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**THE GLOBAL WAR ON TERROR:
MILITARY NECESSITY OR SUPREME EMERGENCY?
MAINTAINING A MORALLY DEFENSIBLE POSITION**

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Abstract

This paper will argue that in order to maintain a morally defensible position in the prosecution of their just war against terrorism, liberal democracies must avoid the temptation to distort or circumvent the inherent morality of the Just War Tradition, as embodied in the United Nations Charter and in existing Laws of Armed Conflict documents. Michael Walzer provides us with an historical example of a supreme emergency, whereby certain morally questionable in bello tactics were used which he argues were morally defensible. Today, however, does the Global War on Terror constitute a supreme emergency, and are certain morally questionable in bello tactics therefore morally forgivable given this terrorist threat? Furthermore, the malleable defense of 'military necessity' is frequently invoked in the war against terrorism, but is this invocation eroding the moral justness of the fight against terror? Indeed, those who must struggle against terrorism on a daily basis, such as the State of Israel, provide another useful lens through which to view the shaping of the military necessity argument. Are liberal democracies ultimately condemned to 'fighting fire with fire' in the war against terrorism, or can such a war be fought and won both legally and morally?

“Freedom must set a limit to the measures we employ to maintain it.”¹

Introduction

The principles contained within the Just War Tradition have evolved for over two thousand years. While efforts have been made to formalize the tradition and the moral reasoning behind it, much is subject to interpretation. Although the many principles of the *jus ad bellum* and *jus in bello* contained within the Just War Tradition can too easily be used and twisted to justify state actions under a moral guise, such a tradition still remains more “just” than realism, and more “real” than pacifism.

Clearly, liberal democracies and their militaries are called to abide by the Laws of Armed Conflict (LOAC) both in the decision to go to war and in its conduct. In the case of the Global War on Terror (GWOT), democratic states face an even greater temptation to twist what is morally accepted in order to meet their own needs and defend their key values. Alex Bellamy, in his book, *Just Wars: From Cicero to Iraq*, speaks to some of the mechanisms democracies use to justify their fight against terrorism:

The continuing prevalence of the idea of military necessity and what Walzer described as ‘emergency ethics’ within the war convention, grants soldiers and politicians considerable leeway to justify actions that may otherwise be proscribed.²

This paper will argue that in order to maintain a morally defensible position in the prosecution of their just war against terrorism, liberal democracies must avoid the temptation to distort or circumvent the inherent morality of the Just War Tradition, as embodied in the United Nations Charter and in existing LOAC. Michael Walzer provides

¹ Michael Ignatieff. *The Lesser Evil: Political Ethics in an Age of Terror*. (Princeton: Princeton University Press, 2004), 145.

² Alex J. Bellamy, *Just Wars: From Cicero to Iraq*, (Cambridge: Polity Press, 2006), 3.

an historical example of a supreme emergency, whereby certain morally questionable *in bello* tactics were used which he argues were morally defensible. Today, however, does the GWOT constitute a supreme emergency, and are certain morally questionable *in bello* tactics therefore morally forgivable given this terrorist threat? Furthermore, the malleable defense of ‘military necessity’ is frequently invoked in the war against terrorism, but is this invocation eroding the moral justness of the fight against terror? Indeed, those who must struggle against terrorism on a daily basis, such as the State of Israel, provide another useful lens through which to view the shaping of the military necessity argument. Are liberal democracies ultimately condemned to ‘fighting fire with fire’ in the war against terrorism, or can such a war be fought and won both legally and morally?

In the current environment of the war on terror there has been significant discussion related to the methods with which to counter this threat. Some have called for extreme measures, such as torture to extract information, assassinations, indiscriminate attacks that include innocents as collateral damage, un-proportional retaliatory or pre-emptive attacks, curtailment or removal of civil liberties. This fight against terrorism is one which challenges the Just War Tradition of conflict and one which tests our morality.

The Case of Supreme Emergency

Michael Walzer, in his book, *Just and Unjust Wars*, makes the case that in the early part of World War Two (1940-1942) the British were involved in a supreme emergency, where they faced an imminent and vile threat in the form of Nazism. So great was this threat, that they were forced to defend themselves by using all means

necessary, even those barred by customary military law.³ Walzer considers whether political leaders “ought” to always act morally, even in the defense of their country from imminent defeat by the direst of threats. He suggests that there are limits, however, and that not all threats constitute a supreme emergency. He recommends the need to make a “map of human crises and to mark off the regions of desperation and disaster.”⁴ Walzer further claims that Nazism fell clearly in this region, and that it “united us in fear and abhorrence.”⁵

Walzer believes that, in such a case, Britain’s supreme emergency provided the moral justification for the indiscriminate area bombing of German cities and innocent civilians.⁶ He caveats this use by pointing out that, for the time period in question, imprecise aerial bombing was the only means by which Britain could attack Germany and hope to achieve both a positive effect on British morale and the opposite effect on the German people. Walzer further argues that in the face of such supreme emergencies, political leaders “will do what they must to save their own people” given that “they bring us under the rule of necessity (and necessity knows no rules).”⁷ The two key factors in determining whether a supreme emergency condition exists are both the nature of the

³ Michael Walzer, “Supreme Emergency,” in *Just and Unjust Wars* (New York: Basic Books, 1992). In describing Churchill’s use of the words “supreme emergency”, Walzer states that, “the phrase also contained an argument: that there is a fear beyond the ordinary fearfulness (and the frantic opportunism) of war, and a danger to which that fear corresponds, and that this fear and danger may well require exactly those measure that the war convention bars.” p. 251.

⁴ Walzer, “Supreme Emergency... Walzer states that Nazism was “a threat to human values so radical that its imminence would surely constitute a supreme emergency.” p. 253.

⁵ *Ibid.*, 253.

⁶ *Ibid.*, 254.

⁷ *Ibid.*, 254.

threat and the imminence of the threat. In determining whether or not to label the threat of terrorism as a supreme emergency, both these aspects will be considered later in this paper.

One of the key counter-arguments for the acceptance of supreme emergencies as constituting the moral justification for contravening the laws of war is the argument that necessity can too easily be replaced with expediency. This, in fact, occurred. Britain, and later the U.S., continued their bombing campaign even though the conditions that constituted a supreme emergency no longer existed.⁸ As well, those who contend that there is a slippery slope to the utilitarian argument see the initial decision to bomb German cities as the precedent to subsequent decisions to fire bomb Japanese cities, and ultimately to use the atomic bomb. While all this may well be true, and convincingly argued, Walzer firmly believes that in the case of a supreme emergency, where there is no other alternative to countering as grave and imminent a threat as Nazism posed in the early 1940s, that the deliberate killing of innocent people is morally acceptable. He personifies what he describes as the political leader's moral wager:

My own action is determinate, of course, only as to its direct consequences, while the rule that bars such acts is founded on a conception of rights that transcends all immediate considerations. It arises out of our common history; it holds the key to our common future. But I dare to say that our history will be nullified and our future condemned unless I accept the burdens of criminality here and now.⁹

⁸ *Ibid.*, Walzer himself states: "The argument used between 1942 and 1945 in defense of terror bombing was utilitarian in character, its emphasis not on victory itself but on the time and price of victory." p. 261. Walzer does not condone the fire bombing of Japanese cities, nor the use of the atomic bomb. pp. 263-268.

⁹ *Ibid.*, 260.

Alex Bellamy, a noted Just War theorist, does not agree with Walzer. He believes that even a supreme emergency cannot justify overriding non-combatant immunity.¹⁰ He is not supportive of the idea that leaders are “compelled to do whatever they can to defend the political community against the supreme danger.”¹¹ Bellamy considers the supreme emergency exception as equivalent to the realist argument that when a nation’s survival is at stake, there are no limits as to its conduct. Martin Cook, a professor of ethics at the United States Air Force Academy, suggests an alternate view. He believes that Walzer’s supreme emergency exemption should not be seen as permitting contraventions of the “normal moral and legal constraints of just war,” but that these contraventions might later be deemed “forgivable.”¹²

Others also contend that perhaps the supreme emergency exemption should be extended to sub-state actors as well; this suggests that even terrorist groups might justly see themselves as facing a supreme emergency and therefore invoke the exemption.¹³ For example, Palestinian resistance groups might be able to mount a strong case that they face such an emergency, and that this emergency can justify the terrorist methods they employ.¹⁴ One might then extend this exemption even further and argue that a state’s response to terrorism be exempt from proscribed behaviour if the state also sees itself as

¹⁰ Alex J. Bellamy, “Supreme Emergencies and the Protection of Non-combatant in War,” *International Affairs* 80, no. 5 (2004): 830.

¹¹ *Ibid.*, 833.

¹² Martin L. Cook, “Michael Walzer’s Concept of Supreme Emergency,” *Journal of Military Ethics* 6, no. 2 (Spring 2007): 138-139.

¹³ C.A.J. Coady, “Terrorism, Morality, and Supreme Emergency,” *Ethics* 114 (July 2004): 777.

¹⁴ *Ibid.*, 783.

facing a supreme emergency. This dovetails with Walzer's contention that, when grievously threatened, states must do "what they must to save their own people."¹⁵ The key question, then, is determining what constitutes a supreme emergency.

Defining the GWOT: Does it Constitute a Supreme Emergency?

There are numerous definitions of terrorism.¹⁶ Many authors, theorists, and politicians choose or create the one that best suits their specific needs. Undeniably, however, the most widely accepted definitions have the "deliberate killing of innocent civilians" as a key element.¹⁷ The type highlighted herein is that which we collectively face in the GWOT, and that which Professor Asa Kasher and Major-General Amos Yadlin, in a 2005 article entitled, "Military Ethics of Fighting Terror: An Israeli Perspective," describe as:

an act, carried out by individuals or organizations, not on behalf of any state, for the purpose of killing or otherwise injuring persons, insofar as they are members of a particular population, in order to instil fear among the members of that population ('terrorize' them), so as to cause them to change the nature of the related regime or of the related government or of policies implemented by related institutions, whether for political or ideological (including religious) reasons.¹⁸

¹⁵ Walzer, "Supreme Emergency...", 254.

¹⁶ Coady, "Terrorism, Morality, and Supreme Emergency..." "It has been estimated that there are more than one hundred definitions in the scholarly and political literature about terrorism and terrorist acts." p. 772.

¹⁷ Dershowitz, *Why Terrorism Works...*, 4.

¹⁸ Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4 no. 1. (2005): 4.

This terrorism is similar to others in that it targets indiscriminately, and consequently violates a key element of the *jus in bello* considerations, that of discrimination and the immunity of non-combatants.

Tony Coady, a noted Australian philosopher, in an article entitled, “Terrorism, Morality, and Supreme Emergency,” highlights the danger of the malleability of certain terms. He cautions that terms such as ‘necessity’ or ‘supreme emergency’ are “very vague and open to diverse interpretations, not to mention exploitation.”¹⁹ It is too easy to slide down the slippery slope of morality in the fight against terrorism. The GWOT, a fight against the evils of terrorism, must not become the justification to do evil.

Although combating terrorism with the moral upper hand is made even more difficult given the increasing threat of Weapons of Mass Destruction (WMD) in the hands of terrorists, we must not fight fire with fire. Dershowitz claims that, with the availability of WMD, the previously ‘retail’ nature of terrorism has now evolved into a ‘wholesale’ ability to wreak devastation on innocents far greater than that seen during 9/11. This increased threat, however, must not become the moral justification to use immoral means to thwart subsequent terrorist strikes.

Indeed, after the attacks of September 11, 2001, many believed then that a state of emergency existed, perhaps even a state of supreme emergency. Certainly there were those who were clamouring for retaliation, retribution, and revenge at any costs, using any means. The very next day the United Nations Security Council passed a resolution

¹⁹ *Ibid.*, 781.

stating that these attacks were “threats to international peace and security.”²⁰ For many, these attacks were simply part of the overarching al-Qaeda 1998 *fatwa* (ruling) that it was the duty of all Muslims to kill U.S. citizens and their allies everywhere:

The ruling to kill Americans and their allies—civilian and military—is an individual duty for every Muslim who can do it in any country in which it is possible.... We—with Allah’s help—call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah’s order to kill the Americans and plunder their money wherever and whenever they find it.²¹

Jean-Bethke Elshtain, in his book, *Just War against Terror*, clearly echoes the belief that radical Islamicists pose a threat to the world:

Most seriously of all, the mass murders of September 11 demonstrated, arguable for the first time, that this movement now possesses not only the openly stated desire, but also the capacity and expertise—including possible access to, and willingness to use chemical, biological, and nuclear weapons—to wreak massive, horrific devastation on its intended targets. Those who slaughtered more than 3,000 persons on September 11 and who, by their own admission, want nothing more than to do it again, constitute a clear and present danger to all people of good will everywhere in the world, not just the United States.²²

In order to determine whether or not the threat posed by terrorism is indeed a supreme emergency, we need to consider Walzer’s two key conditions: both the nature and the imminence of the threat. These two factors are open to some interpretation, since it is certainly difficult to equate the current evil posed by terrorism to what Walzer

²⁰ Nick Fotion and Bruno Coppieters, “Concluding Comments,” in *Moral Constraints in War*, ed. Bruno Coppieters and Nick Fotion, 269-307 (Lanham: Lexington Books, 2002), 269.

²¹ Brad Berner, *Jihad. Bin Laden in His Own Words. Declarations, Interviews and Speeches*. (USA: Book Surge, 2006), 79-80.

²² Jean-Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003). Elshtain also writes: “We use the terms ‘Islamicism’ and ‘radical Islamicist’ to refer to the violent extremist, and radically intolerant religious-political movement that now threatens the world, including the Muslim world. This radical, violent movement opposes not only certain U.S. and Western policies...but also a foundational principle of the modern world, religious tolerance, as well as those fundamental human rights, in particular freedom of conscience and religion, that are enshrined in the United Nations Universal Declaration of Human Rights, and that must be the basis of any civilization oriented to human flourishing, justice, and peace.” p. 191.

describes as an “immeasurable evil.”²³ There is little doubt that the nature of the threat—a WMD-capable al-Qaeda bent on the destruction of the US and its allies—could seriously threaten the liberal and democratic ways of these like-minded nations. If a dirty bomb or two were to be detonated in large cities, the injuries and deaths would be significant. The global markets would be greatly affected. The relative sense of peace and security would be shattered. The liberal and democratic way of life would definitely be under siege. One might argue that the nature of this threat is as abhorrent as a world ruled by Nazis. President Bush certainly equates the threat from the likes of Taliban and al-Qaeda to those of the past, describing them as “the heirs of all the murderous ideologies of the twentieth century ... fascism, Nazism, and totalitarianism.”²⁴ Although one might successfully argue that the evil nature of the current threat is equivalent to that posed by Nazism, the imminence of the threat is less easily argued.

Is the destruction of the liberal and democratic way of life—individual, collective, political and economic—as imminently threatened as it was for Britain in the early years of World War Two? Does the current situation fall in what Walzer would call the regions of “desperation and disaster” on the map of “human crises”?²⁵ It truly does not ‘yet’ fall in that region of the map. The threat certainly seemed more imminent immediately following the attacks of 9/11. However, terrorist attacks directed at liberal democracies since then have been intermittent (London, Madrid), and none of them as devastating as those of 9/11. Although attacked, the liberal and democratic way of life is not

²³ Walzer, “Supreme Emergency...”, 259.

²⁴ Anthony Burke, “Just War or Ethical Peace? Moral Discourse of Strategic Violence after 9/11,” *International Affairs* 80, no. 2 (2004): 334.

²⁵ Walzer, “Supreme Emergency...”, 253.

unravelling, nor is it under constant threat and risk of dissolution. It appears that the criterion of imminence is not yet met in this case.

Certainly the spectre of WMD in the hands of terrorists is cause for great concern. It is a threat that President Bush contends is real.²⁶ Some consider that the U.S. military response to the attacks of 9/11, and the threat of further attacks using WMD was the “culmination of twenty-five years of terrorist attacks on the United States and its citizens that began with the seizure of the U.S. Embassy in Tehran in November 1979.”²⁷ In the final analysis, however, the current terrorist threat that is the object of the GWOT does not constitute a supreme emergency as defined by Walzer. While the nature of the threat might be perceived to be similar to that posed by Nazism, the imminence of the threat is definitely not comparable. The case is not convincingly made to circumvent or contravene the inherent morality of the Just War Tradition as reflected in current LOAC, on the basis of a supreme emergency argument.

²⁶ Russell D. Howard, “Preemptive Military Doctrine: No Other Choice Against Transnational, Non-State Actors,” in *Defeating Terrorism: Shaping the New Security Environment*, ed. Russell D. Howard and Reid L. Sawyer, 119-126 (United States of America: McGraw Hill/Dushkin, 2004). Howard quotes a Bush 2002 speech: “When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons.” p. 120.

²⁷ Paul Christopher, “Terrorism and War,” in *The Ethics of War and Peace: An Introduction to Legal and Moral Issue*, 3rd ed. (United States of America: Pearson Prentice Hall, 2004). Christopher goes through the litany of attacks covering the twenty-five years, including the bombing of the U.S. Embassy and the Marine Headquarters in Beirut, the attack against the U.S. Embassy in Kuwait, attacks against U.S. soldiers in Madrid and Germany in 1985, as well as attacks against airliners. He further includes the first attack on the World Trade Centre, an attack on employees at Langley, Virginia, attacks against U.S.

Fighting Terrorism: The Military Necessity Justification

Even if supreme emergency can not be substantiated, lesser arguments of military necessity are brought to the fore to justify certain morally questionable aspects of the conduct of the GWOT. The term military necessity is set in a long history of limiting military actions to what is strictly necessary to achieve goals, objectives, and victory. The interpretation of military necessity has changed over time, however, and it is now often used as a defence for what would otherwise be considered excessive or perhaps immoral. Formerly, the military necessity argument was that one should do only what was necessary. This correct interpretation still exists today, and is clearly described as such in a variety of LOAC documents. A second, incorrect but convenient interpretation also exists—the use of the term as a justification for what might otherwise be considered immoral acts and decisions. Given the difficult *ad bellum* and *in bello* challenges inherent in the GWOT, the temptation is significant for politicians and military professionals alike to use this second interpretation.

The principle of military necessity stems back to the days of the U.S. Civil War, and is contained within what is known as the Lieber Code.²⁸ Article 14 in the Code defined military necessity as follows:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures that are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.²⁹

citizens in Saudi Arabia, attacks on U.S. Embassies in Kenya and Tanzania, and the attack on the U.S.S. Cole. pp. 191-2.

²⁸ Burus M. Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity,” *The American Journal of International Law* 92, no. 2 (April 1998). Dr. Francis Lieber was a law professor at Columbia University, who defended the Union side during the Civil War. He advised Lincoln on matters of military law. p. 214.

²⁹ *Ibid.*, 215.

The key word ‘indispensable’ has always been widely interpreted. For example, during the Franco-Prussian War of 1870, The Lieber Code was adopted by Prussia, but by 1902 it had evolved into a theory of *Kriegsraison*, “which permitted [them] to violate many of the laws and customs of war on the basis of military necessity.”³⁰ Whereas military necessity was initially set out as a legal principle intended to “limit violence in the absence of any other rule,” it is currently abused as a justification for violence in the absence of any other rule.³¹

Ingrid Detter, noted professor of international law, states that the idea of military necessity was recognized in treaty law as early as the St Petersburg Declaration of 1868 which “established that there are technical limits at which military necessities ought to yield to the requirements of humanity.”³² By extension, Detter cautions that there are cases where military necessity might not yield to the requirements of humanity. She sees military necessity as a “dangerous and harmful doctrine” that provides “a loophole, an excuse, for every conceivable situation.”³³ Certainly the term military necessity has been used to circumvent the morality of the Just War Tradition in order to justify numerous methods and actions in the current GWOT.

³⁰ *Ibid.*, 218. Carnahan states that during the Franco-Prussian War the Prussians adopted aspects of the Lieber Code, which included the notion of military necessity, but by 1902 this very notion (one of restraint) had evolved into the doctrine of *Kriegsraison*.

³¹ *Ibid.*, 213. Carnahan provides further example of where military necessity was expanded to meet supposed requirements both during both the Korean and Vietnam Wars. p. 229.

³² Ingrid Detter, “Suspension of the Law of War,” in *The Law of War*. 2nd ed. (Cambridge: Cambridge University Press, 2000), 393.

³³ *Ibid.*, 394.

Clearly, there is no paucity of interpretations of the principle of military necessity. Although originally envisioned as a principle that would limit *in bello* actions to those that were actually necessary, it is now invoked to justify certain actions that one might objectively consider beyond the limit. In fact, certain authors claim that “military necessity is widely regarded today as an insidious doctrine invoked to justify almost any outrage.”³⁴ Those democratic nations aligned against the threat in the GWOT certainly have liberally interpreted the principle of military necessity; whether legitimately or not is up for debate. Given that the State of Israel faces the threat of terror on a daily basis, it does prove insightful to review its invocation of military necessity in fighting terrorism.

Military Necessity: An Israeli Point of View

Professor Asa Kasher and Major-General Amos Yadlin, in an article entitled, “Military Ethics of Fighting Terror: An Israeli Perspective,” present a modified military ethics doctrine of fighting terror that includes, among others, a new formulation of military necessity. Some might argue that it is dangerous and dubious to argue that ‘what is’ should constitute what ‘ought to be’. While this may be so, the authors go on to propose an alternate third model to the military paradigm and the law enforcement paradigm, one which is intended to govern the activity of a democratic state when faced with terror. One of their key concerns is a relatively new characteristic of terrorists, who

³⁴ Carnahan, “Lincoln, Lieber and the Laws of War...”, 230. Carnahan writes: “That military necessity was originally a limit on state action, and should still function as a limit, seems to have been forgotten. The modern denigration of military necessity goes back at least to the Nuremberg trials after World War II, where some defendants argued that military necessity justified their atrocities against civilian populations.

now possess the ability to “commit acts of mass destruction.”³⁵ This new characteristic of terrorists—their ability to acquire and use WMD—is reflected throughout numerous current writings on the topic, and is perhaps a catalyst for seeking new methods and justifications for countering terrorism. Kasher and Yadlin are keen to highlight, however, that any conception of fighting terror must be done within the framework of a democratic state.³⁶ In order to maintain democratic values, one must use democratic means.

Kasher and Yadlin present their principles for fighting terror and suggest that there are two categories: foundation and execution. One might view these two categories as similar to the *jus ad bellum* and *jus in bello* division within the Just War Tradition. Rightly so, their consideration of military necessity falls within their execution category, which they term “Military Preventive Activity.”³⁷ These activities they further sub-divide into two types: activities that defend citizens of a state against terrorist acts and activities, and activities that defend citizens against being terrorized. Their principle of military necessity falls within the former categorization.

Within this category—defending state citizens from acts and activities of terror—Kasher and Yadlin claim that the “Principle of Military Necessity” as one of the pillars of their proposed doctrine, has been subject to all varieties of interpretation in the past:

³⁵ Kasher and Yadlin, “Military Ethics of Fighting Terror...” 6.

³⁶ *Ibid.*, 7. Kasher and Yadlin, however, for conceptual and moral reasons, do not agree that the 1977 Protocol I to the Geneva Convention provides that appropriate framework for fighting terror: “Nothing in Protocol I indicates that it was meant to be considered applicable to cases of alien homicide-suicide bombers acting against citizens of a state. Notice, also, that Article 44 of it states that ‘combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack’ and during preparations for such an act. Accordingly, he (or she) ‘carries his arms openly during each military engagement’ and during visible preparations for it. No terrorist carries his or her arms openly during their acts of terror and when they commit an act of homicide-suicide bombing in a mall they are not involved in what could be felicitously called ‘military engagement’.” (See their note 15 on page 29)

³⁷ *Ibid.*, 10.

The notion of ‘military necessity’ is ubiquitous in evaluations of certain types of military acts and activities, but legal deliberations and philosophical analyses have failed to establish a commonly held meaning of ‘military necessity’ that would also render moral and ethical all acts and activities that are aptly described as being carried out on grounds of ‘military necessity.’³⁸

They provide five conditions, or clauses, under which acts and activities against terror are right: Purpose Condition; Relative Effectiveness Condition; Minimizing Collateral Damage Condition; Proportionality Condition; and Fairness (or Universalizability) Condition. These are very similar to the *jus in bello* criteria that already exist, but the authors provide greater granularity to the definition of each. Kasher and Yadlin maintain that if these conditions are properly considered, then the principle of military necessity should apply under all circumstances of “ordinary fighting against terror” and not just in the case of exceptions where the defense of military necessity is invoked.³⁹

Although Kasher and Yadlin admit that their proposed doctrine of military ethics does not follow directly from the doctrine of Just War, they do believe that “the moral attitude and the practical approach of the classical doctrine have been kept intact.”⁴⁰ It can be argued that what the authors do provide is another interpretation of military necessity, which is essentially another attempt to distort the morality of the Just War Tradition.

Fighting Terrorism Legally

The international laws of war have evolved as wars have been fought, and many of the moral aspects of the Just War Tradition have been encoded in these laws.

³⁸ *Ibid.*, 11.

³⁹ *Ibid.*, 12.

⁴⁰ *Ibid.*, 28.

Dershowitz claims, however, that “the war against terrorism is a new phenomenon, not adequately addressed by current law.”⁴¹ Walzer weighs in to the legal discussion, and highlights the issue of political assassination, which he states is ruled out in international law. Again, however, Walzer brings up a familiar exception: “no one, no moral person, would have objected to an Allied effort to assassinate Hitler.”⁴² He then goes on to describe how terrorist political and military leaders are one and the same, and that they are therefore not immune to being targeted.⁴³ Emanuel Gross, in a 2002 article, also supports the assertion that the assassination of terrorists is not prohibited given that terrorists are not political representatives of any state.⁴⁴ Others, however, suggest that this is legal word-smithing and a distortion of the inherent morality of the Just War Tradition in order to justify methods in the fight against terrorism.

Bellamy also considers whether or not rules can be “legitimately overridden in times of dire necessity;” he suggests that invoking the supreme emergency exception is but one way of addressing this issue.⁴⁵ He highlights his concerns with this, however, by

⁴¹ Dershowitz, *Why Terrorism Work...*, 221.

⁴² *Ibid.*, 139.

⁴³ *Ibid.*, Walzer describes what he perceives as illogical: “At any rate, it would seem odd to say that it is legitimate to attack a group of terrorists in-training in a camp in Afghanistan, say, but not legitimate to go after the man who is planning the operation for which the others are training. That can’t be right.” p. 140.

⁴⁴ Emanuel Gross, “Self-defense against Terrorism—What Does it Mean? The Israeli Perspective,” *Journal of Military Ethics* 1 no. 2. (2002): 101. Gross concludes by emphasizing that, “If a state faces a threat of terror, and no other way or less harmful measure is available, the state may, in order to prevent a terror attack and defend itself and its population, act in self-defense by killing the perpetrators of terrorism and their commanders.” p. 107.

⁴⁵ Bellamy, *Just Wars: From Cicero to Iraq...* Bellamy writes that “This question is particularly pertinent to the so-called ‘war on terror’, where some states have argued that the threat of terrorism demands that rules governing matters like detention, torture, and self–defence be overridden.” p. 130.

claiming that it “undermines the principle of non-combatant immunity and opens the door to abuse.”⁴⁶ Bellamy later discusses the use of aerial bombardment during Operation Enduring Freedom and outlines his concern over the nature of the bombing which unavoidably resulted in non-combatant deaths. Even though strict targeting procedures were followed, legal advice sought at all levels, and missions called off for fear of collateral damage, the estimated number of non-combatant deaths by January, 2002, ranged from 1,000 to 2,700.⁴⁷ These non-combatants were truly innocent victims, as they had no say whatsoever in the decision of their government (non-elected) to harbour terrorists.

Dershowitz goes on to discuss the legal aspect of combatant versus non-combatant. He begins with the claim that history has shown that when Israel responded firmly to terrorist attacks, that the severity and frequency of these attacks decreased.⁴⁸ He then highlights how it is entirely legal, under the laws of war, to kill an enemy combatant who has not surrendered.⁴⁹ He extrapolates this point and suggests that terrorists who plan, support, or conduct suicide bombings are enemy combatants; as long as terrorists have not surrendered, it is legal to kill them. This type of action he refers to as targeted assassination; the Israelis, in their fight against terrorism, call this pre-emptive self-defence. He differentiates this type of action from the acts of terrorism by stating that “no civilized society regards premeditated first-degree murder as morally equivalent

⁴⁶ *Ibid.*, 144.

⁴⁷ *Ibid.*, 187.

⁴⁸ Allan M. Dershowitz, *The Case for Israel*. (Hoboken: John Wiley & Sons Inc, 2003), 179.

⁴⁹ *Ibid.*, 174.

to negligent homicide.”⁵⁰ It would seem that truly fighting terrorism legally remains subject to interpretation.

Fighting Terrorism Morally

Terrorism can be fought within or without the bounds of morality. It behoves democracies to do so within these bounds as their morals should reflect their values. Again, to not do so, leads down the slippery slope of morality. In the GWOT, democratic values must be morally preserved. Some would suggest that these values were preserved in the decision to invade Afghanistan, and that the *jus ad bellum* moral principles were met in this case. Bruno Coppieters and Nick Fotion, in their book entitled *Moral Constraints on War*, conclude that the U.S. invasion of Afghanistan in the wake of 9/11 can reasonably be assumed to have been defensible from the Just War Theory point of view.⁵¹ But what of the *jus in bello* principles?

David Rodin, in an article entitled, “The Ethics of Asymmetric Warfare,” seeks to identify what are “morally appropriate” *jus in bello* tactics on the part of the stronger side in an asymmetric conflict.⁵² Rodin proposes that an asymmetric war is not a fair war, and that the playing field needs to be levelled. One option is to allow the weaker side more latitude with respect to adherence to *jus in bello* norms, or the alternative would be

⁵⁰ *Ibid.*, 193.

⁵¹ Fotion and Bruno Coppieters, “Concluding Comments...”, 288.

⁵² David Rodin, “The Ethics of Asymmetric War,” in *Ethics of War: Shared Problems in Different Traditions*, eds. Richard Sorabji and David Rodin, 153-168 (Aldershot: Ashgate Publishing Limited, 2006), 156.

to require the stronger side to adhere more stringently to these norms.⁵³ An example that he suggests would be to consider dual-purpose installations as off limits to military attack by the stronger side. He further contends that stricter norms could be applied to the principle of proportionality in order to reduce the risk of collateral damage. Rodin's perspective adds an interesting twist to the examination of GWOT in that he hints that adherence by the stronger side to current *jus in bello* norms, which are considered moral in a 'fair' conventional fight, might not be so moral in an asymmetric conflict.

Elshtain further argues that, "any government that fails to do what is in its power and purview in these matters is guilty of dereliction of duty."⁵⁴ He is at great pains to relate how the U.S. is fighting morally, and not succumbing to the tactics of the terrorists. Yet he is quick to remind us of the fight against Nazism, and quotes noted public theologian, Reinhold Niebuhr, who "chided those who had shrunk from doing what was necessary to combat Nazi tyranny, especially those who made the claim that in the process of fighting fascism, we would all become fascists."⁵⁵ Elshtain seems to attempt to morally justify the actions of liberal democracies in the fight against terrorism. Given that the Allies did not all become fascists, he seems to be suggesting that in fighting terrorism, using questionable means if necessary, citizens of liberal democracies will not all become terrorists. This may be wishful thinking, however. As liberal democracies distort and circumvent the inherent morality of the Just War Tradition, they may be at risk of losing the moral high ground that sets their struggle apart as moral and just.

⁵³ *Ibid.*, 161.

⁵⁴ *Ibid.*, 49.

⁵⁵ *Ibid.*, 107.

Michael Ignatieff provides a detailed analysis of the ethics of fighting terrorism in his book entitled, *The Lesser Evil: Political Ethics in an Age of Terror*. He asks the simple question: “But if the law must sometimes compromise with necessity, must ethics surrender too?”⁵⁶ He suggests that ethics need not be surrendered, but that absolutist positions are untenable. He then describes how liberal democracies have a tendency to over-react and exaggerate the threat; as example, he cites those who equate the attacks of 9/11 to the attack on Pearl Harbor. He maintains that al-Qaeda’s 9/11 acts “did not endanger the social order of the United States or threaten its democracy with collapse.”⁵⁷ Although he relates how there is no evidence in history that terrorism can destroy a liberal democracy, he does admit that the threat of terrorists using WMDs provides a new set of conditions yet unseen.⁵⁸

Ignatieff treats the case of WMD terrorism in his final chapter, aptly entitled, “Liberty and Armageddon.” Herein he argues that a war against terror should not be a war against law.⁵⁹ Ignatieff contends that our belief in human rights and the rule of law is tested by terrorists, but suggests that with WMD, “terrorism, like war itself, is moving beyond the conventional to the apocalyptic.”⁶⁰ Ignatieff concedes that: “Liberal democracies are thus faced with an enemy whose demands cannot be appeased, who

⁵⁶ Ignatieff, *The Lesser Evil...*, 1.

⁵⁷ *Ibid.*, 54.

⁵⁸ *Ibid.*, 62.

⁵⁹ *Ibid.*, 145.

⁶⁰ *Ibid.*, 146.

cannot be deterred, and who does not have to win in order for us to lose.”⁶¹ Although the terrorist threat may not have posed a supreme emergency to date, it might yet represent one in the future.

Conclusion

This paper has argued that in order to maintain a morally defensible position in the prosecution of their just war against terrorism, liberal democracies must avoid the temptation to distort or circumvent the inherent morality of the Just War Tradition, as embodied in the UN Charter and in existing LOAC. Military professionals must always be aware of this temptation, more specifically in the conduct of war and its associated *in bello* principles. In a democracy, moral guises must be challenged and undemocratic practices must be revealed. Liberal democracies must protect against threats and fight against those that would terrorize and murder, but this cannot be done by advocating a realist approach or even a ‘just’ realist approach.

As the defenders of democracy, military professionals must abide by the morality that is embodied within the Just War Tradition. This is a challenge they must not fail. While the vile threat against which the GWOT is fought can arouse the temptation to twist and bend morality, the moral upper-hand must be maintained. Liberal democracies are not facing a supreme emergency. Liberal democracies can not argue military necessity and conduct themselves immorally. Liberal democracies must not chip away at the democratic moral foundation upon which their nations are built. They are not

⁶¹ *Ibid.*, 153.

condemned to fighting immorally. Dershowitz concludes that no one can predict the future and that appropriate balances must be struck:

In striking these balances, we must never forget our deep commitment to liberty, equality and the rule of law. We must not allow the terrorists to win either by destroying us or by destroying what we stand for. It will not be easy.⁶²

While it might be easier to avert the physical destruction of liberal democracies, it is the destruction of what they stand for that is at greater risk. If morality is destroyed, then nothing is left to defend.

⁶² Dershowitz, *Why Terrorism Work...*, 226.

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