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JUST WAR THEORY:
AN ANALYSIS OF ITS RELEVANCE FOR
CONTEMPORARY WARFARE AND STATES

by

Susan L. Gray, MA

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the MA in Public Ethics

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Abstract

JUST WAR THEORY: AN ANALYSIS OF ITS RELEVANCE FOR CONTEMPORARY WARFARE AND STATES

Contemporary Just War Theory (JWT) is the philosophical theory used to determine the moral and ethical issues surrounding warfare and it is currently at a crossroads. Most applications of JWT (within the last century) presuppose at least the following: the conflict's participants are traditionally defined and known states; the world structure is state-based; most conflicts are divisible into stages (in simple terms: pre-conflict, conflict and post-conflict); and, finally, a clear outcome will mean victory for one side, be it one state or an allied group of states. In light of Philip Bobbitt's non-traditional global market state model, is conventional JWT still valid for determining the ethical scope of the types of conflicts emerging in the 21st century? This study explores some of these recent calls for the adaptation and revision of JWT and applies contemporary JWT to a phenomenon of the global market state: the rise of the private military industry. Based on this application, I found that JWT could not assess Private Military Contractor (PMC) activity on three counts. As PMCs operate within the limits of privacy, JWT cannot assess their actions and the behaviour and judgment of their members as JWT's *ad bellum* and *in bello* principles are designed to apply to public actors: namely legitimate states, their political leaders and militaries. Secondly, due to the private nature of PMC contracts and terms of service, the principle of proportionality cannot be applied to their activity. Finally, PMCs obscure the principles of proper authority and public declaration; a state that may not have the public support of its nation to actively influence a war or engage in it altogether can seek to void any open declaration of war and employ a PMC instead of its own military. With regard to modern JWT itself, I concluded that three areas need revision: the decreasing difference between pre-emptive war and preventive strikes; the *jus in bello* issue of discrimination between legitimate and non-legitimate targets; and the responsibilities and principles that should govern the moral behaviour involved in restoring the pre-conflict status quo deserve substantial study.

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INTRODUCTION

Just War Theory (JWT) is not the only philosophical model for assessing the morality of armed conflict; like its counterparts (realism, pacifism, militarism and idealism),¹ JWT has evolved into a meta-theory of many variations, some more useful than others. However, one cannot deny its influence on contemporary international law, state relations and modern thinking about how wars are waged. JWT has been and continues to be the moral theory of choice for thinking about the good and bad of warfare.²

Orend suggests that the triumph of JWT is perhaps fading, in light of the events of 9/11.³ This is indeed a timely statement, despite common assessments of JWT's strength and flexibility, particularly since many Just War theorists are calling for revisions to certain principles of the theory.⁴ I want to assess contemporary JWT in this thesis, and by that I mean primarily the JWT that evolved following the codification of Traditional JWT principles into international law, over the span of about 200 years into the latter half of the 20th century.⁵ It is the brand of JWT that Walzer gave rise to and now studied by a number of moral philosophers, including Christopher and Orend (although each varies to a some extent) on which I intend to focus. Also, I do not disagree with the fundamental tenets of JWT; I do not wish to invalidate the theory, but to explore its validity in light of seemingly substantial calls for its update.⁶ I will conduct this exploration against the backdrop of Bobbitt's recent work, *Terror and Consent*,

¹ Paul Christopher, *The Ethics of War & Peace: An Introduction to Legal and Moral Issues* 3rd (Ed) (Upper Saddle River, New Jersey: Pearson Prentice Hall, 2004). Although Christopher does not talk specifically about idealism, Orend speaks to it in *The Morality of War* (Orchard Park, N.Y.: Broadview Press, 2006)1-5.

² Paul Christopher, *The Ethics of War & Peace* 2

³ Brian Orend, *The Morality of War* 27.

⁴ See: Michael Walzer's Introduction in *Arguing About War* (New Haven: Yale University Press, 2004); Paul Christopher, *The Ethics of War & Peace*, specifically Section III-Moral Issues in War; Nicholas Fotion, *War & Ethics: A New Just war Theory* (London: Continuum, 2007); and Stephen Lee (Ed), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* AMINTAPHIL: The Philosophical Foundations of Law and Justice Series, (Vol. 1.: Springer, 2007) specifically Lee's Introduction, "Just War Theory and the Challenges is Faces," and William Murnion's "A Postmodern View of Just War".

⁵ Brian Orend, *The Morality of War* 22-26.

⁶ Michael Walzer, *Arguing About War* xii.

specifically in light of his proposition that the world structure is moving away from the Westphalian nation state system (in place since the mid-1800s) to a new constitutional order of market-states.⁷

I will meet two objectives: to present an analysis of the recent calls for the adaptation of contemporary JWT in response to 21st century warfare in light of Bobbitt's market state model; to contribute, from a philosophical perspective, to the modern study of the privatization of militaries whose recent dramatic growth as an industry is offered as an example of the market state phenomenon.

STATEMENT OF THE PROBLEM

Contemporary JWT, the philosophical theory used to determine the moral and ethical issues surrounding warfare, is currently at a crossroads.⁸ Most applications of JWT (within the last century) presuppose at least the following: the conflict's participants are traditionally defined and known states; the world structure is Westphalian; most conflicts are divisible into stages (in simple terms: pre-conflict, conflict and post-conflict); and finally a clear outcome will mean victory for one side, be it one state or an allied group of states. Thus, given Bobbitt's non-traditional global market state model and his detailed argument that the world is now entering a post-Westphalian structure, is conventional JWT still a valid theory for determining the ethical scope of the types of conflicts emerging in the twentieth-first century? If yes, how valid is it? Are calls for the adaptation and revision of JWT legitimate?

⁷ See Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Alfred A. Knopf, 2008).

⁸ My work primarily refers to JWT as articulated by Michael Walzer in his *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 4th ed., (New York: Basic Books, 2006), first published in 1977.

STATE OF THE QUESTION

JWT experienced a considerable resurgence in the last half of the 20th century, largely due to Walzer's, *Just and Unjust Wars*. Yet, since the events of 9/11, many philosophers who have held up and critically assessed JWT in its contemporary application have been calling for its 'revision,' 'modernization,' or 'update'. These calls are not a collective uncritical reaction to 9/11 but are based on critical observations and subsequent arguments that there has been a fundamental shift from the 20th century's conventional conflicts to the 21st century's asymmetrical conflicts.

My work draws mainly on recent academic studies concerning military ethics, contemporary JWT, the nature of twenty-first century terrorism and terrorist activities,⁹ as well as Bobbitt's 2008 inclusive study of the emerging world order and the nature of conflict therein.¹⁰ Bobbitt's work presents a general, holistic model of contemporary states and their relations, the 'market-state model'. This model cannot, nor is it meant to be, restricted to American foreign policy analysis or mere military strategy; it encompasses the traditional academic fields of nation state economics, political science, legal theory, history, as well as the variety of factors that make up a modern society including religious, cultural and social traditions. Although it could be applied through a narrow lens to view power shifts or recent economic trends, its strength lies in its foundation, one set in the history of economics, nation state development and the evolution of how power is internationally wielded. However it accounts for and predicts the changes in nation state relations in this century based on a much more globally comprehensive approach than one that limits application to one field, say political economy or foreign policy. The model itself is presented in Chapter 1.

⁹ Terror, terrorism and terrorist activities are often used synonymously within the last several years. A distinction between each term will be made in Chapter 1.

¹⁰ See Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century*.

THESIS STATEMENT

In examining the appeals for JWT revision, the example of Private Military Contractors (PMCs), as a feature of Bobbitt's market state warfare, will be used to determine the overall validity of conventional JWT. If viable, JWT should account for the ethical issues surrounding the increasing use of PMCs. If it cannot morally justify the use of PMCs in Bobbitt's model of 21st century world order, then some of the challenges facing JWT, as raised by several modern theorists, should be sound. The strength and outcome of this argument hinge on the strength of Bobbitt's model.

METHODOLOGY

Two approaches will be used. First, by exploring the more recent calls for JWT revision, a necessary overview of the state of the challenges to JWT will be offered. Secondly, by then applying conventional JWT PMCs, the calls for JWT revision can be examined. This will provide an assessment as to whether JWT can still be validly applied to the challenges of twenty-first century conflict, as Bobbitt describes it, or whether JWT needs to adapt any of its principles or aspects thereof.

The first chapter will characterize the notable features of modern-day conflict and attempt to discern if conflict in this century has evolved or transformed from that of the last. Given that terrorism (and terrorist activity) seems to be a more prominent feature of modern conflict, and characterizes conflict in the market state model, it will be explored in some detail to determine its distinctness from that of the last century. Chapter 1 will also articulate Bobbitt's model as the contextual foundation of the remaining chapters. Chapter 2 will survey the recent commentary on the challenges to JWT: the diverse calls for updating JWT form a broad spectrum of thought. Consequently a concise overview of them will serve further

research in this area. Chapter 3 will examine the contentious issue of the use of PMCs and the moral arguments (for and against) the growth of this industry in the West. As a characteristic of the market state construct, PMCs will be used as an example to explore the validity of the calls for JWT revision. Finally, Chapter 4 will suggest directions that JWT could take in order to remain valid in light of the changing face of modern warfare. The study concludes with recommendations for further research in this area.

CHAPTER 1: THE STATE OF CONFLICT IN THE 21ST CENTURY & THE EMERGENCE OF THE GLOBAL MARKET STATE

In order to determine the continuing relevance of JWT's applicability to warfare in the twenty-first century, it must be asked whether the domain of the theory has changed. That is, has the fundamental nature of modern warfare changed to such an extent that JWT must adapt or be changed in some way to be applied effectively? Or perhaps it is just the fact that the tactics of modern warfare – the way that war is executed – have simply adapted to gross technological advancement, thus giving the impression that the nature of conflict has evolved? This chapter looks at the recent observations that depict an apparent fundamental shift from the conventional conflicts of the 20th century to that of the asymmetrical warfare of this century, to determine if the nature of modern warfare has indeed changed and if, and to what extent, the role of tactics has played in that apparent shift. In doing so, the characteristics of contemporary conflicts (those within the last few decades) and those over the last century will be briefly traced.

Bobbitt's model was chosen for this study since its scope is very sweeping, in holistic as well as temporal terms. It accounts for and predicts trends and shifts apparent in nation state relations in this century based on a much more globally comprehensive approach than one that limits application to one field, say political economy or foreign policy. It will set the foundational context for the remaining chapters.

First, it is important to specify what is meant by the following terms: 'conflict' and 'war', 'asymmetric warfare', and 'nation' and 'state'. As countless definitions of each term exist within the fields of social science and some definitions would appear to support certain critics of contemporary JWT, the paper frames this discussion on the definitions used by contemporary JWT philosopher Orend. As he explains, 'nation' and 'state' are often used

interchangeably but they are conceptually distinct when speaking of JWT.¹¹ In this sense then, a nation refers broadly to the people and institutions of a state, for example the nation of the American people or in the case of Canada, a state of many nations if one considers the concept of Quebec society as a distinct one within the larger state of Canada or Canada's First Nations of Aboriginal peoples. A nation then refers to a group "which thinks of itself as 'a people' usually because they all share many things in common, such as ethnicity, language, culture, historical experiences, a set of ideals and values," etc.¹² However, as Orend continues the state is a much more specific term meaning the machinery of government which oversees and structures the life of the nation within its borders.¹³ In democracies such as those found in North America and Western Europe, the state is the elected body that is given decision making power on behalf of the nation.

War is a violent activity, an armed conflict (AC) or series of conflicts in which the state decides to engage, understood as:¹⁴

an actual, intentional and widespread armed conflict between political communities ... defined as those entities which either are states or intend to become states (in order to allow for civil war) ... certain political pressure groups, like terrorist organizations, might also be considered 'political communities,' in that they are associations of people with a political purpose and, indeed, many of them aspire to statehood or to influence the development of statehood in certain lands.

Moreover, according to Orend, it would seem that *all* war is a violent way to obtain the power to govern, as that is what states do. Yet can the threat of impending war be war? Although Orend emphatically states that it cannot,¹⁵ this issue will be explored further on as it would seem that a direct and open threat to use, for example, weapons of mass destruction by one political community against another, regardless of the respective state legitimacy of both

¹¹ Brian Orend, *The Morality of War* 2.

¹² Brian Orend, *The Morality of War* 2.

¹³ Brian Orend, *The Morality of War* 2.

¹⁴ Brian Orend, *The Morality of War* 2.

¹⁵ Brian Orend, *The Morality of War* 3.

parties, would constitute a valid reason for engaging in war. In Orend's definition however, there is no real war until heavy force is used, until actual AC is intentional and widespread. It is important to keep in mind that this definition of war, or AC, supports most traditional and contemporary JWTs.¹⁶ Given this definition, 'war', 'warfare' and 'AC' will be used synonymously in this study.

Regarding the term 'asymmetric warfare' (AW), I will use Bobbitt's definition: "the use of unconventional means to attack a superior conventional force," it having a long history since at least first century AD when one or a few members of the Jewish Sicarii and the Zealots would openly attack Roman soldiers.¹⁷ Such terrorist tactics continued to be used by various groups such as the Hindu Thuggees in 7th century India, 11th century Shias against Christian crusaders, and the Dutch Sea Beggars of the mid-16th century.

Before continuing, it is also necessary to offer some parameters surrounding the use of the term 'terrorism'. It seems that terrorism is easily recognizable, but not necessarily easy to define. This is particularly so in philosophical discussions where most definitions of terrorism or terrorist activities already contain an element of extreme negativity, given the very nature of the involved activity. Thus, if terrorism is a violent action that seeks to instil fear, almost any judgment on the moral value of the action (inherently pejorative) will be a negative one. But this brief and general description is inadequate, as are most. As Christopher notes, "I may not be able to define terrorism, but I know it when I see it."¹⁸ And given the literature review carried out for this particular chapter, there are as many definitions of terrorism as there are proclaimed terrorist organizations throughout the world. Rightly so, as Bobbitt points out,

¹⁶ Orend's argument about when war actually begins will be discussed later in Chapter 2 when the distinction between preventive and preemptive war is questioned, as a specific challenge to the viability of JWT.

¹⁷ Philip Bobbitt, *Terror and Consent* 22-44.

¹⁸ Paul Christopher, *The Ethics of War and Peace* 181.

significant and damaging terror can be caused by natural disasters such as earthquakes and pandemics, and the options for response to such an event to the modern nation state are much the same as those responses to a significant terrorist attack.¹⁹ But the type of terror that a JWT model deals with is the type caused by the terrorist activity on the part of one group designed to impose a state of terror on the civilian population of its identified enemy. For the most part I agree with Orend's classification of terrorism as a 'tactic' and not a type of war, similar to many contemporary military tactics that serve a larger strategy – an 'ism' or 'ocracy' as Orend states.²⁰ Thus, regardless of the countless definitions that reside within contemporary academic commentary, in its most simply definable terms, terrorism or terrorist activity is a method or device of conflict specifically chosen for a specific effect that targets innocent civilians. One thing that most reasonable people will agree though, including JWT supporters and critics, is that terrorism in any form is always reprehensible and morally unjustifiable. Yet, it is worth adding at this point that terrorism, as used within the AW we have witnessed leading up to and including the last decade, is *more* than a mere tactic or notable feature of current AC. Although terrorist activities have been a feature of AC for centuries, along with a variety of other tactics and strategies, the terrorism used by al-Qaeda and similar organizations seems to constitute a distinct type of warfare. Within Bobbitt's model of the modern market state of terror, terrorist activities are the *only* form of AC utilized by one side. Thus, this may reflect a change not only in the way market states are organizing themselves and their relations with other market states

¹⁹ See Philip Bobbitt, *Terror and Consent* 19. Bobbitt ultimately describes terror as a force of destruction: "it hardly matters whether the forces of destruction arise from militant Islam, North Korean communism or Caribbean hurricanes. Rather the sort of terror that threatens states arises not simply from ephemeral international politics but is endemic to the unique vulnerabilities of globalized, networked market states." This would explain why the United States' military command US Northern Command (NORTHCOM) and the Canadian Forces' Canada Command (Canada COM) are both charged with preparing for and responding to domestic terrorist as well as natural disasters such as devastating earthquakes and pandemics like the Avian Flu virus. In Western militaries, this is a relatively recent change of mandate wherein the twentieth century the planning for a state's response to widespread natural disasters was outside their purview.

²⁰ Brian Orend, *The Morality of War* 68-70.

and states evolving into that construct, but how they carry out AC as well. This point will be more fully explored later.

THE CHARACTERISTICS OF 20th AND 21st CENTURY WARFARE

Peacekeeping, regime-change, armed intervention, preventive and pre-emptive war, and peacemaking are conventional terminology related to conflict.²¹ Although some are even referred to as reasons for states to engage or not in conflict, all are frequently used by Western statesmen, national and international news agencies as well as public commentators. Although many contemporary scholars and public commentators use the two terms ‘peacekeeping’ and ‘peacemaking’ interchangeably, they are not synonymous. Modern peacekeeping as it involved over the last century refers to the insertion of a military force from objective third party supporter(s) following a secured truce. An example of such a force was the several thousand-strong NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina from 1996 to 2005. Peacemaking on the other hand refers to diplomatic mediation techniques with the goal of forging a peaceful deal to warring parties. The negotiation process leading up to the Dayton Peace Accord that brought an end to the war in the former Yugoslavia involved a variety of peacemaking techniques. In many ways the four terms noted above reflect more traditional concepts used to describe the behaviour among states over the last few centuries, and now merely re-labelled for our present thinking. Regardless of terminology, the point is this: any conflict (in any century) seen through the lens of JWT should be studied in and of itself, including an analysis of its causes (including factors of geography, economics, ethnicity and timing).

With this in mind, the 20th century can tragically be described as the “bloodiest era in history,” with between 167 and 188 million dead due to organized violence; this is a shocking

depiction for a time of unprecedented material and democratic growth, medical discovery, human longevity, a quadruple increase of average per capita GDP from 1913 to 1998, and the highest ever literacy rates in the world.²² The problem is to explain how (or why) both unprecedented prosperity and violence occurred simultaneously. Commentary on this historical period commonly looks to three main reasons to explain its violence. The most obvious reason cited is the gross advancement of military technology; where previous eras were marked by centuries of similar type and accuracy of weaponry, the 20th century saw the most powerful and advanced weapons emerge, causing arms race after arms race and extreme numbers of casualties. But careful observation shows that the mass genocides of the last century saw the use of the most unsophisticated of weapons including forced starvation, mass orchestrated rape, and rifles and axes in such places as the Nazi concentration camps, Cambodia, the Balkans and Rwanda.²³ The second most cited reason is that groups of people faced with extreme poverty will revolt; however, states in the 20th century did not *generally* go to war when their nations' economies soured. Such was the case with the Soviet Union and the United States. Although they prompted their poorer satellite states to engage in conflict, in general wars did not erupt solely because of economic crises. Even World War II began among relatively economically stable states. The third most cited reason is that extreme ideology and megalomania are causes of the worst violence from the last century. Hitler, Stalin, Pol Pot, Karadžić and far too many others personally account for some of the worst atrocities in the last one hundred years. But these men, and their ideologies, do not solely explain why so many obeyed their brutal direction. Finally, none of these reasons can explain why such organized brutal violence happened particularly where and when it did. Between 1904 and 1953 the "most dangerous

²² Niall Ferguson, "The Next War of the World," *Foreign Affairs* 85:5 (2006):61.

²³ Niall Ferguson, "The Next War of the World" 63.

place in the world was the triangle that lies between the Balkans, the Baltic Sea, and the Black Sea.”²⁴ Why was there so much violence and conflict in Poland and Serbia during the early 1940s? And why smaller south-east Asian and central American states during the Cold War?

Contemporary historian Niall Ferguson takes a comprehensive approach in explaining the reasons for such bloodshed in the 20th century. He points to three combined ingredients that formed the recipe for extreme violence: ethnic disintegration, economic volatility and the decline of empires.²⁵ Although multi-ethnic regions do not always progress toward violence on a grand scale (one need look to present day Canada, Germany or even the United States), but when combined with a decided decrease in economic prosperity and the end of a familial dynasty or political empire, they often did in the 20th century. Populations under the Hapsburg, Ottoman and Romanov dynasties were ethnically assimilated since loyalty to the sovereign was valued much more than the different ethnicities of the masses; the scope and power of an empire in the 19th century was defined by the amount of loyal servants, not their ethnic type. Yet when these dynasties fell and the resources driving their centralized economies were overtaken by emerging smaller states looking for precisely defined identities, a multi-ethnic population did not suit a new state looking to replace social structures with homogeneous political hierarchies.²⁶ As Samuel Huntington points out, within modern Western civilization “people define their identity by what they are not.”²⁷ Thus, uniformity took the place of tolerance. Ethnic minorities soon found their status and economic power devalued, particularly in east European countries and most notably in post-World War I Germany, summed up by Ferguson:

²⁴ Niall Ferguson, “The Next War of the World” 64.

²⁵ Niall Ferguson, “The Next War of the World,” 65.

²⁶ Niall Ferguson, “Empire with Expiration Dates,” *Foreign Policy* 156 (2006):49.

²⁷ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), 67.

Violence is most likely to occur as empires decline ... one of the last acts of the Ottoman Empire was to attempt genocide against the Armenians. The Austrian, German and Russian empires all met bloody ends as World War I drew to a close; indeed, the civil war and ethnic strife that followed the Russian Revolution in 1917 was as costly to the tsar's former subjects as the preceding war against Austria and Germany was. The most violent year in the entire history of British India was 1947, when partition led to the deaths of more than a million people in communal classes between Hindus and Muslims.

Of course, not all wars in the 20th century can trace their causal roots to one of these factors.

Yet where these three factors merged, hostility leading to conflict almost always resulted.

Like Ferguson, Bobbitt also casts a wide net when looking at history. He depicts conflict in the 20th century as one 'Long War.' Unlike most who view it as many separate and distinct conventional wars throughout the world, Bobbitt sees a continuation of conflicts that "encompassed the First and Second World Wars, the Bolshevik Revolution, the Spanish Civil War, the wars in Korea and Vietnam, and the cold war."²⁸ And as he explains, it was the object of the Long War that makes it distinct from other major wars in previous history: it was a fight not for expanding one state's territory and resources but a protracted and violent struggle to determine what form of the nation-state (fascist, communist or parliamentary) would succeed the empires and dynasties that were so successful in 19th century.²⁹ But he warns not to give in to the temptation to see the Long War as one that resulted in victory by the West where democracy won out over communism and fascism. Indeed, with the recent end of the cold war between the world's two superpowers, the expected peace dividend lasted about as long as it took for Western states to divert funds from their defence budgets and downsize their militaries. Many commentators, such as Huntington, allude to the idea that there was no peace dividend at all following the fall of the Berlin Wall.³⁰ With the creation of the European Union (EU), the end of the Long War meant that one superpower remained, in the form of an

²⁸ Philip Bobbitt, "Get Ready for the Next Long War," *Time* 160:11 (September 9, 2002) 84.

²⁹ Philip Bobbitt, "Get Ready for the Next Long War," 84.

³⁰ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 31-32.

interdependent political and economic alliance of the principal Western states, namely the United States, Britain, France, Germany and Japan. But being the world's most influential powerbase does not automatically ensure continued supremacy as Bobbitt and others point out.³¹ In fact, he argues that it was the *very success* of Western democracy at the end of the 20th century that had created the conditions for a new type of violent conflict that emerged at the beginning of the twenty-first. Bobbitt is supported by Bruce Ackerman and Jeffrey Record, both leading U.S. scholars in political and legal philosophy and warfare planning and strategy. Record in particular emphasizes Bobbitt's point here:

The age of large-scale conventional interstate warfare opened by the French Revolution is drawing to a close, and with it the relevance of Clausewitz's postulation of total war among states. Most future conflict is likely to erupt across ethnic and cultural rather than state boundaries. It is further likely to be predominantly unconventional in character and waged on a far lesser scale than the major interstate wars of the past two centuries ... Perversely, the West has become the victim of its own conventional military success. Unchallenged mastery of conventional war is driving the competition into asymmetric strategies at both the supra- and sub-conventional levels of warfare, thereby reducing prospects of further big conventional wars between the United States and its non-Western adversaries.³²

As Bobbitt explains, "any redefinition of war will have to take into account the causes of war" and in many ways those causes have remained the same for centuries including revenge, hostile anger and even the suffering of peoples not under one's direct political responsibility.³³ Yet while the more common causes of AC in recent centuries may give a nod to the oft-cited quip, 'history repeats itself,' these terms do not (individually or collectively) describe the causes for the conflicts in the last decade involving Western states. Three particular features mark current conflict as different from those of the last century: the unprecedented rapid technological advancements of the last 30 years; that there is no longer

³¹ See Philip Bobbitt, "Get Ready for the Next Long War" 84, and Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 81-83.

³² Jeffrey Record, *The Creeping Irrelevance of U.S. Force Planning*, Report prepared for the U.S. Army War College's Annual Strategy Conference, 1998, accessed Dec. 2, 2008 at: <<http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB311.pdf>>

³³ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 134.

any difference between pre-emption and prevention of war;³⁴ and most disturbing, the fact that civilians are now often the primary target certainly by al-Qaeda and like terrorist organizations, and are not just victims of collateral damage as witnessed in most of the major conventional conflicts of the 20th century. This is not to say that civilians have never been the direct targets of belligerents in the past (for example the allied firebombing campaign over Dresden in 1945) or that technological advancement in weaponry has never led to conflict between states and even between national elements and different peoples within states, but these three particular features at this point in time combine to form a feature of warfare not previously witnessed: the internationalization of terrorism as a type of foreign policy extension, or a new type of conflict.³⁵ At no other time in history was it conceivable that a non-state actor could possess and use technology as weapons to cause the lethality, devastation and fear that al-Qaeda or other like groups could wield today. And the cause of this type of conflict is markedly different from the causes of conventional 20th century wars which were often the outcome of state expansionist policies.

Although popular Western media often simply cast the current Afghan and Iraq conflicts in terms of West versus East, or the rapid decline of another world empire (this time led by the United States), or even in terms of competing religious fundamentalisms, interpreting 21st century conflict through the conventional eyes of the last century will at the very least mean protracted conflict and almost assuredly more casualties on both sides.³⁶ In

³⁴ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 137.

³⁵ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 143.

³⁶ By casualties, I refer to military and civilian, indeed all persons involved or affected, regardless of combatant status. Given that the United States is employing a variety of private military companies in its war effort in Iraq, and although it is not known how many casualties have resulted within the 'ranks' of those persons privately employed, the United States government does *not* consider them to have combatant status and therefore does not track casualties of non-combatants (see: Congress of the United States, House of Representatives Committee on Oversight and Reform, *Memorandum* dated February 7, 2007 at:

other words, the major conflicts witnessed by the world so far in this century should not be analysed with 20th century models – they are no longer applicable which, as Bobbitt asserts, explains why the Bush administration approach in Iraq has not produced a swift victory.

The challenge points to the West's idea of warfare, which is simply no longer appropriate. Many politicians and generals in the West still view the act of going to war as a formal part of the 20th century conflict paradigm known to their fathers and grandfathers, where a repeated cycle beginning with failed diplomacy leads to conflict between the armed forces of two or more readily identifiable states, followed in some instances by civilian peace-building (by non-military aid and reconstruction workers), all in that order.³⁷ As the Iraq and Afghan wars illustrate, these three roles must be carried out simultaneously and no Western military is fully trained or equipped to do so on a scale that the United States military is attempting to do in Iraq.³⁸ Furthermore, with such a narrow view of what constitutes actual warfare, the United States was unable to recognize that a new type of warfare emerged, a failure that affected how that country, leading its willing allies, responded to twenty five years of organized and strategically-targeted terrorism that began with the seizure of the US Embassy in Iran in 1979 and ultimately peaked with the September 2001 attacks on American soil.³⁹

<<http://oversight.house.gov/Documents/20070207112331-22533.pdf>> accessed Nov. 30, 2008). Likewise those considered to be within the enemy camp, also do not fit well within the traditional JWT concept of combatant.

³⁷ Philip Bobbitt, *Terror and Consent* 155. This outlook was still evident throughout the presidential debates in the lead up to the US election in the fall of 2008 where both candidates repeatedly described the eventual victory in Iraq as a result of the US forces overcoming the enemy through massive military might, although neither offered a credible reason why victory has not yet occurred.

³⁸ This is not to say that Western militaries, particularly the American, British and the Canadian, do not recognize the need to be able to fight the “three-block war”. Bobbitt argues convincingly that Western militaries, if they are to be successful in fighting a war like those occurring in Iraq and Afghanistan must adopt large-scale constabulary forces for crowd control and local organized violence. See Bobbitt, *Terror and Consent* 154-158. Indeed, he cites the case of the Australian forces who successfully employ a force capability that is combat capable as well as being adept in local police functions. The French Gendarmerie and Italian Carabinieri have also played a successful role in more recent Balkan and African multinational forces that require constabulary forces. Western infantry troops are not trained nor suited for such a role, but the necessity of that role is increasing.

³⁹ Paul Christopher, *The Ethics of War and Peace, An Introduction to Legal and Moral Issues* 191-193.

Given a brief profile of the wars involving Western states within the last decade, we know that significant and successful terrorist attacks have been carried out on American, British, Spanish, and Turkish soil (among others) by radical Islamic and non-state actors, using modern *non-military* technology with a goal of terrorizing the respective publics of those states.⁴⁰ This does not include foiled terrorist attacks in Canada, Germany and Australia. Thus, the motivation for the action on the part of the initiating belligerent is not to increase his national boundaries (in the Westphalian sense), for his state attribution is not declared. His motivation is not money as no one or state is *apparently* paying the terrorist organization to carry out the intended violence. His objective may be to instil fear within the targeted population, motivated by his will to defend an ideology, or a value system. The repeated attacks on United States military installations and equipment and personnel, in the two decades leading up to and including the events of September 11, 2001 finally prompted the United States government to launch a conventionally-based, second, full-scale military invasion of Afghanistan one month later.⁴¹ While the United States countered the emerging 21st century global terrorist threat with a massive conventional war response, the conflict of the last eight years has proven to be neither an example of a 20th century conventional war (as only one of the sides has any conventional forces to speak of in terms of militarily-trained and identifiable personnel and equipment), nor does it remotely reflect a peacekeeping mission given President Bush's justification for the invasions: in the case of Iraq, to prevent the proliferation of weapons of mass destruction to terror groups and in the case of Afghanistan, to destroy al-

⁴⁰ See the National Consortium for the Study of Terrorism and Responses to Terror (START) which is a U.S. Department of Homeland Security Center of Excellence, tasked with tracking terrorist events throughout the world. Their website was accessed February 18, 2009 at: <<http://www.start.umd.edu/start/>>

⁴¹ The United States invaded Afghanistan on Nov. 7, 2001 and calls this ongoing conflict Operation Enduring Freedom. Although coalition nations are fighting alongside the US military in this operation, the US and other NATO and non-NATO members are also fighting in the UN-sanctioned, NATO-led International Security Assistance Force (ISAF).

Qaeda, including the capture of its leader, and to remove the Taliban regime. From a third party's point of view, the American efforts in Iraq and NATO's efforts in Afghanistan have largely been unsuccessful:

Coalitions led by the US and the UK have invaded and conquered Iraq ... and the UN has sanctioned, for the first time, the invasion of a member state, Afghanistan, in order to suppress terrorism. Much of the senior leadership of al-Qaeda has been killed or detained. Nearly 3,400 of its fighters are either dead or in prison. Two-thirds of the persons known to intelligence agencies at the outset of this war have been sequestered... Yet at the same time, al-Qaeda has continued to strike; indeed there has been a drumbeat of violence and far from abating since the invasion of Iraq, it has picked up momentum. Since 9/11 al-Qaeda and its network of affiliates have carried out countless attacks ... al-Qaeda 'is a more dangerous enemy today than it has ever been before.'⁴²

Clearly conventional warfare tactics have not brought victory or the end of conflict in either Iraq or Afghanistan. Henry Kissinger refers to the overall US' counteraction since 2001 as ineffective, due mainly to the Bush Administration's inability "to operationalize a response or develop a language to discuss it."⁴³

However, the fact that massive force is not overpowering the enemy may have to do with who the combatants are on each side of this war as well as the nature of the role and the responsibility of those who manage them. A brief comparison of the profile of the combatants themselves will shed light on how the nature of warfare has changed in our most recent decades.

THE 21st CENTURY COMBATANT

The survival of the West depends on Americans reaffirming their Western identity and Westerners accepting their civilization as unique, not universal ... and cooperating to maintain the multicivilizational character of global politics.⁴⁴

We are misguided to ask only, 'Who are the terrorists and why do they hate us?' Rather we should also ask, 'Who are we and how have we organized ourselves such that terror could become an historical inevitability?'⁴⁵

⁴² Bruce Riedel, "al-Qaeda Strikes Back" *Foreign Affairs* 83:3 (2007), Academic OneFile. Gale. University of Ottawa. 17 Oct. 2008 [note that the page number is not available online].

⁴³ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 19.

⁴⁴ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 21-22.

⁴⁵ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 18.

Obviously throughout the world, proportional conflict still continues much like it occurred in the previous century. In this sense, the Israeli-Lebanon conflict or the armed struggles for control of resources throughout the African continent come to mind as not significantly different from how the same or similar conflicts were fought twenty or thirty years ago. Many would argue that, like a rose by any other name, a warrior is still a warrior regardless of the era in which he or she fights. Terrorists have existed as long as professional soldiers have been engaged in AC. Yet, within the context of the asymmetrical ACs ongoing in Iraq and Afghanistan, is there something that characterizes the combatant of each side as distinct from their respective predecessors? Who are the combatants who terrorize and the combatants who attempt to stop them? A close look at the profile of each will reveal features not seen in either type of actor in the last century, and furthermore may prompt the question of whether each can still be called a 'combatant' at all. I will limit this discussion on combatant profile to the characteristics that can be ascribed to those who carry out terrorist activities in the current ACs of Iraq and Afghanistan.⁴⁶

Although the majority of radical terrorist groups operate in complete secrecy, a general sketch of the terrorist hailing from the Middle East can be offered based on information gathered following their violent actions, publicized speeches by senior al-Qaeda (including Bin Laden), testimony from cases before American, British and Canadian legal tribunals, and the analyses from recent databases and research in the West.

⁴⁶ Contemporary research about the psychology of terrorists primarily classifies them into one of three types: non-state (e.g. in support of Palestinian statehood), state (e.g. the 1930s Nazi terror campaign against German Jews) or martyr/suicide (e.g. those who carried out the attacks of 9/11). Although any in-depth discussion about terrorists and what motivates them should include such distinctions, it is not particularly germane enough to the discussion here. See Nicholas Fotion et al, *Terrorism: the New World Disorder* (London: Continuum, 2007) 94-105.

The most common Western characterization of a ‘terrorist’ in general is that he⁴⁷ is crazy and/or criminally insane; however the evidence discounts this. Other common depictions assert that he is poor and uneducated and that is largely false as well. In fact a 2003 study carried out by the Norwegian Institute of International Affairs found that generally terrorists are typically better off financially and more educated than their ethnic contemporaries.⁴⁸ In the case of the suicide terrorist, he does not come from a violent background nor has he likely been personally associated with tragic events.⁴⁹ Although not necessarily a critical thinker in terms of a Western post-secondary education, he does not categorize his enemy’s status as soldier vice innocent civilian (combatant *and* non-combatant); his enemy is merely ‘the enemy,’ and this likely in part explains why the radical Islamic terrorist does not wear any sort of uniform or other fixed military insignia.⁵⁰

The Islamic terrorist believes there is no other cause more noble than the one to which he has pledged his life. He strongly believes that Islam is under threat, mainly from the United States who has stationed more than 20,000 members of its military in the Saudi peninsula since 1990.⁵¹ He sees the United States as wrongly acting unilaterally in the affairs of Muslim states and strongly believes that it should be punished, including all Americans (as it is not just those

⁴⁷ Although men are not the only radical terrorists in the world, they far outnumber women in the case of Islamic terrorists. In the case of Palestinian terrorist organizations, only men have been used for suicide missions until very recently mainly due to cited religious reasons that prohibited women in combat. Nevertheless, for the purposes of this study, ‘he’ will be used to represent the members of terrorist groups in general. A deeper profile analysis would explain the reasons for the gender make-up in the case of al-Qaeda and other similar groups, which the scope of this study does not allow. An excellent starting point is Ariel Merari’s “Social, Organizational and Psychological Factors in Suicide Terrorism,” in Tore Bjørgo (Ed.), *The Root Causes of Terrorism: Myths, Realities and Ways Forward* (London: Routledge, 2005) 75.

⁴⁸ See Jitka Malečková, “Impoverished Terrorists: Stereotype or Reality?” in Tore Bjørgo (Ed.), *The Root Causes of Terrorism: Myths, Realities and Ways Forward*, 40-42.

⁴⁹ Nicholas Fotion et.al. *Terrorism: the New World Disorder* 100.

⁵⁰ Johathan Schonsheck, “Determining Moral Rectitude in Thwarting Suicide Terrorist Attacks: Moral Terra Incognita,” in Stephen Lee’s (ed.), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* 156.

⁵¹ Robert Pape, “The Strategic Logic of Suicide Terrorism,” *The American Political Science Review* 97:3(2003) 349.

in uniform who are guilty).⁵² He sees his enemy as an intruder and justifies his action as the only way to compel the democratic aggressor to withdraw its military forces from Islamic territory. Two thirds of his colleagues originate from Muslim states where the United States has had an obvious military presence for the last few decades.

Deterrence is ineffective at the strategic, operational and tactical levels as he *cannot* be deterred by anything the Western soldier (or the state he or she represents) *can* do. Time is on his side; he is not in a hurry or bound to a fixed term contract by his employer. His immediate and long term outlooks are driven by something infinitely larger and more sacred than anything man-made: his religion. It permeates and drives every aspect of his life including what he chooses and is taught to interpret as Qur'anic justification for his violent act. In the case of suicide terrorism, he is not killing, hurting or immolating himself (as is prohibited by the Qur'an), but rather acting as a soldier who defends his Islamic community with honour.⁵³

He belongs to an army (in the metaphorical sense) whose members believe they are all sanctioned by God, in the form of a global electronically-based network that links tens of thousands of like minded men and women worldwide – indeed in the case of al-Qaeda this vast figure includes only those who have been through the Afghan training camps.⁵⁴ As such, his chain of command is not readily discernable and in some cases he may not have one. Thus he is not held to the standard of a clear cut legal system to regulate his decisions and actions, like those of states or internationally recognized bodies. Since he claims no country as his own, there is no court or prison system awaiting him should he choose not to follow orders.

⁵² Pew Research Center, "Where Terrorism Finds Support in the Muslim World," *The Pew Global Attitudes Project* (Washington: Pew Research Center, 2006). <<http://pewresearch.org/pubs/26/where-terrorism-finds-support-in-the-muslim-world>>. Also, in his video messages Bin Laden commonly directs his comments to "You, the American people".

⁵³ Zayn Kassam, "Can a Muslim Be a Terrorist?" in James Sterba, (ed.) *Terrorism and International Justice* (New York: Oxford University Press, 2003) 115.

⁵⁴ Philip Bobbitt, *Terror and Consent* 244.

In his chosen form of fighting, the Islamic terrorist knows he cannot kill as many of the enemy force as he wants, but is also acutely aware that his tactics, with the world watching, have the potential to disrupt the political culture of his enemy's Western society.⁵⁵ If he is selected for a suicide mission (the most aggressive form of terrorism), he is not driven by religious fanaticism but motivated by political goals, usually to end foreign occupation or domestic domination by a different ethnic group.⁵⁶ His choice of target almost always involves one or more members of a Western democracy. If he is chosen for a suicide mission, he does not want to continue living or return to his former life; he welcomes the death that will come from his intended violence and looks forward to promised rewards in the afterlife to come. In this sense, part of his motivation is eschatological. In this clash of armed cultures, he is seen as a hero by those he represents.

In comparison, the typical Western soldier⁵⁷ fighting in the villages and cities of Iraq and Afghanistan knows no other national structure than representative democracy and most likely wears a military uniform from the United States, Britain or Canada. He or she was likely recruited between the ages of 18 and 25, has a high school diploma but not likely a college or university degree (unless recruited as an officer), and is likely Christian or of a Christian background.⁵⁸

⁵⁵ Philip Bobbitt, *Terror and Consent* 123.

⁵⁶ Tore Bjørgo, *The Root Causes of Terrorism* 25, and Robert Pape, "The Strategic Logic of Suicide Terrorism" 357.

⁵⁷ The generalized account or profile of the typical Western soldier is, admittedly a broad characterization, is based on the personal experience of the author as a Canadian Forces officer who has worked in military operations within Canada and abroad in a variety of settings: in multi-national operations with soldiers from most NATO countries and bi-laterally with US and UK military members (non-commissioned and commissioned officers). As well, some characteristics are referenced where appropriate in this section.

⁵⁸ Again, this is a broad characterization based on information gathered from the following: Jungwee Park, "A Profile of the Canadian Forces" Statistics Canada (July 2008) 18, accessed April 13, 2009 at: <<http://www.statcan.gc.ca/pub/75-001-x/2008107/article/10657-eng.htm#DND2008d>>; James Knowles et.al. "Reinventing Army Recruiting," *Interfaces* 32: 1(2002):78-92; and, Ashton Carter, "Keeping America's Military Edge" *Foreign Affairs* 80:1(2001):90-105.

The Western soldier's military training not only includes basic combat, small weapons handling and survival skills but also includes indoctrination into the military culture, distinct from the larger society that it represents. This includes knowing that civilians, whether of one's own society or the enemy's are not combatants, are to be protected and can normally be distinguished by their non-military clothing. Therefore in Iraq and Afghanistan he is fighting an unrecognizable enemy, something that most of his military training has not prepared him to do. Although he has received very basic cross-cultural instruction before being deployed in-theatre and carries a pocket-size manual outlining the country where he fights (containing an overview of the geographical features, climate, natural dangers, road signs, phonetically-written basic sayings of the local dialect, clan structure, etc.), the culture, food, language and value system there are *completely* foreign.

His military training and indoctrination has also provided him with a knowledge of his chain of command and he intimately knows his place in it; as such, he understands that he will be held accountable within a tightly defined military legal system if he does not follow orders and that his livelihood and continued acceptance within his professional culture depend on adhering to a strict set of regulations, whether in combat or not, at home or abroad.

If he is politically astute and understands the reasons for the current AC (and not all his colleagues do), he believes that his state's interests justify his being put in harm's way and that his intentional killing of the enemy is sanctioned by his state and chain of command. Although the Western soldier does not want to become a casualty (injured or deceased), his goal is to follow orders so he can return home safely after his limited tour (anywhere from 6 months to a year). He is also motivated to kill as many of the enemy *as necessary* in order to continue enjoying the way of life for which he is fighting to protect; in this sense, his motivation is

completely secular regardless of however noble and honourable he believes his actions to be. Thus his motivation for continued fighting is not sacred in the religious or spiritual sense. However it is clouded by the fact that, if he is an American soldier his President declared in 2003 that major combat operations in Iraq were successful and over, and if he is a Canadian soldier fighting in Afghanistan, he is technically not fighting a war as his Prime Minister chooses to refer to it officially as an “Engagement”.⁵⁹

In Iraq, he and his 140,000-strong non-conscripted military force, are also fighting along side 180,000 private military contractors (mostly former members of the American military) whose motivation is solely financial, not patriotic.⁶⁰

What the Western soldier also does not comprehend is why his exceptional training (better than the majority of other militaries in the world) and the massive force of which he is a part (supported by the most advanced military technology ever) has not yet secured an end to the war. In this armed clash of cultures, he is seen as a hero by those he represents.

In sum, while the profile of the Western soldier has not changed significantly over the last several decades, he is facing an enemy unlike any he or his predecessors faced in the 20th century. Generally, the enemy combatants of World Wars I and II, Korea, Vietnam, Cambodia, and the USSR were identifiable, used the same type of weapons and were not willing to be a part of the weapon (except in the case of Kamikaze pilots). In most instances, he could recognize his enemy’s values in whatever armed battle of the wills was taking place. Indeed,

⁵⁹ See the link from the Canadian Prime Minister’s website:

<<http://www.afghanistan.gc.ca/canada-afghanistan/index.aspx?lang=en>>. Of note, Canada is not the only Western military participating in the NATO-led, UN-sanctioned International Security Assistance Force (ISAF), but is one of 40 countries (some NATO and non-NATO members). From a strategic military perspective the 51,000 strong force is substantial, yet in reality there are only four countries (all NATO members) who are providing the *en masse* troop commitments and carrying out the most dangerous and intensive combat missions; Canada is one of them and proportionally has suffered the most battle-related fatalities (see Canada, *Independent Panel on Canada’s Future Role in Afghanistan*, Final Report, (Ottawa: Public Works and Government Services, 2008) 86).

⁶⁰Peter Singer, *Corporate Warriors* (Ithaca, New York: Cornell University, Postscript copyright 2008) 245.

the battles of the last century, those that shaped the mindset of the Western soldier of today, were not cultural ones. Collectively, they represent a model that no longer applies.

Internationally organized, it is estimated that al-Qaeda, in particular, either has or will very soon have access to weapons that terrorist organizations in the past century did not (for example, biotoxins, dirty bombs, and nuclear weapons).⁶¹ Thus, 21st century terrorists are potentially much more lethal. They are ‘virtually’ networked which means they are very inexpensive to manage and operate and allow for recruitment to move beyond the confines of mid-East and north African prisons and jails. It also means they are decentralized, global and borderless, not bound by the established conventions of any state or already existing institutional organization that can limit or pressure its decisions and actions. “They are also better financed than their predecessors, who relied mainly on local crime,” or on specific state sponsors who could unexpectedly limit or withdraw funds.⁶² And because of the rise of the global media (largely due to the internet and pan-global agencies like Al Jazeera, CNN and the BBC) terrorism is now much more theatrical; although several Western journalists were kidnapped by terrorist groups in the late 20th century, the editorial management of any mainstream national news agency would have prohibited the airing of a terrorist beheading. Now, with the reach and capability of the internet, the world can watch in horror and fear, as it happens. Quite simply, the evolution of Western technology, designed and funded largely by

⁶¹ Bobbitt casts this comparison in the following manner: “If someone had said to either Gerry Adams or Yasir Arafat, ‘I can get you a ten-kiloton nuclear weapon,’ one can imagine the reaction. A cautious gasp, a quick turning away – reflecting the apprehension that one has met an agent provocateur. But suppose such an offer were made to bin Laden? He would say, “What will it cost?”” Based on the steadily increasing size of the Western military presence in the mid-East region over the last thirty years, one could imagine that Bin Laden might disregard cost altogether. In fact he admitted in 1998 that he has tried to obtain Weapons of Mass Destruction (WMD). Although possession and intent to use are two different scenarios and depending on many factors surrounding the possessor, given the events of 9/11 it would be folly for Western nation states not to prevent such intention, regardless of whether an individual terrorist is profiled or assessed as being criminally insane. See Philip Bobbitt, *Terror and Consent* 59.

⁶² Philip Bobbitt, *Terror and Consent* 49.

the United States' government, has helped the 21st century terrorist to advance his tactics to a more violent and grotesque level. Most importantly, as Philip Bobbitt concludes, the terrorist is no longer a part of the means, but is an end in himself; the goal of Islamic terrorism (as Bin Laden himself has explained) is the establishment of a worldwide caliphate, one "that is incompatible with a global system of human rights."⁶³ On this point it is reasonable to ask why one should take Bin Laden and others like him at his word. After all, he does not represent a quantifiable body of people that subscribe to any international and regional political organizations such as the United Nations, those same institutions to which hundreds of other politically organized groups of people belong (albeit structured within geographical boundaries). I believe that is part of Bobbitt's overall argument: precisely because certain conditions exist within the world's political and economic climate at this time, that have allowed for, perhaps even cultivated the threat posed by Bin Laden. If a constant state of fear becomes the norm (as it has in many states already), one that Western militaries are unable to stop with 20th century deterrence, armaments and strategy, terrorism may have evolved into a viable, albeit insidious, alternative to world order and democracy: the Market State of Terror.

BOBBITT'S MARKET STATE GLOBAL CONSTRUCT

Philip Bobbitt characterises the market state as follows:

"Give us power and we will maximise your opportunity. What you do with it – that's up to you. We will not assure you equality, and we will not assure you steadily improving security, but the total wealth of the society will be maximised."⁶⁴

Bobbitt sees a new constitutional order of market-states evolving from the Westphalian nation state system that the world has known since the mid-1800s. Where the world order of the last 150 years based nation-state legitimacy on its duty to nurture and provide security for

⁶³ Philip Bobbitt, *Terror and Consent* 62.

⁶⁴ Matthew d'Ancona, "Professor Philip Bobbitt Interviewed on a New Global Constitutional Order" *The Spectator*, May 2006, accessed October 10, 2008 at <http://www.utexas.edu/law/news/2006/052506_spectator.html>

its citizens, all the while moving to improve their material and physical wellbeing, a new constitutional order is taking shape that Bobbitt predicts will “eventually replace the nation state.”⁶⁵ And it is precisely the globalization of markets, due in part to rapid technological advancements that is producing the new world order. He explains the difference succinctly here:⁶⁶

Operating through the nineteenth century imperial state, societies sought to enhance the nation as a whole; in the era of the nation state, societies took responsibilities for the well-being of groups; in the market state, society becomes responsible for increasing opportunities available to individuals. This means lowering the transaction costs of individual choice ... It involves deregulation: the ‘franchising’ of various sorts of provision – from private prisons to private pensions – and the withdrawal of the state from many of those areas where it used to bring some kind of moral pressure to bear ... It means that government is free ... to try and increase the literal and metaphorical purchasing of power of citizens, but not to take for granted anything much in the way of agreement about commons goals or social good ... Government is now heard asking to be judged on its delivery of purchasing power and maximal choice... The market state is classless and indifferent to race, ethnicity, and gender, but it is also heedless of the values of reverence, self-sacrifice, loyalty and family.

Thus, where the 19th and 20th centuries were about the state acting on its fundamental duty to maximize sovereignty and the protection of the rights of the citizen (specifically the Long War of the 20th), the market state is about maximizing choice for the citizen. Where the nation state would criminalize gambling, the market state would adopt it as a revenue-generator. Where the nation state would operate *and own* its postal service, the market state would contract out most, if not all of its services, save its name. Where the nation state would conscript its male youth to fight a war, the market state would raise countless contracts with private corporations for services in an area of operations that were once under the responsibility of the military.⁶⁷ Where the nation state answered to the voter, the market state answers to the consumer. Therefore,

⁶⁵ Philip Bobbitt, *Terror and Consent* 87.

⁶⁶ Philip Bobbitt, *Terror and Consent* 89. Portions of this quote are also from Rowan Williams’ Dimpleby Lecture, 2002.

⁶⁷ This explains why the phrase, ‘the coalition of the willing’ has replaced President Bush’s description the allied effort, ‘the coalition of the willing’ in the wake of the US invasion of Afghanistan.

state legitimacy in the last century was acquired by ensuring the welfare of its populace, whether the state was Communist or democratic.

As the nation state has grown dependent on a variety of global economic relationships and principles of corporate management, it has increasingly transferred more of its traditional nation state roles and responsibilities to the private sector. One can see this change clearly by looking at the main issues in US presidential elections over the last several decades; by tracing the key election issues of post-World War II campaigns to those since the turn of the century, a clear trend emerges. The elections of the 1950s and 1960s focused on human rights issues and individual personal freedom (gender, race, contraception, communism and religion) – issues about which the average voter believed its government should dictate policy. From the 1970s and well into the 1990s, the focus gradually changed from morality to material issues centred on energy, job creation, taxes, US competition in world markets, and free trade agreements with countries despite their appalling human rights records. The issue of health care in the US is an example of this trend; while something as basic as access to affordable medical care was generally provided and overseen by the state, is now almost exclusively managed and driven by market forces. As Bobbitt points out, it is no surprise that domestic terrorists like the Unabomber (Ted Kaczynski) and the 1996 Atlanta Summer Olympics bomber used terror tactics to protest government policy on such issues as technology and the deregulation of women's reproduction (respectively);⁶⁸ by this point in time in American history, these issues had no place in government management and certain segments of the population believed this was a direct betrayal of what they understood the responsibilities of government to be. Other

⁶⁸ Philip Bobbitt, *Terror and Consent* 92.

Western states have followed the government privatization trend, notably the United Kingdom and Canada.⁶⁹

The 21st century market state is fuelled by the world economy. The rates of economic growth translate into global integration, where countries in the 1980s and 1990s had low ranking GDPs are now growing by 4-5% annually as in the case of Brazil and Russia. “As an engine of wealth creation, the market state surpasses all of its predecessors ... [with] the potential to bring a kind of perpetual feast to the developed world,”⁷⁰ a feast of perpetual quality and *quantity* never before experienced, but one that contributes to the creation of two types of market states: the market state of consent and the market state of terror.

THE MARKET STATE OF CONSENT

The emerging market state of consent can be characterized by several features that all point to consumer choice: freedom at the individual level, free markets, rights of conscience, the achievement and recognition of minority and women’s rights, among others. It operates based on the free will of the citizen who can and does say ‘yes’ to government at any level within the state, and conversely ‘no.’ In the market state of consent, it is the citizen who gives legitimacy to the actions of the government, albeit a consumer-based consent. Given the fact that outsourcing and privatization are key features of market state governments, the state begins to bear a remarkable resemblance to a corporation whose government is driven more by market dynamics than social welfare and human rights.⁷¹

Interdependent globalization is one way the market state economy is fuelled. However, the main driver is the consumer found at the individual level, who exercises his or her

⁶⁹ See: William Megginson, “Privatization,” *Foreign Policy* 118(Spring 2000):14-27; William Megginson and Jeffry Netter, “From State to Market: A Survey of Empirical Studies on Privatization,” *Journal of Economic Literature* 39:2(2001):321-389; and Stephen Clarkson, “The Multi-level State: Canada in the Semi-periphery of both Continentalism and Globalization,” *Review of International Political Economy* 8:3(Autumn 2001):501-527.

⁷⁰ Philip Bobbitt, *Terror and Consent* 94.

⁷¹ Philip Bobbitt, *Terror and Consent* 94.

individual freedom directly through personal choice for almost any decision that must be made in daily life: which school; which pension fund; which doctor; who do I want to entertain me; which search engine will I use; etc. Although the consumers of most Western market states of consent see this freedom as derived from their status within a democratic state, the amount and type of choices before their populations (everything from the mundane to the sacred) is now presented by the market and no longer the state. Even the protection of their physical borders, airspace and port security, as well as military is being privatized, as will be discussed in the next chapter.

THE MARKET STATE OF TERROR

Philip Bobbitt notes that we have entered an era where the feast has already been interrupted by the plague of the market state of terror. As the antithesis of the market state of consent, the state of terror seeks to restrict personal choice and freedoms, by not allowing its people to say 'yes' or 'no'. States of terror contrast with states of consent in how they act, but not in how they have evolved, as it is precisely the same conditions that allow for the state of consent to develop that also allow for the state of terror to be created and flourish. In evolving from state terrorism, market state terrorism has grown out of, ironically, the market state system. The Islamist terrorist group of today has grown amidst the system of economic globalization and the relaxed conditions brought about by the gross development of privatization within market states of consent.

Within a global system run on interdependent economies (corporate and state), instantaneous communications platforms such as the internet, and the lack of international government oversight of any kind, the market state of terror does not need the same structure as did its predecessors of state and liberation terrorism such as the Palestine Liberation

Organization (PLO) and the Irish Republican Army (IRA). Groups like al-Qaeda are not required to rely on the support of sovereign states precisely because they are able to operate outside the construct of them.⁷² That is, they are independently financed, and so do not respond to the pressures and influence of any nation state. Like the market state of consent that favours privatization and outsourcing as a way to provide goods and services, the market state of terror often ‘contracts out’ operations to local independent groups who are paid to provide the commodity of terror.⁷³ One example is the failed plot to bomb the Los Angeles Library Tower, where “six months after the 9/11 attacks, al-Qaeda found itself under siege in Afghanistan. Khalid Sheik Mohammed decided to contract out the Los Angeles attack. He turned to a terrorist named Hambali, the leader of an al-Qaeda affiliate in Southeast Asia.”⁷⁴ The point is that it is not a coincidence that words such as outsourcing, affiliate and associate are more corporate in origin and meaning than words that have traditionally been used to describe the organization and operation of state terrorist groups. Indeed, the organizational structure of 20th century terrorist groups like the IRA and the Japanese Red Army were military in nature: very hierarchical with a distinct chain of command. Transnational market states of terror are run as flat organizations, much like credit card companies.⁷⁵ John Sullivan notes that:⁷⁶

These new networked terrorist or criminal adversaries possess standing armies, treasury and revenue sources (even if derived from criminal enterprises), bureaucratic functions, intelligence

⁷² Philip Bobbitt, *Terror and Consent* 45.

⁷³ Philip Bobbitt, *Terror and Consent* 50.

⁷⁴ This example is derived from Pierre Thomas, “al-Qaeda Tried to Outsource L.A. Skyscraper Terror Plot” *ABC News*, Feb. 9, 2006, found at: <<http://abcnews.go.com/wnt/Story?id=1600806&page=1>> and verified by a report from the Center for Strategic and International Studies by Sheldon Simon, “U.S.-Southeast Asia Relations: A WMD Discovery in Malaysia and Counter-Terrorism Concerns in the Rest of Southeast Asia” Apr. 2004 accessed Dec. 15, 2008 at: <http://www.csis.org/media/csis/pubs/0401qus_seasia.pdf> 3-4.

⁷⁵ Bobbitt makes this comparison based on a RAND study (John Arquilla, David Ronfeldt and Michele Zanini, “Networks, Netwar, and Information-Age Terrorism,” in *Countering the New Terrorism*, Santa Monica, CA: RAND, 1999) that notes that networked international terrorist structures are “loosely interconnected, semi-independent cells that have no single commanding hierarchy.” See Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century*, 52.

⁷⁶ John Sullivan, “Terrorism, Crime and Private Armies,” in Robert Bunker, (Ed.) *Networks, Terrorism and Global Insurgency*, (New York: Routledge, 2005) 70.

services and welfare apparatuses, and the ability to make alliances (with state and non-state entities) ... RAND analysts John Arquilla and David Ronfeldt identified this trend where technological and organizational changes that benefit relatively small actors fuel asymmetric threats. They succinctly noted that networks can prevail over hierarchies in this emerging post-modern battle or operational space: 'Power is migrating to small non-state actors who can organize into sprawling networks more readily than can traditionally hierarchical state actors.'

Furthermore, because we still cling to the 20th century idea of only nation states having the legitimacy and ability to declare and carry out war, we underestimate the ability, power and goals of non-state entities when they do declare war as al-Qaeda did well before 2001. Thus, the enemies that posed threats to the Western nations in the last century have changed in their structure, scope and ability.

For example, because promotion of the individual ideology of each separate mid-East terrorist group is no longer the goal, groups can share resources; transcripts of interviews with terrorists indicate that it no longer matters which extremist or separate groups one belong to at the local level.⁷⁷ But their common denominator is extreme fear of the West, which translates into hostility for Western targets. An umbrella organization like al-Qaeda (much like a mother company), allows for smaller terrorist groups (or subsidiaries), regardless of their local cause, to contribute to the transnational terrorist agenda. In economic parlance, the consumer base is growing for the market state of terror which says: "Give us power and we will increase your opportunities... and this can only be done if you allow us to protect you with methods and practices that are not subject to [your] consent."⁷⁸

Finally, the market state of terror is growing in power and influence because it is fuelled by the same forces that drive the market state of consent: competition, information technology, decentralization and lack of oversight and regulation. The events of 9/11 are symbolic on many

⁷⁷ Corine Hegland, "Global Jihad," *National Journal* 36(2004):1399.

⁷⁸ Philip Bobbitt, *Terror and Consent* 183.

levels, and not just for the number of innocent people who were killed on that day,⁷⁹ but unfortunately what many in the West seem to miss is that they meant the world had officially entered a new era of terrorism:

Bin Laden attacked the very basis for the society of national states – its national orientation – and attacked, too, the principal institutions of that society, the United Nations and other nation state international organizations, and the systems of representative democracy of the nation state that had triumphed in the twentieth century. His own account of the moral responsibilities of the democracies recapitulates the market state assault on the legitimacy of nation states.⁸⁰

No one terrorist or terrorist organization had ever accomplished such an attack before. As Arquilla, Ronfeldt and Zanini noted before the events of 9/11, “psychological disruption may become as important a goal as physical destruction.”⁸¹ The nature of the terrorism, as an adversary, has evolved due mainly to rapid technological advancement; thus the type of threats posed by terrorist organizations and the methods they use to cause conflict has also evolved.

Thus, while the market state of consent had surpassed the nation state, and what it defined and represented, so too has market state terrorism surpassed its predecessors; it no longer focuses on national or regional revolution or policy reform, but seeks an entrenched global and collective presence, ironically, in reaction to the conditions that allowed it to grow beyond its predecessors.

THE NEED TO RE-DEFINE VICTORY

But it is still more deplorable to see that those remaining princes are so far from taking warning from the downfall of others, that they pursue the same course and live in the same sort of misrule and fatal security.⁸²

I know we're killing a lot, capturing a lot, collecting arms ...we just don't know yet whether that is the same as winning. – Former US Secretary of Defence, Donald Rumsfeld, 2003⁸³

⁷⁹ The severity of the attacks cost almost 3000 lives on September 11, 2001. And while that number is indisputably the result of an unjust and morally reprehensible terrorist attack, it should be kept in perspective. Indeed, today an American is more likely to die from food-induced anaphylaxis or an obesity-related health condition than a terrorist attack. See Philip Bobbitt, *Terror and Consent* 7.

⁸⁰ Philip Bobbitt, *Terror and Consent* 80.

⁸¹ John Arquilla et al, *Countering the New Terrorism* 46.

⁸² Niccolò Machiavelli, *The Art of War* (New York: De Capo Press, 1965) 211.

⁸³ Philip Bobbitt, *Terror and Consent* 235.

A media and academic debate on a massive scale ensued following the events of 9/11, and still continues: the issue of what constituted an appropriate and effective response from the United States. In fact, the idea of a ‘global war on terrorism’ goes to the very heart of what may actually constitute warfare in the twenty-first century. But regardless of whether such a characterization is merely political rhetoric or reflects a serious and credible security threat not witnessed in the 20th century, the West’s definition of victory will have to change.

In the last century, war victory was determined by the war aim. Because the legitimacy of the nation state, in fact its very purpose was to ensure the safety and material well being of its population, wars were fought over the goal of the continued security of the nation state. With the market state construct, states of consent look to continued provision of choice to the consumer – thus, when that choice is compromised and the legitimacy of that system is overtly challenged by the market state of terror, AC takes on a new form. Unfortunately the methods of engaging 21st century conflict by a market state of consent still reflect the 20th century conventional paradigm. Thus, the war aim of the US invasions of Afghanistan and Iraq have more to do with ‘overcoming’ and ‘overpowering’ the enemy with a massive military force than overtly deposing the enemy’s legitimacy. The result, unfortunately in these two particular instances, has been a dramatic show of military might, which serves more to reinforce the legitimacy of the market state of terror to its consumer base – those who would support the future world Islamic caliphate, those who believe *en masse* that the West is all too powerful, already.

The question is, then, if the market state of terror cannot be defeated with massive military might, how *can* it? How *should* victory be defined now? What is the West’s war aim? It appears that the goal of overcoming the enemy is not going to be achieved anytime soon in

either Iraq or Afghanistan, again despite President Bush's 2003 claim that combat operations were completed; coalition soldiers and Iraqis are still waiting for the *post bellum* phase to commence.

In the market state construct, Bobbitt describes the only possible victory for either side as one of preclusion, by not allowing a certain state of affairs from being created and becoming the predominant one.⁸⁴ For the West to win the US-declared 'war on global terror' it must preclude terror from manifestation, specifically by protecting innocent people on both sides. For the international terrorist organization, it must continue to prevent individual determination and choice from disseminating within the societies it seeks to control however those societies define themselves. Perhaps, then, 21st century victories will be measured against how much fear is prevented from deliberate insertion into market state societies. And this is very different from the victory that most understand today. This is a type of victory not declared in news conferences to the cameras of imbedded media, nor parades that celebrate troop repatriations. Indeed, it is the very fact the soldier steps off the plane in his country, post-combat, that will define part of that ongoing victory. Victory of this sort will not be defined by a singular moment such as VE-Day in 1945, but by intentionally and continually making the world safer for both sides. In the case of the 2001 invasion of Afghanistan, Bobbitt asks if we are better off, safer now than the day we intervened:

Probably not. Before that war we knew where al-Qaeda had its bases. It had not struck since September 11, 2001. A number of American and allied soldiers who became casualties were then alive and unwounded. Public opinion in Pakistan was less hostile to America...There is, however a more relevant question: Are we – the states of consent, including the US and the UK – better off today than we would have been if we had let the Taliban continue arming and sheltering our al-Qaeda enemies ... we, and the Afghan people, are vastly better off for our having acted.⁸⁵

⁸⁴ Philip Bobbitt, *Terror and Consent* 198-203.

⁸⁵ Philip Bobbitt, *Terror and Consent* 208.

Bobbitt concludes that if we (ever) lose the ability to protect civilians (those of states of consent *and* states of terror) then we should declare defeat. Thus, for states of consent, victory amounts to being able to continue. Victory means safely escorting an unwanted aircraft out of one's airspace and the continual safeguarding of critical infrastructure, like banking, computer security systems and energy installations. It means safer civilian travel. And as discussed more in the following chapter, the tactics of obtaining this kind of victory will have more to do with pre-emption, prevention and stopping terrorist attacks before they happen, than swift retaliation, military battles and overpowerment.

With the evolution of the market state and its affect on the nation state and 20th century terrorism, I will now turn to Just War Theory. It also seems to be facing a point of transformation in its development.

CHAPTER 2: CONVENTIONAL JUST WAR THEORY AND THE CHALLENGES OF ITS APPLICATION TO 21st CENTURY WARFARE

“Some political theories die and go to heaven; some, I hope, die and go to hell. But some have a long life in this world, a history most often of service to the powers-that-be...”

– Michael Walzer, 2002.⁸⁶

There are few human endeavours that stir as much passion among people as organized violence; “war kills and that is why the argument about war is so intense.”⁸⁷ And regardless of the causes, methods, and outcome of any armed conflict, arguably no other human activity raises as many questions concerning morality. In attempting to respond to these questions, JWT, as a meta-theory, has probably had the most impact throughout history on serious debates about armed conflict; it has proven to have a long life as Michael Walzer points out, and continues to do so.

As a political theory that seeks critical justification for the issues that surround warfare, in terms of moral boundaries and ethical understanding, I will present two important aspects of JWT. First, I will explore the point JWT has reached in its development as a political theory. What are contemporary Just War theorists saying about this theory at this point in its development? Second, stemming from these observations, I will determine how valid it is in light of 21st century conflict, specifically in the face of terrorism. I will begin with a brief overview of the JWT most often discussed in the last several decades and its principles.

Before beginning this discussion however, it is necessary to point out that a comprehensive discussion of the current challenges to JWT, particularly in light of the evolution of terrorism in the last quarter century, should also include a discussion of the challenges facing international law. Since much of the body of international law is based on

⁸⁶ Michael Walzer, *Arguing About War* 3.

⁸⁷ Michael Walzer, *Arguing About War* ix.

traditional JWT, many of the challenges and calls for JWT reform or revision, are ‘prima facie’ applicable to the laws governing state to state relations.

CONVENTIONAL JUST WAR THEORY AND ITS PRINCIPLES

Judging from the number of times Michael Walzer was cited by Just War scholars during the research and literature review carried out for this study, it would appear that he is the most often cited Just War theorist, given the scope of his work in this area of moral philosophy. He describes JWT as primarily a two-pronged argument about the moral standing of armed conflict as one type of human activity. First, it can be justly and coherently argued that regardless of how horrific and deadly war can be, it is *sometimes* a justifiable and moral activity. Second, as a human activity that is likely to continue, warfare must *always* be subject to moral criticism precisely because of the extent and type of harm it inflicts.⁸⁸ Although not the only ethic of war, Walzer classifies JWT critics into two main camps: those who argue that war is always wrong because the nature of its intent and method is criminal (pacifists) and those who claim that applying moral criticism to any aspect of armed conflict is futile since throughout history wars have repeatedly exemplified the Latin axiom: *inter arma silent leges* (‘laws are silent in the time of war’) (realists).⁸⁹

One of JWT’s strengths is that it has given us a formal construct in which to talk intelligently and objectively about war. In other words, that regardless of one’s language, history or political system, JWT provides a platform, based on a fairly straightforward paradigm to speak clearly about a subject that is often extremely disturbing in its details, or at the other end of the spectrum, a subject that is often portrayed in such pragmatic and unfeeling

⁸⁸ Michael Walzer, *Arguing About War*, ix.

⁸⁹ Michael Walzer, *Arguing About War*, ix. The other two main ethics of war are militarism based on the presupposition that going to war is a right of states, and idealism which denies such a right and looks directly to a third-party peacekeeper of sorts. Walzer summarizes militarism and idealism in this book. For a more in-depth study, look to Anthony Coates, *The Ethics of War* (New York: Manchester University Press, 1997), particularly Part I where he discusses realism, militarism, pacifism and JWT.

text that the magnitude of its barbarism and consequences is lost. Thus, the goal of JWT is to provide a balanced, ethical framework in which to debate the one area of human behaviour that has influenced humanity's development like no other.

The application of JWT is based on the theory's three principles, most often identified by their Latin labels: '*jus ad bellum*' which speaks of the just causes of going to war; '*jus in bello*' which refers to the justness of how war is conducted; and '*jus post bellum*' which concerns the justness of activity following the end of conflict.⁹⁰ As will be discussed later, these designations and their phases are not always as clear cut as their definitions suggest. Regardless, the goal of the combined parts of the theory is to limit the incidence of violence and provide moral constraints surrounding the conduct of it.⁹¹ For the sake of clarity however, each main principle is briefly explained here.

As a theory that seeks to limit armed conflict, the first step in its applications is to look to the causes of the conflict at hand and assess the apparent conditions leading to conflict. Specifically, the principle of *jus ad bellum* notes that a state may instigate a war only for certain reasons including: self-defence from outside attack; the defence of others from the same; the protection of states or groups of people from other brutal states or groups; and finally (and often most contested by JWT opponents) to punish for an uncorrected wrongdoing. These causes are often collectively described as the just 'resistance to aggression,' where aggression (as an international act) is defined as the use of serious, direct physical force (usually armed force) in violation of a group's basic rights.⁹² Therefore, aggression can be directed toward a nation state, or a group of people either within or outside one. This principle, then, states that

⁹⁰ For a general discussion of the essential elements of JWT, see: Paul Christopher, *The Ethics of War & Peace* 81-98; Nicholas Fotion, *War and Ethics* Chapter 2; and Michael Walzer, *Just and Unjust*.

⁹¹ William Murnion, "A Postmodern View of Just War," in Steven Lee's (Ed.), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, 29.

⁹² Brian Orend, *The Morality of War* 32-33.

any aggressor has forfeited its right to self-defence once it commences armed conflict. But how does this principle account for a state acting against a would-be aggressor, such as in the case where a state's intelligence organization uncovers a plot by a terrorist group to attack the state and proposes a pre-emptive strike to counter the aggression before it occurs? For example, are there some instances where it would be permissible and accounted for by the *jus ad bellum* principle to prevent forcefully certain types of aggression, constituting armed and direct action against a potential aggressor who has not yet committed the anticipated aggression? Many Just War theorists have argued against any kind of pre-emptive aggression discounting the utilitarian grounds often cited in support of pre-emptive action. Walzer, too, is not enthusiastic about pre-emption but notes that given certain conditions it can be warranted.⁹³ He offers three conditions in particular: "a manifest intent to injure; a degree of active preparation that makes that intent a positive danger; and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."⁹⁴ It is important to note however, that when Walzer articulated these conditions, the distinction of pre-emption and preventive was clear. As he wrote in the first edition of *Just and Unjust Wars* in 1997, "preventive war looks to the past and future ...while the idea of being under a threat focuses on what we had best call simply *the present*."⁹⁵ But as we have witnessed in recent years, the conditions of certain types of armed conflict have considerably shortened the time span that Walzer refers to in the case of a preventive war. The distinction between preventive and pre-emptive conflict will be discussed later in this chapter.

Aside from just cause, five other criteria must be met for the principle of *jus ad bellum* to be met: right intention (a state must go to war only for the stated just reason and not another

⁹³ Brian Orend, *The Morality of War* 75.

⁹⁴ Michael Walzer, *Just and Unjust Wars* 81.

⁹⁵ Michael Walzer, *Just and Unjust Wars* 81.

undeclared motive such as obtaining future access to the aggressor's natural resources); proper authority and public declaration (the declaration of war must be publicly stated and made by the appropriate state authority); last resort (all other avenues for peaceful resolution have been exhausted); probable success (a state must not go to war and engage its citizens in the armed conflict if it has no chance of winning the war); and proportionality (any state proposing to start a war must weigh the overall goods expected at the end of the conflict with the casualties that will be incurred).

Like principles that govern the ethical conduct of practitioners in such fields as medicine, law and journalism, the second principle of JWT, *jus in bello* concerns the criteria that guide the behaviour and actions of those who participate in the armed conflict. In fact, most Western militaries impose a list, or code of ethical conduct on and off the battlefield. Although off-battle codes tend to be general in their approach (e.g. "respect the dignity of all persons"⁹⁶), the set of rules concerning the behaviour on the battlefield should be detailed and specific. To the soldier, these are commonly known as rules of engagement and as the traditional or external *jus in bello* criteria they include: proportionality (limiting force at the tactical, operational and strategic levels to what is absolutely necessary) and discrimination between legitimate (enemy combatants) and non-legitimate targets (children, religious leaders, innocent civilians, etc.). Of course strict definitions of non-legitimate targets as well as appropriate force, particularly at the strategic level, are challenging at the best of times and perhaps even more so in the 21st century. This will also be further discussed. A further category of criteria for this principle, that of internal *jus in bello*, can be included. It refers to those rules that apply to the state which require it to respect the human rights of those under its

⁹⁶ See, for example: Canada, Department of National Defence, *Defence Statement of Ethics* (Ottawa: DND, 2004) accessed October 20, 2008 at: <http://www.forces.gc.ca/ethics/expectations/statement_e.asp>

protection and responsibility.⁹⁷ Some of these would be rules related to conscription, avoiding press censorship, ensuring due process of established federal law, etc.

A third principle of JWT and a relatively conventional one is *just post bellum* or those conditions required to oversee the legitimacy of the victor and ensure just closure for those affected by the war (on both sides). Walzer notes that it is precisely the challenges to modern JWT that point to the need for more theoretical and practical work related directly to the issues of peacemaking, occupation, reparations for victims and reconstruction following the end of the conflict phase.⁹⁸ This principle holds that civilians, regardless of whether they reside on the losing or winning side, are entitled to certain rights following the conflict that compromised their safety and security in the first place; for instance, post-conflict economic sanctions would require limitations and ongoing monitored oversight to avoid punishing innocent civilians even further. Walzer sees this principle as the one needing the most critical attention in the expansion of the overall theory and one that I shall return to later.

THE STRENGTHS OF JUST WAR THEORY

Given the defining characteristics of JWT, why does it have staying power as a political theory? What are its relative strengths, those that explain why it continues to serve political decision makers and statesmen? Indeed, opponents of JWT are quick to call attention to an apparent incongruity within the theory itself when they ask how a theory that seeks to limit armed conflict can justify, with moral reasoning, the violence that the conflict produces.⁹⁹ Yet, despite its critics, JWT remains as the primary moral force underlying most contemporary

⁹⁷ Brian Orend, *The Morality of War* 126-136.

⁹⁸ Michael Walzer, *Arguing About War* xiii and 18-22.

⁹⁹ Pacifism theorists hinge much of their theoretical arguments on this very point. See Anthony Coates, *The Ethics of War*, Chapter 3.

guidelines of warfare, from international agreements to tactical rules of engagement.¹⁰⁰ The very fact that wars still occur between states and armed conflict continues among groups of people does not call into question the value of JWT in directing, to a noticeable extent, how the conflict is carried out, and setting a standard of combatant responsibility and obligation. That the standard is not always reached does not necessarily reflect the strength or weakness of JWT itself, but rather the moral failing of those operating within the scope of its influence.

JWT proponents frequently describe it as a ‘plastic’ theory, due to its apparent flexibility and ability to adapt developmentally as its object does. As Steven Lee remarks:

From the time that JWT was systematically formulated in the Middle Ages, there have been a series of revolutions in the nature of warfare. Through these, the theory has proved surprisingly flexible; it has survived and retained its practical relevance, though not without modifications.¹⁰¹

In fact, it is precisely because of its design that it is flexible and able to adapt to evolutions within the practice of warfare.¹⁰² In trying to defend any war at any time in history, JWT imposes the requirement for the burden of proof, particularly at the *jus ad bellum* stage. Take the very recent example of the United States invasion of Iraq, publicly declared in March, 2003, the justification of which was “to disarm Iraq of weapons of mass destruction” (WMD).¹⁰³ Even though the invasion involved some 300,000 coalition troops (80% of which were American), no evidence of WMD has been found in the six years since the initial invasion phase took place. And despite President Bush’s decision to go to war (by invading Iraq), a decision clearly couched in JWT language, his administration was faced with repeated public

¹⁰⁰ See: Brian Orend, *The Morality of War* 9-10; Michael Walzer, *Arguing About War*, 3-22; and William Murnion, “A Postmodern View of Just War” 23.

¹⁰¹ Steven Lee, *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* 5.

¹⁰² William Murnion, “A Postmodern View of Just War” 23.

¹⁰³ George W. Bush, “President Discusses Beginning of Operation Iraqi Freedom,” Radio Address (Washington: United States Government, 2003). Accessed Oct. 21, 2008:

< <http://www.whitehouse.gov/news/releases/2003/03/20030322.html> >

challenges to justify the moral value of this particular grounds for war.¹⁰⁴ In fact, on this point Nicholas Fotion asserts that the technological power and influence of media have served to strengthen JWT in recent years;¹⁰⁵ due to mass media's ability to see and report on most things almost instantaneously, JWT has become more relevant today than even a few generations ago.

Another way to look at this issue is that JWT's burden of proof is a fixed test within the theory's design, particularly when used by a democratic state.¹⁰⁶

These tests are the business of citizens as well as government officials since citizens are meant to be the conscience of the nation. 'Democracy is a way of distributing responsibility just as a way a monarchy is a way of refusing to distribute it.' Citizens who avoid this responsibility invite tyranny ... and have no reason to complain when their leaders bungle them into senseless wars.

In this instance, the Bush Administration's requirement for the burden of proof in accounting for its decisions and actions was not met, a testament to the merit of this test and the result of not passing it.

Another strength of JWT is that the theoretical goal of pacifism is also built into its design: the goal of just peace. Thus, JWT imposes the standard that the harm of innocents must be condemned and avoided. Because no society, regardless of its political structure, religion, history or appreciation of inherent basic human rights, is devoid of innocent people, "the morality with which [JWT] works is deemed to be applicable to all human societies and situations."¹⁰⁷ JWT takes into account the innocents of *both* sides and thus, has a universal approach.

¹⁰⁴ See the Centre for Public Integrity, the US-based independent research organization that carries out independent investigative journalism about significant public issues with the aim of making institutional power more transparent and accountable. On this particular issue, the Centre compiled and examined over 935 public statements about this threat by senior members of the Bush Administration concluding that these statements were part of an orchestrated campaign that effectively galvanized public opinion and, in the process, led the nation to war under decidedly false pretences. The Centre for Public Integrity, "Iraq – the Wild Card" (Washington: Centre for Public Integrity, 2008) accessed Oct. 23, 2008 < <http://projects.publicintegrity.org/WarCard/> >

¹⁰⁵ Nicholas Fotion, *War and Ethics* 158.

¹⁰⁶ Daniel Maguire, *The Horrors We Bless* (Minneapolis: Fortress Press, 2007) 26.

¹⁰⁷ Mark Evans, *Just War Theory – A Reappraisal* (Edinburgh: Edinburgh University Press, 2005) 8.

Walzer also points out that JWT is a successful applied theory: “moral theory has been incorporated into war-making as a real constraint on when and how wars are fought.”¹⁰⁸ For example, the idea of minimizing conflict while achieving the goal of a stable end state is incorporated in the NATO operational planning doctrine, at the strategic, operational and tactical levels, as laid out in its doctrine policy on civil-military cooperation.¹⁰⁹

NATO operations are required to take account of social, political, cultural, religious, economic, environmental, and humanitarian factors when planning and conducting military operations. Further, NATO commanders must take into account the presence of increasingly large numbers of international and non-governmental civilian organisations. These demanding circumstances may be further complicated by differences in culture and mandate between the military and civilian organisations concerned. Forging an effective relationship between the military and all civilian authorities, organisations, agencies and populations within the JOA [joint operations area] will help maximise the non-military contribution in achieving a stable environment while minimizing conflict.

Although written in pragmatic terms that suggest a utilitarian approach, the fact that humanitarian concerns are incorporated into a planning document reflects an overall ethic of concern for civilians and non-military aid agencies. Just War Theorist Paul Christopher offers another example stressing that the militaries of the US, UK and their allies deliberately took care to protect non-combatants as well as national monuments in the 2003 Iraqi war, a “conscious, dedicated effort to adhere to the Just War Tradition in the conduct of hostilities.”¹¹⁰

Walzer notes that the theory has evolved to the point where it has been taken over “by the generals and is being used to explain and justify [military] actions,” from when it was used primarily in the last half of the 20th century, as a forum for criticizing military action.¹¹¹ This is quite a shift in a short amount of time that reflects a change in the Western military mindset that is by no means pacifist, but is less realist in its thinking.

¹⁰⁸ Michael Walzer, *Arguing About War* 12.

¹⁰⁹ NATO International Military Staff, *NATO Military Policy on Civil-Military Cooperation*, MC 411/1 (Brussels: North Atlantic Treaty Organization, 2002) paragraph 2.8.

¹¹⁰ Paul Christopher, *The Ethics of War and Peace* 2.

¹¹¹ Michael Walzer, *Arguing About War* 13.

Finally, JWT theory, in addition to being universal, is also objective – at least it should be in its application. “A war is not just because the just warriors say it is, but because justice is objectively and independently on their side.”¹¹² Indeed, justice is not only reserved for the victorious or the side that can declare ‘victory’ the loudest. Because JWT traditionally accounts for the moral rightness *and* wrongness of what it assesses, the possibility of equating a just war with a losing cause is very real.

THE VALIDITY OF CONVENTIONAL JUST WAR THEORY

Walzer claims that “there are now reasons of state for fighting justly,” due to the triumph of JWT and its staying power.¹¹³ Despite that success however, he also offers a warning to the theory’s advocates in that we should not lapse into confusing the function of it (making necessary wars morally accountable) with allowing JWT to soften the critical mind because it has been put on a pedestal. JWT cannot be allowed to rest on its laurels, which helps to explain the point at which we presently find ourselves: a juncture in the JWT tradition.

Other JWT advocates¹¹⁴ are also calling for revisions and updates to the theory’s structure, criteria and application, suggesting that particular aspects of JWT need to adapt in order to take account of the ways in which recent conflicts are carried out, in particular (but not only) the United States’ invasions of Afghanistan and Iraq. Such calls may merely be a collection of ‘expected’ reactions following the latest revolution in military affairs, much like

¹¹² Mark Evans, *Just War Theory – A Reappraisal* 8.

¹¹³ Michael Walzer, *Arguing About War* 9.

¹¹⁴ See James Pattison, “Just War Theory and the Privatization of Military Force,” *Ethics and International Affairs* (22:1): 143-162; Amy Eckert, “Ethical Norms and the Public/Private Divide: Private Military Companies and Just War Theory,” *Paper presented at the annual meeting of the International Studies Association 49th Annual Convention: Bridging Multiple Divides*, (San Francisco, CA, March 26, 2008), accessed November 25, 2008 at: <http://www.allacademic.com/meta/p251963_index.html>; Stephen Nathanson, “Terrorism and the Ethics of War,” in Stephen Lee (Ed.) *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory*, AMINTAPHIL: The Philosophical Foundations of Law and Justice Series, (Vol. 1.: Springer, 2007) 182; Stephen Lee, “Just War Theory and the Challenges it Faces,” in Stephen Lee (Ed.) *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory*, 3-19; Mark Evans, *Just War Theory*; Nicholas Fotion, *War &*. These references form the basis of the recent scholarly collection of a variety calls for modernization of JWT.

the Just War thinking that developed following the conflicts of the ancient Roman Empire (by Cicero, Augustine and eventually Aquinas) or the later JWT tradition that moulded itself into the corpus of international law following the Thirty Years' War. Or perhaps the latest challenges to JWT are valid in their own right in response to significant and tangible changes in the nature of warfare. What follows then, is an exploration of some of the major criticisms of the contemporary effectiveness of JWT, presented according to the theory's main principles.

CHALLENGES TO *JUS AD BELLUM*

What counts as 'war' in the tradition of JWT? As explained in Chapter 1, the conventional wars that played out in the last century are no longer the primary focus of the militaries of the world's major political and economic powers. Most Western militaries no longer continue to train and equip their forces solely for a large scale conventional war fought with contingents of infantry and armoured brigades. Most no longer strategize for a World War II or even regional small-scale scenarios between similar nation states, but design exercises for scenarios that include responding to natural disasters (severe earthquakes, ice storms and viral plagues), dirty bomb detonations in urban centres, and humanitarian assistance in peace-support operations. In fact, they are 'shifting gears on the fly' so to speak in an effort to counter an enemy who does not recognize any civilized rules of warfare, particularly the criteria of *jus ad bellum*. How then can *jus ad bellum* be applied? Although President Bush declared a 'war on terror' nine days after the al-Qaeda attacks penetrated American soil during his public declaration of the United States' intention to invade Afghanistan, the phrase has been used many times over the last century, mostly in a rhetorical sense.¹¹⁵ But what President Bush actually stated is worth a closer look since it was not just mere rhetoric: "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of

¹¹⁵ Mark Evans, *Just War Theory – A Reappraisal* 204.

global reach has been found, stopped and defeated.”¹¹⁶ If one were to attempt to justify the actions of any terrorist, particularly the events deliberately caused on September 11, 2001, it would be a futile, deluded exercise as terrorism fails to meet every criteria of *jus ad bellum*. And although applying Bush’s declaration of war to the same criteria has yielded debatable results (indeed the debate about the moral validity of the US invasion of Afghanistan continues and likely will for some time), this is not the point I want to stress here. Rather, Bush’s declaration of war is open-ended and *indefinite*, directed to an enemy comprised of people who declare no nation state their own, and who do not adhere to the modern conventions of international state conflict (or intra-national for that matter). It would seem that the question is not how long the United States can use its military to participate in the armed conflicts in Afghanistan and Iraq. Nor is it how much the United States is willing to sacrifice financially and more importantly in human lives. Rather, from the JWT perspective, one should ask if an indefinite campaign of armed conflict can be justified on the basis of self-defence given the events of 9/11. Michael Ignatieff writes that his “political sense of this is that the longer the war goes on, the more threadbare the *jus ad bellum* criterion will become ...so there is a window of legitimacy in the prosecution of this war that may disappear as the conflict continues.”¹¹⁷ Thus, within a JWT framework, it is reasonable to question whether a justified war can be declared on this kind of enemy.

Looking at this from another angle, JWT applies very neatly within the Westphalian world structure of relatively equal nation states who govern themselves under the umbrella of the international rule of law. Al-Qaeda, as it has materialized over the last few decades, does

¹¹⁶ George W. Bush, *Address to a Joint Session of Congress and the American People* (Washington: United States Government, 2001). Accessed Oct. 21, 2008: < <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> >

¹¹⁷ Michael Ignatieff, “Ethics and the New War” *Canadian Military Journal* 2:4 (Winter 2001-2002) 6.

not fit within this paradigm. Its very existence and the type of terrorist activities for which it has claimed responsibility have been characterized as the ‘perfect terrorism’: perfect in that given its likelihood of acquiring WMD, even the world’s sole powerbase¹¹⁸ *must* respond in some capacity to its threat of ongoing clear and present danger, and perfect in that it did what no nation state could or would risk, that of attacking the Western sole superpower and expect to survive.¹¹⁹ In probing this idea deeper, ‘perfect terrorism’ poses a direct threat to the *legitimacy* of the Western superpower; it demands and requires a response, but perhaps not the typical or traditional response one would expect within the JWT construct of armed conflict that the theory is designed to address. Nation-state response in a battle-waged scenario requires the use of its military -- the state’s strong arm. But how effective can that response be when faced with the enemy of ‘perfect terrorism’? The answer to this question may explain why Coalition militaries are still fighting in Afghanistan and Iraq, and why the United States alone has experienced over 4,700 fatalities.¹²⁰ Perhaps the response must take another form as Philip Bobbitt suggests, an effort comprised of methods that have one ultimate goal of stopping terrorism before it occurs. Specifically such methods include maximum safeguards for the nation state’s critical infrastructure and borders, the safest possible air, sea and land travel for its citizens and visitors, and the like. But more importantly, as Huntington points out,¹²¹ the United States, along with its closest economic allies, fundamentally needs to reassess its role in

¹¹⁸ As explained in the previous chapter, this can be defined as the interdependent political and economic alliance of the principal Western states, namely the United States, Britain, France, Germany and Japan. Military might, provided mainly by the United States, is also a factor that contributes to its influence and power.

¹¹⁹ Eugene Dais, “Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense,” in Steven Lee (Ed.), *Intervention, Terrorism, and Torture* 106. Although my personal preference is to avoid describing 21st century terrorism as ‘perfect’, I believe Dais does not use the term in a positive complimentary manner, but rather ‘perfect’ in the sense of the target’s inability and moral unwillingness to counter in the same way, where terrorism (like that of al Qaeda) appears on the face of it to limit the target with few if any effective options for response.

¹²⁰ Washington Post, “*Faces of the Fallen*,” Washington Post Online, accessed Oct. 28, 2008 at:

< <http://projects.washingtonpost.com/fallen/> >

¹²¹ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 21-22.

the world (as it has done in the past), and accept that its value and political systems are unique but not so unique that they are superior to all others and therefore inevitably appeal to the rest of the world. Furthermore, although the US sees itself as the moral authority for the world, a significant portion of the world has the right not to accept the United States' self-declared moral authority. And the actions of the West, particularly the United States, must serve to reinforce that understanding. However the challenge for JWT theory in this regard, is that such an overall response includes (for the most part)¹²² decidedly non-military tools and in fact, may not require armed conflict at all.

Therefore, how can JWT account for this type of enemy, or in this case, for the West's 'global war on terror'? Certainly states, even those who qualify as a nation state of consent (within Bobbitt's nation state configuration), have the duty and responsibility to protect its citizens from external threats. The majority of contemporary Just War theorists adhere to Hugo Grotius' six accepted conditions that must be present to justify a nation going to war, falling within the categories of self-defence or the defence of another state.¹²³ Yet as one JWT theorist claims, "the rule that only self-defensive wars are just ... leaves the SWS [sole world's superpower] without an effective defence for the resolution of its double legitimacy dilemma."¹²⁴ This dilemma being that if the US responds positively to al-Qaeda's demands and

¹²² Some would argue that preventive or preemption measures of fighting terrorism must include nation-state supported assassination. Two Israeli philosophers have developed an extension to the JWT paradigm that justifies, based on carefully defined scaled criteria, when this type of military operation ("Military Preventive Activity") should be imposed: "An act of targeted prevention of terror that involves killing a person who operates in a vicinity not under the effective control of the state is morally justified as a preventive act of military necessity, when there is no other way of defending citizens against an act of terror that is being performed by that person or with his or her crucial participation, without jeopardizing the life of some citizens, including combatants ... However, when there is no effective way to capture the terrorist in time, killing him is morally justified as a military act of self-defense and as a last resort." See Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4 (2005) 18.

¹²³ See Paul Christopher, *The Ethics of War and Peace* 82, and Nicholas Fotion, *War & Ethics* 12-14.

¹²⁴ Eugene Dais, "Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense" 112. Although Dais refers to the *jus ad bellum* condition of self-defence as a 'rule', the term 'rule' is misleading. Most contemporary Just War Theorists describe Grotius' six criteria as just that – conditions, criteria, even principles.

withdraws its military presence from the Middle East entirely, or even significantly, its legitimacy in the eyes of its own people and its allies would be compromised. Indeed, over half of the world's oil reserves would then be controlled by nation state governments in that region, most of whom support the terrorists' cause to a variable extent. The other side of this legitimacy dilemma concerns the actual response of the West, its war on terror. The massive military assault continues to take place in two states that posed, it seems, no direct armed threat against the West as a whole. Indisputably, the totalitarian regimes of Saddam Hussein's Iraq and Taliban-controlled Afghanistan were morally reprehensible and criminal by international legal standards. Yet JWT does not account for the invasion of those two nation states on the basis of pre-emption for self-defensive reasons – to invade another country as a pre-emptive strike against the likelihood that more terrorist attacks would occur on US soil. While the United States had suffered an attack on Sept. 11, 2001 that constituted an outright act of war and rightly feared that further terrorist attacks might occur, it responded by invading two countries whose state governments did not carry out the original attack against the United States. JWT does not justify state A carrying out a pre-emptive strike on state B in the form of full military invasion for reasons of self-defence.

It seems that the response by the United States more closely resembled acts of punitive intervention -- using massive military might to punish those whom it thought contributed directly or indirectly to the attacks on 9/11. Punitive intervention is not new and the United States has used this act in the past.¹²⁵ One cannot dispute that the language used by Western nation state leaders since 9/11 is characteristically punitive in nature. But again such activity still constitutes the invasion of a sovereign nation state regardless of the wrong it may have

¹²⁵ See Mark Evans, *Just War Theory – A Reappraisal* 50-52 for a concise overview of examples of punitive intervention in the last century. He includes a number of US cases (Panama 1989, Haiti 1994, Libya 1986) as well as the ongoing Russian intervention in Chechnya and the 'punishing nature' of the aggressor's military tactics.

perpetrated against the invading aggressor, activity that is not supported by international law or JWT. One does not “use military violence for psychodynamic, psychologically consoling objectives like punishment and retribution.”¹²⁶ Using military force to punish another nation state fails to adhere to the prime principles set out in the Just War tradition and the generally accepted military doctrine common to the West. Although Walzer does agree that the idea of just war *as* an act of punishment is very old, he notes that it is not established in customary or positive international law.¹²⁷ He rightly questions the aim of such activity: for deterrence, territorial marking or to exact revenge? It is even suggested that the rise of punitive intervention in the few decades, particularly by the United States, illustrates how JWT is often distorted by leaders, not only in the West, to serve their individual purposes which have little to do with just goals of armed conflict.¹²⁸

Another challenge to JWT can be posed by asking if there is still a distinct difference between pre-emption and prevention of war. First these terms need clarification. Walzer justifies the use of a pre-emptive military action when the state is faced with “threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence ... [when] they have been forced to fight and that they are the victims of aggression.”¹²⁹ Conversely a preventive war follows when a state believes that armed conflict with a known adversary is either possible or most probable at an unknown time in the future and waiting to engage the enemy will prove a greater risk than acting immediately.¹³⁰ Traditional JWT has treated these two concepts very differently: while pre-emption is generally

¹²⁶ Michael Ignatieff, “Ethics and the New War” 6.

¹²⁷ Michael Walzer, *Just and Unjust Wars* 62-63.

¹²⁸ Mark Evans, *Just War Theory – A Reappraisal* 52.

¹²⁹ Michael Walzer, *Just and Unjust Wars* 85.

¹³⁰ Neta Crawford, “Preemption and Preventive War Doctrines,” in Mark Evans (Ed.), *Just War Theory – A Reappraisal* 26.

considered allowable within specific circumstances,¹³¹ preventive war is generally thought of as illegal and unjustifiable aggression. In particular, Walzer describes the difference between the two as one of a spectrum of anticipation where immediate action driven by necessity sits at one end, and at the other, decisive military action is based on free choice and foresight, a reaction, if you will, to a distant danger.¹³² So in the case of the United States' military response to Sept. 11, 2001, the question is whether the threat posed by al-Qaeda, based on the attacks of Sept. 11, was no longer distant and avoidable? Was the Bush administration morally right when it argued that new technology contributed to the immediacy and tenacity of the al-Qaeda threat? It would seem that the ends of the spectrum of anticipation had joined. Open negotiations (or diplomacy) with terrorist groups is one activity that successive American administrations have refused to do. In this case, negotiation would have publicly awarded legitimacy to its enemy; hitherto such legitimacy was reserved for relations between nation states. This may mean that technological advancement alone has eliminated the distinction between pre-emption and preventive war. Not according to Bobbitt:¹³³

Anticipatory warfare is not the result of the development of WMD or delivery systems that allow no time for diplomacy in the face of an imminent reversal of the status quo ... rather it is the potential threat to civilians – a market state concern ... posed by arming, with whatever weapons, groups and states openly dedicated to mass killing that has collapsed the distinction between pre-emption and prevention, giving rise to anticipatory war.

Thus, it is no longer only the threat of deliberate massive fear imposed by the terrorist group on one's public, but as well the very real possibility of causing widespread death and ensuing panic that technological advancement has allowed. Clearly for Bobbitt the distinction between pre-emption and prevention no longer remains in response to the terrorist threat, but has been

¹³¹ Walzer cites the 1967 Six Day War between Israel and Egypt where he believes that the Israeli first strike constituted legitimate pre-emptive action in the face of an asymmetric threat that clearly challenged its legitimacy as a state and right to continued existence as a nation state. See Michael Walzer, *Just and Unjust War* 82-85.

¹³² Michael Walzer, *Just and Unjust Wars* 75.

¹³³ Philip Bobbitt, *Terror and Consent* 137.

replaced by the notion of military preclusion and its increase due to technological advancement, representing a move away from more traditional tactics that are easily assessed by JWT (such as the US-led militarily enforced trade embargo against Iraq) to newer tactics like preventing the acquisition of WMD.¹³⁴ Although a tactic like depleting an enemy's weapons supplies is not new in the sense that it has been used historically, but new in the sense that it is a tactic that will now be used continuously outside the parameters of military battles. Such an approach requires a security doctrine much more encompassing than the conventional strategies of the 20th century designed for conflicts with distinct phases including an end time. It is now a tactic to be used for continued survival whether a 'global war on terror' is declared or not. The ante has been upped significantly.

CHALLENGES TO *JUS IN BELLO*

“While war is the strategy of the strong, terrorism is the strategy of the weak.”¹³⁵

Much of traditional JWT is grounded in the role and responsibilities of the combatants, which shape, to a considerable extent, the parameters of the rules of engagement (what a soldier may and may not do while engaged in armed conflict which includes rules that directly reflect the *jus in bello* discrimination principle). This principle states that combatants must avoid any tactic that would directly target those not engaged in the immediate conflict,¹³⁶ i.e. civilian non-combatants that historically included women, children, religious leaders, the elderly and the sick. This cornerstone principle of JWT is also based on the assumption that the soldiers of both sides share many of the same principles or ideals, almost similar value systems on the individual level. Yet, as was explained in the previous chapter, the 21st century combatant of the West is so different on almost every level from the enemy he or she fights in

¹³⁴ Philip Bobbitt, *Terror and Consent* 138.

¹³⁵ Eugene Dais, “*Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense*” 110.

¹³⁶ Mark Evans, *Just War Theory – A Reappraisal* 13.

the battles in Afghanistan and Iraq. Given the nature of terrorism, there is little moral equality between the two warring sides. Therefore, how can JWT account for the principle of discrimination when one of the combatants cannot be readily identified, when he deliberately chooses to fight outside the 'rules' of warfare? He wears no uniform and often deliberately chooses to misrepresent the true identity of his person challenging the judgment of his opponent even further. Take the recent example of Canadian troops who shot and wounded an Afghani teenager after a civilian vehicle failed to stop at a military checkpoint. As the Canadian military spokesman stated, "Our soldiers are trained to take all appropriate steps to minimize civilian casualties. However, they must take action to protect themselves when threatened."¹³⁷ Although this teenager was not likely a serious threat, he had to be treated as such given the ongoing threat posed by suicide bombers. Another Israeli example, also a checkpoint scenario, reflects the fact that this is not just a change in tactic on behalf of one side, but a deliberate increase of the imminent danger.¹³⁸

Under many circumstances, an act of terror is not known for certain to occur, all the more so to occur imminently, though the probability of its occurrence cannot be taken to be nil. The probability that a pregnant woman is going to commit an act of homicide-suicide bombing is very low, as is the probability that a woman can pass a checkpoint pretending to be pregnant while she is not. The probability that she can pass a checkpoint carrying explosives on her body without being caught is also low. Consider now the case of a woman, seemingly pregnant, who approaches a checkpoint claiming she is trying to reach a hospital. The probability that she passes the checkpoint into Israel not being pregnant, but carrying explosives in order to commit a terrorist act, is very low, but it is not nil.

The fact that the probability is not nil and that this is a reality facing every military checkpoint in Afghanistan and Iraq is what now challenges the viability of the principle of discrimination. The Canadian, British or American private at *any* checkpoint has very little way of knowing for certain if this seemingly pregnant woman is actually carrying a fetus or twenty pounds of

¹³⁷ International Security Assistance Force (ISAF) News Release, "*ISAF accidentally injures rider who fails to stop at checkpoint*," accessed Oct. 14, 2008 at < <http://www.nato.int/isaf/docu/pressreleases/2008/10-october/pr081014-533.html> >

¹³⁸ Asa Kasher and Amos Yadlin, "*Military Ethics of Fighting Terror: An Israeli Perspective*" 12.

explosives set to detonate at any moment. Given the tactics commonly used by terrorists, the situation leaves the private no choice but to consider the possibility, albeit a small one, that she is a terrorist. If he does not, he faces the chance, albeit a small one, that she may be a suicide bomber intent on killing them both. This asymmetry in combat translates to an asymmetry of morality, perhaps *the* prime ethical dilemma of a war against terror.

Thus, regardless of the strength and precision of the rules of engagement in place for the coalition soldier, the *jus in bello* constraints of justice during armed conflict have little relevance for the terrorist.¹³⁹ Unlike his similar predecessors (guerrilla fighters, revolutionaries and the twentieth century state terrorist), the terrorist that has emerged in recent years incites fear in the hegemonic enemy with two ultimate goals: a. causing the hegemon to change its foreign policy to undermine its hegemonic role by maximizing the number of people who identify with the victims of that violence, within and allied with the hegemon, and b. maximizing the number of people who identify with or even identify themselves as the victims of the reciprocal violence of the hegemon.¹⁴⁰ Bobbitt and others point out that this would disrupt the international free market economy on which the hegemon's legitimacy is based. The horrific irony is that one of the most effective ways to cause such fear is through indiscriminate killing, including the "disproportionate killings of non-combatants."¹⁴¹

A further aspect of this issue is that *jus in bello*, by its very name, appeals to ethical conduct within the declared war by combatants. 'In bello' also implies a timeframe to the conflict, based on the reasonable expectation that the war and its combatants will experience an end to the fighting. As one Just War theorist argues, the theory itself must now be expanded to

¹³⁹ Eugene Dais, "*Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense*" 110.

¹⁴⁰ Rigstad, Mark, "Jus Ad Bellum After 9/11: A State of the Art Report" *The IPT Beacon* 3 (June 2007) 29.

¹⁴¹ Eugene Dais, "*Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense*" 110.

include what is “both required and allowed for a nation in peacetime.”¹⁴² For instance, in 2003 American civilian hackers infiltrated the website of Al-Jazeera, the largest Arab-language news network. Although the FBI had previously warned the hackers that such action would constitute a criminal act under United States’ federal law, a cyber-attack was carried out when these civilians hacked into Al-Jazeera’s main English site replacing the contents with an American flag.¹⁴³ On the face of it, the intent of such activity may have been to contribute to the overall war effort of the nation:¹⁴⁴

... for a nation involved in war, denial of service to enemy computers by viruses, worms, or other techniques is comparable to jamming radar and other nonlethal means of warfare and is clearly preferable to more violent means that result in injury and death if they achieve the same purpose, for example, disruption of command and control functions. Clearly, if JWT justifies killing and the destruction of property – military and governmental – in the pursuit of a just war, cyber attacks by nations at war are justified.

And while such activity harkens back to post World War II movies that depicted non-combatant efforts resulting in successful sabotage of enemy resources, in reality most military strategists do not welcome such efforts however noble their intent, as they are deemed to be counter-productive or indeed harmful to the overall war effort. In state-sanctioned activity where the stakes involve life and death, actions on the part of untrained and inexperienced people outside a chain of command who are not privy to tactical and strategic military planning and intelligence, are not likely going to contribute positively to the overall mission. Similar action carried out by civilians of either warring side is not justified, even if current technology gives them the ability to do so; it is still criminal even in wartime. Yet, this reasoning also applies during peacetime, or what may seem to be peacetime to non-combatants on the home front. It is conceivable that such activity could have happened even if the United States chose

¹⁴² Richard De George, “Non-Combatant Immunity in an Age of High Tech Warfare,” in Steven Lee’s, *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* 310.

¹⁴³ Richard De George, “Non-Combatant Immunity in an Age of High Tech Warfare” 301.

¹⁴⁴ Richard De George, “Non-Combatant Immunity in an Age of High Tech Warfare” 310.

not to invade Afghanistan or Iraq, or declared a soft, rhetorical ‘war on terror’.¹⁴⁵ Al-Jazeera is the one of the main news site for much of the Middle East and pan-Arabic world via the internet and traditional television broadcast; causing it to cease transmission is criminal whether in peace or war time.

It would seem, too, that the type of terrorism that emerged in the last few decades as exemplified by al-Qaeda, distorts the principle of proportionality. By definition proportionality refers to “the use of force required to secure the just objectives”¹⁴⁶ but if a nation state’s only recourse in responding to a carefully coordinated terrorist attack on its soil is to mount a massive military campaign in the form of a declared invasion, the effects of one act clearly outweigh the other when weighing the proportionality of each. Although JWT, like other moral theories such as consequentialism, is not precise and is criticized for this apparent weakness, I offer the following rough calculation. We know that approximately 3,000 non-combatants, mostly United States citizens, died as a direct result of the coordinated terrorist attacks on September 11. We do not know for certain the number of deaths and injuries of innocents in Iraq and Afghanistan as a result of the American led invasions; in reality an accurate number will never be calculated. We know that the number of coalition deaths in Iraq alone is about 4,500 (predominantly US and UK), the number of US military injuries at about 31,000 and the number of Iraqi deaths (security forces and non-combatant civilians) is at least 43,000.¹⁴⁷ The number of coalition fatalities in Afghanistan is about 1,000. My point is not to belabour the horror of these two wars, but to stress that even if these two wars were just and reflect just objectives on the part of the participating coalition nation states, the military force used to

¹⁴⁵ Mohammed El-Nawawy, *Al-Jazeera: how the free Arab news network scooped the world and changed the Middle East* (New York: Westview Press, 2002) 21.

¹⁴⁶ Mark Evans, *Just War Theory – A Reappraisal* 13.

¹⁴⁷ It is almost impossible to gather precise information concerning war casualties, even from official government sources. Although these numbers are not completely accurate, they do represent fairly reliable estimations; in fact they are likely under-estimations. This information was accessed on Oct. 28, 2008 at: < <http://icasualties.org/oif/>

secure the objective is excessive in response to the harm caused by the al-Qaeda terrorist attacks directed at American targets over the last two decades combined. Just War theorist Mark Rigstad describes this challenge here:¹⁴⁸

If the measure of force that is proportional for one's humanitarian cause will not suffice for purposes of self-defense, and the measure of force required for deterrence will exceed what is proportional for humanitarian purposes, then one cannot possibly wage a proportional war with a view to achieving both causes. In such cases, one must choose whether to sacrifice the interests of others for the sake of self-defense or risk one's own security in order to benefit others. In principle the Bush Doctrine clearly chooses the first option, but in practice it has impaled itself on the ethical contradiction of compassionate deterrence.

Thus, it is fair to question whether the principle of proportionality can be applied in response to the type of terrorism posed so far in this century. If one attempt to use this principle to assess the proportionality of the violence of armed conflict to the threat it is meant to surmount, what military response would be proportionate to the actions of a suicide bomber or a jet high-jacked by a self-proclaimed terrorist with a box-cutter? Although some Just War theorists argue that the principle of proportionality has been respected by the United States and its response to al-Qaeda in invading Afghanistan and Iraq was morally justified, they also admit that “fighting the current war on terror ... opens up some of the fundamental commitments of just war theory and international humanitarian law and asks us to rethink their purpose and the standards that guide their use.”¹⁴⁹ The principle is challenged on at least two fronts.¹⁵⁰ First, because terrorism targets civilians, it forces its target to take on a central role in modern warfare. They are no longer just unfortunate casualties of warfare that seeks to expand territorial borders, but are the terrorists' target. Second, an argument can be made that we seem to be less sensitive to death and casualty (certainly in North American) than we were in past generations. For example, the United States' overall treatment of prisoners of war post 9/11 seems to be based more on the

¹⁴⁸ Mark Rigstad, “Jus Ad Bellum After 9/11: A State of the Art Report” 22.

¹⁴⁹ Kateri Carmola, “The Concept of proportionality: Old Questions and New Ambiguities,” in Mark Evans, *Just War Theory – A Reappraisal* 95.

¹⁵⁰ Kateri Carmola, “The Concept of proportionality: Old Questions and New Ambiguities” 95.

deliberate limitation of combatant rights as opposed to a guarded respect of the enemy's basic human rights stemming from the Just War thinking of the mid-20th century and international humanitarian law. "A war fought against terror as a tactic, and against terrorists as illegal combatants, is a war fought against those without formal rights according to the law of armed conflict,"¹⁵¹ thus the moral restraint provided by more traditional JWT is less apparent. This may explain why the United States has detained child prisoners at Guantanamo Bay. Public accusations of unethical and excessive prisoner torture and inhumane interrogation practices continue, including those from at least four former United States military prosecutors who have resigned in protest.¹⁵² Any analysis carried out by ethicists in determining the extent to which modern terrorism challenges the principle of proportionality must be steered by the guidance that Walzer makes on this very point: the concept underlying this principle must be directed by the moral truth that the innocent victims of violence in conflict have rights that may never be denied.¹⁵³ To justify overriding such rights is another matter entirely, but one that cannot be made in a weak manner.

¹⁵¹ Kateri Carmola, "The Concept of proportionality: Old Questions and New Ambiguities," 95.

¹⁵² Canadian media accounts of the Omar Khadr case are too numerous to cite here, suffice to say that Canadian Government attempts to extradite the young adult (he was 15 when captured by US soldiers) have failed. He is not the only child housed at Guantanamo Bay, Cuba, however in legal proceedings held at Guantanamo Bay in June 2007, a US Army judge dismissed charges against Omar Khadr and openly rebuked President Bush and the Congress who passed the Military Commission Act allowing child soldiers to be detained there; see: Deen Chatterjee (Ed.), *Values and Violence: Intangible Aspects of Terrorism* (Dordrecht, NLD: Springer Netherlands, 2009) 269. A recent summary in the Los Angeles Times of former US military legal prosecutor, Lt-Col Darrell Vandeveld can be accessed here: <<http://www.latimes.com/news/nationworld/world/la-na-gitmo12-2008oct12,0,3624147.story>>

¹⁵³ Kateri Carmola, "The Concept of proportionality: Old Questions and New Ambiguities" 109.

WALZER'S VIEWS ON THE FUTURE STUDY OF JUST WAR THEORY

Fortunately for students of JWT, Walzer has not lost interest in this field of moral reasoning. In his most recent collection of essays on JWT,¹⁵⁴ he points to two areas which he hopes JWT theorists will concentrate their attention.

Curiously, he sees war-making as having evolved into a somewhat risk-free activity.¹⁵⁵ He speaks, of course, about the effect of rapid technological advances on how wars can now be fought particularly in cases of humanitarian intervention. He fears that despite the evolution of JWT and the overall positive influence it has had on the mindset and cultures of Western militaries, as well as international law, JWT's advances do not seem to prompt modern leaders to put their soldiers into harm's way in the defence of humanity, vice the defence of their own countries.¹⁵⁶ Specifically he cites the case of the NATO air bombings over Kosovo in the spring of 1999, to prevent the further ethnic cleansing and massacre of innocents by Serbian forces. He notes that this particular conflict, which was clearly a war, proved that risk-free wars can be fought without bloody battles on the ground. In this case, those NATO pilots who flew the 38,000 air missions were immune to any viable Serb counterattacks. While Walzer argues that there is nothing in JWT that bars this kind of warfare, and ethnic cleansing and the like will not likely stop, he rightly suggests that we do have a moral responsibility to do *more* in rescuing persecuted peoples. But doing more, up to this point, requires more than what risk-free war accomplishes. It requires soldiers and their political leaders to take risks. In sum, Walzer believes much more thought needs to be done in this area.

Secondly, Walzer looks to the issues surrounding *jus post bellum* (justice after the war). He questions what it means to have a just conclusion to conflict, not discounting what occurred

¹⁵⁴ Michael Walzer, *Arguing About War*.

¹⁵⁵ Michael Walzer, *Arguing About War* 16-18.

¹⁵⁶ Michael Walzer, *Arguing About War* 16.

at the end of World War II.¹⁵⁷ In the case of the current war in Iraq, he cites not just the requirement but the right of the citizens for restoration, once the hostilities truly end. And although the theoretical groundwork for this is being laid by other Just War theorists only recently, the reality of imposing reparations and restorations in this particular war are problematic given that those who would presumably impose it (or lead it) on behalf of a newly formed government share very little politically, culturally or historically with those that deserve it. Arguably, re-structure and restoration are already an intrinsic part of the Canadian military effort in Afghanistan; however, as Walzer points out, most states refuse to take on this responsibility because legitimacy and closure are extremely hard tests to pass.¹⁵⁸ Most Western nation states do not want to be judged should they fail in meeting such a standard. There are other more tangible reasons for this as well; restitution and a solid, stable outlook (i.e. promises of allied protection) are expensive, something that moral goodwill cannot pay for alone. The theoretical work needed for a solid footing for *jus post bellum* thought is required and not just to keep the theory afloat or to continue with its success, but because nation-building is a necessary part of post-war politics. As far as Walzer is concerned, such work will have to include venturing beyond the current definitions of “legitimate occupations, regime changes and protectorates” and move into strengthening these notions as they relate especially to international law. This will allow those who lead us into war, and those who lead its battles, to acquire a deeper understanding of the distribution of responsibility so that countries fighting in wars like the present ones clearly understand what their responsibilities will be if they win, not

¹⁵⁷ Michael Walzer, *Arguing About War* 18.

¹⁵⁸ Michael Walzer, *Arguing About War* 20.

what resources they think they may be entitled to. This is the reality of JWT: “the work of the virtuous is never finished.”¹⁵⁹

Clearly there are some challenges facing JWT that need further reflection and analysis in light of twenty-first century terrorism and the conflict it causes. To explore even further and perhaps test some of these challenges, I offer an example in the coming chapter of the implications of the industry of the privatized soldier.

¹⁵⁹ Michael Walzer, *Arguing About War* 21.

CHAPTER 3: THE MORAL VALIDITY OF PRIVATE MILITARY CONTRACTORS (PMCs)

It would be ludicrous to permit persons from outside of the profession [of the military] to make technical decisions regarding how force should be managed in training or on the battlefield. Deciding about the conduct of war falls under *jus in bello*, justice in war, and such decisions are the responsibility of military professionals.¹⁶⁰

The extent of PMC involvement in contemporary conflicts makes assessing the justice of a particular war *without* reference to private actors impossible.¹⁶¹

[T]he privatized military industry is a reality of the twenty-first century. This entrance of the profit motive onto the battlefield opens up vast new possibilities and raises a series of troubling question – for democracy, for ethics ... and for national and international security.¹⁶²

Mercenaries have often been compared to prostitutes in uniforms, more bluntly characterized as the ‘whores of war.’¹⁶³ While it is safe to say that most reasonable people find something fundamentally immoral about those who are financially remunerated to participate in conflicts, one could also contend that mercenaries are amoral specifically because they choose to operate outside any accepted moral code that would otherwise be put in place to guide their activity. Yet, when private mercenaries are hired by the public state to carry out foreign policy that involves armed conflict, it is reasonable to ask questions of the moral

¹⁶⁰ Paul Christopher, *The Ethics of War* & 238.

¹⁶¹ Amy Eckert, "Ethical Norms and the Public/Private Divide: Private Military Companies and Just War Theory" 26.

¹⁶² Peter Singer, *Corporate Warriors* 260. To date this is the only in-depth study of the rise in military privatization. The research within it is comprehensive but has been criticized as exaggerative with respect to some information [see Uwe Steinhoff, "What are Mercenaries," in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations* (New York: Routledge, 2008)]. Singer rightly calls for more academic analysis of this subject, in all related academic fields including security studies, international relations theory and political economy. And in the six years since *Corporate Warriors* was first published, scholars have been taking note. From a philosophical perspective, Andrew Alexandra, Deane-Peter Baker and Marina Caparini's 2008 *Private Military and Security Companies* offers a needed balance and analysis of the moral concerns surrounding this industry and its impact on 21st century warfare. Beyond these two scholarly publications (Singer and Alexandra (et.al.)), there are only a few other books that offer an analysis of this industry from the perspectives of global economics and international relations. Additionally, only a handful of journal articles have appeared. Therefore, there is a limited amount of independent academic thought from which to draw at this point. Nevertheless, the limited collection of commentary and academic study appearing thus far should serve as a sound platform for further scholarly thought in this area of military ethics.

¹⁶³ See Deane –Peter Baker, "Of 'mercenaries' and prostitutes: can private warriors be ethical?" in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations*, 30-41. Baker probes whether there is something intrinsically morally wrong about the hired, private soldier that would make it wrong to be a mercenary, even where PMCs are hired for seemingly good mercenary activities such as peacekeeping or security surrounding the delivery of humanitarian aid. Following a comparison of characteristics and motives of the state soldier and the hired soldier, he concludes that there is nothing about the mercenary that makes him or her intrinsically bad.

validity of state decisions in an effort to measure the justness of such decisions. This chapter, then, presents the contentious issue of the use of Private Military Contractors (PMCs) and the moral issues and arguments (for and against) surrounding the recent escalation of this industry in the West. The extent to which this industry reflects actual changes in warfare will also be assessed. As a characteristic of Bobbitt's market state construct, PMCs will be presented here as an example to explore the validity of the calls for JWT revision. If the presence and effect of corporate mercenaries (indeed, if they can be defined as mercenaries) can be accounted for by the JWT model, then perhaps the calls for JWT revision are inflated.

DEFINITION AND TYPES OF PMCs

There are a variety of acronyms used to describe private companies who provide military and military-related services on behalf of the public and private entities who contract their services and expertise. A few are: 'Private Military Firms' (PMFs); 'Private Military Corporations' (PMCs); 'Private Military Companies' (PMCs); 'Private Security Companies' (PSCs); and others that essentially describe or refer to much the same thing -- business organizations that trade in professional services intricately linked to armed conflict including, but not limited to, the provision of general and specific military skills, combat operations, strategic, operational and tactical advice and planning, electronic and human intelligence gathering, risk assessment training and logistical support.¹⁶⁴ Such an array of services offers the downsized Western military, either an attractive means of participating in conflicts of various types that may not be politically and publicly supported at home, or to engage an adversary that might be seen as insurmountable with existing force levels. Peter Singer defines PMFs as "private business entities that deliver to consumers a wide spectrum of military and security

¹⁶⁴Peter Singer, *Corporate Warriors* 260, and Kevjn Lim, "Military privatisation and its impact on the nature of warfare" *Melbourne Journal of Politics* 32(2007) 9.

services, once generally assumed to be exclusively inside the public context.”¹⁶⁵ Indeed Singer coined the more commonly used acronym ‘PMF’ to include all types of services that are provided from a privatized or incorporated entity. Although the term ‘Firm’ is more inclusive and certainly suggests the corporate nature of this industry, it also connotes a sense of legitimacy or deference that may or may not reflect the actual moral validity of such entities, given their mercenary or mercenary-like activity. As such, I will use the term ‘Private Military Contractors’ (PMC). Furthermore, I agree with Avant’s preference to use the term ‘contract’ vice ‘firm’ in analysing this issue as the unit ‘contract’ more accurately describes what *all* types or PMCs or PMFs *do*, as opposed to how they are classified or named.¹⁶⁶ Thus, whether a privatized military entity is part of a larger global national corporation offering a wide variety of military and security services, or a small-scale company responding to a specialized or limited niche of the market, the term ‘PMC’ reflects what they all do – engage in a contractual relationship with a legitimate state government or other private entity to carry out specifically defined military, security or military-related services that may or may not involve violence and risk of personal injury or death of anyone involved.

Although an academic debate continues as to whether PMCs really are mercenaries,¹⁶⁷ I conclude that they are based on the following definitions. According to the Geneva Conventions, a mercenary:¹⁶⁸

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

¹⁶⁵ Peter Singer, *Corporate Warriors* 8.

¹⁶⁶ Deborah Avant, *The Market for Force: The Consequences of Privatizing Security*, (New York: Cambridge University Press, 2005) 1-2.

¹⁶⁷ For a philosophical debate of this issue, see Uwe Steinhoff, “What are mercenaries?” and Deane-Peter Baker’s “Of ‘mercenaries’ and prostitutes: can private warriors be ethical?”

¹⁶⁸ International Committee of the Red Cross, “International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, Article 1,” accessed Nov. 20, 2008 at: < <http://www.icrc.org/ihl.nsf/FULL/530?OpenDocument> >

- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - (d) Is not a member of the armed forces of a party to the conflict; and
 - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
 - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - (c) Is neither a national nor a resident of the State against which such an act is directed;
 - (d) Has not been sent by a State on official duty; and
 - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

By all accounts, PMCs fit this description with the exception of note 2(c) since, for example, many employees of the PMCs hired by Western governments are citizens of those states and are in fact previous members of those militaries for which they are hired to support. But as Peter Singer notes, the Geneva Conventions' definition is flawed since signatories to it later tightened the definition of mercenaries to those that operate only in international conflicts.¹⁶⁹ This clearly precludes a mercenary or mercenary group that is hired by rebel forces or a legitimate state government to fight rebel forces in a conflict internal to that state, and such mercenaries do match the traditionally accepted idea of mercenaries that we have witnessed throughout history.

Uwe Steinhoff also finds the Geneva Conventions' definition too narrow and offers this one:

A mercenary is a person who sells the service of taking part in hostilities to groups other than his own (in terms of nation, ethnic group, class and so on) and is ready to deliver this service even if this involves taking part in hostilities. Which groups are relevant depends on the nature of the conflict.¹⁷⁰

He argues that mercenaries can belong to the same nationality as those hiring their services, since there are a variety of examples of mercenaries recruited from within the state by the state (the Free Companies in late medieval Europe, the later Italian Condottieri, and "Bosnian

¹⁶⁹ Peter Singer, *Corporate Warriors* 41.

¹⁷⁰ Uwe Steinhoff, "What are mercenaries?" 19-24.

Muslims hired by Bosnian Croats to fight Bosnian Serbs”). I agree with Steinhoff in that it is not so much the individual identity of the person that makes him a mercenary, but what a person is contracted to do. Clearly a person acting as a member of a PMC is not acting as a state soldier for that person’s loyalty, sense of duty, cause, personal motivation and remuneration distinguish him from those of state soldiers. While it is possible that a state soldier who hails from a particularly impoverished background may originally join a state military solely for financial reasons¹⁷¹ I would argue that once enlisted that person is socially conditioned into a clearly defined system that includes and enforces a tightly defined code of conduct on and off the battlefield. This is not the case with a member of a PMC whose responsibilities and tasks are defined solely by his present contract; contract stipulations do not normally affect any other aspect of the mercenary’s life. Feasibly, a mercenary could hold public office or have another profession entirely when not in a contractual relationship with a PMC, while a soldier of most Western militaries is prohibited from political campaigning and running for any state office. To be sure, there are those members in militaries, albeit an insignificantly small number, who repeatedly and actively seek out one dangerous mission after another, to the point where they are deployed more than not.¹⁷² Nonetheless, they are still members of their state’s military bound by its ethical codes as well as internationally accepted standards of war fighting. Mercenaries, unless stipulated in the formal agreement or contract

¹⁷¹ Indeed, statistical trends show that American and Canadian armies tend to recruit more enlisted members from more economically-repressed areas of their countries. In the case of the United States, there is a propensity of enlisted members from the traditionally poorer south east states and from ethnic minorities (see David Segal and Mady Wechsler Segal, “America’s Military Population” *Population Bulletin*, 59:4(2004) 11). In the case of Canada, there is a high representation of Regular Force recruits from the Atlantic Provinces certainly over the last twenty years, based on information provided from the Assistant Deputy Minister Public Affairs, National Defence Headquarters, Ottawa, Canada in an email to the author, January 27, 2009.

¹⁷² Although this statement cannot be verified statistically, it has been my professional military experience, as well as that of my military colleagues, to know of a several members who represent a variety of occupations within the CF who are consistently deployed quite simply because the adventure of combat or combat related activity within a military context significantly appeals to them.

which accounts for their presence, are not bound by any rules on the battlefield. I believe that this is what distinguishes them the most from regular state soldiers. In fact, one could argue that modern mercenaries are potentially amoral whereas their counterparts theoretically cannot be, as they are required, as long as they are members of the force, to adhere to a code of ethics and behaviour that represents the moral standard reflecting that of their country to which they have promised to defend. The British, American and Canadian militaries have established their own legal systems apart from the rest of their societies to which members of their militaries are held. Mercenaries, on the other hand, can operate without any such moral standard as long as they fulfill the terms of their contract which can include killing; in fact, a noticeable characteristic of the emerging private military industry is that there exists no legal oversight or effective system of accountability (this point will be revisited later in the chapter). And the fact that contractual terms can include the killing and maiming of others does make their behaviour immoral as well, since there can be nothing moral about taking a human life when predominantly motivated by money. The soldier, although trained and prepared to kill, enters every battle doing everything possible not to. And although it is possible that a PMC and its personnel could exist and deliberately operate only in support of just conflicts, a tenet of JWT is that killing in armed conflict is only ever justifiable when the soldier is motivated by right intention *and* just cause. True, there is the realistic case of the soldier who joins the military because he is poor and believes that the salary provided by the state will allow for a financially more secure life than he would have otherwise obtained, or the case of the infanteer who stays in the military for financial reasons because he realizes he has no other professional skill set. But these soldiers do not join and go to war with the idea that killing perfectly acceptable, rather it is a tragic result of a conflict sanctioned by his state, that he believes is *justifiably* sanctioned:

In the case of the resort to war, Aquinas demands that one have a right intention. One must intend to promote the good and avoid evil... Justifiable killing motives must not only be non-lucrepathic, but also, following Aquinas, must include just cause and right intention.¹⁷³

According to Aquinas, legitimate moral military engagement must involve such intention. Thus in the case of the poor man who joins his state's military to eke out a living, he can still have joined with the primary motive based on financial gain, knowing that he may have to kill in conflict *but within* the context of promoting good and avoiding evil. Conversely, for the mercenary, promoting good and avoiding evil is irrelevant. The fact of the matter is that the primary motivation of private soldiers for hire, regardless of whether they belong to the military for which they are hired to support, is money. This, I believe, is the primary difference between the two. Given what we know about the work that contemporary PMCs have been hired to do in the last few decades, it can be said that they are mercenary in nature.

DIFFERENCES BETWEEN MODERN PMCs AND 20TH CENTURY MERCENARIES

PMCs are by no means a new phenomenon as the history of hiring soldiers is a practice as old as organized conflict. In fact, it is often assumed today that the state has always been the chief wielder of violence. Yet this is a modern assumption, as Peter Singer notes:

Private military organizations particularly thrived in periods of systemic transition. Governments were weakened, powerful military capabilities (often superior to local capabilities) were available on the open market, and transnational companies were often the most efficiently organized actors. In short, much of privatized military history is reminiscent of the post-Cold War world today.¹⁷⁴

If PMCs have acted throughout history in varying capacities and sizes, then perhaps there is little that distinguishes modern mercenary organizations from their predecessors. But if they are being used increasingly more by the modern state as a tool for state engagement in conflict, perhaps there is a feature about them that allows for the state to justify morally their use. Or maybe their recent re-emergence into what most consider the exclusive and *legitimate* domain

¹⁷³ Lynch, Tony, and A. J. Walsh, "The Good Mercenary?" *Journal of Political Philosophy* 8:2(2000) 133-153.

¹⁷⁴ Peter Singer, *Corporate Warriors* 20.

of the nation-state rightly sounds the alarm bells of moral discomfort. In fact, there are a few notable features of modern mercenary organizations that set them apart from those of history. Despite these differences though, the basic nature of PMCs is still the same as we will see shortly.

The first obvious and major difference between PMCs of the 21st century and past individual or groups of mercenaries is their sophistication in terms of organization and scope. It is the ‘corporatization’ of PMCs that sets them apart from their uncomplicated predecessors.¹⁷⁵ Today’s corporate soldier is represented by hierarchically organized, registered businesses that are traded on the global market and contribute significantly to the revenues of some of the world’s largest multinational corporations. Collectively they comprise an industry that, as of 2002, accounted for an estimated \$56 billion worth of contracted military service, an industry that reflects a time-tested business structure well entrenched in the global market economy and one that is predicted to double by 2010.¹⁷⁶ Indeed, in the eight years *before* the United States invaded Iraq, the Department of Defense had let over 3,000 contracts representing over \$300 billion of public monies.¹⁷⁷ As Lim points out, “what distinguishes [PMCs] from classical, ‘dogs of war’ mercenaries is the former’s rapidly evolving status as legal and presumably disciplined corporate organizations” staffed by legitimate business consultants and advisors, and fronted by a massive public relations machinery.¹⁷⁸ Although individual and loose bands of

¹⁷⁵ Peter Singer, *Corporate Warriors* 44.

¹⁷⁶ Peter Singer, *Corporate Warriors* 78, and Amy Eckert, “Ethical Norms and the Public/Private Divide: Justice and the Privatization of War”. Singer bases these figures on a number of different sources including: a report published by International Alert, *The Politicization of Humanitarian Action and Staff Security* available online at: < <http://www.international-alert.org/publications/index.php> > and a *Los Angeles Times* article by Esther Schrader, “Companies Capitalize on War on Terror” April 14, 2002. International Alert is an independent peacebuilding organisation that works primarily in Africa, South America and South Asia to help shape policy for the European Union, the United Nations and other global organizations. These figures are further supported by other independent studies; see Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* 8.

¹⁷⁷ Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* 8.

¹⁷⁸ Kevjn Lim, “*Military privatisation and its impact on the nature of warfare*” 7.

mercenaries operated well into the 20th century and made no secret of the nature of their actions (such as Mike Hoare's and Bob Denard's soldiers in the Congo in the 1960s and even the Free Companies that prospered in late medieval Europe¹⁷⁹) no one individual or organized entity has ever garnered this level of profit from mercenary activities.¹⁸⁰

Secondly, 21st century PMCs are distinguishable from their 20th century predecessors by the range of services they offer and their technical expertise, which often cannot be matched by the contract provider, even when that provider is one of the largest and most lethal militaries in the world. While it would be incorrect to say that PMCs are the only conflict-related agents on the international stage that have evolved in organizational complexity, technological adeptness and financial worth, as other corporate multinationals, states, and their militaries have also evolved, it is precisely the corporate structure, financial worth and technological advancement that lends an air of legitimacy to their activity. This point will be further elaborated, but first a basic profile of the industry will frame the context of this discussion.

Singer breaks down the industry into three types of services: service providers, consultants and supporters.¹⁸¹ Providers operate and focus on the tactical environment, or in NATO parlance, 'in theatre' operations. They specialize in front line or first line provision, ranging from combat pilots to the direct command and fielding of whole military units. One notable company is Executive Outcomes (EO). Although now defunct, EO was a mercenary company based in South Africa that claimed it could draw on 2,000 soldiers and that by

¹⁷⁹Uwe Steinhoff, "What are mercenaries"20.

¹⁸⁰ Indeed MPRI (Military Professional Resources Incorporated), one of over 100 subsidiary companies of L-3 Communications, employs nearly 3000 people in the U.S. and forty other countries around the globe. MPRI contracts in 2005 contributed to \$2 billion in revenues for L-3's government sector (see MPRI's website: <<http://www.mpri.com/main/profile.html>>). As one of the largest and most profitable PMCs, MPRI is contracted to provide core officer training to the U.S. Army as well as all Active and Reserve Officers' Training Corp (ROTC) training in over 200 U.S. universities; in this latter capacity its civilian instructors wear military uniforms. For a full analysis of MPRI, see Peter Singer, *Corporate Warriors*, specifically chapter 8.

¹⁸¹Peter Singer, *Corporate Warriors* 91-100.

engaging in conflict along side its customer, it could increase their effectiveness and confidence.¹⁸² EO was contracted frequently in the 1990s by failing or unstable African governments and was instrumental in the conflict in Sierra Leone in 1995-1996 when its government spent one third of its defence budget to hire EO to quash the Revolutionary United Front.¹⁸³ EO forces were active in the Angolan conflict against liberation forces (UNITA) in 1994; in addition to training and advising the Angolan state military, EO successfully regained key oil and diamond resource installations for the Angolan government, losing ten of its soldiers in the process.¹⁸⁴ Although EO has fielded battalion-size units, what it reflects is a 'one-stop-shopping' option for clients: professional expertise, hardened experience, and particularly an immediacy that even legitimate United Nations peacekeeping and NATO peacemaking missions have not been able to match up to this point. Companies like EO provide whatever a particular client may need to achieve a strategic or tactical military objective in a limited amount of time: hardware, software, firepower and the soldiers to secure the desired outcome.

A second type of PMC is the military consultant. Although a variety of large and small scale military consultants exist today, they mainly represent services that do not include direct combat but provide "the application of knowledge and training [that] are often just as valuable as the application of firepower."¹⁸⁵ This does not mean however that they are not within harm's way in or near conflict zones. The most prominent and likely the largest consultant company is MPRI, which accounts for a significant portion of the U.S. Department of Defense's contracts over the last two decades. Companies like MPRI provide instant access to an extensive pool of

¹⁸²David Shearer, "Outsourcing War," *Foreign Policy* 112 (Autumn 1998) 73.

¹⁸³David Shearer, "Outsourcing War" 73.

¹⁸⁴Herbert Howe, "Private Security Forces and African Stability: The Case of Executive Outcomes" *The Journal of Modern African Studies* 36: 2 (1998) 312.

¹⁸⁵Peter Singer, *Corporate Warriors* 95.

expertise that any current military simply does not possess, for advice on strategy, tactics, defence policy, force restructuring, force training, operational assessments, etc. MPRI, for instance, is credited with directly supporting the US government's foreign policy goal of ending the Serb-Croat conflict in the former Yugoslavia in 1995.¹⁸⁶ By 1995 the Serbs were gaining a decisive military advantage, Sarajevo was still under siege and news of ethnic cleansing by Serb forces was frequently reported in international media. The United States decided to bring some balance to the conflict by hiring MPRI in early 1995 to lend a strategic hand to the Croats in the form of immediate military training for its forces and operational planning and oversight:

Lieutenant General Harry Soyster, former director and now civilian adviser to the Defense Intelligence Agency and a partner in MPRI, affirmed that the company had been awarded the only U.S. State Department license to operate in Croatia to westernize the Croat army and to "export [that] talent overseas." He added, "We do not deal with the Bosnians, what the Croats want to do is their business. We don't control the Croats and we are only helping them with their goals."¹⁸⁷

Despite the 1991 United Nations arms embargo to the area (which also included military training and advice), MPRI was hired for a long-range management program for the Croatian defence forces and a "Democracy Transition Assistance Program" with the goal of transforming the Croatian army into a more professional and tactical force based on NATO military principles, not that of the Soviet-era training with which the Croat Defence force was familiar.¹⁸⁸ By late that summer, the Croat Army launched a large offensive operation against the Serbs, which proved decisive in bringing the two sides together to reach an accord ending the war. Although MPRI has categorically denied that it offered any military advice to the Croatian Army or that any of its training directly contributed to battle victory over the Serbs, it

¹⁸⁶ See David Shearer, "Outsourcing War" 74, Peter Singer, *Corporate Warriors* 125-130, and Stephanie Neuman, "The Arms Trade, Military Assistance, and Recent Wars: Change and Continuity," *Annals of the American Academy of Political and Social Science* 541(1995) 68-69.

¹⁸⁷ Stephanie Neuman, "The Arms Trade, Military Assistance, and Recent Wars: Change and Continuity" 68-69.

¹⁸⁸ Peter Singer, *Corporate Warriors* 125-126.

did contribute to improving morale within the Croatian Army and signalled U.S. support of the Croat side of the conflict since the U.S. government contracted MPRI in the first place, critical for an emerging state seeking credibility in the eyes of potential European economic and military allies. Deborah Avant concludes that MPRI played a significant but private role in the Serb-Croat conflict and acted as a paid tool to effectuate US foreign policy:

The participation of a PSC [private security company] under contract with the Croatian government improved the functional control of force, changed the political control of force, and improved the integration of force with international values. It is unclear that Croatia would have started down this path without the private option. The contract between MPRI and Croatia was a way around the international embargo in the Balkans – sending U.S. troops to train the Croatian forces would have been very difficult given the embargo. The contract proved crucial to Tudjman's consolidation of political power and the ability of Croatia to expel Serbian forces from its territory ... This high conditionality ... led private advice and training to enhance long term control over force in Croatia.¹⁸⁹

This example also serves to illustrate a classic account of foreign policy by proxy.

Finally, Singer describes the third category of PMC as support providers that specialize primarily in military logistics. Companies such as Kellog, Brown and Root (KBR) and DynCorp provide a vast range of services in and out of operational theatres, including basic field engineering, base construction, road repair, postal services, water purification, overseas transport, etc. Such companies have been instrumental, indeed indispensable, in virtually all of the major conflicts the United States, Canada and Britain have participated in throughout the last twenty years. As one of the largest PMCs in the world, KBR in particular employs about 20,000 people with gross revenues (as of 2002) of close to \$6 billion annually.¹⁹⁰ One scholar from the U.S. Army Command and General Staff College describes how logistics contractors in Iraq are now carrying out a number of battlefield functions that have traditionally been the sole responsibility of soldiers in uniform:

¹⁸⁹ Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* 113. Avant offers a very detailed, balanced and well-researched account of MPRI's contract with the Croatian government during the war, see pages 98-113.

¹⁹⁰ Peter Singer, *Corporate Warriors* 136.

They include planners, translators, intelligence analysts, interrogators, construction workers, air traffic controllers, police and military trainers, and personal security teams. Meanwhile, private contractor Kellogg, Brown and Root (KBR) now provides the Army with many aspects of logistical and life support in Iraq, from fuel and ammunition management to field sanitation. As KBR Vice President Paul Cerjan noted, 'We support the military [in Iraq and Kuwait] with an equivalent of over 30 battalions' worth of support. That's a lot.'¹⁹¹

Quite simply that is an understatement; that level of logistical support means that the United States military could not carry out the war in Iraq *without* the services of KBR.¹⁹²

A third characteristic distinguishing PMCs from 20th century mercenary groups is that the scope of their existence today poses a challenge to the modern state's monopoly on violence. As one scholar notes, although these private actors have not replaced the state, nor do their motivations indicate any intention to do so, the international "system is now more populated with private actors than at any other point since the rise of the national army following the French Revolution."¹⁹³ If these private companies have in fact overtaken fundamental roles that were previously under the command and control of the military to the point where a military cannot go to war or defend the state without their services, it would seem that the state no longer can maintain its long-held monopoly on violence or fulfill its responsibility for protecting the state and its citizens independent of private support, vice the monopoly that the state held throughout the last century. A further case in point is the staffing ratio of military to contract employees at the U.S. Northern Command (NORTHCOM).

¹⁹¹ William Latham, "Not My Job: Contracting vs. Professionalism in the United States Army," A Paper presented to the *Annual Conference of the International Society on Military Ethics*, San Diego, California, Jan. 24-25, 2008.

¹⁹² The Canadian military also faces a similar reality. With no heavy lift air or naval capability for transportation of supplies and equipment to theatres of operation and repatriation of troops, it cannot commit to any large scale involvement without contracting out privately for these services. Such was the case in Canada's contribution to the International Standing Assistance Force in Bosnia Herzegovina and its current contribution to Afghanistan. The dangers of such reliance are not unknown to Canada; in the summer of 2000, the Department of National Defence had contracted out shipping services to the GTS Katie, which carried several hundred Army vehicles and ammunition containers from Kosovo and refused to enter Canadian waters due to a contracting dispute between the prime and sub contractor companies. Armed Canadian Forces' personnel eventually boarded the ship and took control. While this type of risk is apparent, the significance of this incident is that the loss of the amount and type of equipment that was held on board would have been severely detrimental to the overall capability of the Canadian Forces at that time.

¹⁹³ Amy Eckert, "*Ethical Norms and the Public/Private Divide: Justice and the Privatization of War*" 24.

NORTHCOM is the U.S. military command responsible for homeland defence tasked to defend, protect, and secure the United States and its interests within U.S. borders. Unlike the Pentagon or Canada's National Defence Headquarters, where government positions are staffed by civilian Defence Department employees, NORTHCOM contracts out approximately 50% of its civilian positions. As such, the ratio of military to contractor positions is 1.3:1 respectively.¹⁹⁴ One can contend that this makes more sense for the employer in the long run, citing economic savings and the advantages of buying expertise, knowledge and goods 'off the shelf.' But it does not take a great leap of imagination to speculate how a military operational headquarters such as U.S. NORTHCOM would function in the midst of a massive natural or man-made disaster, precisely the type of operations that it is tasked to manage (tsunamis, earthquakes, terrorist attacks, pandemic outbreaks, etc), if a significant portion of its employees are civilian contractors whose primary interests, presumably in the face of such a disaster, would include their families and homes, not arriving for work on time or at all. The disastrous reality of Hurricane Katrina proved this point with many front line security and police personnel abandoning their professional commitment in lieu of attempts to evacuate their own families and belongings.¹⁹⁵

Perhaps one of the most significant differences between today's private military industry and mercenary groups of the past is that PMCs are seeking and perhaps gaining a foothold in terms of legitimacy. Put into the context of the public/private divide within International Relations (IR), PMCs have always operated in the private realm. IR theory holds that there are two spheres to relations between states: the public and the private. As such, IR

¹⁹⁴ Information provided by the Public Affairs Office of US NORTHCOM in an email to the author, Jan. 26, 2009.

¹⁹⁵ United States Congress, *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, February 15, 2006 (Washington: U.S. Government, 2006) 241. Accessed Nov. 15, 2008 at: <<http://www.gpoaccess.gov/katrinareport/fullreport.pdf>>

theories, including JWT, are founded on the role of the state as the sole legitimate actor in state relations. Therefore, non-state agents become marginalized and are treated as separate entities, *seemingly* acting apart from legitimately accepted actors. Taken a step further, the assumption is often made that because they are private, illegitimate actors, their influence is negligible to minimal. Their existence is ignored, because they operate within the private sphere, as is their affect on state relations:

This international public/private divide cuts across subfields within the academic study of international relations, international ethics included. The effect of this divide is to obscure theorizing about non-state actors within the international system whose conduct may bear on the application of ethical norms to states. The activity within these marginalized private spaces may be so significant that the normative implications of state action cannot be appreciated without some recognition of the private sphere.¹⁹⁶

Therefore unless the value of PMCs in terms of their affect, scope and influence in state relations is taken into account, that is if their existence and activity remain obscured because they are private entities, the effect of their actions on the behaviour of public entities (namely the state) also remains hidden. In the case of PMCs (as private corporate entities), as they take on more roles that used to be under the sole responsibility of the military (a public state entity), the responsibilities associated with the military continue in the public sphere but do not accurately reflect reality. The public continues to expect and assume that its state-supported military is carrying out its mandate (in this case state sanctioned and directed war-fighting) to the best of its abilities without the significant assistance of state funded private entities (in this case PMCs). Continued public support for the public function is based on a false impression and an understanding with the state that the state is the moral agent with the trusted responsibility for protection of the public and the right to wage war in defending it. Hence,

The privatization of force in a system characterized by the presumption in favour of the state carries with it very different implications than the privatization of force in a system without this presumption ... as such the emergence (or, rather, the re-emergence) of these private actors [PMCs] poses some important and difficult questions for IR [international relations] theory and

¹⁹⁶ Amy Eckert, “*Ethical Norms and the Public/Private Divide: Justice and the Privatization of War*” 2.

other theoretical models, like the Just War tradition, that rely on the statist view of the world ... the effect of this growing privatization of warfare is to shift the waging of war increasingly into unseen private spaces.¹⁹⁷

Yet, despite an apparent general lack of awareness on the part of the state's citizens, the fact that PMCs are a significant force within the global economy seems that they have gained at least global economic legitimacy. Such legitimacy affords PMCs, certainly the larger companies within multi-national corporations, latitude and influence at the international political level. That the United Nations, several international humanitarian and aid agencies, and virtually all militaries of the major Western states have employed and continue to employ PMCs shows that PMCs represent concrete influence and power among inter-state relations. While their increasing growth may not yet translate into public legitimacy, this may have more to do with the fact that their status as private entities affords them a level of privacy that precludes the accountability and regulation normally imposed on public entities. This seems to be the case in the United States as within the last several months the issue has come out into the open in a limited context. In September 2007, the US Senate Democratic Policy Committee began investigating the Defense Department's overall funding and use of PMCs in the Iraqi war.¹⁹⁸ The public investigation is in response to a public shooting in Iraq involving several members of the PMC Blackwater USA, Inc. who were allegedly accused of the murder of several Iraqi civilians. The Senate committee also investigated waste, fraud and other abuse as well as effective means to control contractor oversight of all PMCs.¹⁹⁹ And while government investigations may eventually result in fair oversight of state PMC use, at least in the United States, it would also more importantly deepen the public's understanding of the limits of its

¹⁹⁷ Amy Eckert, "Ethical Norms and the Public/Private Divide: Justice and the Privatization of War" 16, 18.

¹⁹⁸ United States' Senate, "Democrats Investigating Private Military Contracting in Iraq," *Democratic Caucus Senate Journal*, September 21, 2007, accessed Dec. 30, 2008 at: <<http://democrats.senate.gov/journal/entry.cfm?id=283924>>

¹⁹⁹ United States' Senate, "Democrats Investigating Private Military Contracting in Iraq."

military's capabilities. In any democracy, the public ultimately reserves the right to determine how it wants its state entities to be utilized; it cannot do this if it does not have the necessary information to make that determination. In democracies, public trust is just that – public. As such private entities carrying out what the public deems to be state responsibilities must be sanctioned by the public.

Yet, the presence of several thousand contractors in Iraq²⁰⁰ to support the efforts of U.S. and British troops *is* presently significant and while the ethical legitimacy of their presence is debatable, it can be argued that their use in significant quantities, representing contracts of billions of U.S. dollars, to carry out functions that were otherwise very recently within the sole domain of the military poses a challenge to the ability of Western states to wage wars without their support. Their use signifies a critical change from how wars were waged and carried out in the 20th century.

REASONS FOR THE RISE IN THE PRIVATE MILITARY INDUSTRY

The reasons for the recent and striking rise in the private military industry may not be so obvious since mercenary groups have always existed and acted as major agents particularly in African conflicts in the last half of the 20th century. Yet it is worth delving into the conditions that contributed to the re-emergence and corporate sophistication of PMCs, which appears to parallel Bobbitt's account of the emergence of the market state of consent. Three primary

²⁰⁰ There exists no one figure that represents an accurate account of the number of contractors in Iraq. Estimates by scholars and industry analysts range from 5,000 to 180,000. One industry analyst testified before the U.S. House Appropriations Subcommittee on Defence, in 2007, that he had calculated at least 126,000 contractors are deployed alongside U.S. troops (see Jeremy Scahill, "Outsourcing War," *The Nation*, May 11, 2007). This lack of accuracy is caused by a number of factors: the U.S. government only tracks the number of its military and not contractors; several thousand Iraqis (known as "local nationals") are considered contractors as they are hired by PMCs, but an exact number is not known; and finally PMCs do not normally make this information public. It should be pointed out the U.S. government does not know exactly how many contracts it has let with PMC in support of its war effort in Iraq (see Singer, *Corporate Warriors* 245). The U.S. Department of Labour is now tracking civilian casualties in Iraq based on information voluntarily offered by PMCs who have contracts with the U.S. government in Iraq and as of August 2007, 1001 civilian contractors have been killed. As Eckert notes, "this is not a negligible number of casualties when compared to the public losses among military personnel in Iraq." (see Amy Eckert, *Ethical Norms and the Public/Private Divide: Justice and the Privatization of War* 20.

reasons account for the rapid rise in the private military: a marked increase in the demand, hence the increase in supply to fill the market void; transformation in the nature of warfare; and the power and influence offered by a privatized capability.²⁰¹

The 1990s have come to represent a period of intense military downsizing within most NATO members,²⁰² in response to an *apparent* peace dividend following the collapse of the Soviet Union. Yet what the end of the Cold War really signalled was an increase in the state instability among those nation states that previously benefited from the influence, protection and watchful eye of the two world superpowers.

At the same time, the crumbling of the main ideological alternative to the capitalist system contributed to the growing influence of neo-liberalism, marked by the trend towards the privatization of a range of services previously provided by the state.²⁰³

Coupled with an increasing instability among weak states and no world power to keep smaller states in check, a security gap arose that the Western-based private market quickly filled. Therefore, what had been a neatly defined and controlled world order since the end of World War II, was now rife with civil wars, ethnically based conflicts and mounting insecurity in several different regions around the globe. Weak countries with outdated weapons systems and untrained militaries began to look to private solutions.

Secondly, a revolution in military affairs (RMA) occurred simultaneously as the new world order emerged following the fall of the Berlin wall, driven by the explosion of rapid technological change in the last few decades of the 20th century. Militaries that were previously at the cutting edge of technological innovation and were the primary market drivers during the Cold War, albeit for military purposes, were surpassed by a global market that again filled a

²⁰¹ Peter Singer, *Corporate Warriors* Chapter 4.

²⁰² For example, the United States reduced its military by approximately 35% from its strength during the height of the Cold War. See David Shearer, *Private Armies and Military Intervention*, 27.

²⁰³ Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations* 2.

consumer demand. Thus, instead of militaries that had previously internally developed and paid for their own weapons technology, they were faced with a private market capable and eager to provide the latest in military innovation off the shelf. It is no longer a case of militaries choosing to develop their own weapons technology, but a case of not being able to keep up with developments in the civilian market; it simply no longer makes sense for governments to spend limited defence dollars on research and development.

Most of the information systems [now] used by the world's modern military forces are designed, developed, and managed by civilians, primarily for civilian purposes ... but as one analyst notes, 'The U.S. Army has concluded that in the future it will require contract personnel, even in the close fight area, to keep its most modern systems functioning. This applies especially to information-related systems.'²⁰⁴

It also means that militaries are unable to train their uniformed members fast enough in order to operate these systems given the pace of development and changes in them. Furthermore, given technological advances, non-state actors can now wield a significant amount of power which the world has witnessed with every major terrorist attack since the 1983 suicide bombing of the U.S. Embassy in Beirut to the most recent series of ten coordinated attacks committed by Islamic terrorists, in Mumbai in 2008. Again, terrorism itself is nothing new but the firepower they can obtain and the potential damage they can ensue is unprecedented, particularly when the possibility of a terrorist using WMD is taken into consideration.²⁰⁵

And the Western military focus on high technology, it would seem, has not been able to prevent low-technology terrorism as witnessed in the September 11, 2001 attacks on the United States; box cutters and airplane high-jackings do not reflect 21st century technology by any means. That the move to adopt high technology in military warfare in the west overlooked the possibility of such basic and tested terrorist techniques, like these being used, speaks more to

²⁰⁴Peter Singer, *Corporate Warriors* 63.

²⁰⁵ Philip Bobbitt argues that unlike terrorists and terrorist activity of the past century, the market state terrorist of this century "would actually use WMD against civilians." See Philip Bobbitt, *Terror and Consent* 9-10.

the West's lack of an overall realistic global security outlook. Without a sober and realistic view of its place in the world, the US failed in its assessment of the extent of anti-Americanism and anti-globalization among its allies and enemies. As the world's leading 'emerging' market state, its interest in furthering US economic advantage by whatever means possible (including warfare) fuelled anti-Americanism particularly in the mid-East and perhaps help to explain the causes to a certain extent of the events of September 11.²⁰⁶ Bobbitt points out that while the Bush Administration had "done much to arouse anti-Americanism, many of American's friends have done little to suppress it," and further adds that "it is a popular European retort to American policy since September 11 to say that the only thing new about the attacks on that day is that US citizens were the victims."²⁰⁷ Thus, while the US continued to seek military global dominance, even to the extent of promoting the rise of the private military industry, it overlooked its state security vulnerabilities in the face of even basic 20th century terrorist tactics.

A third reason that accounts for the rise in the privatized military industry is what Singer refers to as "the power of privatization and the privatization of power."²⁰⁸ He argues that because privatization emerged as the business model of choice in North American, European and Japanese markets, more and more functions that were previously under the responsibility of the state were naturally privatized, and not just to companies belonging to the state in question. This is so even in the developing world where the race toward liberal democracy has sidestepped those functions that were traditionally provided by the government, including public health and human rights monitoring.²⁰⁹ The massive increase in military outsourcing

²⁰⁶ Philip Bobbitt, *Terror and Consent* 61.

²⁰⁷ Philip Bobbitt, *Terror and Consent* 83, 23.

²⁰⁸ Peter Singer, *Corporate Warriors* 66.

²⁰⁹ Peter Singer, *Corporate Warriors* 67.

reflects what Bobbitt describes as the growth of the market state. A portion of a quote from Bobbitt used in Chapter 1 is worth repeating. He characterizes the market state as one where:

government is free ... to try and increase the literal and metaphorical purchasing of power of citizens, but not to take for granted anything much in the way of agreement about commons goals or social good ... Government is now heard asking to be judged on its delivery of purchasing power and maximal choice ... The market state is classless and indifferent to race, ethnicity, and gender, but it is also heedless of the values of reverence, self-sacrifice, loyalty and family.²¹⁰

With this in mind, it is no coincidence that an industry that provides so much in the way of choice should be appealing to a military incapable of fighting the wars it has waged due to previous downsizing. The military, then, is the next logical step in outsourcing traditionally accepted public state functions. Moreover, one can argue that the boom in privatization is pushing this market activity away from the private side and out into the open, legitimizing its existence regardless of the very valid ethical concerns surrounding it. It also challenges the traditional notions of state and public. It would seem that the ancient idea of public as good is now facing an inversion in meaning; the ‘public’ in its federal or state sense is less efficient, more costly, too regulated and therefore somehow less respectable. The growth of the private military industry then should be no surprise, but as with any human behaviour that has the potential to produce good *and* bad, it must be open to scrutiny in order to determine its real value. The moral validity of humanity’s ability and choice to control violence must continue to be weighed, regardless of who pulls the trigger.

A FEW ARGUMENTS IN SUPPORT OF PMCS

In picking up on a case in point made earlier, there are a few arguments to be made in support of the use of PMCs. Two examples help to illustrate this idea: one hypothetical and one real.

²¹⁰ Philip Bobbitt, *Terror and Consent* 89. Portions of this quote are also taken from the Rowan Williams’ Dimbleby Lecture, 2002.

In the first case, we look to the ethnic tension that erupted in Rwanda in 1994, resulting in one of the most horrific occurrences of genocide since the end of World War II. Within three short months, the majority Hutu population massacred an estimated 800,000 of the minority Tutsi population. Much like the massive ethnic cleansing that took place in the same decade throughout the former Yugoslav republic, the world powers of the time failed to intervene. Although many reasons have been explored by scholars to explain the lack of action on the part of the United Nations and the major world powers who are also its member states, one reason often cited is the slow bureaucratic nature of the United Nations itself and its repeated inability to muster enough support for early military intervention in cases like Rwanda and Bosnia. Another factor is that it often takes months for a Western military to plan, train and deploy even a small contingent for a UN or NATO force regardless of the emergency nature of the mission. Three characteristics of PMCs are their ability to mobilize quickly, their ready access to arms, expertise and experienced military planners, and the lack of any weighty administrative or bureaucratic machinery to slow a rapid deployment effort. Also, as Lim points out, PMCs cost a mere fraction²¹¹ of the type and size of a UN peacekeeping force that would have been required to quell the brewing conflict in Rwanda in the months leading up to the eruption of violence in April 1994. Although ethnic tension was nothing new to Rwanda, and enough signs and small scale violence were present well before the shooting down of President Habyarimana's plane in April 1994, it is reasonable to ask if PMCs, as the peacekeeping or preventive-war force, would not have made sense in the case of Rwanda. It is anything but a justified response for the world to watch in horror as up to one million people, including the elderly and children, are slaughtered. Thus, despite the traditional objections to mercenary activity and the fact that such a mercenary force would have to be financially recompensed,

²¹¹Kevjn Lim, "Military privatisation and its impact on the nature of warfare" 6.

would not such a force have been the lesser of two evils, especially if it could have prevented the genocide that ensued? Although this is a more consequentialist approach to justify the use of PMC activity, this is an area of study that deserves more attention. It is also an area that a particular sector of the PMC industry will likely exploit in an effort to gain a more legitimate image. Given the established presence of PMCs, it is likely that scholars will pursue this line of reasoning too. There seems to be a more benevolent role for PMCs in the future than just the guns-for-hire approach apparent in the U.S. war effort in Iraq.

The second case is not so hypothetical. As cited earlier, the war in the former Yugoslav Republic was not going well for the Croat side by the summer of 1994. The U.S. government referred the Croatian Defence Minister to the PMC, MPRI, and the U.S. also financed the contract which was designed to turn the Croats into a more modern professional force.²¹² The Croatian force was poorly-equipped, not well-trained and was losing a significant amount of territory to the Serbs. Although a rough ceasefire had been drafted, fighting still continued and reports of ethnic cleansing, rape camps and forced starvation played out daily in international news reports. Again the world watched in horror while countries including the United States vowed to do something to put an end to the horror. With the Serbs continuing to gain ground, it would prove unlikely that the two sides would ever meet to agree to a protracted and stronger ceasefire. One thing was clear by this point, the United States and the more powerful West European states were not going to involve their militaries directly into the conflict. With MPRI in place to advise and train the Croat Army, the U.S. was able to “achieve their foreign-policy goals free from the need to secure public approval” and safe in the knowledge that should the situation have deteriorated, no one could claim that the U.S. officially had a direct hand in

²¹² Rita Abrahamsen and Michael Williams, “Selling security: Assessing the impact of military privatization,” *Review of International Political Economy* 15:1 (2008):137.

contributing to an outcome that favoured U.S. strategic interests; as one of the key signatories to the Dayton Peace Accord the U.S. had to maintain an appearance of neutrality.²¹³ The fact that the formerly weak Croat Army was able to push the Serb forces back and regain key locations and territory within a few months, using textbook NATO tactical warfare, was no coincidence. The result of the Croat offensive, although not completely without bloodshed, was to turn the tide of the war and by November 1995, the Dayton Peace Accord was signed and brought the major hostilities to an end. Given this scenario, it is difficult to say that the use of a PMC with the right skill set, knowledge and expertise in this manner is wrong. If the major Western powers were not willing to intervene militarily, diplomatic negotiations were stalled, and UN forces were sufficiently limited by their rules of engagement to stop any of the conflict, then by all accounts the Serbs would likely have continued to gain control of Croat territory, killing every Croat in the process, eventually winning the war. Radovan Karadzic, most often compared to Hitler, would likely have assumed a leadership position within his controlled territory and continued further expansion in no less a horrific manner than he carried out into Croat controlled land. With the manner in which the warring sides were carrying out the war, and the ensuing bloodshed, it is difficult to argue that the U.S. should not have pushed for the solution it did: for a PMC such as MPRI to bolster the Croat forces to at least give them a competitive edge. In this case, although it was not public or agreed to by both sides, and seemed to involve defined mercenary activities, it was foreign policy by proxy that was successful in stopping more genocide and likely another Srebrenica from occurring.

THE MORAL VALIDITY OF PMCS

At this point, I want to apply JWT to PMCs, specifically to explore some moral arguments in favour of and against their use and to determine if they have moral responsibility

²¹³ David Shearer, "Outsourcing War" 74.

when carrying out the terms of their contracts. This discussion will set the stage to determine how relevant JWT is in accounting for PMCs and their growing role in global armed conflict.

If one side in a given war has contracted out traditional functions of its military to private companies,²¹⁴ and if that side cannot engage in hostilities without the services provided by the contractors alongside the soldiers in uniform that they support *in the theatre of operations*, one could reasonably surmise that those contractors have the same moral responsibilities as the soldiers in uniform that they support. To be certain, I am not referring to those contracted civilian employees hired for non-military or non-security positions (for example, local nationals who work as base building custodians and cleaners, or civilians contracted to work at the Camp Talil Pizza Hut outlet). Specifically, I mean the 50% of interrogators at the Abu Ghraib prison (35% of which were found to have no formal training in military interrogation in 2004)²¹⁵ or the contractors who maintain and load weapons on the U.S.' B-2 stealth bombers and Apache helicopters, or for example the:

... estimated 6,000 non-Iraqi private contractors [who] currently carry out armed tactical function in [Iraq]. These individuals are sometimes described as 'security guards,' but ... their jobs include protecting important installations such as corporate enclaves, U.S. facilities and the Green Zone in Baghdad; guarding key individuals (Ambassador Paul Bremer, the head of the Coalition Provisional Authority, was protected by a Blackwater team that even had its own armed helicopters); and escorting convoys, a particularly dangerous task thanks to the frequency of roadside ambushes and bombings by the insurgents.²¹⁶

In carrying out even combat-related duties, such PMC employees have a responsibility certainly to their employer (the company, not government, who employs them) to fulfil the duties stipulated in the contract. But if the contract does not specifically define any moral or ethical responsibilities that the employee has in carrying out those duties, he does not have any

²¹⁴ For example, the United States and its declared allies who have troops on the ground currently fighting in the hostilities Iraq.

²¹⁵ Peter Singer, *Corporate Warriors* 255. See also Maj.-Gen. George Fay and Lieut.-Gen. Anthony Jones, U.S. Army "Investigation of Intelligence Activities at Abu Ghraib" (2004) 50. Accessed Nov. 24, 2008 at: <<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>>

²¹⁶ Peter Singer, "Outsourcing War," *Foreign Affairs* 84:2 (2005):122.

beyond the basic moral constraint (MC) expected of the average human citizen operating in *or* outside of a conflict situation. The way a soldier carries out his duties is based on a specific military legal code as well as a code of ethics that stipulates how he is to do this. For most militaries, this code includes adjectives that reflect courage, honesty, duty before self, respect and loyalty. Thus, while skill set and expertise may ensure that an employee fulfils his contractual requirements, unless his contract specifies moral responsibilities, or even commonly understood virtues, there is no moral burden that he must carry in fulfilling his contract. To be sure, functions and duties critical to the military engaged in a war-fighting mission, such as military interrogation and close personnel protection, are some of those being carried out in Iraq and Afghanistan by contractors who fall *outside* of the military chain of command. In this case it is not enough to assume, as one would with perhaps a government function such as tax return processing or postal delivery, that the contract employee will carry out the contract with integrity; the consequences of dishonesty or lack of respect for the client, while important, are not life-threatening nor would such ill-intended behaviour reflect the credibility of an entire nation in the face of a declared enemy. Quite simply, the stakes are not critically high or morally imperative for either side for *most* privatized state functions. So while there may be assumed moral responsibility of private military contractors on the part of the client, in reality privatized soldiers, like mercenaries, have no moral responsibility and cannot be held to a moral standard. Without a legal framework in place to hold such employees accountable, one that presumably would incorporate an effective moral standard, there are very little means other than relying on the market forces to hold the employee accountable should he fail to carry out his tasks according to the contract requirements. In other words, if a company's employee is found to have committed a violent act in this situation, his company would not be

hired in the future. But this is not realistic particularly in wartime scenario when the state may not be able to find another company who can offer the same type of service or product. For example, there is the case of the civilian contractors who were found guilty of committing torture on Iraqi prisoners in 2003-2004; to date none have been charged or prosecuted in any sort of legal tribunal.²¹⁷ The U.S. military members that were implicated in the same behaviour were prosecuted according to the United States Uniform Code of Military Justice (UCMJ), a federal law enacted by Congress. Or perhaps even if private contractors could be brought under the legal jurisdiction of the military legal system that oversees the uniformed soldier operating in the same conflict, there would still remain organizational and operational challenges as presumably PMC personnel would still fall outside the military chain of command and therefore accountability for PMC behaviour could only be acted on *after* an incident, creating an environment of hopeful deterrence in the face of potential immoral and illegal behaviour. This is indeed what the US government has recently legislated. In September 2007, immediately following the Blackwater incident, the Department of Defense issued specific direction regarding the management of its contractor force.²¹⁸ While it gave military commanders more responsibilities, adding to the already overburdened chain of command in theatre, it also introduced expectations concerning the disciplining of PMC personnel. Seeking to have commanders exercise increased authority over:

DOD contractor personnel (regardless of their nationality) within the UCMJ, the memorandum allows military commanders to “disarm, apprehend, and detain DOD contractors suspected of having committed a felony offense in violation of the [rules for the use of force] . . . and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the court-martial of military service members.”²¹⁹

²¹⁷ Peter Singer, *Corporate Warriors* 251.

²¹⁸ Jeffrey Thurnher, “Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts” *The Army Lawyer*, July 2008: 64-90.

²¹⁹ Jeffrey Thurnher, “Drowning in Blackwater” 81.

Although it is too soon to assess the effect this change has had on contractor behaviour, it is undoubtedly a step in the right moral direction.

One must ask then if a just war can be waged using the services of a PMC. Furthermore, it can be argued very convincingly from the JWT perspective that regardless of however noble the intentions are of the state declaring war or however just the cause of going to war is, if PMCs are used in the capacity whereby their civilian employees are put directly in harm's way, the justness of the state's use of PMCs to wage the war is invalidated. This is not to say that there are no instances where PMCs can be used justly, for example some scholars argue that the use of PMCs can be justified in a true peacekeeping capacity or in support of some humanitarian missions, and their arguments are based on sound reasoning.²²⁰ Yet peacekeeping missions, where a viable truce has been called, do not normally involve combat or include the potential for injury or death. For instance, much of the United Nations Peacekeeping Force in Cyprus (UNFICYP) could be contracted out to supervise ceasefire lines, maintain the buffer zone and undertake humanitarian activities. Given that there is a very low possibility of hostilities, this may be a more cost effective way to support the ongoing mission. In fact, contractors may very well be present there as the United Nations has contracted out support services to forces in the past. Such a scenario though would have to be based on the agreement of both sides.

²²⁰ See Doug Brooks and Matan Chorev, "Ruthless humanitarianism: Why marginalizing private peacekeeping kills people," in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relation* 116-130. Brooks and Chorev argue in favour of the 'peace and stability industry' in conflict and post-conflict environments. See also Kevjn Lim, "Military privatisation and its impact on the nature of warfare" 6-24.

HOW JWT CANNOT ACCOUNT FOR PMCS

There are a variety of reasons that can be used to argue against the use of PMCs. Although some have been presented already, they will be discussed in this section from a JWT perspective.

JWT has a long history whose theorizing can be traced as far back as Augustine and Aquinas.²²¹ Much of its development though is based on the Westphalian state system that evolved and the nationalization of state force.²²² One can argue that JWT's influence and strength have had a tremendous impact on the way we discuss war today as well as the international laws that govern interstate relations. As Eckert notes,

... the historical evolution of Just War Theory suggests that it is not inherently statist. However, the present formulations of *jus ad bellum* and *jus in bello* rules rely implicitly on the existence of this public sphere as personified by the state and its dominance over the private sphere with respect to warfare.²²³

This would explain why JWT is unable to account adequately for private actors who not only have a role in international relations but who significantly impact the interplay of the legitimately recognized state actors. Such is the case with PMCs.²²⁴ Thus, if the rise of the private military industry has significantly altered how some states approach and engage in armed conflict, it would seem that JWT must adapt in order to account for their presence and effect. If the key principles of JWT, namely those rules within *jus ad bellum* and *jus in bello* are still rules that apply to public actors, legitimate states and their political leaders, what rules within JWT can be applied to private actors, namely PMCs? Eckert further points out that while mercenaries (private and illegitimate by their nature and definition) have operated for the

²²¹ See Mark Evans (Ed), *Just War Theory: A Reappraisal* 3, 52, and Brian Orend, *The Morality of War* 14, 16.

²²² Brian Orend, *The Morality of War* 14-23. Orend offers a concise and useful history of JWT's development in these pages, highlighting the most salient aspects of its evolution into the 20th century.

²²³ Amy Eckert, "Ethical Norms and the Public/Private Divide: Justice and the Privatization of War" 15.

²²⁴ One could also make this assertion regarding the presence of non-governmental organizations including humanitarian aid agencies.

most part on “the margins of the international system during much of the Cold War” (I would argue much of the 20th century), PMCs are now acting as actors critical to the state’s use of force, as we can see in the Afghanistan and Iraqi wars that currently continue.²²⁵ If the United States and Canada cannot wage a war (legitimate or otherwise) without the support of PMCs, this also brings into question the state’s ability to protect its citizens without their use. Their presence, then, can no longer be disregarded or relegated to the private sphere of international relations. The danger is that if a moral theory as strong as JWT cannot assess the impact of PMCs in any given conflict, particularly PMCs who carry out a tactical combat or near-combat role,²²⁶ their rising influence in warfare continues to remain hidden within the private realm of international relations. For instance, if no formal mechanisms exist to track PMC casualties by those states who employ them, or regulate the quality of their work, no theory can be applied to assess the moral validity of the agent regardless of its strength, in this case a private agent not bound by any law to publicize anything but its profit margin to its shareholders. As Pattison explains:²²⁷

The use of PMCs undermines one of the key justifications of the principle of legitimate authority: the limiting of the frequency and awfulness of warfare ... because the privatization of military force introduces a set of nonstate actors that do not fit into state-based systems of regulation. Although a state that employs PMCs is still subject to international law that proscribes certain types of behaviour (such as aggressive war), the use of PMCs means that it is harder to enforce such prohibitions.

Simply put, contemporary JWT assesses the legitimacy of going to and carrying out war, but one within the public domain and thus, cannot adequately and critically assess those conflicts that are not or that involve private actors to a notable extent. Thus, the growing presence of PMCs in a variety of conflicts challenges the principle of legitimate authority.

²²⁵ Amy Eckert, “*Ethical Norms and the Public/Private Divide: Justice and the Privatization of War*” 15.

²²⁶ Singer uses the ‘tip of the spear’ analogy in that those PMCs like Executive Outcomes who are capable and willing to provide tactical combat operators on the front lines are those who sit at or near the tip of the spear. See Singer, *Corporate Warriors*, 88-95.

²²⁷ James Pattison, “Just War Theory and the Privatization of Military Forces” 151.

The presence of PMCs also challenges JWT's principle of proportionality. Stated plainly, this principle balances the just outcome of a war against the costs of waging it. Granted, such an assessment can never be pinpointed with accuracy. Walzer rightly reminds us that it is not 'pay back' for perceived wrongs already committed; "the use of the term is different with regard to war, because war isn't an act of retribution; it isn't a backward-looking activity, and the law of even-Steven doesn't apply."²²⁸ It is impossible to calculate that a particular number of deaths, displacements and economic devastation were worth one side winning over another. Walzer continues:

The values at stake are not commensurate – at least they can't be expressed or compared mathematically ... how do we measure the value of a country's independence against the value of the lives that might be lost in defending it?²²⁹

However, we do seem to recognize more easily a disproportionate war, such as the extensive bombing of Iraqi infrastructure by US forces in the first Gulf War.²³⁰ But in order even to estimate the factors involved in determining proportionality such as the universal evils caused and ensured by *all* parties to a conflict, one cannot look just at the official number of casualties. It is a good start though. As previously stated, the United States government cannot even assess the total number of casualties on the coalition side of the Iraq war since no firm number exists of the amount of PMC personnel in theatre, let alone the number of casualties that have resulted.

²²⁸ Michael Walzer, "On Proportionality," *The New Republic*. January 8, 2009. Accessed Jan. 27, 2009 at: <<http://www.tnr.com/politics/story.html?id=d6473c26-2ae3-4bf6-9673-ef043cae914f>>

²²⁹ Michael Walzer, *Arguing About War* 89-90.

²³⁰ Paul Christopher, *The Ethics of War and Peace* 94.

Furthermore, military ethicist Asa Kasher argues that the goal of profit common to all PMCs will be expected to be their driving motive and it will usually trump any ethical judgment related to proportionality.²³¹

Whenever there is a significant gap between the legal 'threshold' and the ethical 'shelf', raising the 'shelf' may correlate with rising expenditures [for the PMC]. Under such conditions, the profit-oriented PMC is naturally expected to act slightly above the legal 'threshold' even if it is much below the moral and ethical 'shelf' of a democratic regime. The principle of proportionality, which requires that collateral damage be minimized, is a possible example of that gap, where PMCs will invoke the law in justification of the behaviour that would be unethical for the military force of a democratic state.

The same argument applies in trying to assess further how a conflict is fought. In determining a disproportionate war, one cannot rely on incomplete media assessments as to the rightness or wrongness of behaviour. Indeed, Walzer characterizes the Vietnam War as one that "we should never have fought, and that we fought badly, brutally, as if there were no moral limits."²³² Yet at this point, there exists little evidence that can point to the overall quality of PMC contribution to the overall military effort in Iraq or Afghanistan as their private nature precludes any sort of public eye. There are a few US congressional reports that paint a morally abhorrent picture of the ethical judgement and behaviour of some PMC employees who operated in the Abu Ghraib prison in the early years of the Iraq war. Other critics such as Peter Singer offer a number of key examples of operations and incidents that clearly compromised the integrity of the US and its operational viability in conflicts where it has employed PMCs in varying capacities and again, many of these accounts are based on legitimate news reports. The fact, however, that such information is not readily available as public information, such as military reports and other government reports that are normally made public following significant conflicts and wars, confounds any attempt to assess proportionality *even further*.

²³¹ Asa Kasher, "Interface Ethics: state and private forces," in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations* 243.

²³² Michael Walzer, *Arguing About War*, 9.

Another scholar who researches extensively in the area of the need for legal oversight of PMCs, notes that although federal US and international laws exist that could be applied to PMC personnel when they commit crimes, “enforcement ... has been deeply problematic to date and the US has, with very few exceptions, generally failed to prosecute civilian security contractors who are suspected of having committed serious crimes and human rights abuses.”²³³ Casualties are an important case in point too: “certainly one dead contractor who is a U.S. citizen is no less a dead American than a dead soldier who is a U.S. citizen.”²³⁴ In the case of Iraq, the estimated hundreds of contractor deaths cannot be factored into any proportionality assessment. The same argument holds true for the financial cost of contractors in the U.S. war effort in Iraq; the price tag attached to most contracts is private information protected from public access.

The use of PMCs further obscures the *jus ad bellum* principles of proper authority and public declaration. A state that may be legitimate but does not have the public support of its citizens to engage in armed conflict can skirt around the process of openly declaring war and using its military as the appropriate tool to do so, with the support of a PMC. Such was the case it seems with MPRI and the war in the former Yugoslavia in the mid-1990s. This case provided a way for the U.S. government to deploy a military force without openly declaring its preference for the defeat of the Serb forces. It could also be argued that, overall this may have been the best way to end the hostilities, it was an underhanded process shielded from congressional scrutiny and the eyes of the public whose tax dollars ultimately funded the contract.

But there is nothing to prevent any state or non-state from engaging the services of a PMC. With the dramatic rise of the private military industry, the number of actors able to apply

²³³ Marina Caparini, “Regulating PMSCs: the U.S. Approach,” in in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations* 181-182.

²³⁴ Amy Eckert, “*Ethical Norms and the Public/Private Divide: Justice and the Privatization of War*” 20.

lethal military force has increased. PMCs have been hired by national rebel forces, drug cartels and before Sept. 11, two al-Qaeda-linked jihadist groups.²³⁵ With more actors, a significant number of whom are represented by an industry motivated by nothing other than capital gain, instability between nation states will also increase.

As a principle of *jus in bello*, non-combatant immunity “underlies and shapes the judgments we make of wartime conduct.”²³⁶ JWT also accounts for the moral validity of a war based on the status of those who carry it out. Thus, legal combatants are those members of states’ militaries who have openly declared war on each other. As members of militaries they are distinguishable from non-combatants who are normally a part of the civilian population in which the conflict is waged. In JWT terms, combatants have forfeited their right to immunity from harm and if they fight justly, attempt as much as humanly possible to ensure the right of immunity held by all non-combatants is respected. Yet despite being hired by one state to fight along side and/or directly support that state’s military force, the status of PMC personnel under international humanitarian law is unclear.²³⁷ On the face of it, PMCs seem to be non-combatants who willingly adopt a combatant role. While most PMC personnel would not expect non-combatant immunity despite their civilian status, their actions violate the principle of non-combatant immunity.²³⁸ Their status seems to amount to an almost complete lack of accountability. This is not to say that the whole industry takes advantage of the lack of any effective oversight, and that it is possible a state may choose not to hire a company due to a questionable reputation, but it does translate into effective impunity in the face of unscrupulous and even illegal behaviour. As Pattison notes, there is very little that can prevent a PMC from

²³⁵ Fred Schreier and Marian Caparini, “Privatising Security: Law, Practice and Governance of Private Military and security Companies” *Occasional Paper No. 6* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005) 8.

²³⁶ Michael Walzer, *Just and Unjust Wars* 135.

²³⁷ James Pattison, “Just War Theory and the Privatization of Military Forces” 151.

²³⁸ James Pattison, “Just War Theory and the Privatization of Military Forces” 151.

committing the worst atrocities known to occur in war.²³⁹ Several employees of one U.S. company hired for policing services in post-Dayton Bosnia were openly implicated in a human trafficking and sex slave scandal.²⁴⁰ The Blackwater incident in Baghdad previously discussed resulted in 17 civilian deaths (some of whom were women and children)²⁴¹ and caused, according to one US Army lawyer, “an unusually unified and strong condemnation from the various elements of the Iraqi Government” even though Iraqi citizens had been previously killed by American forces in the current war.²⁴² Although the industry seems to be concerned about its public image, particularly given the nature of some of the alleged abuses attributed to them, self-regulation is certainly not enough as a check for moral behaviour. Thus, while most Western soldiers are subject and held to a moral and legal code of conduct, the status of PMC employees in any conflict zone precludes accountability, yet their actions are sometimes indistinguishable from uniformed military forces. Singer rightly concludes that civilian immunity can no longer be respected.²⁴³ Furthermore, “turning a blind eye to the *jus in bello* violations of those individuals who fall outside the state structure makes a mockery of the protections in place for non-combatants, prisoners and other vulnerable populations,”²⁴⁴ and further erodes any credibility of the state who contracts for the services of the PMC in the first place. In the case of Blackwater, it would seem that the Iraqi government agrees; it announced in late January 2009 that it would not issue a license to the US company to continue assisting

²³⁹ James Pattison, “Just War Theory and the Privatization of Military Forces” 152.

²⁴⁰ See Cynthia Enloe, “Crucial Reporting: Human Rights Reports and Why We Should All Be Reading Them,” *The Women's Review of Books* 21:5(2004):22, as well as Peter Singer, *Corporate Warriors* 222, and James Pattison, “Just War Theory and the Privatization of Military Forces” 152.

²⁴¹ James Pattison, “Just War Theory and the Privatization of Military Forces” 152.

²⁴² Jeffrey Thurnher, “Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts” 64.

²⁴³ Peter Singer, *Corporate Warriors* 64.

²⁴⁴ Amy Eckert, “Ethical Norms and the Public/Private Divide: Justice and the Privatization of War” 26.

US military forces in the country stemming directly from the incident in 2007 resulting in the deaths of Iraqi civilians.²⁴⁵

Additionally it is a fair question to ask what, if any, protection PMC personnel are owed by the state government who contracted their services. Undoubtedly many PMC personnel, particularly those in lower-level support jobs (for example, administrative support staff, cleaners, translators, food outlet workers, computer systems technicians and trouble-shooters) are attracted to a contract simply for the opportunity to earn a much more lucrative wage than they would otherwise back in Canada or the United States. These people do not wear uniforms, live and work only within a protected static military compound, are not trained militarily for such an environment and whose only frame of reference are war movies. Yet, they are exposed to the same risk as the military they support. Thus, if the threat is high, say from rockets launched by insurgents into the camp, the threat is exposed to all personnel regardless of their status as combatants or non-combatants. The point is simply this: these people provide their services for a fee and are not considered combatants, but all the while face a real threat of harm to their person or worse. Thus, while they will be offered the same protection and guard as their uniformed and armed colleagues, they are not armed and do not have access to weapons for self-protection. They are in harm's way (hand propelled rockets are fired at the base regularly), therefore what protection are they entitled to? If one applies the JWT principle of non-combatant immunity, they should be immune from deliberately directed harm from the enemy.

²⁴⁵ News agencies throughout the world announced this decision on Jan. 29 and 30, 2009; see: Deborah Haynes, "Private Security Firm Blackwater to be Ejected from Iraq," *The Times* (London), January 30, 2009, accessed the same day at: <<http://www.timesonline.co.uk/tol/news/world/iraq/article5611311.ece>> and James Risen and Timothy Williams, "US Looks for Blackwater Replacement in Iraq," *The New York Times*, January 29, 2009, accessed Jan. 30, 2009 at: <<http://www.nytimes.com/2009/01/30/world/middleeast/30blackwater.html?scp=2&sq=blackwater&st=cse>>. The information was also confirmed by a US Department of State spokesperson in a press briefing January 29, 2009; see: US Department of State Department, *Daily Press Briefing*, January 29, 2009 accessed Jan. 30, 2009 at: <<http://www.state.gov/r/pa/prs/dpb/2009/jan/115562.htm>>

But they are working in direct support of one side who is a declared combatant in the conflict, and living within the confines of that side's camp. Orend spells out this distinction quite clearly:

A legitimate target in wartime is anyone or anything engaged in harming. All non-harming persons, or institutions, are thus ethically and legally immune from direct and intentional attack by soldiers and their weapons systems. Since the soldiers of the enemy nation, for instance, are clearly engaged in harming they may be directly targeted, as may their equipment, their supply routes and even *some* of the civilian suppliers. Civilians not engaged in the military effort of their nation *may not* be targeted with lethal force. [italics added]²⁴⁶

According to Orend's rationale, it is not a stretch to say that the computer technicians and translators are not immune from direct enemy targeting; those who are serving these necessary functions directly aid in enabling one side to fight in the conflict. But what of the young women serving coffee at the Tim Horton's outlet on the Canadian camp? Although they are serving coffee and donuts, and therefore not necessary for the Canadian soldiers to continue in their war effort, obviously they are not restocking ammunitions or providing translation services necessary for the war effort. So while Orend would likely classify them as those "civilians not engaged in the military effort of their nation civilians" the reality is that they *are* targets by virtue of their location and willingness to be there in the first place – they cannot not be targets.

On this point, it is a fair question to ask whether most if not all contractors are acceptable targets. One is hard pressed to argue 'no' on three counts: what some contractors are hired to do; that their tasks involve managing and potentially incurring violence; and that they have willingly consented to be put directly in harm's way. I am not convinced that the same logic can be applied to contractors who are further away from the tip of Singer's spear, such as a firm that is providing strategic advice or training. Clearly a person who is armed, who willingly puts himself in harm's way, who contributes to the violence of the conflict cannot consider himself to be an illegitimate target by the enemy. Moreover in the case of an armed

²⁴⁶ Brian Orend, *The Morality of War* 107.

contractor, it is the fact that this person *is paid* to carry a weapon, be put in harm's way and very possibly may add to the violence of the conflict that renders him a legitimate target. In fact some contractors are paid as much as seven or eight times the salary of a uniformed soldier doing the same task:

Although many private military contractors in Iraq also claim other motives such as trying to help and fighting for democracy and freedom, they admit that the key reason for their being in the region is the high wages they can earn as military contractors. As one U.S. citizen recruited by Halliburton for one of the notoriously dangerous truck driver positions in Iraq puts it: 'I look at it from a business perspective. When you're talking a possible \$1,000 a day tax free, it's real attractive.'²⁴⁷

War is not inexpensive in financial cost, but it is the contractor's very motive (to be paid for his mercenary services), that deny his right to protection from harm.

Yet, the division between uniformed soldier and hired gun is not so straightforward -- certainly not from the commander's perspective, the soldier who is charged with weighing moral factors in his daily force protection decisions. When a commander is dependent upon contractors to carry out his orders, force protection becomes a crucial factor in achieving a victorious mission, even in humanitarian scenarios.

A commander must therefore conduct his operations while withholding sufficient combat capability to protect his contractors and their operations... after all, if they were not critical to his mission, they would not be there ... if the contractor employee does feel unsafe, or for any reason feels he isn't being 'paid enough for this' and quits, there is little the commander can do.²⁴⁸

The soldiers under his command do not have this choice; desertion under most Western military laws carries a sentence ranging from several years imprisonment to death. For the commander, there is little he can do if a contractor leaves at any point during a contract, or acts in anyway that can compromise an operation (provided there are no elements in his contract that pertain to desertion). Singer cites a 2006 U.S. Government Accountability Office report

²⁴⁷ Elke Krahmann, "New model soldier and civil-military relations," in Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations* 255.

²⁴⁸ Gordon Campbell, "Contractors on the Battlefield: the Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldier to Depend upon Them," *A Paper Presented to the United States Military Joint Services Conference on Professional Ethics*. Springfield, Virginia, January 2000. Accessed Oct. 31, 2008 at: <<http://www.usafa.edu/isme/JSCOPE00/Campbell00.html>>

that warned against private contractors who repeatedly enter the Iraqi battle space not having coordinated their planned actions with the appropriate military chain of command, putting both units at risk.²⁴⁹ The deputy commander of the U.S. Third Infantry Division put it more bluntly: “There’s no authority over them ... they escalate force [and] shoot people, and someone else has to deal with the aftermath.”²⁵⁰ The reality of armed conflict is that it can often be chaotic and confusing, but in these situations, the ethics of requiring a senior officer (whose very taxes contribute to the contractor’s salary) to maintain force protection over contractors who cannot be held accountable for their actions, are void of any measurable validity. In sum, armed contractors are mercenary combatants, a type of combatant that operates without guidance, protection, and the ethical codes of conduct inherent in modern military law and the international body law to which JWT has aptly influenced.

Although the editors of *Private Military and Security Companies: Ethics, policies and civil-military relations* assert that since most contractors hail from military and policing backgrounds, they possess the necessary grasp of military law and even JWT.²⁵¹ This is clearly a stretch at most, and an educated estimate at best. Based on personal experience, most officers *may* have heard of JWT and have likely read at some point whatever ethical code has been established within their respective force, but most enlisted soldiers, sailor and airmen and women in the British, Canadian and American militaries would not be familiar enough with the moral basis of JWT, even peripherally, to claim a basic understanding of the theory. It would be folly to assume that PMC employees, a notable amount of whom are recruited globally from countries including Angola, Israel, Nepal, Ukraine and Zimbabwe, as well as from most

²⁴⁹ Peter Singer, *Corporate Warriors* 254.

²⁵⁰ Peter Singer, *Corporate Warriors* 254.

²⁵¹ Andrew Alexandra et. al. (Eds.) *Private Military and Security Companies: Ethics, policies and civil-military relations*, 6-7. This is largest and most recent collection of commentary on the moral issues surrounding PMCs, a valuable contribution to academic thought in this area.

Western militaries, related their professional activity to an ethical code.²⁵² JWT attempts to assess the morality of armed conflict, yet when key players do not carry any ethical legitimacy within such law, and are in fact operating in the public realm but immune to its scrutiny, JWT cannot account for the results and consequences of their actions.

It would seem that the increasing use of PMCs in the 21st century reflects a change in warfare to a type that is now wielded more from economic forces than political power. Michael Walzer states that “it is the absence of political discipline or its ineffectiveness in detail that opens the way for ‘creative war.’”²⁵³ The rise in complexity of mercenary organizations that are at least legitimate within the global market, regardless of their questionable legitimacy on the battlefield, speaks to this newly created warrior as a reflection of a changing international structure. Thus, it should be no surprise that *how* states fight wars will also change. Indeed if many of the services traditionally provided by the state can be effectively delivered through private means, and democratic taxpayers support government privatization for the most part, the trust between the citizen and state continues to be upheld. But when a state can no longer wage a war or protect its nation *without* the necessary and significant contribution of PMCs, the responsibility of the state to carry out these roles is compromised. Moreover with respect to PMCs, the service provided by the ‘privateer’ poses significant challenges to the relationship of the citizen and the state. While the average citizen may not care how protection of their nation is maintained, or who maintains it, it remains to be seen if they would support an arrangement that lacks an ethical foundation, an arrangement that does not publicly recognize the private sacrifice of their fellow citizens. Quite simply, just because it may appear that a public function like the military can be privatized does not mean that it should. Regardless, such a

²⁵² Peter Singer, *Corporate Warriors* 76.

²⁵³ Michael Walzer, *Just and Unjust Wars* 28.

foundation cannot be fully assessed by JWT until the theory adapts to the new realities of 21st century warfare. And as many Just War theorists stipulate, it has effectively done so in its appraisal of all types of 20th century conflict from guerrilla warfare to nuclear deterrence.²⁵⁴ The next chapter, then, assesses and recommends possible directions for JWT to take in order to account for 21st century warfare in light of the global market state construct that Bobbitt describes.

²⁵⁴ See William Murnion, "A Postmodern view of Just War," Chapter 1 of Steven Lee, (Ed.) *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*. Murnion offers a thorough and comprehensive overview of JWT's 'plasticity' in evolving to meet the postmodern changes in warfare.

CHAPTER 4: POSSIBLE DIRECTIONS FOR THE REVISION OF JUST WAR THEORY

If the 20th century state system is moving toward a market state construct, as Philip Bobbitt argues, then JWT presumably would evolve as it has over the last several centuries in meeting the moral challenges posed by evolving warfare in this time. Yet, what elements of JWT would need to evolve to render it useful for assessing the justness of conflict between market states and states of terror? This chapter will examine, as a summary of recommended areas for further study, possible adaptations to JWT in light of the emerging market state system and the example of PMCs as reflective of the emerging market state system.

Orend summarizes the current debate concerning JWT and its challenges in the “Age of Terror” when he writes: “9/11 revealed that non-state actors, like terrorist groups, can now pose state-scale levels of threat and destruction.”²⁵⁵ He rightly asks if JWT already includes the tool set to evaluate appropriately the West’s War on Terror, and concludes that it does. Indeed JWT is an ‘irreplaceable’ model as Orend notes²⁵⁶ but it is necessary, at this particular juncture in time, for the tools to be sharpened.

As discussed, conventional 20th century warfare strategies do not meet the global threat of non-state terrorism. Within this context then, I recommend three particular calls for JWT revision as the most important for further thought and study: the *jus ad bellum* issue of the distinction between pre-emptive war and preventive strikes; the *jus in bello* issue of discrimination between legitimate (enemy combatants) and non-legitimate targets (children, religious leaders, innocent civilians, etc); and the *jus post bellum* issue as a whole. The question of the winning state’s moral responsibility in reconstruction efforts following combat needs more attention from a JWT perspective and is one facet of JWT that theorists are now

²⁵⁵ Brian Orend, *The Morality of War* 25-26.

²⁵⁶ Brian Orend, *The Morality of War* 268.

just beginning to focus. More and more Western states are developing and implementing less linear plans to their military efforts, plans that are multi-purpose. This is particularly evident in multi-nation or coalition efforts, where strategies such as the ‘three-block war’ approach are applied where forces simultaneously provide for aid delivery, constabulary tasks, and training of the host nation’s police and military forces, often before conflict had ended; the more conventional 20th century goal of going to war in order to win it by overcoming the enemy forces is no longer the only goal of conflict. The task of re-writing or updating Western military doctrine, certainly an ongoing activity within the British, Canadian and American forces, is compounded when long held theories such as JWT do not yet offer a theoretical foundation from which to draw.

THE DISTINCTION BETWEEN PRE-EMPTIVE WAR AND PREVENTIVE STRIKES

Within contemporary JWT, preventive war is generally thought of as illegal and unjustifiable aggression while pre-emption (or a pre-emptive first strike) is generally considered allowable within specific circumstances. As noted, Walzer describes the difference between the two as one of a spectrum of anticipation. Yet, if that spectrum has been made significantly narrower because of either technology or a group’s intent to use that technology on a large group of innocent civilians (as al-Qaeda did Sept. 11, 2001), then the distinction may no longer exist. Walzer wrote shortly after 9/11 that the goal of fighting a “war” against terrorism is not about carrying out revenge, nor can it be “backward looking and retributive but forward looking and preventive.”²⁵⁷ Therefore, in this sense, JWT thinking should focus on the moral rules that could guide democracies in preventing terrorism from happening and not just *within* what most consider the traditional idea of a conflict. A joint Canadian-American military plan is an appropriate example. Although military contingency plans may have existed for an

²⁵⁷ Michael Walzer, *Arguing About War* 138.

aviation shoot-down scenario during and following the Cold War, such an operation was not front and centre for North American military strategists until the events of 9/11. Since then NORAD forces designed Operation Noble Eagle as an ongoing mission of both aerial surveillance of the US and Canadian air space and, if necessary, the elimination of any suspected threat posed by an aircraft that violates US and Canadian aviation regulations (e.g. repeated ignoring of official radio contact). This scenario is war-gamed regularly within and between the US and Canadian militaries and actual sorties number at least 45,000 since September 2001.²⁵⁸ Even if ongoing aerial surveillance of North American skies is morally unproblematic, what moral thinking lies behind the viewpoint that the rules of engagement agreed to by the governments of the United States and Canada permit the pilot of the NORAD aircraft to shoot down any aircraft that does not comply with criteria based on the military and civilian aviation regulations of both countries? It is therefore possible that a military pilot of either nation could shoot down an aircraft carrying innocent civilians and one or more terrorists intent on causing mass civilian casualty and terror. It is precisely this type of 21st scenario that JWT has not largely addressed in the past as a typical war-fighting example. It is a scenario that would occur outside what most think of as traditional warfare involving two or more combatant sides using conventional weaponry. But even, hypothetically, if the terrorists on board state that they intend to fly into an identified building in a highly populated urban area killing the innocent civilians on board as well as those on the ground, and the military pilot shoots-down of the aircraft, is the shoot-down a preventive or pre-emptive act? As John Woodgate writes of this scenario,

²⁵⁸ See US Department of Defence, "Defense Secretary Salutes NORAD's 50 Years as Guardians of Skies," *American Forces Press Service News Article*, May 13, 2008, accessed Jan. 27, 2009 at: < <http://www.defenselink.mil/news/newsarticle.aspx?id=49853> >

The act is a legitimate act of defense with no evil intent. In addition the COA [course of action] would prevent considerable loss of life and material, which are both important considerations. Finally the COA is carried out to defend innocent citizens and the nation. It is a just act that most reasonable people would understand and support ... more innocent lives will be saved [than not engaging the aircraft] and the terrorist attack will be defeated.²⁵⁹

It would seem that the overall goal of this act is preventive in nature. Yet, it is also pre-emptive in that the shoot-down (once decided that there is absolutely no other way of stopping the aircraft) represents a violent attack carried out on a suspected enemy as a precautionary response to an anticipated and more violent act. However, JWT normally discounts preventive strikes as unjustifiable. It would seem, at least in this example, that Bobbitt is also correct in characterizing the spectrum of difference between preventive and pre-emptive acts as having been eliminated, not because of technological advancement but by the intent of 21st century terrorists:

It is the potential threat to civilians – a market state concern ... posed by arming, with whatever weapons, groups and states openly dedicated to mass killing that has collapsed the distinction between pre-emption and prevention, giving rise to anticipatory war ... as with all moral questions, one would have to know a good deal about the facts of the case under consideration.²⁶⁰

The reality of technology today, however, means that there is not always enough time to deliberate about the facts and moral decisions involving potential mass death of innocents must be made almost immediately. It is from this perspective that the military ethicists Asa Kasher and Amos Yadlin designed a model for application in fighting this type of terror. As an extension of the classic JWT, their model of 11 principles is meant to “govern the democratic state when faced with terror”.²⁶¹ They argue that since the conditions fighting modern terrorism are essentially different from the conditions of classical wars, the military paradigm to which

²⁵⁹ John Woodgate, *An Analysis of the Canadian Defense Ethics Program Decision-making Guidance*, An unpublished thesis presented to and approved by the Faculty of the U.S. Army Command and General Staff College, (Fort Leavenworth, Kansas: United States Army, 2004) 29, 31-32.

²⁶⁰ Philip Bobbitt, *Terror and Consent* 137.

²⁶¹ Asa Kasher and Amos Yadlin, “Military Ethics of Fighting Terror: An Israeli Perspective” 3.

much of JWT points is no longer applicable and another model is needed (within the meta-theory itself). They describe their doctrine as one that “that delineates the sphere of justified activities against terrorists ... by making proper assumptions, drawing appropriate distinctions, and formulating justified guidelines.”²⁶² It is a model that weighs the duties of state regarding its responsibility to protect its citizens with the potential and anticipated devastation caused by terrorism. Although criticized for being universally inapplicable,²⁶³ it is calculative but carefully thought out and designed. While the limits of this present study do not allow more in-depth analysis of the Israeli model or more appropriately an application to test its utility, I believe it is the type of model that will aid JWT supporters in further development regarding the pre-emptive and preventive activity in countering contemporary terrorism. Jonathan Schonsheck is correct when he notes that “much work remains to be done by moral philosophers” since JWT cannot offer “moral guidance for a state to successfully thwart suicide terrorist attacks.”²⁶⁴ Quite simply, for a state to stop such immoral and illegal activity, it must use preventive measures, activity which generally requires more rigorous guidelines than pre-emptive measures.

DISCRIMINATION: LEGITIMATE AND NON-LEGITIMATE TARGETS

The Principle of Non-Combatant Immunity is widely held to be one of JWT’s strongest and as Orend points out, “it is also one of the most frequently, and stridently, codified rules within the international laws of armed conflict.”²⁶⁵ Simply put, non-combatants can *never* be the targets of military activity. It would be immoral for any reasonable person to disagree with this

²⁶² Asa Kasher and Amos Yadlin, “Military Ethics of Fighting Terror: An Israeli Perspective” 7.

²⁶³ See Paul Robinson, “The Ethics of the Strong against the Tactics of the Weak: A Response to Kasher and Yadlin’s ‘Military Ethics of Fighting Terror’” *Philosophia* 36:2(June 2008): 195–202.

²⁶⁴ Jonathan Schonsheck, “Determining Moral Rectitude in Thwarting Suicide Terrorist Attacks: Moral *Terra Incognita*,” in Stephen Lee (Ed), *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory* 168.

²⁶⁵ Brian Orend, *The Morality of War* 106.

principle. But the reality of warfare, certainly throughout the last century, saw non-combatants centered between the warring sides caught in the deadly crossfire, often deliberately. David Duquette explains that care must be taken to avoid harming them based on JWT's principle of non-combatant immunity.²⁶⁶ The reality of this century, though, often sees them as the central target, as the means. Given the example of the shoot-down scenario, the terrorists are using the passengers on the hi-jacked aircraft as part of the means to commit an act of war. It is reasonable to say that the civilians on the aircraft have just as much right to protection from harm as do the civilians on the ground. After all their predicament is not their own choosing but they are forced into a situation that will mean the end to their lives. The military pilot, ordered to fly the mission and to potentially shoot down the aircraft, will then be the cause of the death of the non-combatants on board. Putting utilitarian logic aside, Walzer asks:

But what degree of care should be taken? And at what cost to the individual soldiers who are involved? The laws of war say nothing about such matters; they leave the cruelest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve.²⁶⁷

This is an apt description of the pilot faced with the decision to shoot-down a high-jacked civilian aircraft. Duquette continues in response to Walzer:

They are not free of guilt but they are, apparently, justified. However, here moral justification must lack coherence, as the language Walzer uses suggests. If to target and kill innocent people is murder, then it cannot be morally right, and if it is morally right it cannot be murder but justified killing. One cannot give back with one hand what is taken away with the other.²⁶⁸

Again, in the case of the pilot, if he is ordered or decides based on his approved rules of engagement to shoot down the plane, he is guilty of causing the death of all the people on board the aircraft, non-combatant or belligerent. But is he morally justified in taking the action he does? One non-combatant cannot be more immune to harm than another. This is the quandary

²⁶⁶ David Duquette, "From Rights to Realism" in Stephen Lee (Ed.) *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory* 42.

²⁶⁷ Michael Walzer, *Just and Unjust Wars* 152.

²⁶⁸ David Duquette, "From Rights to Realism" 53.

we are faced with in countering 21st century terrorism, and the type of moral quandary to which JWT now needs to turn.

JUS POST BELLUM

Restoring the pre-conflict status quo is often cited as the traditional meaning of *jus post bellum*.²⁶⁹ This could involve the restoration of old boundaries, financial reparations, rebuilding infrastructure and the like. But in light of the types of conflict we find ourselves engaged in this century and those that immediately led up to this century, the definition of restoration may need expanding. Indeed, as we see in ISAF's efforts in Afghanistan, some aspects of restoration have been started before the conflict has even ceased. There is little recent thought upon which to draw regarding the responsibilities and rules that should govern post-war 'fixing'. Although Walzer suggests the two worthy starting points of legitimacy and closure, he also calls them tests that are very difficult to meet.²⁷⁰ This is particularly so when the motive of the 'fixer' comes into play. The most recent US invasion of Iraq quickly comes to mind as one where a carefully designed post-war phase would have required that questions of original motive and post-conflict responsibility be answered. Such a plan for reparations may also have swayed more NATO allies to come on board in support of the American effort. Yet it is not just military invasions that warrant appropriate restoration. Following the cessation of major hostilities and the establishment of a large stabilization force in Bosnia Herzegovina (the former Yugoslavia), work began to turn the former communist nation into a capitalist based Western style democracy with national elections held almost immediately following the Dayton agreement. While I would assert that a capitalist-based democracy is far superior morally to

²⁶⁹ Michael Walzer, *Arguing About War* 20.

²⁷⁰ Michael Walzer, *Arguing About War* 20.

communist oppression, one questions whether such a value system, so foreign to the people and their varying cultures, can be imposed in such a short time frame.

Orend is one of the few leading Just War theorists who has devoted much ink to the *jus post bellum* topic.²⁷¹ He outlines several dangers when this aspect of JWT is avoided or sidelined. First, he notes that by not including a moral account of how the conflict will or should end, a combatant side will more likely be criticized particularly by pacifists and rightly so.²⁷² That by imposing an appropriate restitution plan that aims to improve the devastating effects of the conflict will go some length to “make the international system more peaceful over the longer term.” Furthermore, Orend states that the reality of recent and current warfare proves the importance and necessity of a just-peace settlement, and that without one, fighting will be prolonged or at the very least resume in the near future.²⁷³ Finally he offers a seven-point plan made up of principles designed to be the ethical basis of any post-war exit strategy, which includes: an open peace settlement; the security of those rights whose violation caused the original conflict; reasonable immunity for non-combatants from punitive activity following the hostilities; appropriate public punishment of the aggressor(s) and combatants who committed war crimes on all sides of the conflict; compensation and rehabilitation of society.²⁷⁴ By all accounts, this is a tall measure but without question worth pursuing. It is also a solid foundation for further study in this area. I would humbly add one point based on Walzer’s idea of the necessity for legitimacy and closure cited above. Any comprehensive arrangement for post-war justice should also include a longer term plan for review and assessment looking at such aspects as the effectiveness of the imposed electoral system for example, and a tempered

²⁷¹ See Brian Orend, *The Morality of War* Chapter 6.

²⁷² Brian Orend, *The Morality of War* 160.

²⁷³ Brian Orend, *The Morality of War* 161.

²⁷⁴ Brian Orend, *The Morality of War* 160-181.

withdrawal plan for any stabilization force. While self-review and critique are not traits that come easily to most people, it is one action or process already engrained in most militaries of the West. Commonly referred to as an ‘after-action report,’ it is a step that completes virtually all military operations. By asking what could have been done better or more effectively, and conversely what areas were apparent failures, the goal is to develop from the successes and failures of missions to avoid repeated mistakes. Were such a ‘step’ grossly enlarged and made part of a full-fledged restitution plan, it could only strengthen the justice sought following conflict. It is not a stretch to envision a permanent or standing NATO-type commission that would serve such a function, for instance following a coalition-based conflict. Giving it teeth for the future in-depth analysis and scrutiny, however, is another matter likely related to the realm of international law.

OTHER JWT ISSUES RELATED TO 21st CENTURY CONFLICT

There are two other issues that warrant further study. First, very little work has been carried out regarding the prospect of PMCs filling legitimate peacemaking roles, yet a strong argument can be made particularly in conflicts in which many states are reluctant to engage their militaries for whatever reason (usually related to political risk, although not directly stated). I use the term ‘peacemaking’ vice ‘peacekeeping’ for as David Shearer notes:

According to recent empirical studies, outright victories, rather than negotiated peace settlements, have ended the greater part of the twentieth century’s internal conflicts. Combatants in Angola, Bosnia, and Sierra Leone consistently resisted a negotiated, consent-based settlement.²⁷⁵

A peacekeeping force can only be brought in when a settlement, or at least a maintainable ceasefire, has been reached by the warring parties. However, PMCs possess the very skill set needed for peacemaking: intense training, experience, speed of deployment, agility and state of the art equipment not normally possessed by the warring parties. The genocide in Rwanda in

²⁷⁵ David Shearer, “Outsourcing War” 75.

the mid-1990s is a good example of where the world cried out for military intervention but no one answered. The more recent crisis in Darfur is another. Although many states cite seemingly valid reasons for not intervening to stop such atrocities, money is usually not one of them. As such, it is worth pursuing on a philosophical level the moral value of a group of like-minded states pooling financial resources to lease the skill sets of PMCs to halt such horror, when reluctance to send their own troops prevails.

Secondly, and not surprisingly, Philip Bobbitt looks to strengthening the existing body of international law as one way to combat states of terror. He specifically cites the urgent necessity to reform the laws of war, including the Geneva Conventions.²⁷⁶ Due to WMD and the “emergence of a territory-less, virtual state ... the *jus ad bellum* of the UN Charter simply does not contemplate a strategic context in which the anticipatory use of force is a necessity for a state’s survival...”²⁷⁷ Instead, he recommends the insertion of a more modern meaning of *jus ad bellum*, one that allows lawful intervention beyond the sovereignty of a state that either develops or trades in WMD, harbours global terrorists or commits large scale human rights violations against its own people. This is one example of the area of law that Bobbitt points to in his larger recommendation to reform the laws of war based on their JWT foundation.

Although there are a host of other contemporary JWT issues that warrant further study, I have limited my discussion to those presented here.

²⁷⁶ Philip Bobbitt, *Terror and Consent* 496.

²⁷⁷ Philip Bobbitt, *Terror and Consent* 495.

CONCLUSION

To explore the validity of calls for the revision of JWT, this paper began with a presentation of the features of 21st century warfare, used Bobbitt's characterization of a new type of terrorist, and argued that the nature of warfare has changed. Although Bobbitt's species of terrorism falls into the larger genus of terrorist, it possesses a scope and type of power hitherto unseen. The degree of terror that an organization like al-Qaeda can cause is not merely a tactic made possible by rapid and large technological change, but reflects the will to inflict the type of violence on a scale far beyond that accepted by 20th century terrorists. This is a combatant who operates outside of state boundaries and who fights for a cause that is not defined by national or even regional identity markers; his cause is global and believes the threat to his value system and way of life comes from an idea intrinsic to the identities and cultures of many states. Thus, the very nature, or the domain of warfare has changed. Although it is still overwhelmingly violent, brutal and carried out for mainly political reasons, it is the way in which terrorist tactics can be applied that has evolved. This is due mainly to three factors: (i) the rapid evolution of technology over the last quarter century that has grossly affected how wars can be waged at a rate not seen before in history; (ii) the will of extreme radical terrorists to inflict this magnitude of terror, and (iii) the evolution of the operational structure and organization of such terrorist groups. Combined, these three factors have created the virtual state of terror as Bobbitt suggests. Pan-global extreme terrorist organizations no longer need the funding and infrastructure of established nation states. Furthermore, maintaining or enlarging state boundaries is not a goal of organizations like al-Qaeda, nor is legitimacy within the already existing boundaries of a state. Hence, the tactics and strategies employed by Western states in the conventional wars of the 20th century are no longer wholly effective.

Finally, although non-combatants were victims of war and often direct targets in 20th century conflict (including but not limited to genocide and conventional symmetrical conflict), there did not exist such an extreme will to use civilians and innocents of all ages as the very means to achieve the goals of conflict; although it can be argued that Hitler, Pol Pot, Stalin and others often used civilians as a method of deterrence or to secure their hold on power, the use of civilians as the tools of conflict was not the *only* means to achieve their immoral objectives. In this sense, the terrorist representing a radical extremist group in the 21st century is different than his predecessor of even a few generations past. Indeed, hijacking a plane was not uncommon in the last half of the 20th century, but using the same method to orchestrate an attack on the Pentagon and Wall Street was almost unimaginable as was the use of a nuclear device. That scope and kind of devastation was not seen as required by the terrorist to achieve his aim. And this fact poses an enormous challenge to the West's idea of what constitutes warfare and what methods are appropriate to counter it.

With this in mind, the question was asked if JWT is still relevant in a system of states of terror and consent, or if it still provides an adequate platform on which to talk intelligently and cogently about modern conflict? Indeed a common description of JWT is that it is flexible enough to adapt to a variety of challenges. In sum, I agree with Orend that JWT already possesses the basic tool set to evaluate appropriately the type of war that the West currently faces. Given its pacifist goal of 'just peace' that reflects humanity's overall continual hope for peace, and its solid entrenchment in the body of international law that exists to govern such state activity, the simple fact is that JWT cannot be relegated to the history books. The foundational thinking of JWT is too much a part of how the world formally tries to control this type of behaviour – at the very least in its thinking and legal applications. Despite the range of

calls for its update, in order to account for the changes in warfare noted above, it has been argued the JWT is adaptable enough to evolve according to the historical changes that have affected it. It is facing similar challenges at this point in time and I point to three calls in particular for JWT revision as the most pressing for immediate study and critical development.

First, in terms of *jus ad bellum*, the shrinking difference between pre-emptive war and preventive strikes is one that was not generally foreseen given the conventional, symmetrical character of much of 20th century warfare. Now, with such a narrow distinction between the state's means to pre-emptively halt warfare and the capability to carry out preventive strikes, the moral issues surrounding such activity need closer inspection. The nature of such missions, for instance the example of the shoot-down scenario, are forcing Just War theorists to expand their thinking of what is morally permissible during what is still generally considered 'peacetime'. What we are asking our military members to do within and outside the parameters of our traditional idea of armed conflict demands such examination.

Second, the *jus in bello* issue of discrimination between legitimate and non-legitimate targets warrants additional study within the JWT framework. It is true that less collateral damage is possible in conflict precisely due to the precision of modern day weaponry. As Fotion points out:

Some of the new 'smart' weapons make it possible to adhere to the principle of discrimination at a level undreamed of even as late as the Vietnam War. There will always be collateral damage, especially if one side chooses to fight in urban centres. But with smart weapons that damage can be, and often is, much less than it would have been with the technology of the past.²⁷⁸

But when one side deliberately targets mass groups of civilians using instruments not designed specifically for warfare and completely violates the principle of discrimination, it forces a considerable widening of the opposition's rules of engagement. Again, the shoot-down scenario highlights the vulnerability of civilians even more so in peacetime; the state's shoot-down

²⁷⁸ Nicholas Fotion, *War and Ethics* 158.

dilemma is either permit the terrorists to cause their intended damage and terror, or kill the terrorists and the innocents on board. Hitherto, JWT provided the language to address such conflict-related decisions and can continue to do so in a way that pacifism and realism are hard pressed to do. How can the strictness of a pacifist approach deal with the non-compliance of a wide-bodied jet hijacked by extremists intent on killing the 250 innocent passengers on board as well as the hundreds of non-combatants unknowingly about to be killed at the point of impact on the ground, regardless of the strength of the state's security measures already in place? Even if the state has taken no steps to involve itself in a conflict involving these terrorists, the state and all of its citizens are still targets. In this scenario and others presented by such terrorists, there is no room for negotiations, sanctions or discouragement. The realist, on the other hand, would find no qualms with shooting down the aircraft before impact as a preventive/pre-emptive act, justifying it through reasons of prudence and self-interest to avoid further harm to the state. And while the outcome would likely be no different than that of the Just War theorist making the same decision, it is the reasons that are different as to why the realist and the Just War theorist make the decision they do. While a realist allows for the necessity of innocent killing in a conflict if necessary, he does so as a matter of self-interest so as not to let the hijackers 'win'. The Just War theorist however will weigh his decision in terms of what is morally appropriate in this case, even if the outcome is the same as the realist's. To do so for any other reason than one that is guided by what the state believes to be morally good, or at the very least morally better than other option(s), counters the moral foundation of what the state professes, evident in its constitutions, bodies of law, tradition and past actions in warfare. In this and similar scenarios, the differences between realism and JWT may in the

future seem to decrease. However, JWT will continue to provide the language and philosophical structure to remain distinct from pacifism and realism.

Although not a new feature of JWT, the area of *jus post bellum* is beginning to receive attention by Just War theorists. However, there is still little recent thought regarding the responsibilities and principles that should govern the moral behaviour involved in restoring the pre-conflict status quo. For example, much work needs to be done concerning whether countries with no experience as a democratic society should be established as such following civil war. Regardless of the challenges for international bodies helping to set up democratic institutions and civil practices in cultures with little to no familiarity with democracy, the question of whether democracy should be instituted needs to be explored. Must legitimacy and closure, within the JWT *post bellum* framework, reflect democratic theory? Can restitution be achieved according to non-Western standards, particularly since it is more often than not Western states who collectively develop such *post bellum* plans? These are questions that require further thinking within JWT.

Given Bobbitt's market state model, a model that functions according to choice and government outsourcing, the rise in the Private Military industry is no surprise. Thus, it should be no surprise that *how* states engage in conflict is also changing. I argued that PMCs are fundamentally mercenary when they are hired for combat. I did not argue that all hired PMC functions are mercenary; camp cleaners, concessionary workers and most administrative staff are not mercenaries, yet armed security guards and skilled combat soldiers in private garb prepared to kill on contact certainly fall within the traditional idea of 'hired guns'. *All* employees of PMCs in theatre may be thought of as combatants by the opposing side, and in fact, likely will be thought of as such. I have argued that most PMC personnel operating in the

theatre of operation do have combatant status as their actions violate the principle of non-combatant immunity. But, as to whether a state can fight a moral war with a private military (according the tested principles of JWT), I argue that it cannot while maintaining an ethical relationship between its democratically elected government and its nation of tax-paying citizens. It certainly cannot do this in a private fashion, outside of the eyes of public oversight. This is not to say that I claim that the use of PMCs in any capacity is altogether immoral; there are perhaps functions whereby PMCs can be used effectively and stand on solid moral ground. Acting in the capacity of security forces for aid agencies may be one of these functions, yet further study in this area is required.

In sum, it was argued that JWT cannot morally account for the modern use of PMCs on three counts. First, because PMCs operate within the limits of privacy, JWT cannot assess their actions and the behaviour and judgment of their members as JWT's principles, namely those within *jus ad bellum* and *jus in bello*, are designed to apply to public actors: legitimate states, their political leaders and militaries. Thus, the impact of PMCs in the Afghanistan and Iraq conflicts today, particularly those who are hired to carry out tactical combat or near-combat roles, cannot be publicly assessed by JWT. This calls into question whether the state who employs them can also be adequately assessed by the same standards. Secondly, again due to the secretive nature of PMC contracts and terms of service, the principle of proportionality cannot be applied. Quite simply, if the state does not know how many PMC casualties have occurred, it is impossible to render a judgment as to how proportional the overall effort is. Furthermore, if PMCs fall outside the state's military chain of command during AC, the moral value of their tactics, techniques and war fighting behaviour cannot be assessed. Finally, the employment of PMCs obscures the *jus ad bellum* principles of proper authority and public

declaration; a state that may not have the public support of its nation to actively influence a war or engage in it altogether can simply avoid any open declaration of war and employ a PMC instead of its own military. Although this seems rather far-fetched, it would appear that the US government hiring of a PMC to aid the Croatian forces during the 1990's war in the former Yugoslavia is a case in point. JWT allows us to judge the value of a state's combative behaviour; at this point in time, it cannot do so effectively for PMCs.

I was not able to deal with Bobbitt's model in great depth, specifically his call for an even stronger relationship between national and international laws and the West's approach to anti-terrorism, which is another strength of *Terror and Consent*.²⁷⁹ This is an area in which JWT can play an immense role given its influence in international law over the last few centuries. Bobbitt appeals directly to JWT in a call for law reform and a new set of rules within the body of international law, specifically regarding when it is permissible for a state to intervene militarily for reasons of protecting itself or its allies from terrorism as well as the behaviour of one's military forces during such actions.²⁸⁰ And it must do so, Bobbitt declares, only with the idea of protecting human rights:²⁸¹

Because current international law has not caught up with the changes in the global strategic context, it seems to present states with an intolerable choice: either follow the rule of law and

²⁷⁹ See Philip Bobbitt, *Terror and Consent*, in particular Part III: Strategy and Law in the International Theatre of Terror.

²⁸⁰ Philip Bobbitt, *Terror and Consent* 531. Although I did not discuss this aspect in Chapter 1, it would be very useful to apply this principle of JWT to the recent Israeli offensive against Hamas in the Gaza, which began December 27, 2008 and lasted several weeks. While international media and military analysts commonly referred to Israel's actions in this conflict as wholly disproportionate, Michael Walzer pointed out in a January 8, 2009 article that three questions must be asked of this situation to determine the proportionality of each side: first, are there other ways of achieving the end-in-view without armed conflict, before conflict ensues; second, which side's tactics put civilians at a greater risk; and third, is the attacking army (in this case Israel) acting to minimize the risks imposed on the civilians population. In referring to this particular conflict, Walzer concludes that these questions are not being asked by commentators and thus, leave us with a skewed assessment of the proportionality of Israel's actions. As Walzer points out, Hamas "is an organization explicitly committed to the destruction of Israel. How many civilian casualties are 'not disproportionate to' the value of avoiding the rocketing of Tel Aviv? How many civilian casualties would America's leaders think were 'not disproportionate to' the value of avoiding the rocketing of New York?" See Michael Walzer, "On Proportionality," *The New Republic* January 8, 2009, accessed Jan. 27, 2009 at: < <http://www.tnr.com/politics/story.html?id=d6473c26-2ae3-4bf6-9673-ef043cae914f>>

²⁸¹ Philip Bobbitt, *Terror and Consent* 532.

sacrifice one war aim (the protection of civilians) or dispense with law and sacrifice the legitimacy of the war effort (which, is after all, another war aim, namely the legitimization of market states as states or consent). The answer to this dilemma is to reject it: law must be reformed.

Thus, for reform of international law to occur, it follows that reform of JWT should follow in step, after all the respect of human rights and the restriction of violence are two of its objectives.

Aristotle said that “we enquire into what goodness is, not in order that we may know, but in order that we may become good men.”²⁸² Thus, merely understanding the value of good and bad is not enough; one should act on that understanding. Like other models of moral inquiry, JWT helps us to do both by serving as a model of scrutiny built on the past and present collective thinking about the value of armed conflict and by directing our actions, based on applied judgement, to its goal of restraining “both the incidence and destructiveness of warfare.”²⁸³ Unfortunately, no moral theory has yet to realize its goal of completely limiting the horrors of armed conflict; JWT however, continues to provide a framework to ask probing questions that most people would more often not rather avoid. I agree with Brian Orend that the reality of warfare today, particularly the speed at which it can be waged and fought, dictates the need for sensible and humane policies based on sound examination.²⁸⁴ I hope that this study contributes in some small measure to the body of contemporary Just War literature as our world continues to be influenced by new technology and paradigm shifts within international relations.

²⁸² Aristotle, *Nicomachean Ethics* 1103 b 27.

²⁸³ Brian Orend, *The Morality of War* 31.

²⁸⁴ Brian Orend, *The Morality of War* 267.

BIBLIOGRAPHY

Abrahamsen, Rita and Michael Williams. "Selling security: Assessing the Impact of Military Privatization." *Review of International Political Economy* 15:1 (2008): 131–146.

Adams, Thomas. "The New Mercenaries and the Privatization of Conflict." *Parameters – the US Army War College Quarterly* 29:2 (1999): 2.

Alexandra, Andrew, Deane-Peter Baker and Marina Caparini, ed. *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations*. New York: Routledge, 2008.

Aristotle. *Nicomachean Ethics*. 1103 b 27.

Arquilla, John, David Ronfeldt, Michele Zanini et al. *Countering the New Terrorism*. Santa Monica, CA: RAND, 1999.

Avant, Deborah. *The Market for Force: The Consequences of Privatizing Security*. New York: Cambridge University Press, 2005.

Bering, Henrick. "Thinking About Terror And Law." *PolicyReview* 152 (2008). Accessed online Jan. 28, 2009 at:
<http://www.hoover.org/publications/policyreview/35483444.html>

Bjørge, Tore. *The Root Causes of Terrorism: Myths, Realities and Ways Forward*. London: Routledge, 2005.

Bobbitt, Philip. "Get Ready for the Next Long War." *Time* Sep. 9 2002: 84.

----- *Terror and Consent: The Wars for the Twenty-First Century*. New York: Alfred A. Knopf, 2008.

Bunker, Robert, ed. *Networks, Terrorism and Global Insurgency*. New York: Routledge, 2005.

Campbell, Gordon. "Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them." *A Paper Presented to the United States Military Joint Services Conference on Professional Ethics*. Springfield, Virginia January 2000. Accessed Oct. 31, 2008 at:
<<http://www.usafa.edu/isme/JSCOPE00/Campbell00.html>>

Christopher, Paul. *The Ethics of War and Peace, An Introduction to Legal and Moral Issues*. Upper Saddle River, NJ: Prentice-Hall, 1999.

Clarkson, Stephen. "The Multi-level State: Canada in the Semi-periphery of Both Continentalism and Globalization." *Review of International Political Economy* 8:3 (2001): 501-527.

Coates, Anthony. *The Ethics of War*. New York: Manchester University Press, 1997.

Corlett, J. Angelo. *Terrorism, A Philosophical Analysis*. Dordrecht: Kluwer, 2003.

d'Ancona, Matthew. "Professor Philip Bobbitt Interviewed on a New Global Constitutional Order." *The Spectator* (Online newspaper, University of Texas at Austin) May 2006, accessed Oct. 10, 2008 at:
<http://www.utexas.edu/law/news/2006/052506_spectator.html>

Eckert, Amy. "Ethical Norms and the Public/Private Divide: Private Military Companies and Just War Theory" *Paper presented at the Annual Meeting of the International Studies Association 49th Annual Convention: Bridging Multiple Divides*. San Francisco, CA, March 26, 2008. Accessed Nov. 25, 2008 at:
<http://www.allacademic.com/meta/p251963_index.html>

Enloe, Cynthia. "Crucial Reporting: Human Rights Reports and Why We Should All Be Reading Them." *The Women's Review of Books* 21:5 (2004): 21-23.

Evans, Mark, ed. *Just War Theory: A Reappraisal*. Edinburgh: Edinburgh University Press, 2005.

Ferguson, Niall. "Empire with Expiration Dates." *Foreign Policy* 156 (2006): 46-52.

----- "The Next War of the World." *Foreign Affairs* 85:5 (2006): 61-74.

Fotion, Nicholas, Boris Kashnikov and Joanne Lekea. *Terrorism: the New World Disorder*. London: Continuum, 2007.

Fotion, Nicholas. *War and Ethics: A New Just War Theory*. London: Continuum, 2007.

Gilbert, Paul. *New Terror, New Wars*. Edinburgh: Edinburgh University Press, 2003.

Hare, R.M. "On Terrorism." *The Journal of Value Inquiry* 13:4 (1979): 241-249.

Hegland, Corine. "Global Jihad." *National Journal* 36 (2004): 1399.

Howe, Herbert. "Private Security Forces and African Stability: The Case of Executive Outcomes." *The Journal of Modern African Studies* 36: 2 (1998): 307-331.

Huntington, Samuel. *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 1996.

Ignatieff, Michael. "Ethics and the New War." *Canadian Military Journal* 2:4 (2001-2002): 5-10.

Kane, Tim. "Who Bears the Burden? Demographic Characteristics of U.S. Military Recruits Before and After 9/11." *Center for Data Analysis Report #05-08* (2005), accessed Sep. 30, 2008 at: <<http://www.heritage.org/research/nationalsecurity/cda05-08.cfm>>

Kasher, Asa. "Public Trust in a Military Force." *Journal of Military Ethics* 2:1 (2003): 20-45.

Kasher, Asa and Amos Yadlin. "Military Ethics of Fighting Terror: An Israeli Perspective." *Journal of Military Ethics* 4:1 (2005): 3-32.

----- Problems in Military Ethics of Fighting Terrorism. Paper presented to the Canadian Centre for Ethics Development Conference, 2006.

Latham, William. "Not My Job: Contracting vs. Professionalism in the United States Army." A Paper presented to the *Annual Conference of the International Society on Military Ethics*. San Diego, California, Jan. 2008, accessed Sep. 18, 2008 at: <<http://www.usafa.edu/isme/ISME08/Latham08.html>>

Lee, Steven, ed. *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*. AMINTAPHIL: The Philosophical Foundations of Law and Justice Series, Vol. 1.: Springer, 2007.

Lim, Kevjn. "Military Privatisation and Its Impact on the Nature of Warfare." *Melbourne Journal of Politics* 32 (2007): 6-24.

Lynch, Tony, and A. J. Walsh. "The Good Mercenary?" *Journal of Political Philosophy* 8:2 (2000): 133-153.

Machiavelli, Niccolò. *The Art of War*. New York: De Capo Press, 1965.

Maguire, Daniel. *The Horrors We Bless*. Minneapolis: Fortress Press, 2007.

McMahan, Jeff. "Just Cause for War." *Ethics and International Affairs* 19:3 (2005): 1-22.

Megginson, William. "Privatization." *Foreign Policy* 118 (2000): 14-27.

Megginson, William and Jeffery Netter, "From State to Market: A Survey of Empirical Studies on Privatization." *Journal of Economic Literature* 39:2 (2001): 321-389.

North Atlantic Treaty Organization. International Security Assistance Force (ISAF). News Release, "ISAF accidentally injures rider who fails to stop at checkpoint," Accessed Oct. 14, 2008 at: <<http://www.nato.int/isaf/docu/pressreleases/2008/10-october/pr081014-533.html>>

North Atlantic Treaty Organization. International Military Staff. *NATO Military Policy on Civil-Military Cooperation, MC 411/1*. Brussels: North Atlantic Treaty Organization, 2002.

Neuman, Stephanie. "The Arms Trade, Military Assistance, and Recent Wars: Change and Continuity." *Annals of the American Academy of Political and Social Science* 541 (1995): 47-74.

Orend, Brian. *The Morality of War*. Orchard Park, N.Y.: Broadview Press, 2006.

Pape, Robert. "The Strategic Logic of Suicide Terrorism." *The American Political Science Review* 97:3 (2003): 343-361.

Patterson, Eric. "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11." *International Politics* 42 (2005): 122-127.

Pattison, James. "Just War Theory and the Privatization of Military Forces." *Ethics and International Affairs* 22:1 (2008): 143-162.

Pew Research Center. "Where Terrorism Finds Support in the Muslim World." *The Pew Global Attitudes Project*. Washington: Pew Research Center, 2006. Accessed Oct. 5, 2008 at: <<http://pewresearch.org/pubs/26/where-terrorism-finds-support-in-the-muslim-world>>.

Pojman, Louis. "The Moral Response to Terrorism and the Cosmopolitan Imperative." *Terrorism and International Justice*. Ed. J. Sterba. New York: Oxford University Press, 2002.

Record, Jeffrey. *The Creeping Irrelevance of U.S. Force Planning*, Report prepared for the U.S. Army War College's Annual Strategy Conference, 1998, accessed Dec. 2, 2008 at: <<http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB311.pdf>>

Riedel, Bruce. "Al Qaeda Strikes Back." *Foreign Affairs* 83:3 (2007). Accessed online through: *Academic OneFile*. Gale. University of Ottawa. Oct. 17, 2008.

Rigstad, Mark. "Jus Ad Bellum After 9/11: A State of the Art Report." *The IPT Beacon* 3 (2007). Accessed Nov. 17, 2008 at: <<http://international-political-theory.net/3/rigstad.pdf>>

Robinson, Paul. "The Ethics of the Strong against the Tactics of the Weak: A Response to Kasher and Yadlin's 'Military Ethics of Fighting Terror.'" *Philosophia* 36:2 (2008): 195-202.

Schreier, Fred and Marian Caparini. "Privatising Security: Law, Practice and Governance of Private Military and Security Companies." *Occasional Paper No. 6*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005.

Shearer, David. "Outsourcing War." *Foreign Policy* 112 (1998): 68-81.

----- *Private Armies and Military Intervention*. London: International Institute for Strategic Studies, Adelphi Paper #316, February 1998.

Singer, Peter. *Corporate Warriors: The Rise of the Privatized Military Industry*. London: Cornell University Press, 2003.

----- "Outsourcing War." *Foreign Affairs* 84:2 (2005): 119-128.

Sterba, James, ed. *Terrorism and International Justice*. New York: Oxford University Press, 2003.

Thurnher, Jeffrey. "Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts." *The Army Lawyer* (2008): 64-90.

United States. Senate. "Democrats Investigating Private Military Contracting in Iraq." *Democratic Caucus Senate Journal* September 21, 2007. Washington: US Government, 2007. Accessed Dec. 30, 2008 at: <<http://democrats.senate.gov/journal/entry.cfm?id=283924>>

United States. Congress. *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*. February 15, 2006. Washington: US Government, 2006. Accessed Nov. 15, 2008 at: <<http://www.gpoaccess.gov/katrinareport/fullreport.pdf>>

Walzer, Michael. *Arguing about War*. New Haven: Yale University Press, 2004.

----- *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 4th Ed. New York: Basic Books, 2006.

----- "On Proportionality." *The New Republic* Jan. 8, 2009. Accessed Jan. 27, 2009 at: <<http://www.tnr.com/politics/story.html?id=d6473c26-2ae3-4bf6-9673-ef043cae914f>>

Woodgate, John. *An Analysis of the Canadian Defense Ethics Program Decision-making Guidance*. An unpublished thesis presented to and approved by the Faculty of the U.S. Army Command and General Staff College. Fort Leavenworth, Kansas: United States Army, 2004.