consideration of the terms used in the debate over presumption, violence “in the scholastic tradition that nurtured the just war theory, is

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<sup>23</sup> Los Angeles Times, “Text of Barack Obama Nobel Prize acceptance lecture”, *Top of the Ticket: Political Commentary from Andrew Malcom*, <http://latimesblogs.latimes.com/washington/2009/12/barack-obama-nobel-peace-prize-speech-text.html>.

<sup>24</sup> James Turner Johnson, *The War to Oust*, 32.

understood as disordered force.”<sup>25</sup> As disordered force, violence is contrary to justice and rational order. Since a just war, as classically understood, aims at order, it is contrary to reason that it may be disordered. Thus, the just war tradition is best described as containing a presumption against violence: “a just war is waged to counter violence, and a just war may not itself use violence...” understood as disordered force.<sup>26</sup> The just war may only be waged on the presumption that violence be opposed and “waged such that it eschews acts of violence.”<sup>27</sup>

In secular circles, the presumption doctrine prevails as well. Nick Fotion attempts to formulate an alternative theory of just war more suited to deal with nation vs. non-nation wars. Fotion argues that traditional conceptions of just war theory are not appropriate for dealing with twenty-first century conflict. Fotion’s secular ethics-based discourse focuses on the universally-held ethical principles and possible exceptions to them. He argues that “certain ethical rules are universal.”<sup>28</sup> Chief among these, according to Fotion, is that killing and violence are wrong. In addition to inverting the principles of the *jus ad bellum*, Cecile Fabre also subscribes to the presumption doctrine. Fabre argues that restrictions on the rights

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<sup>25</sup> John Hymers, “Regrounding the Just War’s ‘Presumption Against Violence’ in Light of George Weigel,” *Ethical Perspectives* 11, no. 2 (2004): 111.

<sup>26</sup> *Ibid.*, 111.

<sup>27</sup> *Ibid.*, 118.

<sup>28</sup> Nick Fotion, “Two Theories of Just War,” *Philosophia* 34, no. 1 (2006): 53.



to legitimately wage war were developed out of the shared principle that killing and violence are wrong “and [their] occurrence must be restricted as far as possible.”<sup>29</sup>

### *Discipleship Theory*

The Catholic Bishops have failed to account for changes in twenty-first century warfare. Emerging just war scholarship is just beginning to seriously attempt to square the classical tradition, suited more for state vs. state conflict, with conflict that oftentimes does not include a state at all.<sup>30</sup> Sometimes, however, just war scholars conclude that the classical just war tradition, when faced with the problem of NSAs, appears to be rendered obsolete.<sup>31</sup> One such approach is called the discipleship theory. This argument is offered by Daniel M. Bell, Jr. in his 2006 article “Can A War Against Terror Be Just? Or, What Is Just War Good For?”. Bell argues that the real challenge facing the just war tradition today stems from conflicting accounts of the tradition’s end or purpose. The prevailing answer to the question of the tradition’s purpose, according to Bell, is that it first and foremost serves the state.<sup>32</sup> Subsequently, the tradition is primarily concerned with defining the moral responsibilities of states and politicians who manage them. Thus, the just war tradition is understood as a

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<sup>29</sup> Cecile Fabre, “Cosmopolitanism, just war theory and legitimate authority,” *International Affairs* 84, no. 5 (2008): 968.

<sup>30</sup> James Turner Johnson attempted this in his prescient 1984 work *Can Modern War Be Just?* (New Haven: Yale University Press, 1984). There was, however, a noticeable dearth of scholarly work on this subject until after 9/11.

<sup>31</sup> Daniel Bell, “Can A War Against Terror Be Just? Or, What Is Just War Good For?,” *Crosscurrents* 56, no. 1 (2006); Nick Fotion, “Two Theories of Just War”; Cecile Fabre “Cosmopolitanism, Just War Theory and Legitimate Authority”.

<sup>32</sup> Bell, “What Is Just War Good For?,” 37.

theory of statecraft.<sup>33</sup> The trouble with this understanding, Bell argues, is that presupposing the existence of states and the relations between them is called into question in an age of NSAs. In other words, when facing an NSA, the classical tradition as an instrument of statecraft appears to be rendered obsolete. Bell then formulates an alternative answer to the question of the tradition's purpose and end: the answer begins with the church.

The starting point for this argument is medieval just war theory. After an examination of the prevailing thought on just war at the time, Bell finds that medieval just war theory was not a theory of statecraft. Rather, it was an ecclesial discipline, the ends of which were the edification of the body of Christ.<sup>34</sup> Bell is right to claim that the just war tradition is much more than a checklist of criteria. He is also correct in that the classic just war tradition, as formulated in the ancient church, sought to discern certain virtues on the ethics of conflict. What follows from Bell's argument is that these virtues were made possible through the practices of discipleship.<sup>35</sup> The Christian community is therefore charged with the task of spreading the virtues of charity, fortitude and hospitality. Christian disciples, as other-directed, are much better suited to these tasks than a modern nation-state using just war as an instrument of statecraft. Just war as an instrument of Christian discipleship is thus driven by a love that desires to bestow the benefits of a just peace upon the enemy.<sup>36</sup> Ultimately, Bell argues that in a time of terror, just war's primary goal should

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<sup>33</sup> Ibid., 37. This is an argument I tend to agree with. Also, it is an understanding that needs to endure; the reasons for which I will argue later.

<sup>34</sup> Ibid., 39.

<sup>35</sup> Ibid., 39.

<sup>36</sup> Ibid., 41.

be the formation of disciples.<sup>37</sup> I offer this as an example of one attempt to square the just war tradition with the novelties of twenty-first century conflict. What Bell does correctly is look back at classical conceptions of the tradition in order to formulate a just war theory for the twenty-first century. However, his reading of the early tradition is, I will argue, incorrect.

### *Cosmopolitanism*

Cosmopolitan morality is generally characterized by the notions of individualism, egalitarianism and universalism. All humans have the right to the freedoms and resources they need to live a minimally flourishing life. To cosmopolitans, these are human rights held by all regardless of where they reside and are inherent to humans as such. In order to lead a minimally flourishing life, two things are necessary: autonomy and well-being.<sup>38</sup> Autonomy is the opportunity for individuals to make “meaningful, identity-conferring choices as to how to lead their lives.”<sup>39</sup> Well-being means that an individual should not be “subject to constant physical or psychological suffering, be well fed, be warm, etc.”<sup>40</sup> The intersection of cosmopolitanism and just war theory comes with regard to the state’s authority to wage war. To begin with, Fabre challenges the notion that states are imbued with the authority to wage war simply by virtue of being a state. The idea that states are in the unique position to legitimately use armed force because they are the highest authority, duly constituted and widely recognized is inconsistent with Fabre’s cosmopolitan philosophy. For Fabre, the

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<sup>37</sup> Ibid., 41.

<sup>38</sup> Fabre, “Cosmopolitanism,” 965.

<sup>39</sup> Ibid., 965.

<sup>40</sup> Ibid., 966.

authority to wage war comes exclusively from the use of force as a mechanism for enforcing cosmopolitan moral norms, rather than a mechanism for resolving interstate disputes.<sup>41</sup>

With this consideration in mind, Fabre argues that the principle of legitimate authority is unnecessary. Because the only grounding for a state's authority to wage war is found in the defense of cosmopolitan moral norms (read: human rights), any use of force which does not support this end is null and void. If the state is unable or unwilling to protect the fundamental human rights of its population and those of individuals in other states, the right to wage war reverts to the individual and ultimate possessor of those inherent human rights. The over-all line of reasoning in this argument is that the principle of legitimate authority is unnecessary. Since it traditionally applies to states in a manner inconsistent with the only legitimate reason to wage war, defense of human rights, its exclusivity to states should be scrapped.<sup>42</sup> Ultimately, this argument attempts to bring NSAs into the just war tradition, but in a rather logically flawed way. Attempting to legitimize the efforts of an NSA to defend cosmopolitan moral norms while scrapping the basic structure under which they could, conceivably, achieve this legitimacy is logically problematic. As a moral structure seeking to provide commentary on the ethical use of force, the just war tradition has survived for nearly two-millennia. To question its eminent practicality in the face of yet another challenge is a failure to appreciate its proven transitive nature. The pursuit of universal cosmopolitan moral norms in the form of individuals militarily defending their own human rights is an invitation to chaos. The end result would be the destabilization of order

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<sup>41</sup> Ibid., 964.

<sup>42</sup> Ibid., 964.

and security, principles which the classic just war tradition set out to ensure. It is one of the purposes of this paper to make this clear.

*Ethical Rules and Possible Exceptions: Two Theories of Just War*

The starting point of the ethical rules argument is similar to that found in discipleship theory: classically conceived, the just war tradition is not well suited for dealing with twenty-first century conflict. Also, this argument proposes to scrap the traditional just war criteria or at least develop a new set of criteria for dealing with NSAs. As offered by Nick Fotion, the ethical rules approach then argues that it “makes sense to create a second just war theory to deal...” with this type of warfare.<sup>43</sup>

As stated above, Fotion’s central premise is a just war theory based on ethical principles, rules and possible exceptions. As such, Fotion approaches an examination of the just war tradition not as a political scientist but as a philosopher.<sup>44</sup> For Fotion, certain ethical rules are universal. Chief among these is: do not kill. Yet, there may be situations in which there is a pressing need to override our most basic notions of human ethical behavior. Within the general context of this ethical commandment, exceptions are made based on the application of four criteria: good reasons, last resort, proportionality, and proper authorization.<sup>45</sup> Notice the similarity to the just war tradition. Indeed, Fotion argues that exceptions theory in the military field is known as just war theory. However, the most

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<sup>43</sup> Fotion, “Two Theories of Just War,” 53.

<sup>44</sup> According to Eric Patterson, this is another problem of contemporary just war theory. The abandonment of normative endeavors by political scientists and international relations theorists in favor of parsimonious scientific theories has produced “an unfruitful exercise in theoretical ethics...” (Patterson, *Just War Thinking*, 27.)

<sup>45</sup> Fotion, “Two Theories of Just War,” 54.

common version of the theory addresses situations where two nations threaten to go to war with each other.<sup>46</sup> Thus, the theory is primarily a nation vs. nation construction. Because of this, there are serious problems with the application of exceptions to the rule of do not kill as they concern wars of states vs. non-states. The first problem concerns the nature of just war's principles in general. Fotion argues that the principles are stated so loosely that there is a great deal of play in them when it comes to their application.<sup>47</sup> They have lost their moral and practical efficacy. Another problem has to do with the state vs. state nature of traditional just war. Unfortunately, the just war tradition does not give us a clear sense of how to act when the threat of war against a state is generated by an NSA.<sup>48</sup> The theory employed in state vs. state wars is clearly of a different nature than the theory needed to apply to wars including an NSA. Thus, the domain of war should be divided into two sub-domains: traditional just war theory and irregular just war theory.<sup>49</sup>

Couched in terms of the principle of legitimate authority, Fotion illustrates his argument further: legitimate authority needs to be modified to take into account the special conditions of a state vs. non-state conflict.<sup>50</sup> For example, in state vs. state conflicts,

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<sup>46</sup> Ibid., 55.

<sup>47</sup> Ibid., 57.

<sup>48</sup> Ibid., 57. I challenge this notion as well. I think the principle of legitimate authority is pretty clear on this point. NSAs initiate conflict illegitimately; no exceptions. Rather than dilute the efficacy of the principle as Fotion argues, I think it strengthens it by excluding certain groups. This allows it to retain its moral and practical usage in the regulation of conflict.

<sup>49</sup> Ibid., 58.

<sup>50</sup> Ibid., 58.

authorities that legitimize war and undertake war legitimately can be easily identified.<sup>51</sup> In any situation in which a state is about to enter a war, the question asked is: was/is the war properly authorized? Yet, in irregular wars, this question has no place. For example, a terrorist organization may have a leader, but that leader has no legitimacy.<sup>52</sup> If a terrorist organization, guerilla group, or other irregular group becomes involved in a war with a state, it makes no sense to ask these groups to satisfy the legitimate authority principle. The state involved still has to satisfy the legitimate authority principle, but not the NSA.<sup>53</sup> Thus, it makes no sense to ask these groups to satisfy the legitimate authority principle because they cannot.

Fotion's conclusion is a very controversial one. His argument that asking NSAs to satisfy the legitimate authority principle is a fool's errand may lead to the conclusion that these actors are getting off scot-free. However, Fotion argues that since they do not have to be a legitimate authority to engage in conflict, they are subject to preventive war by a legitimate authority. NSA military plans are non-contingent. They are not planning military action just in case a certain thing should happen. Rather, their plans represent "the first step in a process that, eventually, will lead to violence. So they are in effect at war already with

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<sup>51</sup> There is a reading of legitimate authority which argues that there must be a legitimate authority to declare the war, which is being waged by a legitimate authority, just. I do not find this to be an accurate understanding of traditional legitimate authority and will explore this in more detail below.

<sup>52</sup> Ibid., 58.

<sup>53</sup> Fotion seems to suggest that as such, the war would not be just. Nowhere in classical conceptions of legitimate authority does it say that each party to a conflict should be a legitimate authority.

the nation they are opposing.”<sup>54</sup> Ultimately, the reason for two just war theories is that is easier “to be clear about what one is judging when the judgments concerning two kinds of wars are separated into regular and irregular theory.”<sup>55</sup> One of the biggest problems with Fotion’s line of reasoning is that, essentially, he proposes an alternative theory of just war in order to clearly de-legitimize an NSA’s authority to wage war. However, the classic just war tradition is quite capable of this. The best way to strengthen just war’s basic tenets is to stay true to the parsimonious theory of legitimate authority as it is classically understood.

*Legitimate Authority, (Mis)understood*

In addition to misunderstanding the broad purpose, aim and enduring nature of the just war tradition, contemporary scholars also have widely different readings of the principle of legitimate authority. Above, I have included reference to this in my discussion of a couple scholars’ misunderstanding of the just war tradition more broadly. It is necessary to examine the ways in which legitimate authority is contemporarily understood. As with the just war tradition, I will then focus on how this principle is classically understood by both secular and divine figures who contributed to its rise.

The conception of authority in the just war tradition is complex. Contributing to this complexity is a lack of authoritativeness in the use of its modifying term. Right authority, legitimate authority and sovereign authority are all ways in which the concept of authority has been labeled.<sup>56</sup> The diversity in terminology can lead to diversity in understanding. For

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<sup>54</sup> Ibid., 59.

<sup>55</sup> Ibid., 61.

<sup>56</sup> Also proper and competent, but these are similar to legitimate and right, respectively.



example, contemporary secular conceptions limit authority to mean: one with the authority to engage in the use of force must be a “duly constituted authority, widely recognized as having” this right.<sup>57</sup> On the other hand, religious conceptions understand authority to mean that which is vested in the sovereign by God and used for the promotion of good. A lack of consensus on definition has led to a number of differing implications of authority. In addition to this, contemporary scholars have lost sight of the principle’s centrality. The unfortunate fade into definitional word-play has contributed to the fall of what was originally conceived as a central principle in the morality of war.<sup>58</sup> Each of these problems will be considered in turn.

First, competing definitions. As mentioned above, inconsistent use of modifiers has given rise to competing definitions. When referring to legitimate authority, our definition above is the most authoritative. It is a benign, simplistic understanding of specific international actors and their right to wage war. It is also inherently limiting. Terms such as “duly constituted” and “widely recognized” imply that very few entities will meet this standard. In fact, “duly constituted” has, at least in the modern sense, meant states. Yet, post-modern international relations are dominated by conflict outside of the traditional inter-state conception.

Right authority is considerably less limiting in definition. It has been defined thusly: “a people considering war must rely on some individual or body to effect the declaration of

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<sup>57</sup> Heinze and Steele, *Ethics*, 5. This is consistent among many sources I checked.

<sup>58</sup> James Turner Johnson, “Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force,” *The Journal of Religious Ethics* 31, no. 1 (2003): 3-20.

war.”<sup>59</sup> This definition is qualified by two essential attributes: “trust in the reliability of those who are giving orders and a conviction of their moral integrity.”<sup>60</sup> This understanding allows us to incorporate actors outside of the traditional statist paradigm. Realistically, we could incorporate an organized association of people with a political purpose who may or may not aspire to statehood, “or at least an [organization with a] wish to influence governance in a particular territory.”<sup>61</sup>

Finally, a corollary concept, sovereign authority, further qualifies this debate. Sovereign authority notes that “the leader’s capability to act depends upon a perception, at least, of the capacity to act well.”<sup>62</sup> Sovereign authority also means a person or community with no political superior.<sup>63</sup> The authorization for a sovereign authority to use force implies the “ability to control and cease that use, that is, a well-constituted and efficient chain of command.”<sup>64</sup>

In today’s complex world, the authority being claimed is often ambiguous, tenuous, and legally spurious. Because of this, the concepts of right authority and sovereign authority are necessarily interrelated, complicating the understanding further. In such cases of ambiguous authority (including but not limited to rigged elections, military takeovers, and

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<sup>59</sup> Hartley S. Spatt, “Faith, Force, or Fellowship: The Future of Right Authority,” in Michael W. Brough, John W. Lango, Harry van der Linden, eds., *Rethinking the Just War Tradition*, (Albany: State University of New York Press, 2007), 205.

<sup>60</sup> Ibid., 205.

<sup>61</sup> Heinze and Steele, *Ethics*, 11.

<sup>62</sup> Spatt, “Faith, Force, or Fellowship,” 205.

<sup>63</sup> Johnson, *The War to Oust*, 38.

<sup>64</sup> Ibid., 38.

failed states), the sovereign authority, a person or community with no political superior, may not be able to claim to right authority, trust in reliability of those giving orders and the moral integrity of those claiming authority. This is a deep and fundamental problem for the concept of authority. Because of this, I will use the term legitimate authority. I will not, however, be constrained in my analysis by any strict interpretations thus advanced. Instead, as will be shown below, I will argue for an understanding of the principle which focuses on the broad themes of responsibility, security, and order as they are found in the classical just war tradition. The important thing to take from competing definitions is that they allow us to begin the process of conceptualizing an understanding of authority which will enable theorists to account for international actors who challenge the statist paradigm. Two important questions come to mind. What kind of authority must an entity claim in order to wage war? Under these conceptions of authority, is there room to incorporate non-state actors?

In addition to misunderstanding the just war tradition broadly, many of the scholars above have also failed to account for the true nature of legitimate authority. Two problems prevail. The first is the tendency to attach clauses and limitations to the principle which have no grounding in classical readings. The other fundamental problem is a relegation of legitimate authority to more of an afterthought in the just war hierarchy. In its place, just cause and, increasingly, the prudential criteria of last resort have been elevated to the top of the list.

As with contemporary misunderstandings of the just war tradition, both secular and divine sources are guilty of these two problems. While the advancement of the presumption doctrine is perhaps the most important problem, the U.S. Catholic Bishops have also

contributed to problems with legitimate authority as well. In their 1983 letter *The Challenge of Peace*, the Bishops listed just cause as the first requirement in jus ad bellum. This is problematic since classical Catholic understandings of the tradition definitively list legitimate authority as the most important principle. Ironically, the 1983 letter does define legitimate authority in line with classical Catholic interpretations: “In the Catholic tradition the use of force has always been joined to the common good: war must be declared by those with responsibility for public order.”<sup>65</sup> To mark the 10 year anniversary of their 1983 letter, the Bishops issued *The Harvest of Justice is Sown in Peace* in 1993. This time around, the principle of legitimate authority was moved to third on the list behind the new criteria of comparative justice. Furthermore, legitimate authority was defined as: “only duly constituted public authorities may use deadly force or wage war.”<sup>66</sup> In this sense, legitimate authority had been stripped of all ties to classical Catholic understandings and instead reflected the contemporary secular definition.

Once again, in 2002, the Bishops issued a scathing indictment of the coming Iraq War. After an exhaustive examination of all jus ad bellum and jus in bello criteria, the Bishops declared the war unjust. The 2002 statement interpreted legitimate authority to require “not only compliance with U.S. constitutional standards and broad national consensus but also some form of international sanction, which was then rephrased as action taking place within the framework of the United Nations.”<sup>67</sup> Essentially, the classical conception of

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<sup>65</sup> “The Challenge of Peace: God’s Promise and Our Response,” unpublished manuscript for the National Conference of Catholic Bishops, May 3, 1983.

<sup>66</sup> Catholic Bishops, “Harvest of Justice,” 5.

<sup>67</sup> Johnson, *The War To Oust*, 31.

legitimate authority as responsibility, order and security had been restated as a concept of legality “within the frame of the U.N. system.”<sup>68</sup>

Nick Fotion’s “Two Theories of Just War” is guilty of both problems as well. With regard to the first problem, Fotion’s examination of *jus ad bellum* incorporates the traditional as well as prudential criteria. The problem is that legitimate authority, classically conceived as one of the most important principles, is listed last in his article, behind even the prudential criteria of likelihood of success and last resort. Having inverted the classical just war principles, Fotion then advances the following definition of legitimate authority: “to start a war, a nation must see to it that the authorities assigned to war matters are the ones who actually get the war started.”<sup>69</sup> This seems to reflect the widely cited contemporary understanding of “duly constituted” and “widely recognized”. However, Fotion adds that while PMCs, political parties, religious groups and guerilla organizations are not typically thought to be legitimate authorities, a war started by them could be just if “one of these groups happens to be the legitimate authority for a nation.”<sup>70</sup>

As I mentioned above, Fotion’s ultimate conclusion is that there is a need for an alternative just war theory, one which makes it easier “to be clear about what one is judging when the judgments concerning two kinds of wars are separated into regular and irregular theory.”<sup>71</sup> One of the biggest problems with Fotion’s line of reasoning is that, essentially, he

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<sup>68</sup> Ibid., 31.

<sup>69</sup> Fotion, “Two Theories of Just War,” 57.

<sup>70</sup> Ibid., 57.

<sup>71</sup> Ibid., 61.

proposes an alternative theory of just war in order to clearly de-legitimize an NSA's authority to wage war. However, the classic just war tradition is quite capable of this. The best way to strengthen just war's basic tenets is to stay true to the parsimonious theory of legitimate authority as it is classically understood.

While I support Daniel Bell's premise that we ought to look back on the classical just war tradition as a way forward, I question his ultimate conclusion that this tradition leads to the advancement of Christian virtues and the formation of Christian disciples. Ironically, upon examining the classical just war tradition, Bell does not correct the interpretation of legitimate authority he advances early in his article. He states that the concept of legitimate authority has been challenged by NSAs due to the fact the war on terror, in order to be effective, requires secrecy. The problem is that such secrecy means that "no state could publicly make the case for the justness of a given war, with the result that its authority to wage war could never in fact be legitimated."<sup>72</sup> What Bell suggests here is what is known as the public declaration. This is a qualification which is often added in the definition of legitimate authority. It has only scarce foundation in the classical just war tradition and Bell fails to point that out.

The public declaration qualification is often cited as being equal to the "duly constituted" or "widely recognized" authorization. This argument states that in order to satisfy the principle of legitimate authority, the war must be authorized by a legitimate body,

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<sup>72</sup> Bell, "What is Just War Good For?," 38.

usually the U.N.<sup>73</sup> In proposing solutions to the failure of legitimate authority to account for the rise of PMCs, James Pattison suggests that the best possible solution is to reaffirm the importance of the principle of public declaration of war. According to Pattison, this criterion holds that war “needs to be declared openly and in accordance with the constitutional and parliamentary conventions on waging war.”<sup>74</sup> Legitimate authority, in practice, means that “war can be authorized only by certain institutions-in particular, by states themselves or by international institutions such as the U.N. Security Council.”<sup>75</sup> Again, this is a modern conception. The original understanding of legitimate authority does not support this interpretation.

Finally, cosmopolitan morality, while severely compromising the efficacy of the just war tradition, does not distort the principle of legitimate authority. Instead, theorists who support cosmopolitan ethics in war seem to develop a new interpretation of legitimate authority. The problem, as I pointed out above, is that attempting to legitimize the efforts of an NSA to defend cosmopolitan moral norms while scrapping the basic structure under which they could, conceivably, achieve this legitimacy is logically problematic. The pursuit of universal cosmopolitan moral norms in the form of individuals militarily defending their own human rights is an invitation to chaos. The end result would be the destabilization of order and security, principles which the classic just war tradition set out to ensure. What is

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<sup>73</sup> James Pattison, “Just War Theory and the Privatization of Military Force,” *Ethics and International Affairs* 22, no. 2 (2008): 150.

<sup>74</sup> *Ibid.*, 154.

<sup>75</sup> *Ibid.*, 150.

needed, is a parsimonious, efficacious, yet transitive modern just war theory rooted in the principles of the classic just war tradition.

Cosmopolitan moral interpretations of the just war tradition have lead to some interesting commentary on the nexus between the role of the state and its authority to wage war. Ultimately, what we see are arguments which attempt to discover what it is about states that gives them this authority. If it can be found that this inherent characteristic is advanced by NSAs, then they must have the same right to engage in the use of force. In perhaps one of the most well-known applications of legitimate authority to NSAs and in particular terrorist organizations, Andrew Valls argues that a terrorist organization could actually be constituted as a legitimate authority. Valls argues that the inherent characteristic of a state which legitimates its use of force is essentially its claim to represent the interests and rights of its people.<sup>76</sup> At a deeper level, what really matters is the plausibility of the claim to represent the interests and rights of the people. Thus, if a terrorist organization claims to act on behalf of a people, and is widely seen by that people as legitimately doing so, the rest of us (states) should look on that organization as the legitimate authority for the purpose of engaging in violence on their behalf.<sup>77</sup> The problem with this argument is that there is no easily devised quantifiable method to measure legitimacy this way. As a result, it becomes very difficult both for an NSA to claim such legitimacy and for states to be able to prove that an NSA's claims to that legitimacy are false.

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<sup>76</sup> Andrew Valls, "Can Terrorism Be Justified?," in Andrew Valls ed., *Ethics in International Affairs: Theories and Cases* (New York: Rowman & Littlefield, Inc., 2000).

<sup>77</sup> Ibid.



In a similar vein, Michael Walzer, perhaps the premier secular commentator on just war, argues in favor of the “political community” interpretation of legitimate authority. States are morally valuable because it is within states that citizens can build their own political community. Thus the state provides “an arena within which freedom can be fought for and (sometimes) won.”<sup>78</sup> The interpretation is that this is the moral basis for states’ right to resort to war. The logic here suggests that if “non-state entities can provide this same possibility for meaningful political community, then such entities may also at times have the right to wage war...”<sup>79</sup> Brian Orend takes this a step further. He argues that war should be understood not as a conflict between sovereign states, but instead as conflict between political communities.<sup>80</sup> This seems to make room in the just war tradition for wars fought by and between NSAs. This is, however, a very slippery slope argument. If such a loose standard is used to judge the authority of actors to engage in the use of force, there is really no end in sight. Adopting this standard of legitimate authority, we would have to include substate revolutionary groups, armed criminal organizations, terrorist groups, etc. As long as an NSA used organized violence to affect a political order, they could seemingly meet the standard. The incorporation of NSAs is something that contemporary just war scholars have thought the tradition incapable of addressing.<sup>81</sup> In order to strengthen the tradition, the argument is to adopt new standards of justice to account for the changing nature of warfare. Introducing NSAs into the just war tradition will have the opposite effect. With the inclusion

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<sup>78</sup> Walzer, *Just and Unjust Wars*, 61.

<sup>79</sup> Henize and Steele, *Ethics*, 11.

<sup>80</sup> Brian Orend, *The Morality of War* (Toronto: Broadview Press, 2006), 2.

<sup>81</sup> Heinze and Steele, *Ethics*, 11.

of a whole host of previously illegitimate actors, the tradition will lose its moral efficacy and practicality for policy-makers. This threat aside, allowing the tradition to include NSAs is a betrayal of the tradition as it developed in order to promote certain important principles, namely the just use of force to protect order, stability, and security. Trouble is, most terrorist organizations seek to overturn the existing political order, at odds with the fundamentals of the just war tradition. Even if an NSA does not seek to change the existing political order, they do not play by the rules of BOP or respond in kind to threats of MAD. While NSAs increasingly demonstrate state-like military capabilities, they do not behave like states as regards threats to international security.

CHAPTER 3

THE JUST WAR TRADITION:  
CLASSICAL UNDERSTANDINGS

The widely accepted criteria of the just war tradition listed above is the result of more than 2000 years of conversation about ethics in war. To understand the classic just war tradition in this way is essentially correct. However, it is wrong to find the tradition in this highly complete form in the writings of any specific just war theorist in the development of the tradition. Neither Augustine nor Thomas Aquinas, two of the most recognizable theorists of just war, conceived the tradition in this highly advanced form. Likewise, it is also not correct to assume that the tradition is a wholly Christian doctrine, i.e., theological or canonical. The just war tradition is rightly understood as an amalgam of many different theories on the just conduct of war, secular, moral, divine and philosophical. Indeed, the just war tradition in its fullest form “was the result of forces from outside as well as within the walls of the medieval church.”<sup>1</sup> As such, the classic just war tradition was a product of secular and divine sources together which has helped contribute to both its strength and practicality. By including elements of numerous theories on the ethics of war, the just war tradition has developed into the most comprehensive consideration on the subject. This, in turn, helps promote its universality even though just war theory is largely a product of western sources: Greco-Romans first and then Catholic canonists.<sup>2</sup>

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<sup>1</sup> James Turner Johnson, *Ideology, Reason, and the Limitation of War* (Princeton: Princeton University Press, 1975), 26.

<sup>2</sup> Orend, *The Morality of War*, 9.

### *Greco-Roman Just War Theory*

James Turner Johnson, the premier just war historian, has observed that in its origins, just war theory is essentially a synthesis of Greco-Roman and Christian values.<sup>3</sup> The ancient Greek philosopher Aristotle (384-322 BC) is widely credited with coining the term just war.<sup>4</sup> In stark contrast to the older idea of holy war, thought to be mandated by Divinity, Aristotle's just war was strictly secular in nature. Yet, a just war so developed by Aristotle was not purely an altruistic conception. His most important contribution to the just war tradition was the principle of self defense. Aristotle "thought it morally justified to go to war to prevent one's community from being attacked and enslaved by another."<sup>5</sup> There is, today, agreement among just war theorists that self-defense is the most appropriate just cause for war. However, Aristotle did articulate two controversial principles of just war, neither of which has survived. First, Aristotle justified going to war to gain an empire. He also argued that war to gain slaves for one's community could be justified.<sup>6</sup> With regard to individual vs. state conceptions of justice and the procurement of such, Aristotle was clear: "when devoid of virtue man is the most unscrupulous and savage of animals..." Therefore, justice "is an element of the state; for judicial procedure, which means the decision of what is just, is the

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<sup>3</sup> James Turner Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton: Princeton University Press, 1987), 45.

<sup>4</sup> Aristotle, *Politics* (Cambridge: Harvard University Press, 1950), quoted in Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, (Upper Saddle River: Prentice Hall, 1998), 10-11.

<sup>5</sup> Orend, *The Morality of War*, 10.

<sup>6</sup> *Ibid.*, 10-11.

regulation of the political leadership.”<sup>7</sup> This seems to be the earliest form of a legitimate authority. What is implied here is that there is something inherent in the state not found in individuals.

The “state” as understood by Aristotle was the city-state of Athens. Much like other Greek city-states at the time, Athens had a predominately agricultural economy. In order to sustain this type of economy, the work force in Athens was largely drawn from slaves captured in war or bought from pirates.<sup>8</sup> This is precisely why Aristotle found it just to wage war for the attainment of slaves. The political make-up of Athens at the time was characterized by severely limited enfranchisement. This right was limited to sons of enfranchised men and political participation was completely closed to women.<sup>9</sup> I point this out in order to show that at the time of the earliest formulation of a just war theory, the state did not gain its legitimacy due to its representative nature or its defense of human rights. Ancient Athens was, by our standards, a crude form of democracy. Yet, Aristotle still contributed the authority to wage war to the state for the purpose of security.

The Roman Empire followed the Greek Empire. As a result of Rome’s battlefield success, the senator Cicero (106-43 BC) developed deep reflections on war. In fact, Brian Orend claims that Cicero “probably deserves credit for co-founding just war theory with Augustine...”<sup>10</sup> Cicero legitimized wars of self-defense and much like Aristotle, endorsed

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<sup>7</sup> Aristotle, *Politics*, Book 1, Chapter 1, 12.

<sup>8</sup> Plato, *Republic* (New York: Barnes & Noble Classics, 2004), xvi.

<sup>9</sup> *Ibid.*, xvi.

<sup>10</sup> Orend, *The Morality of War*, 11.

wars waged in the defense of Rome's honor or glory: "a war is never undertaken by the ideal state, except in defense of its honour or its safety..."<sup>11</sup> Continuing a theme found in Aristotle above, Cicero pointed out the importance of the continuation of the state: "death is not natural for a state as it is for a human being...there is some great similarity...between the overthrow, destruction, and extinction of a state, and the decay and dissolution of the whole universe."<sup>12</sup> It is clear in this passage that Cicero attributes an intrinsic value to the state. One of the important duties of the state is the procurement of the just use of force. Undertaking a just war in defense of the state, whether for safety or honor is an important part of its continuation, the extinction of which would invite chaos and dissolution.<sup>13</sup> It is up to the state, as the arbiter of justice, to use force judiciously.

Unlike Aristotle, Cicero did reject the employment of war to acquire slave labor.<sup>14</sup> Most importantly, Cicero added to Aristotle's just cause requirement the principles of proper authority and public declaration.<sup>15</sup> Cicero "demanded the articulation of a formal declaration of war by the king or emperor."<sup>16</sup> Rome's political procedures as to the decision to wage war reflected an early commitment to the [now] prudential criteria of last resort. The military could not engage in war until a quasi-diplomatic exchange between Rome and a potential

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<sup>11</sup> Cicero, *The Republic* (Cambridge: Harvard University Press, 1952), Book III, XXIII, 34.

<sup>12</sup> *Ibid.*, 34.

<sup>13</sup> *Ibid.*, 34.

<sup>14</sup> Orend, *The Morality of War*, 11.

<sup>15</sup> *Ibid.*, 11.

<sup>16</sup> Flynn, *How Just is the War On Terror?*, 7.

adversary had clearly signaled the latter's intent to engage Rome militarily.<sup>17</sup> The chain of events in this diplomatic exchange is important for the principle of legitimate authority. Rome's diplomatic party would be sent to the target city of a potential adversary and announce Rome's discrepancy and lay out the framework of rectification. If no satisfactory response was given by the rival empire, Rome's diplomatic party would then return to the enemy and threaten war.<sup>18</sup> When an immediate and positive reply was not given, the party would return to Rome and inform the Senate. If the Senate voted for war, the party would again travel to the enemy and officially declare war.<sup>19</sup> The important aspect of this procedure is that the diplomatic party had to inform the Senate, the official representative body of the state. Since it took a vote of the Senate to declare war, this body thus represented the legitimate authority for the decision to use force.<sup>20</sup> Cicero also developed early principles of *jus in bello*, commenting "repeatedly on the need for restraint in battle."<sup>21</sup>

What we see in the writings of both Aristotle and Cicero is the development and application of a just war theory for thinking about and responding to the real-world dilemmas of politics. Also inherent here is an early development of the principle of legitimate authority. Even in antiquity, the state was considered the legitimate authority with the responsibility to engage in the use of force. Considering Cicero's high regard for the state as an essential piece in the ordering of the universe, it is not surprising that it was the Senate

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<sup>17</sup> Ibid., 11.

<sup>18</sup> Orend, *The Morality of War*, 11.

<sup>19</sup> Ibid., 11.

<sup>20</sup> Ibid., 11.

<sup>21</sup> Ibid., 11.

which held the responsibility of deciding war. Aristotle likewise argued that the procurement of justice was the business of the state, not of the individual. Through the political procedure, rather than the unscrupulous behavior of individual men, justice could be decided and security preserved.

### *The Early Christian Synthesis*

The Roman emperor Constantine (306-337) is widely assumed to have presided over a revolution in early Christian thinking about war and military service more generally.<sup>22</sup> The standard account of this transformation goes something like this: Jesus was a pacifist who accepted neither the use of violent means to advance his message nor the resort to violence in self-defense. Following the example of Christ, the early Church was pacifistic in both regards. Pacifism remained a central tenet of Christian thought until early in the fourth century when the arrival of Constantine affected a change in Christian thought. According to this account, what Constantine did was bring “the Church and its leaders into such close proximity to the state that the Church lost its earlier purity and became accommodated to the needs of the secular empire.”<sup>23</sup> What Constantine did was lay the foundation for Christianity to become the official, state-sanctioned religion of the Roman Empire. However, what Constantine did not do was preside over or usher in a grand revolutionary change in early Christian thought on the subject. There is evidence to the contrary, in fact. Throughout the Old and New Testaments in the Bible, there are accounts of Christians serving in the Roman

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<sup>22</sup> Flynn, *How Just is the War on Terror?*, 7.

<sup>23</sup> Johnson, *The Quest for Peace*, 3.



Army before Constantine.<sup>24</sup> Further, leading Christian theorists in the centuries before the arrival of Constantine as emperor debated and began to articulate a Christian theory on the ethics of war, not all of which recited the assumed pacifistic doctrine.<sup>25</sup>

Clement of Alexandria (150-215) is perhaps the first Christian just war thinker. While Clement did not specifically use the term “just war”, his contribution to the development of the tradition is notable. Clement’s writings attempted to achieve a synthesis of Roman Army principles and Christian thought to produce an early form of a just war theory. Augustine is widely credited with having done this, but Augustine actually drew upon the writings of Clement to advance his theory of a just war.<sup>26</sup> Contrary to the widely held notion of a pacifistic Christian doctrine prior to Constantine, Clement argued that military service and war were “justified to protect the goods represented by the Empire.”<sup>27</sup> In general, Clement’s writings advanced the theory of how and when the resort to military force might be justified. Specifically, Clement noted two of the three *jus ad bellum* criteria advanced by Augustine: just cause (protection of the goods represented by the empire) and legitimate authority (possessed by the emperor).<sup>28</sup>

It is important to recognize that one will not find a fully articulated just war theory in the writings of Clement, or even Augustine for that matter. This was formulated much later

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<sup>24</sup> Ibid., 33-40.

<sup>25</sup> Among these are Tertullian, Origen and Lactantius.

<sup>26</sup> Augustine did more fully articulate this synthesis, but he was not the first to approach this subject.

<sup>27</sup> Ibid., 50.

<sup>28</sup> Ibid., 50. To these, Augustine added right intention.

in the writings of Aquinas and others. What is to be taken from the writings of Clement is the advancement of a Christian theory of just war which was not pacifistic in nature and one which was developed before Constantine established Christianity as the official religion of the Roman Empire. The question that consumed him and prompted him to comment on the ethics of war was: what is the role of the Christian in the affairs of the Roman Empire? In articulating an answer to this question, Clement did not find that Christians had to fully separate themselves from the affairs of the secular world to remain true to Christianity. Rather, engagement with the affairs of the state could in fact help advance the goods found in the state. Clement used the two principles of just cause and legitimate authority to comment broadly on the responsibility of the Empire as the prevailing governmental authority of the time. He also argued for the idea of responsibility and attributed that notion to the state. The over-arching theme was that “Christians might responsibly take part in securing the temporal goods represented by the state...”<sup>29</sup> In this regard, Clement attributed legitimate authority to the emperor. The implications of this were not drawn out as fully as they were by Augustine, but the assumption remains: the emperor was the legitimate authority of a state which represented the advancement of certain temporal goods, namely security and order. The state was viewed as charged with the task of protecting the people “from the onslaught of the barbarians from outside.”<sup>30</sup> Christians were justified in taking up arms in the defense of the

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<sup>29</sup> Ibid., 52.

<sup>30</sup> Davis Brown, *The Sword, the Cross, and the Eagle* (Lanham: Rowman & Littlefield, 2008), 29.

state to protect the goods represented by the Empire.<sup>31</sup> In sum, Clement deferred to the authority of the state to wage a just war.

Following Clement, another Christian formulation was put forth by Ambrose, Bishop of Milan (340-397). Writing after Constantine had laid the foundation for the establishment of Christianity as the official religion of the Roman Empire, Ambrose viewed the Empire's responsibility in the same vein as Clement. With Clement, Ambrose shared the view that the purpose of the Empire was to protect the people from outside invasion and to provide order and security. Yet, since Christianity had been elevated to a state religion, Ambrose considered outside threats as intent upon the destruction of not only the Empire but also Christendom. This outlook necessitated a Christian re-examination of the ethics of war. As a result, Ambrose continued what Clement had begun and "merged Christian ethics with the Ciceronian tradition of public and private duties..."<sup>32</sup> These duties included self-preservation, "defense of others and intervention, finding justice in war that preserves the country from the barbarians...or defends one's neighbors from robbers."<sup>33</sup> Ambrose echoed Clement's writing, arguing that military force may be necessary to protect the goods represented by society. As I mentioned above, Ambrose viewed the Empire as a protector of Christianity namely, but also of order and security. In order to preserve these goods, war may be necessary. Here again we see a deference to the state as a necessary element in the achievement of order and security. It is because of this that the state may be justified in

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<sup>31</sup> Johnson, *The Quest for Peace*, 50.

<sup>32</sup> Brown, *Sword, Cross and Eagle*, 29.

<sup>33</sup> *Ibid.*, 29.

using armed force. With regard specifically to legitimate authority, Ambrose advanced the position that it was the duty of the laity, as opposed to the Clergy, to make war. As a former commentator on secular policy in the Roman Empire and the holder of a high civil office, Ambrose questioned the degree to which the Church ought to be involved in making war. For Ambrose, that duty was left to the state.<sup>34</sup>

While Ambrose's specific thought on just war does not differ much from that of Clement, his greatest contribution to the just war tradition is that "he achieved a practical synthesis of Christian and secular thought..."<sup>35</sup> What this synthesis achieved is two-fold. First and most importantly, this blend laid the framework for Augustine and Aquinas's just war theory. Specifically, Ambrose's argument that Christians ought to be peaceful in warring is retrenched later in the writings of Augustine and Aquinas. Second, it blends "a limited acceptance of Christian participation in the use of force together with established secular Roman traditions on the legitimation of war."<sup>36</sup> In the end, what this amounts to is a *de facto* obligation for Christians, yet not the Church, to use force in the defense of the goods represented by the state.<sup>37</sup>

#### *Augustine*

Considering the historical development of the tradition laid out above, it is almost impossible to argue that Augustine was the sole founder of just war theory. In fact,

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<sup>34</sup> Johnson, *The Quest for Peace*, 57.

<sup>35</sup> Ibid., 57.

<sup>36</sup> Ibid., 56.

<sup>37</sup> Ibid., 56.

Augustine's writings build upon the foundation laid by Greco-Roman and early Christian writers. Augustine (354-430) was a great admirer of Cicero whom he thought to represent "the very best of all that is Roman."<sup>38</sup> Ambrose is similarly exalted in the writings of Augustine. John Mattox, an expert on Augustinian thought remarks that "Ambrose is to Augustine...as Socrates is to Plato."<sup>39</sup> The influence of both of these writers upon Augustine is apparent. Cicero's reverence for the state is found in Augustine's writings. Further, Ambrose's attempt to synthesize Roman political practice with Christian thinking is mentioned and extended in many of Augustine's works. What sets Augustine apart however is that in Augustine we see the beginning framework of what will eventually be a more complete just war theory. To be sure, the just war tradition as we know it today is conceptualized much later. Yet, Augustine is the first just war theorist to fully draw out the connection between the legitimate authority and the responsibilities associated with the right to engage in the use of force, namely order and security.

While Augustine and Cicero agree that the preservation of the state is the most desirable aim, the world in which they lived was very different. The circumstances surrounding Augustine's world shaped his just war theory in an altogether different manner than that of Cicero. Augustine lived in the day of the decline of the Roman Empire and its approaching collapse. The Empire was being threatened externally as well as internally. Barbaric peoples from northern Europe and central Asia were the primary external threat while civil war within the provinces of the Empire itself posed a challenge to internal

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<sup>38</sup> John Mark Mattox, *St. Augustine and the Theory of Just War* (New York: Continuum, 2006), 14.

<sup>39</sup> *Ibid.*, 14.

stability. As such, war was never far from being a reality and the dissolution of the state, unthinkable in Cicero's time, was a glaring reality.<sup>40</sup> With regard to the external threats to the empire, Augustine was primarily concerned by the violence and lawlessness which characterized the various tribes and barbarian factions threatening to overwhelm the empire. To me, this has very relevant connotations to the nature of twenty-first century international relations. States are in the position of providing the goods of international security and order. This security and order are being challenged by the unrelenting violence of NSAs as they seek to overthrow existing political orders both domestically and internationally.

In his massive fourth century masterpiece, *The City of God*, Augustine presents his argument for the purpose of the state. Reflecting the Christian nature of Ambrose's just war theory, Augustine juxtaposes the temporal nature of the state with the eternal Kingdom of God. He conceptualizes the universe as God's realm: "God is the ultimate Creator, Judge, Arbiter, and End."<sup>41</sup> Within God's universe, the tragic reality of sin permeates human relationships. Nonetheless, God sustains the universe with a divine order. By the time of Augustine's writings, the Roman Empire had adopted Christianity as the official religion of the state. With this in mind, it is important to note that while Augustine recognized this, he ultimately concluded that "the city of Rome and the Kingdom of God could not possibly be one and the same."<sup>42</sup> The divine order with which God sustains the universe can never be reflected fully in the state. Yet, the state with its laws and hierarchy does, more than any

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<sup>40</sup> Ibid., 23.

<sup>41</sup> Patterson, *Just War Thinking*, 37.

<sup>42</sup> Mattox, *Saint Augustine*, 24.

other, mirror this divine order. Temporal political order, while being a poor reflection of the City of God, most approximates that eternal order.<sup>43</sup> Augustine consistently praised political order over disorder. Because the threat of political disorder was such a tragic reality, Augustine genuinely feared the breakdown of civic order. Specifically, Augustine termed this *tranquillitas ordinis*. At a minimum, the primary responsibility of government is to provide basic security and order. The earthy dominion of government “has been established to serve God and to benefit all human beings.”<sup>44</sup> As such, it is the authority of earthly kings and kingdoms to use force and that matters of temporal order should not be left to self help.<sup>45</sup> The prospect of leaving questions of justice and order in the hands of individuals conjures up a nightmare of private warfare, rife with vengeance and vendettas, motives for war which Augustine specifically rejects.<sup>46</sup> Those in positions of authority have the responsibility and obligation to protect the temporal goods of domestic and international life. Augustine’s conception of order and responsibility stipulates that the goods of the *tranquillitas ordinis* cannot be achieved in the face of pervasive and unrelenting violence, which is the basic nature of private warfare.<sup>47</sup>

It is within this context that Augustine’s conception of legitimate authority is set. In a letter to Count Boniface, a Roman official with responsibility for public order in his region

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<sup>43</sup> Patterson, *Just War Thinking*, 37.

<sup>44</sup> Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), 53.

<sup>45</sup> *Ibid.*, 53.

<sup>46</sup> Patterson, *Just War Thinking*, 37.

<sup>47</sup> Elshtain, *Just War Against Terror*, 53.

“and the command of troops to maintain that order...” Augustine outlines the purpose for waging war: “We do not seek peace in order to be at war, but we go to war that we may have peace.”<sup>48</sup> It is particularly instructive that Augustine instructs Count Boniface how to prosecute war, noting Boniface’s responsibility for public order. Perhaps Augustine’s most succinct statement on the principle of legitimate authority is found in this passage in the *Contra Faustum*. Augustine’s line of reasoning is that only a public authority can justly use military force: “The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.”<sup>49</sup> The Latin word used by Augustine to define war is *bellum*. This word literally translates “war” which at the time was a conflict between two prevailing governmental, public authorities.<sup>50</sup> In contrast another Latin word *duellum* which translates “a duel”. A duel is a conflict between private authorities for reasons not associated with the duties of the state. Therefore, Augustine’s thought on legitimate authority is that *bellum*, when undertaken by the proper authority may or may not be just depending on the circumstances; *duellum*, on the other hand, can never be.<sup>51</sup>

Augustine holds unmistakably that human governments are ordained by God for the benefit of man. The political sovereign is God’s lieutenant on earth. Decisions by the authority to wage war are reflections of the divine will. Indeed, the legitimate right to wage

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<sup>48</sup> Johnson, “Aquinas and Luther,” 6.

<sup>49</sup> Saint Augustine, *Contra Faustum* xxii, 75, quoted in Johnson, “Aquinas and Luther,” 6.

<sup>50</sup> Brown, *Sword, Cross, and Eagle*, 51.

<sup>51</sup> Johnson, “Aquinas and Luther,” 6.



war is vested exclusively in the sovereign authority: “the natural order which seeks peace for mankind ordains that the monarch should have the power for undertaking war.”<sup>52</sup> Augustine also argues that the power to wage war is one of the functions which properly belongs to a “just government.”<sup>53</sup> Interestingly, Augustine argues that temporal legal authority to wage war is found not in the degree of the sovereign’s personal righteousness, but in the position itself. As God’s arbiter for temporal political order, the sovereign authority has the legitimate authority to wage war. The overarching argument from Augustine with regard to legitimate authority is that “the state has a responsibility to both domestic and international security—a responsibility that it must uphold, even if the state dirties its hands in the process of securing the realm.”<sup>54</sup>

Clearly, the contemporary applications of the just war tradition outlined above are far more restrictive than the minimalistic conception formulated by the early secular and Christian writers. Indeed, much of the just war literature today lacks their practical concern for “political order in the form of national security [and] responsibility for standing up to aggression.”<sup>55</sup>

In addition to developing the principle of legitimate authority, Augustine introduced the principle of right intention. What is significant about this principle is that Augustine conceptualized it within the *jus ad bellum*, which was the primary theory on just war, but also

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<sup>52</sup> Mattox, *Saint Augustine*, 59.

<sup>53</sup> *Ibid.*, 59.

<sup>54</sup> Patterson, *Just War Thinking*, 37.

<sup>55</sup> Patterson, *Just War Thinking*, 37.

attributed right intention to *jus in bello*, still in its infancy. The *jus ad bellum* understanding of right intention is essentially that a ruler must order war with the greatest reluctance and not for the motives of territorial aggrandizement or revenge. War is to be waged with the ultimate goal of peace in mind. Right intention in the *jus in bello* was understood to mean that soldiers executing the command of the ruler must also “get no joy out of bloodlust and violence but, rather, should protect the innocents and fend off the guilty attackers with nothing but solemn duty as their focus.”<sup>56</sup> Although Augustine’s *jus in bello* and general just war theory was rudimentary by our standards, his writings began to shape the direction that just war thought would take for centuries to follow.

*Thomas Aquinas*

From the time of Augustine to the time of Thomas Aquinas (1225-1274), the just war tradition, *jus ad bellum* in particular, was perverted by regression of the European political scene. This time period 500-1000, is commonly referred to as the Dark Ages due to the lack of information which has survived from this time period. The western part of the Roman Empire dissolved into a number of small ethnic groups and many wars between them ensued. Around 800, “attempts were made by ambitious local warlords to consolidate their control over larger pieces of territory.”<sup>57</sup> The Catholic Church was the only institution to survive the collapse of Roman civilization. As a result of its incredible longevity, these local warlords sought to win the Church’s approval as it could essentially give them the stamp of legitimacy.

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<sup>56</sup> Orend, *The Morality of War*, 12.

<sup>57</sup> *Ibid.*, 13.

Between 1000-1300, these European warlords answered the Church's call for a series of military crusades against the encroachment of Islam into Europe.<sup>58</sup> During this period, the concept of holy war was once again resurrected and, for a time, war was approved based on the direct blessing of God found in sacred scripture or specific religious authorities such as the pope. The difference between holy war and just war is that just war is not sacred in nature; it is merely moral. During the Dark Ages, just war and holy war became inappropriately conflated by Christian writers and theorists. *Jus ad bellum* was polluted with religious dimensions like "self-righteousness, inflexibility, demonization of others and fanaticism."<sup>59</sup> Thankfully, today, no just war theorist endorses holy war as a just cause for war. With regard to *jus in bello*, however, important steps were taken during the latter part of the Dark Ages and into the crusades. Specifically, the writings of Gratian in 1148 helped to form concrete principles in the *jus in bello*.<sup>60</sup>

Within the context of warring ethnic and religious groups led by numerous warlords, Thomas Aquinas contributed a just war theory spear-headed by the principle of legitimate authority. In addition to warring ethnic and religious factions, there were "very wealthy trading enterprises, with their own private militias or armed security corps...also sporting private militias were aristocrats out to challenge the king..."<sup>61</sup> His conception of this

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<sup>58</sup> Ibid., 13.

<sup>59</sup> Ibid., 14.

<sup>60</sup> Ibid., 14. Specifically, non-combatant immunity, prohibition of weapons, specification of military v. civilian targets.

<sup>61</sup> Ibid., 15.

principle marks both a return to the original nature of legitimate authority as well as providing commentary for a practical way to approach temporal politics.

Aquinas's commentary on just war is found in the *Summa Theologica*. In this writing, Aquinas seeks to answer various questions on the topic of war. One of the questions that he answers is: whether war is sinful. "In order for a war to be just, three things are necessary." He lists these three conditions, which he borrows from Augustine, as: sovereign authority, just cause, and right intention.<sup>62</sup> What is most striking about Aquinas's list is not only the privileged position he gives to the authority principle, but the way in which he defines just cause and right intention with regard to the principle of sovereign authority. His definition of these two principles is focused on "the preservation of evil, the setting right of wrongs already done, the punishment of evildoers, and the overall promotion of good."<sup>63</sup> According to James Turner Johnson, there is an undeniable significance here. It is important that Aquinas's list of the requirements for just war begins with sovereign authority, "and so that we do not miss the significance of this requirement...he reminds us by the way he casts the requirements of just cause and right intention. These are all precisely what the good ruler is to do."<sup>64</sup> Also implicit in his ordering of just war principles is "the assumption that war is by definition an act of state, proclaimed and executed by those who speak and act on the state's behalf."<sup>65</sup>

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<sup>62</sup> Johnson, "Aquinas and Luther," 8.

<sup>63</sup> Ibid., 8.

<sup>64</sup> Ibid., 8.

<sup>65</sup> Brown, *Sword, Cross, and Eagle*, 52.

Aquinas's definition of sovereign authority is thus:

“For it is not the business of the private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover, it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.”<sup>66</sup>

For our purposes, two things stand out here. First, Aquinas specifically makes a distinction between “the rights of the sovereign and those of private persons relating to war.”<sup>67</sup> This is all the more important considering the international political situation at the time of this writing. Second, the right of the sovereign to wage war is derived from “the positive responsibilities as the one given charge for the common weal.”<sup>68</sup> These positive responsibilities include those listed above: prevention of evil, promotion of good, punishment of evil. Inherent in a legitimate authority as understood by Aquinas is first and foremost that the legitimate authority be a sovereign, public authority and not a private person. From the position of a legitimate authority as such, the right to wage war is derived. This reflects Augustine's argument that it is the position as such that holds the right, not the individual.

Aquinas prioritized legitimate authority for a reason. He wanted us to “look behind that requirement to its foundation in the conception of the good political community and the

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<sup>66</sup> Saint Thomas Aquinas, *Summa Theologiae*, II/II, Q. 40, A.1, quoted in William Baumgarth and Richard Regan, eds., *Saint Thomas Aquinas on Law, Morality, and Politics* (Indianapolis: Hackett Publishing Company, 1988), 221.

<sup>67</sup> Johnson, “Aquinas and Luther,” 8.

<sup>68</sup> *Ibid.*, 8.

responsibility of the sovereign authority to support its common weal and defend it against threats from both within and without.”<sup>69</sup> Therefore, “the legitimate use of force should only be in the hands of the rightful authorities in order to promote security.”<sup>70</sup>

In Aquinas we see the intersection of morality and pragmatism in legitimate authority. The concept of morality is found in the sovereign authority’s responsibility to protect the common weal. Using the basis of morality, Aquinas condemned the private militias and armed trading companies challenging the rule of the king. Pragmatically, he gave us a standard by which to evaluate the present international situation in a way that preserves the principles of security and order provided by the state. For Aquinas, the purpose of the state was to provide a counter to the lawlessness found in private militias seeking to usurp power. It is striking to see the similarities between the proliferation of private militias in Aquinas’s time and the growth of NSAs in our time. Aquinas favored the non-proliferation of armies. The general thought of Aquinas was that “the more armies we have got, the more likely they’ll step on each other’s toes and start fighting.”<sup>71</sup> His rejection of the proliferation of private armies led him to favor a more central authority like a king or prince. In this sense, “Aquinas sided with the rise of the modern nation-state.”<sup>72</sup>

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<sup>69</sup> Ibid., 12.

<sup>70</sup> Patterson, *Just War Thinking*, 38.

<sup>71</sup> Orend, *The Morality of War*, 16.

<sup>72</sup> Ibid., 16.

### *Grotius And The Development of International Law*

Following Aquinas, the coalescence of the just war tradition around the core *jus ad bellum* principles intersected with the rise of the modern nation-state and the early development of international law. This combination has had a profound effect on the way the just war tradition developed in the early- modern period and how it is understood today.

Essentially, we can see a shift in the international political system between the Peace of Westphalia in 1648 and the Congress of Vienna in 1814-1815. The development of international law, led by the writings of Hugo Grotius, fostered a divorce between the heretofore union of morality and pragmatism in the just war tradition. A more legalistically structured international system grew out of the centuries-long wars of religion when holy war, rather than just war, provided the justification for a resort to force. Nevertheless, distinct and transformative ideas began to dominate the international political system during this time period.<sup>73</sup>

For our purposes, the idea of sovereignty was fundamentally reconceived, beginning with the writings of Grotius as early as 1625. Traditionally, sovereignty or the sovereign authority represented the political authority with no superior. Throughout the development of the just war tradition, this has been attributed to many different entities: the Senate of ancient Greek city-states, the ruler of the Roman Empire, the King, Prince, or other ruler of the independent kingdoms formed after the fall of the Roman Empire. Vested in each of these authorities was the right to engage in the use of force. This right was understood to be the exclusive realm of the sovereign authority *as such*. However, not only was this right

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<sup>73</sup> James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), 52.

given to the sovereign *as such*, the framers of the just war tradition, both secular and divine, understood that the sword was to be wielded by the authority with certain moral principles in mind: defense of the state, protection of the goods of society; essentially security and order. Included within the legalistic understanding of the sovereign as the highest political entity were the morally-based goods of security and order. This combination characterizes legitimate authority traditionally understood.

Authority was thus associated with the person, or ruler, or the position itself. Associating legitimate authority with the ruler of the empire or state is an embodiment of the ruler with the legitimate authority to make war. This association is, as Augustine pointed out, not to be a continuation of the righteousness of the person himself. Rather, the legitimate authority to make war was vested in the person as the embodiment of the position of sovereign with the responsibility to defend order and provide security.

The shift that took place in this time period was to disassociate authority with the person or ruler and to place it in the entity itself, namely the state. Essentially, it was a “shift in the idea of sovereignty from the individual who wields it to the state on whose behalf it is wielded.”<sup>74</sup>

In 1625, Hugo Grotius published *De Jure Belli ac Pacis* (*The Law of War and Peace*). This work became the foundation upon which modern international law developed. Like many just war theorists before him, Grotius rethought the inherited just war tradition. His rethinking transformed the tradition into a theory of the law of nations. On the matter of

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<sup>74</sup> Ibid., 52.



authority to make war, Grotius continued the requirement that it be a sovereign authority.<sup>75</sup> Yet, as I mentioned, he “located the basis of sovereignty in the political entity governed, not in the person or persons who govern.”<sup>76</sup> “The subject of sovereignty is the state”, he declares, “and not any particular person.”<sup>77</sup> Grotius does rightly distinguish the private interests of the ruler from the interests of the state for which he is responsible. This is in line with the writings of both Augustine and Aquinas. Yet, he then goes on to argue that sovereign power derives from the people of the state, an interpretation of natural law which will heavily influence the just war tradition for centuries to come.<sup>78</sup> Indeed, writers like John Locke picked up on the theme of natural law arguing that the rights of man were based in nature, contrasting the centuries-old understanding that these rights were given by the state. It is from this line of reasoning that cosmopolitanism and a rights-based just war theory have developed. Using a natural law understanding of the state and the rights of man has led many to argue that if a particular NSA can meet this standard, essentially that the organization claim representative status and be perceived to enjoy that status by the people it claims to represent, then it qualifies as a legitimate authority to wage war.<sup>79</sup>

One of the biggest consequences of this new conception of sovereignty and authority “was that the exercise of sovereign power in regard to the use of armed force became more

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<sup>75</sup> Ibid., 53.

<sup>76</sup> Ibid., 53.

<sup>77</sup> Ibid., 53.

<sup>78</sup> Ibid., 53.

<sup>79</sup> Valls, “Can Terrorism Be Justified?”.

formalistic and less moral in character.”<sup>80</sup> Grotius’s natural law construct “disconnected morality from any single political authority structure.”<sup>81</sup> Influenced heavily by the religiously motivated wars which had torn Europe apart for centuries, Grotius sought to recast the justification for the use of armed force in terms of legality rather than morality. The overarching theme of Grotius’s thought was the idea that the right to make war was given to states by the law of nature, as opposed to a mandate from divinity. With regard to just cause, Grotius narrowed the cause of justice to the purpose of self-defense. His mandate that war must be formally declared by the sovereign authority on behalf of the state sought to make “the initiation of armed hostilities more subject to objective judgments...”<sup>82</sup> The problem is that Grotius completely discounted conceptions of morality and justice as they relate to the right to make war. Preservation of order and the pursuit of security are both moral principles expressly articulated by the traditional just war theorists outlined above. While traditional just war theory envisioned the state, “under the authority of its sovereign head, as the central actor in the employment of armed force to combat injustice...” the result of Grotian conceptions of sovereignty and authority has been the development of legal thought in the just war tradition which has “sought to limit the right of individual states to resort to force.”<sup>83</sup>

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<sup>80</sup> Johnson, *Morality*, 53.

<sup>81</sup> Anthony F. Lang, Jr. “Authority and the Problem of Non-State Actors,” in Heinze and Steele, *Ethics*, 49.

<sup>82</sup> *Ibid.*, 54.

<sup>83</sup> *Ibid.*, 58.

This has had the effect of “making war seem more an instrument of injustice than of justice, more a source of destruction of lives and values than a means of protecting them.”<sup>84</sup>

This indictment of the state-centered international system, based in part on the horrors of total war in the twentieth century, has led many to question the positive role the state can and should play in the preservation of order and the pursuit of security in the twenty-first century. Indeed, the framework of the sovereign state-system is under increasing challenge in the twenty-first century. Both local and global demands upon this framework threaten to destabilize the international political order. Locally, “new wars” are beginning to demonstrate “that those using military force range from states to revolutionary movements to ethnic groups.”<sup>85</sup> Private military contractors have begun to redefine the rules of warfare and challenge the conception that states authorities control the use of force. Terrorist organizations and guerilla movements motivated by ideology and a lust to destroy the existing political order challenge the very fundamentals of the international political system. These are serious threats. States in the international community need to carefully consider how to deal with these threats. As a framework providing commentary on the moral and pragmatic use of force, the just war tradition must provide states with a way forward.

This chapter has been an attempt to argue that as public authorities, states, rather than private, NSAs, have the moral responsibility to provide security and order to the international political system. The central role of states as guarantors of these principles is being threatened by the proliferation of NSAs engaging in state-like military capabilities. Yet, NSAs do not have the same goals of states in the international system. They are not

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<sup>84</sup> Ibid., 58.

<sup>85</sup> Ibid., 54.

motivated by security or survival. Nor do they play by the rules of BOP. As such, they cannot be accepted into the just war tradition as legitimate authorities. The writings of traditional scholars of just war theory show that states, or the legitimate authority of the time, sit at the intersection of morality and practicality. To strip the just war tradition of this dual-themed history in order to fit NSAs into the tradition is a betrayal of just war's founding principles. In order that just war remain an eminently practical framework for the ethical use of force, its over-arching principles and themes must be retained in any discussion about the morality of war in the twenty-first century. This efficacy is rooted in the fact that the ethical dilemmas of public v. private authorities and the use of force have been explored by just war's founding theorists. A look back provides us with the necessary framework to move forward. In order to move forward, we must re-centralize the role of the state as the central player in the international political system. Threats to the state's centrality and responsibility must be recognized and dealt with according to the principles of the just war tradition. The next chapter will examine the role of NSAs in the twenty-first century, and comment on their inapplicability to the just war tradition's concept of legitimate authority.

## CHAPTER 4

### NSAS IN THE TWENTY-FIRST CENTURY

#### *Private Military Contractors*

As of July 2010, the United States employed more private military contractors (PMCs) than uniformed personnel in the prosecution of the wars in Iraq and Afghanistan.<sup>1</sup> PMCs do serve important tactical and strategic roles in each of these campaigns. The nature of twenty-first century warfare and specifically the problems presented by the war on terror has given rise to the role that PMCs continue to play. With the attacks on September 11, 2001, the global war on terror began in full force and would provide the type of war that PMCs were well equipped to fight. With an evolving war that would not center on the clashing of massive armies on large battlefields, but rather quick response teams to take out embedded terrorists, the stage was primed for the rise of PMCs.

To be sure, the Department of Defense has long relied upon contractors to support military operations.<sup>2</sup> During the Revolutionary War, “the Continental Army relied on contractors to provide such goods and services as transportation and engineering services, clothing, and weapons.”<sup>3</sup> Also, Hessian mercenaries were employed by England in the American Revolution. Since then, major advances in technology and the nature of warfare have expanded the role and responsibilities of contractors in military operations.<sup>4</sup> Currently,

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<sup>1</sup> Congressional Research Service, “DoD Contractors in Iraq and Afghanistan,” 1.

<sup>2</sup> Ibid., 1.

<sup>3</sup> Ibid., 1.

<sup>4</sup> Ibid., 1.

PMCs provide services for which the U.S. government is bureaucratically too cumbersome. These companies serve the government from the private sector in a force enhancing manner. They create and staff the food supply lines so that the U.S. Army no longer has to provide that service internally. In many ways, this has proved to be a more efficient means of waging war; freeing up portions of the Army that were dedicated to logistical support and refocusing on actually waging the war. Indeed, as of March 2010, 65% of contractor personnel in Iraq were engaged in a base support role. Base support functions include maintaining the grounds, running dining facilities and providing laundry services.<sup>5</sup> The other 35% is made up of functions including security, training, logistics, construction and transportation.<sup>6</sup> While the percentage of base support operations has remained relatively constant throughout the duration of the Iraqi operation, the role that PMCs provide for security has increased.<sup>7</sup> Evidence suggests that some states are beginning to cede direct “control over important security operations to the private sector.”<sup>8</sup> The very nature of these actors is perhaps their greatest danger. By reducing the political and material costs of waging war, they make “the resort to force in general easier to contemplate.”<sup>9</sup> Indeed, PMCs are increasingly present in “international conflict situations where states find it easier to outsource some security

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<sup>5</sup> Ibid., 8.

<sup>6</sup> Ibid., 8.

<sup>7</sup> Ibid., 8.

<sup>8</sup> Sean Kay, *Global Security in the Twenty-First Century: The Quest for Power and the Search for Peace* (Lanham: Rowman & Littlefield, 2006), 200.

<sup>9</sup> Eric Heinze, “Private Military Companies, Just War, and Humanitarian Intervention,” in Heinze and Steele, *Ethics*, 125.

operations.”<sup>10</sup> The ambiguous nature of security operations remains the most troubling aspect of PMCs’ role in the war on terror and for considerations of legitimate authority. As I proceed to examine the role of PMC operations in the war on terror, it helps to keep in mind Augustine’s formulation of the role of a legitimate authority: “the natural order conducive to human peace demands that the power to counsel and declare war belongs to those who hold the supreme authority.”<sup>11</sup>

Many of the problems, specifically in Iraq, can be traced back to the infamous *Coalition Provisional Authority Order Number 17*. This 16 page document outlines a number of definitions of various organizational plans for the administration of post-invasion Iraq. Inside this document is found the clause that allows the contractors to essentially get out of jail free: “Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their personnel, property, funds and assets, and all International Consultants shall be immune from the Iraqi legal process.”<sup>12</sup> In essence, this clause creates a loophole for PMCs in Iraq and prevents any accountability to the Iraqi government specifically, and the rule of law in general. This will come to be of utmost importance in a number of cases involving Blackwater, a controversial PMC in Iraq.<sup>13</sup> Not only did this law give PMC

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<sup>10</sup> Kay, *Global Security*, 200.

<sup>11</sup> James Pattison, “Just War Theory,” 150.

<sup>12</sup> Iraqi Coalition, *Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq*, [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_\\_Rev\\_\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf).

<sup>13</sup> Blackwater is now known as Xe Services, LLC. As I mention above, the biggest role played by PMCs in Iraq is of a non-combat nature. Blackwater is one of thousands of PMCs operating in Iraq and Afghanistan. Yet, its role as a security firm combined with the number

operatives freedom from prosecution, but it stripped them of any considerations for their actions when dealing with civilians.

There are a number of examples which illustrate that Blackwater was operating essentially outside of the command and control of the U.S. military and with impunity for their actions especially with regard to security operations. On April 4, 2004, the CPA headquarters in Najaf came under attack by 300 to 400 insurgents.<sup>14</sup> Ultimately, the building was defended by eight guards from Blackwater and a handful of Marines. However, before U.S. reinforcements could arrive, “the firm...sent in its own helicopters amid an intense firefight to resupply its commandos with ammunition and to ferry out a wounded Marine.”<sup>15</sup> Although the personnel acted bravely to hold their position, Blackwater was unwilling to comment on the incident and provide its view of the events. Even more troubling for considerations of legitimate authority is a statement from a DoD spokesman that “there were no military reports about the opening hours of the siege on CPA headquarters in Najaf because there were no military personnel on the scene.”<sup>16</sup> As a result the DoD “does not have a clear handle on the daily actions of security contractors because the contractors work

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of important examples of controversy surrounding its operations represents a worst-case scenario.

<sup>14</sup> “Contractors in Combat: Firefight From a Rooftop in Iraq,” *The Virginian Pilot*, <http://hamptonroads.com/node/66301>.

<sup>15</sup> Dana Priest, “Private Guards Repel Attack on U.S. Headquarters,” *Washington Post*, <http://www.washingtonpost.com/ac2/wp-dyn/A53059-2004Apr5?language=printer>.

<sup>16</sup> *Ibid.*, 1.



directly for the coalition authority, which coordinates and communicates on a limited basis through the normal military chain of command.”<sup>17</sup>

In another stunning example of Blackwater’s operational impunity, we turn to the events of 7 February, 2006. On this particular day, a sniper employed by Blackwater,

“opened fire from the roof of the Iraqi Justice Ministry. The bullet tore through the head of a 23-year-old guard for the state-funded Iraqi Media Network, who was standing on a balcony across an open traffic circle. Another guard rushed to his colleague’s side and was fatally shot in the neck. A third guard was found dead more than an hour later on the same balcony.”<sup>18</sup>

The only certainty this case offers is that three guards were killed and Blackwater personnel did open fire. However, there is a large lack of evidence in this case to draw solid conclusions. The Iraqi Police and the State Department have both written conflicting accounts of the incident. The Blackwater agents were guarding a U.S. diplomat holding a meeting inside the Justice Ministry building, which was the purpose for snipers posted atop the building. Incidentally, this gave snipers the perfect angle to fire at the Iraqi Media Network building across the square. The official Iraqi police report reached the conclusion that the guards had not opened fire on the Justice Ministry nor the Blackwater personnel.

Blackwater personnel claimed that they were fired upon and returned fire appropriate to the circumstances they believed they found themselves in. Aside from declaring that the guards came under fire, “the company was unable to comment further because of operational

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<sup>17</sup> Ibid., 1.

<sup>18</sup> Steve Fainaru, “How Blackwater Sniper Fire Felled 3 Iraqi Guards,” *Washington Post*, [http://www.washingtonpost.com/wp-dyn/content/article/2007/11/07/AR2007110702751\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/11/07/AR2007110702751_pf.html).

security and contractual obligations.”<sup>19</sup> None of the reports can pinpoint if the Blackwater guards came under fire first, if Blackwater fired first, or if a third unnamed party did something to provoke the incident. Once again, Blackwater was protected not only by its silence, but by operational immunity guaranteed to contractors in Iraq.

There are strong implications about how warfare will be conducted in the future with regards to private military contractors. If the U.S. is able to create a stable and legal operational frame of laws and rules through which the contractors can operate, there is a chance for an exciting, albeit risky, opportunity for the private sector to gain lucrative contracts and directly aid in the country’s strategic goals. The U.S. could see a new and potentially powerful arm of the military arise. However, if these new contractors continue to operate under murky structures devised outside of the normal chain of command, we could see the beginning of an era of PMCs whose only loyalty is to the highest bidder. Indeed, PMCs “have worked for...rebel groups, drug cartels, and before 9/11, two al Qaeda-linked jihadist groups.”<sup>20</sup> The current standard of allowing PMCs to fight without strict supervision and with relative impunity for their actions is a dangerous precedent. We could potentially see a U.S. that is dependent on private armies to wage wars in a worst case scenario. What we have witnessed with regard to one specific PMC, Blackwater, are soldiers who have the

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<sup>19</sup> Ibid., 2.

<sup>20</sup> Fred Schreier and Marina Carapini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” Occasional Paper No. 6 (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005), 7-9, [www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=14077](http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=14077), in James Pattison, “Just War Theory,” 151.

authority to kill rooted not in the specific sanction of a legitimate authority, but in a private entity, be it a privately held business or a single person.

It has been argued that there are compelling reasons “to require that non-state actors such as PMCs operate under the ‘legitimate authority’ of a state...”<sup>21</sup> It is well understood that a PMC operates only when there is some actor with whom to contract. The argument is that if a PMC is working on behalf of a state, even engaging in military operations, they could be justified legitimate authorities.<sup>22</sup> This line of reasoning assumes that most states have “mechanisms for the internal discipline of those said to be acting on their behalf on the battlefield, and can thus hold them accountable for any unlawful or immoral conduct.”<sup>23</sup> If only this could be true every time. Again, with regard to Blackwater, it seems that the U.S. government has been reluctant to claim full jurisdictional authority for the actions of the firm. Upon the investigation of the shooting of an Iraqi guard by a Blackwater employee, the question of legal jurisdiction was raised. Erik Prince, co-founder of Blackwater, testified in front of the House Oversight Committee on the issue. His comments are revealing: “We fired him. We fined him. But we, as a private organization, cannot do any more. We cannot flog him. We cannot incarcerate him. That is up to the Justice Department. We are not empowered to enforce U.S. law.”<sup>24</sup> Prince was right. In a stunning turn of events in this case, it was revealed that “The State Department...hoped to keep the case quiet by helping

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<sup>21</sup> Heinze, “Private Military Companies,” in Heinze and Steele, *Ethics*, 136.

<sup>22</sup> *Ibid.*, 136.

<sup>23</sup> *Ibid.*, 136.

<sup>24</sup> “Contractor involved in Iraq shooting got job in Kuwait,” *CNN*, <http://www.cnn.com/2007/POLITICS/10/04/blackwater.contractor/>.

Blackwater to take Mr. Moonen [the accused Blackwater employee] out of Iraq and by paying the slain guard's family \$20,000 in cash."<sup>25</sup> If the U.S. government is not going to hold these actors accountable for unlawful and immoral conduct, then it cannot be expected that other states, let alone non-state actors, will hold them accountable.

With regard to considerations of security and order, the proliferation of PMCs operating outside of the command structure of the military of a legitimate authority and with relative impunity for their actions means that warfare can no longer be regulated. As Sean Kay has presciently pointed out, the existence of contractors outside the control of states contributes to a lack of "accountability that military or intelligence personnel might have."<sup>26</sup> The privatization of military force dramatically increases the number of actors able to use military force in the international arena. This is exactly what Aquinas cautioned against. Clearly, entities such as Blackwater operate outside of the command and control of the U.S. military. The increase of PMCs combined with less control over these entities increases the likelihood of instability.<sup>27</sup> Further, PMCs operate not for goals of international security but rather out of a pure profit motive. Evidence of this is found in PMCs' willingness to sell themselves to the highest bidder. Often times, this is not even a state.<sup>28</sup> Even when PMCs are employed by a state, the evidence above suggests that they operate outside of a normal

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<sup>25</sup> John M. Broder, "Ex-Paratrooper is Suspect in a Blackwater Killing," *The New York Times*, [http://www.nytimes.com/2007/10/04/world/middleeast/04contractor.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/10/04/world/middleeast/04contractor.html?_r=1&hp&oref=slogin).

<sup>26</sup> Kay, *Global Security*, 200.

<sup>27</sup> Pattison, "Just War Theory," 151.

<sup>28</sup> *Ibid.*, 151.

chain of command and apart from state-based systems of regulation. As a result of their ability to operate in secrecy, they provide a way for “governments to deploy military force without the blatancy of state action—for instance, by enabling foreign policy by proxy.”<sup>29</sup> And although a state that employs a PMC is still subject to international law, the PMCs themselves are not.<sup>30</sup>

PMCs clearly must be rejected by the just war tradition’s conception of legitimate authority. They operate with relatively little accountability for their actions. Their over-all profit motive has led them to carry out military activity for other non-state actors outside of the confines of international law. Further, the proliferation of entities outside of the command and control structure of state militaries undeniably contributes to the increase in the likelihood of international instability. Thus, PMCs do not line up with classical just war conceptions of legitimate authority rooted in the moral and pragmatic concepts of order and security. Although allowing them to continue to provide operational support to military efforts in the form of the base support outlined above is acceptable, they must not be allowed to engage in the use of military force in a security or training role. In order that the just war tradition continue to be an accepted and revered authority on the moral limitations on the use of war, it must condemn the use of force of this type. By nature PMCs present a challenge to the tradition of moral limitations in war. The quickness, secrecy, and unaccountable way in which these actors can engage in the use of force are troubling aspects of twenty-first century warfare. These entities must not be justified as legitimate authorities.

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<sup>29</sup> Ibid., 151.

<sup>30</sup> Kay, *Global Security*, 201.

### *Terrorist Organizations*

Terrorism is an asymmetrical tactic used in the pursuit of a strategic objective. It is a tool of the weak used in an attempt to “level the strategic playing field through dramatic and shocking political events.”<sup>31</sup> By definition, terrorism targets innocent civilians without regard to discrimination in order to generate fear and achieve a political objective.<sup>32</sup> Much like PMCs, terrorism as a tactic has been used for centuries, often by governments as a means of securing power amid internal uncertainties.<sup>33</sup> Modern terrorism, however, is much different: the capacity for action has been revolutionized by twenty-first century technology. Moreover, modern terrorism is most often perpetrated by NSAs on an international scale. Common actors include: insurgents, guerilla movements, revolutionary groups and religious zealots. With regard to insurgents, guerilla and revolutionary movements, the strategic rationale for terrorism appears to be the creation of “confusion, chaos, and fear to show that those in power cannot govern effectively.”<sup>34</sup> Religiously motivated zealots, on the other hand, seek to project their nihilistic political philosophy on a specific region or even the world in an effort to more hastily usher in Armageddon. Either way, the central tenet remains: those who perpetuate terrorism are unsatisfied with the existing international

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<sup>31</sup> Ibid., 227.

<sup>32</sup> Ibid., 228.

<sup>33</sup> In places such as North Korea, terrorism is still used by the state on its own people for intimidation purposes. Yet, this represents one of the last bastions of a largely twentieth-century phenomenon.

<sup>34</sup> Kay, *Global Security*, 229.

political order and seek the establishment of an alternative order based around their specific principles and ideals.

There is a well-documented history of the tactical and strategic use of terrorism as a political weapon. For example, terror was used to restore order following the French Revolution.<sup>35</sup> Yet, the dynamics of the global security environment in the twenty-first century have contributed to the dramatic proliferation of terrorism as a tactic and strategy of NSAs. Many of the marvelous technological advances which have given rise to the benefits of globalization have also made it easier for terrorist organizations to coordinate and act.

Transportation technology has given extremists virtually unlimited access to countries for use as either training or base-states or potential targets. This is in addition to the use of transportation technology as a weapon such as the use of airliners as missiles on September 11<sup>th</sup> or subway trains as transport mechanisms for bombs. Communication technology has increasingly played the role of “force multiplier” aiding in the rapidity of “communications among members of an organization, and also as a means of publicizing via the media.”<sup>36</sup> Any AK 47-brandishing individual with access to the internet can upload a video of himself inciting hatred and spreading false information as an instantaneous tool of recruitment. The use of the internet and cell phone technology has enabled terrorists to coordinate attacks more efficiently as well as update and adapt to changing circumstances in real-time. Also, the traditional role of the state in the international economy has been weakened by its

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<sup>35</sup> Ibid., 228.

<sup>36</sup> Ibid., 229.

deregulation. This deregulation, while increasing the ease with which the flow of money is facilitated, has also helped the flow of weapons and the business of weapons-trading.<sup>37</sup>

In addition to the role of technology as a catalyst for significant change in the global security environment, the proliferation of failed states has created a specific arena in which terrorist groups have been able to consolidate power and establish a base from which to launch international attacks. The period of rapid decolonization following World War II simply left a number of states in key regions unprepared to make the transition to a stable government. In the wake of weak or failed states, armed gangs or militias coalesced “into organized insurgent or guerilla movements seeking to consolidate power.”<sup>38</sup> When a state fails or is on the brink of failure, an enormous power vacuum is created. Obviously, a number of actors emerge as potential candidates for power holder in the next government. Thus weak, failing, or failed states are fertile ground for armed gangs or militias seeking to redress the existing power imbalance. Terrorism is most often the tool used to promote fear, “intimidate civilians and harass or kill political opposition...” on the way to consolidating ultimate power.<sup>39</sup> This prescription also rings true for states making the difficult transition toward democracy. Terrorism is adopted by insurgent groups in these situations for essentially the same reasons, though the terror is often directed at international aid workers and those seeking to build civil institutions. In this case, the objective “would be to create the circumstances in which outside forces withdraw, leaving a political and security vacuum

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<sup>37</sup> Ibid., 229.

<sup>38</sup> Ibid., 230.

<sup>39</sup> Ibid., 230.



for insurgents to fill.”<sup>40</sup> The 2006 insurgency in Iraq is a prime example. Efforts of the U.S.-led coalition suffered a serious set-back upon the adoption of terrorism by insurgent groups seeking to drive out coalition forces and consolidate power in the wake of the toppled Saddam Hussein regime.

Further, the examples of the Taliban in Afghanistan, al-Qaeda, and al-Shabaab in Somalia demonstrate the raw capacity for action that these organizations can have as challengers to the international political order. The Taliban and al-Qaeda grew together out of the anti-Soviet Mujahedeen movement in Afghanistan in the 1990s. Late in the decade, the Taliban had consolidated their power and came to control most of Afghanistan. The maniacal and puritanical Taliban regime harbored al-Qaeda, giving them a base from which to coordinate their attacks. The training bases allowed by the Taliban regime trained as many as 100,000 fighters committed to holy war.<sup>41</sup> Prior to 9/11, Al-Qaeda was comprised of a remarkable military organization “including a high-level political committee which authorized actions.”<sup>42</sup> Furthermore, al-Qaeda had a military committee, a finance committee, a foreign purchases committee, a security committee, and a public relations committee.<sup>43</sup> Each of these committees seems to have reported to the political committee for authorization of specific actions. Al-Qaeda was involved in a number of terrorist attacks (and attempted

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<sup>40</sup> Ibid., 230.

<sup>41</sup> Ibid., 237.

<sup>42</sup> Ibid., 237.

<sup>43</sup> Ibid., 237.

attacks) prior to 9/11. In fact, al-Qaeda declared war on the United States in 1996.<sup>44</sup> Al-Qaeda was responsible for the 1993 effort to bring down the World Trade Center. Several years later, al-Qaeda members attempted to blow up a number of airliners over the Pacific Ocean. Fortunately, this plot was foiled in time. In 1998, al-Qaeda operatives killed hundreds of local African civilians when they attacked American embassies in Kenya and Tanzania.<sup>45</sup> Other than 9/11, one of the most recognizable al-Qaeda attacks came in late 2000 when “members used a small boat to bring explosives alongside the *USS Cole* which was at harbor in Yemen, killing over a dozen soldiers and severely disabling the ship.”<sup>46</sup>

Somalia represents one of the best examples of the growth of terrorist organizations out of the ruins of a failed state. Unfortunately, Somalia has not had a central government since 1991. In the wake of the large power vacuum created as a result, al-Shabaab has been able to “expand its footprint in Somalia.”<sup>47</sup> In July 2011, al-Shabaab claimed responsibility for what was its first major attack outside of Somalia. A pair of separate, but related, bombings killed more than seventy people in Uganda as they gathered to watch the World Cup final.<sup>48</sup> These attacks point up the “internationalization of al-Shabaab’s terrorist activities, which could destabilize East Africa and unleash repercussions abroad.”<sup>49</sup>

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<sup>44</sup> Ibid., 238.

<sup>45</sup> Ibid., 238.

<sup>46</sup> Ibid., 238.

<sup>47</sup> Council on Foreign Relations, *Al-Shabaab*, <http://www.cfr.org/somalia/al-shabaab/p18650>.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

However, while this was their first international attack, al-Shabaab has had success recruiting foreign fighters to its cause. In May 2010, national security advisor John Brennan remarked that “We have seen an increasing number of individuals here in the United States become captivated by extremist ideologies or causes.”<sup>50</sup> Specifically, Brennan noted five Somali-Americans who fled to Somalia to fight for al-Shabaab. Shortly after Brennan’s remarks, two U.S. citizens from New Jersey were arrested at New York’s JFK airport over allegations that they planned to travel to Somalia to join al-Shabaab.<sup>51</sup> An unsettling observation by the Council on Foreign Relations has noted a growing trend “in which radicalized Americans have become involved in terrorism-related activities.”<sup>52</sup>

Al-Shabaab has recently demonstrated a number of state-like capabilities, especially with regard to political behavior. The organization has begun to reach out to the Somali public through a series of coordinated town visits. In these outings, al-Shabaab would “hand out food and money to the poor, give criminals quick trials with mobile Sharia courts, and attempt to settle local disputes.”<sup>53</sup> In a pragmatic and remarkably successful consolidation of power, al-Shabaab “has extended its political power in southern Somalia...” though non-violent means.<sup>54</sup> Yet, the over-arching ideology remains: “the group espouses a strict form of Islam, Salafi/Wahhabism, and websites for the group claim to be waging jihad against

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

infidels.”<sup>55</sup> Despite relatively peaceful political activities, al-Shabaab continues to launch suicide terrorist attacks aimed at civilians and AU peacekeepers in Mogadishu. In addition, the organization appears to be coordinating with the infamous Somali pirates in exchange for a share of the spoils.<sup>56</sup> Piracy off the coast of Africa threatens to destabilize the flow of international trade in addition to providing a huge financial resource for al-Shabaab.<sup>57</sup>

As challengers to the existing political order, terrorist organizations behave in an altogether different manner than that of states. While there are specific examples of terrorist organizations exhibiting state-like behavior with regard to internal structures, the over-all goals of these organizations and the way in which they attempt to achieve them are far different and more troubling with regard to international order and security.<sup>58</sup> One of the key differences between states and terrorist organizations with regard to the use of force has to do with intentions.

When looking at capacity to act, states and terrorist organizations both have access to the unique features of the twenty-first century. This was explored briefly above: transportation technology, communication, and finance. In addition to this, it is well understood that modern war strategies and technologies have the capacity to bring destruction on a scale which has never been seen before. While the technology for nuclear

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<sup>55</sup> Ibid.

<sup>56</sup> “Somali Militants Training Pirates,” *National Post*, <http://www.nationalpost.com/news/story.html?id=2295946>.

<sup>57</sup> Ibid.

<sup>58</sup> Kay, *Global Security*, 237. Kay demonstrates that al Qaeda displays an amazing military organization which resembles a chain-of-command-like structure.

weapons was developed in World War II, the threat of nuclear proliferation is one of the central problems of global security today. For states which possess them, the principle of MAD virtually forbids their use. To be sure, it is disconcerting that a maniacal leader such as Kim Jong Il possess nuclear weapons technology. Yet, even he recognizes the use of that technology would bring about the destruction of his state. As the leader of a state, survival remains his ultimate goal. For example, Kim Jong Il has managed to parlay North Korea's nuclear capabilities into international aid.<sup>59</sup> The biggest potential threat of nuclear proliferation is that terrorist organizations will be given this technology. Puritanical and apocalyptic groups such as al-Qaeda and al-Shabaab, explicitly state their desire to bring about Armageddon and the end of the world. It follows that the rules of MAD would not necessarily apply to them and there might not be any hesitation to use nuclear weapons. The prolific use of suicide terrorism points out the fact that the rationality of survival does not apply to terrorists.

In addition to the potential destructiveness of nuclear weapons, military technology has advanced to the point that conventional aerial bombs and rockets are able to wreak considerable destruction. One author has claimed that this blurs the line between states and terrorists due to the potential for civilian casualties and the perceived disregard for efforts on the part of states to limit them. Upon lamenting how inexact the modern killing machine really is, Talal Asad claims that: "It is well known that aerial bombardment does not discriminate well between combatants and noncombatants, but it is wrong to think that this is due primarily to individual negligence rather than to the nature of modern military strategies

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<sup>59</sup> Andrei Lankov, "Staying Alive: Why North Korea Will Not Change," *Foreign Affairs* 87, no. 2 (2008): 9-16.

themselves.”<sup>60</sup> It is quite an absurd claim. While it remains true that modern military strategies are by nature incredibly destructive, the author fails to consider the development of precision guided munitions. Examples of civilian deaths as a result of aerial bombardment have as much to do with operator error and bad guidance from troops on the ground as they do with the nature of the weapons themselves. Furthermore, although civilian casualties are inherently a part of war, the advent of military technology has minimized this unfortunate reality considerably; states, not terrorist organizations have the technology and intent to limit the destructiveness of war. The just war tradition does have something to say about this, in fact. While the tradition does not preclude the killing of civilians, the invocation of the principle of double effect was introduced by Aquinas to limit it.

Aquinas’s principle of double effect “is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity.”<sup>61</sup> This principle is driven by four conditions, the most important of which is as follows: “The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.”<sup>62</sup> In other words, in pursuit of the aims of order and security strategically and undertaking tactical operations in support of the strategic goal, civilian deaths can be accepted as long as every effort has been taken, up to the point of danger to the operator, to limit civilian casualties. It is the very nature of the just war tradition, as it developed in antiquity and became codified in international law, to limit the

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<sup>60</sup> Talal Asad, “Thinking about Terrorism and Just War,” *Cambridge Review of International Affairs* 23, no. 1 (2010): 13.

<sup>61</sup> Walzer, *Just and Unjust Wars*, 153.

<sup>62</sup> *Ibid.*, 153.

destructive nature of warfare. In fact, this is the very reason that a conversation about the founding principles of the just war tradition is necessary in the first place. It is more likely that states, for pragmatic as well as moral reasons, will adhere to these principles. Terrorist organizations, on the other hand, by nature have no regard for this type of behavior. They seek to overturn the existing international political climate characterized by security and order and defended by states. While their growing capacity to act oftentimes mimics that of states, their intent, ultimate goals, and means through which they attempt to achieve those goals has a remarkably destabilizing effect on the international political order.

Alternative standards by which to judge the how terrorist organizations could be incorporated into the just war tradition have been proposed. Yet, they lack the proper grounding in just war's founding principles. The first of these alternatives was proposed by Andrew Valls. Seeking to answer the penetrating question of "can terrorism be justified?", Valls rejects the claim that all states are legitimate authorities because many of them do not "represent the interests and rights of [their] people."<sup>63</sup> The standard thus proposed by Valls for an evaluation of terrorists as legitimate authorities is a claim by the organization to represent the people and "also being seen by the people themselves as their representative."<sup>64</sup> Using this standard, it is possible that terrorist organizations and other NSAs may be able to enjoy the status of legitimate authorities with the right to engage in the use of force.<sup>65</sup>

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<sup>63</sup> Valls, "Can Terrorism be Justified?," 567.

<sup>64</sup> Ibid., 567.

<sup>65</sup> Ibid., 568.

Another standard by which to judge NSAs, and terrorist organizations more specifically, was proposed by Michael Walzer. Walzer argues in favor of the “political community” interpretation of legitimate authority. States are morally valuable because it is within states that citizens can build their own political community. Thus the state provides “an arena within which freedom can be fought for and (sometimes) won.”<sup>66</sup> The interpretation is that this is the moral basis for states’ right to resort to war. The logic here suggests that if “non-state entities can provide this same possibility for meaningful political community, then such entities may also at times have the right to wage war...”<sup>67</sup>

The problem with these alternative standards is that they do not consider the intent and goals of terrorist organizations. Be it insurgencies, guerilla and revolutionary movements, or religiously-driven groups, terrorists seek to overturn the existing political order. The internal structure and/or potential opportunities provided to those under the control of a terrorist organization matter very little in terms of their ability to contribute to international security and order. Furthermore, the more the principle of legitimate authority is diluted to incorporate actors which are incongruent with its tradition, the less likely it becomes that the just war tradition as a whole can have the desired effect of placing moral limitations on war. Pragmatically, the more warfare is waged by private actors, the possibility for chaos and instability grows exponentially. Security becomes harder to provide resulting in more conflict between states and NSAs and NSAs with other NSAs. It is the responsibility of states as legitimate authorities to provide for the order and security of not

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<sup>66</sup> Walzer, *Just and Unjust Wars*, 61.

<sup>67</sup> Henize and Steele, *Ethics*, 11.



only their own domestic populations but also of the international system. As a result, the just war tradition must reject terrorist organizations as legitimate authorities with the right to engage in the use of force.

## CHAPTER 5

### NATO AND LEGITIMATE AUTHORITY

In light of the recent U.S.-led NATO efforts to enforce a no-fly-zone over Libya, it has become increasingly relevant to discuss how an international security organization such as NATO could fit into the just war tradition. The challenge to the sovereignty of states in twenty-first century warfare has been outline above. Yet, although NATO is simply a sum of state authority, it exercises the use of force as a unified entity which could present a challenge to the concept of legitimate authority. The classical just war tradition vested legitimate authority in a single person. Rightly or wrongly, this is no longer the case. The concept of pooled authority such as that found in a security organization like NATO has quickly transformed the concept of state authority. In this final chapter, I will critically examine NATO with the conception of authority in mind. I will examine its over-all structure and decision-making process, seeking to discern how authority is wielded. Following this, the final section of this paper will attempt to reconcile this body with the conceptions of authority I have laid out above.

#### *What is NATO?*

NATO is an intergovernmental, trans-Atlantic political and military alliance. It provides a framework for managing security challenges, links North American and European security interests and aims to build security through understanding and cooperation for the prevention of future conflict. In the wake of the Second World War, ideological tensions between the countries of the west and the Soviet Union in the east were on the rise. At this time, 12 countries from North America and Western Europe formed the North Atlantic Alliance. From the onset, the primary aim was to create “a pact of mutual assistance” to

counter the rise of the Soviet Union and the risk of its extension into Eastern Europe and other parts of the continent.<sup>1</sup> Militarily, the alliance is based on the principle of collective defense. This commitment to a unified response in the defense of one is enshrined in Article 5 of the Washington Treaty. NATO is also politically engaged in the promotion of democracy in the region. The establishment of democratic principles promotes trust, cooperation, and predictability, serving the over-all mission of conflict prevention. While NATO has, in the past, sacrificed their commitment to these principles in the interest of geopolitical necessity, the promotion of democracy remains a hallmark of NATO action.<sup>2</sup>

For our purposes, there are several dynamics of NATO which need to be considered. The first is NATO's consensus decision-making. NATO claims that one of the keys to its durability is its consensus-based decision-making process. As I mentioned above, NATO is an intergovernmental body. Intergovernmentalism is an application of a realist idea to the liberal concept of integration. It is an approach to integration that treats states as the primary actors in the integration process. NATO's consensus decision-making process respects the sovereignty and independence of each member state. All NATO decisions made have to be unanimous. This means that when a decision is reached, "it has the full backing of all member countries and their commitment to implement it."<sup>3</sup>

The principal decision-making body of NATO is the North Atlantic Council. As an intergovernmental body, the Council is the primary means through which member states

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<sup>1</sup>NATO, "Together for Security: An Introduction to NATO."  
[http://www.nato.int/ebookshop/introduction\\_to\\_nato/nato\\_security\\_en.pdf](http://www.nato.int/ebookshop/introduction_to_nato/nato_security_en.pdf)

<sup>2</sup> Portugal, Greece and Turkey are prime examples.

<sup>3</sup>NATO, "Together for Security."

fight, squabble and pursue their national interests. The Council meets at least once a week with each member state represented at the ambassadorial level. Meetings at the Council also occur with various other representatives of each member state. These representatives often include foreign ministers, defense ministers and heads of state and government.<sup>4</sup> Within the NATO command structure, there are also numerous committees. Like the council, each committee is made up of a representative from each member state. Any decisions made at the committee level also require unanimity. In addition to the Council, two defense-related bodies sit at the top of the complex web of committees: the Defense Planning Committee and the Nuclear Planning Group.<sup>5</sup> Within this system, “the Military Committee is responsible for providing these three main bodies with military advice and gives the strategic commanders guidance on military matters.”<sup>6</sup>

The head of the North Atlantic Council is the rotating position of Secretary General. The Secretary General is a senior international representative from one of the member states and is appointed for four years. Responsibilities of this post include chairing “meetings of the North Atlantic Council and other important NATO bodies and help[ing] to build consensus among the members.”<sup>7</sup>

Another dynamic is NATO’s military command structure. Here, the principle of state sovereignty and independence also prevails. NATO does not have armed forces of its own.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

The forces available to NATO “remain under full national command and control until they are assigned by the member countries to undertake tasks...”<sup>8</sup> Also, “all NATO members fund their own troops and military maintenance in all situations and at all locations.”<sup>9</sup> The famed Article V, the Washington Treaty’s collective defense provision, does not, as is often assumed, require an automatic response by any of the member states. In reality, Article V leaves the “precise actions taken by each Party subject to their sovereign decision, and this was the interpretation of those who supported Treaty ratification in 1949.”<sup>10</sup> As such, a decision to commit forces to defend a NATO country against attack would still require approval within each member states’ constitutional framework.<sup>11</sup> In short, NATO remains an organization of sovereign nation states. For this reason, “no member can be compelled to participate in a military operation that it does not support.”<sup>12</sup>

While NATO’s structure does protect and facilitate the sovereignty of its many member states, it continues to thrive as a result of the active commitment of those member states to pursue defense cooperation. Specifically, when NATO engages in the use of force, it does so as a unified organization which complicates the issue of authority significantly. NATO’s use of force as a unified organization is only possible when forces are “assigned to a

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<sup>8</sup> Ibid.

<sup>9</sup> Christopher Bell, “NATO: Background and Current Developments,” in A.M. Babkina, ed., *NATO’s Role, Missions and Future* (Commack: Nova Science Publishers, Inc., 1999), 4.

<sup>10</sup> Stanley Sloan and Michelle Forrest, “NATO’s Evolving Role and Missions,” in Babkina *NATO’s Role*, 15.

<sup>11</sup> Ibid., 15.

<sup>12</sup> Ibid., 16.

specific operation decided upon at the political level.”<sup>13</sup> Even then, member states still retain important controls over their military forces. The forces available to NATO are delineated between those which come under operational command (OPCOM) and those under operational control (OPCON).<sup>14</sup> These are military-specific terms which relate to the “nature of the authority exercised by military commanders over the forces assigned to them.”<sup>15</sup> As such, when member states assign OPCOM or OPCON control, it places specific limits on the authority of the commanding NATO military officer at any given time.

Specifically, OPCOM allows for a commander to “assign missions or tasks to subordinate commanders, to deploy units, and to retain operational and or tactical controls as may be deemed necessary.”<sup>16</sup> This authority does not include responsibility for administration or logistics which is held by the respective member state. OPCON allows a commander to direct forces assigned to accomplish specific missions or tasks “which are usually limited by function, time, or location; to deploy units concerned; and to retain or assign tactical control to those units.”<sup>17</sup> Authority not delegated at the OPCON level includes assigning separate employment of components of the units concerned or

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<sup>13</sup> NATO, “NATO Handbook, Chapter 12, Military Force Structure,” <http://www.nato.int/docu/handbook/2001/hb1207.htm>

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Thomas Durell-Young, “NATO Command and Control for the 21<sup>st</sup> Century.”, *Joint Force Quarterly*, Autumn-Winter (2001): 41.

<sup>17</sup> Ibid., 41.

administrative and logistic control.<sup>18</sup> Tactical-level authority is also reserved to member states. TACOM and TACON assign specific levels of authority to NATO commanders at the lower tactical-level of military operations.<sup>19</sup> Member states retain the authority to assign forces on command and control levels as distinct from full command over all aspects of operations and administration of those forces.

The final authority dynamic of NATO is the use of its Article V collective defense provision. Within the just war tradition, the principle of just cause looms large. There remains disagreement among just war theorists on the justness of certain *casus belli*, which tend to include the punishment of evil, recovery of stolen property, and righting of a wrong. Self defense against aggression is today the most widely agreed upon just cause.<sup>20</sup> As article V is the embodiment of self defense against aggression, NATO's use of force citing this clause is of no serious controversy. The problem is that it has only been invoked once, after September 11<sup>th</sup>. Historically, NATO has been active militarily in a number of missions. Yet, on no previous occasion has NATO invoked Article V as a justification for its use of force. NATO's first military mission was the 1995 air campaign in Bosnia Herzegovina. This was an effort to compel an end to Serb-led violence. In June 1999, NATO entered Kosovo to end wide-spread violence and halt the humanitarian disaster. In both of these operations, NATO maintained forces to assist in the procurement of peace and stabilization. Current NATO military operations include counter-piracy off the Horn of Africa and peace-keeping support

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Heinze and Steele, *Ethics*, 5.

to the African Union.<sup>21</sup> Humanitarian intervention remains a very controversial aspect of the just cause principle. NATO boasts an impressive record of humanitarian intervention. Clearly, NATO has shown a willingness to act when others sit idly by. NATO's effort to adapt to twenty-first century conflict has been aimed specifically at non-Article V crisis response operations. These include proliferation, failed states, piracy, energy supplies, terrorism, and climate change.<sup>22</sup> The problem for NATO vis-à-vis the just war tradition is two-fold: questions regarding the principles of legitimate authority and just cause are raised by NATO's international military action. A lack of consensus on the definition of legitimate authority and the controversy over humanitarian intervention as satisfactory for the principle of just cause need to be reconciled.

It should be recognized by now that the problem lies not within NATO, other international organizations, and non-state actors. Rather, the lack of accommodation of these entities into the just war tradition harms its salience as a set of moral and ethical principles for those seeking to engage in the use of force. Because war is an unfortunate reality, there must be some framework to manage its conduct. However, this framework needs to reflect the reality of current international conflict. NATO is an important international actor. In addition to its collective response to the US invasion of Afghanistan, NATO continues to enforce peace and uphold security in troubled regions. There is no question that it remains a global force for justice, peace, and order. For this reason, NATO as an entity satisfies the

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<sup>21</sup>NATO, "NATO Operations and Missions," [http://www.nato.int/cps/en/natolive/topics\\_52060.htm](http://www.nato.int/cps/en/natolive/topics_52060.htm). These are NATO missions which have not invoked Article V.

<sup>22</sup>NATO, "NATO's New Strategic Concept," <http://www.nato.int/strategic-concept/what-is-strategic-concept.html>.



requirement of a legitimate authority laid out by formative just war thinkers above. While NATO does not receive its legitimate authority directly from God, its actions in pursuit of peace and security are aligned with the actions of the sovereign in defense of the common weal.

This aspect of legitimate authority needs to be re-incorporated into the just war tradition. The addition of this standard would help to stymie the recent diminution of the authority principle. There is no question that just war needs to accommodate new and disparate actors. Yet, this can be done without accommodating *all* new and disparate actors. While terrorist organizations may be able to meet a new standard of authority such as an entity seeking to affect governance in a particular region, it would fail to align with the additional standard of seeking to affect peace, justice, order and eliminate chaos and individual reprisals.

This is a complicated and controversial topic. I have only begun to scratch the surface. If the just war tradition is to retain its salience, it must evolve to incorporate twenty-first century conflict. Ironically, this evolution should incorporate the standards espoused by some of just wars most formative thinkers. As a global force for peace, justice, and order, NATO satisfies this traditional requirement of a legitimate authority.

## CONCLUSION

In this paper, I have attempted to build a framework for further debate in an effort to update the just war tradition to meet changes in international relations. The statist paradigm of international relations is being challenged by non-state actors engaging in the use of force with more frequency than that of states. Recent just war scholarship has attempted a reconciliation of the principle of legitimate authority. These applications have, unfortunately, diluted the efficacy of one of just war's most important principles. The changing nature of twenty-first century international relations presents just war scholars with the unique opportunity to continue the salience of just war thinking. The just war tradition "has been useful in calling leaders and strategists to consider their ideals when confronted with the necessity of violence."<sup>23</sup> In order that we may preserve the ideals and values that structure the way of life that we hold so dear, the just war tradition must remain a central aspect of the use of military force against threats to their future.

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<sup>23</sup> Patterson, *Just War Thinking*, 119.

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## VITA

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After working as a freight forwarder for two years at Scarbrough International in Kansas City, Missouri, he enrolled in the M.A. program in political science at the University of Missouri-Kansas City. Upon completion of the M.A., he will begin Ph.D. work at the University of Kansas in the fall of 2011.

He is a member of Pi Sigma Alpha, Phi Alpha Theta, and the Midwest Political Science Association.

