

# 9

## WAR AND TERRORISM

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War is well defined as an actual, intentional and widespread armed conflict between groups of people (Orend 2013). This is true whether these groups are *within* one country (civil war) or in *different* countries (classic international warfare). “Armed conflict” means the use of weapons and physical violence with the intention of inflicting harm upon people, trying to coerce them into doing whatever one wants. As Clausewitz said, war is “an act of violence, intended to compel our opponent to fulfil our will”. War is like a duel, he concluded, “only on an extensive scale” (Clausewitz 1995: 10–11). There have been over two hundred wars (thus defined, and with a minimum of a thousand battlefield deaths) in the last hundred years alone. So, on average, there are *two new wars every year*. As of writing, there seem to be, around the world, about twelve armed conflicts ongoing (Harrison & Wolf 2009).

Armed conflict has a massive impact on all our lives. It shapes the fate of nations, alters the course of history, consumes enormous resources, determines who is in control and, obviously, causes much death and destruction (Keegan 1994). How should we think about “the ethics of armed conflict”? Or is this an oxymoron (like “deafening silence”)? The purpose of this chapter is to explain what dominant traditions of thought have had to say about the morality of war (and terrorism), using current and historical case references to illustrate the relevant ideas and values.

There are three basic, and influential, perspectives on the ethics of war and peace. They can be diagrammed, crudely, on the following continuum:



Each of these traditions has something very important and influential to say about the ethics of war and peace. Let us begin by looking at the extremes, to get a better fix on the middle, which tends to be the more commonplace, or majority, understanding (if not always the prevailing practice).

## Realism

Realism is the view that, as a country, your goal should be *to advance your own country's national interests*. National interests are those things that improve, benefit or enhance the position of one's country in the world. Realism is like a form of national egoism or selfishness. When dealing with the outside world, or "the international community", one ought to (as they say) "look out for number one!" Do the best you can for your own society, especially in terms of national security and defence, growing your economy, population and access to natural resources, and augmenting your cultural and political influence around the world. At minimum, realism insists that *you've got to protect what you've already got*; and, at most, you should get as much as you can and, in fact (if it is possible), *try to re-make the world in your own image*. In terms of war, realism adheres to the doctrine of "anything goes". Realists usually believe that there is no such thing as "the ethics of war and peace": it is all about power and protecting one's country. And, since history teaches us that few things are worse for a people than losing a war, it follows that people are going to feel free to, and should feel free to, use whatever means at their disposal to try to win. As the old saying goes, "all's fair in love and war". (Note that some realists are risk-favouring, whereas others are risk-averse, when it comes to debating the most advantageous thing to do in terms of using armed force on behalf of one's country. Some are quite aggressive, others quite cautious.) Prominent realist thinkers would include Machiavelli and Hans Morgenthau. Prominent realist politicians would include Henry Kissinger and former US President Richard Nixon (Morgenthau 1970, Kissinger 1995, Machiavelli 1998).

### *Strengths and weaknesses*

In terms of strengths and weaknesses, one need only look at history to realize that realists paint a plausible picture of how states and peoples *actually tend to behave* during wartime: "looking out for number one" even seems to put it mildly. Also, smart governments need to fear the risk of "being suckered" by less scrupulous players on the international stage: soft-mindedness and kind-heartedness can sometimes lead to harmful results. Finally, few people can deny that one of the most basic purposes of a national government is to protect its own people, especially from the kinds of suffering, and foreign attack, which war typically involves.

At the same time, many view realism as unbearably cynical: if everything is indeed this ultra-competitive struggle over power and resources, how is the world supposed to get any better? In other words, *there's not enough idealism in realism*. Others have noted how realism's obsession with power props up the status quo, and is biased in favour of the most powerful. More biting, in terms of war, many have pointed out that realism actually seems a recipe for escalation in war-fighting: the lack of trust and jostling for power lead to war; and then one belligerent tries a controversial tactic, and then the other replies. Not to be outdone, the first does something even stronger, and then it is a "race to the gutter" in terms of tactics and measures. This, critics say, is the true, ugly face of the "anything goes" attitude: total warfare. Indeed, some have noted that the "anything goes" permissibility offered by realism may be a seductive psychological motive in favour of its belief: it is not so much that it is true, or that it is good advice but, rather, that people *want to be free of moral constraints*, especially in such stressful circumstances as armed conflict. But constraints nevertheless prevent a spill-over into total warfare, and serve plausible, and laudable, goals of reigning in war's destructiveness (Forde 1992, Mapel 1996, McMahan 1996).

## Pacifism

At the other extreme is pacifism. Different pacifists define pacifism differently, and offer various kinds of justification for their beliefs. But it seems that what unites all forms of pacifism – the basic

proposition, or lowest common denominator – is opposition to warfare. The logical core of pacifism, as Jenny Teichman says, is “anti-war-ism” (Teichman 1986). No matter what kind of pacifist you are, you believe that *war is always wrong*; there is always some better approach to the problem than warfare. So, unlike realists, pacifists believe that it *is* possible and meaningful to apply moral judgement to international affairs. In this, they agree with just war theorists (more below). But they disagree with just war theorists regarding the application of moral judgement to warfare. Just war theorists say war is *sometimes* morally permissible, whereas pacifists say war is *never* morally permissible. If realism asserts that, during wartime, “anything goes”, pacifists rejoin: “nothing goes”: *there is always some morally superior option to war-fighting, such as non-violent resistance*. The most relevant (secular) pro-pacifist arguments here include the following: (a) a more “teleological” form of pacifism (or TP), which asserts that war and killing are at odds with human excellence and flourishing; (b) a more “consequentialist” form of pacifism (or CP), which maintains that the benefits accruing from war can never outweigh the costs of fighting it; and (c) a more “deontological” form of pacifism (or DP), which contends that the very activity of war is intrinsically unjust, since it violates foremost duties of morality and justice, such as not killing other human beings. Most common and compelling among contemporary secular pacifists, such as Robert Holmes and Richard Norman, is a mixed doctrine that combines, in some way, all three (Holmes 1989, Norman 1995).

### ***Strengths and weaknesses***

The obvious strength of pacifism is that it very much desires to secure a more peaceful world. No lack of idealism here. And it is hard to disagree with the claim that war brings enormous costs and casualties in its train, and is steeped in tragedy. And pacifism’s discussion of non-violent resistance does open people’s minds to alternative, and additional, tactics to use when resisting nasty regimes. Consider the following list of tactics offered by Gene Sharp:

general strike, sit-down strike, industry strike, go-slow and work to rule ... economic boycotts, consumers’ boycott, traders boycott, rent refusal, international economic embargo and social boycott ... boycott of government employment, boycott of elections, revenue refusal, civil disobedience and mutiny ... sit-ins, reverse strikes, non-violent obstruction, non-violent invasion and parallel government.

(Sharp 2005: 254)

But what are some of the weaknesses? Michael Walzer, the just war theorist, contends that pacifism’s idealism is excessively optimistic. In other words, pacifism lacks realism. More precisely, the non-violent world imagined by the pacifist is not actually attainable, at least for the foreseeable future. Since “ought implies can”, the set of “oughts” we are committed to must express a moral outlook on war less utopian in nature. While we *are* committed to morality in wartime, we are forced to concede that, sometimes in the real world against especially brutal regimes, resorting to war can be morally justified (Walzer 1977).

Another objection to pacifism is that, by failing to resist international aggression with effective means, it actually ends up: (a) rewarding aggression; and (b) failing to protect people who need it. Pacifists reply to this argument by contending that we do not need to resort to war in order to protect people and punish aggression effectively. In the event of an armed invasion by an aggressor state, an organized and committed campaign of non-violent civil disobedience – perhaps combined with international diplomatic and economic sanctions – would be just as effective as war in expelling the aggressor, with much less destruction of lives and property.

After all, the pacifist might say, no invader could possibly maintain its grip on the conquered nation in light of such systematic isolation, non-cooperation and non-violent resistance. How could it work the factories, harvest the fields, or run the stores, when everyone would be striking? How could it maintain the will to keep the country in the face of crippling economic sanctions and diplomatic censure from the international community? And so on, perhaps citing further from Sharp's list above (Ackerman & DuVall 2000).

Though one cannot exactly disprove this pacifist proposition – since it is a counter-factual thesis – there are reasons to agree with John Rawls (1971) that such is “an unworldly view” to hold. For, as Walzer (1977) points out, the effectiveness of this proposed campaign of civil disobedience relies on the moral scruples of the invading aggressor. But what if the aggressor is brutal, ruthless? What if, faced with civil disobedience, the invader “cleanses” the area of the native population, and then imports its own people from back home? What if, faced with economic sanctions and diplomatic censure from a neighbouring country, the invader decides to invade it, too? We have some indication from history, particularly that of Nazi Germany, that such pitiless tactics are quite effective at breaking the will of people to resist. The defence of our lives and rights may well, against such invaders, require the use of political violence. Under such conditions, Walzer says, adherence to pacifism would amount to “a disguised form of surrender” (*ibid.*: 334–35).

Pacifists respond to this accusation of “unworldliness” by citing what they believe are real-world examples of effective non-violent resistance to aggression. Examples mentioned include Mahatma Gandhi's campaign to drive the British Imperial regime out of India in the late 1940s and Martin Luther King Jr's civil rights crusade in the 1960s on behalf of African-Americans. Walzer replies curtly that there is no evidence that non-violent resistance has ever, of itself, succeeded. This may be rash on his part, though it is clear that Britain's own exhaustion after the Second World War, for example, had much to do with the evaporation of its Empire. Walzer's main counter-argument against these pacifist counter-examples is that they only underline his main point: that effective non-violent resistance depends upon the scruples of those it is aimed against. It was only because the British and the Americans had some scruples, and were moved by the determined idealism of the non-violent protesters, that they acquiesced to their demands. But aggressors will not always be so moved. A tyrant like Hitler, for example, might interpret non-violent resistance as weakness, deserving contemptuous crushing. “Non-violent defense”, Walzer suggests, “is no defense at all against tyrants or conquerors ready to adopt such measures” (*ibid.*: 335).

### **International law and just war theory**

In between the extreme views of realism and pacifism resides just war theory. Like pacifism (and unlike realism), just war theory believes that there *is* both sense and value in applying ethics and moral values to issues of international relations. But unlike pacifism (and like realism), just war theory believes that there *can sometimes* be instances where resorting to war is justified, if only as “the least-worst” option. Thus, if pacifism says “nothing goes” with regard to the ethics of war, and realism declares that “anything goes”, just war theory opines that “something, sometimes, goes”. While war *can* be morally permissible, just war theory nevertheless views war dimly and dangerously, and insists that it is too risky and lacking in restraint to allow for “anything goes”. Just war theory seeks to substitute, for that realist permissiveness, a set of sensible rules to restrain and guide those considering warfare as a tool for solving some serious foreign policy problem. The just war approach has been deeply influential on the international laws of armed conflict, for instance as contained in the Hague and Geneva Conventions, as well as in the United Nations (UN) Charter and the various resolutions of the UN Security Council (UNSC) (Reisman & Antoniou 1994). To be crystal clear: just war

theory refers to the prior moral tradition, with a pedigree stretching all the way back (at least) to the ancient Greco-Romans, whereas international law refers to agreed-upon contractual treaties between national governments (and most such treaties regulating warfare date only from about 1850 forwards). They are thus separate things; but the point here is that the content of the laws, and even their general structure, has been heavily influenced by just war theory, and so we can put just war theory and the laws of armed conflict together, for our purposes, as a tightly related bundle of concepts and values, sporting a shared outlook on how countries and peoples ought to behave during armed conflict.

### *Jus ad bellum*

*Jus ad bellum* is Latin for “the justice of war”. When, if ever, may states fight? The just war answer is that states may fight *only if* they satisfy *all* of the following rules: just cause; right intention; public declaration of war by a proper authority; last resort; probability of success; and proportionality. (Like the other traditions above, there is pluralism and some interpretive dispute as to the exact and best meaning of these rules within just war theory.) Those with “the war power” (usually the executive branch in non-democratic societies, and the legislative branch in democratic ones) are to ensure they satisfy these principles before embarking on war.

### *Just cause*

The way international law renders just war theory in this regard is very clear and quite helpful. Most experts agree that, when it comes to a just cause for war, three general principles are at play:

- All countries have the inherent, or “natural”, right to go to war in *self-defence* from aggression. (Aggression is defined as any unjustified first use of armed force against another country. Any armed attack which crosses an international border constitutes aggression and is a *casus belli*, that is, “a cause for war”.)
- All countries have the further natural, or inherent, right of *other-defence* – otherwise known as “collective security” – to go to war as an act of aid, or assistance, to *any* country victimized by aggression.
- Any other use of force – for example a pre-emptive strike, or armed humanitarian intervention (AHI) – is *not* an inherent, or natural, right of states. Any country wishing to engage in such is supposed to get *the prior approval* of the UNSC. Failing to receive such prior authorization renders any such use of force illegal, itself an act of aggression (Roberts & Guelff 1999, Orend 2012).

So, if country A commits an armed attack against country B, then B (and any other country C) is entitled to go to war against A as an act of *defence from*, *resistance to* and *punishment of* aggression. Aggression is seen as a wrong so severe that war is a fitting response because it violates the most basic rights of groups, and individuals, to life and security, and to freedom and well-being: that is, to go about their lives peacefully, on a territory where their people reside. Classic examples of international aggression include: Imperial Germany’s invasion of Belgium in 1914, sparking the First World War; Nazi Germany’s invasion of Poland in 1939, sparking the Second World War; Japan’s invasion of China in 1937, and its attack on the US at Pearl Harbor in 1941, sparking the Pacific part of the Second World War; the USSR’s invasion of Afghanistan in 1979; and Iraq’s invasion of Kuwait in 1990, sparking the Persian Gulf War. There are actually thousands of historical examples of international aggression (R. K. Grant 2008).

### ***Proportionality***

In every kind of law or rule, there is supposed to be a proportion, or balance, between problem and solution (or between violation and response). What, if anything, might be a problem truly so severe that war is a proportionate response? The answer of international law and just war theory (for reasons stated above) is: aggression. When confronted with an aggressive invader – like Nazi Germany, Imperial Japan or the Soviet Union – who is intent on conquering and enslaving other nations, it is deemed reasonable to stand up to such a dark threat to life and liberty and to resist it, and beat it back, with force if need be. Just as dangerous criminals must be resisted and not be allowed to get away with their crimes, countries are entitled to stand up to aggressors, and to resist and defeat them (Orend 2006: 59–61).<sup>1</sup>

### ***Public declaration of war by a proper authority***

War is supposed to be declared out in the open, officially and honestly, by the proper authority for doing so. In every country, some branch of government has “the war power”: that is, the authority to order the use of force and warfare. In Canada and Britain, the war power rests with Parliament; in America, the war power likewise rests with the legislature: that is, Congress. But the American President, as Commander-in-Chief of the Armed Forces, has enormous *de facto* power to order the American military into action. As a result, many experts argue that the war power in the US is actually split – in classic American “checks-and-balances” style – between the legislative and executive branches of government.<sup>2</sup> We have seen, further, how in all cases where non-defensive armed force is being considered, the UNSC must also approve of the action, and beforehand. This is to say that, with non-defensive war, *both domestic and international* authorization must be satisfied (Orend 2006: 50–57).

### ***Last resort***

State governments are only supposed to go to war as a last resort, after all other reasonable means of problem-solving have been tried, and failed. It is said that countries have four basic tools in their foreign policy tool-box: diplomacy, positive economic incentives, sanctions and force. Obviously, you want to exhaust all other means of problem-solving before engaging in something as expensive, bloody and risky as war. A nice illustration of this rule in action happened during the run-up to the Persian Gulf War of 1991. In August 1990, Saddam Hussein’s Iraq invaded its tiny neighbour, Kuwait. International allies, as led by the US and UK, tried to talk to Saddam and threaten him, to no avail. They offered him financial incentives, but he refused, preferring to hold on to Kuwait’s oil fields. They then slapped sweeping sanctions on him, and got most of his neighbours to agree and also put pressure on Iraq. Still nothing. As a result, the international community felt it was the last resort to go to war to push Saddam out of Kuwait, and back into his own borders. This they did, within two months, in early 1991 (Johnson & Weigel 1991).

The above *jus ad bellum* rules are all part of the international laws of armed conflict (Best 1994). Just war theory, as a theory of ethics, levies two additional moral requirements.

### ***Right intention***

The notion here is that one’s motives need to be ethically proper. It is not enough merely that one’s *actions* comply with the above rules but that, furthermore, one acts with *the right frame of*

*mind* and, in particular, that seedy, ulterior motives, such as greed, play no role. In the case of a just war, then, the idea would be that one's intentions in acting are to resist, repulse and punish aggression, and nothing more. Though this rule is *not* part of international law – largely owing to the difficulty involved discerning the true intentions of a complex, multi-part actor like a state government – it is, nevertheless, very frequently invoked in common moral discussion of warfare. It was, for example, a popular criticism of the Bush Administration's decision to invade Iraq in 2003 to suggest that the decision had as much, or more, to do with the desire to gain secure access to oil as it did with, say, ensuring that Iraq was not about to deploy weapons of mass destruction (WMD) against the US (Orend 2006: 46–48).<sup>3</sup>

### ***Probability of success***

The rule here is that one should not begin a war one knows in advance is going to be futile. The point is *to prohibit pointless killing and suffering*: one should have some probability of success before resorting to war. At the same time, this can be very difficult to predict at the start of war, and history has shown that, sometimes, long-shots can actually win. Moreover, this rule seems biased in favour of powerful states, who (for that very reason) have better chance of winning their wars. This probably explains the absence of this rule from international law, which is based around theoretical ideals regarding the equality of sovereign states: if a country – any country, big or small – has been victimized by aggression, who are we to say that they should not go to war, because at the outset it looks like such a risky venture (Orend 2006: 58–59)?<sup>4</sup>

### **Two quick recent applications of *jus ad bellum***

Many experts felt that the recent war on Afghanistan was justified, according to the above criteria, whereas the war on Iraq was not. The war in Afghanistan was justified because it was a response to America being attacked by the terrorist group al-Qaeda on 11 September (“9/11”) 2001. It was quickly determined that the then-government of Afghanistan, the Taliban, was offering state sponsorship – safe harbour, protection and resources – to al-Qaeda, and as a result was complicit in the 9/11 act of aggression. America was thus seen as exercising its right of self-defence when it went to war in late 2001, and overthrew the Taliban regime in early 2002. The twenty-eight other countries who joined in were seen as offering other-defence, or collective security (Corbin 2002, Barfield 2009).

By contrast, in March 2003, America launched an anticipatory attack, aimed at changing the regime in Iraq. We have seen above that, when it comes to cases other than self- or other-defence, a country is supposed to get prior permission from the UNSC. America failed to secure such, and thus most international law experts view the resulting war as having lacked legitimacy. America tried to argue instead that the attack was needed as an act of “pre-emptive self-defence”, alleging that Saddam was plotting with remnants of al-Qaeda to give them WMD and have them strike the US. Most countries did not believe this argument (as the secular dictator Saddam and the religious fanatics al-Qaeda would have made very strange bedfellows), and the fact that Iraqi WMD were never found only called into deep question the justice of the start of this war (McGoldlick 2004). Now, there is a range of opinion as how best to interpret the law and just war theory on these points and cases. Though the above may be a common view, not all agree. But what does seem almost entirely agreed to – among those within this tradition – is how just war theory and international law provide a rich and appropriate moral framework for having these kinds of discussions intelligently and usefully.

### *Jus in bello*

Whereas we saw above that the rules of *jus ad bellum* are aimed at those with the war power, the rules of *jus in bello* are aimed at soldiers and officers: those who actually do the fighting. If they violate these rules, they can find themselves – after the conflict – facing war crime charges, either domestically through their own military justice system or internationally through The Hague (Walzer 1977: 40–156). And by far and away the most important, strongly worded and repeatedly mentioned and codified principle in this regard is that of discrimination and non-combatant immunity.

#### *Discrimination and non-combatant immunity*

“Discrimination” here means the need for fighters to distinguish, or discriminate, between legitimate and illegitimate targets, and to take aim only at the former. A legitimate target is anyone, or anything, which is part of the war machine of the enemy society. “The war machine” refers to the military–industrial–political complex that guides the war and fights it. Loosely speaking, it is anything which is a source of potential physical harm, or armed force, directed against oneself. More specifically, legitimate targets include: soldiers, sailors, marines, pilots and their officers; their weapons and equipment; their barracks and training areas; their means of transportation; their supply and communications lines; and the industrial sites which produce their supply. Core political and bureaucratic institutions are also legitimate objects of attack, in particular things like the Defence Ministry. Illegitimate targets include residential areas, schools, hospitals, farms, churches, cultural institutions and non-military industrial sites. *In general, anyone or anything not demonstrably engaged in military supply, or military activity, is immune from direct, intentional attack.* Thus, non-combatants – that is, civilians – are “immune” from intentional attack. This is seen as probably the worst war crime: the intentional killing of civilians (Orend 2006: 105–40).

Strange as it may sound, the non-combatant immunity principle does *not* mean that it is illegal for civilians to die in wartime. What is illegal is *taking deliberate and intentional aim* at civilians with armed force. If a fighting side has taken every reasonable effort to avoid and minimize civilian casualties, but some civilians still die accidentally, or in the indirect way just noted, then that is *not* a war crime. Such civilians are viewed as “collateral damage”: accidental, unintended casualties of the fighting. An example would be an air-bombing raid on an enemy’s industrial sites, during which a few bombs accidentally go astray and hit a close-by residential area, wounding and killing some civilians.<sup>5</sup>

So, civilians are *only* entitled to “due care” from fighters; they are *not* entitled to absolute and failsafe immunity from warfare.<sup>6</sup> What does “due care” include? It includes all serious and sustained efforts, from the top of the military chain of command down to the bottom, to protect civilian lives as best as possible amid the difficult circumstances of war. So, for example, strategists must make their plans with an eye to minimizing civilian casualties; intelligence needs to be gathered and analysed regarding which are the permissible targets; soldiers need to be trained exhaustively in proper – that is, restrained and discriminating – ways of fighting; any rough treatment of civilians needs to be investigated and punished; and so on (Walzer 1977: 40–156).

What about so-called “dual-use” targets? The question arises: what about things used *both* by the military and civilians during war, such as roads, bridges, radio and TV networks and transmitters, railway lines, harbours and airports? International law forbids targeting them but, in reality, they often are, as they are so useful in helping military planners communicate with their troops and to move them around to where they are needed to fight. More controversial, and thus more criticized, is targeting basic infrastructure, like farms, food supply, sewers, water treatment plants, irrigation systems, water pipelines, oil and gas pipelines, electricity generators, and power

and telephone lines. The civilian population pays a huge price for any damage inflicted on such vital social infrastructure, and so it seems to violate civilian immunity to go after them. America did this twice recently. During the opening days of both the 1999 Kosovo War and the 2003 Iraq attack, America launched a so-called “shock and awe” campaign – relying on air power, bombing raids and cruise missiles – to inflict heavy damage on basic infrastructure (especially communications and electricity) in Serbia and Baghdad, respectively. The military goal of such a strike is to hit the enemy as fast and furiously as possible, dazing them, and “softening them up” for a subsequent ground invasion by army soldiers. It is also to shock the civilians in that society into putting pressure on their regime to give up and surrender quickly (Ignatieff 2001b, Clark 2002).

### ***Prisoners of war and benevolent quarantine***

It follows from the idea of non-combatant immunity that, should enemy soldiers themselves cease to be a source of harm during war – for example, by laying down their weapons and surrendering – then they cannot be targeted with lethal force after that point. In fact, they are to become prisoners of war (or POWs) offered “benevolent quarantine” for the duration of the war. “Benevolent quarantine” means that captured enemy soldiers can be stripped of their weapons, incarcerated with their fellows and questioned verbally for information. But they cannot, for example, be tortured during questioning. Nor can they be beaten, starved or somehow medically experimented on. They cannot be used as shields between oneself and the opposing side; the understanding is that captured enemy soldiers are to be incarcerated far away from the front lines. And very basic medical and hygienic treatment is supposed to be offered: things like aspirin, soap, water and toothbrushes. When it is all over, they are then usually freed in exchange for POWs on the other side (Orend 2006: 105–59).

### ***Proportionality***

The *jus in bello* version of proportionality mandates that soldiers deploy only proportionate force against legitimate targets. The rule is *not* about the war as a whole; it is about tactics *within* the war. Make sure, the rule commands, that the destruction needed to fulfil the military objective is proportional to the good of achieving it. The crude version of this rule is: don’t squash a squirrel with a tank, or shoot a fly with cannon; use force appropriate to securing the target (Walzer 1977: 129).

### ***Prohibited weapons***

There is a vast number of relevant conventions and legal treaties on this issue, aside from the canonical Hague and Geneva Conventions, such as those banning the use of chemical (1925 and second protocol 1996), biological (1972) and “excessively injurious weapons” (1980). Also relevant are the conventions against genocide (1948), against “methods of warfare which alter the natural environment” (1977) and banning land mines (1999). Prohibiting certain weapons puts an added restriction upon belligerents and, as such, is consistent with the deepest aim of *jus in bello*, namely, to limit war’s destruction (Reisman & Antoniou 1994).

### ***Means mala in se***

There is a traditional ban on “means *mala in se*”, or “methods evil in themselves”. The imprecise yet interesting idea here is that some weapons and means of war are forbidden not so much

because of the badness of the consequences they inflict but, more importantly, because they themselves are intrinsically awful. Using rape as a tool of warfare, for instance, to drive a population off a territory, or to reward one's troops after battle, is a clear example. Rape is ruled out not so much because of all the pain it produces, or because it is aimed at civilians, but because the act itself is rights-violating, a disgusting disregard for the humanity of the woman raped: a coercive violation of her bodily integrity and her entitlement to choose her own sex partner(s). Rape was used as a tool of war both in the Bosnian Civil War (1992–95) and in the presently ongoing war in the Congo in Africa. Methods like campaigns of genocide, ethnic cleansing, use of child soldiers and torture probably also fall under this category of means *mala in se* (Allen 1996, Orend 2002b, Danner 2004, P. Singer 2006).

### ***Reprisals***

Reprisals are not permitted in the laws of armed conflict. At the same time, they have happened in history, and are rather frequently threatened during wartime. The reprisal doctrine permits a violation of *jus in bello* rules – but *only* in response to a *prior* violation by the opposing side. Walzer offers an example of what he labels a justified reprisal, and it focuses on proportionality and prohibited weapons. He claims that Winston Churchill was “entirely justified when he warned the German government, early in World War II, that the use of [poison] gas by its army would bring an immediate Allied reprisal”. International law, for its part, disallows any reprisals, on grounds that, more often than not, they will lead to a serious escalation in violence. One is supposed to win well, so to speak: the pursuit of victory, but within the rules (Walzer 1977: 207; Regan 1996: 172–78).

### ***Emerging military technologies***

There is a new category of weapons and methods of warfare, which have come to be known under the umbrella term “emerging military technologies” (EMTs). These include: *soldier enhancements* (notably drugs designed to augment one's biological energy); *incapacitating agents* (designed to knock out, but not kill, enemy soldiers); *unmanned weapons systems* (notably, drones); and *cyber-warfare* (the use of advanced computer, and Internet, technologies to substantially harm the interests of a target community). Since these are freshly emerging, international law is racing to keep up, and no clear, agreed-upon rules have yet been structured. For instance, in 2011, America, China and Russia met to try to craft a treaty regulating the means of cyber-warfare, only to have the talks fall apart amid bitter mutual accusations. The ongoing, future development of *jus in bello* will include rules regulating the use of these new technologies (Dockery 2007; P. Singer 2009; Orend 2012: 186–245).

### ***Interconnections***

Traditionally, the categories of just war theory and international law, like *jus ad bellum* and *jus in bello*, have been treated as separate, demanding the attention of different groups of people (e.g. politicians the former, soldiers the latter). But, starting perhaps with Kant, and recently gaining momentum with the works of David Rodin, Jeff McMahan and others, there is a definite body of thought which calls this traditional separation into question, preferring to stress instead the robust linkages which must exist between the categories. A notable point here is how the justice of the start of the war in question seems to affect our judgements of everything else: how to describe a *jus in bello* tactic, for example, as “proportionate”, unless one knows the overall justice of the war whose objective it advances (Rodin 2005, McMahan 2011)?

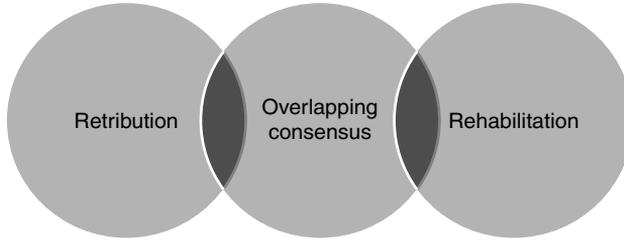


Figure 9.1 Overlapping consensus: theories of post-war justice.

### **Jus post bellum: aftermath**

Substantially (and sadly) unregulated by international law (Orend 2000), we can only speak of different theories of post-war justice. There are two major rival theories in this regard – retribution and rehabilitation – though they do share some common ground.

Most people agree this common ground (or “overlapping consensus”) posits that the basic goal of post-war justice is *to vindicate the rights whose violation triggered the war to begin with*, forcing the defeated aggressor<sup>7</sup> to accept a proportionate policy on surrender which includes:

- public (as opposed to secret) terms of settlement;
- mutual exchange of POWs at war’s end;
- aggressor to apologize (for committing aggression);
- aggressor to give up any unjust gains;
- aggressor to de-militarize (so no short-term repeat of aggression is possible);
- war crimes trials (*jus ad bellum* trials for the aggressor; *jus in bello* trials for all sides).

(Orend 2002a: 43–56)

### **Thick Theory 1: Retribution**

So much for the thin theory of post-war justice and its general, and rather familiar, principles. What of the more rebust, and controversial, thick theories, as depicted in Figure 9.1. Historically, we tend to see two major rivals. The first one is that of retribution. Defenders of this model of post-war justice have, as their goal, to make the defeated aggressor *worse off* than prior to the war (as backward-looking punishment). The means to be used to achieve this include all elements of the thin theory above, plus:

- compensation payments from aggressor to victim, and possibly to the international community more broadly;
- sanctions put on the aggressor, to hamper its future economic growth;
- no aid, or assistance, with post-war reconstruction. Such is left up to the locals, with no forcible regime change imposed on the aggressor.

Prime historical examples of the retribution model in action would be the Treaty of Versailles, ending the First World War in 1918–19, and the terms ending the Persian Gulf War in 1991 (Orend 2000: 217–67).

Now, why does the aggressor need to be made worse off than it was prior to the war? The defenders of this model suggest several reasons. First, it is thought that justice itself demands retribution of this nature: the aggressor must be made to feel the wrongness, and sting, of the

war which it unjustly began. Second, consider an analogy to an individual criminal: in domestic society, when a thief has stolen a diamond ring, we do not just make him give the ring back, say he is sorry, and take away his thieving tools. We also make him pay a fine, or send him to jail, to impress upon him the wrongness of his conduct. And this ties into the third reason: by punishing the aggressor, we hope to *deter or prevent* future aggression, both by him (so to speak) and by any others who might be having similar ideas (Orend 2006: 160–90).

### ***Thick Theory 2: Rehabilitation***

The goal of this model, by contrast, is to make the defeated aggressor *better off* than prior to the war (as forward-looking reconstruction). The means to be employed include all of the elements of the thin theory above, plus:

- no compensation payments;
- no sanctions;
- aid and assistance with post-war reconstruction, including forcible regime change imposed on defeated aggressor.

Prime historical examples of the rehabilitation model in action would be the post-Second-World-War (1945–55) reconstruction of West Germany and Japan, and today’s cases of Afghanistan and Iraq (early 2002 and mid-2003, respectively, until 2013 or even, arguably, the present) (Orend 2013: 215–50).

Where the two models of post-war justice differ is over three major issues. First, the rehabilitation model *rejects sanctions*, especially on grounds that they have been shown, historically, to harm civilians and thus to violate discrimination. Second, the rehabilitation model *rejects compensation payments*, for the same reason. In fact, the model favours *investing in* a defeated aggressor, to help it re-build and to help smooth over the wounds of war. Finally, the rehabilitation model *favours forcing regime change* whereas the retribution model views that as too risky and costly. That it may be, but those who favour the rehabilitative model suggest that it can be worth it over the long term, leading to the creation of a new, better, non-aggressive, and even progressive, member of the international community.<sup>8</sup>

### **Strengths and weaknesses**

Just war theory and international law (JWT/IL) clearly carve out a more detailed and comprehensive account of the ethics of war and peace than either realism or pacifism. As such, they enable a more finely grained and thorough analysis. While realists and pacifists might counter that JWT/IL is thus rendered more complex, the JWT/IL reply would be that the subject matter itself is quite complex and difficult, and hence simplicity in this regard is no virtue.

Realism views JWT/IL as actually being likely to create more wars than necessary, what with its moral “crusading” and insistence on justice being done. Moreover, realists will assert that it is just plain silly to prosecute a war “with one arm tied behind one’s back”, as it were, in adherence to *jus in bello*. Modern JWT/IL, in reply, disavows any association with strident crusading and insists that it only makes sense to limit war-fighting with sensible rules of restraint. The realist alternative – unrestrained, total warfare – seems a recipe for humanitarian disaster (Welch 1993).

Pacifism, for its part, almost has more respect for realism, for at least the realist does not pretend to be serving morality with his/her views on war, whereas the just war theorist does. For the pacifist, the only morally acceptable opinion on these matters is pacifism, and thus the

just war theorist appears morally distasteful. We have already seen the JWT/IL reply above: the pacifist's excess optimism about non-violence in our world – the real world – is what is the true moral mistake, as it can quite predictably lead to: (a) the failure to protect those who need it; and (b) rewarding aggression by default.

JWT/IL views itself as being more moderate and sensible, more detailed and less sweeping, more rational and less extreme, than either of its rivals. It prides itself on being more realistic than pacifism, yet not so “realistic” as to give in to the cynicism and ruthlessness of the realist worldview. JWT/IL still insists upon moral rules and ideals, yet tries to responsibly tailor such to the rough-and-tumble circumstances of actual geopolitics. It thus sees itself as having the best of both worlds. Quite literally: JWT/IL borrows content from realism (especially regarding rules like proportionality and probability of success) as well as from pacifism: for example, as witnessed through the rule of last resort and the rehabilitation model of post-war justice (which is obviously concerned with structural changes in favour of creating a less violent world). Critics view JWT/IL as thus being “messy”, maybe even a grab-bag jumble of concepts and values, squished into the “cramped quarters” between the two coherent options of realism and pacifism. But JWT/IL prefers to see itself as occupying the big middle – the expansive, commonsense middle ground – with the other two doctrines residing at the extreme fringes of opinion on these issues.

### **Application to terrorism**

Terrorism is defined as the use of violence – especially killing force – against civilians with the intent of spreading fear throughout a population, hoping that this fear will advance a political objective. Crucial to terrorism is not just the deed itself but also what some have called “the propaganda of the deed”. Since terrorists want to spread fear, it is vital that their deed not only be terrible but be so terrible that it gets covered by media, and word/image about the threat become disseminated throughout the population. The 9/11 attacks, for example, were clearly motivated not just by the desire to kill civilians but also by the drive to maximize the propaganda value of the high-profile attacks (*Der Spiegel* 2002, Sterba 2003).

Terrorism also gets used as a tool of authoritarian regimes to crush their own populations into submission: for example, the dictatorship under Robespierre, during the French Revolution, established the “Reign of Terror” (which I believe is the root source of the word “terrorism” in Western vocabularies). The Reign of Terror, 1793–94, was when “Enemies of the Revolution” were rounded up and, in a very deliberate, public, propagandistic way, given their own special “close shave” by Mme La Guillotine. At the Terror's peak, Robespierre had forty thousand people guillotined in just one month.<sup>9</sup> And terrorism gets used as a tool of extremist outsiders against representative regimes. In this context, which is obviously where the 9/11 attacks fit, terrorism is a violent attempt to circumvent such democratic processes as rational persuasion, coalition- and consensus-building, the rule of law, and the will of the majority expressed in free elections. The terrorist seeks to short-circuit all these things and simply inflict his will on a population, probably because he knows his extreme beliefs would have no chance of achieving mainstream success. He cannot persuade people, so he seeks to coerce them. The terrorist, in this sense, is actually much like a tyrant, but without the power and control the tyrant already has. The terrorist is a tyrant-in-waiting, and he dreams of becoming someone like Robespierre, who is able to radically re-fashion all of society from the top down through what he views as the cleansing power of violence. The personnel of al-Qaeda seem to fit this mould precisely (Corbin 2002, Berman 2003).

Whether terrorism, as a tactic, is consistent with any “-ism” or “-ocracy” is a difficult and delicate debate. Fortunately, I do not have to resolve it here. From the point of view of both pacifism and JWT/IL, *terrorism is always an impermissible tactic*, since it involves the deliberate

killing of innocent civilians: which right-thinking people view as murder. Realists would not frame the issue in moral terms, but would probably note how, historically, terrorism has not proven massively successful in achieving its objective. And the reason is obvious: while it may spread fear in the short term, over the longer term, people feel outrage at acts of terrorism, and discover a new-found resolve in dealing with terrorists and not letting them have their way through the use of such decrepit measures. For instance, 9/11 did not force America out of the Middle East and North Africa: indeed, it began the War on Terror and has led to the direct fall of at least two regional governments, and some even credit the War on Terror for indirectly inspiring some of the popular, pro-democracy uprisings now known as the Arab Spring (Falk 2002, Eshtain 2003, Noueihad & Warren 2012).

It is important to note that *either state- or non-state actors can commit aggression*, which we have seen is what roots, from the perspective of JWT/IL, a morally justified resort to war. Consider the 9/11 attacks, which were clear instances of aggression. They involved the use of armed force, first to hijack the planes and then to use the planes themselves as high-powered missiles. They violated America's right to territorial integrity, in so far as they were lethal attacks on American soil, having penetrated American airspace. And they violated America's right of political sovereignty, by attempting to force serious foreign policy changes upon a freely choosing population. So 9/11 was an act of aggression, very reminiscent of Pearl Harbor, just as it was obviously designed to be ("propaganda of the deed" and all). And aggression, we explained above, justifies a defensive war in response.

But, likewise, the rules of JWT/IL remain relevant when it comes to permissible tactics used in the War on Terror. We have seen, notably, that these include a ban on torture, and may raise questions about the use of drone-strikes and extra-judicial killing. Thus, even though the beginning of the War on Terror, in Afghanistan, seemed to be well founded, numerous questions can be raised about certain weapons and methods which have since been employed in its name, and further questions need to be raised sharply about the endgame: what would be a satisfying and acceptable "victory", or end, in the War on Terror? Would the democratization of the Middle East, through the Arab Spring, be the ultimate goal – or is the war seen instead as a longer-term, Cold-War-style protracted conflict, decades in length, which demands ultimately the eventual destruction of the opposing ideology and social system, in this case radical Islamic extremism? The tools of JWT/IL, more than their rivals, can help decision-makers think through their options in this regard (Orend 2013: 297–98).

## Notes

- 1 Aquinas is often credited with bringing proportionality into just war theory: see Tooke (1975).
- 2 This became an issue of struggle between the branches during both the Korean War (1950–53) and especially the Vietnam War (1954–74), when Congress felt successive presidents were running a *de facto* war without actually publicly declaring it and getting *de jure* authority for doing so: that is, getting a clear vote of support from Congress: see Regan 1996.
- 3 Augustine is seen as the inventor of right intention in just war: see Deane (1963). On Iraq, see, e.g., Murray & Scales (2003), B. Woodward (2004).
- 4 Grotius is considered the first proponent of probability of success: see Tuck (1999).
- 5 This raises the complex issue of the Doctrine of Double Effect. The core moral problem is this: even if soldiers intentionally aim *only* at legitimate targets, they can often *foresee* that taking out some of these targets will still involve *collateral* civilian casualties. And if civilians do nothing to lose their human rights, does it not follow that such acts will be unjust, since civilians will predictably suffer some harm or even death? The DDE stipulates that an agent A may perform an action X, even though A foresees that X will result in *both* good (G) and bad (B) effects, *provided all* of the following criteria are met: (a) X is an otherwise morally permissible action; (b) A only intends G and not B; (c) B is not a means