

## JUST WAR THEORY AND THE CHALLENGES IT FACES

The extent to which the world changed on 9/11, with the terrorist attacks on New York and Washington, is a matter of debate. But, even if the attacks did not themselves introduce significant changes, it is clear that they highlighted and accelerated changes that were already underway in the role of military violence. This volume is an examination of the moral implications of those changes. The chapters consider how these changes should be understood in moral terms.

Traditionally, matters of the morality of military violence have been understood and assessed in terms of Just War Theory (JWT). This volume examines the extent to which recent changes in the role of military violence pose challenges to JWT. How has the role of military violence changed, and what are the moral implications? There are different ways in which this question might be approached. In this introduction, I will approach it by asking whether JWT is adequate to handle the challenges, or whether instead it needs to be revised or abandoned in favor of a different approach. What does it mean to ask whether JWT is adequate to the contemporary challenges? JWT has always been understood not as an abstract moral theory, but as a practical guide for political leaders and military personnel in their decisions about the employment of military violence. The adequacy of JWT is bound up with its continuing ability to serve this practical function. If the contemporary changes have left the theory unable to provide practical guidance, the theory is now inadequate.

JWT consists of a set of rules and norms that seek to control military violence, to limit or restrict its exercise. It is a theory of limited war. Unlike doctrines of pacifism, it does not seek to outlaw all war; it assumes that some military violence is morally justified. It accepts the assumption that in a world of sovereign states without an overarching governing authority, military violence must be available to states, at least to protect themselves from aggression. At the same time, unlike doctrines of realism, JWT does not assume that any use of military violence that furthers a belligerent's national interests is justified; it seeks to impose moral limits on military violence. It assumes that even in a world of sovereign states, states have some mutual moral obligations not to interfere

with each other. As a theory of limited war, JWT is in a middle position, so to speak, between pacifism and realism, allowing some uses of military violence and disallowing others. Its adequacy is tied to its ability to maintain that sometimes precarious middle position, not to move too close to, or collapse into, either realism or pacifism. If JWT moves too close to realism, it is not serving its moral function. If it moves too far from realism, it is not serving its practical action-guiding function because military decision-makers will simply ignore rules that require too great a sacrifice of national self-interest.

The just war rules have been developed over time in response to given social, political, and technological realities, and, as these realities change, the question arises whether the rules remain adequate, whether they retain their action-guiding function. The concern is that the nature of current changes in military violence will deprive the theory of its practical import, relegating it to the status of an abstract moral theory without practical applicability, a classroom exercise, lacking relevance to those making decisions on the use of military violence. Or, perhaps the theory, in the face of the changes, continues to provide practical moral guidance to military decision-makers, proving adequate to the changes.

The rules of JWT are rules of moral permissibility. They indicate to military leaders and combatants (as well as to those observing their behavior) when military violence is allowed and when not. One part of JWT, *jus ad bellum*, consists of conditions that must be satisfied for a war to be initiated or joined. The conditions are that the war have a just cause; that it be declared by legitimate authority; that it be fought with the right intention; that the harm reasonably expected to be done by the war be proportionate to (i.e., not exceed) the good the war can be reasonably expected to achieve; and that the war be a last resort. The other part of the theory, *jus in bello*, involves principles that must be satisfied by the way violence is used to achieve the military objectives of a war. The two chief principles of *jus in bello* are discrimination, which requires that attacks not be made against civilians and civilian targets, and proportionality, which requires that particular military actions contribute to winning the war (i.e., cause no gratuitous harm) and contribute sufficiently to that end to outweigh the harm they are likely to do.

What are the contemporary changes to which JWT is called upon to respond? Perhaps the most important change is the accelerating pace of globalization, the growing economic and informational interconnectedness of nations. Globalization is affecting what parties are engaging in military violence, how that violence is organized and used, and the weapons available for its use. Other important changes are part of, or are

reinforced by, globalization. One is the decline in state sovereignty; sovereignty is the idea that each state has exclusive authority over its own internal affairs and should not be subject to interference by other states. A second is the burgeoning international human rights movement, which is creating practical global standards for how states should treat their citizens. A third is the rise of international, nonstate terrorism. Another is the diffusion, through proliferation, and the resulting wider availability, of especially destructive military technologies, such as weapons of mass destruction. A related change is the Revolution in Military Affairs, the way the uses of military violence have been affected by the development of advanced forms of military technology, such as precision-guided munitions.

All these have led to changes in the use of military violence, and these pose challenges to JWT. Three of these challenges receive extended discussion in Parts III, IV, and V – intervention, terrorism, and torture. A fourth challenge is the development and use of high-tech weaponry discussed in Part VI. Part II addresses in a general way JWT and the challenges it faces.

## 1. THE RESOURCES OF JUST WAR THEORY

To begin to address the question whether JWT is adequate to the contemporary challenges, it is necessary first to have a better understanding of the theory itself and its resources. The history of the theory suggests that its capacity to encompass new forms of military violence is extensive. From the time that JWT was systematically formulated in the Middle Ages, there have been a series of revolutions in the nature of warfare. Through these, the theory has proved surprisingly flexible; it has survived and retained its practical relevance, though not without modifications. But is its flexibility sufficient to the changes of our own era?

The adaptability of JWT is strongly argued for by William Murnion in Chapter 1. He takes a perspective on the nature of the just war theory different from that presented above. In his view, the just war approach is not strictly a theory or a tradition yielding univocal judgments about the morality of particular wars or methods of fighting. It is rather a heuristic construct, a way of considering and talking about the morality of war. The just war perspective contrasts with four alternative approaches: realism, pacifism (as mentioned earlier), militarism, and idealism. These alternative approaches can be distinguished by different epistemological and ontological assumptions they make, and each can be found historically in both religious and secular forms. Part of the adaptability of the

just war approach is its ability to take on characteristics of one or another of these alternatives. Murnion sketches the history of just war thinking, portraying it as a series of four paradigm shifts, from the divine law approach of Augustine, to the natural law approach of Aquinas, to the law of nations approach of Vitoria and Grotius, to the contemporary international law approach. It is the lability of the just war heuristic that makes it “the last best hope for meeting the contemporary challenges to the ethics of warfare.”

Chapters 2 and 3 provide a more pessimistic read on the adequacy of JWT. Both David Duquette and Patrick Hubbard see the resources of JWT as more limited and currently under significant strain. The chapters concern the relationship between JWT and realism, and each criticizes the views on this relationship of Michael Walzer, the most prominent contemporary expositor of JWT.<sup>1</sup> Duquette faults Walzer for presenting a form of JWT that moves too close to realism, while Hubbard faults Walzer for not moving far enough toward realism. Despite their coming at the issue from opposite directions, each author would probably endorse the point that for JWT to be adequate, it must move much closer to realism. Hubbard endorses this move, finding in it the only way for the theory to retain its relevance, while Duquette condemns the move, seeing it as an abandonment of the theory as a coherent moral perspective.

Duquette sees the moral heart of JWT in the principle of discrimination, which expresses a respect for human rights. But the action-guiding capacity of this principle is always under pressure because the principle can interfere with the ability of a state to achieve its military goals. Duquette argues that Walzer’s treatment of the issue of civilian deaths through “collateral damage” shows that he has moved the theory too far in an accommodation to realism. This is also the case with Walzer’s doctrine of “supreme emergency,” under which states are allowed to directly attack civilians if the attacking community faces utter destruction. When JWT is under pressure from realism to weaken its commitment to human rights, it must stand its ground, so to speak. Walzer’s version of JWT tilts too far toward realism. The theory gains in adequacy, but its coherence as a moral theory is undermined.

Hubbard, on the other hand, reproaches Walzer for presenting a theory that cannot adequately guide action. Walzer argues that his version of JWT is action-guiding because the moral language it deploys can constrain policy choices before the fact and serve to hold leaders and combatants responsible after the fact. But it does neither. The moral language of the theory does not constrain policy choices because of the nature of the political process and the way that moral language is used

to rationalize decisions made on other grounds. Moreover, leaders often regard their rule-violating actions as morally required because they are acting on their moral role responsibility to protect their nations. Nor does the moral language effectively hold leaders and combatants responsible after the fact. Walzer introduces supreme emergency as an attempt to deal with this problem, but it does not go far enough. Leaders regard all wars as emergencies, and tend to violate the constraints of the theory across the board.

Duquette calls for a less realist theory for the sake of moral coherence, while Hubbard calls for one closer to realism for the sake of practical effectiveness. In Hubbard's view, if the new forms of military violence are seen as necessary, they will be practiced whatever the theory prescribes. The opposing positions of Duquette and Hubbard represent one of the problems this volume addresses. To maintain its coherence and its integrity as a moral theory, JWT would have to prohibit the new forms of military violence. Because these new forms are seen as militarily necessary, this would weaken the theory as a practical guide to military action.

## 2. INTERVENTION

Intervention involves the first use or initiation of military force by one state against another in the absence of the latter's having committed aggression. Recently, two forms of intervention have come into prominence, humanitarian intervention, the use of military force to stop massive human rights violations in another state, and preventive intervention, the use of military force in response not to actual or imminent attack, but to an expected future attack. For example, the 1999 Kosovo War was a humanitarian intervention, while the 2003 Iraq War was a preventive intervention. Both of these forms of intervention have a long history, but recent changes have brought them to the fore. The changes fostering humanitarian intervention include the growth in the international human rights movement and an increase in the number and severity of intrastate ethnic conflicts, leading in some cases to genocide or ethnic cleansing. The changes fostering preventive intervention include the growth in international terrorism and the wider availability of destructive technologies. In addition, both forms of intervention have been given momentum by the decline of state sovereignty.

The main question is whether the reasons offered for humanitarian or preventive interventions provide a just cause under *jus ad bellum*. Intervention is often seen as morally problematic because the only just cause for going to war is thought to be self-defense, so that a state is

prohibited from initiating war.<sup>2</sup> On this view, interventions are nondefensive wars and so forms of aggression. The prohibition of aggression is based on respect for national sovereignty. Does JWT have the resources to accommodate either humanitarian or preventive intervention?

Chapter 4 by Rex Martin is devoted largely to humanitarian intervention. He discusses the similar versions of JWT offered by Walzer and John Rawls.<sup>3</sup> Both Walzer and Rawls regard humanitarian intervention as justified, but it is unclear how this view fits into their overall theories. In general, humanitarian intervention is justified on the grounds of the defense of human rights, but, more specifically, we need to know what level of rights violations is required for intervention and what the theoretical justification for picking that level is. Martin finds that Walzer and Rawls answer the question of the required level of rights violations largely by pointing to shared judgments (intervention is justified when the rights violations “shock the conscience of mankind”), but do not provide theoretical underpinnings for their answers. Concerning the question of who should authorize intervention, which concerns the *jus ad bellum* condition of legitimate authority, Walzer and Rawls move away from regarding unilateral intervention as justified toward requiring some form of international authorization, though not necessarily by the United Nations.

Humanitarian intervention is also the subject of Chapter 5 by Helen Stacy. She argues that such intervention lacks an adequate foundation in international law, and, through appealing to what she calls relational sovereignty, she proposes legal revisions that would justify it. Relational sovereignty is a recognition that globalization has altered the conditions of sovereignty by blurring the distinction between domestic and international politics and making a government’s claims of immunity from intervention conditional on its respecting its citizens’ human rights. Stacy addresses the issue of the level of human rights violations needed to justify intervention by appealing to the legal doctrine of equity and to an analogy between intervention and individual rescue under tort law. This leads to the position that humanitarian intervention is justified when human rights violations are widespread and extreme, the victims support the intervention, and the intervention promises to do more good than harm. A fourth criterion is that the intervener be committed to helping the state to rebuild its institutions to avoid a recurrence of the humanitarian crisis.<sup>4</sup> Moreover, Stacy argues that intervention may be justified not only when victims are being killed, but when they are being starved.

Preventive intervention is taken up by Eugene Dais in Chapter 6. He argues that the world has seen the advent of “perfect terrorism,” terrorism perpetrated by members of stateless organizations with potential

access to weapons of mass destruction. Perfect terrorism justifies a form of preventive intervention. The goal of perfect terrorism has been the termination of the hegemonic role the United States plays in world affairs. Since the end of the cold war, the United States has become the single world superpower, and as such it has assumed a hegemonic role of policing the world to maintain the conditions of free trade and mutual prosperity. This has meant, for example, keeping the oil flowing, leading to its hegemonic interference in Middle Eastern politics. Islamic terrorists have attacked the United States to get it to abandon such interference. Given the extreme threat posed by perfect terrorism, it is necessary for the hegemon, in violation of the normal constraints of *jus ad bellum*, to have an exclusive right to engage in a form of preventive intervention, a “protective right of first strike.” But this creates a problem of fairness, since the right is special to the hegemon. Partly in response to the fairness issue, Dais places a tight set of constraints upon the exercise of this right.

A different perspective on preventive intervention is offered by Steven Lee in Chapter 7. By focusing on the *jus ad bellum* criteria of just cause and proportionality, he argues that preventive intervention is not justified. He discusses just cause in terms of a domestic analogy between individual autonomy and state sovereignty. As it would be wrong to interfere with an individual based only on suspicions about his or her future malign actions, absent the initiation of such actions, so it would be wrong to attack a state based only on expectations of its future aggression. Preventive intervention fails also to satisfy proportionality because the consequences of such intervention are very likely to be negative, if we count not only the direct consequences of the particular intervention but also the indirect consequences on the international system, including an increase in the likelihood of war through the precedent of that intervention. But there remains the argument that the “new circumstances” of international terrorism require our rethinking this case against preventive intervention, but Lee concludes that the argument against preventive intervention holds nonetheless.

Martin’s discussion suggests that just war theory may have some problems with humanitarian intervention, suggesting that changes in the theory may be needed. Stacy sees the need for changes in international law to accommodate such intervention, and since international law largely tracks JWT, this may support the need for changes in the theory as well. Dais endorses the need for changes in either JWT or international law to accommodate preventive intervention because such intervention is now necessary. Lee agrees that JWT would need to be changed to accommodate preventive intervention, but he does not endorse such changes.

Thus, it seems that Dais takes the Hubbard side of the more general argument, while Lee takes the Duquette side.

### 3. TERRORISM

The growth in the lethality and reach of international nonstate terrorism is perhaps the most prominent change in the use of military violence challenging the traditional understandings of the morality of war. One moral question for the states at risk from such terrorism is what their response to it should be. A question for us is whether JWT is adequate in providing an answer. This part addresses issues in addition to whether terrorism justifies preventive intervention. Is terrorism itself ever justified? Should the principle of discrimination be taken as a moral absolute? What should we say about the terrorism of state actors? Is a “war” against terrorism an appropriate, a morally justified, or even a coherent response? What about other, nonmilitary methods of fighting terrorism? Terrorism is an attempt to further political goals by using violence against civilians, and this definition applies to states as well as nonstate actors. Indeed, terrorism has been practiced by states that are the current victims of nonstate terrorists. It is interesting to note that terrorism has come in for special concern only since it has begun to be practiced by nonstate actors against states.

Approaching the question from international law, Allen Weiner in Chapter 8 asks whether the “war” against terrorism currently being waged by the United States is really a war. While it is not a war as defined by international law, it may be regarded as a war by a plausible “functional extrapolation” from international law. But there is an important caveat. Being in a state of war entails various legal restraints on the belligerents. The United States is not abiding by these restraints, as is evident, for example, in its claiming a right to attack individuals and states not part of al-Qaeda, ignoring the rights to which detainees in war are entitled, and not recognizing the reciprocity inherent in war. This undermines the claim that the United States could legitimately regard its activities as war under the functional extrapolation argument. The lack of proper restraints by the United States calls into question its being at war in a legal sense, and thus its right to take various actions to which it would be entitled were it at war.

The moral uniqueness of the threat posed by terrorism is emphasized by Jonathan Schonsheck in Chapter 9, and, like Dais, he argues that this may justify preventive intervention. But his argument for this is different and his conclusions more tentative. The moral uniqueness of the threat



means that morality, including JWT, provides no guidance, but at the same time no basis for denying that preventive intervention is justified. The *sui generis* character of contemporary terrorism lies in the fact that suicide terrorists are neither combatants nor criminals and are undeterrable. Because defense cannot be sufficiently effective, the response to the threat must go beyond defense; it must be preventive. JWT does not provide guidance because the conflict between the United States and the terrorists is asymmetric, not only materially, but morally. The theory's assumption of moral universalism fails. Also failing to provide guidance is the Kantian argument that an action is morally permissible only if it is universalizable. The reason is that nations are not like individuals. We are in a moral *terra incognita*, and it is unclear where we go for guidance.

In his discussion of terrorism, Stephen Nathanson in Chapter 10 notes that, while the rhetoric of the war on terrorism condemns terrorism in the strongest moral terms, people often react cynically to this condemnation. This is due to the hypocrisy many sense on the part of those offering these condemnations, resulting from their failure to condemn terrorism practiced by states. What is needed for a credible condemnation of terrorism is a consistent and rigorous application of the principle of discrimination to all parties engaged in military violence, whether state or nonstate actor. This means condemning not only state actions such as the city bombings of World War II, but also much of the "collateral damage" killings of civilians. This is where JWT comes up short. If the theory includes Walzer's doctrine of supreme emergency, it regards deliberate civilian killings as sometimes justified, and, even if it does not, it still accepts too many civilian deaths under the doctrine of double effect. In the indifference it shows to civilian lives, this doctrine is morally equivalent to terrorism. A credible condemnation of terrorism must endorse a moral theory that shows a greater respect for civilian lives. This is a theory that includes what he terms the "bend over backwards" principle of reducing the risk of civilian deaths.

In his discussion, Alistair Macleod in Chapter 11, distinguishes a literal (military) war against terrorism from a metaphorical one, where the means are nonmilitary, and explores reasons that the latter may be preferable to the former, both morally and prudentially. Even if military retaliation against terrorist attacks is deserved, it often ends up killing many innocent parties. This makes it both counterproductive and morally problematic. The best strategy for combating terrorism is a function of the best explanation for terrorism's emergence and persistence. In determining the best explanation, we must consider not only the motives of the terrorists, but also the motives of their supporters, without whom the

terrorism could not continue. Also, we must recognize that in explaining terrorism, we are not justifying it, and in acting in the light of that explanation, we must not shrink from being willing to abandon sacrosanct foreign policies, so long as they are not obligatory. Also, we must not be scared off by a concern not to “give in to terrorists”, for, if terrorists have adopted a demand in order to garner political support, refusing to give into that demand may play into the terrorists’ hands.

Among nonmilitary alternatives to fighting terrorism, legal responses loom large. The legal response is explored by Win-chiat Lee in Chapter 12, who argues that terrorist crimes should be matters of universal jurisdiction, crimes that any state has a right to prosecute. Universal jurisdiction is jurisdiction independent of the two factors that have traditionally defined jurisdiction, territoriality and nationality. The need for terrorist crimes to be under universal jurisdiction is shown by the extradition dilemma: If a state receives an extradition request for a terrorist suspect, and the requesting state does not allow due process of law, the receiving state would face the dilemma of either handing over the suspect to an unjust procedure or allowing him or her to escape prosecution. If terrorist crimes were of universal jurisdiction, then the state could avoid the dilemma by trying the suspect itself. Genocide and other crimes against humanity have been viewed as subject to universal jurisdiction because they are heinous crimes that are likely to occur in states that are unlikely to prosecute them. Terrorist crimes create a related but opposite problem: they are likely to be prosecuted locally, but in a way not respectful of due process. In both cases, extradition-dilemma style arguments imply that universal jurisdiction is appropriate.

Weiner, from an international legal perspective, argues that the military war against terrorism is not justified. Nathanson, from a moral perspective, argues that a coherent struggle against terrorism requires that moral strictures on military violence not be weakened, but strengthened. His concern, like Duquette’s, is not so much the practical adequacy of JWT but rather its intellectual adequacy, its ability to support a consistent language of condemnation, one that does not sustain a double standard between states and nonstate actors. Schonsheck is also concerned about a moral double standard, as in the Kantian requirement of universalizability, but he argues that preventive action against nonstate terrorism would not create a double standard because of the *sui generis* nature of such terrorism. The discussions of nonmilitary responses to terrorism by Macleod and W. Lee indirectly support the practical adequacy of JWT, in that they suggest that there are effective, nonmilitary approaches in responding to terrorism.

#### 4. TORTURE

Torture, like terrorism, involves an abuse of fundamental human rights. Torture can be the imposition of gratuitous suffering, but it can also, like terrorism, be a means to an end, such as the extraction of information believed to be possessed by the victim. It is torture in the latter sense that is the main focus of discussion in this part. Torture has been practiced throughout history, but its prominence now is due to its being practiced as a matter of policy, despite denials, by the United States. Interestingly, while terrorism has our attention now that it is being practiced by the weak, torture has our attention now that it is being practiced by the strong. The moral challenge torture poses is the adequacy of the *jus in bello* rules that condemn it, given that it is believed to be militarily necessary. Given the nature of nonstate terrorism, proponents argue that the torture of detainees for information is a necessary means of defense. There are several moral questions about torture: What is the moral basis of the claim that torture is wrong? Are there any situations (such as in the so-called ticking time bomb example) where torture is justified? Given that torture is now practiced, should we seek to bring it under control or to end it, and how should we do this?

In his discussion of torture, Larry May in Chapter 13 begins by noting that, though torture is now being discussed as a live possibility, it has long been condemned by international law. Because our rejection of torture is based on the idea that it is an inhumane form of treatment, the question is how the notion of humanity condemns torture. Grotius provides some help, pointing out that humane treatment is especially required in the case of prisoners of war (POW) because of their defenseless and dependent position. While justice might not bar all forms of captive abuse, humanity does. Based on considerations of humanity, the dependent position of the captive creates either a fiduciary obligation, or at least a stewardship obligation, of captors toward their captives. But do these considerations apply in extreme cases of military necessity? Could the permissibility to torture in such cases be based on an analogue to Walzer's idea of supreme emergency? May admits that there may be such cases, but he argues that they would be so few that it would be better to adopt an absolute ban on torture.

But it is the perceived military necessity of torture in fighting terrorism that drives the contemporary case for torture. This argument is encapsulated in the hypothetical example of the "ticking time bomb," in which a person in custody knows the whereabouts of a bomb set shortly to explode, killing multitudes of innocent people, and can be got to reveal

its location only under torture. The next three authors, assuming, like May, the general unjustifiability of torture, address especially this extreme case.

In Chapter 14, Kenneth Himma notes that the possibility of nuclear terrorism shows that the ticking time bomb example is not so far-fetched. Many regard torture as absolutely morally wrong, but that would make the anti-torture principle unique among general moral principles in being exceptionless. In fact, however, our recognition that torture may be justified in the ticking time bomb example shows the principle is not absolute. But, how broad is the exception? Conditions must be met for torture to be permissible, among which are that the threatened harm is grave, that the suspect is morally culpable, that torture is the only way to prevent the harm, and that the suspect can stop the torture by talking. In addition, the authorities must have proof beyond a reasonable doubt that these conditions hold. Torture does present culpable suspects with a forced choice, but a forced choice may be justified in such cases because the suspects' culpability implies that forcing the information from them would be forcing them only not to do wrong.

Chapter 15 by David Luban draws a different conclusion about the ticking time bomb example. The prevalence of this example results from the way that torture figures in the liberal imagination. Torture is a serious wrong for liberals because, by putting its victims under the will of the torturer and stripping them of their dignity, it is morally analogous to tyranny. At the same time, torture in the bomb example is meant to save many innocent lives, and this goal is part of the liberal project. The example bewitches liberals by appearing to allow torture as an exception to the general prohibition. The example is rhetorically powerful because it forces liberals away from an absolutist position and into a posture of haggling over the consequentialist price of torture. Luban sets out to disarm the example as "an intellectual fraud." First, the example is a fiction, in the sense that we cannot have the degree of certainty that the example stipulates. Second, the example looks at torture as an isolated case, when we live in a world of practices. To allow torture would be to allow a practice, and so a culture, of torture, and this is unacceptable.

The ticking time bomb example is also the starting point for Chapter 16 by Deirdre Golash, but her moral objections to torture run deeper than Luban's. While agreeing with him that the stipulations regarding the certainty of belief in the example cannot be satisfied, she argues that torture would not be justified even if they were. Part of the case for torture, as Himma argues, is that the suspect is known to be culpable, so the torture is not of an innocent person. But this does not, Golash argues, make a moral difference. The harm of torturing a culpable suspect is

qualitatively different from, and worse than, the harm inflicted in punishment or even in self-defense. (Torture for information is morally worse than torture for punishment.) Retributive punishment requires respect for human dignity, but dignity is what torture for information denies. Torture requires that the victim betray herself or himself. The object of the torturer is to break or usurp the suspect's will. The moral issue of torture for information puts to us the question of what we value and who we are or what the bomber can force us to become. Torture in extremity is problematic not simply because it would require an institution, but because it is wrong apart from that.

Another form of torture in a military context is war rape, an issue discussed by Sally Scholz in Chapter 17. War rape is a form of torture when done gratuitously, with no military goal, as has generally been the case in the past, and it has long been recognized as a war crime. But contemporary war rape is mass rape, and, like torture for information, has become a means to an end. Mass rape may be intended to demoralize communities, achieve ethnic cleansing, or perpetrate genocide. It is genocidal when, for example, its purpose is to impregnate women whose children, with fathers from a different ethnic group, will not be accepted in the women's group, thereby helping to destroy that group. JWT may be adequate to our moral understanding of individual war rape, but not mass rape. A just-war individual rights approach cannot account for several features of mass rape, such as the bodily nature of the violation (which it shares in part with other torture), its cultural meaning, and the way mass rape can straddle the line between being a concern of *jus ad bellum* and a concern of *jus in bello*.

The main concern about torture has been its practice by the United States, post-9/11, as a means of obtaining information on the terrorist threat. Chapter 18 by Ken Kipnis addresses the institutional question of how these interrogation-by-torture practices are pursued. A global network of interrogation centers has been created, and these centers are neither POW camps nor prisons (echoing Schonsheck's claim that contemporary terrorists are neither combatants nor criminals.) The centers are designed to maximize the extraction of information with as little outside (domestic or international) legal interference as possible, a purpose different from that of prisons or POW camps. This lack of legal oversight has created a "jurisprudential *terra incognita*". What should the legal response to this reality be? How should these new legal institutions be regularized so as to bring them under some kind of legal constraints? These institutions may be here to stay; like the Japanese internment camps of World War II, the United States public has largely acquiesced

in their existence. If the interrogation centers are here to stay, the job of social and legal philosophy is to think about how they can be brought under legal regulation.

Himma argues that the ticking time bomb example is a justified case of torture, showing that the moral prohibition against torture is not absolute. May and Luban seem to agree that the example may be a justified case in the abstract, but argue that the prohibition should be absolute nonetheless. Golash's moral understanding of torture does not recognize the possibility of a justified case. None of the four authors base his or her argument directly on JWT, but the conclusions of May, Luban, and Golash are in accord with the prohibition on torture implicit in the *jus in bello* principle of discrimination and conventions about prisoners. In contrast, Himma's argument supporting justified torture is in line with the claim that torture may be militarily necessary and that morality must accommodate this. Implicit in this claim is that just war theory and its implied absolute prohibition of torture is now inadequate as a practical guide. Scholz argues that JWT is inadequate in a different way, in its failure to conceptualize the harm of mass war rape.

## 5. TECHNOLOGY

The Revolution in Military Affairs is the transformation of the battlefield by technological developments such as accurate guidance systems, remote sensing, and computational power. Chapter 19 by Richard De George focuses on the moral implications. One fruit of the new technology is the "smart bomb," an explosive that can be delivered with much greater accuracy than in the past. Such weapons make states potentially more effective in adhering to the principle of discrimination because, with greater accuracy, the bombs have smaller explosive yields and do less collateral damage. As a result, the principle of discrimination has implications in peace as well as war. One new moral obligation is that states develop better smart bombs during peacetime, so as to be able to be more discriminatory when war comes, despite the counterintuitive implication of a morally prescribed arms race. A second obligation is that states assist their opponents by sharing with them the smart-bomb technology, thereby allowing them to be more discriminatory as well. Another obligation is that states have public debates on whether there should be international prohibitions on the development of certain forms of harmful technology such as directed energy weapons, which would kill many innocents indirectly by destroying the electronic systems on which urban life depends. Finally, computer technology now makes possible "private" wars

fought over the internet by individual hackers against perceived foreign enemies, and there is a new obligation not to engage in such freelancing.

De George's proposal that these new obligations be considered implicit in JWT may show another way in which the theory is now at odds with military necessity. For example, if it is a matter of military necessity to keep one's military technology secret from one's opponent, then the first of De George's obligations would run counter to this.<sup>5</sup>

## 6. DOES JUST WAR THEORY MEET THE CHALLENGES?

Is JWT adequate to address the recent changes in the use of military violence?<sup>6</sup> Murnion argues that it is. The theory can accommodate great social, political, and technological change because it is a heuristic construct rather than a theory in a strict sense. In contrast, Duquette and Hubbard see a problem for JWT. To what extent can and should the theory resist a move toward realism? The concerns of realism are implicated in the recent changes in the use of military violence because some of these changes are seen as a matter of military necessity. Realism is, at minimum, the view that what is militarily necessary is permissible. Duquette argues, in effect, that just war theory should hold fast, resisting the call that these new forms of violence be regarded as morally permissible. This position risks the adequacy of JWT because, to the extent that the theory prohibits what is thought to be militarily necessary, its counsel will be ignored by military decision-makers. This is one of the main concerns of Hubbard, who argues that the theory must accommodate itself more fully to realism. Walzer's appeal to supreme emergency is, in their view, an accommodation to realism, but it goes too far for Duquette and not far enough for Hubbard.

The challenges to JWT may show the theory to be inadequate and thus indicate the need for it to be either revised or abandoned. But the inadequacies are of two kinds and would have to be addressed in different ways, one by revision and one by abandonment. The first kind, calling for theory revision, is seen, for example, in the challenge posed by humanitarian intervention. This may require, as Martin and Stacy suggest, that the rules of *jus ad bellum* be revised to permit the violation of sovereignty in the case of a great humanitarian crisis, but such a revision in JWT is consistent with the basic principles of the theory, namely, a concern for human rights. So to change the rules in the required way does not lead to a radical alternation in the theory; it is a matter of consistent development rather than radical change. The second kind of inadequacy, posed, for example, by preventive intervention may, as Dais suggests,

require a radical change in the theory. This is because such intervention requires a violation of sovereignty that is not directly related to securing human rights. Changes in the theory in response to the second kind of inadequacy, because they seem at odds with its core moral values, bring the theory closer to realism. Here it is more appropriate to talk about an abandonment of the theory rather than a revision.

How would one argue for changing or abandoning the theory in this radical way? Consider that pacifism is sometimes criticized on the grounds that, since there will always be wars, it is better to adopt a moral theory, like JWT, that seeks to limit the violence of war, than to stick to a theory like pacifism that abandons the battlefield, so to speak, leaving military violence unrestrained. While the moral force of this criticism is unclear, because it may be pragmatic rather than moral, the same kind of criticism can be used against those, such as Duquette, who refuse to abandon just war theory in favor of a theory closer to realism. If there are going now to be preventive interventions, better to revise JWT to seek to bring them under limited control. The legal analogue of this criticism underlies the discussion of detention centers by Kipnis. Because the detention centers now exist, better to adopt the law in an effort to seek some kind of legal control over them than to treat them as outside the law and refuse to deal with them legally. But the claim that it is be morally appropriate to argue in this way for changes in an applied moral theory, such as JWT, is controversial.

Of course, in the face of the second kind of inadequacy, it is always open to defenders of JWT to argue against the assumptions about military necessity on which the arguments for the theory's inadequacy are based. This can be done conceptually or empirically. The conceptual approach is taken by Walzer, who argues that true military necessity, the necessity that can override the principle of discrimination, holds only in extremis, when the life of a community is at stake.<sup>7</sup> None of the new forms of military violence seem to rise to this standard.<sup>8</sup> The empirical approach is represented, for example, by Macleod, who suggests that nonmilitary responses to terrorism may be more effective, indeed, that military responses may be counterproductive.

We come in the end back to the idea that the change in circumstances chiefly driving the growth in the new forms of military violence is the decline in state sovereignty, the fact that states have less control over what happens to their citizens than used to be the case. This has been moving states toward accepting stronger forms of international governance, and a number of the chapters make reference to the ways in which developments in international law play or should play a role in controlling the



new forms of military violence. This does not necessarily affect JWT, at least as long as these developments allow states to do what JWT allows them to do anyway. But when international law begins to take out of state's hands decisions about the use of military violence, just war theory may face a challenge of a different sort. That this kind of growth in international law may be an appropriate moral development is suggested by Walzer and Rawls, who, as Martin notes, see the need for an international organization, rather than single states, to authorize humanitarian intervention. This might be appropriate as well, contra Dais, in the case of preventive intervention. More generally, Murnion cites Yoram Dinstein and David Rodin, who argue that the world should move toward a cosmopolitan regime of collective security and law enforcement.<sup>9</sup> This may be morally desirable, but it seems to be an abandonment of JWT, which has always assumed the preeminence of the sovereign state. When all is police enforcement, there is no need for war or its rules.

## NOTES

1. Michael Walzer, *Just and Unjust Wars*, 3rd edn (New York: Basic Books, 2000, 1977).
2. Unless an attack from the target state is imminent, in which case the initial strike is preemptive and not a case of intervention. The distinction between preemption and prevention is one of the controversial issues in this area.
3. Walzer, *Just and Unjust Wars*; John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).
4. This kind of consideration is much discussed these days, often under the label of *jus post bellum*.
5. De George does address this, suggesting that the obligation could be crafted so as not to give away one's military advantage, but it seems doubtful that this is possible. A similar moral problem arose during the cold war when, for example, President Reagan argued that "star wars" missile defense technology would be shared with the Soviet Union.
6. It is the prejudice of an age to see its own changes as more revolutionary, more challenging to the status quo, than those of its predecessors. This suggests a note of caution in any easy assumption that the changes of our era are sufficient to nullify the practical relevance of the theory, when it has maintained its relevance through the changes of previous eras.
7. Walzer, *Just and Unjust Wars*; see, for example, pp. 251–255.
8. One might argue that nonstate terrorism does, if, for example, we imagine terrorists planting nuclear bombs in several of America's largest cities.
9. See Murnion, notes 26 and 27, and accompanying text.