Just war theory and the war on terror

Bill Calcutt

Centre for Policing, Intelligence and Counter Terrorism (PICT), Macquarie University, Sydney, Australia

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PLEASE SCROLL DOWN FOR ARTICLE
Almost a decade after the horrific events of September 11 it is timely to reflect on some of the lessons learned from the global ‘war on terror’. The evolution of a more sophisticated understanding of the threat posed by contemporary terrorism has cast doubt on the value and accuracy of using a war metaphor to define an effective global response. Terrorism is fundamentally the use of intimidation and fear to force major social and political change. The willingness of terrorists to use indiscriminate force against civilians means that terrorism falls outside the scope of the international laws governing armed conflict. In responding to terrorism with extreme (war-like) measures, there is a risk that the state could damage the social bonds that are the foundation for a cohesive, peaceful, inclusive, and resilient society.

**Keywords:** just war; human rights; terrorism

**Introduction**

*Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.*

(Benjamin Franklin, 1759)

Advances in technology since the Second World War have fundamentally transformed large parts of human society. Ubiquitous access to information and communications has reduced the distance between nations and peoples, and technology-enabled growth has progressively narrowed economic disparities between developed and some developing countries. Likewise the blending of different cultures as a result of migration has accelerated the ‘great big melting pot’ made famous in the 1960s by the band Blue Mink. Scientific developments have improved the quality and duration of life for many, but have also created new weapons that “can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defence” (National Conference of Catholic Bishops, 1983).

Better communications and greater economic interdependence may well have diminished the prospects of conventional conflicts between states by narrowing ideological differences and reducing the potential for misunderstandings. However, the same technologies have created new opportunities for ‘psychological’ and low-tech unconventional conflicts that can gain international prominence (notoriety) and disproportionate influence through the media. Twenty-first century anxiety about the phenomenon of terrorism has been the catalyst for the modern state to expand its
capacity to monitor its citizens in the name of increased security, and to enact new
counter-terrorism laws with the potential to impinge on civil liberties (International
rights is the first casualty of unconventional war. Even in liberal democracies
perceptions of national insecurity can rapidly destroy citizen support for interna-
tional law and democratic values, such as the rule of law and tolerance”.

This paper examines the conceptual foundations for the resort to force by the
individual and the state, and the international laws governing armed conflict. The
paper evaluates how the phenomenon of terrorism relates to these laws, and
considers whether there are elements of the ‘just war’ theory that may be useful in
developing an appropriate and effective response to terrorism.

The individual and resort to force
Innate power is the capacity of the individual to threaten or use force. Relatively few
people still rely on their own aggression and physical prowess for their day-to-day
survival, and most live in various forms of ordered societies. The foundation of the
social contract (between the individual and the state) is the individual’s acceptance of
the obligation to eschew force in return for the protection of collective security
provided by the state. Under the social contract the state reserves the exclusive right
to use force, with the exception of the individual’s intrinsic right to proportionate
self-defence. As will become evident throughout this paper, the intrinsic right to self-
defence retains great potency to this day as the primary justification for resort to
force at the individual, state, and international levels.

Most of the rules that govern the relationships between individuals and with the
state are codified as laws, though laws do not always prevent individuals from
resorting to force. Individuals who choose to abrogate their obligation to comply
with laws may do so at the cost of their own rights to state protection.

International imperatives for peace
The United Nations Charter is one of the foundations of the international law that
governs relations between sovereign states. A primary rationale for the establishment
of the United Nations in 1945 was to maintain international peace and security and
to provide a mechanism to prevent future conflicts (Article 1, Charter of the United
Nations). Article 2(3) of the UN Charter states that all members “shall settle their
international disputes by peaceful means in such a manner that international peace
and security, and justice, are not endangered”. Likewise, Article 2(4) of the UN
Charter states “all members shall refrain in their international relations from the
threat or use of force against the territorial integrity or political independence of any
state” (Article 2, Charter of the United Nations). Under the UN Charter there are
only two circumstances where a state may use force against another state: in self-
defence if under actual or imminent attack, or if authorised to do so by the Security
Council (Posner & Sykes, 2004).

In the period since the Second World War the international community and the
United Nations have been beset by a profound dilemma. On the one hand, there has
been virtual unanimity on the need to avoid armed (in particular nuclear) conflict
between sovereign states, with the urgency reinforced soon after the Second World
War by the outbreak of the Korean War and the intensification of the Cold War.
On the other hand, there has been emphatic support for the right to self-determination and independence of peoples subject to colonialism and other forms of authoritarian rule, and acceptance of the legitimacy of armed action to overthrow such repression.

**Wars of national liberation**

Support for the right to self-determination is reflected in Articles 1(2) and 55 of the UN Charter that refer to “respect for the principle of equal rights and self-determination of peoples”. The same principle is reflected in the preamble to the 1948 Universal Declaration of Human Rights, that observes that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the law”.

In the United Nations each of the sovereign states enjoys equality, irrespective of their size, population, level of development or power. Overwhelming support amongst UN members for the rights of oppressed peoples to self-determination has meant that ‘wars of national liberation’ are recognised as ‘just wars’. The widespread acceptance of the legitimacy of wars of national liberation has its origins in the often violent struggles of many indigenous peoples to break free from imperialism and colonial domination. Most states view colonialism as morally abhorrent and unjust, and some contend that a ‘war of national liberation’ is an act of armed self-defence under Article 51 of the UN Charter (the “inherent right of individual or collective self-defence if an armed attack occurs against a member”) (Gorelick, 1979).

It is possible that Common Article 3 of the Geneva Conventions that defines armed conflict “not of an international character”, and that applies minimum standards to the humanitarian treatment of lawful combatants, was drafted specifically to recognise the legitimacy of wars of national liberation (Green, 2008, p. 346).

The legitimacy and legal status of wars of national liberation by peoples seeking self-determination were the subject of intense debate in the United Nations throughout the 1950s and 1960s, with Western nations (in the minority) opposing the recognition of the legitimacy of the use of force other than by a sovereign state. A series of UN General Assembly resolutions during this period reaffirmed the inherent right of all peoples to self-determination and liberation from colonial domination. The debate culminated in the Friendly Relations Declaration (Resolution 2625) in 1970 that recognises that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security.” This was followed by Resolution 3314 in 1974 that defined aggression and excluded its application to peoples fighting for independence and self-determination.

The issue of the legitimate status of wars of national liberation was formally recognised in 1977 with the adoption (by many but not all states) of two Additional Protocols to the Geneva Conventions. Article 1(4) of Additional Protocol 1 recognises “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” as having the same status as international armed conflicts, and are thus covered by the rights and obligations of the Geneva Conventions. The principal obligations under Additional Protocol 1 for national liberation forces to be recognised as lawful combatants is that they operate under a command structure
with internal discipline able to enforce compliance with international humanitarian law rules (Article 43), that they “distinguish themselves from the civilian population while they are engaged ... in a military operation”, and arms are carried openly in such operations (Article 44).

Article 7 of the Rome Statute governs the jurisdiction and operations (post-July 2002) of the International Criminal Court. The Rome Statute identifies the crime of apartheid as one of a series of international offences that constitute ‘crimes against humanity’. Crimes of apartheid are “committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime” (Rome Statute of the International Criminal Court). The Rome Statute explicitly criminalises oppression and in doing so implicitly legitimises armed action by national liberation movements.

‘Just war’ theory

Because war involves profound decisions about the value of human life and the sanctioned use of lethal force, it is an issue on which law and morality overlap. At its broadest level ‘just war’ relates to the moral justification for state-sanctioned killing. The concept of ‘just war’ has its roots in theology and the writings of Saint Augustine of Hippo in the fifth century, but it was Saint Thomas Aquinas, in the thirteenth century, who articulated the main principles that are to be satisfied if recourse to war is to be morally justified (Fixdal & Smith, 1998, pp. 283–312). Much of the bloody conflict during this period of history was over religious differences, and questions about moral justification were considered by prominent theologians and philosophers during the fifteenth, sixteenth, and seventeenth centuries, leading to the formulation of criteria to judge the morality of wars.

‘Just war’ theory encompasses two dimensions: *jus ad bellum* (justice in resort to war) and *jus in bello* (justice in the conduct of war). Their origins include the medieval precepts of chivalry, honour, civility, and mercy. Both elements have humanitarian aims and are founded in the concept of self-defence (resort to defensive not offensive force). Theologians over many centuries have been deeply troubled by the moral dilemma of having to choose between respect for human life and the sometimes unavoidable necessity to kill (such as in order to protect the innocent).

The fundamental difference between the two complementary elements of ‘just war’ theory is that the moral principles of *jus ad bellum* (the reasons for going to war) were not explicitly codified and were to a large degree subsumed in other international law, while the principles and practices of *jus in bello* (the way war is to be conducted) were ultimately translated into what is now called the law of armed conflict (or international humanitarian law), of which the four Geneva Conventions and three Additional Protocols form a major part.

It is possible that the concept of ‘just war’ (or more pointedly, the *jus ad bellum* element) fell into disuse because of the consolidation of the autonomy and sovereign authority of the post-Westphalia nation state, and because of the diminishing power and influence of religion on national and international affairs. To this day, however, ‘just war’ remains an important and influential Catholic Church doctrine, as reflected in a recent edict that “peoples have a right and even a duty to protect their existence and freedom by proportionate means against an unjust aggressor” (National Conference of Catholic Bishops, 1983).
**Jus ad bellum (justice in resort to war)**

The agreed elements of the *jus ad bellum* criteria are: Competent authority—the decision to resort to war must be made by a legitimately constituted public authority; Just cause—the reason to resort to war is to protect life and confront a real and imminent danger; Right intention—the motives for and goals of resorting to war are honourable (such as to secure a just peace); Comparative justice—neither side to a conflict is absolutely right or wrong, but the issue under dispute does warrant killing; Probability of success—there are reasonable grounds to believe that resort to war will be effective and not futile; Last resort—all other non-violent options for resolution have been exhausted; and Proportionality—resort to war will do more good than harm (Fixdal & Smith, 1998, pp. 283–312).

**Jus in bello (justice in the conduct of war)**

The principles of *jus in bello*, developed over many centuries, are directed towards the ‘civilised’ conduct of armed conflict, and are now codified in the law of armed conflict. Broadly, these embrace the concepts of distinction (as to who are legitimate targets and combatants), proportionality (in the level and nature of violence used), humanity (in the treatment of casualties and avoidance of unnecessary suffering), and military necessity (legitimate military ends). The rules are intended to prevent unnecessary suffering and destruction while not impeding the waging of war.

Codification of the rules governing armed conflict became increasingly urgent as growing industrialisation and new military technologies provided highly efficient but indiscriminate means of killing large numbers of people from afar. It was through the actions and humanitarian ideals of Henri Dunant that the International Committee of the Red Cross (ICRC) was established in the mid nineteenth century, and in 1864 an international conference adopted the first Geneva Convention codifying the rules governing the amelioration of the condition of the wounded and sick (*hors de combat*).

Further treaties codifying the humane treatment of the victims of war were adopted at international conferences in 1906 and 1929, with a fourth treaty (primarily concerned with the protection of civilians during armed conflicts) adopted at Geneva in 1949 following the Second World War. Three additional protocols have since been added, two in 1977 and one in 2005. While the ICRC has primary responsibility for administering these treaties (most of which have been ratified by virtually all nations), there is no established international body (like the United Nations) to oversee their application.

The law of armed conflict that has evolved under the aegis of the ICRC is essentially a framework of rules and protocols that govern the conduct of military conflict between states and with non-state parties. These rules recognise that conflict is an undesirable but sometimes inevitable element of human relations, and as such needs to be regulated to minimise the impact on non-combatants (civilians). The law of armed conflict is a harm-minimisation strategy that aims to keep organised conflict within limits (Heintze, 2004).

The law of armed conflict regulates organised military conflict by imposing reciprocal obligations and offering reciprocal privileges for participants at both a command and individual level. The law of armed conflict recognises war as a unique type of organised human activity where organised killing is officially sanctioned.
The law of armed conflict is most effective where all of the parties (state and non-state) to a conflict accept the rules (agree to the ‘contract’), but can also be used to constrain the activities of one party (the state) to a non-international conflict. The law of armed conflict offers parties to a conflict certain protections (including status as lawful combatants), but breaches of the conventions are crimes and grave breaches are international crimes.

The key rules of the law of armed conflict as stipulated by the ICRC (n.d.) are:
- Parties must at all times distinguish between combatants and the civilian population;
- It is explicitly prohibited to attack a civilian population; Attacks must be limited solely to military objectives; Combatants who can no longer take part in hostilities must be protected; It is forbidden to kill or wound an adversary who surrenders; It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary loss or excessive suffering; The wounded and sick must be collected and cared for; The ICRC symbol must be respected; and Captured combatants must be respected and protected from violence.

**Difficulties in classifying non-international armed conflicts**

The differentiation of what is and is not a non-international armed conflict, an internal armed conflict, legitimate self-defence, a war of national liberation, or a ‘just war’ has dogged the United Nations since its inception. Virtually any action by an organised armed group can be represented as having some degree of legitimacy (including a resistance or guerrilla movement seeking territorial independence from a sovereign state). The law applicable in each instance where armed force is used in a non-international conflict will vary depending on its unique characteristics. The members of the United Nations have found it difficult to reach consensus on the legitimacy of various armed conflicts not of an international nature (whether they are ‘just’), and as a consequence have been reluctant to take action against or impose restrictions on such activities. This reluctance extends to agreement on the nature of and response to terrorism.

Additional Protocol 2 of the Geneva Conventions extends the essential elements of international humanitarian law to non-international armed conflicts, and articulates a set of criteria for the recognition of dissident armed forces or other organised armed groups as lawful combatants. To gain lawful combatant status, belligerents need to: be operating under responsible command (system of discipline); exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations; and agree to implement the Additional Protocol.

**The essence of non-state international terrorism**

As mentioned in the introduction, one of the most profound changes facilitated by technology has been global information-sharing and communications, enabling a dramatic reduction in the distance between peoples throughout the world. The power of a ubiquitous media to connect with and influence an almost universal audience has reduced the distance between diverse cultures, but it has also provided unprecedented opportunities for exploitation. A major incident in one location can be seen world-wide almost instantaneously.
What distinguishes the phenomenon of international terrorism in the twenty-first century is not that the goal of attacks is primarily psychological (to cause widespread horror and fear), but that an unprecedented capacity to intimidate and coerce is achieved through virtually instantaneous access to a world-wide audience. Engendering widespread fear is a form of psychological warfare, and the mass media (often supported by the state) are the primary means through which this effect is achieved and reinforced. The role of the state in accentuating the threat of terrorism in order to justify expanded security measures is described by a number of authors as the ‘politics of fear’ (citizens demand tough, decisive, and simplistic action in the face of threats, and leaders can gain political benefit from endorsing increasingly authoritarian measures). Terrorism is predominantly a virtual conflict, though the death and damage that may be inflicted to establish an ability and a willingness to strike anywhere with unconstrained and indiscriminate deadly force against civilians are real. The horror of September 11 has been deeply seared into the West’s psyche, with the prospect of continuing to elicit a visceral response for many years.

Those seeking to use the leverage of terror to intimidate are willing to undertake any actions that will secure international attention, including targeting high profile or symbolic locations or prominent people and the use of ‘suicide bombers’ to cause explosions in enclosed and densely populated places. Most remarkably, the states targeted by terrorists have been co-opted into sustaining the psychological warfare in their own communities.

Terrorism is thus “the use of violence to create fear in the larger audience in order to create change in that larger audience” (Garrison, 2003, p. 40). A relatively small number of determined and well-organised individuals using improvised weapons can acquire global power and influence through the judicious use of extreme violence. The longer-term strategic goal of terrorism is to catalyse permanent social change. This is achieved by ‘forcing’ the state to (over)react with a range of typically disproportionate security measures intended to prevent further physical attacks. Protecting the community against the (even remote) possibility of attack (or further attack) requires a readjustment of national priorities and the reallocation of significant financial and human resources to national security and defence measures. The consequent expansion of state surveillance capabilities and increase in police and security powers has significant potential to impinge on civil liberties. At the same time, heightened community suspicion of ‘foreigners’ can erode social cohesion with the potential to exacerbate a sense of alienation amongst particular individuals and groups (Marks & Clapham, 2005).

There are a range of other tactical and strategic objectives for the use of terror. These can include: to demean and humiliate a vastly superior power; to draw international attention to an ideology or grievance; to build the group’s international prestige and capacity to recruit others; to retaliate for personal loss; and to inspire others who feel alienated and disempowered to undertake similar attacks. It is possible that the success of terrorism in the twenty-first century as a strategy to acquire power and prompt fundamental change through intimidation has provided considerable impetus for the continuation of further attacks.

A willingness to resort to indiscriminate violence against the community in order to force change is thus one of the unique characteristics of terrorism. Defining terrorism by the strategies used to acquire and exercise disproportionate power means that state actions to pre-empt and mitigate future terrorist attacks are more likely to be proportionate and based on an objective risk management approach.
As an example, rather than addressing and confronting the threat posed by a relatively small group of Islamic extremists (Al-Qaeda) following September 11, the conflict rapidly escalated into a full-scale global ‘war’ against Islamic fundamentalism (Garrison, 2003, pp. 39–52).

Beres (2007–2008, p. 712) has noted the West’s fondness for “projecting our own sense of rationality upon our adversaries” and “imposing our own notions of compliance and justice upon an altogether different kind of civilization” (p. 713). Much has been made in the media of the Islamic concept of jihad, which can mean an individual’s struggle for religious purity, but also has a broader connotation (ironically) as ‘just war’ (Noor, 1985, p. 381). The challenge for authorities confronting adversaries acting with profound moral conviction is that conventional precepts of common law, tolerance, and compromise may have little influence. Reconciliation may have little appeal to radicalised and socially alienated young people who perceive themselves as ‘outsiders’ living in a morally corrupt society, particularly where a sense of righteousness and commitment to self-sacrifice have sacred meaning and offer a divine purpose (Arzt, 2002).

The recent emergence in a number of Western countries of renewed interest in fundamentalism amongst second-generation locally-born children of migrants has focused attention on the potential for social and cultural alienation in a loose multicultural framework. Young male defendants in recent terrorism trials in Australia and the United Kingdom have claimed to feel like foreigners in their own country.

Some Western countries have poorly articulated and largely un-codified cultural and human rights principles, meaning that core social values such as plurality, diversity, equality, secularism, liberty, respect, tolerance, ethics, democracy, rule of law, and freedom of speech (to name a few) can be perceived as either relativistic or political (and often derided as ‘politically correct’). A number of states (particularly in Europe) have recently reasserted the pluralist and secular nature of their societies, and have actively opposed attempts to assert one singular identity (such as religion) as taking precedence over all others (Grayling, 2009). This has raised difficult issues about apparently irreconcilable differences between individual rights and broader cultural values.

**Does terrorism ‘fit’ the law of armed conflict war paradigm?**

Several commentators have argued that the early adoption of a ‘war’ paradigm to depict the fight against global terrorism post-September 11 has been highly counter-productive. While the coalition intervention in Afghanistan following September 11 was clearly an international armed conflict, the distinction between conventional military action against organised armed belligerents (the Taliban) and covert intelligence operations against a small but high-profile terrorism group (Al-Qaeda) has become blurred (Posner & Sykes, 2004).

ICRC advice on the status of terrorism is clear:

Terrorism is a phenomenon. Both practically and legally war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. . . . On the basis of currently available factual evidence it is doubtful whether these [terrorist] groups and networks can be characterised as a ‘party’ to a conflict within the meaning of IHL.
[the law of armed conflict] does not regulate terrorist acts committed in peacetime (ICRC, 2004).

The deliberate use of unconstrained and indiscriminate deadly force against civilians as a modus operandi emphatically contravenes all of the tenets of the law of armed conflict in respect to distinction, proportionality, humanity, and necessity. Additional Protocols 1 and 2 of the Geneva Conventions also prohibit "acts or threats of violence, the primary purpose of which is to spread terror throughout the civilian population". It is difficult to see how any armed group that was intentionally unconstrained in its resort to force could qualify as a party to an international or non-international conflict, nor could a member of such a group gain recognition as a lawful combatant. This not a position supported by Jinks (2003) who argues that the war on terror may be legitimately construed as a non-international armed conflict under international humanitarian law.

If terrorism is not war and terrorist acts fall outside the jurisdiction of the law of armed conflict, it is unclear whether they might qualify as 'crimes against humanity' under Article 7 of the Rome Statute of the International Criminal Court. To be eligible as international crimes, the acts (terrorist attacks) would need to be "committed as part of a widespread or systematic attack directed against any civilian population... pursuant to or in furtherance of a state or organisational policy". It is conceivable that the International Criminal Court could mount a case against an individual terrorist who was acting pursuant to the goals of an enduring and structured international terrorist group.

A just (but not war) approach to counter terrorism

Throughout history groups and individuals have been willing to act outside the bounds of normative behaviour, but what distinguishes the principled state is that it steadfastly maintains the standards and upholds the laws that are the foundation of a modern civilised society, including safeguarding the fundamental rights of its citizens. How then should the moral state respond to the real (physical) threat posed by future terrorism, and when and how should the state intervene pre-emptively?

Consequent to the earlier observations about the pivotal role of a ubiquitous media in facilitating widespread fear and intimidation, a practical first (non-violent) step may be to deprive the terrorists of immediate and intensive media coverage. Without the access afforded by the media, the capacity and incentive to publicly intimidate is significantly reduced, and the state can readily moderate its own (inadvertent) role in perpetuating community fear. While such an approach may have implications for civil liberties in the short term, there may be longer-term benefits if the state can relax its security measures because of reduced community insecurity and a diminished real threat.

Widespread international debate about the efficacy, morality, and legality of military and covert paramilitary activities post-September 11, and the invocation of pre-emptive self-defence as the justification for unilateral armed operations, have prompted growing demands for a more explicit and transparent counter-terrorism policy (Wallerstein, 2006). Crawford (2003, p. 5) examines changes in policy and rhetoric post-September 11 and notes the Bush administration's contention that "we need to expect and accept different ethical, legal and military standards, such
as pre-emptive strikes and military tribunals where suspected terrorists may not even know the evidence against them”. Subsequent revelations of the authorised use of techniques such as extraordinary rendition, incarceration without trial, humiliating and degrading treatment of prisoners (and allegations of torture) and targeted killing (assassination), may indeed demonstrate how the principles encapsulated in international humanitarian law have been “transformed” post-September 11 (Hathaway, 2004; Hajjar, 2002). The Geneva Conventions do not appear to recognise covert paramilitary forces as lawful combatants, and some activities challenge the very notion of jus cogens (sustaining peremptory norms) (Powell, 2008, p. 61).

Several commentators have examined the ‘war on terror’ through the prism of the just war theory because of the central role of the doctrine of pre-emptive self-defence as justification. The consensus is that some of the military and many of the covert paramilitary operations may not comply with the jus ad bellum criteria. Given the original theological rationale for the just war doctrine was the “need to restrain an enemy who would injure the innocent”, and the continuing debate over what constitutes legitimate self-defence, it is understandable that there are growing calls for the inclusion of ethics and justice in the consideration of future counter-terrorism strategies (Enemark & Michaelsen, 2005, pp. 543–63).

How might the jus ad bellum criteria apply to an assessment of an appropriate and measured state response to future terrorism threats? The first jus ad bellum criterion of ‘competent authority’ is intended to ensure that a decision to resort to force is made by a legitimately constituted public authority. Article 51 of the UN Charter permits unilateral defensive action by a sovereign state that is attacked or under imminent threat of attack. Where international action or multiple states were involved, the authority of the UN Security Council would appear to be required.

The second jus ad bellum criterion of ‘just cause’ dictates that proposed armed action must be a defensive response to an actual armed attack (on life), or an imminent armed attack (where lives are threatened). Unprovoked offensive action is prohibited. There is a subtle but important distinction between acting pre-emptively to prevent an imminent armed attack and to protect life (that would constitute a legitimate ‘just cause’), and acting to prevent a potential adversary from developing an attack capability (that may not constitute a legitimate ‘just cause’).

The key to establishing the ‘just cause’ criterion in the absence of an actual armed attack would be high-quality information or intelligence advice on the imminence of a potentially deadly attack. However, as was demonstrated following the invasion of Iraq, the reliability of intelligence providing forewarning of a threat can sometimes be highly suspect. Given the interpretative nature of intelligence advice, it will always be inherently fallible.

One issue that poses challenges in the application of ‘just cause’ in a counter-terrorism context is whether it should extend beyond conventional military activities to include unconventional warfare and covert paramilitary operations (that are unlikely to be recognised as lawful combatants under the Geneva Conventions). The covert nature of paramilitary operations may make it extremely difficult to determine when armed operations have commenced and concluded, and the success of such operations is often reliant on secrecy and the element of surprise. Under these circumstances it may be difficult to establish whether covert paramilitary operations would satisfy the ‘just cause’ criterion.
The third *jus ad bellum* criterion of ‘right intention’ may be satisfied if the ‘honourable’ intent was to prevent mass civilian casualties as the result of the deliberate use by terrorists of unconstrained and indiscriminate deadly force. Covert paramilitary operations directed towards the prevention of mass casualties may well satisfy this criterion.

The fourth *jus ad bellum* criterion of ‘comparative justice’ would clearly justify resort to armed force if a prospective terrorist attack threatened the deliberate use of unconstrained and indiscriminate deadly force against innocent civilians. Its applicability to covert paramilitary operations may be limited.

The fifth *jus ad bellum* criterion, ‘probability of success’, may be difficult to determine given the unpredictable, indiscriminate, and opportunist nature of terrorist attacks and the asymmetric nature of the conflict. One of the tactical advantages terrorists enjoy is an ability to meld into the target population and a capacity to improvise in the means used to maximise harm.

The sixth *jus ad bellum* criterion of ‘last resort’ would probably be satisfied and would justify the use of armed force as an appropriate response to a prospective terrorist attack threatening the use of unconstrained and indiscriminate deadly force against civilians. Covert paramilitary operations directed towards the prevention of mass casualties may well satisfy the ‘last resort’ criterion.

The last *jus ad bellum* criterion of ‘proportionality’ would be satisfied if the resort to armed force was to prevent mass civilian casualties that could result from the deliberate use by terrorists of unconstrained and indiscriminate deadly force. However, if terrorism is essentially a criminal act, then there may be a question as to which state organ would be responsible for responding (police or military). There may be inherent difficulties in evaluating proportionality in the conduct of covert paramilitary operations.

The consideration of ‘proportionality’ may also have some broader relevance in evaluating the costs and consequences of non-military counter-terrorism strategies, in particular of the adoption of increased national security measures. Many states have enacted comprehensive counter-terrorism legislation that has significantly expanded the powers and capabilities of the state to monitor citizens and to authorise pre-emptive action against individuals and groups under suspicion. While the temporary derogation of certain rights is permissible in law in times of crisis, some of the measures that have been adopted (many enabled by new technologies) appear to be permanent and have the potential to fundamentally alter the balance of power between the individual and the state (Hartman, 1985; Kiss, 1985; Marks & Clapham, 2005). The most overt example is the United Kingdom’s extensive installation of CCTV in public areas. Industry figures suggest that there are between 3.2 and 4.2 million cameras installed in the UK, with a camera for every 20 residents (Webster, 2009).

**Conclusion**

This paper has examined the conceptual foundations for and the rules that govern the sanctioned resort to armed force by the individual and the state. The paper has highlighted the difficulty in determining the legitimacy of some types of conflicts. States are torn between opposing war in principle and sanctioning wars of national liberation, and this has created difficulties in gaining international consensus on the legitimacy of armed conflicts.
Under the UN Charter the only legitimate option for unilateral recourse to armed force by a state is in self-defence (under actual or imminent attack). This constraint on the use of force by a sovereign state is being undermined by the progressive broadening of the concept of anticipatory self-defence in order to justify pre-emptive military and covert paramilitary action.

This paper has highlighted the psychological and virtual characteristics of terrorism and its reliance on a ubiquitous media (and the state) to maximise widespread intimidation. It has concluded that terrorism does not qualify as war and does not ‘fit’ within the law of armed conflict framework. The blurring of the distinction between military and covert paramilitary operations, and the broad application of the term ‘terrorism’ to justify and encompass all sorts of armed activities (some of which should be properly governed by the law of armed conflict) is a cause for concern.

This paper questions whether a disproportionate and diffuse ‘war-like’ response to terrorism threats may pose a greater long-term threat to liberal democracies than the terrorist attacks themselves. In particular, the zealous enactment of wide-ranging laws enabling intrusive security measures has significant potential to compromise fundamental human rights. The success to date of terrorism in catalysing major social and political change may act as an incentive for further attacks. Brysk (2007, p. 1), has observed that “terrorism has succeeded in destroying democracy when a national security state, without the knowledge or consent of its citizens, tortures and kills detainees, runs secret prisons, kidnaps foreign nationals and deports them to third countries to be abused, imprisons asylum seekers, spies upon its citizens, and impedes freedom of movement, association and expression, on the basis of religion and national origin”.

This paper concludes by revisiting the jus ad bellum element of the ‘just war’ theory and reviewing its potential utility as a more objective and transparent approach in determining how to respond in a legal, proportionate and morally defensible manner to future terrorism threats. The ‘just war’ doctrine retains significant relevance to conventional armed conflicts, but its viability as a framework to evaluate the justification for unconventional paramilitary operations may be limited.

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References


