

JUST WAR AND TERRORISM

In this paper I will argue that traditional just war theory provides the salient criteria for a polity's violent actions against groups that are not themselves, or at least, need not be polities. Traditional just war theory has its origins particularly in the writings of Aristotle, Cicero and St. Augustine¹, however was developed in the Scholastic and Neo-Scholastic periods by Aquinas, Grotius, Suarez, Vattel and Vitoria. Recently just war theory has received considerable pedigree as lying behind the codification of armed conflict in international law through The United Nations Charter and The Hague and Geneva Conventions. Contemporary apologists of just war theory are deeply influential in ethical and political debates and include writers such as Germain Grisez, John Finnis, Joseph Boyle, James Johnson and Michael Walzer.²

Although there have been attempts to deal with the relation between just war theory and terrorism³ traditional just war theory was primarily concerned with rationally grounding the moral legitimacy of waging war between polities, states and nations. Nevertheless with the increasing prevalence of radical terrorist groups in the contemporary world that need have no official relation to a polity it is worth questioning again whether an

¹ See Aristotle, *Politics*, Book 1, chs. III & IV; *Nicomachean Ethics*, Book VII; Cicero, *De Officiis*, *Philippics*; Augustine, *City of God*, Book XIX.

² J. Boyle, G. Grisez and J. Finnis, *Nuclear Deterrence, Morality and Realism*, Clarendon Press, Oxford, 1987; J. Johnson, *Can Modern War Be Just?*, Yale University Press, New Haven, 1984, and *Morality and Contemporary Warfare*, Yale University Press, New Haven, 1999; M. Walzer, *Arguing About War*, Yale University Press, New Haven, 2004, and *Just and Unjust Wars*, Basic Books, New York, 2000.

³ See, for example, J. Boyle, "Just War Doctrine and the Military Response to Terrorism," *The Journal of Political Philosophy*, 11, 2, 2003, pp. 153-70. Despite the fierce level of criticism I subject Boyle's arguments to I am deeply indebted to his paper.

extension of traditional just war theory to include waging of war against such groups is morally legitimate.⁴ In this paper I will argue that some of the contemporary accounts of just war theory are inadequate because they fail to take traditional justifications for punishment in just war as central to justice.

Contemporary just war theorists have moved away from the notion of just war as including a punitive dimension and have focused on the central case of *ius ad bellum* as being defensive.⁵ In this they have been remarkably consistent with trends apparent in the international community. Justifications for war tend to be framed in terms of international agreements and international law, typically accompanied by a search for consensus usually thrashed out through the United Nations. Such approaches have lamentably met with limited success partly I suggest because many polities do not trust the motivations of powerful nations who attempt to build a consensus for war. It is in this context that I think traditional just war theory provides a set of meaningful normative guidelines on the justifiability of engaging in war (*ius ad bellum*), for conduct within wars (*ius in bello*) and for termination of hostilities at the end of war (*ius post bellum*).

As I argued in “Torture, Tragedy and Natural Law” St. Thomas Aquinas thinks that there are salient moral features of action which trade on a distinction between the public and the private. War is one such arena in which public authority overrides personal authority:

⁴ Of course, there are polities that do and have done terrorist acts. One could point clearly to some of the actions performed by North Korea and Afghanistan without in any way suggesting that certain actions of liberal democratic countries, such as the USA’s involvements against the Sandinista regime in Nicaragua (to take but one case), should not be termed terrorist. In such cases the moral permissibility of engaging in war more closely aligns with traditional just war theory.

⁵ See, for example, J. Boyle, “Just War Doctrine and the Military Response to Terrorism,” *The Journal of Political Philosophy*, 11, 2, 2003, pp. 153-70. Other examples are contained in the body of this paper.

Just as the rulers of a city-state, kingdom or province rightly defend its public order (republicam) against internal disturbance, by using the physical sword in punishing criminals... so too rulers have the right (ad principes pertinet) to safeguard that public order against external enemies, by using the sword of war.⁶

Moreover, just as a private individual must never intend to kill another person even in self-defence but proper public authority can intend to kill, so too it is only public authority that justifies the intention to kill in a just war: "... no private person has the right (*non pertinet ad personam privatam*) to initiate a war (*bellum movere*)."⁷

Leaving aside difficulties that may arise in peripheral cases the waging of war requires three central conditions to be fulfilled in order to be morally justifiable:

1. Legitimate Public Authority (*legitima auctoritas*)
2. Just Cause (*iusta causa*), and,
3. Proper Intentions (*recta intentio*)

All three of these conditions together with a set of further specifications concerned with each must be met in order for a decision to wage war to be morally licit.⁸ I will discuss each condition more fully below, however, it should be pointed out that even in the central cases of war in which all three conditions are fully met there are lacunae of a more practical nature. For example, proper public authority has limiting conditions over

⁶ St. Thomas Aquinas, *Summa Theologica*, (henceforth, *ST*), II-II, q. 40, a. 1c.

⁷ *ST*, II-II, q. 40. Nevertheless, Aquinas's account again admits of exceptions even to the notion of public authority. He entertains, but does not discuss in detail, peripheral cases in which a judge or "even a private person" may legitimately defend the common good against 'bandits' when there is an incapacity to organize official resistance or when public authority is 'temporarily' absent. See *ST*, II-II, q. 123 a.

⁸ The other conditions are traditionally recognized as "last resort", "public declaration", "probability of success" and "proportionality."

both the status of the authority and its moral rectitude and similarly just cause in and of itself is not sufficient since waging war against overwhelming odds which will cause severe suffering to innocents is deemed to be practically unreasonable, and right intentions may be defeasible through the use of certain illegitimate means.

Although my primary interest in this paper is with *ius ad bellum* there is nonetheless a requirement to briefly outline the foundational concepts of *ius in bello* and *ius post bellum* as there is a considerable degree of overlap between the three elements of traditional just war theory that are mutually enlightening. *Ius in bello* concerns the rules combating states must follow for the conduct of the war to be just. Such rules include prohibitions on the use of weapons of mass destruction such as nuclear weapons, biological or chemical agents and the like; requirements that no civilians (non-harmers) are to be deliberately attacked together with the infrastructure that supports non-combatants and correlatively that only those directly involved “in harm” can be targeted; force may only be used proportionately to the end sought after; rules over the humane treatment of prisoners of war; no use of means *mala in se* that is that are evil in themselves such as lying, mass rape, genocide or treachery; and no willful reprisals of breaches of the rules of *ius in bello*.

Ius post bellum deals with the restoration of order, peace and justice after war. It includes principles of proportionality and publicity so that the settlement should be open and reasonable and not create the conditions for further injustice. Moreover, the settlement should secure the basic rights offended against but also securing the openness

to fundamental human goods of the vanquished. Civilians are to receive immunity from punishments and only those guilty of war crimes are to be punished. Punishment however must be proportionate and all war crimes must be punished on both sides. Compensation may be exacted but only on the condition that a polity's populace can still participate in fundamental human goods. Perhaps most importantly, there must be a concerted effort to rehabilitate the vanquished polity and its infrastructure.⁹

Proper Authority

Aquinas thinks that proper authority rests only with the head (*princeps*) of a polity. In the hierarchical world of the Middle Ages in Europe this would have been uncontroversial however there is nothing in the texts that require us to suppose that such authority need be individual, and therefore, the thrust of his discussion can cover constitutional and elected groups, such as is the case with contemporary democracies. Aquinas's concern with public authority addresses two concerns; firstly, that private individuals have no moral right to deliberately intend the deaths of others even in self-defence¹⁰; and secondly, that many disputes, conflicts and injustices can in principle be resolved by moving up the hierarchical chain, as it were, to courts of higher appeal. So the motivating factors are related to the requirement not to act in a private capacity with an intention to kill (only public authority can act on such an intention) and with procedural considerations related to peace so that only the ultimate public authority can

⁹ For an excellent discussion of contemporary issues of *ius in bello* and *ius post bellum* see, Brian Orend, *The Morality of War*, Broadview Press, Ontario, 2006.

¹⁰ See my fuller discussion in "Torture, Tragedy and Natural Law", in this volume.

legitimately draw the populace together for war. His justification for this approach is tied to Aquinas's definition of public authority and law which in the central case under discussion is:

...the rule (over) a free people ... the co-ordination of willing subjects by law which, by its fully public character (promulgation), its clarity, generality, stability and practicability, treats them as partners in public reason.¹¹

The role then of public authority is one of trust invested in a "sovereign" who has the care of the community, principally in respect to peace and justice, in his/her control.

It is worth noting that just as St. Augustine was troubled by the notion of a private right to self-defence so too was Aquinas. Thus, it would be wrong to interpret Aquinas, as Rodin does,¹² as thinking that the nature of a just war declared by proper public authority rests on an analogy between private self-defence and national self-defence. Indeed Aquinas at no point in his discussion of just war mentions a private right to self-defence; rather Aquinas's analogy is couched in terms of the legitimate authority exercised within a polity and extended to that authority exercised against outsiders.¹³

¹¹ See ST. I-II, q. 90; q. 95; q. 96 & 97. Also see Finnis's discussion in J. Finnis, *Aquinas: Moral, Political and Legal Theory*, Oxford University Press, Oxford, 1998, p. 257.

¹² David Rodin, *War and Self-Defense*, Oxford University Press, Oxford, pp. 165-179.

¹³ See J. Boyle, *op. cit.*, p. 159, note 6.

Leaving Aquinas for the moment it might well be speculated that given the nature of contemporary society proper public authority should be thought of in terms of international bodies such as the United Nations and international law and conventions. Globalization and technology are two powerful factors in highlighting the international and transnational interdependence of contemporary states. In this context and despite ethnic, ideological, cultural and religious differences, when nations go to war the effects are often enough global and so it may well be thought that the prospect of investing proper public authority in a trans-national body such as the United Nations is an ideal well worth pursuing. Clearly until such a body becomes effective particular states retain a prima facie duty to protect themselves from terrorism but the increasing interdependence of the contemporary world does seem to point in the direction just outlined and at some stage should be both procedurally and substantively central to the notion of public authority espoused in the just war tradition.

JUST CAUSE

After proper public authority Aquinas settles on a second necessary condition for a just war – just cause. The motivating consideration here is drawn from his more general moral theory that any chosen action whatsoever must be done for a good reason and with a proper purpose. Unfortunately Aquinas provides us with no specific examples or reasons that justify a just war.¹⁴ Nevertheless, beyond the elaboration of the moral principle just mentioned Aquinas points out that the nature of a just cause in respect to

¹⁴ For a later discussion with reasons and examples see Francisco de Vitoria, *Political Writings*, Cambridge University Press, Cambridge, 1991.

war is a *response* to the wrongdoing of outsiders and that the just war is essentially *punitive*, though punishment in Aquinas's account is deeply linked to justice. Here Aquinas refers approvingly to Augustine:

We usually describe a just war as one that avenges wrongs, that is, when a nation or state has to be punished either for refusing to make amends for outrages done by its subjects or to restore what has been seized injuriously.¹⁵

This punitive dimension of Augustine and Aquinas's account of just war has come under immense criticism in recent times, particularly within the catholic tradition. Thus, *The Catechism of the Catholic Church*, 2309, has *defined* just war as being solely defensive and not punitive, and this perspective is faithful to the Second Vatican Council's document *Gaudium et Spes* (itself a belated response to World War II) which declares:

As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate self-defence, once every means of peaceful settlement has been exhausted. Therefore, government authorities and others who share public responsibility have the duty to protect the welfare of people entrusted to their care and to conduct such matters soberly ... But it is one thing to undertake military action for the just defence of the people, and something else again to seek the subjugation of other nations.¹⁶

¹⁵ Quoted in J. Boyle, *op. cit.*, p. 160.

¹⁶ *Gaudium et Spes*, paragraph 79.

Joseph Boyle has defended this innovation on traditional just war theory as being necessarily defensive and not punitive:

The relationship between punishment, the common good of a polity, and the authority of the leaders who serve it are such that the punitive conception of just cause is not justifiable; in a word, leaders lack the authority to punish outsiders. The reasoning is as follows: political leaders have authority over their subjects and authority to punish malefactors. That authority is rooted in the common good of the polity and the special role of service which political leaders have to that good. The care for that good sometimes requires the use of force to stop and deter domestic criminals, those who share in the life of a political community but violate its just regulations. This reasonably includes the right to punish them as a means of restoring justice, which also enhances the fulfillment of the deterrent and defensive responsibilities of leaders.

For the same reason, political leaders also have authority to lead and command defensive measures against externally based threats to the welfare of the polity. Defending subjects from injuries inflicted by outsiders plainly is a responsibility of those entrusted with the care of a polity's common good.

What is needed at this point is a justification of the authority of the leaders of a polity not simply to command and organize defense from outside attack but precisely to punish those who are not its citizens or voluntary residents, namely, other polities and the

subjects of other polities. For those who are resisted in defense do not thereby become subjects of the defending state. The condition of hostility does not make individual enemies participants in the common lives of the opposing communities, but only mutual external threats to those lives; similarly, the state of war does not collapse the common goods of the belligerents into one, or the authority of leaders into a kind of bloody election. A sign of the abiding political distinction among belligerent states and their citizens is the presumptive injustice of the victors lacking the impartiality of judges needed fairly to put the vanquished on trial.

Yet that status of citizenship, that participation in the life of the community, is necessary if those who punish are to have the authority to do so. This is so because the authority to organize and command defense is not the stronger authority to punish, which involves imposing further burdens on those against whom defense is mounted than defense itself implies.

Punishment can be a means to defense, insofar as it deters some from actions for which punishments are prescribed, and sometimes prevents the punished persons from continuing in their criminal activity. But it is possible to choose to defend without choosing to inflict any further harm on the attacker that might constitute punishment. The negative effects on those against whom one defends can perhaps be understood as punishment, but that sort of injury to the attacker is an unavoidable aspect of defense. Just as a private self-defender may ward off an attack with no punitive authority and no interest in punishing, so may a community.

The stronger authority to punish is rooted in the leaders' coordination of the actions of community members for common action for the sake of a community's common good.

That basis sets its limits. They may punish those over whom they have authority, not outsiders against whom they may authoritatively organize and defend. Consequently, the only ground for extending the authority beyond community members is instrumental.¹⁷

I would like to address several issues raised by Boyle related to the innovation in traditional just war theory to exclude punishment. Boyle's argument that "... the defensive rather than punitive understanding of just cause which has developed in just war thinking in the 20th century is a proper development of traditional just war doctrine"¹⁸ is open to criticism on a number of fronts. His first point in defending the defensive model is that one cannot extend the right to justly punish internal acts of criminality to the punishment of external acts of terrorism because "... hostility does not make individual enemies participants in the common lives of the opposing communities, but only mutual external threats to those lives."¹⁹ This justification seriously underestimates the conditions of the contemporary world. It suffers from a rather old-fashioned notion of a polity or state as relatively homogeneous and separated (almost isolated) from other states and polities. It is precisely because the phenomenon of globalization, in particular in its economic form, itself embedded in a liberal democratic and hegemonic world view, that renders this position untenable. We now inhabit a world that is so deeply inter-related that any appeal to the idea that there is no common good that is transnational, and so a Boyle thinks, that a polity is lacking in proper authority and just cause to punish terrorist action, is anachronistic. Economic (but not just economic)

¹⁷ J. Boyle, *op. cit.*, pp. 162-163.

¹⁸ J. Boyle, *op. cit.*, pp. 163.

¹⁹ J. Boyle, *op. cit.*, pp. 163.

globalization has led to a very high degree of interdependence among sovereign nations and this can be readily discerned by the fact that a financial crisis, say, in South East Asia, has very serious consequences for the common good in much of the world.

Boyle also thinks that the punitive dimension of traditional just war theory is unjustified because the advocates of a just war involving punishment lack the “impartiality of judges.” The legal analogy is a particularly weak one. If we have learned any lessons from Critical Legal Theory in its manifold guises it is that the very notion of judicial impartiality is itself subject to social, economic, political and gender factors.²⁰ Certainly procedural and hopefully substantive objectivity among judges is an important idea but it is an ideal that everyday practices call into doubt. Moreover, once again internationalization and globalization have brought into sharp relief international bodies such as the United Nations and International Courts, such as those for war crimes and human rights (a process stretching back to the Nuremburg Trials) that even on a charitable reading of judicial impartiality would meet Boyle’s criticism.²¹

Boyle believes further that the only ground for extending the just authority to punish from within a polity to terrorists from without (I leave aside the complex questions associated

²⁰ See Mark Kelman, *A Guide to Critical Legal Studies*, Harvard University Press, 1987; Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, Harvard University Press, 1983; Janet E. Halley (ed.), Wendy Brown (ed.), *Left Legalism/Left Critique-P*, Duke University Press, 2003; Richard W. Bauman, *Critical legal studies : a guide to the literature*, Westview Press, 1996; Richard W. Bauman, *Ideology and community in the first wave of critical legal studies*, University of Toronto Press, 2002; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, New York University Press, 2004

²¹ Boyle also thinks that punishment “can be a means to defense.” I will meet this objection directly in the next section on Right Intention.

with internal terrorist activity for the purposes of this paper) is instrumental. Here it would seem that he has in mind the coercive force of punishment which might deter future attacks. However this fails to capture a very significant dimension of the traditional Thomistic notion of retributive punishment, namely, the restoration of an order of justice that has been transgressed. The desire to punish when backed by proper authority is aimed at the good of redressing wrongs and is thus not primarily instrumental, although the deterrent aspect of just punishment, if it does in fact deter, is a side-effect of the restoration or recreation of a just equilibrium. Therefore, the traditional Thomistic conception of just punishment should not so readily be put aside, particularly in respect to just punishment of terrorists, which I discuss more fully later.

Right Intention

Even given that conditions one and two of a just war are fulfilled a war may still be unjust because it may be initiated with wrongful intentions, or during its course develop wrongful intentions. Thus wars engaged in out of hatred, a desire for revenge or for profit (oil) or some similar motive, or mixed motives, not fully consistent with justice will be unjust wars. Justice and peace are the central concerns and the ultimate rightful intentions guiding war and so a just cause does not excuse further mixed motivations. The key motivating condition here is related to the notion that a just war is in itself a “last resort”, that war is a “bad” thing, and that the undoubted evils of war must serve the

fundamental goods of justice and peace. Thus, the requirement of right intention is closely aligned with just cause and proper authority because the moral legitimacy of war, even in the context of a just cause and proper authority, leaves too much permissible without right intentions.

It is important to note that for Aquinas intention has a fully practical dimension. The fact that a person may desire and intend to flap his/her arm and fly is a matter of wishful thinking, of a volition that seeks to beat objective limitations.²² This practical dimension to the notion of intention renders any action taken subject to practical requirements of reasonability. To engage in a war knowing, or having reasonable belief, that a polity will be soundly beaten with disastrous results for that polity is wrong, even when proper authority and just causes are present. The idea here is that it is practically unreasonable to have an intention that does not “fit the facts.”²³ It must be remembered that we are considering the case of a polity that goes to war with just cause and proper authority, in other words, a war proposed and engaged in by a public decision by those who are entrusted with the care of the community. The fact that individuals (soldiers) may engage in a war with motivations of hatred, revenge, etc., is a different issue.

Right intention then is practically oriented towards specific and realizable goals which are reasonably believed to be achievable and which further the just cause by restoring or creating a more just peace. This, moreover, provides some of the reasons that shape the contours of *ius in bello*. The use of violence other than for the direct purposes of

²² This notion is captured well in Plato’s discussion of *pleonexia* in *Republic*, I.

²³ See my “Dennett on Ethics: Fitting the Facts against Greed for the Good,” in *Dennett’s Philosophy: A Comprehensive Assessment*, eds. D. Ross, A. Brook and D. Thompson, The MIT Press, 2000, 309-327.

achieving justice and peace, of mixed motivations, of stratagems for ulterior purposes are all rejected by the close relationship between the three central conditions of just war. The fact that peace and justice are at the heart of right intention does not preclude concern or consideration for other goods associated with peace and justice (such as economic prosperity, safe travel etc.,) but these are, as it were, side-effects of the intention to create peace and justice. Just as it may legitimately be argued that certain benefits accrue from loving another person, it is nonetheless the case that what is loved *is* the other person, and the benefits supervene on such loving. One does not love the other person for the benefits that accrue, one's motivation to love is care for the other, the consequent benefits do not render the love of the person instrumental. Similarly the benefits that accrue to the state of justice and peace should, in order for right intention to be fulfilled in just war, not be the motivating factors though they may be reasonably entertained as ancillary to the desire for justice and peace.

Nevertheless, to return to an earlier point, even a war fought with proper authority, just cause and right intention must be practically reasonable in a broader sense. I have in mind here that it will be an absolute requirement of just war in the sense I am elaborating that the goals of justice and peace are realizable. This requires of a polity engaging in a just war that the conditions for justice and peace cannot be "one-sided" – the result cannot be justice and peace "for us." War, as a "last resort", must, to be a just war, seek to engender the conditions of justice and peace (the goals that legitimate a just war) including the conditions that caused the original breach. These are unlikely to be capable

of being achieved by war itself but nonetheless will be crucially tied to the notion of right intention and bolstered by the just war tradition of thinking on *ius post bellum*.

Proper Authority and the War on Terror

It would seem that *prima facie* the leaders of a polity have the moral authority to respond to terrorist actions consonant with their responsibility of care for the community with which they are entrusted, just as they have authority to punish and deter criminal activity. Moreover this seems to be true at a broader level given that polities are increasingly not isolated but interdependent, and so the interests of justice and peace, will be concerned not just with a given polity's own "subjects" but also its allies. Typically terrorist actions and threats not only cause deep wrongs in terms of the physical harms inflicted on innocents but also at a psychological level and thus represent severe attacks upon the public good. Thus, the moral legitimacy to respond to terrorism requires a wholistic approach ranging through the education of the public to alert authorities to possible or actual sources of attack, through effective policing, surveillance, intelligence gathering up to and including military intervention.

Nevertheless, no polity exists, as I have repeatedly argued, as an independent entity and as a result the same constraints placed on just war, many of which have in the contemporary period have led to the formation of international bodies and laws, must apply to the context of international operations. It thus seems to be important that restraints be placed on unilateral action. One reason for this is that in the practical realm

“mixed” motivations (or sometimes plain self-interest or the will-to-power) are prevalent and the necessary “impersonality” required to fulfill the conditions of right intention and just cause will often enough be lacking. It does, therefore, seem to be both reasonable and prudent to consider the binding nature of international agreements and laws and thus to seek so far as possible a high level of international agreement. Once again the reason for this is plain – given the interdependent nature of the contemporary world unilateral military action is likely to suffer from sufficient bias, lack of information and insufficient impersonality so as to temper the central motivations required for a just war namely the realistic furthering of justice and peace. This however does not take away the right of an individual polity to wage a limited just war, rather it fosters a mentality of cooperation and consensus building and places checks on naked self-interest and wishful thinking. This consideration would appear to be wholly consonant with the application of traditional just war theory in the context of the contemporary world.

It must be admitted nonetheless that the context of the contemporary world creates a series of demanding questions that may not have been so clear cut in the Middle Ages when at least presumptively in Europe the social more of honour provided a backdrop to the exercise of war. Questions need to be addressed over preemptive military action and in particular against groups who are not themselves polities, but reside within the territory of a given polity (perhaps against the wishes of that polity’s authorities) and whose territorial sovereignty may be transgressed in pursuit of terrorists. These sorts of complexities however are not the concern of this paper; suffice to say that difficulties of this kind provide further justification for requiring greater international cooperation and

the fostering of such ties through more comprehensive and binding international agreements.

Just Cause and Terrorism

There are two central questions that need to be addressed in respect to the just war condition of just cause in relation to terrorism. Can a just cause against terrorism involve the punishment of terrorists? Or, on the other hand, must a just cause against terrorism be confined to defence? As I have already argued the notion of punishment delivered by public authority for the sake of justice and peace is central to the traditional just war theory espoused by Augustine and Aquinas. Nevertheless some contemporary just war theorists, particularly those closely associated with Catholic teachings have limited just war to defensive action.²⁴

I have already rehearsed the positions on this issue at a general level here I merely apply these considerations to a just war on terrorism. Both positions hold in common the idea that military action taken against terrorism is justified, has a just cause, because of the wrong-doing of the terrorists both at the level of harm inflicted (or intended to be inflicted) on innocents and because of the climate of fear engendered by terrorist activity designed to alter a polity's structure, policies and order. Throughout this paper I have also worked with two assumptions (both controversial) that terrorists do not act in a just cause (because even on the assumption of some justice to the cause the means employed render the just cause redundant) as a "last resort" and that terrorist organizations lack

²⁴ See J. Boyle, *op.cit.*

public authority (because they are putatively not entrusted with the care of the community as a common good). Both the punitive and defensive models of just cause thinking agree on this characterization of terrorism. So clearly there is relevant accounts of just cause against terrorism whether one works with the defensive or punitive models.

Problems however arise for the modern innovation of just war theory – the defensive model – in that a purely defensive conception has difficulties with the intrinsic nature of terrorist attacks. Once, for example, a terrorist act has already been committed any military action taken against the perpetrators of that act (though not perhaps the organization as such) would seem to be, at best, not a form of defence, and worse, purely instrumental. But perhaps it might be replied from the defensive model that terrorist activity is scarcely a “one-off” action. Terrorist activity is coordinated, often long term and designed to break or alter the will of the polity and community under attack.

Terrorists thus have a set of goals and often enough a relatively homogeneous set of intentions that unifies the terrorist group. It would then be argued that one can act defensively against such groups by preventing (further) terrorist activity, including against those who have already carried out terrorist actions, through the use of military force and by destroying the infrastructure that supports the on-going terrorist activity – seizing assets, destruction of safe-houses, etc.

Nevertheless, this conception of defence does seem to stretch the notion a bit too much because it, on the same grounds, allows for preemptive and punitive actions against terrorists with a bit too much casuistical ingenuity. It can show why a defensive war

against terrorism will allow for preemptive strikes and why a just war can be waged against an on-going terrorist group unified by a set of intentions that are socially consolidated within the group but what it fails to address is why this particular group of terrorists who have just bombed, murdered and maimed that group of innocents ought to be dealt with. In other words there is an important dimension of retributive justice as punishment that is left out of the picture. It is because there is a special kind of wrongdoing perpetrated by individuals X, Y and Z against the innocent individuals A, B and C (together with the effects on families, friends and the common good) that the purely defensive conception of just war is lacking. The intuition that undergirds this consideration is not purely instrumental in that it has deterrent or some similar value, nor is it narrowly retributive in the “eye for an eye” sense; rather it is that the terrorist act constitutes an offence against the equilibrious order of justice. The restoration of a balance demands that just punishment be delivered to help restore or rebuild the equilibrium that has been so severely damaged by the terrorist act.

Right Intention and Terrorism

There are inherent practical difficulties associated with the final condition of right intention in order for a just war to be fought against terrorists. Such practical difficulties are the result of, or flow from, the complexity of the contemporary world. A just war will have a set of objectives that are constrained by practical or pragmatic features of the situation demanding military action, together with the constraints derived from *ius in*

bello rules and deliberative constraints as to the likely consequences to the communities directly and indirectly effected *post bellum*.

Certainly there is considerable de facto reason to think that a just war with right intention can and should be waged against terrorists, and as I have argued, the set of right intentions need not be limited to purely defensive aims. But the matter is intractably complex. Just as a polity has the duty to protect the common good of people under its care from criminal activity so too it has the duty to protect the common good against terrorism. However the analogy with criminal activity can be pursued further. Are there limits to what a polity's leaders can justly do in defending (and propagating) the public good against criminals? While it is widely accepted that police services have a duty to protect and enhance the public good, should this include widespread and intrusive surveillance, draconian powers of detention and arrest, which for the public good may effect non-criminals? How should a polity act in situations in which criminal activity is largely located among socially (and economically) disadvantaged groups?

When one extends the analogy to contemporary terrorism the picture becomes even more complicated because terrorist groups are typically "backed" by supporters and sympathizers who would never commit terrorist actions themselves, but who believe in the justice of terrorist causes, though they may well disapprove of the methods employed by the terrorist groups they sympathize with. How should such supporters and sympathizers be thought of and are they legitimately targets for defensive or punitive interventions? When considered from the perspective of the condition of right intention,

it is the very “mixed” nature of intentions that make it so difficult to assess whether or not right intentions are fulfilled in a manner suitable for a just war.

In other words it would seem that in order for there to be the requisite right intentions considerable deliberative and practical effort must be expended on the breaches of justice that breed the conditions under which malefactors resort to criminal activity, as too what breaches of justice create the conditions for terrorism. Clearly then the notion of right intention must be constrained, and deeply constrained, by *ius post bellum* thinking.

Moreover, the rightfully intended military response to terrorism must also be deeply constrained by *ius in bello* conditions. It would seem that right intentions can only be directed at those actually involved in the network of the terrorist groups. Sympathizers and supporters admit of very varying degrees and certainly just punishment or attacks on infrastructure of personal as opposed to logistic support would appear only to widen and deepen the conflict which the just war intends to correct. A central feature then of right intention must be the firm resolve to win over hearts and thus to fully address the causes that give rise to the terrorist threat.

It is for these reasons that a just war with right intention must never be anything but a last resort. Every political, social economic, psychological and practical must be exhausted. The world is a precarious and often dangerous place, we all live subject to tragedy and the possibility of loss. We cannot remove all risk from life and as a result perhaps a certain level of terrorism (contained as far as possible) needs to be accepted as another

tragic dimension of ordinary life, as we prepare the conditions for addressing the causes of terrorism, and so to create, not just the absence of war, but the *amicitia* that fully grounds peace and justice. As Joseph Boyle notes: "... a just cause must serve peace and not simply protect an unjust status quo."²⁵

It is my contention that just intention must have as a condition *sine qua non* an intention to rectify the causes that lead to terrorism if this is at all possible.

In this paper I have assumed that terrorist acts are wrong and on this assumption argued that a polity has a right to wage a just war on terrorism. I have further argued that the conditions for such a just war are settled by the three central conditions of traditional just war theory in respect to *ius ad bellum*, including a punitive dimension. Nevertheless, these conditions need to be supplemented with the other requirements of *ius in bello* and *ius post bellum*. The requirements of such a just war place severe restrictions on the right to engage, conduct and bring to a close a just war on terrorism to such an extent that much of what is now called the "war on terror" fail to meet these requirements and thus render that war, in many respects, unjust.

T. Brian Mooney

²⁵ J. Boyle, *op. cit.*, p. 170.