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My Father, Shall I Kill Them?

Applying the Combatant/Noncombatant Distinction in the Context of the War on Terror

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A Senior Thesis submitted in partial fulfillment
of the requirements for graduation
in the Honors Program
Liberty University
Fall 2007

Acceptance of Senior Honors Thesis

This Senior Honors Thesis is accepted in partial fulfillment of the requirements for graduation from the Honors Program of Liberty University.

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Abstract

In the Western tradition, wars were typically fought between uniformed armies on a public battlefield. Even in the Twentieth Century, wars were largely fought between state-sponsored armies, who wore uniforms that made them legitimate targets by distinguishing them from the surrounding civilian population. Civilians, so long as they refrained from military-type actions, were generally considered to be unlawful targets. Though there were borderline cases, and certainly abuses of the system, for the most part the exceptions only reinforced the accepted standard. Spies, for example, as soldiers in civilian clothing, forfeited the protection of the laws of war and were subject to prompt and inglorious death. The war on terror, fought against a non-national enemy in the shadows and dark corners of the world, poses a new problem: How are we to determine the identity of our enemies? Determining the identity of those who hate us is not difficult; deciding which individuals among those who hate us are legitimate targets for the use of deadly force will prove more so.

My Father, Shall I Kill Them?

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Long ago, in a nation at war, a city was surrounded by the enemy. A man of God, Elisha by name, lived in that city of Dothan. At Elisha's request God blinded the enemy troops (at least in their heads, if not in their eyes), and Elisha led them inside the nation's capital city, inside the walls of Samaria, where their eyes were opened and they saw. They had come to Israel hoping, planning to kill, but now they were surrounded, in danger of imminent death. Since Elisha had captured these men, Jehoram, the King of Israel, asked him what should be done. "My father, shall I kill them? Shall I kill them?"[1] In doing so he raised an important question, one we must consider today: we assume that some people may legitimately be killed in the course of a war, but whom, and when?

Today, our nation—the United States of America—is at war. At least, it seems fair to conclude that such is the case; all the signs point in that direction.[2] With troops stationed—and often fighting—around the globe,[3] growing defense spending,[4] congressional debates on troop deployments,[5] and the ever lengthening list of those who

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[1] II *Kings* 6:21.

[2] CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret, trans. 1976): "War is thus an act of force to compel our enemy to do our will." Black's Law Dictionary distinguishes a "mixed war" ("A war between a nation and private individuals") and a "solemn war" ("A war formally declared"); the war in which we are currently involved belongs largely to the former category. BLACK'S LAW DICTIONARY 1614 (8th ed. 1999).

[3] *See*, i.e., DEPARTMENT OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A) (June 30, 2006), *available at* http://siadapp.dmdc.osd.mil/personnel/MILITARY/ history/hst0606.pdf.

[4] Associated Press, *House passes record Pentagon budget*, CNN (August 5, 2007), *available at* http://www.cnn.com/2007/POLITICS/08/05/defense.spending.ap/.

[5] Carl Hulse & Jeff Zeleny, *Senate Rejects Iraq Troop Withdrawal*, NEW YORK TIMES (May 17, 2007), available at http://www.nytimes.com/2007/05/17/washington/17cong.html.

have made the ultimate sacrifice,[6] the lack of an official declaration of war seems meaningless.[7] Yet because we lack that declaration, and because of the international political and religious climate in which we live, we are faced with uncertainty regarding the identity of our foe. The conflict has variously been described as a war on terror (by people on our side),[8] a war on Islam (by those we are fighting against),[9] a war on Islamic fascism (or Islamic fundamentalism, or Islamic fanaticism),[10] and even a war for democracy.[11] That uncertainty is compounded by the strategy and tactics of those against whom we fight. With the exception of a few short weeks in 2003 when our military and allies quickly defeated the formal Iraqi armed forces, we have fought against a decentralized foe composed largely of civilians acting without explicit state sanction, unmarked by anything except their willingness to use force against us, against our allies, and against all who stand in their way.

The broad scope of this war in which we are now engaged, and the numerous questions it raises for our society, are beyond the scope of this short Thesis. One small but important issue, however, must engage our attention: wars in the West, particularly

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[6] David Wood, *U.S. posts drop in Iraq war deaths*, BALTIMORE SUN (October 31, 2007), *available at* http://www.baltimoresun.com/news/world/iraq/bal-te.iraq31oct31001524,0,6312177.story.

[7] It should be noted, however, that there are other options. Some writers contend that the fight against terrorists should be viewed through the paradigm of America's early struggle against piracy, rather than traditional war between nation-states. *See*, e.g., Jon M. Paladini, *Terrorism: War or Piracy*, 40 ARIZONA ATTORNEY 38 (Feb. 2004); Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism, and a New International Law*, 13 U. MIAMI INT'L. & COMP. L. REV. 293 (Spring 2006); Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11*, 27 TUL. MAR. L.J. 257 (Winter 2002).

[8] *See*, e.g., George W. Bush, President of the United States, address to a joint session of Congress (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

[9] *See*, e.g., ENVER MASUD, THE WAR ON ISLAM (3rd. ed. 2003).

[10] See, e.g., George W. Bush, President of the United States, speech at Green Bay, WI (August 10, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/08/20060810-3.html: ("this nation is at war with Islamic fascists. . . .").

[11] *The War for Democracy*, editorial, THE JERUSALEM POST (Sept. 11, 2002), *available at* http://info.jpost.com/C002/Supplements/911_OneYearLater/story_14.html; Thomas Freidman, *War on Terror, or War on Democracy?* THE STRAITS TIMES (Singapore) (May 10, 2002).

among European nations and their former colonies (and with the exception of some civil wars, including some parts of both the American Revolution[12] and the American Civil War[13]), have traditionally been fought between official, state-sanctioned armies that were distinguishable from the larger civilian population to which they belonged during times of peace.[14] To put on the uniform or other distinguishing badge of a soldier and take the field against a known enemy was seen as the only proper way to wage war; the alternative was seen as dishonorable, almost unthinkable. Today, however, the rules appear to have changed. Our troops—soldiers, sailors, airmen, and marines—are faced with an enemy that intentionally hides among the civilian population, appearing only to maim, terrorize and end the lives of others. Some may live apparently innocent lives until the day they decide to kill. Others may never take that step, but support those who do from behind the scenes. The possible variations are endless; the problems they present are difficult; the questions they raise are unresolved.

This Thesis will assume, without addressing the issues involved, that we are truly fighting a war, and that the war which we are fighting is just, as just war has traditionally been understood.[15] It will focus on the limited question of distinguishing between legitimate and illegitimate targets—the question of whether a specific individual can be killed. Given the situation that now exists on the ground in nations where the United

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[12] *See*, e.g., LYNN MONTROSS, WAR THROUGH THE AGES 430 (1960), describing the defeat of uniformed, organized British regulars by Virginia riflemen in buckskins, who communicated by wild turkey calls, at the battle of Freeman's Farm, shortly before Saratoga. *See also*, David Kiethly, *Poor, Nasty, Brutish: Guerilla Operations in America's First Civil War*, 4 CIVIL WARS 35 (Autumn 2001).

[13] *See generally*, MICHAEL FELLMAN, INSIDE WAR: THE GUERILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR (1990).

[14] VICTOR DAVIS HANSON, CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER 321-333 (2001).

[15] For a detailed discussion of Just War Doctrine, *see* Jeffery C. Tuomala, *Just Cause: The Thread that Runs So True*, 13 DICK. J. INT'L. L. 1 (1994), particularly Part V.

States has stationed troops, the Thesis will discuss what principles should be applied, and what conclusions should be reached (oversimplified and preliminary as they must be). In doing so, the Thesis will address the topic in three separate but related areas: morality (what is right), legality (what is permitted), and politics (what is wise).

The primary logic for the combatant/noncombatant distinction is morality.[16] Although there may also be legal and/or political reasons for the distinction, these are more likely to result from the application of moral sanctions than to cause them. Although other religions may have different perspectives and raise different issues, this paper will address the question of morality only from the perspective of Christianity, since the author is most familiar with that religion, although in doing so it will attempt to consider a range of Christian thought through the centuries. Particular emphasis will be given to those passages in the Bible that discuss warfare, both didactic and historical.

Morality is enforced among people by law. Among nation-states, that morality takes the form of international law, which is further divided into customary international law and contractual or consensual international law, characterized by treaties. In the field of customary law, notice must be taken of classical writers like Grotius. Among the treaties that must be discussed are the Geneva and Hague conventions. The Thesis will discuss both the requirements of international law and the application of that law to the current conflict.

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[16] Jeffrey C. Tuomala, *The Law of Nature and the Law of War*, 2 OAK BROOK COL. J.L. & GOV. POL. 99 (2004). *But see contra*, G.I.A.D. Draper, *Book Review: The Just War Doctrine*, 86 YALE L.J. 370, 374-376 (Dec. 1976), arguing that the law of war is a product primarily, although not exclusively, of secular motives.

The Thesis will conclude with a discussion of the political ramifications of the combatant/noncombatant distinction, and the pragmatic results that any change in the current policies of the United States military might entail. Effects on military and civilian morale, on the policies and support of our allies, and on the likely responses of our enemies must all be considered.

As this summary makes clear, even a limited discussion of this topic will soon exceed the capabilities of this short Thesis. Although the specific questions raised may be new, or at least rarely discussed in contemporary America, the issues involved have been around for millennia and will survive as long as war itself. Only by raising these difficult questions, however, can we provide the necessary answers to our own troops, fighting on our behalf, in our own time.

It is interesting, though not determinative, to look at the response of Elisha. The Syrian troops had been specifically sent after him; it was his head that was supposed to return to Damascus. And yet, if only in this specific case, he counseled mercy. At his request the king prepared a "great feast"[17] for his mortal foes, and sent them home again in peace. Why? Is this normative? How would it apply? These questions, and others raised by similar passages, must be answered if we are to be faithful to our calling as true witnesses of Jesus Christ, and at the same time carry out our responsibilities as citizens of these United States.

Finally, the author must admit his own personal inexperience with the situations in which this distinction must be made. No decisions are made in a vacuum, but decisions

[17] II *Kings* 6:23.

made in the heat of battle are uniquely difficult to isolate from their surrounding circumstances. As a German soldier, whose name is lost in history, once said, "Those who haven't lived through the experience may sympathize as they read, the way one sympathizes with the hero of a novel or a play, but they certainly will never understand, as one cannot understand the unexplainable."[18] The principles, reasoning, and law applied in this Thesis are theoretical or based on the observations of others; to the extent they inaccurately affect the reality of war, as experienced by the reader, a sincere apology is here offered. May God grant our nation peace, that we may not face these choices; but let us consider them, that if the worst should come, we will be prepared and will know what we must—and must not—do.

Definitions: What Do We Mean by a Combatant?

As used in this Thesis, "civilian" will generically refer to someone who is not officially designated to bear arms in actual military operations on behalf of a state, nation, tribe, or similar entity with civil authority.[19] The term "soldier," in contrast, will refer to someone who has been so designated, regardless of whether that person is actually carrying arms into battle or otherwise directly supporting combat operation, or to which branch of the armed forces that person may belong.[20] It will also include those who have authority to command the military, even if they do not personally carry arms into battle.

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[18] SAMUEL HYNES, THE SOLDIERS' TALE: BEARING WITNESS TO MODERN WAR 2 (1998).

[19] Black's generic definition ("A person not serving in the military") is helpful, but arguably too broad for this purpose, since it would not include non-uniformed personnel within the military chain of command, like the American Secretary of Defense. BLACK'S LAW DICTIONARY 262 (8th ed. 1999).

[20] As used in this Thesis, the use "soldier" will not imply any knowledge of the laws of war, in contrast to a distinction some have drawn between "soldiers" and "warriors." See, e.g., Michael F. Noone, Jr., *Applying Just War* Jus In Bello *Doctrine to Reprisals: An Afghan Hypothetical*, 51 CATH. U.L.R. 27 (Fall 2001).

Although the specific usage has perhaps varied over time, the general ideas expressed have remained the same for millennia.

The combatant/noncombatant distinction is much more recent in origin, and must be understood in the context of international treaties negotiated in the past several centuries, primarily among the nations of Western Europe.[21] As used in this paper, the terms combatant/noncombatant will generally be used as synonymous with soldier/civilian respectively, but where they appear in the context of a quote from an official source, they should be understood in more limited terms. This overlapping usage is demonstrated by Fuller, describing the changes in the protocols of warfare through time, and their elimination during the French Revolution:

> Primitive tribes are armed hordes, in which every man is a warrior, and because the entire tribe engages in war, warfare is total. But since man abandoned the life of a hunter and of a nomad, with few exceptions, in the agricultural civilization which supplanted the barbaric, a distinction was made between the warrior and the food-producer—the non-combatant. In the classical city states, fully qualified citizens alone were enrolled in the city militias; in feudal times, the knights and their retainers when called to arms constituted but a minute fraction of the total population, and, as already mentioned, in the age of the absolute kings the civil population was excluded from war. This differentiation was now abolished, and a return was made to the armed horde, this time on a national footing.[22]

According to Fuller, this modern trend toward strategic warfare directed against the enemy's means of production—civilians—has greatly eroded, though not completely destroyed, the combatant/non-combatant distinction.[23] Atkinson also traces this

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[21] As late as 1828, the modern use of "combatant" was still secondary: "A person who combats; any person who fights another, or in an army, or fleet." NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[22] J.F.C. FULLER, THE CONDUCT OF WAR: 1789-1961 at 31 (1961).

[23] *See also* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 262 (Fall 2004), pointing to the French Revolution as the beginning of a larger trend:

breakdown to the French Revolution. Before that time, he argued, war was limited by largely unchallenged custom:

> That the professional soldier or sailor thought of war as an operation involving the employment of force in the hands of duly recognized combatants is not at all surprising. Statesmen, philosophers, writers who had studied the question of war, and ordinary folk alike held much the same view. Had not war been the trade of the military man for centuries? And was not this trade something that all recognized as quite different from the quiet ways of peace? . . . . [24]

Like Fuller, Atkinson argues that this shared belief would not survive unscathed the radical reshaping of Western Civilization that surrounded the French Revolution:

> During the French Revolution the National Convention . . . promulgated a degree which was a measure of total war that involved an entire people in warfare. This "total war" order really did not differentiate between combatants and non-combatants, between soldiers and civilians. It was radical departure from the usual lines drawn between peace and war.[25]

Although Fuller and Atkinson may have a case for the ultimate destruction of the foundation on which the distinction is based, however, they seem to have over anticipated its demise, as indicated by the investigation following the incident at My Lai[26] and the charges of war crimes against former Bosnian Serbs.[27]

> Beginning with the wars of the French Revolution and proceeding through the American Civil War and World Wars I and II, the lines between combatants and noncombatants were blurred in practice. Military necessity - or simple military advantage - began to dictate attacking civilian populations on many occasions. Civilians could no longer rely on utilitarian considerations to protect them, and violations of civilian immunity became so frequent and so massive that they called into question the willingness, and even the ability, of nations involved in modern wars to spare the lives of noncombatants.

[24] JAMES DAVID ATKINSON, THE EDGE OF WAR 102 (1960).

[25] *Id*. at 103.

[26] *See generally* F.L. BAILEY, FOR THE DEFENSE 29-143 (1975). F. Lee Bailey served as defense counsel for Capt. Ernest Medina, the commanding officer on the ground at My Lai.

[27] *See generally* International Criminal Tribunal for the former Yugoslavia *at* http://www.un.org/icty/; indictments and decisions are posted to the Tribunal's website, as well as annual reports.

For the purposes of the present discussion, then, a soldier is someone officially designated by those in authority to participate in military operations; all others are civilians, although their actions may indirectly support the war effort. The applicability of this distinction to the war on terror will be discussed later in more depth.

Morality: Who Does God Say Should Be Killed?

Since at least the days of Abraham, man has engaged in warfare. For reasons as lost in antiquity as the men who died because of them, kings, priests, tribal chieftains, pharaohs, and others who could by one means or another demand or buy the loyalty of a group of armed men led them into battle against neighbors, rivals, or even total strangers. In Genesis 14, for example, Chedorlaomer, King of Elam (believed to be in modern day Iran)[28] gathered his allies and came to attack a group of cities in Canaan, among them Sodom and Gomorrah.[29] (Note that this incident does not bode well for the future of Iranian/Palestinian relations, even if the nation of Israel somehow moved to Antarctica.) He won the battle, as it happened, but lost the war, since he made the mistake of capturing a permanent resident named Lot while sacking the defeated cities, and Abraham and his faithful band came riding to the rescue (although probably on camels instead of white horses).[30] Who was killed? Why? This brings us to one of the most difficult questions in interpreting and applying the Scriptures passages that describe war. We can be sure that many men, and perhaps women and children, died during this small war, but who they were and whether their deaths were justified we simply cannot know.

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[28] D.T. POTTS, THE ARCHAEOLOGY OF ELAM: FORMATION AND TRANSFORMATION OF AN ANCIENT IRANIAN STATE 3 (1999).
[29] *Genesis* 14:1-12.
[30] *Genesis* 14:13-16.

The Israelites were given very specific combat instructions by God on several occasions—the invasion of Canaan,[31] for example, and the war against Amalek[32]—and in those specific cases were commanded to kill every human being within enemy territory. (It should be noted that they were never particularly obedient, often allowing the enemy to survive).[33] The fact that these commands were given for a specific situation, however, without indication that they were intended to be of broader application, should make us pause before using them to determine our contemporary policy. To be fair, however, we should also note that the same is true where the result was less violent; Joab's summary ending of the siege at Abel,[34] for example, or Elisha's encounter with the Syrians discussed above (where the Syrians were eventually feted and released).[35] A moral argument from Scripture, as from any other source, cannot be based exclusively on historical examples.

The only passage in the Bible to directly address the question of warfare in a prescriptive (as opposed to descriptive) way is Deuteronomy 20, where God gives Israel rules for war. Those rules generally require, for example, that the army consist of volunteers, and that certain categories of men be excluded from offensive operations (though they would presumably be permitted to defend their homes).[36] More specifically, however, God directly legislated on the method and manner of siege warfare, a type of war that almost necessarily involves civilians and noncombatants. As Craigie summarizes the passage:

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[31] *Deuteronomy* 20:16-18.
[32] I *Samuel* 15:3.
[33] *See*, e.g., *Judges* 1:27-33, I *Samuel* 15:9.
[34] II *Samuel* 20:20-22.
[35] II *Kings* 6:22-23.
[36] *Deuteronomy* 20:5-8.

> [T]he Israelites were to offer to the inhabitants of such cities the terms of a vassal treat. If the city accepted the terms, it would open its gates to the Israelites, both as a symbol of surrender and to grant the Israelites access to the city; the inhabitants would become vassals and would serve Israel. If the offer was rejected, the Israelites were to besiege the city, and when they were victorious (God's victory is taken for granted. . . .) they would execute all the males; everything else was to be spared.[37]

Thus, where a city had to be taken, the Israelites were required to offer peace to the city—to permit it to surrender—and in such a case, the lives of the people were to be spared.[38] On the other hand, if the city refused to surrender, the Israelites were then authorized not only to lay siege to and capture the city (with the accompanying suffering and death of civilians trapped within the city), God specifically authorized the killing of every man in the city once it had been captured.[39] The women and children were to be spared, however, unlike the wars within Canaan itself, where everyone was to die.[40]

Theologians, commentators, and scholars have disagreed almost since the origin of the Church about the continuing implications of Old Testament law in the era following Christ coming to earth.[41] Although many have supported the continuing application of the Ten Commandments, commonly referred to as the moral law, fewer Christians have been comfortable using specific Old Testament legal provisions in the development of civil government policy.[42] Macintosh, for example, argues that Deuteronomy 20 should not be used to regulate the conduct of Christian nations today:

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[37] PETER C. CRAIGIE, THE BOOK OF DEUTERONOMY 275-76 (1976).
[38] *Deuteronomy* 20:10-11.
[39] *Deuteronomy* 20:12-13.
[40] *Deuteronomy* 20:14-15, cf. 20:16-18.
[41] *See*, e.g., GREG L. BAHNSEN, ET. AL, FIVE VIEWS ON LAW AND GOSPEL (Stanley N. Gundry, ed. 1996), presenting theonomist and dispensationalist views of the continuing application of the law, along with interpretations representing the theological middle ground.
[42] One notable exception is DAVID CHILTON, PRODUCTIVE CHRISTIANS IN AN AGE OF GUILT-MANIPULATORS (1986).

> These are the lovely ethics of the Church of God, the principles of that heavenly kingdom to which all true Christians belong. Would they have suited Israel of old? Certainly not. Only conceive Joshua acting toward the Canaanites on the principles of Romans xii! It would have been as flagrant an inconsistency as for us to act on the principle of Deuteronomy xx. How is this? Simply because in Joshua's day God was executing judgment in righteousness, whereas now He is dealing in unqualified grace. [43]

This does not mean, however, that nations can no longer go to war; far from it; Macintosh goes on to argue that Christianity should not be used to limit civil policy, for "[t]o attempt to amalgamate the principles of grace with the law of nations, or to infuse the spirit of the New Testament into the frame-work of political economy, would instantly plunge civilized society into hopeless confusion."[44]

Although many have challenged the continuing application of the Mosaic laws to contemporary society, fewer have doubted that the provisions of the Mosaic Law accurately reflect the character of the Holy God who gave them to His people; as Rushdoony argues, "[t]he law is the revelation of God and His righteousness."[45] A few have argued that the character of the God of the Old Testament does not match the ethics of Jesus in the New Testament, but this position has been widely rejected.[46]

Regardless of which position we take, it seems fair to conclude that at the very least, killing male non-combatants during combat operations is not offensive to God, and is therefore not immoral. The intentional targeting of the broader population is a more difficult question, since it would involve the killing of women and children, something

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[43] C.H. MACKINTOSH, NOTES ON THE BOOK OF DEUTERONOMY 317-318 (1879).
[44] *Id*. at 318.
[45] R.J. RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 6 (1973). Rushdoony concludes that it is impossible to know God without law: "The law as revelation is thus a basic aspect of God's manifestation of Himself. . . . The implication of this is that no knowledge of God is possible if the law is rejected." *Id.* at 697.
[46] *See*, e.g., GREG L. BAHNSEN, BY THIS STANDARD 53-61 (1985), arguing that the sinless perfection of Christ in the New Testament is defined in terms of Old Testament law.

God did not permit the Israelites to do. Although the issue is not addressed, it is plausible to draw broader principles from this passage. The men of the city might have been killed out of vindictiveness, but it seems to be better understood as the killing of those who posed a continuing threat of violence to Israel. Assuming that to be the case, women and children could be killed when participating in combat-type operations—e.g., as suicide bombers—but not at other times. Another plausible interpretation of the passage would be to argue that it represents a covenant view of warfare—that wars are fought between peoples, bound by covenant (like the Western social contract theory), and that all the people are therefore responsible for the war and can be properly targeted for the duration of combat operations.[47]

Legality – Who Does The Law Permit Us to Kill?

To answer the question of who may be killed during war, we must look at international law, particularly as it has developed in the western world. Although based on the same ethical principles that also give rise to domestic law regarding violence and killing—"the laws of nature and of nature's God,"[48] as Jefferson so aptly put it—international law applies in a very different context and must be applied in a different

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[47] This idea has broader secular foundation as well; *see*. e.g., Eric Jaworski, *"Military Necessity" and Civilian Immunity": Where is the Balance?* 2 CHINESE J. INT'L L. 175, 176-177 (2003), quoting Hans Morganthau in support of the idea that wars involved the entire community:

> While there are records of very early formulations of laws of war emanating from the ancient Egyptian, Chinese, and Indian cultures, it has been suggested that generally from "the beginning of history through the better part of the Middle Ages, belligerents were held to be free, according to ethics as well as law, to kill all enemies whether or not they were members of the armed forces." The renowned political theorist Hans J. Morganthau believed that this attitude most likely resulted from the prevailing view of war at that time. Ancient war was often seen as a struggle between two communities acting as wholes with every individual citizen being "an enemy of every individual citizen on the other side."

[48] THE DECLARATION OF INDEPENDENCE para.1 (U.S.1776).

way.[49] Where domestic law is applied to individuals by a community, international law applies to groups of individuals acting corporately, as nations, by other nations that may be stronger militarily or politically, but legally are equals. International law, therefore, affects individuals—combatants or not—only as they are members of a larger corporate body, typically a nation or state. Thus Plato, in his laws, argues that no individual can start a war on the city's behalf, and that anyone attempting to do so should be put to death.[50] So when Richard Cameron and company declared at Sanquar that Charles II had forfeited the crown of Scotland, they were treated as criminals and put to death, as acting on their own account, but when John Hancock and Samuel Adams acted with the blessing of the people of Massachusetts, their actions led to the creation of a state, and so were ultimately protected (although with a close call at Lexington) by international law, as enforced by the colonial militia, the colonial army, and eventually, the government of the United States.

International law is normally understood to consist of two parts: first, customary international law, developed over the centuries and understood to apply to all nations, regardless of the situation or circumstances, and second, treaties, negotiated and ratified by specific states for specific purposes, which apply only to those states party to them. According to the Naval War College, for example: "International law derives from the practice of nations in the international arena and from international agreements."[51] More specifically, "[t]he general and consistent practice among nations with respect to a

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[49] For a more detailed discussion of the relationship between the law of nature and international law, *see* Robert J. Barth, *Law of Nature and the Law of Nations: The Historical Perspective*, 2 OAK BROOK COL. J.L. & GOV. POLICY 1 (2004).
[50] PLATO, LAWS, bk. xii, 955b-c, *quoted in* THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS 29-30 (Gregory M. Reichberg, Henrick Syse, and Endre Begby, eds. 2006).
[51] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations 3 (1997).

particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations!"[52] Treaties on the other hand, are more limited in both scope and application:

> An international agreement is a commitment entered into by two or more nations that reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, are the second principal source of international law. However, they bind only those nations that are party to them or that may otherwise consent to be bound by them.[53]

Taken together, customary international law and treaties constitute the application of the law of nature to nations, and are the legal standard that must be consulted.

In theory, customary international law should never conflict with treaties, since treaties are intended to apply that existing, customary law to specific circumstances. If there is apparent conflict, the treaties should be interpreted according to the principles of customary international law if possible. To determine the status of the combatant/non-combatant distinction under international law today, this paper will first look at customary law sources, and then at international treaties, particularly those to which the United States is a party.

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[52] *Id.*
[53] *Id.*

Customary International Law

Customary international law is commonly understood as the application of the law of nature to nations.[54] Because only God is sovereign over the nations, only His law can serve as an effective check upon their power. This law of God, which, Blackstone argued, was only a form of the law of nature, [55] is not always agreed upon by the nations; occasionally, however, such an agreement can be reached. Grotius, for example, says that like domestic laws which implement the law of nature, treaties implementing the law of nature against nations are approved by the consent of the governed:

> But just as the laws of each state have in view the advantage of that state, so by mutual convent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.[56]

Thus for both Blackstone and Grotius, nations are bound by the law of nature in the same way as individual men, but the particular applications of that law of nature to them are called the law of nations. Specific applications and extensions of that law may be agreed upon between nations, and these agreements take the form of treaties.

Customary international law, while not as specific as modern treaty law, dealt generally with the combatant/noncombatant distinction in the context of war. "[S]eventeenth-century writers on international law," for example, "while admitting that

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[54] *See generally* SAMUEL PUFENDORF, II DE JURE NATURE ET GENTIUM LIBRI OCTO [Of the Law of Nature and Nations in Eight Volumes] (1688) (C.H. Oldfather & W.A. Oldfather, trans., Oxford University Press 1934).
[55] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *41 (1765).
[56] HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE 13 (Francis W. Kelsey, trans., Library of Liberal Arts Ed. 1957).

the entire population of the enemy was in strict law subject to attack, distinguished between the combatants and the noncombatants, asserting that approved usage should in general exempt the latter."[57] The broad principles of customary international law would find specific application through treaty law.

Treaty Law

Treaties have two functions: to define and delineate the law of nations, and to supplement it where a common understanding is lacking. Most of the treaties that are applicable to the United States during warfare today were negotiated within the past 150 years, many since the end of World War I. Governing everything from the type of uniforms to be worn to the type of weapons to be used, these treaties have been widely accepted as setting the limits for civilized warfare, with those who break the rules being punished as war criminals.

Applicability of treaties to non-state actors. One of the difficult questions that must first be answered is whether the United States is bound by treaties signed with other states when it is at war, or at least involved in armed conflict, with non-state actors, like al-Qaeda. Some treaties, like the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, contain specific provisions governing armed conflict with parties not members of the convention; in that specific case, the non-party is to be given a reasonable time to declare adherence to the terms of the treaty, and during that interval any parties to

[57] QUINCY WRIGHT, A STUDY OF WAR 308 (1967).

the convention involved in the conflict must treat the non-parties' soldiers as if their state was a party.[58] As Jean de Preux explains, commenting on that convention:

> The spirit and character of the Conventions lead perforce to the conclusion that the Contracting Power must at least apply their provisions from the moment hostilities break out until such time as the adverse Party has had the time and an opportunity to state his intentions. That may not be a strictly legal interpretation; it does not altogether follow from the text itself; but it is in our opinion the only reasonable solution.[59]

Other treaties, like the 1907 Convention Relative to the Opening of Hostilities (Hague III) and the Convention Respecting the Laws and Customs of War on Land (Hague IV), take a more limited approach, requiring "Non-Signatory Powers" to provide notice "in writing" if they choose to opt in to the convention.[60] So far, in spite of his stated intent to be at war with the United States, bin Laden is not a party.[61]

Even assuming that international conventions should apply to conflicts involving non-party states, their applicability to non-state parties is more difficult. For al-Qaeda or the Egyptian Islamic Jihad to become parties to a convention would be unlikely, even if a recognized authority capable of binding the organization was recognized. The very nature of the war they have chosen to fight, however, consisting largely of violence directed at

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[58] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 2, *as quoted in* JEAN DE PREUX, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 24-77 (International Committee of the Red Cross, 1960).

[59] *Id.*

[60] Convention Relative to the Opening of Hostilities (Hague III), Oct. 18, 1907; Convention Respecting the Laws and Customs of War on land and its Annex: Regulation Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907.

[61] Osama bin Laden, fatwa published in *Al Quds Al Arabi* (London), August 1996:

> Those youths know that their rewards in fighting you, the USA, is double than their rewards in fighting some one else not from the people of the book. They have no intention except to enter paradise by killing you. An infidel, and enemy of God like you, cannot be in the same hell with his righteous executioner.

Available at http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html.

non-military targets (though by no means exclusively—the attacks on the U.S. Cole and the Khobar towers are notable exceptions), makes it improbable.

Nor is it certain that al-Qaeda operatives—soldiers, although correct according to the definition above, seems inappropriate—would be covered even if Osama bin Ladin himself were to publicly sign the Geneva conventions. Again, to use the Convention on the Treatment of Prisoners of War as an example, that convention lists specific criteria that "militias and . . . volunteer corps" must meet for their members to be protected, and thus by implication, would also be required of members of a transnational organization like al-Qaeda. At a minimum, they must meet each of four requirements that together identify them as protected by the Convention:

> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.[62]

While some of the organizations that have claimed responsibility for violence against U.S. interests and forces may have a chain-of-command exercising some level of control and responsibility, none of them—at least to this point—have worn "a fixed distinctive sign" into combat. And although some of the operations conducted against American troops in Afghanistan and Iraq have involved openly carried arms, and might be at least arguably within the laws of war, the bombings of the World Trade Center (1993 and 2001), of U.S embassies in Kenya and Tanzania (1998), of the Pentagon

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[62] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 4, § 2, *as quoted in* JEAN DE PREUX, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 44 (International Committee of the Red Cross, 1960). *See also*, Convention Respecting the Laws and Customs of War on Land of Oct. 18 1907 (Hague IV), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, sec. 1, ch. 1, art. 1.

(2001) of Madrid (2004), of London (2005), etc., did neither. Nor was this accidental; bin Laden specifically endorsed attacks by non-uniformed operatives, or by military personnel acting outside the chain of command, in his 1996 fatwa against Saudi Arabia, Israel, and the United States:

> Nevertheless, it must be obvious to you that, due to the imbalance of power between our armed forces and the enemy forces, a suitable means of fighting must be adopted i.e[.] using fast moving light forces that work under complete secrecy. In other word to initiate a guerrilla warfare, were [*sic*] the sons of the nation, and not the military forces, take part in it.[63]

The Basque ETA in Spain[64] and the Tamil Tigers in Sri Lanki[65] operate on similar principles, although in each case their violence is directed primarily toward the nation in which they are based, rather than against the United States (with notable exceptions).[66]

Even the use of a standardized badge or sign, however, would not necessarily provide protection under the conventions. Hitler's Waffen SS, for example, was organized and uniformed as a typical military unit (although technically a branch of the Nazi party),[67] openly carrying arms;[68] their disregard for the "laws and customs of war," however, evident as early as 1940[69] but infamously noted during the Battle of the Bulge,[70] placed them outside the pale and protection of those laws. Similar principles

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[63] bin Laden, *supra* note 61.
[64] *See generally* YONAH ALEXANDER, MICHAEL S. SWETNAM, & HERBERT LEVINE, ETA: PROFILE OF A TERRORIST GROUP (2001).
[65] *See*, e.g., HARVEY W. KUSHNER, ENCYCLOPEDIA OF TERRORISM 215-217 (2003).
[66] *See*, e.g., ALEXANDER, *supra* note 64, describing attacks on U.S. businesses and the destruction of an oil pipeline between two joint U.S./Spanish military installations.
[67] CHARLES W. SYDNOR, JR., SOLDIERS OF DESTRUCTION: THE SS DEATH'S HEAD DIVISION, 1933-1945 at xiii-xiv, 32 (1977).
[68] *Id*. at 64.
[69] I*d.* at 106-108.
[70] CHARLES B. MCDONALD, A TIME FOR TRUMPETS: THE UNTOLD STORY OF THE BATTLE OF THE BULGE 203, 207, 218-221 (1985).

might also apply to uniformed military personnel that participated in war crimes in places like Rwanda and the former Yugoslavia.[71]

While bin Laden and other Islamic terrorists intentionally place themselves outside the bounds of international treaties however, claiming to be bound only by the higher law of the Koran, established nations, and specifically the United States, may find themselves bound unilaterally to treaties they have signed. The August 12, 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), for example, applies by its own terms to armed conflict within the territory of states party to the convention (including Afghanistan and Iraq), even where the conflict is not between state parties (e.g., anti-terrorist operations).[72] All combat forces are required respect "[p]ersons taking no active part in the hostilities;" specifically, they are to be protected from, among other things, "violence to life or person" and "outrages upon personal dignity."[73] Technically, of course, this would apply equally to Coalition troops and militants, but in practice it limits only our military and those of our allies. Osama Bin Laden, for example, has no intention of being captured alive and brought to trial, so the violation of international law is hardly a deterrent.[74] This requirement, however, returns the discussion to the opening question: how are we to define and determine the amount of active involvement necessary to forfeit protection?

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[71] *See*, e.g., DORE GOLD, TOWER OF BABBLE: HOW THE UNITED NATIONS HAS FUELED GLOBAL CHAOS 142-143, 158 (2004).
[72] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV), art. 3, *as quoted in* JEAN DE PREUX, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (International Committee of the Red Cross, 1960).
[73] *Id*. at sec. 1.
[74] Bob Simon, interview with Abu Jandal, former bodyguard to Osama bin Laden, 60 Minutes (April 2, 2006), *available at* http://www.cbsnews.com/stories/2006/03/30/60minutes/main1457859.shtml.

Protection of International Law. Arguably, however, the Geneva IV should not protect those involved in terrorist operations or networks. Article 4 of that convention specifically states that "[n]ationals of a State which is not bound by the Convention are not protected by it."[75] Although most members of al-Qaeda and other terrorist organizations are technically citizens of member states, their allegiance is to their organization rather than their own nation; some, like bin Laden, specifically desire to overthrow the government of their native lands.[76] Logically, then they should not be protected by their nominal citizenship, but should instead should be treated as if their citizenship, like their allegiance, was to a non-party. Such a determination appears to be specifically prohibited by Article 8, however, which denies any personal authority to disclaim rights under the convention.[77]

Political Implications

The application of the combatant/noncombatant distinction in the context of the war on terror raises both moral and legal questions, and the answers to those questions have political implications. Particularly in an age of embedded media and 24/7 news coverage, any decisions regarding the use of force against particular targets or individuals may be subject to immediate international scrutiny. That scrutiny, in turn, can affect public opinion both in the United States and around the world. It is not enough, then, to

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[75] Geneva IV, *supra* note 72, at art. 4.

[76] JONATHAN RANDALL, OSAMA: THE MAKING OF A TERRORIST 99-100 (2005); HARVEY W. KUSHNER, ENCYCLOPEDIA OF TERRORISM 72 (2003).

[77] As a matter of policy, the United States could seek an amendment to the Convention, defining circumstances in which a person loses the protection due to a citizen of a State Party, but such an amendment would probably be difficult to obtain.

look only at what is moral, and what is legal; our policies must look beyond to the public perception of any actions that we take, and the consequences for the greater war effort.

Due to the nature of the American political system, the American people have both a larger role in policy and a larger sense of responsibility for national actions than any other significant nation. This role was evident (although generally unsuccessful) in the national discussion related to the annexation of Texas,[78] the protest movements that attempted to prevent American entry into both World War I[79] and World War II,[80] and more recently, the alternating approval/disapproval for a variety of peacekeeping missions around the world. Similarly, the American sense of corporate responsibility for national actions, if less evident, is nonetheless present, coloring national debates about involvement in foreign struggles since the earliest days of the republic, and dramatically illustrated in the national angst over Vietnam.[81]

How would Americans react to the intentional targeting of individuals that would traditionally have been identified as noncombatants? History indicates that the answer to that question will probably turn on the perceived necessity of the action. Retaliatory raids against Indian villages on the frontier were sometimes condemned by those living in the safety of civilization, but rarely by those whose lives were directly affected.[82] Though the

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[78] PETER MARSHALL & DAVID MANUEL, SOUNDING FORTH THE TRUMPET 126-138 (1997).
[79] ROBERT H. ZIEGER, AMERICA'S GREAT WAR: WORLD WAR I AND THE AMERICAN EXPERIENCE 14-22 (2000).
[80] *See generally*, ROBERT A. DIVINE, THE RELUCTANT BELLIGERENT (1965).
[81] *See*, e.g, CLARK DOUGAN & STEPHEN WEISS, THE VIETNAM EXPERIENCE: NINETEEN SIXTY-EIGHT 84-133 (1983); EDWARD DOYLE & TERRENCE MAITLAND, THE VIETNAM EXPERIENCE: THE AFTERMATH 1975-85, at 106-115 (1985).
[82] *See*, e.g., BENSON BOBRICK, ANGEL IN THE WHIRLWIND: THE TRIUMPH OF THE AMERICAN REVOLUTION 375-376 (1998).

Allies condemned Axis killings both of civilians[83] and of military prisoners,[84] few objected to widespread bombing of largely civilian targets, such as Berlin, Tokyo, Hiroshima, or Nagasaki.[85] (It should be noted, however, that the first instances of strategic bombing in World War I were believed, at least by some, to violate existing treaties, if not the law of war itself.[86]) Similarly, the intentional targeting of large cities with overwhelming strategic nuclear forces, often referred to as Mutually Assured Destruction, was widely accepted as a necessary evil throughout the Cold War.[87]

Proportionality and Military Necessity

This acceptance, at least in part, is explained by traditional Just War Doctrine, and particularly the principles of military necessity and proportionality of ends. These two principles, taken together, help to fill the gaps in the law of war: "In the absence of any

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[83] *See*, e.g., OFFICE OF THE UNITED STATES CHIEF OF COUNSEL FOR THE PROSECUTION OF AXIS CRIMINALITY, II NAZI CONSPIRACY AND AGGRESSION 444-446 (1946), charging Hermann Goering with, *inter alia*, the murder of civilians.

[84] *See*, e.g., *id.* at 568-569, charging Alfred Jodl with ordering the murder of Allied soldiers taken as prisoners or war.

[85] *See*, e.g., R.J. OVERY, THE AIR WAR 1939-1945 at 102-127 (1980). As Air Marshall Arthur Harris is reported to have said, when discussing British bombing raids over Germany: "There was nothing to be ashamed of, except in the sense that everybody might be ashamed of the sort of thing that has to be done in every war, as of war itself." *Quoted in* A.J. COATES, THE ETHICS OF WAR 27 (1997), *as cited by* Coverdale, *supra* note 23, at 221. The targeting and destruction of cities was not limited to the Allies; Germany, in particular, targeted large English cities with highly inaccurate V-1 and V-2 rockets. *See*, e.g., Jaworski, *supra* note 47, at 175, 181-182.

[86] *See*, e.g., G.F. NICOLAI, THE BIOLOGY OF WAR 188-189 (Constance A Grande & Julian Grande, trans. 1918), arguing that bombing towns violated the Geneva Convention:

> Treaties, however sacred, make no difference, for, as Bethmann-Hollweg quite rightly told the British ambassador, in war-time they are scraps of paper. In actual fact, even now violations of the so-called Geneva Conventions are the order of the day in all armies. . . . Within the same category of actions must be included the dropping of bombs by airmen on undefended towns. . . .

[87] LAWRENCE FREEDMAN, THE EVOLUTION OF NUCLEAR STRATEGY 22-30, 247-256 (1983).

positive rule of war, military activity was, and is, to be restrained chiefly by the doctrine of military necessity."[88] Tucker explains:

> Although the aggressor must be defeated, and although peace-loving nations have a right and even a duty to deal with an aggressor so as to insure that he will have neither the inclination nor the ability to pursue his evil design in the future, no more destruction and suffering ought to be inflicted than the necessities of war require. The employment of any kind of degree of force unnecessary for the purpose (s) of war and needlessly causing human suffering and physical destruction therefore stands condemned. And since a clear distinction is drawn by doctrine between the evil aggressor and the innocent population of the aggressor state, the obligation to employ force in as discriminating a manner as the necessities of war permit must also appear compelling. In consequence the noncombatant population of an aggressor state ought not to be made the direct and deliberate object of attack and should be spared from injuries not incidental to military operation directed against combatant forces and other legitimate military objectives.[89]

Military necessity, in this context, means that it may sometimes be necessary to strike a military target—a rail yard, for example—even when the attack is almost certain to cause civilian casualties. According to Coverdale, "International law acknowledges that the imperative of winning the war or the battle may justify attacks on legitimate military targets despite their consequences for civilians and civilian objects."[90] In this way, attacks on cities like Dresden may be justified because of their contribution to the war effort, even though specific buildings destroyed or individuals killed may not be directly involved in the war effort.

This principle of military necessity is limited by the requirement of proportionality: the projected civilian harm cannot outweigh the apparent military value

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[88] Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213, 218 (April, 1998).
[89] ROBERT W. TUCKER, THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE 85-86 (1960).
[90] Coverdale, *supra* note 23, at 272.

of the target. The bombing of Monte Casino in Italy, for example, was probably justified because the local commander reasonably believed, based on the intelligence available to him, that it was being used by artillery spotters, snipers, and other German military personnel, who were in turn directing attacks that resulted in large numbers of Allied casualties.[91] (As it turned out, ironically, although the Germans operated in the vicinity of the monastery, they chose not to occupy the monastery itself until after it had been almost completely destroyed by American bombers and artillery.)[92] Similarly, the nuclear attacks on Japan at the end of the Second World War demonstrated the futility of further Japanese resistance, and therefore saved many thousands, perhaps millions, of both Japanese and American lives.[93] Tucker sums it up this way:

> In the final analysis, then, the insistence that even against an aggressor the manner of employing force must remain subject to humanitarian restraints may well prove to be little more than an empty gesture if unrelated to the purposes of war. It is not what the principle of humanity condemns in the abstract, but rather what the principle of military necessity is deemed to permit in the concrete circumstances of war that is decisive. The interpretation of the requirement of humanity will be governed by the interpretation of the requirement of what is militarily necessary.[94]

Assuming, therefore, that a military operation is necessary and justified, and that the benefits to be gained outweigh the probable harm to noncombatants, that operation is permitted under traditional just war theory.

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[91] MARTIN BLUMENSON, SALERNO TO CASSINO 403-408 (1993).
[92] *Id*. at 413-416.
[93] *See*, e.g., Karl Taylor Compton, *If the Atomic Bomb Had Not Been Used*, THE ATLANTIC MONTHLY, CLVXXVIII at 54-56 (Dec. 1946), *reprinted in* HIROSHIMA: THE DECISION TO USE THE A-BOMB (Edwin Fogelman, ed. 1964).
[94] ROBERT W. TUCKER, THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE 89-90 (1960).

Political Fallout

International responses to American disregard for, or limitation of, the protection afforded by noncombatant status is harder to gauge. Certainly, those against whom it is directed—al Qaeda, for example—would attempt to rouse public opinion against it. Our European allies would also be likely to condemn such an action, at least in public.[95] In fact, American forces are now being trained to ignore some attacks, refusing to respond even when fired upon, because of the political ramifications that accompany civilian casualties.[96] In most of the world, though, where the combatant/noncombatant distinction receives little more than lip service when it becomes inconvenient for the state, such a decision would have little practical effect. Burma, Sudan, or Iran might in fact condemn the United States through the United Nations or other international bodies, but their own historical records indicate that they would be acting only out of political expediency, not moral principle.[97] The primary danger on the international scene would be the prospect of inflaming the more moderate Muslim community, resulting in less cooperation or, in

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[95] Indeed, our European allies often seem eager for a chance to condemn us, as demonstrated by European press reports about the alleged rape and murder of an Iraqi woman by U.S. Marines at Haditha. *See*, e.g., *European Press Review*, BBC INTERNATIONAL (June 1, 2006), *available at* http://news.bbc.co.uk/2/hi/europe/5035804.stm.

[96] Fawzia Sheikh, *Forces spare Afghan civilians*, THE WASHINGTON TIMES (Oct 16, 2007), *available at* http://washingtontimes.com/apps/pbcs.dll/article?AID=/20071016/FOREIGN/110160083/1001:

> Coalition forces in Afghanistan are being trained to avoid civilian casualties even if that means sometimes refusing to respond to direct attacks, a senior officer said. . . . The cautious approach, adopted in the face of widespread anger at the deaths of civilians in a number of incidents, comes as U.S. commanders increasingly see winning the trust of Afghans as critical to the war effort.

[97] Iran forced young boys to serve in martyr's brigades during the Iran-Iraq war, where they faced almost certain death; *see*, e.g., "Iran: The Iran-Iraq War", Encyclopedia Britannica Online, *available at* http://www.britannica.com/eb/article-230081/Iran; Burma has recently raised international ire as troops fired on unarmed protestors; *see*, e.g., Jill Drew, *Burmese Refugees Recall How the Protests Evolved*, Washington Post Foreign Service, A01 (October 26, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/25/AR2007102502902.html?hpid=moreheadlines; Sudan has also gained international notoriety for its crimes against humanity, even genocide; *see*, e.g., Priya Abraham, *Spectator to genocide*, WORLD (April 2, 2005), *available at* http://www.worldmag.com/articles/10479.

some cases, even greater violence throughout the Middle East.[98] Riots occurred, for example, after Newsweek incorrectly reported that American military personnel had flushed a copy of the Koran down the toilet.[99] Suspicion and unrest also followed an incident where American soldiers in Afghanistan desecrated the bodies of Afghan fighters by burning them,[100] and more recently, after the unfortunate incident involving Blackwater security personnel in Baghdad.[101] The resulting complications to American military activities in the region, then must be weighed against the danger not targeting noncombatants will pose: a difficult question with both political and military factors, and no easy answer.

Conclusion

Combatants—those actively engaged in warfare—are proper targets for military operations, and may be killed in combat. Noncombatants—everyone else—have traditionally been protected by a system of rules that regulated the Western way of war, and reflected an understanding of justice and law that saw them as not deserving to suffer the consequences of war. Morally, however, there is little in Scripture that protects male civilians in the vicinity of combat; their presence seems to lead to a presumption of

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[98] Although very different in nature, the widespread violence following the publication in Europe of cartoons mocking Mohammed demonstrates the severe consequences that are possible. *See*, e.g., *Muslim cartoon fury claims lives*, BBC EUROPE (February 6, 2006), *available at* http://news.bbc.co.uk/2/hi/south_asia/4684652.stm.

[99] *See*, e.g., Elisabeth Bumiller, *White House Presses Newsweek in Wake of Koran Report*, New York Times (May 18, 2005), *available at* http://www.nytimes.com/2005/05/18/politics/18koran.html.

[100] *Report: U.S. soldiers desecrated bodies of Taliban fighters*, INTERNATIONAL HERALD TRIBUNE, ASIA-PACIFIC EDITION (October 25, 2005), *available at* http://www.iht.com/articles/2005/10/20/asia/web.1020taliban.php. In contrast, the desecration of the bodies of American soldiers in Iraq is largely forgotten: *U.S. soldiers' bodies mutilated, booby-trapped*, CNN (June 21, 2006), available at http://www.cnn.com/2006/WORLD/meast/06/20/soldiers.missing/index.html.

[101] Brian Bennett, *America's Other Army*, TIME 28-31 (October 29, 2007).

participation, and it therefore condemns them to death. Those incapable of causing harm, however—women and children in a captured city, for example—are to be spared.

The legal question is more complicated, especially since most of the relevant documents were drafted decades ago, in a very different military and political context. Generally speaking, it is illegal to kill noncombatants, but a careful reading of the treaties indicates that they do not protect a population that is actively engaged in guerilla warfare from being targeted in return.

Politically, it may be unwise to intentionally target noncombatants, but that is largely the result of American public opinion. Where the risk to American lives is great, and the number of noncombatants to be targeted is commensurable, the American people are unlikely to object if the necessity of the operation is clear.

In conclusion, then, it seems that the traditional application of the combatant/noncombatant distinction in international law is too imprecise for blanket application in the war on terror; morality does not protect those participating in terrorism, even indirectly, and arguably, neither does the law. After weighing the political considerations, it seems fair to conclude that the protections of international law should be limited to those who pose no risk of harm to American forces under the circumstances, regardless of how they would have been classified under the traditional combatant/noncombatant distinction.

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