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AIR WAR COLLEGE

Research Report

BEYOND JUST WAR DOCTRINE.....A DOCTRINE OF FAIRNESS

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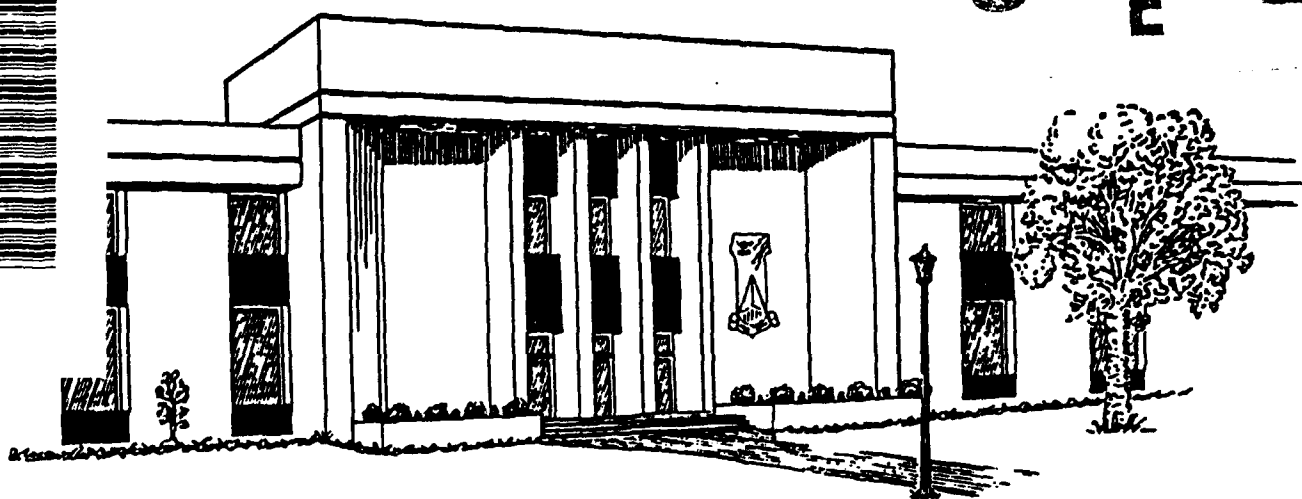
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AIR WAR COLLEGE

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BEYOND JUST WAR DOCTRINE.....A DOCTRINE OF FAIRNESS

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A RESEARCH REPORT SUBMITTED TO THE FACULTY

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Introduction

Well, then, we Athenians will use no fine words; we will not go out of our way to prove at length that we have a right to rule, because we overthrew the Persians; or that we attack you now because we are suffering any injury at your hands. We should not convince you if we did; nor must you expect to convince us by arguing that, although a colony of the Lacedaemonians, you have taken no part in their expeditions, or that you have never done us any wrong. But you and we should say what we really think, and aim only at what is possible, for we both alike know that into the discussion of human affairs the question of justice only enters where the pressure of necessity is equal, that the powerful exact what they can, and the weak grant what they must (1:360-361).

This excerpt from the "The Melian Dialogue" of Thucydides' The Peloponnesian War reflect more than the realpolitik of 416 B.C.

Throughout history, nations have grappled with the problem of resorting to armed conflict with smaller and weaker adversaries. Since the end of World War II, this nation has been involved in three major--and a number of lesser--armed conflicts. In all likelihood, future conflicts will be low intensity, limited wars.

In the afterglow of Operation Desert Storm, it would be easy to become complacent about the ease with which the United States can successfully engage and defeat a small or regional power. However, it is not likely that our future adversaries will be as villainous as Saddam Hussein, that domestic and international support will be so great, or that the operation will be conducted so smoothly and successfully.

There might never be another conflict like the Persian Gulf War again. This reality places increased importance on the need to

insure that the use of armed force is necessary and justified and that this fact is effectively communicated to those who must execute the President's order, the public at large and the international community. Consideration of these issues raises a number of perplexing problems for both political and military leaders.

- * How does the national political leadership determine that sufficient cause exists to justify the use of the military instrument?

- * What are the legal, moral and political criteria for such a decision? What are their relative weights?

- * How can this process be effectively communicated to the members of the armed forces, the nation and the international community?

Heretofore, our leaders have "answered" these questions by claiming the moral high ground. In each conflict, we have asserted--either directly or by implication--our recourse to warfare under the Just War doctrine. Not only have we made such claims, our adversaries--even Saddam Hussein--have done so as well.

The purpose of this paper is to study the validity and appropriateness of Just War doctrine as the determinate of the right to resort to armed conflict in the contemporary environment. This study will be conducted through the use of the October, 1983 invasion of Grenada, "Operation Urgent Fury", as a case study against which to evaluate our nation's adherence to Just War principles.

This study advocates a new, more comprehensive doctrine which combines elements of Just War doctrine and the moral standards of the

tion. Such a doctrine is needed for several reasons. First, this nation attempts to conduct its foreign affairs fairly and in conformance with international laws and norms. Our leaders, reflecting our national character, assert that we pursue armed conflicts in conformance with Just War doctrine. As we shall see, this assertion is open to debate.

Secondly, Just War doctrine is a deceptively complex concept. It is understood by a relatively small body of academicians, practitioners, realists, and pacifists. Thirdly, our vital national interests sometimes justify the use of armed force under conditions that do not conform to Just War doctrine criteria. A doctrine which explains and provides rationale for such situations is required.

In an era when low intensity conflict with lesser powers is likely, it is important that our doctrine be clearly understood by citizen, friend and foe alike. These concerns support a contemporary re-evaluation of force doctrine. The "fairness doctrine" is advocated as an approach to meet this need. Full conceptual development and support of a new doctrine is beyond the scope of this study. It is hoped that this paper will generate consideration, study and debate of the need for a new approach to the justification of armed conflict which the nation can understand and support.

SECTION 1

BACKGROUND, CONCEPTS AND DEFINITIONS

This section provides the background information needed to appreciate the complexity of the situation that President Reagan faced in deciding to order the invasion of Grenada. Just War doctrine is discussed in general terms. The specifics of its component parts are discussed later.

. Just War Doctrine

Just War doctrine is a set of principles which performs two functions. First, it prescribes the moral and legal conditions which permit nations the recourse to armed conflict (2:14). Under this component, called "Jus Ad Bellum", the presumption is always against the use of armed force (2:16). A second component, Jus In Bello, prescribes Just War doctrine for the conduct of warfare (2:13). Jus In Bello serves to limit warfare's destructiveness. Just War doctrine has three purposes: to "condemn war as evil, to limit the evils it entails, and to humanize its conduct as far as possible" (17:103).

The interest in and development of Just War doctrine finds its origin in the interpretations of Christ's teachings. Some early Christians believed that Christ sanctioned pacifism. They draw this conclusion from His disarming of Peter in the Garden of Gethsemane, the fact that He did not engage in violence for any reason and the emphasis on peace that characterized His teachings and ministry (3:1). The development of classical theory began with St Ambrose's and St

gustine's efforts to justify Christians' participation in the Roman
rs (3:1).

St Thomas Aquinas and other Scholastic thinkers further
veloped the concept during the Middle Ages (2:4). Refinements
ntinued during the Reformation period, led by Protestant moralists and
cular writers (2:43). Their efforts, however, were not taken
riously. It was not until the twentieth century that the horrors of
tal war again focused attention on Just War doctrine. This effort has
en led by the Catholic Church, primarily through papal encyclicals and
onouncements such as the documents developed during Vatican II (2:4).

In classic Just War doctrine, the emphasis was on justice.
he just war was a war of execution, an act of vindictive justice,
ken to punish an offending state for a wrong done and unamended"
:9).

"Just-war doctrine today consists of traditional Scholastic
st-war theory enriched by the contemporary social teachings of the
tholic church on war and the scholarship of Protestant and secular
ralists and philosophers" (2:4). In spite of the close tie to the
urch in general and the Catholic Church in particular, these teachings
ve become "secularized" and, as such, rise or fall on their own
rit (17:105). "The intent of a justifiable war was to vindicate
stice and restore peace" (17:105).

As the doctrine has evolved, Just War no longer sanctions the
e of armed force to redress rights that have been violated.
ntemporary Catholic and Protestant thought, moralists, philosophers

international law hold that "to the extent that armed force is permitted to states, it does so only to protect the state's self--its territorial integrity and political independence--against attack" (7-8). The right of the state to "protect its self" encompasses the right to collective defense, i.e., the right of third parties (nations and collective security organizations such as NATO) to come to the assistance of nations acting in legitimate self-defense (5:8).

Just War is not purely a western phenomenon. Parallel concepts exist in most other cultures. The communist concept of Just War, as one would expect, has significant differences from the western concept.

While communist theory has, so far as I know, no definition of "unjust conduct", it does have (as any justification of war must have) its own understanding of "just cause". In Marxist-Leninist doctrine any class struggle leading to war makes the war just. In the Soviet view, "a just war is a non-predatory, liberating war". Today, this means not only defensive wars and revolutionary wars, but also "wars of national liberation" (4:189).

Just War Doctrine and International Law

The distinction between international law and Just War doctrine could be made at the outset. Whether there is such a thing as "international law" is, itself, debatable (10:18). The basis of this argument is the tenuous foundation upon which international law is built.

There are two sources of international law: treaty law and customary law (10:11). The efficacy of treaty law is unassailable; nations have entered into formal agreements to which they are duty bound.

:12). Customary law, on the other hand, reflect the past practices which are acceptable and expected to be continued (10:12).

There is likewise no single Just War doctrine. Just War doctrine is a combination of many different theories and arguments (14:141). International (treaty) law refers to a nation's legal obligations. Just War refers to a set of moral standards to which nations should adhere. Although the two sometimes overlap, they are often very different.

. Grenada - Historical Perspective

Grenada is located in the Caribbean Sea about 92 miles north of Venezuela. The island, approximately twice the size of the District of Columbia, has a population of about 100,000 (7:1). The vast majority of the population is of African descent. The predominant language is English (7:1-3). In October, 1983, approximately 1000 American citizens were killed in Grenada. About 750 were medical students (6:12).

A former British colony, Grenada gained independence in 1974. The nation adopted a parliamentary form of government and Sir Eric Williams was elected as the first prime minister (6:3).

In March, 1979, with Williams out of the country to discuss unidentified flying objects (UFO's) at the United Nations, the New JEWEL Movement took power in a "near bloodless" coup (7:6). Maurice Bishop was appointed prime minister. The New JEWEL Movement promised elections

and the observance of human rights; neither promise was kept (6:3). The Bishop government established close relations with the Soviet Union and Cuba, and the eastern block nations.

The Bishop government's inclination toward Marxist-Leninist doctrine was reflected in the role that Fidel Castro played in shaping the nation's political, economic, social and military institutions. Castro served as Maurice Bishop's mentor. The government of Grenada advocated a "revolutionary democracy" built on the Cuban model (6:3).

In 1980, only two Latin American nations, Grenada and Cuba, voted against the United Nations (UN) resolution condemning the Soviet invasion of Afghanistan (6:3). A point frequently emphasized by President Reagan, Grenada sought Cuba's help to build an international airport for the stated purpose of handling tourist air traffic. The airport's suitability for military aircraft was a continuing point of contention (6:12).

On October 19, 1983, Maurice Bishop and several senior government officials were executed following a power struggle with the Deputy Prime Minister, Bernard Coard (7:11). The Grenadian Army subsequently announced the dissolution of the government and the formation of a 16 member Revolutionary Military Council (RMC) under General Hudson Austin's leadership. The RMC announced that a new government would be formed in "ten days or two weeks" (6:16). The political situation continued to deteriorate and six days later, Operation Urgent Fury was launched.

IV. Grenada - Strategic Importance

In spite of a history of benign neglect by the United States, the Caribbean basin is critical from a geopolitical perspective (8:2). The most important considerations are unimpeded access to the sea lanes adjacent to the Caribbean Sea and the maintenance of stable national borders (8:2). Grenada is located near Venezuela, one of the western worlds' most important sources of petroleum (3:159). The Caribbean basin hosts vital U.S. communications facilities and listening posts as well as important tracking, test and evaluation and navigation facilities (8:3). The Caribbean basin itself is the principal source of a number of critical raw materials. These include silver, zinc, gypsum, mercury, barium, and others (8:3).

Perhaps of greater significance, by 1983, Grenada was well on the way to becoming a "little Cuba" (7:31). The strategic importance of the region was not lost on President Reagan. In a speech to the Permanent Council of the Organization of American States President Reagan said:

The Caribbean region is a vital strategic and commercial artery for the United States. Nearly half of our trade, and two-thirds of our imported strategic minerals pass through the Panama Canal or the Gulf of Mexico. Make no mistake: The well-being and security of our neighbors in this region are in our own vital interest (21:219).

V. Organization of Eastern Caribbean States (OECS)

The OECS, comprised of Antigua/Barbuda, Dominica, Grenada, Monserrat, St Kitts-Nevis, St Lucia and St Vincent and the Grenadines, was formed in 1981 (6:2). These nations, all former British colonies,

share a common market, a common currency and, to a limited extent, common diplomatic, judicial, administrative and defense functions under the OECS umbrella (18:13). These nations' heritage and political/social bonds are such that they view themselves as one people.

Social, political and legal developments in Grenada caused alarm within the OECS shortly after Maurice Bishop took power in 1979. Grenada's military build-up was of particular concern. The six OECS sister nations maintain token military forces or none at all (19:145). By 1983, Grenada had an army of 600 Cuban trained regular soldiers and an armed militia of 2500 - 2800 (19:145). Grenada's military strength exceeded that of its OECS sister nations combined (19:145).

The Bishop government planned to add 12 battalions of regulars (19:145). This build up was accompanied by provocative actions directed against the other OECS member nations. Grenada's disproportionately large military force, the permanent basing of Cuban and Soviet "advisors" in Grenada and the nation's political instability were matters of grave concern to the OECS.

A unique confluence of events led to the U.S.-led invasion of Grenada. Grenada's political revolution became anarchical. The nation's geostrategic importance to the United States was amplified by its tilt to the Soviet camp. The presence of a large contingent of Cuban troops caused great concern among the OECS nations. The failure of governmental institutions caused President Reagan to act.

The decision to invade has been widely discussed and debated. Many of our closest allies, including Great Britain, consider the

invasion illegal. These issues will be examined as we consider the Just War implications of Operation Urgent Fury.

The clear understanding of Just War doctrine is a prerequisite for an evaluation of the invasion. The following discussion is the foundation upon which we will build our evaluation of Operation Urgent Fury.

SECTION 2

JUS AD BELLUM JUST WAR DOCTRINE

I. CRITERIA

The term Jus Ad Bellum, which dates back to the 4th Century A.D., means "justice in undertaking war" (10:40). Jus Ad Bellum prescribes the criteria which must be met before a nation can resort to armed conflict. The mere satisfaction of these criteria do not, in itself, imply that armed conflict must follow. A key tenant of Just War doctrine is the presumption against war. The decision to resort to armed conflict must be based on the following criteria:

[T]here must be competent authority to order the war for a public purpose; there must be a just cause (it may be self-defense or the protection of rights by offensive war) and the means must be proportionate to the just cause and all peaceful alternatives must have been exhausted; and there must be right intention on the part of the just belligerent (2:16).

These criteria are fully explored below.

II. Competent Authority

Reflecting its 4th Century A.D. origin, this criteria requires that war be declared only by those designated to act for the public good (10:63). In ancient times, private armies were prevalent and private wars were commonplace (2:17). "The decentralized political system wherein public, private and criminal violence overlapped, as well as the state of military art and science permitted a variety of private wars" (2:17).

This problem does not exist today. However, William V. O'Brien, the author of The Conduct of Just and Limited War, identifies two contemporary problems with respect to competent authority: (a) the lack of a clear definition of authority to declare war arising out of legal/constitutional ambiguities and (b) civil/revolutionary wars which are initiated by persons who claim revolutionary rights (2:17).

The former problem is germane to this study and will be discussed in the case study section. Comprehensive treatment of the latter concern is beyond the scope of this study; Mr. O'Brien's book provides excellent insight into this aspect of Just War doctrine.

In most states today, constitutional prerequisites must be met in order for war to be declared. The authority to make such a declaration is vested in designated individuals (2:17). If war is initiated outside of these restrictions, the requirement of this "legal competency" is not met and the war is not just (2:17).

The actual process of declaring war has evolved as weaponry and communications systems have become increasingly sophisticated (2:18). The advanced declaration of war has become an anachronism. Today, it would be militarily disadvantageous to formally declare war before the conflict is actually initiated (2:18). Today the declaration of war usually confirms a condition which already exists.

The requirements of this criteria are clearly evident. War must be declared by a person (or institution) who possesses the legal

authority of the state to do so. The person must be acting within the scope of his authority. Finally, the declaration must comply in form and substance with legal requirements.

In declaring war, the official is acting as society's representative. This presupposes that the official is acting in the best interest of society. In the modern state, particularly the United States, public opinion has become an important barometer to ensure that the best interest of society is indeed being pursued.

III. Just Cause

The requirement that there be a justifiable cause in order to initiate war evolved from the first moralists. This principle is now universally accepted. There has been and continues to be, however, differences of opinion on exactly what constitutes just cause.

St Augustine believed that injury to self should be met with forbearance . . . "turn the other cheek" (10:63). However, injury to some other innocent person constituted just cause for the christian (10:63). In essence, St Augustine held that "just wars avenge the wrong done when another state refuses to make amends for wrongs done by its citizens or restore what has been unjustly taken" (10:63-64). St Thomas found just cause "if those who are to be attacked are attacked because they deserve to be attacked because of a fault" (10:64).

The concept of justifying cause has evolved as human circumstance has changed. Historically, just cause to initiate war has been claimed for self defense against active military aggression, " . . . restoration of rights wrongfully denied, reestablishment of

secure balance of power, and the overthrow of internal tyranny" (11:147).

The modern concept of just cause holds that there must be a "serious value threatened that is higher on a public good hierarchy than the disvalues involved in taking military action" (10:147). What is not clear is if a state may justly enter a war when its interests are not violated, i.e., for humanitarian purposes, in the interest of another nation, or in the interest of international order (11:147).

Although moralists and philosophers' opinions on just cause vary, they are in general agreement on its constituent parts. Just cause consists of these four subdivisions: "the substance of the just cause, the forms of pursuing just cause, the requirement of proportionality of ends and means, and the requirement of exhaustion of peaceful remedies" (2:20).

The substance of the just cause must be sufficiently "serious and weighty" as to overcome the basic just war doctrine injunction against "killing in general and war in particular" (2:20). O'Brien endorses three conditions that meet the requirement of a "serious and weighty" cause: "(1) To protect the innocent from unjust attack. (2) to restore rights wrongfully denied. (3) to reestablish a just order" (2:20).

Evaluating the substance of just cause is a difficult process. "In practical terms, this task of evaluating the substance of just cause leads inescapably to a comparative analysis of the characteristics of the polities or political-social systems posed in warlike

confrontation" (2:20). This is one of the most difficult considerations confronting national security policy decision-makers when use of the military instrument is contemplated. "Any just-war analysis that does not face the question of the comparative justice and character of contending political-social orders is not offering responsible answers to the just-war ends/means dilemmas of the modern world" (2:20).

There are two methods of pursuing just cause: offensive and defensive wars (2:21). Under Just War doctrine, the justice of self-defense is generally conceded (2:21). "Defense of the state is *prima facie* defense of an essential social institution. So strong is the presumption in favor of the right of self-defense that the requirement of probable success . . . is usually waived" (2:22).

The question of justice inherent in offensive wars raises complicated problems. "In classical just-war doctrine, offensive wars were permitted to protect vital rights unjustly threatened or injured" (2:22). Wars were also permitted to exact vindictive justice against infidels and heretics (2:22). Wars for such purposes are now, of course, not permitted. Today there are two permissible forms of warfare. These are wars of self-defense and offensive wars to enforce justice for oneself (2:22).

O'Brien addressed the limitations that international law has placed on initiating armed conflict. "Article 2(4) of the [UN] charter lays down a general prohibition against the threat or use of force against the territorial integrity or political independence of any state" (2:22). Armed conflict sanctioned as collective defense by the

UN Security Council--as was recently seen in the Persian Gulf War--is the only legally permissible form of offensive war.

The United States has no legal right to engage in an offensive war to save a people from communism , or some other tyrannical form of government or even from genocide, unless it is part of a UN enforcement action, an unlikely possibility given security council divisions (2:23).

A minority of scholars argue for the permissibility of humanitarian intervention under the UN Jus Ad Bellum. They argue that protection of human rights is as much a concern or value in the UN charter as is avoidance of war (2:23).

There are no contemporary examples to prove or disprove this point of view.

The proportionality between the ends and means is called the heart of just cause (2:27). The essence of this criteria is a two-fold evaluation. First, the issue in dispute must be sufficiently important to justify the inherent destructiveness and evil of war. Secondly, the good to be accomplished must be sufficiently important to justify the harm that the conflict will produce (2:27). The process of making this evaluation is extremely complex and difficult. An estimate of the "good and evil" that each belligerent is likely to incur must be accomplished (2:27).

The impact of the conflict on the international community and neutral third parties must also be calculated (2:27). "[T]he doctrine requires a responsible judgment that there is a probability of success

for the just party" (2:27). This set of calculations is an iterative process. They are performed before the conflict is initiated and at critical phases as the war progresses (2:27).

The final sub-element under just cause for consideration is the requirement that war be initiated as a last resort after all peaceful remedies have been exhausted (2:31).

A number of international organizations have been developed under the aegis of the UN whose intent is to make arbitration, mediation, and adjudication of disputes between nations an acceptable means of resolving differences (2:31). The existence of these institutions has prompted many statesmen to adopt the following general rule. "[T]he state that fails to exhaust the peaceful remedies available before resorting to war is prima facie an aggressor" (2:31).

O'Brien points out several fallacies with this reasoning: (1) States are generally unwilling to relinquish control of vital interests to international organizations (2) Most of the disputes which cause conflict are, by their very nature, inappropriate for arbitration or mediation. Resolution of such disputes require the nations to either resort to war or abandon fundamental values. (3) In spite of all of the organizations that have been established in pursuit of international arbitration, mediation and adjudication, their efforts have been largely unsuccessful. "The United Nations, keystone of the whole system of international law and organization, has always been a political organization that a state in the political minority could argue that it could not receive justice if it submitted to the jurisdiction of UN

institutions" (2:32-33).

The UN has been most useful in providing peacekeeping forces. The International Court of Justice has been a disappointment; communist nations have virtually boycotted it (2:33). The more traditional institutions of negotiation and mediation have played their part in alleviating some conflicts. But on the whole, the machinery for peace has not lived up to expectations (2:33).

The ineffectiveness of international organizations notwithstanding, Just War doctrine requires that peaceful means of averting war be fully explored. The emphasis here is on the requirement that peaceful means of achieving settlement be explored . . . not necessarily attempted (10:65).

This does not mean that every alternative short of armed force has actually to be pursued, a requirement that would make it impossible for states ever to use force to undo a wrong. States are not required to pursue avenues of settlement that experience has shown offer little or no hope of success or of the timely settlement of an urgent crisis. And, of course, it does not mean that states cannot initiate wars (10:64).

V. RIGHT INTENTION

The final Jus Ad Bellum criteria to be considered is right intention. The mere presence of a justifiable grievance is not sufficient cause to resort to armed conflict (10:64). O'Brien lists three criteria that should be considered to ensure that the Jus Ad Bellum requirement of right intention is met.

First, the belligerent is limited to the cause upon which a just cause finding has been made. Causes/objectives that do not meet the just cause criteria cannot be pursued (2:34). "The intention should be to rectify the wrong that constituted the just cause and to conclude the war with the institution of a just and fair peace: the war must be intended as a means of reestablishing this peace" (10:64)

Secondly, the just belligerent must have in mind a just and lasting peace. This requirement evolved from the early moralists. "In natural law theory from Cicero to Grotius, the ultimate goal in going to war was always to be the subsequent condition of peace" (11:52)

As a third criteria, the foundation for all others, "right intention insists that charity and love exist even among enemies. Enemies must be treated as human beings with rights" (2:34)

Right intention poses difficult problems for modern nations. It may be that all of its idealistic standards are unattainable (2:34). We can, however, more reasonably insist that just belligerences may not translate their strong feelings into behavior that is prohibited by the principle of right intention" (2:34).

Application of Just War Doctrine Jus Ad Bellum Criteria

Although most nations assert, either explicitly or implicitly, that they are compliant with Just War doctrine, the basis for such claims are seldom if ever disclosed. A valid claim of compliance must

based on a structured analysis using the criteria contained in internationally accepted doctrine. The process of applying these criteria, however, is problematic (2:35).

There is relatively little guidance or discussion in the literature on how Just War doctrine should be applied (2:35). O'Brien provides insight into how such a process could be structured.

First, all conditions must be met. There is no apparent hierarchy of criteria; they form a comprehensive whole (2:35). Secondly, continuing review is required. This is particularly true with respect to proportionality. The number of times such reassessments are required vary with the fortunes of war (2:36). Finally, the question of the justice of the war if a nation conspicuously fail to meet one or more Just War criteria and the impact of this failure on an overall finding remains unresolved.

The application of Just War criteria is a judgmental process (2:35). It is difficult to make a definite determination except on a case-by-case basis (2:35). It should be noted that, in William O'Brien's opinion, the United States violated Just War criteria in the conduct of the war against Vietnam. In spite of specific violations, he holds that the war itself was just (2:257-276). This aptly demonstrates the potential for controversy inherent in the judgmental process.

SECTION 3

OPERATION URGENT FURY AND JUS AD BELLUM - A CASE STUDY

I. Setting

At 0500 hours on October 25, 1983, 1900 U.S. Army and Marine Corps troops, along with 300 men from six Caribbean nations launched Operation Urgent Fury, the invasion of Grenada (12:39). President Reagan ordered this action out of concern for the safety of American citizens on the island and in response to appeals from the Organization of Eastern Caribbean States (OECS) and the Governor General of Grenada.

A strong argument can be made for the invasion in that it contributed significantly to the strategic and political interests of the United States and the OECS. The moral justification of the action is not as clearly evident or easily defensible. The following Jus Ad Bellum analysis of Operation Urgent Fury is intended to provide insight into the level of U.S. compliance with Just War doctrine.

II. Competent Authority

As stated above, the individual who declares war must have the legal authority to do so. Because of the bureaufication of authority and responsibility intended by the framers of the U.S. Constitution, the issue of who has the legal authority to declare war is far from clear. In practice, the President has the authority to initiate conflict; Congress must formally declare war, and the public must support the action.

Article 1, Section 8 of the Constitution gives Congress the responsibility for declaring war and to ensure that war is properly executed (12:33). Although, acting in his role as commander in chief, the President exercises command over the armed forces, his authority is limited by the Constitution. The President can only order forces into hostilities or areas where there is an imminent danger when there is (1) a declaration of war (2) specific statutory authorization or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces (12:33).

Another constraint on the President's authority is Public Law 93-148, the War Powers Act. Under this law, passed over President Nixon's veto in 1973, the President must "consult" with Congress before armed forces are introduced into combat or areas where hostilities are imminent (12:33). He is also required to consult with Congress "regularly" thereafter until the conflict is terminated (12:33).

Public law levies a number of reporting requirements on the President in cases where U.S. forces are introduced into hostilities or sent into areas where hostilities are imminent (12:34). Perhaps the most significant aspect of the War Powers Act is the requirement that Congress approve or disapprove the continued use of troops within 60 days after they are committed to action (13:35). The President can, by certifying that the safety of the forces require, extend the cutoff period by 30 days. Unless Congress approves their continued use, the troops must be withdrawn at the end of the 60 or 90 day period (12:35).

President Reagan ordered the invasion, termed a "deployment", on his constitutional authority as commander in chief and on his authority to conduct the nation's foreign policy (12:39). The level of compliance with the requirement to "consult" with Congress is debatable. The President met this requirement by briefing key congressional leaders on the operation just prior to its start. President Reagan complied with the reporting requirement by providing a letter to the Speaker of the House of Representatives on October 25, 1983 (12:38-39).

III. Fairness

From a "fairness" perspective, the roles that Congress and public opinion play in constraining presidential power deserve additional comment. In order to qualify as a fair war under a "fairness doctrine", the President would be required to address the issue of congressional support and U.S. public support prior to the introduction of forces into potential or actual conflicts. This requirement would augment the Jus Ad Bellum "competent authority" criteria.

The constitution purposely places tension between the legislative and executive branches in the issue of initiating and conducting war (22:3). The President, as commander in chief, has the authority to initiate conflict. Congress must ratify the action and agree to continue the use of the armed forces.

Public opinion has taken on tremendous importance in recent years. U.S. public opinion is shaped by a number of factors. Most are beyond the control of political leaders. Many are influences from beyond our borders.

The communications revolution has made it possible, especially in case of the democracies, for world opinion to impact upon the domestic opinion in a state contemplating or taking military action. What world opinion cannot accomplish by direct impact upon the head of a democratic state it may be able to effect indirectly by influencing public attitudes and national legislatures. Foreign opposition and criticism, for instance, had considerable impact upon American public attitudes during the U.S. involvement in Vietnam from 1965 to 1975. In turn, domestic public concern regarding "unrestricted" use of military force in that conflict resulted in the War Powers Act passed by the American Congress in 1973. To the extent that opinion can influence decisions about the resort to military force, a new and complicating phenomenon has emerged in international politics (14:31).

To date, no president has demonstrated the willingness to share power in the international arena with Congress to the degree anticipated (and required) by the Constitution. In order to ensure that the nation shows a "united front" and that forces will be sustained and supported once a conflict is initiated, presidents must ensure that a mechanism is developed to bring Congress into the decision-making process.

Emphasizing the need for cooperation, former Secretary of Defense Caspar Weinberger said that "We cannot fight a battle with the congress at home while asking our troops to win a war overseas or, as in the case of Vietnam, in effect asking our troops not to win, just to be there" (15:8). Sharing war-making power with Congress will require extraordinary statesmanship, but is essential to ensure that the war is initiated and declared in a "fair" manner.

The public plays a critical role in the use of military power. Jus Ad Bellum anticipates that in declaring war, the authorized official

is doing so at the behest of the public. The public now play a key role in the president's ability to successfully employ the military instrument of national power.

How should the role that the public play be accounted for during the national security policy-making process? Should it be considered at all? There is a difference of opinion over this issue.

The classic liberal argument that grows out of the normative view that citizen opinions should influence all affairs-that all policy should reflect the beliefs of the people-or at least the majority of the people-could also be offered. On the other hand, realist propositions can be advanced, maintaining that foreign and security policy is so important that it deserves the control of the most educated and informed; that mass opinion is often too slow to crystallize; that public discussion can provide other governments premature information concerning U.S. national security policy.

Whatever the position taken on the desirable depth of public involvement, it is clear that any U.S. security policy requiring national sacrifices must be founded, in large part, upon basic public values. Indeed, inasmuch as values are often imprecise, diverse, and subject to change, part of the job of the policy-maker is to clarify, interpret, synthesize, and articulate them as they bear on foreign and national security issues (14:44).

Addressing the requirement for public support as a part of the "Weinberger Doctrine", the former Secretary of Defense said:

Before the United States commits combat forces abroad, there must be some reasonable assurance that we will have the support of the American people and their elected representatives in congress. This support cannot be achieved unless we are candid in making clear the threats we face; the support cannot be sustained without continuing and close consultation (15:8).

Though he was quite correctly known as "the great communicator" and made several major policy speeches on Central America and Grenada, President Reagan had limited success in winning widespread support for Operation Urgent Fury. In a 18 - 21 November 1983 Gallup Poll, 59% of the respondents approved of the President's handling of the situation; 32% disapproved; and 9% had no opinion (23:29). In a poll conducted for Newsweek Magazine, 53% approved of the invasion, 34% disapproved and 13% had no opinion (24:65). Significantly, 48% felt that the invasion was justified to replace the Marxist government and 36% felt that an invasion for that purpose was not justified (24:65).

A February 1991 Gallup Poll asked respondents if several major wars in which the U.S. participated were "just". Eighty nine percent said that World War II was the most "just" war of all, 49% said that the Korean War was just, 25% felt that the Vietnam War was just, and 49% felt that the Gulf War met all six "Just War" criteria listed by the pollsters (25:19). Operation Urgent Fury was not included in the survey.

In whatever way he chooses, it is clear that the president must win and sustain public support to ensure that the Jus Ad Bellum requirement is met. In this way, he can ensure that the war is for "a public purpose" and that it will enjoy the support of the American people. The requirement for public support must be part of the decision-making process before a conflict is initiated.

IV. Just Cause

With respect to Jus Ad Bellum just cause criteria, Operation Urgent Fury is problematic at best. Speaking to reporters during a question and answer session on 25 October 1983, President Reagan said that he ordered the invasion for three reasons: to protect the 1000 Americans on the island, to forestall further chaos and to assist in the restoration of law, order and government in Grenada (26:1487). Whether either of these reasons meet the requirements of "just cause" criteria is questionable.

Protection of American Citizens: The president cited his concern for the safety of U.S. citizens as the primary reason for his decision to invade Grenada. His reason for concern was well founded. In the aftermath of the Bishop assassination, a 24 hour shoot-to-kill curfew was imposed (27:2). Attempts by the State Department to assess the status of U.S. citizens in Grenada were unsuccessful. Two State Department officials who tried to visit the island were refused entry (27:2). The Ambassador to Barbados recommended evacuation of U.S. citizens in an urgent telex to the State Department (27:2). This apparent threat was exacerbated by the possibility that U.S. citizens might be taken hostage (10:12).

There is no question that the safety of the American citizens was of grave concern to the President. However, did his concern constitute a legitimate the need to act? Was the action taken legal? Did it comply with just war Jus Ad Bellum criteria? Answers to these questions are central to the issue of "fairness".

A number of reasons may be used to justify armed intervention. Included among these is the right to intervene for purposes of self-defense. This is justifiable only after all available means have been attempted (11:133). Intervention for this purpose is appropriate only when aggression has been directly threatened (11:133). This was not the case in the dispute between the U.S. and Grenada.

Another plausible reason for intervention is for humanitarian purposes, i.e., to protect one's own citizens from widespread human rights abuses (11:133). In asserting the right to intervene to protect U.S. citizens, the President was claiming the right to intervene for humanitarian purposes (11:135). Before intervening for this purpose, however, all peaceful means must have been exhausted.

Actions were taken to communicate with and obtain the cooperation of authorities in Grenada. However, there is no evidence that the matter was referred to the Organization of American States (OAS), United Nations (UN), or any other organization which could have acted to resolve the situation short of armed conflict.

Reporting on the legal aspects of the intervention in Military Legal Review, Major Ronald Riggs discusses the theories that are relevant to the legality of the intervention to protect foreign nationals. These theories are restrictive, realist and self defense (18:21). The restrictive view holds that intervention to protect citizens abroad is unlawful under the UN Charter (18:21). Under the realist approach, intervention for humanitarian purposes may be justified (18:23). The self-defense theory justifies hyperactive

intervention (18:24). The study concludes that notwithstanding the President's concerns, there was not sufficient justification to support intervention on humanitarian grounds (18:43).

The second reason for the invasion, the OECS' request for assistance, is also problematic. Deputy Secretary of State Kenneth Dam cited certain provisions of the OECS Treaty, OAS Charter provisions, and UN Charter provisions as the legal authority for the action (10:16). Reflecting on the legality of the action, he said "Both Charters expressly recognize the competence of regional security bodies in ensuring peace and stability" (10:16). There are, however, opposing views on this issue.

A number of legal scholars question this interpretation of the Treaty and Charters. Writing in The American Journal Of International Law, Christopher C. Joynes observed: "While "collective defense" as such is called for in the [OECS] Treaty, nowhere is there stipulated the option to invite outside assistance against a member state" (28:136). The entire question of the OECS Treaty is questionable since it had not been technically registered with the UN Secretariat as required (13:164). The major problem with reliance on the Treaty is the fact that the United States is not a signatory (28:136).

Reliance on the OAS Charter also poses several problems. The Charter specifically prohibits intervention by one nation into the affairs of another (28:140). Article 18 of the OAS Charter says "The American States shall bind themselves in their international relations not to have recourse to the use of force except in the case of

self-defense in accordance with existing treaties or in the fulfillment thereof" (28:140). Taking a different view, Major Riggs cites qualifications in the OAS Charter which would authorize the intervention as a regional peacekeeping action (18:50-51).

The question of authorization for the action under the UN Charter is just as murky. Legal scholars are divided on this question as well. However, a majority would appear to support the view that the action is not sanctioned by the UN Charter. The following comment is typical.

Both the OAS and UN Charters unequivocally condemn the U.S. invasion of Grenada as a gross violation of the most fundamental principles of international law. Just recently, 11 members of the UN Security Council and 108 members of the UN General Assembly, among them several staunch U.S. allies, have deplored this invasion for precisely these reasons (29:174).

As provocative as the referenced articles' title ("International Lawlessness in Grenada") and contents are, it is noteworthy that nine prominent legal scholars, professors from Harvard and Princeton among them, were the authors.

In summation, no clear position has emerged regarding the legality of the invasion. An illegal invasion would be a prima facie violation of Jus Ad Bellum just cause criteria. The widespread opinion that the action did not conform to international law must be interpreted and weighed by the reader. The fact that the action was universally condemned is troubling.

Proportionality between ends and means has been called the heart of just cause (2:27). Did the potential good to be accomplished by the

invasion justify the harm that would most likely result? Jus Ad Bellum criteria require the decision-maker to answer this question before resorting to armed conflict. While it is not possible to determine if this issue was part of the decision-making process, a brief review of the process used to authorize Operation Urgent Fury is worthwhile.

The decision to invade Grenada was probably atypical of important national security policy decisions in its' abruptness and the level of analysis (7:73). Initially, a small interagency group began meeting to discuss the potential impact of the deteriorating situation in Grenada (9:2). Mr Langhorn A. Motley, Assistant Secretary of State for International Affairs, headed the interagency group that evaluated options (9:2). He reported to the Vice President and President (9:2). In the initial crises management planning process, the invasion of Grenada was not anticipated (9:2). Planning centered on a peaceful evacuation of American citizens.

As the situation deteriorated, planning became more formalized and intensive (9:2). A special National Security Council Situation Group was formed to analyze events in Grenada. "Perhaps surprisingly, it was during the preparation of the initial NSDD [National Security Decision Directive] that it was discovered that (a) there were no contingency plans on file for a possible invasion of Grenada (b) that maps and photographs of the island were inadequate" (7:75).

The planning process took on a sense of urgency on October 22, 1983. The following specific objectives were identified (7:75). (a) If at all possible, guarantee the safety of all Americans (b) restore a

democratic government in conjunction with friendly governments with the same interests and (c) eliminate and prevent Cuban activity on the island (7:75). The similarity between this plan and the justification for the action cited by President Reagan is striking. It is also interesting to note that there were a variety of discussions about "the likelihood of success vs failure, and about the risks connected with the invasion" (7:76). "[T]he decision was made to launch the invasion, apparently in response to judgements about the likelihood of success and the number of casualties that would be sustained. (7:76).

In view of the dearth of information on how the decision was actually made, the following is intended to show how the decision-making process could have functioned. There were four possible options: (1) Do nothing. (2) Intervene diplomatically to affect change in the government and protect American citizens. (3) Evacuate U.S. citizens by peaceful means. (4) Invade and evacuate American citizens (7:80-82). Each of these options could have been evaluated using the following criteria: (a) Threat to U.S. citizens (b) domestic political consequences (c) Military cost, and (d) Internal political consequences (7:82). The objectives of the proposed action would have been safety of American citizens, restoration of democratic government in Grenada, and elimination of Cuban activity on the island (7:82).

In a formal analysis, each of these criteria would be defined in detail. The threat to U.S. citizens in Grenada, for example, could be defined in terms of the number of citizens injured or killed; domestic political consequences could be measured by changes in the President's domestic popularity; military costs could be defined in terms of the number of soldiers killed or injured; and international consequences could be

measured according to the number of nations that approved or condemned the invasion (7:82).

It is not known if the Reagan administration conducted an analysis as rigorous as the one suggested above. If they did, Jus Ad Bellum criteria would have required additional considerations such as (a) the number of Grenadian/foreign nationals likely to be killed or injured; (b) anticipated damage to property (c) expected impact on political institutions such as the OECS/OAS, and (d) the possibility of wider conflict, i.e., Cuba or the Soviet Union.

There is no record of inclusion of any of these criteria in the decision-making process. Indeed, because of the haste with which the decision was made, it would be surprising to find these criteria among those considered.

The final criteria for consideration under Just Cause is "last resort". There is no evidence that the invasion was the action of last resort. There was certainly concern about the safety of American citizens in Grenada. However, other factors undoubtedly contributed to the decision to invade. These included the desire for stability in the region and the desire for a democratic government in Grenada. The President's action was certainly in the national security interest. It is not clear, however, that all options short of war were considered and found wanting.

7. Right Intention

The final Jus Ad Bellum criteria for consideration is right intention. Under this criteria, armed conflict may only be undertaken

for the reason for which there is a just cause. It is not clear that a just cause existed for the invasion. If the rationale of humanitarian intervention (to protect American citizens) and/or regional peacekeeping is valid, the U.S. probably complied with the provisions of right intention criteria.

The size and composition of American forces was appropriate for the mission (7:163-167). The action was of a relatively short duration and a minimal number of casualties were sustained (16:196). Hostilities were terminated and combat forces were withdrawn within 60 days of the initiation of the conflict (16:196).

Although civil affairs/peacekeeping forces remained on the island until December, 1984, that action was at the request of the Grenadian government. It is clear that U.S. objectives were limited to those stated by the President (16:196).

SECTION 4

JUS IN BELLO JUST WAR DOCTRINE

I. CONCEPT

The primary purpose of Just War doctrine is to prevent wars. When the stringent Jus Ad Bellum criteria are met, nations have a legal recourse to war. However, Just War doctrine imposes equally stringent criteria on the conduct of war. Jus In Bello Just War criteria limits the means and methods which may be used to prosecute a war. Jus In Bello has the objective of focusing and ameliorating the violence of warfare. The uncontrolled and indiscriminate use of force is prohibited. We now turn our attention to Jus In Bello criteria.

II. CRITERIA

Jus In Bello imposes two basic limitations on belligerents:

One was the principle of proportion requiring proportionality of military means to political and military ends. The other was the principle of discrimination prohibiting direct, intentional attacks on noncombatants and nonmilitary targets . . . the history of attempts to limit the conduct of war reveals a third category of restrictions, namely, prohibited means (that is, means that by definition are considered disproportionate and cannot be used even if they can be discriminatory) (2:37).

III. Proportionality

Under Jus Ad Bellum criteria, proportionality refers to the political judgment that must be made about going to war (11:132). It is an evaluation of the good (i.e., justice) that will be accomplished by

war in comparison to the harm (evil) that will result because of war's destructiveness. The good must exceed the harm in order to satisfy Jus Ad Bellum criteria.

The principal of proportionality finds a different application under Jus In Bello criteria. The evaluation seeks to ensure that "military strategy, tactics and objectives have their proper objectives, targets and dynamics" (11:132).

Proportionality relates military means to political and military ends. An evaluation of the proportionality of military means with political/military ends is applied at the strategic and tactical levels.

a. Proportionality--the strategic view. At the strategic level, the military ends of a war must be proportional to the Jus Ad Bellum just cause which is being pursued. War aims must be confined to the just cause criteria which necessitated the conflict. These Jus In Bello criteria requires that all wars be limited. Under these criteria, total wars are always unjust. These criteria also affirms the political nature of wars.

According to Clausewitz, war is the continuation of policy with other means (30:69). (Evaluation of the just cause aims of war, i.e., the "policy which is being pursued", is accomplished at the strategic level. War aims and goals are usually stated in political terms. "The ultimate justification for all means in war lies in the just cause that is a political purpose" (2:39).

Historically, U.S. presidents have provided strategic guidance on the conduct of wars in which we have been involved. During World War

II, the allied leaders met on several occasions to review and approve strategy. They prioritized the allocation of resources and provide guidance on the conduct of the war.

National command authorities provide the overall framework under which military commanders operate. For example, the decision to conduct a daylight bombing campaign against strategic targets in Germany was made by the President in consultation with other allied leaders. Unquestionably, the decision to employ nuclear weapons against Japan was made by President Truman.

During the Vietnam War, President Johnson and his closest advisors provided detailed management and direction of the war effort to field commanders. President Bush reviewed, modified and approved the overall strategic plan for the conduct of Operation Desert Storm. The Secretary of Defense visited the theater on two occasions and received detailed briefings on the strategic concept of the campaign. The President enunciated the political goals and military objectives to a national--indeed a world--audience.

It is clear that President Reagan directed and approved Operation Urgent Fury. He made a number of major foreign policy statements on U.S. vital national interests in the Caribbean in general and Grenada in particular. His involvement, however, in setting the strategic agenda for the invasion itself is unclear.

As a second echelon in the strategic decision-making process, senior military leaders establish the policies, procedures and rules of engagement which shape the character of the war effort. Rules of

engagement, regulations and policy statements clearly have strategic implications which are applicable to Jus In Bello criteria.

Political and military leaders also influence a nation's ability to comply with Jus In Bello criteria in their policy, force structure, training, readiness and procurement decisions. Forces must be trained and equipped to achieve victory in combat effectively and efficiently. The introduction of precision guided weaponry and "smart munitions" have made it possible to achieve military objectives while limiting collateral damage to nonmilitary targets and noncombatants.

b. Proportionality--the tactical view. At the tactical level, the Jus In Bello concept of proportionality evaluates tactical means against military ends (2:40). The cost of the operation in terms of societal damage--lives of noncombatants, nonmilitary damage and destruction--that will result is evaluated against the military importance of achieving the tactical objective.

An excellent example of how proportionality at the tactical level can influence military decision-making can be taken from Operation Desert Storm. During the war, the decision was made not to attack anti-aircraft artillery which Iraq had placed in heavily populated areas. It was judged that the damage to noncombatants and culturally important structures outweighed the benefit that would have been gained by attacking the weapons.

Commander responsibility. Ultimately, decisions about the moral implications of military means and ends are made at the unit commander/crew member level. These decisions are made--and judged--on

the basis of reasonableness (2:41). Commanders set the standard and establish the norm which guide the conduct of their subordinates. Through policy and personal example, they define "reasonable conduct" for their units.

Reasonableness is difficult to define except in a specific context (2:44). In domestic law, the "reasonable man" is one who "sets the standard to be emulated by law abiding persons. The reasonable commander is the counterpart to the reasonable man in the law of war. The construct of the reasonable commander is based upon the experience of military men in dealing with basic military problems" (2:41).

Constructing a "reasonable commander" model could provide improved guidelines as to acceptable behavior in various situations. Although this has not been attempted, U.S. military tribunals after World War II and in the case of Lt William Calley evaluated conduct on the standard of reasonableness (2:44).

IV. Discrimination

The principle of discrimination finds its origin in the age of chivalry. At that time, the nature of weaponry and warfare made it possible to distinguish between combatants and noncombatants. Modern technology and the advent of weapons that cannot discriminate has blurred the lines (2:49).

The concept of discrimination prohibits direct, intentional attacks on noncombatants and nonmilitary targets (2:42). This prohibition is not absolute. It takes into account military requirements to conduct warfare. However, it requires military

commanders to make judgments about the potential damage that will result from military operations.

The concept of "Discrimination" accounts for the fact that military operations pose unavoidable risks to noncombatants. The requirement to conduct operations in spite of the risks is known as "military necessity". The military necessity of an operation must be balanced against the danger posed to noncombatants and nonmilitary targets.

The initial problem in addressing "discrimination" is one of degree. The degree of protection that should be afforded noncombatants is the subject of considerable debate. Some argue for absolute discrimination. They hold that noncombatants and nonmilitary targets should be protected at all cost. Others acknowledge the requirement to protect noncombatants and nonmilitary targets. However, they assert the principle of military necessity. In the final analysis, a nation's adherence to the principle of discrimination is determined by its security interests and moral integrity.

A second problem encountered in addressing discrimination revolves around discernment. To what lengths should a nation reasonably be expected to go in determining that a significant number of noncombatants are exposed to attack. What responsibility does an adversary assume by placing noncombatants "in harm's way?" The impact of this issue was demonstrated during Operation Desert Storm.

The Iraqi government had used a civil defense shelter for command and control purposes. After identifying the shelter as a

legitimate military target, a decision was made to attack using precision guided munitions. It was subsequently discovered that whatever other function the facility might have served, it housed a significant number of noncombatants.

The U.S. government's responsibility/culpability for the deaths was the subject of considerable debate. The moralist would subject the bombing to the following analysis:

(1). Should the attacker have known that noncombatants were present in the target area? If so, the moralist could argue that the attack violated the principle of discrimination.

(2). Should the attacker have suspected that noncombatants were intermingled with combatants in the target area? If so, The attack could have violated the principle of discrimination.

(3). Did the attacker have reasonable evidence to judge the presence of noncombatants a remote possibility? If so, the principle of discrimination was probably not violated.

The bunker incident illustrate the difficulty of defining and protecting legitimate noncombatants. Do persons who deliberately expose themselves to attack lose their non-combatant status? Does a government which places its citizens in harm's way absolve its adversary of blame? Are person's who work in defense-supporting industries protected? Each nation "answers" these questions through its national policies and military doctrine.

Under Jus In Bello criteria, three targets are justified for attack by combatants. These are: (1) Targets necessary for

accomplishment of the military objective. (2) Those attacked in self-defense. (3) Those attacked in retaliation (11:165).

Defining "nonmilitary" targets poses an equally challenging set of questions. Is it "just" to destroy all war-supporting industries? Should electrical power grids--critical to the health and welfare of society--be destroyed? Should portions of a nation's economic and industrial infrastructure be exempt?

Operation Desert Storm provides an excellent example of the problems associated with defining legitimate military targets. Iraq took several measures to attack their adversaries' ecosystem. It released vast quantities of crude oil in an effort to foul Saudi and Kuwaiti desalinization plants and thus limit water supplies. It used tactical missiles as weapons of mass terror. The apparent goal was to split the coalition. It destroyed oil fields as a measure of economic warfare or in sheer meanness. Although each of these actions were clearly despicable, in the mind of Saddam Hussein--and probably other similarly motivated dictators--they were legitimate acts of warfare appropriate for use against more powerful adversaries.

The final term for discussion is "direct/intentional attack". Most nations minimize or eliminate direct and intentional attacks against obvious nonmilitary targets through national policy and rules of engagement. However, the impact of "collateral damage" is often significant. The propensity of "rogue" nations to take advantage of

their adversaries' efforts to respect nonmilitary targets presents significant problems. The bombing of the "baby milk factory" during Operation Desert Storm is a case in point.

V. Prohibited Means.

In his book The Conduct of Just and Limited War, William V. O'Brien includes "prohibited means" as a separate category under Jus In Bello. Means of waging war are prohibited for two reasons. In some cases, they are inherently wrong and may never be used. In other instances, operations and weapons are legally banned (2:56). Prohibited means are considered disproportionate by definition and cannot be used even if they could be used discriminately. (2:37).

Means of conducting warfare may be judged inherently wrong for moral, traditional, natural law or "humanity" purposes (2:56). Genocide has been recognized as inherently wrong and is a prohibited means of warfare.

Several means which, under some circumstances could be permissible, have been declared illegal through international agreement. These include "means causing superfluous suffering, chemical warfare, biological warfare and grave offenses against law of war defined by various treaties" (2:59).

SECTION 5

DEPARTMENT OF DEFENSE COMPLIANCE WITH JUS IN BELLO CRITERIA

I. Policy

The Department of Defense requires the services to comply with the "Law of War". (The terms "law of war" and "law of armed conflict" are used interchangeably.) The Law of War incorporates the essence of Jus In Bello doctrine. The goal is to ensure that violence is used to defeat the enemy's forces, not "merely to cause purposeless and unnecessary suffering" (31:1-1).

DoD Directive 5100.77, DoD Law of War Program, 10 Jul 79, implements the Law of War Program. This directive requires each service to establish a training program for combatants. The purpose of the program is expressed in the following quotation from the Air Force implementing directive:

The law of armed conflict is essentially inspired by the humanitarian desire of civilized nations to diminish the effects of conflicts. It protects both combatants and noncombatants from unnecessary suffering, and safeguards the fundamental rights of civilians, PWs, and the wounded and sick. The law also attempts to prevent degeneration of conflicts into savagery and brutality, thereby facilitating the restoration of peace and friendly relations which must, at some point, inevitably accompany or follow the conclusion of hostilities. It has been said to represent in some measure minimum standards of civilization (32:1-5).

II. Implementation.

Each Service has implemented a Law of Armed Conflict Program

which includes detailed guidance and training. The Air Force program is implemented by AFP 110-31, International Law--The Conduct of Armed Conflict and Air Operations and AFP 110-34, Commander's Handbook on the Law of Armed Conflict. A brief overview of the Air Force program is presented as an illustration of the DoD program.

III. Comparison--Jus In Bello versus Air Force Implementation Guidance.

The Air Force program provides comprehensive coverage of Jus In Bello criteria. It provides detailed explanations that assist commanders in implementing the program. The following is an overview of Air Force treatment of Jus In Bello criteria.

a. **Military necessity.** This principle corresponds to "proportionality." It has four elements:

(i) that the force used is capable of being and is in fact regulated by the user; (ii) that the use of force is necessary to achieve as quickly as possible the partial or complete submission of the adversary; (iii) that the force used is no greater in effect on the enemy's personnel or property than needed to achieve his prompt submission (economy of force), and (iv) that the force used is not otherwise prohibited (32:1-6).

b. **Humanity.** This principle addresses issues inherent in proportionality and discrimination. It prohibits weapons which cause unnecessary suffering. It also prohibits direct attacks against noncombatants. On the other hand, it affirms that unavoidable civilian casualties may result from the legitimate pursuit of military objectives (32:1-6).

c. **Chivalry.** The Law of Armed Conflict incorporates elements of chivalry. Chivalry finds its origin in the Middle Ages. "[C]hivalry

embraced the notion that combatants belonged to a caste, that their combat in arms was ceremonial, that the opponent was entitled to respect and honor, and that the enemy was a brother in the fraternity of knights in arms" (32:1-6). The principle of chivalry contributes to Jus In Bello principles by making combat "less savage and more civilized for the individual combatant" (32:1-6).

IV. Jus In Bello compliance.

The Air Force Law of Armed Conflict program contains a number of specific features which enhance compliance with Jus In Bello doctrine. Some of these features are summarized below.

a. Legitimate military objectives. Legitimate objectives are identified. They include specific examples of military targets, militarily significant economic targets, and targets which provide indirect support to military operations (31:2-1).

b. Populated areas. Restrictions are placed on attacks against populated areas. Targets must be capable of being located, identified and separately attacked (31:2-6). The advent of "smart weapons" has made attacks against heavily defended targets and targets in urban areas much more feasible.

c. Political targets. "Agencies that provide command, administrative or logistic support for military operations are lawful targets, if their destruction would result in a definite military advantage" (31:2-2). Such targets often receive protection through the rules of engagement (31:2-2).

d. **Persons.** Persons who may be lawfully attacked include military personnel and others taking part in hostilities. The latter category include civilians bearing arms and taking a direct role in hostilities, intelligence agents, and those engaged in combat search and rescue operations (31:2-2).

e. **Weapons.** DoD policy requires a pre-production review to determine that weapons conform to international law. Weapons may be deemed unlawful if they cause unnecessary suffering, are incapable of being controlled, or "may be expected to cause widespread, long term and severe" damage to the environment (31:6-1).

The U.S. has taken the position that nuclear weapons are not illegal (31:6-1). This position is disputed by a number of "moralists" and pacifists.

V. **Effectiveness of Air Force Law of Armed Conflict Program.** The Air Force has implemented a comprehensive Law of Armed Conflict program. It is designed to provide information and rationale to all potential combatants which, thus, promotes compliance with Jus In Bello principles. The program is not, however, without critics.

In The Conduct of Just and Limited War, O'Brien took issue with several claims made in AFP 110-31. He questions the interpretation and treatment of the principle of humanity (2:53). The position adopted in the pamphlet is compared with bombardment practices World War II (i.e., incendiary bombing of Japanese cities).

O'Brien also questions the Air Force definition and treatment of "undefended areas" as "another conspicuous example of a stern rule that

is reduced to something rather innocuous" (2:55). The Air Force takes the position that cities behind enemy lines are not undefended areas since they are not open to occupation (32:5-12). In O'Brien's view, "...the interpretation may be realistic and reasonable, but it reduces the immunity of undefended localities to the vanishing point" (2:55).

The criticism of AFP 110-31 may or may not be justified. However, it illustrates the difficulty inherent in crafting a program that will universally satisfy even the most well intentioned experts on Just War doctrine. This illustrates Just War Doctrine's major fallacy--the inability to reach consensus.

SECTION 6

OPERATION URGENT FURY AND JUS IN BELLO--A CASE STUDY

I. DoD Philosophy.

As was discussed in Section 5, the U.S. armed forces comply with Jus In Bello criteria as interpreted in service implementing directives. Each service has issued directives which comply with the "International Law of War". These directives incorporate the basic sources of Jus In Bello doctrine. These sources include Hague Convention IV, 1907; Geneva Conventions of 1949; and Geneva Protocols, 1977 (2:37). The services also comply with the basic principles of positive law: military necessity, humanity and chivalry (2:37).

As a result of these structured programs, most U.S. combatants are familiar and comply Jus In Bello guidance as interpreted in applicable DoD and service directives. Consequently, there were relatively few violations of Jus In Bello criteria during Operation Urgent Fury.

II. Proportionality. It appears that the military means used during Operation Urgent Fury were appropriate to the political ends which justified the conflict.

Although many of the details of the Operation remain classified, the following support the position that, at the strategic level, the concept of proportionality was observed.

a. Given the relative differences in military capability between the U.S. and Grenada, the composition of forces used in the operation were tailored to achieve the political goals stated by the President.

Action was taken to limit the conflict to the Island of Grenada. Positive measures were taken to prevent the conflict from widening. Additionally, once the stated objectives were accomplished, combat forces were withdrawn.

b. The rules of engagement have not been made public. However, weaponry and tactics were appropriate to the situation. Air Forces provided surveillance, close air support, airlift and combat air patrol. General purpose and special forces secured and evacuated noncombatants (medical students). They also apprehended and expatriated foreign--primarily Cuban--forces from the Island. Their final mission consisted of returning control of the Island to the Governor General. Naval forces provided close air support and command and control. The overall operation was under the command of a Naval officer. Additionally, Navy special operations forces (SEALS) played a crucial role in the conflict.

Conventional weaponry--primarily helicopter and fixed wing gunships a limited amount of armor, and small arms--were used. Given the vast array of weaponry and forces at its disposal, the U.S. Joint Task Force was tailored to accomplish the mission assigned by the National Command Authorities.

III. Discrimination.

The conflict was, for the most part, confined to legitimate combatants. Eighteen Americans were killed in action and 116 were

wounded (33:9). A total of 45 Grenadians were killed in action and 337 were wounded. About 800 Cubans were on the Island at the start of the Operation. Approximately 24 were killed and 59 were wounded (33:9).

There was one major incident involving noncombatants. A mental hospital was accidentally bombed. Several patients were killed in the bombing. However, the facts of the incident indicate that the U.S. bears little if any blame.

The accidental attack is ameliorated by the fact that the hospital was not properly marked. It was located near Fort Frederick and the Governor General's residence. These two sites saw some of the heaviest fighting of the conflict.

The hospital was surrounded by troop concentrations. It had been used as an anti-aircraft artillery site. Additionally, a large Grenadian flag was displayed outside of the building. These problems led to the accidental bombing (34:34).

SECTION 7

JUST WAR DOCTRINE'S FAILINGS

I. Lack of consensus.

"Just War doctrine" is a misnomer. Not only is there is no single, agreed-upon doctrine, it would be difficult--if not impossible--to craft a universally acceptable doctrine! The current "Just War doctrine" is an amalgamation of religious, political and military positions on when war is justified and how it is to be conducted. The current doctrine incorporates many theories, interpretations, and common law practices. There are as many variations of "Just War doctrine" as there are sovereign nations.

Although the U.S. has asserted its intention to comply with the Law of War (Jus In Bello), there is no such assertion about Jus Ad Bellum. For reasons discussed below, such compliance is not practical. However, it is important that we enunciate a policy which incorporates societal values and beliefs with respect to justice in warfare. Such an effort could lead to a doctrine of Fairness.

II. Why we cannot comply with Just War Doctrine.

We have had and will continue to have great difficulty in complying with Just War doctrine for a number of reasons:

a. The primacy of national security interests. All nations-- the U.S. included--act to protect their vital national interests. As this case study has revealed, Operation Urgent Fury had several objectives. While the rescue of the medical students was an important factor, it was by no

means the only reason for the invasion. There were equally compelling political, economic and military reasons for the operation. A strong case can be made that other vital national security interests prompted the invasion.

Although the operation might have been an example of "realpolitik", it was perceived as reasonable and necessary by the American people. After initial misgivings, Congress supported the action. In summary, while the action might not meet Just War doctrine criteria, it was perceived as an acceptable measure because of our national security interests.

b. Divergence of international opinions. In the international arena, the legality of Operation Urgent Fury was (and continues to be) questioned. Indeed, Operation Desert Storm being a conspicuous exception, it is virtually impossible to gain international consensus on the use of force. A strong case can be made that the invasion violated the UN charter and other international laws. There is, however, no question that the action was in our national security interest.

It is likely that similar situations will present themselves in the future. Under such circumstances, it is far easier to successfully apply a doctrine that asserts fairness based on national security interests than to claim compliance with Just War doctrine criteria.

c. Separation of powers. The Constitutionally mandated division of responsibility between the Executive and Legislative branches makes compliance with Jus Ad Bellum criteria difficult. The President, as Commander in Chief, has the authority to deploy and employ forces. Congress declares wars. The War Powers Act notwithstanding, it is likely

that combat forces will continue to be employed before formal declarations of war are issued. As a result, war is almost always initiated by an official who does not have the "pure" legal authority to do so. This is a prima facie violation of Just War doctrine.

d. Moral standard of the people. There is ample evidence that the American people support action which is fair and reasonable. This support extends to the use of armed force. As was seen during the Vietnam War, the failure to win the people's support can lead to catastrophic results.

Most people are unfamiliar with Just War criteria. They equate justice with fairness. When making personal or political decisions on the necessity to expend the nation's resources on warfare, the key questions are: Is the action absolutely necessary? Have we exhausted all reasonable means short of war? Is the action that we are contemplating legal? Is it supported in the international community? (If not, why?) Will it be of a limited duration? And, most importantly, is it fair and reasonable?

While the Just War doctrine does not answer these questions, a fairness doctrine would and should. It is clearly time that such an approach replace the current "Just War" assertion that national leaders make at the start of armed conflict. By assuring the American people that the use of armed force is required, in our national interest, and the only fair and reasonable recourse, our leaders can win the support that is critical to the successful outcome of warfare. It is clearly time for a doctrine of fairness in warfare!

SECTION 8

FAIRNESS DOCTRINE

I. Fairness

The term "fairness" is not defined in the legal lexicon. The critical elements, however, are included in the definition of the term "fair". Black's Law Dictionary defines "fair" as: "Having the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest. Just; equitable; even-handed; equal, as between conflicting interests" (9:535).

II. Justice Versus Fairness

The term "justice" has amoral connotations. It is often depicted as blind. It exacts the appropriate penalty regardless of circumstances. It is "legalistic". It is personified in the biblical concept of "an eye for an eye". It does not represent the moral standards of an enlightened society such as that of this nation.

On the other hand, fairness contains elements of justice but also applies morality. It considers "extenuating circumstances". Rather than seeking retribution, it seeks rehabilitation. The tenets of traditional Just War doctrine would be more appropriate termed "fair" than "just".

III. Fairness and Operation Urgent Fury

It is clear that the president acted in the national security interest of the United States by ordering the invasion of Grenada. As has been shown, however, the method of implementing that decision might

have violated international law. How can this conflict in ends and means be reconciled?

It is a widely held dictum in international politics that states tend to act in their own national interest. A second conclusion relates to law and order and the means required to secure it. That is, what is good and right and just is not necessarily brought about by lawful means. Rescuing U.S. nationals abroad from harms' way would seem good; restoring municipal law and order to an anarchic political situation would seem right; removing an oppressive totalitarian regime and replacing it with democratic institutions would seem just. Yet it falls to international law to determine how these ends may be obtained in a lawful manner. In the case of U.S. armed involvement in Grenada, the ends achieved certainly appear positive - militarily, politically and strategically. Even so, the coercive means employed to secure them remain conspicuously suspect legally, and this recognition should not be left unnoted (28:142-143).

IV. The Fairness Doctrine

Having reviewed Just War criteria and applying the criteria to Operation Urgent Fury, the question of fairness remains. The following outlines some of the ideas and elements relevant to a doctrine of "fairness":

a. Any fairness doctrine must start with the requirement to comply with international law. The United States should ensure that its actions are in compliance with the spirit and letter of the law.

b. The doctrine would require compliance with Just War doctrine. In the case of Operation Urgent Fury, there is no indication that Just War doctrine was considered. It is important that Just War doctrine be considered for two reasons. First, the American public

expect the nation's conduct in the international arena to be of the highest moral character. Secondly, the U.S. has attempted to cultivate a reputation for fairness and lawfulness. This reputation should be preserved. The President can ensure that this is done by assigning the task of ensuring compliance with Just War doctrine to the appropriate official within the National Security Council.

c. The president should publicly declare that areas or issues that are vital to the national interest. Only then should use of the military instrument be contemplated. For reasons of security, care must be exercised in declaring the nation's willingness to use force. However, the public and international community should be aware of our vital interests to ensure that wars can be avoided where possible and supported when necessary.

SECTION 9

CONCLUSION

The United States' compliance with Just War Jus Ad Bellum criteria in Operation Urgent Fury is questionable at best. Action should be taken to ensure that Just War doctrine is considered as national security policy-makers contemplate the use of the military instrument.

A concerted effort has been taken to ensure compliance with Jus In Bello criteria. As a result, effective compliance has been realized during recent conflicts.

A fairness doctrine could be developed and promulgated without compromising necessary diplomatic ambiguity. It would serve to inform friend and foe alike of the general conditions under which we would use armed force. Such a policy would have a deterrent affect against potential adversaries which are otherwise difficult to deter.

The issue of Just War doctrine is a complicated but important concept. The author believes that Just War doctrine--and the proposed "fairness" doctrine are subjects that should be of interest to senior military officers. As a result, it is recommended that this subject be added to the curriculum of senior service schools.

The concept of a doctrine of fairness deserves further development, discussion and debate. This would be an excellent concept for research projects at intermediate and senior service schools. The concept of a "fairness doctrine" should be included on the list of

recommended topics for research work at appropriate military institutions.

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