

**PEACEKEEPING
AND THE JUST WAR TRADITION**

Tony Pfaff

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FOREWORD

In the following monograph, Major Tony Pfaff, a former Assistant Professor of Philosophy at the United States Military Academy, addresses an important source of much of the confusion that currently surrounds many of the Operations Other Than War (OOTW) that the military finds itself participating in with increasing frequency. The author points out that, though the source of this confusion is primarily ethical, it has important operational implications as well. In the Just War Tradition, as well as the Law of War, there has always been a tension between winning and fighting well, and the peacekeeping environment does not change this. Commonly, the resolution of this tension is expressed in the maxim: always use the least amount of force *necessary* to achieve the military objective. This maxim applies, regardless of the environment one is in. The author's contention is, however, that the understanding of *necessary* is radically different in the peacekeeping environment than what it is in more conventional operations.

Others have intuitively grasped this point. At the International Military Ethics Symposium in Trondheim, Norway, for example, the Judge Advocate General for the Norwegian Army claimed that the police ethical doctrine is the most appropriate one for peacekeeping missions. He did not, however, explain why. By comparing and contrasting military and police ethics with the range of environments in which soldiers find themselves, the author tries to fill this void by first demonstrating that the Just War Tradition, as generally understood, cannot extend to peacekeeping operations. The author then discusses what must be done to solve this problem and, by so doing, resolve much of the confusion generated when soldiers look like policemen on the outside but have to think like soldiers on the inside. Thus, this monograph should be of great interest not only to

those in the field who are routinely confronted with the ambiguities of the peacekeeping environment, but also to those charged with forming the policies that those in the field must observe.

This monograph is being published in cooperation with the Center for the Professional Military Ethic to enhance discussion of military professionalism within the Army and sister services.

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BIOGRAPHICAL SKETCH OF THE AUTHOR

TONY PFAFF, a U.S. Army major, taught in the Department of English and Philosophy at West Point. He received a BA in Economics and Philosophy from Washington and Lee University and an MA in Philosophy from Stanford University, where he was also a graduate fellow at the Stanford Center for Conflict and Negotiation. An Infantry officer, he served in the 1/505 PIR, 82d Airborne Division from 1987 to 1991 with which he deployed to Persian Gulf. He also served in the First Armored Division from 1992 to 1995, holding several brigade and battalion level positions including Company Commander and Battalion S3. During that time he also deployed to Macedonia for Operation ABLE SENTRY. Major Pfaff has written on a variety of topics including military ethics, ethics of development, chaos theory, and conflict resolution.

PEACEKEEPING AND THE JUST WAR TRADITION

Introduction.

For most people, considerations about the use of deadly force are most commonly and readily thought of as whether and in what circumstances (if ever) it is permissible to deploy such means. However, in the case of soldiers, we presume that deadly force is a legitimate and often relied upon means to their chosen end. It is, in fact, part of our very conception of what soldiers are and what they do, that they rely on and face deadly force in order to realize their objectives. This much is uncontroversial and, in some sense, obvious. It may still not be clear, however, that, from the soldier's point of view, the issue of deadly force is not primarily a matter of how much force *should* be used. Rather, soldiers most commonly and readily think in terms of how much force *can* they use.

When soldiers consider how to accomplish their ends, they are legally, morally, and pragmatically obligated to consider how much force to use.¹ As a general rule of thumb, the more indirect and long-range direct fire soldiers can put on an objective is inversely proportional to the amount of resistance they will experience when they try to take the objective. The less the resistance, the less the cost in friendly soldiers' lives necessary to take the objective. Thus, the more force soldiers apply, the less risk they have to take in order to accomplish their missions. Viewed this way, what soldiers understand as the amount of force necessary is that which reduces risks to soldiers the most. Sometimes, however, the application of this force endangers civilian lives and property. Because of this, soldiers must also ask how much force *should* they apply.

In order to limit the misery caused by war, the law and morality of war attempt to answer the question of "how

much” by requiring soldiers to consider certain rules, principles, and consequences that may restrain the amount of force they may apply.² To determine how much force they should place on an objective, soldiers must temper their judgments not only with the pragmatic concern of how much is practical, but also with the moral and legal concern of protecting civilian lives and property. A commander may be able, with a high degree of accuracy, to place a single bomb in a specific building, but he cannot always be sure how many civilian lives will be lost if he does so. And though there is nothing in the law or morality of war that absolutely prohibits him from doing so, he is morally and legally required to take into account the due care he owes civilians when deciding how much and what kind of force he will use. Often, this means lowering the amount of force soldiers may want to apply in order to minimize risk. Thus there is a tension between the amount of due care commanders owe civilians and the amount of due risk they and their soldiers are expected to take in order to accomplish military missions.³

Given the logic of warfare, it is always in the commander’s interest to place as much force as is morally and legally permissible on any particular objective in order to preserve soldiers’ lives. This means when commanders and their soldiers determine what is necessary, they are always asking themselves how much force is allowable, not how little is possible. What is necessary when resolving the tension between due care and due risk is minimizing risk, not force. The most force allowable then becomes the necessary force since it is what is necessary to preserve soldiers’ lives without violating the law or morality of war.

Sometimes, however, and in some situations soldiers are morally obligated to consider the least force possible—given that this force is sufficient to accomplish the mission—when deciding how much force to apply. *If this last view is true, then it is the case that the law and morality of war do not extend well into certain kinds of missions.* What I wish to do

in this paper is show that this is in fact the case, and then offer some considerations for filling in this ethical gap.

To fully demonstrate this point, I will do several distinct but related things. First, I will demonstrate that the moral and legal considerations soldiers must take into account do, in fact, obligate them only to consider the maximum force permissible, rather than the minimum force possible. Next, I will offer an example of the application of military force that will meet the criteria of both the law and morality of war, but which will not conform to a broader understanding of morality. I will then employ a domestic analogy to show that this discrepancy is a result of a very important misconception about how the roles soldiers play alter their moral obligations. I trust this will demonstrate that when the traditional role of the soldier is conflated with the traditional role of the police officer, moral (as well as pragmatic) confusion results. Finally, I will offer ways to extend the Just War Tradition so that it resolves the confusion created by this conflation.

The Law and Morality of War.

The moral and legal distinctions of *jus in bello* are captured in the concepts of proportionality and discrimination. Proportionality, which is a legal as well as moral requirement, requires soldiers to do more good than harm. Discrimination requires that soldiers distinguish between legitimate and illegitimate targets AND only engage legitimate ones. While these considerations tend to limit the amount force soldiers will use, that is not always the case. In the Appendix, there is further discussion regarding the complex relationship between these three categories of obligation.

Soldiers, when establishing peace abroad, do have a legal obligation to take into account the damage that will be done to civilian life and property when they apply force. When the duly appointed representatives of a nation agree to ratify a treaty, the nation, including the individuals

subject to its laws, become subject to the provisions of that treaty.⁴ For this reason, soldiers belonging to nations that have signed international treaties regarding proper conduct in war are legally obligated to consider those provisions when applying force. The provision that most directly applies to the application of force is the one that deals with proportionality. According to the Law of War, soldiers are obligated to ensure

... loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.⁵

While this can require soldiers to limit force by the constraint of how much military advantage is to be gained, it does not require them to minimize it. Furthermore, proportionality does not preclude some actions that many would still find objectionable. For example, it would not preclude killing some civilians in order to achieve any military objective, as long as the harm done was proportional to the advantage gained. Take, for example, the situation at No Gun Ri, where American soldiers are accused of intentionally killing hundreds of civilians in the beginning moments of the Korean War. Some of the arguments advanced to justify their actions have been that killing the civilians was necessary to prevent the greater harm of allowing enemy agents and soldiers through friendly lines.⁶

Although the letter of the law may not prohibit all acts we would like to call immoral, the spirit of the law does, and that spirit is found in the Just War Tradition (JWT). JWT is that body of thought that represents the soldiers' struggle with the tension between winning and fighting well. Since it has a long and deep history, it is difficult to make general

comments regarding its content. To illustrate my point, however, I have chosen one of the more recent, and most restrictive versions of the ancient doctrine of double effect.

The doctrine of double effect is a Christian doctrine first formulated by St. Thomas Aquinas as a response to St. Augustine's moral prohibition against self-defense.⁷ This doctrine results from the recognition that there is a moral difference between the consequences of our actions that we intend and those we do not intend, but still foresee. Thus, according to this doctrine, it is permissible to perform a good act that has bad consequences, if certain other conditions hold. Those conditions are (1) the bad effect is unintended, (2) the bad effect is proportional to the desired military objective, (3) the bad effect is not a direct means to the good effect, and (4) actions are taken to minimize the foreseeable bad effects, even if it means accepting an increased risk to soldiers.⁸

Double effect could further restrain how much force is permissible, and would preclude the soldiers' actions at No Gun Ri. However, it does not require soldiers to understand necessity in terms of the least amount of force one can use and still accomplish the desired end.⁹ This can be a problem in certain kinds of military operations.

Applying the Law and Morality of War to Peacekeeping.

The law and morality of war only obligate soldiers to consider the most force permissible, rather than least possible, and it is this feature of the morality of war that causes problems when we want to extend it to the peacekeeping environment. To understand why, consider the following example:

On 21 January 1996, an AK-47 let loose near a US dismounted patrol in the Zone of Separation. As rounds ripped through the troop formation of D Company, 3d Battalion, 5th Cavalry, the soldiers realized that this fire was not celebratory and instinctively sought cover. Tumbling behind the protection of

their overwatching M2 Bradley Fighting Vehicle, the patrol chambered rounds and brought their weapons off safe.¹⁰

From this point, the soldiers had at least three possible courses of action that cover the spectrum from assuming no risk at the expense of civilian lives to accepting too much risk at the expense of accomplishing the mission:¹¹

(1) Use the Bradley 25 mm main gun and fire in the direction of the gunman. This would cause the most damage and most likely result in the death of gunman as well as some others (if there were any) in the building. This would pose the least amount of risk to the soldiers.

(2) Leave cover and, using squad fire and maneuver techniques, assault the gunman's position. As long as they only fired at the gunman, this course of action posed the greatest risk to the soldiers, but would likely result in the least amount of civilian casualties.

(3) Remain behind cover until a local authority of some sort took care of the gunman. In this course of action, they accept no risk but do no harm.

According to the legally binding consideration of proportionality, the soldiers would be permitted to pursue any of those courses of action. If the harm is simply the death of the gunman and the destruction of some property and the military gain is that peace is maintained, a belligerent is eliminated, and soldiers lives are protected, it would be hard to argue that the first course of action, though it is the most destructive, would not be permitted.

Furthermore, even if it was likely that there were some civilians in the building, it is not clear at all that the soldiers would not be permitted to risk injuring or killing them. Unless the building was clearly marked "Hospital" or was obviously occupied by a number of civilians, any civilians inside would not enjoy any protection from the Law of War. Given that several soldiers' lives could potentially be saved and given the added gain of eliminating the belligerent, the balance would tip in favor of permitting course of action 1.

The choice is further complicated by the fact that the mission (maintaining the peace) depended to a large degree on how the people regarded the peacekeeping force. They could not appear too reluctant to use force, but neither could they afford to apply force too strongly—that would alienate subgroups and make their job more difficult and dangerous. In fact, it was the failure to properly balance this tension that led to the failure of the United Nations (U.N.) mission in Bosnia, which precipitated NATO's involvement.¹²

However, as argued before, legal considerations are not the only things that the soldiers must consider. They must also take into account moral considerations, which in this case are more restrictive. In addition to the condition of proportionality already discussed, double effect also holds that the bad effect must be unintended. In this case, the soldiers may plausibly argue that they only wanted to eliminate the threat the gunman posed to them and to the peace. That others might be harmed would certainly be unintended, especially since the soldiers did not intend to be shot at.

Double effect also holds that the bad effect must not be a direct means to the good effect. In this case, even with course of action 1, the soldiers are not destroying the building to stop the gunman nor are they putting civilians at risk as a means to stop the gunman. Thus, this condition would also hold.

Finally, soldiers must act to minimize the foreseeable bad effects, even if it means accepting an increased risk to themselves. This is the most restrictive element of this doctrine and may make it hard to justify course of action one. But even this condition has limits. Soldiers are not required to take risks that may lead to them not being able to accomplish the mission at hand or make it likely they will not retain enough fighting capacity to continue to accomplish additional missions.¹³

One way to resolve the tension of due care and due risk is to adopt a course of action where one assumes no risk and

does no harm—course of action 3. Soldiers could always refuse to apply force when the possibility of civilian casualties exists and when any other course of action would place additional risk on the soldiers themselves. This would often be, however, at the expense of mission accomplishment. Thus such a refusal would be tantamount to refusing to accomplish a mission, and this is a course of action seldom available to the soldier.

It is important at this point to acknowledge the complexity of this particular situation. It is a legitimate question in the context of this scenario whether accepting no risk and doing no harm was, in fact, the best means to accomplish the mission. In this case it is not clear. Nonetheless, course of action three would only be a permissible option if it *were* the case that it was the best way to accomplish the mission. What *is* the case is that soldiers are not permitted to resolve the tension between getting the job and getting it done in a moral fashion simply by walking away. Soldiers have a *prima facie* obligation to accomplish properly assigned missions, and thus can only be obligated, as argued before, to consider the maximum permissible force, not the minimum possible force.

Thus in this situation, the maximum amount of force permissible would balance the additional risk inherent in course of action 2 with considerations of mission accomplishment. Again, the fog of war makes such judgments problematic. What the soldiers could not know was if there were other gunmen or what other weapons the gunman had. It was certainly conceivable that he could have been equipped with anti-tank weapons that could have damaged the Bradley. Also, it is not clear from the example how risky an assault from their current position was. If there were inadequate cover and concealment or if they would have had to remain exposed for long periods in order to get to the gunman, it is likely that this condition would also hold.

If any one of these considerations were true—and there would be no way for the soldiers at the time to know otherwise—then choosing course of action two over course of action one would no longer be morally obligatory. So again, the application of the Just War Tradition would not preclude choosing the most damaging and lethal of the possible courses of action. Thus, the law of war and the morality of war would permit the soldiers to eliminate the gunman, even if it meant killing civilians.

The Problem for the JWT: There's a Difference between War and Peace.

One might reasonably ask why we are applying the Just War Tradition to peacekeeping operations. If it is an ethic for war, it is not immediately obvious that it applies in such situations. But though named the Just War Tradition, the purpose of the morality of war and the laws derived from it can generally be considered a guide for soldiers' judgments regarding the application of force across national boundaries. Furthermore, much of the doctrine soldiers employ is formed with the tenets of JWT in mind. Thus, for many soldiers, it will be the natural starting point for considering any other ethical problem.

Thus, it is appropriate to extend JWT to any situation outside national borders in which soldiers are involved. It takes the form that it does because it is based on the presumption that such force is applied in the absence of peace and that since there is no higher authority to which belligerent parties can appeal, this force is necessary to create peace. However, increasingly during this decade the U.N. and the North Atlantic Treaty Organization (NATO) have applied force across national boundaries, not with the purpose of establishing the peace, but with the purpose of maintaining it. Thus, if we are to extend the Just War Tradition to such operations, it makes sense to consider what it means to apply force across national boundaries in order to maintain, rather than create peace.

For the Just War Tradition, the appropriate end of all wars is a “better state of peace.”¹⁴ Such a peace must be more secure than the peace before the war was fought. This means it must be the kind of peace in which parties in conflict can and *want* to resolve conflicts nonviolently.¹⁵ Thus while an absence of fighting is a necessary condition for peace, it is not a sufficient one. Parties in conflict must have available to them peaceful means to resolve conflicts of interest.

For peace operations, the endstate, then, is a “settlement,” which is defined as “a resolution by conciliation among the competing parties, rather than termination (of the conflict) by force.”¹⁶ Thus, the condition of “peace” may be understood as that set of conditions that permit nonviolent resolution of conflicts of interests among individuals and groups. This does not mean groups or individuals will always seek nonviolent means to resolve conflicts; but it does mean that those means are available, and that they are the preferred and normal means of resolving conflict.

To achieve this settlement, the military primarily conducts two kinds of operations: peace enforcement and peacekeeping. In peace enforcement operations, the sides have not agreed to a settlement and must be compelled to do so. In peacekeeping operations, the warring sides have agreed to a settlement, but require outside assistance to ensure compliance.¹⁷ If peace is understood in this way, peace enforcement operations resemble a conventional conflict, in which peace must be established. Peacekeeping resembles the domestic situation, in which individuals and groups have nonviolent means to resolve conflicts, though may not always agree to use them. Thus, even though the Just War Tradition can apply to peacekeeping operations, the operations themselves more resemble the domestic situation in which police operate. As will be demonstrated, this will have important implications for how soldiers *should* conduct themselves.

In the example above, the soldiers chose course of action 3, the one that involved the least risk to themselves, the least harm to others, and, which some later argued, the most risk to mission accomplishment.¹⁸ In fact, in the aftermath of the incident, the soldiers were both criticized and praised for the decision they made. Most of the debate revolved around determining the kind of operation they were engaged in.

Some argued that their purpose was to establish peace where there was none. By failing to send a clear and decisive signal to all the factions that NATO forces would impose peace, even at a cost to civilian lives if necessary, the soldiers had sent a clear signal that it was now “open season on [NATO implementation forces] IFOR.”¹⁹ Others argued that their purpose was to maintain the peace established by the Dayton Accords.²⁰ They further pointed out that killing everyone who posed a threat, no matter how minimal that threat might be, would only serve to polarize the factions against IFOR and make maintaining the peace even more difficult.²¹

Certainly, when settling the issue of “should,” soldiers must also consider a practical dimension. What the soldiers should do does depend on what will most likely facilitate mission accomplishment. A problem did arise for our soldiers, however, because there was no agreement on what the mission really was. It is interesting to note that pragmatically speaking, right or wrong depended on an accurate understanding of what purpose the soldiers in fact served. In addition to this practical conundrum, soldiers must also deal with its moral analog.

Resolving the Problem for JWT: An Argument by Analogy.

While such ambiguity does make it difficult for soldiers to make certain practical decisions, as argued before, these are not the *only* considerations soldiers must make. Further, just as judging the best course of action depends on

settling the issue of ends, it is also the case that as the ends change, so do to some degree the ethical requirements of the application of force.

If we look at this situation from the analogous position of the police officer, much of the moral ambiguity is clarified. Police maintain, rather than establish, peace. Thus, it does not make sense for police officers to breach the peace in order to maintain it. If a sniper were firing from a building that contained civilians, we would not likely claim that the police were morally permitted to use the maximum force allowable under the principles of proportionality or doctrine of double effect. Even if a sniper were likely to kill several people if he were allowed to remain in the building, it would still not be permissible to destroy the building if by doing so innocent people would be killed. Even in extreme cases, police would be obligated to try *every* possible course of action that precludes civilian casualties before they would be morally permitted to engage in a course of action that could potentially lead to civilian casualties. But, from the standpoint of the law and morality of war, this just is not the case.

This is not to say that police are prohibited from taking some risks that might place civilian lives in danger. For example, police are permitted to engage in high-speed pursuits even though such pursuits can and have resulted in accidents in which innocent bystanders have been killed. The difference is police are not permitted to engage in such pursuits, or any other activity in which they *know* civilians *will* be killed or seriously injured.²² But, as discussed above, there are many conditions under which such actions would be permissible for soldiers.

Of course, it remains to be shown that this analogy is, in fact, appropriate. Soldiers, after all, protect the nation from external threats, while police protect it from internal ones. Soldiers traditionally fight wars; police traditionally protect the peace. It would seem unfair then to claim that moral truths from one professional ethic should then inform the

other. Nonetheless, as soldiers find themselves more and more in situations where there is a peace, even though it may be a tenuous one, the military profession would do well to reconsider some of the principles upon which they base their legal and moral judgments.

Extending the JWT: When Soldiers Have to Act Like Police.

When it is the case that there is no peace and that it must be established, it only makes sense to think of applying as much force as is permissible given the law and morality of war. This facilitates the defeat of the enemy, and defeat of the enemy facilitates the reestablishment of peace—the appropriate end of all wars. However, in peacekeeping situations the peace exists. It may be tenuous, and as the above discussion indicates, not always recognized, but it exists nonetheless.

When peace exists, people who break the peace are more like criminals than soldiers in that they destroy the security the rest of the society enjoys as a result of this state of peace. However, because those who break the peace are more like criminals, they enjoy roughly the same kinds of rights and protections that criminals generally enjoy—namely, a presumption of innocence.

To underscore this point, as well as underscore the gap between how police and military consider the application of force, consider the following example that occurred during the riots in Los Angeles in 1992:

Police officers responded to a domestic dispute, accompanied by marines. They had just gone up to the door when two shotgun birdshot rounds were fired through the door, hitting the officers. One yelled “cover me!” to the marines, who then laid down a heavy base of fire . . . The police officer had not meant “shoot” when he yelled “cover me” to the marines. [He] meant . . . point your weapons and be prepared to respond if necessary. However, the marines responded instantly in the precise way they had been trained, where “cover me” means

provide me with cover using firepower. . . . over two hundred bullets [were] fired into that house.²³

The good news is that no one was hurt. What is interesting about this example is that, even in the face of mass rioting where peace and civil authority were tenuous and not always recognized, it was still inappropriate, from the police officers' point of view, for the Marines to respond the way they did. At one level, such a response was probably imprudent. At another, it was certainly immoral.²⁴ If the morally appropriate end of the use of force is to maintain the peace, it does not make sense, especially moral sense, to breach the peace in order to preserve it. Though there was a riot in progress, the civilians in question were not directly partaking in it. Though the peace was being disrupted elsewhere, it was not being abandoned everywhere. Thus, the Marines responded to a potential breach of the peace with an actual breach of the peace. This would make them morally culpable for any further breaches of the peace their actions engendered.²⁵

Furthermore, while rioting may represent a massive disruption of the peace, it is not the same as the destruction of the peace. This of course begs the question regarding what to do in the face of large angry mobs, who are obviously bent on disrupting, if not destroying, the peace. It also begs the question regarding the differences between a mob and an army. Given the way belligerents have conducted themselves in the Balkans, in Rwanda, as well as in other ethnic conflicts, it is not always easy to tell.

Nonetheless, it can never be the case that police could be morally permitted to resort to deadly force first, setting aside the presumed innocence of any suspect as well as the right of innocent civilians not to be killed or severely injured. For it to be moral for police to do this, it would have to be the case that, where conditions of peace do not exist or are tenuous at best, it would be appropriate for police officers to adopt the law and morality of war to guide their actions. This, however, is rarely the case. Soldiers, when

acting as soldiers, fight enemies; police, when acting as police, protect citizens. They may have to harm certain citizens in order to do so, but this can never be a first resort.²⁶

It is a different and probably dangerous thing for police to consider as “enemies” any members of the community whom they are sworn to protect. The political philosopher Carl Schmitt labeled the enemy distinction: “the utmost degree of intensity of . . . separation.”²⁷ Enemies represent the most intense threat there can be to the security of a community. The presence of an enemy represents the absence of peace. As such, the enemy becomes the class of persons it is permissible to kill, since failure to defeat or at least contain them would mean the loss of the community and the loss of peace. Since citizens, even ones suspected of committing a crime, enjoy a presumption of innocence, they do not represent the same threat that enemies do and thus do not belong to the class of persons it is permissible to kill. Only when a citizen presents him or herself as a threat to other citizens may police be permitted to use deadly force, and then only after they have tried other means to apprehend the citizen peacefully.²⁸

Of course, the police-peacekeeping analogy is not without weaknesses. Peacekeeping operations are different from those on the domestic front, even in situations where peace is tenuous and not universally recognized. In domestic situations, police and soldiers rarely, if ever, are permitted to view the citizens they protect as enemies. In peacekeeping, soldiers are sent to restore and then preserve peace by preventing groups, *who are not their enemies*, from breaching the peace. In spite of this, they are unlike police in that soldiers on peacekeeping missions are neither a part of the community they find themselves in nor are they going to be a part of it. Furthermore, while neither group involved in the conflict is an enemy to the peacekeepers, they are enemies (or at least were) of each other, thus there is a potential for peacekeepers to *become* enemies, which does not exist for police.

This last point is significant. In a guerrilla war, like Vietnam, it is hard to discern who the enemy is; but this is different from what troops face in places like Bosnia, where it is not even clear that there *is* an enemy. Logically, where this is hard to discern, the morally (as well as practically) appropriate course of action may also be hard to discern. While this will have important implications for the specific policies and rules of engagement for certain operations, it does not alter the principle of using the least amount of force possible when a state of peace exists. Thus, ultimately, the analogy holds.

What is not clear is that the analogy holds in the other direction. When police find themselves in situations where the peace must be established, can the ethic of war apply to them? While I am reluctant to grant it, the argument does imply that when individuals or groups identify themselves as an enemy, the police would be permitted to employ the doctrine of double effect when dealing with them. This would mean they would be permitted to use the most force allowable under that doctrine, even if it meant killing or seriously injuring innocent civilians.

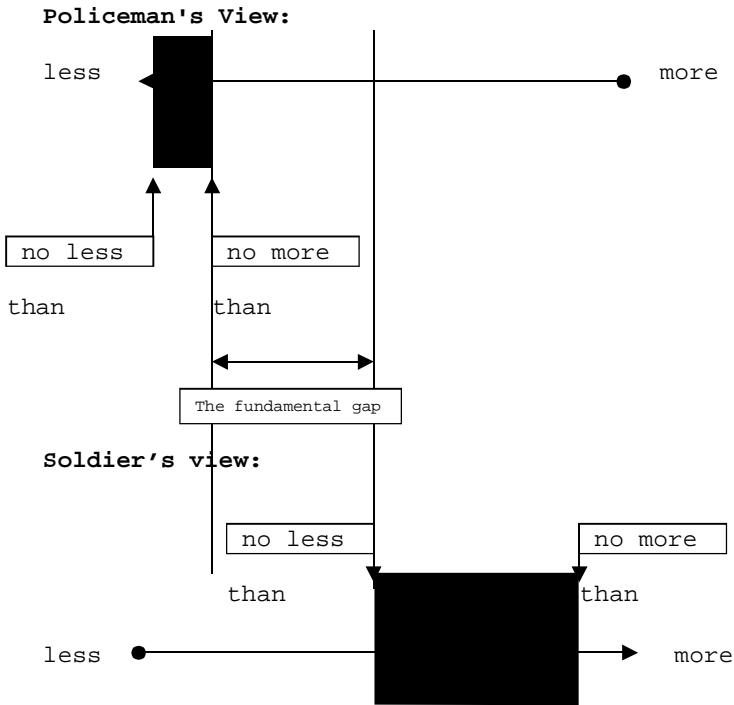
Though the argument does seem to imply this, it also implies that such situations will be rare. Recall that to be an enemy, an individual or group must represent the existential negation of the community and their success must represent the absence of peace. I would argue that even terrorist groups do not usually, if ever, represent this level and kind of threat. However, as the threat they represent increases, selective suspension of this prohibition becomes permissible. For example, police may not be required to attempt to capture a terrorist if by doing so they will not likely be able to stop him from detonating an explosive in a crowded area (for example, the bombing of the Olympics in Atlanta). I would argue, however, that they would not be morally permitted to risk harming an innocent civilian to do so unless the threat is an unusually great one.

Having said this, it is certainly the case that there is room for judgment in both police and military applications of force. It may seem as though police are merely lowering the maximum amount of force permissible, rather than applying the minimum possible, so that they may afford protection to a larger group of people than soldiers must. However, this is not the case. There is a fundamental gap between the ranges of force permitted to soldiers acting as soldiers and police acting as police. (See Figure 1.)

The gap exists because for soldiers the application of force is oriented toward the upper limit allowable. This makes sense since soldiers, when fighting enemies, are preventing the existential negation of the community. Soldiers, when acting as soldiers, are permitted to kill as a first resort and are permitted to engage in courses of actions that will result in the certain death of civilians (as long as the provisions of the doctrine of double effect hold) because if they do not, the security the community enjoys may be lost. As we have seen, the problem arises when soldiers import an ethic designed to deal with enemies into an environment where there are none.

For police the application of force is oriented toward the least amount possible. When police apply force against a suspected perpetrator they are not permitted to use deadly force as a first resort and never if it is the case that the perpetrator is not likely to harm anyone (even if he or she is likely to evade capture otherwise). Furthermore, as stated before, police are never permitted to engage in any action that, if by doing so, will very likely result in the death or serious injury of a civilian.

Returning to our earlier example, the rules of engagement for the peacekeeping mission in Bosnia included the provision, "to 'use only the minimum force necessary to defend yourself.'" These rules also included additional provisions that restricted soldiers' authority to return deadly fire.



Police are obligated to apply force with a view to using the least amount possible and still accomplish the desired end (e.g. preventing a violent criminal from escaping), never exceeding so much force that an innocent person will be seriously harmed. When deliberating on how much force to use, police are obligated to first consider using the amount of force represented by the "no less than" arrow and are prohibited from using more force than is represented by the "no more than" arrow.

Soldiers are obligated to apply force with a view to using no more than the most amount permissible (given other legal and moral considerations), even if an innocent person is likely to be seriously harmed. In this figure, the "no more than" arrow represents the most amount of force that complies with legal and moral restrictions, but poses the least risk to soldiers. They are, of course not obligated to use this maximum force, as they are free to take more risk than may be morally required. However, they are not obligated to engage in a course of action where they apply so little force that they fail the mission or render themselves incapable of conducting future operations.

Figure 1.

You may open fire against an individual who fires or aims his weapon at you, friendly forces, or persons with designated special status under your protection.²⁹

While this certainly reduced the amount of force permissible, it did not require the minimum amount of force necessary. Thus, such rules of engagement would permit the soldiers of D Company, 3-5 CAV firing on the sniper even if civilians would likely be harmed because it did not require them to rethink the concept of necessity. The Just War Tradition only requires soldiers to understand “minimum necessary force” to mean the most amount of force allowable (in order to minimize risk) without violating the doctrine of double effect.

Furthermore, rules of engagement do not supersede laws of war, but only clarify them.³⁰ Thus, if someone violated a rule, they may be guilty of violating an order, but they are not guilty of a war crime, or of transgressing the morality of war. Furthermore, such rules do not require soldiers to change the way they think about the application of force. They may encourage soldiers to reduce the amount of force they apply, but they do not require soldiers to minimize it. There is nothing in these rules of engagement that make it immoral for soldiers, when opening fire on individuals who fire or aim their weapons at them or at others, to engage in a course of action that would cause harm to innocent civilians.

Therefore, rules of engagement (ROEs) are not sufficient. In order to extend the law of war and by extension the morality of war on which it is founded to peacekeeping operations, we must understand that in certain military operations where the goal is to maintain peace, applying the least amount of force possible is morally obligatory.

So, where conditions of peace exist, soldiers, like police, must consider what is the least amount of force possible, rather than what is the most amount of force permissible. If there is a peace, even a tenuous one, it makes no sense to preserve it by engaging in courses of action that breach it.

Where there is peace, there may be criminals who breach it, but they do not, by themselves, destroy it. It is true that police may harm criminals who will likely harm others, but it generally makes no sense to harm those others in order to prevent the criminal from doing so. To minimize the potential for harm to those others, those with the authority to use force must use the least amount possible, rather than the most amount permissible.

It is true that in many cases it is difficult for commanders and soldiers to know if they are in a peace maintaining or peace establishing operation. The discussion regarding the actions of 3-5 CAV was not merely academic. Though labeled a peace maintaining operation, there were times and places during the initial phases of Operation JOINT ENDEAVOR where it had all the characteristics of a peace establishing operation. It is also interesting to note that operations in Somalia fell under the doctrinal distinction of "peacetime" which the Army defines as those operations that are routine actions between nations.³¹ This clearly would fall under the category of peace maintaining, though to those involved there were significant parts of the operation that were clearly peace establishing.³²

It is true that such practical, as well as epistemic, difficulties make it very difficult to apply the moral distinction this monograph recommends. However, this does not invalidate such a distinction, nor does it render it useless. Political leaders and senior commanders may label military operations in certain ways because of political concerns or limitations in the doctrinal vocabulary. But political and doctrinal distinctions do not necessarily map onto moral ones. As the nature of an operation changes on the ground, commanders and their soldiers must see their moral obligations more clearly by understanding how the condition of the state of peace in the area under their control should affect their moral decisionmaking.

Policy Implications.

Several policy implications follow from the above arguments.

1. Just War Theorists, as well as those who rely on the Just War Tradition to form policy and law, must work to extend it to peacekeeping operations. It is not enough simply to declare the mission as peacekeeping and then conclude the police ethic applies. As suggested earlier, there is only a limited analogy between the police officer maintaining the peace at home and the soldier maintaining the peace abroad. For instance, for police officers the status of peace in their communities is relatively stable; thus, they do not need to be prepared to transition rapidly from one state of peace to another.

Such stability is not present for soldiers maintaining the peace abroad. If this were so, their presence would not be needed. Because of the potential for rapidly changing situations and, consequently, rapidly changing moral frameworks, it may not always be appropriate to adopt the police ethic, even when the warring parties have reached a settlement. For any particular situation, the answer will lie in resolving the tension that exists between the police ethic, which is designed to preserve peace, and the Just War ethic, which is designed to establish it.

2. In peacekeeping operations, the language of operations orders and rules of engagement must be changed to better reflect the ethical demands of the environment. Rather than requiring soldiers to apply the minimum force necessary, they should, instead, require soldiers to only use that force which is the minimum amount possible to accomplish the mission.

3. Training for peacekeeping operations must be changed to reflect the requirements of the police ethic. As things stand now, even for peacekeeping operations, soldiers still, for the most part, train to apply the maximum force permissible. Though ROEs typically restrict what is

permitted compared to combat operations, they still permit, as argued earlier, courses of action which are not morally permissible.

4. If it is the case that training a force to handle both situations renders the force ineffective at both, then the argument for establishing a separate peacekeeping force within the military becomes more compelling. It should be noted, however, that we would still not want to create a force that would *only* be capable of routine policing. Even in peacekeeping operations, the peace is often unstable; such a force would have to be prepared to handle rapid shifts between peacekeeping and peace enforcement. Thus, it would have to be more robust and more flexible than a conventional police unit.

5. The argument also suggests that the current debate over nonlethal weapons should be resolved in favor of developing and deploying such weapons. While some are concerned that such weapons will “inadvertently bridge the gap between peace and war” and thus lead us down the “slippery slope” to war,³³ they do give soldiers a wider range of options in applying the minimum force possible. This ultimately makes it easier for soldiers respond appropriately to breaches of the peace.

6. This argument also suggests senior leaders should reconsider whether certain weapons and ammunition currently not permitted for soldiers’ use, such as CS gas and “dum dum” bullets, should, in fact, be permitted. Though these can have undesirable effects, they, too, give the soldier a wider range of options for applying the least amount of force possible.³⁴

Conclusion.

Many questions and issues remain. As has been demonstrated, the epistemic issue of how a commander can know if a state of peace exists has not been settled. While it is entirely possible to settle this issue at the political level,

until it is done it will be difficult for military officers to know if an operation is peace enforcing or peacekeeping. When this distinction is uncertain, it will be difficult for soldiers to discern their moral obligations regarding civilians and their property. But what has been suggested is that answering this question will have moral as well as political significance.

In addition, as the police-Marine incident suggests, the actions that soldiers are trained to take in warfighting missions may be inappropriate in peacekeeping missions. They have to do the right thing very quickly, without much time for moral-philosophical reflection. This means that training for war and operations other than war may be more difficult than anticipated.

What has been suggested is that as an area of operations transitions from a state of nature to a state of peace, what it means morally to apply force also changes. This means when such a distinction can be made, soldiers are afforded a powerful and practical conceptual tool for resolving the inherent conflict between the due care they owe civilians and the due risk they are obligated to take to achieve their objectives. By understanding the limits on necessity as applying the least amount of force possible rather than the most permissible under the principal of proportionality and the doctrine of double effect, soldiers avoid the contradictory and self-defeating practice of destroying the peace in order to preserve it.

ENDNOTES

1. The use of the word "force" throughout this monograph is synonymous with "deadly force." For the sake of simplicity, I am not considering uses of force that do not have the potential to kill or seriously injure someone.

2. The way moral and legal considerations shape the use of force is quite complex. While moral and legal considerations do limit the misery caused by war, this does not always (though it does usually) entail

limiting the amount of force a soldier should apply. For a more detailed discussion, see Appendix.

3. James M. Dubik, "Human Rights, Command Responsibility, and Walzer's Just War Theory," *Philosophy and Public Affairs*, Vol. 11, No. 4, 1982, p. 355.

4. *Documents on the Laws of War*, Adam Roberts and Richard Guelff, eds., Oxford: Clarendon Press, 1989, p. 11.

5. "The Law of Land Warfare," *Department of the Army Field Manual 27-10*, U.S. Government Printing Office, 1956, Change No. 1, July 15, 1976, para 41, p. 5.

6. James Webb, "The Bridge at No Gun Ri," *Wall Street Journal*, October 6, 1999, Letters to the Editor.

7. Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, 2nd ed., Trenton, NJ: Prentice Hall, 1999, p. 52. Augustine held that self-defense was inherently selfish, and that acts motivated by selfishness were not morally justifiable since selfishness is not morally justifiable.

8. *Ibid.*, p. 93.

9. Sometimes, of course, it is the case that the amount of force a soldier can practically apply is not as great as the amount of force he can legally and morally apply. Thus we must resist the temptation of seeing the legal and moral considerations as *always* constraining. Sometimes, in fact, they can have the opposite effect. For a detailed discussion of the complex interaction of practical, legal, and moral considerations, see the Appendix.

10. David Fastabend, "The Categorization of Conflict," *Parameters*, Summer 1997, p. 75. [Http://carlisle-www.army.mil/usawc/Parameters/97summer/fastaben.htm](http://carlisle-www.army.mil/usawc/Parameters/97summer/fastaben.htm)

11. There may have been other options. However, whatever other options there may have been, they would have fallen along the same spectrum created by the tension between due care and due risk.

12. Richard Holbrooke, *To End a War*, New York: The Modern Library, 1999, pp. 69, 72.

13. Michael Walzer, *Just and Unjust Wars*, New York: Basic Books, 1992, p. 157.

14. Walzer, p. 121.

15. *Ibid.*

16. "Peace Operations," *U.S. Army Field Manual FM 100-23*, Washington, DC: Department of the Army, December 1994, pp. v-vi.

17. *Ibid.*, pp. 111-112.

18. Fastabend, p. 75.

19. *Ibid.*, p. 77.

20. *Ibid.*

21. Richard Holbrooke's analysis suggests the latter interpretation is the more appropriate and that NATO troops were there to maintain, rather than impose, peace. Holbrooke points out that

in any case, we would not employ American or other NATO troops absent ironclad guarantees from all three parties concerning their safety, access, and authority...*There is no peace without American involvement, but . . . there is no American involvement without peace.*"(Emphasis in original)

To End a War, p. 218.

22. John Kleinig, *The Ethics of Policing*, Cambridge: Cambridge University Press, 1996, pp. 118-122.

23. James D. Delk, *Fires & Furies: The L.A. Riots*, Palm Springs: ETC Publications, 1995. Quoted in Christopher M. Schnaubelt "Lessons in Command and Control from the Los Angeles Riots," *Parameters*, Summer, 1997, p. 1.

24. I wish to emphasize that the judgment of immorality is against the act, and not the Marines in question. They were acting in good faith in accordance with their training and their understanding of the situation. Since what I am arguing is not generally accepted at this point, it would be unreasonable to hold any particular individual responsible for not acting in accordance with it.

25. Kleinig, in *The Ethics of Policing*, p. 98, points out that,

the use of force represents a nonrational and nonloving response to a situation involving conflict between rational

beings, it does nothing to defuse, but only serves to perpetuate, and may even magnify the violence.

This suggests that resorting to violence to preserve the peace will only serve to escalate the violence until one side has run out of the capacity to continue acting violently. Peace may eventually be restored, but only at a cost. This underscores why police should never resort to deadly force before they have attempted all other possible courses of action. It also suggests they are partially responsible for any further violence if they do.

26. Kleinig, pp. 116-117.

27. Carl Schmitt, *The Concept of the Political*, George Schwab, trans., Chicago: The University of Chicago Press, 1996, p. 26.

28. Kleinig, p. 116.

29. Fastabend, p. 77.

30. According to Dr. Gary Solis of the U.S. Military Academy Law Department, there is no official Department of the Army position on this matter. This claim that the ROE clarify, but do not supersede, the law of war follows from the fact that since ROEs are *not* laws, they must fall before the *law* of war. Since they are not laws, they are considered regulations, orders, instructions, goals, or mandates. If someone violates an ROE, he or she is not tried for violation of the ROE, but for the underlying offense, e.g., aggravated assault, rape, violation of the underlying military order. For a more complete discussion of the status of ROEs, see Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, New Brunswick: Transaction Publishers, 1999, p. 100.

31. "Operations," *U.S. Army Field Manual 100-5*, Washington, DC: Department of the Army, U.S. Government Printing Office, p. 2-1.

32. Lieutenant Colonel Stephen Parshley, U.S. Military Academy, interview by author, October 28, 1999.

33. F.M. Lorenz,, "Non-Lethal Force: The Slippery Slope to War?" *Parameters*, Autumn 1996, p. 52.

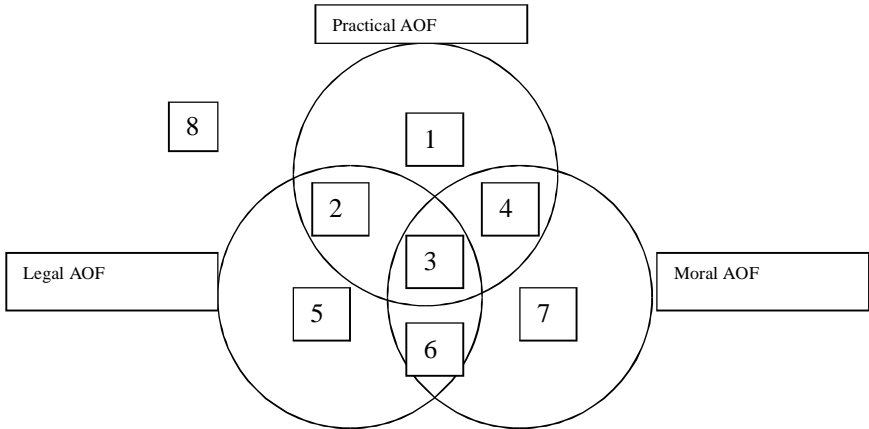
35. While the Law of Land Warfare does not expressly prohibit CS gas, it does prohibit its first use in many situations. For this reason, military units seldom deploy with CS gas because it requires presidential approval to employ ("The Law of Land Warfare," *U.S.*

Department of the Army Field Manual 27-10 July 1956, pp. 1-4). "Dum dum" bullets are made of soft lead, and thus they expand when they enter the body. Because of this, they are prohibited because they do more damage to the individual than is necessary to accomplish conventional military missions. A problem arises in that the smaller, harder bullets are likely to pass through the individual and thus, in crowd situations, are more likely to strike others. This makes their use by soldiers trying to defend themselves against angry mobs more indiscriminate than it otherwise might be.

APPENDIX¹

THE LAW AND MORALITY OF WAR

The purpose of the law and morality of war is to prevent war and when that fails, limit the misery caused by war. Because of this function, the law and morality of war are often conceived as restraining the amount of force that soldiers can practically apply in any given situation. While this is certainly the most natural way to understand these concepts, it is not always the most accurate. The relationship among the practical, legal, and moral applications of force is much more complex than that. It is possible, for example, to have an application of force that is moral and practical, but not legal. It is also possible for the most amount force legally and morally permissible to also be impractical. Figure 2 illustrates the various categories of



*AOF= Application of Force

Figure 2.

the application of force generated by the complex interaction of practical, legal, and moral concerns.

In this diagram, the lower left-hand circle represents, for any given situation, the most amount of force a soldier may legally apply. The lower right hand circle represents the most amount of force a soldier may morally apply and the upper circle represents the most amount of force a soldier may practically apply.² In this way, the diagram sums up the various judgments we can make regarding the application of force.

Region One. *Some practical applications of force are neither legal nor moral.* This region represents the amount of force that a soldier can practically employ, but should not because of legal and moral considerations. The events of My Lai serve as an obvious and extreme example. However, many would argue that strategic bombing of civilian targets that have no military significance whatsoever also falls into this category.

Region Two. *Some practical applications of force are legal, but not moral.* This region represents the amount of force that is both practical and legally permissible, but not morally. In this monograph, COA 1 for the 3-5 CAV soldiers, as well as the actions of the marines during the Los Angeles riots, fell into this category. Another good illustration of this would be Sherman's drive to Atlanta. At the time, there was no law prohibiting the intentional and wanton destruction of civilian property and lives, but strong arguments can be made that these actions *were* immoral.³

Region Three. *Some practical applications of force are both legal and moral.* This region represents that amount of force that is practically, as well as legally and morally, permissible. This is where soldiers, sailors, airmen, and marines should endeavor to be at all times. Fortunately, as the monograph suggests, there are also numerous examples in this category. The course of action (COA) the soldiers of 3-5 CAV chose (COA 3) falls into this category. The issue for military leaders is to ensure that this is not accidental, but

is rather the result of intelligent, reflective leadership that ensures that soldiers, sailors, airmen, and marines understand the law and morality of war and can apply it.

Region Four. *Some practical applications of force are moral, but not legal.* This region represents the amount of force that is practically and morally permissible, but legally prohibited. Walzer describes such situations in his discussions of supreme emergency in Chapter 16 of *Just and Unjust Wars*. Under the doctrine of supreme emergency, it is sometimes morally permissible to set aside the laws of war when the threat of defeat is imminent and the defeat itself represents slavery, genocide, or some other catastrophe of similar magnitude, for the defeated. Thus it was morally permissible under this doctrine for the British to bomb civilian targets during World War II before 1942 when they were the only nation resisting the Nazis. This is because a Nazi victory would, in fact, result in slavery and genocide for millions. But it would not have been permissible for the Argentinians to have strategically bombed civilian targets in London or the Falklands during the war in the Falkland Islands since their defeat did not represent slavery, genocide, or some other like consequence.

Region Five. *Some applications of force are legal but are neither practical nor moral.* This region represents a condition where the law of war does not prohibit a COA, but it is the case that it is not practical for the belligerent party in question to carry it out. Certain uses of tactical nuclear weapons would fall into this category. Such weapons are not outlawed, but given the likelihood that their use could lead to a nuclear holocaust, their use is not practical. Furthermore, since a nuclear holocaust is immoral, any action directly leading to it would also be immoral.⁴

Region Six. *Some applications of force are legal and moral, but not practical.* If we accept the doctrine of invincible ignorance⁵ and agree that soldiers are not morally responsible for the wars they fight, then this would describe many situations the German Army found itself in

after Stalingrad and D-Day. There were many instances where they would have been morally and legally permitted to use more force than they could at the time. From a moral perspective, this category is problematic since according to Kant *ought* implies *can*. But recall that practical considerations take into account many factors, not just what *can* be done. For example, it may not have been practical for Hitler to order the German Army to hold Stalingrad at all costs or to launch the offensive in the Ardennes in 1944, but it is obvious it could have been done. The interesting thing about these cases is that they represent instances where practical considerations, not legal and moral ones, limit the amount of force soldiers should apply.

Region Seven. *Some applications of force are moral, but neither legal nor practical.* This region represents the amount of force that would be permitted by the doctrine of supreme emergency, but which would not be available. Had the British not been able to bomb German civilians prior to 1942, England would have found herself in this unfortunate position.

Region Eight. *Some applications of force are neither practical, legal, nor moral.* On the surface this category would hardly seem worth mentioning since it seems to represent a null set. However, rather than being empty, this category can be, and has been, filled with many weapons development projects. The development of biological weapons is one example that comes to mind. Such weapons are neither moral nor legal, and, given the adverse effects they can have on friendly forces and civilian populations as well enemy ones, they are also not practical. This is the category that those who are charged with developing the weapons systems of the future should avoid.

While this has been meant to be a fairly comprehensive list of the different categories of the application of force, it is by no means a complete discussion. Much more can be said about the examples used to illustrate each category as well

as the categories themselves. Nonetheless, this discussion illustrates *how* these categories can be applied to aid the decisionmaking process military people must go through when deciding, in any given situation, how much force they *should* use.

ENDNOTES - APPENDIX

1. I am most grateful to Lieutenant Colonel Timothy Challans and Major Benton Danner of the Department of English, U.S. Military Academy, for their assistance in developing this appendix.

2. Practical judgments regarding the application of force are themselves complex. Soldiers must consider not only the effects of the available weapons on the enemy soldiers and civilians, but also on friendly soldiers and civilians. Additionally, when making practical judgments, soldiers must consider logistic as well as myriad other prudential factors.

3. For a more detailed discussion, see Walzer, pp. 32-33.

4. See Christopher, pp. 224-234.

5. This is the doctrine that holds that soldiers of any side are not guilty of the crime of war, but can only be held morally and legally responsible for their actions in war. See Walzer, chapters 3 and 8, for a more detailed discussion.

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