

The Ethical Limits of Military Necessity: Algiers 1957

by
Walter A. Schrepel

Abstract

In On War, Carl von Clausewitz describes war in theoretical terms, called Ideal or Absolute War, as "an act of force, and there is no logical limit to application of that force. Each side, therefore, compels its opponent to follow suit: a reciprocal action is started which must lead, in theory, to extremes." In his theory of war, Clausewitz argues for exerting maximum force as military necessity. In effect, tactics and strategies which maneuver killing power without constraint would be permissible in mercilessly flattening the enemy's resistance. Commanders would face few substantial impediments in applying all forces available to: "compel our enemy to do our will." Clausewitz's concept of Ideal or Absolute War appears to collide massively with deeply-held ethical principles of right conduct on the battlefield by perverting the doctrine of Military Necessity. *Jus in Bello*, a Just War principle, permits commanders to conduct battles while limiting the application of military force to only justifiably necessary or non-Clausewitzian levels of force. While commanders may have previously reigned supremely on the battlefield, the modern operational environment influenced by politics, international law, and morality precludes commanders from acting like so many killer angels in war. Ethical limitations arising from the political nature of war, a reality recognized by Clausewitz as a component of Real War, do constrain theoretical war by complementing and reinforcing the traditional constraints imposed the Just War. Thus, Military Necessity in battles like Algiers becomes the antithesis of Ideal War, requiring battles fought with justice and honor by commanders aware of their ethical duties.

The views expressed in this paper are the author's own and do not reflect the position of the United States Army, Fort Leavenworth, Battle Command Training Program, or Northrop-Grumman Technical Services.

In *On War*, Carl von Clausewitz describes war in theoretical terms, called Ideal or Absolute War, as "an act of force, and there is no logical limit to application of that force. Each side, therefore, compels its opponent to follow suit: a reciprocal action is started which must lead, in theory, to extremes."¹ In his theory of war, Clausewitz argues for exerting maximum force as military necessity. In effect, tactics and strategies which maneuver killing power without constraint would be permissible in mercilessly flattening the enemy's resistance. Commanders would face few substantial impediments in applying all forces available to: "compel our enemy to do our will."² Clausewitz's concept of Ideal or Absolute War appears to collide massively with deeply-held ethical principles of right conduct on the battlefield by perverting the doctrine of Military Necessity. *jus in bello*, a Just War principle, permits commanders to conduct battles while limiting the application of military force to only justifiably necessary or non-Clausewitzian levels of force. While commanders may have previously reigned supremely on the battlefield, the modern operational environment influenced by politics, international law, and morality precludes commander from acting like so many killer angels in war.³ Ethical limitations arising from the political nature of war, a reality recognized by Clausewitz as a component of Real War, do constrain theoretical war by complementing and reinforcing the traditional constraints imposed the Just War. Thus, Military Necessity in battles like Algiers becomes the antithesis of Ideal War, requiring battles fought with justice and honor by commanders aware of their ethical duties.

In the waning months of 1956, the capital of French Algeria ran red with the blood of innocent victims of terror bombings, political assassinations, and indiscriminate murders. Nationalist rebels, working from the National Liberation Front (FLN) deliberately attacked European civilians throughout Algeria, but most brutally in Algiers. The city's police force proved itself impotent against the terrorists as was French Algeria's government in protecting the public safety of Europeans and Muslims alike. By mid-December 1956, the level of terrorist violence had reached crisis proportions. Fear in the European quarters dominated the streets. European vigilantes took revenge for FLN terrorism against innocent Muslims. Civil authority verged on total collapse. Governor-General Robert Lacoste, recognizing the extent of the emergency, chose radical measures to end the reign of terror by calling in soldiers to fight the counter-terrorist battle for Algiers.

Algiers provides a useful case study for understanding the ethical limits of Military Necessity, demonstrating when, or if, Military Necessity morally justifies efficient, brutal tactics in counter-terrorist operations. Military Necessity is a principle long-recognized in military law and international conventions. Its moral origin may be found in the tradition of the Just War, as an ethical construct for evaluating policies and methods used in the Western concept of war.⁴ Paul Christopher, a former colleague at the U.S. Military Academy, argues the Just War straddles the divide between legal and moral concepts of justifiable use of military force. The Just War tradition reflects "a tension between the negative duty not intentionally to harm innocent people, on one hand, and the positive obligation that innocent persons be protected, on the other."⁵

The Just War provides a dual-level structure for morally evaluating the levels and kinds of military force commanders may use even in challenging urban counter-terrorist operations. This dual structure allows citizens in a democracy to evaluate the moral justification for national policies requiring military force, including how battles are fought. The Just War consists of two principles allowing us to evaluate independently the two levels and function of war, namely the decision to wage war and the conduct of military operations. The first principle, *jus ad bellum*, addresses judgments offered to the electorate for choosing war as national policy.⁶ *jus ad bellum* allows citizens to evaluate morally the actions of political leaders who choose to wage war. This paper will ignore discussions of *jus ad bellum* as beyond its intended scope. The war to retain French Algeria had already entered its third year when Algiers reached emergency proportions. Evaluating the moral and political judgments on Fourth Republic colonial policy will be left for to others so that this paper will focus on the role of the military commander during the battle.

This paper will concentrate on the second principle of the Just War, *jus in bello*, in order to evaluate whether Major General Jacques Massu commanding the 10th Parachute Division fought the battle honorably. *jus in bello* traditionally consists of two principles, Discrimination and Proportionality. Discrimination requires commanders to establish policies that differentiate between properly identified combatants or armed fighters. Orders to subordinates must identify the enemy while limiting or avoiding strikes against target areas containing civilians or noncombatants. Proportionality is the second principle which requires commanders to determine a necessary, but not excessive, amount of force to attain an objective. Orders to take no prisoners or inflict brutality or inflict harm and maiming are not necessary for securing the legitimate military objective; such measures, though militarily effective, would be morally impermissible.⁷

When viewed from an impartial stance, the principles of Discrimination and Proportionality reflect a humanitarian impulse to limit pain, suffering, and destruction in an anti-humanitarian enterprise. Brigadier General Anthony Hartle (U.S. Army, Retired) writes that the intent of *jus in bello* is derived from two humanitarian principles which define the laws of war:

HP1: Individual persons deserve respect. (Deontological principles of human rights);

HP2: Human suffering ought to be minimized. (International Law).⁸

These principles constitute the "basis for *formulating* the laws of war." Hartle states, "Only in situations for which there is no applicable law or in situations in which the justifiability of a particular law is being questioned would the principles be directly applied in determining appropriate choice of action."⁹ For Hartle states that HP1 is considered to be the morally prior principle because it is based on human rights that ought to establish moral protections from unjustified or disproportional violence in wartime. While statesmen may consider war necessary, commanders cannot choose any tactic as necessary. American military law includes a legal formulation of *jus in bello* which limit the harm caused by soldiers during wartime, as we shall see. Commanders must not only fight smartly but well, acting affirmatively to enforce the principles of *jus in bello*. In this way, commanders can be held legally and morally accountable for their actions.

Evaluating the conduct of commanders on the battlefield is essential for citizens in a democracy. Commanders make claims in reports, pronouncements, and memoirs seeking to justify their tactics and strategies. They want to demonstrate not only efficiency but also military honor by having made morally permissible judgments. In this manner, they avoid public censure. Military Necessity allows commanders to modify positively the battle calculus of military force to their advantage. We should remember that Just War theologians, philosophers, and lawyers had never outlawed war. They did recognize that certain tactics are logically necessary in order to wage war justifiably, even at the cost of taking human lives. Accordingly

Military Necessity allows certain logically necessary but specific, narrow exceptions to what would otherwise have been forbidden military tactics and strategies, temporarily loosening ethical constraints on commanders to win without dishonoring themselves. Algiers exemplifies the problems involved in relying on Military Necessity to secure tactical advantages and retain military honor by fighting ethically versus fighting efficiently with force and brutality. The former allows commanders to march home, confidently returning in honor; the latter taints their honor, causing them to skulk home in disrepute.

CONTROLLING IDEA

Soldiers will sympathize with Massu's dilemma. His paratroopers, called *paras*, were ordered to quash a genuine threat to innocents. What ought a commander do? How many innocent people should suffer before taking aggressive actions to end the scourge? Admittedly, in the modern concept of war, a certain segment of the civilian population supports the war effort, such as transportation or war munitions plant workers; these people may arguably become members of the combatant class of people liable to be attacked-while conducting their war-related duties. It would seem reasonable that a munitions worker might be indirectly attacked while working at the factory making artillery shells. However, killing him while he reads a bed time story to his daughter would be unreasonable and unjust. At that point when he is with his daughter, he has resumed his natural status as a non-uniformed person and should regain the protections afforded a noncombatant. If this claim is not reasonable, then it would follow that he could never be protected. Killing him and his daughter would simply be another attrition tactic, the cost of doing business in morally challenging world. It would be reasonable to view soldiers righteously prepared with unique vigor to halt glorified murders of otherwise innocent persons.

In our own country, too many people are not inclined to understand the extent of the task in countering terrorism. Media coverage of the Iraq war makes moral evaluation too easy and antiseptic in determining what is or is not necessary and permissible. Television coverage rarely allows us to see-and feel--the harm done to innocents-but the *paras* did. At first glance, it would have been easy to assume their tactics were necessary and justified. Any sympathy for the *paras* should be leavened with regret, since they followed the orders of General Massu. However, he relied on a highly elastic, but illegitimate, interpretation of Military Necessity to justify *para* efficiency to avert a humanitarian emergency. Instead of avoiding atrocity, he created his own humanitarian emergency, an Abu Grhaib-like atrocity committed in France's name. In so doing, he trampled over *jus in bello* and a millennium of Christian and international legal norms constraining the actions of soldiers in the field.¹⁰

In order to acquaint the audience with Algiers, the first part of the paper will summarize the threat posed by the *fellagha* and Massu's challenge. The second part will analyze his conduct as a commander in crafting counter-terrorist operations to defeat the *fellagha*. The remaining parts of the paper will review in turn the ethical limitations which ought to have guided Massu as a commander in the field. Once the limitations have been argued, the parting lesson should become apparent. While victory for commanders is desirable, winning with nobility is obligatory.

THE GENIE UNLEASHED: FLN TERROR

Algiers became an urban battlefield for symbolic, military, and philosophical reasons. The capital of French Algeria was a French overseas department considered an extension of metropolitan France similar in relationship as Hawaii is to the continental United States.¹¹ For the FLN, Algiers attained unique status in the third year of the war for independence. The fellagha had gained control over the lightly settled hinterland, but could not militarily defeat the French Army.¹² Facing a military stalemate favoring France, FLN leaders chose an asymmetrical strategy to strike French Algeria's soft underbelly. Terror attacks against civilians would not only bolster Algerian morale and bring the war home to European civilians, but would also gain support in the United Nations among Third World countries.¹² Attacking civilians in Algiers would gain unmistakable media attention undermining France's legitimacy.

The effectiveness of the FLN strategy cannot be denied. European morale plummeted as Algiers' once secure streets portended danger. War weary Algerians began to see flickers of success as their colonial superiors starting feeling the fear they had long felt.¹⁴ Philosopher William V. O'Brien describes the utility of terror campaigns: "insurgents use terror tactics designed to subvert the confidence of the populations in the regime and its prospects. The message implies in these tactics is that no one is safe anywhere as long as

the regime remains in power."¹⁵ The essential ethical point concerns the intent to harm, because the "terrorist aims to harm or kill the innocent, whereas legitimate acts of war, when they do harm the innocent, do so unintentionally," according to Jeff McMahan, author of "War and Peace."¹⁶

In a terrorist war, the innocent must suffer. On this battlefield, European civilians were the primary targets. Not everyone thought European deaths were evil. Jean Paul Sartre, the prominent French existentialist philosopher, considered killing European civilians to be permissible, if not essential, for Algeria's political and philosophical liberation: "To shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses at the same time: there remains a dead man and a free man."¹⁷ Hence for the FLN, the terror campaign metaphorically became a justified battle without limits for Algerian liberation against French masters. In Sartre's existentialist philosophy, innocent Europeans had to suffer, as had innocent Algerians in this war, as a matter of course for the liberation of Algeria.¹⁸

And so, the FLN terrorists planted bombs in the European quarter-in restaurants, discos, milk bars, coffee shops, lamp posts, and sports stadiums-in sites populated by young Europeans. These locations were hardly the places to fight a just battle between peer combatants. Gillo Pontecorvo's classic film The Battle for Algiers visually portrays the terrorist handiwork.¹⁹ "The jukebox is flung into the middle of the street. There is blood, strips of flesh, material . . . the white smoke and shouts, weeping, hysterical girls' screams. One of them no longer has an arm and runs around howling despairingly; it is impossible to control her."²⁰ Street crime and random killings terrorized Algerians and European civilians alike, causing fear and uncertainty.²¹ Colonel Roger Trinquier, a French counter-revolutionary theorist, suggested the power of the *fellagha* noting that power grew from bombs, knives, as well as the barrels of guns.²²

LA RIPOSTE: THE FRENCH RESPONSE

When Governor-General Robert Lacoste recognized that Algiers had reached crisis proportions, he ordered General Massu to assume the duties of magistrate and security czar. He empowered Massu with virtual dictatorial powers under the Special Powers Act which suspended civil rights--largely for Algerians--to suppress the terrorists. Then Major Paul Aussaresses, who would run Massu's interrogation and torture system, stated "Robert Lacoste, a member of Guy Mollet's government... appointed General Massu to eradicate terrorism rapidly and by using all means necessary. I was called upon to carry out this policy by Massu..., knowing that such a result could not be achieved, unfortunately, without dirtying one's hands."²³ Massu himself characterized his portfolio as "the most extensive powers for undertaking any exceptional measure dictated by circumstances with a view to the reestablishment of order, the protection of persons, and property and the safeguard of territory."²⁴

It is not known if Lacoste had authorized the use of any and all means necessary to the task.²⁵ Nevertheless, the record suggests Massu acted as if he had. The *paras* operated within the city quarters inhabited by Arabs. Their hallmark of para operations centered on the forceful seizure of the Casbah. Massu correctly considered the old Arab quarter to be the FLN's center of gravity. Accordingly, the *paras* blanketed access to the European quarters from the Casbah with patrols and wire obstacles. Nightly curfews immobilized Casbah inhabitants in their homes allowing patrols to close on suspected *fellagha* and terrorist targets. *paras* entered homes without warrant, searching and ransacking the insides for *fellagha*. Patrols checked Arab men for their identities. Known or suspected FLN supporters were rounded up along with many innocent Algerians. Massu's audacity and celerity definitely placed the *fellagha* at a disadvantage. As the *paras* blanketed the city, terror attacks dropped precipitately. FLN leaders fled Algiers to escape arrest. In short order, the *paras* re-established French authority with few, if any, legal or ethical constraints.²⁶ Carl von Clausewitz, author of On War, would have approved of Massu's ruthlessness from a theoretical perspective. From the French perspective, counter-terrorist operations were not police actions but were security operations in an internal war. The earlier reference to Clausewitz noted that war is theoretically designed to accomplish policy. In this case, French policy would have ended the terrorist attacks, subdued the Arabs, and defeated the FLN objectives. Clausewitz recognized the need for ruthless tactics, Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. . . . If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand. That side will force the other to

follow suit: each will drive its opponent toward extremes, and the only limiting factors are the counterpoises inherent in war.²⁷

Massu used his extraordinary powers to "adapt" the criminal justice system to wartime conditions.²⁸ The courts treated apprehended terrorists as first time offenders, often releasing suspects on bail who promptly disappeared into the Casbah without appearing for trial. Jacques Chevallier, a former government minister, highlighted the system's failings.

The Algerian rebellion revealed how ill-fitted our judicial and legislative processes were to cope with an unprecedented state of affairs which forced us to undertake veritable military operations against French citizens . . . in peacetime, and under a peacetime regime. The slowness . . . at the outset of the rebellion . . . compelled the responsible authorities to take illicit steps if they wished to act rapidly and effectively. This required of them the assumption of personal responsibilities that they sometimes refused to shoulder.²⁹ Colonel Lacheroy, a para commander, fittingly noted one cannot "fight a revolutionary war with the Napoleonic code."³⁰

In response to calls for Algerian independence, France consistently declared the emergency to be an internal matter beyond the purview of the United Nations. French policy placed Massu in a difficult situation. Paris would not depart from peacetime law and declare martial law as a response to the emergency. Martial law would have been a tacit recognition of the FLN. Otherwise, the *fellagha* could remain classified as trouble makers or bandits but not as genuine political threats to French authority. The FLN could not increasingly proclaim itself as legitimate organization representing Algerian national aspirations. In the absence of martial law, Massu relied on a broad interpretation of his extraordinary powers to create a security apparatus which circumvented peacetime legalisms. He authorized interning suspects in camps de *triage et de transit* without probable cause, warrants, Miranda warnings, or *habeas corpus* during peacetime. Suspects were interned indefinitely including former felons who had already served their prison sentences.³¹ Illegal summary executions, actually revenge murders, eliminated intransigent FLN operatives, called the "irreducibles."³²

Interrogators secured information using "close interrogation," a term for brutality and torture. The French army adopted the doctrine of Collective Responsibility to guide, and even justify, whom to interrogate. Under Collective Responsibility, the *paras* considered all Algerians as willing or unwilling FLN supporters. In reality, the FLN often coerced Algerians in supporting the revolution when nationalism, religious fervor, or race hatred failed to motivate the masses. In the course of the battle, many presumed innocent Algerians suffered unnecessarily. Algerian men and women became information sources, not persons who deserved respect. When an Arab man was considered only a source, a thing, or an icon on a map, he became de-personalized. He would have lost moral significance, making it intellectually easier to beat or drown, or apply Algiers's most useful tactic for gaining information: *La gengene*.³³ *La gengene* involved electric shock treatment. Electrical current generated from cranking a field telephone creates enough juice to influence behavior. When bare electrodes were attached to the breast, genitals, or ears, the source quickly succumbed. Pontecorvo's opening scene shows an Algerian man following *La gengene*; he was less a man than a quivering mass of flesh after his interrogation.

Close interrogation was efficient in providing dramatic successes. Intelligence officers uncovered the heretofore shadowy nature of the terrorist organization. *paras* then attacked key terrorist infrastructure: bomb factories, arms caches, "banks," and fund collectors. Armed with quality information, like information from the tortured Algerian mentioned, the *paras* destroyed the remaining terrorist cells. Captured FLN files indicated despair: "We are no longer protected by legality. We ask all our friends to have legality re-established; otherwise we are lost."³⁴ Once the *paras* had captured the chief FLN terrorist, the terror ended, bringing peace to Algiers.

The French public had initially lionized the *paras* as the heroes of the war until their disproportionate and indiscriminant tactics became widely known. *La gengene* alienated the home front, as draftee soldiers and Catholic clerics reported home the brutalities used to collect information. Regular soldiers like the *paras* desperately wanted to win; they understandably rationalized impermissible tactics as necessary evils against a far more evil FLN behavior. One para officer stated he "received the order to torture with a view

for collecting information . . . They were told the end justified the means, and that France's victory depended on it (torture)."³⁵

To his credit, Massu worried about using impermissible means for victory. He sought counsel from Father Louis Delarue, his division chaplain. He prepared a position paper relying on the doctrine of Double Effect from Natural Law ethics to argue that using a lesser evil would be permissible but only to defeat a far greater evil: "Between two evils, it is necessary to choose the least. So the innocent persons should not be unjustly punished and put to death or mutilated, the criminals must be punished and put effectively out of harm's way."³⁶ To quiet his critics, Massu submitted to *La gègne*. Of course, he could end his session; suspects could not.

MASSU'S DEFENSE: NECESSITY FOR TOUGH COUNTER-TERRORISM

It might be argued that Massu acted under compulsion-necessarily but with regret-using normally impermissible tactics to save innocents from harm. Principles developed during the post-war Nuremberg trials appear to support claims for justified Military Necessity. Francois de Menthon, a French prosecutor at Nuremberg, had argued that criminal actions in war created a situation outside of *jus in bello*. Under French reasoning, the FLN had committed internal war against the legitimate government. Hence, they were criminals. De Menthon explained the inadequacy of applying peacetime law in differentiating between external and internal aggression.

Acts committed in the execution of a war are assaults on persons and goods which are themselves prohibited . . . The state of war could make them legitimate only if the war itself was legitimate. As Mr. Justice Jackson has already argued . . . any recourse to war is a recourse to means that are in themselves criminal. . . . A war perpetrated in violation of international law no longer really possesses the juridical character of a war. It is truly an act of gangsterism, a systematically criminal undertaking.³⁷

Although de Menthon's argument failed to persuade his peers, he raised issues concerning state sovereignty. The FLN rebellion was akin to internal war which buttressed French claims of justified necessity. First, the Algerian rebellion itself was an illegal assault against the lawful French political order (because issues about the justice of French Algeria were not considered relevant by France). Secondly, FLN terrorists had long violated the principles of Discrimination and Proportionality by their barbaric rapes and mutilations of European civilians, especially females and wounded soldiers. FLN atrocities were clearly unlawful under any legal or moral code of behavior which could hardly be justified in overturning the colonial order. Finally, for 1950 France, national sovereignty was considered sufficient to justify self-defense and self-preservation against external or internal assault.

Paul Christopher summarizes a series of ethical writings which would have supported the French cause. Lieber's code developed during the Civil War stated the unarmed citizen "is to be spared in person, property, and honor as the exigencies of war will admit" presumably including living free from terror.³⁸ Paul Ramsay refers to Reinhold Niebuhr's attitude that war contains mixed consequences, in which proportionality involves choosing the lesser of two evils.³⁹ Alastair Horne aptly names the Algerian conflict A Savage War of Peace. During the fighting in the countryside and in the cities, Horne suggests that the security forces and the *fellagha* alike had committed various atrocities. Civilians and soldiers suffered crimes and indignities which could never be justified under *jus in bello*. From the FLN perspective, a war of liberation provided a unique moral justification for relying on terrorism, as the *fellagha* threatened the European's strategic rear area. As the Jean-Paul Sartre reference suggested, liberation movements may be excused for using an immoral means when combating the military superiority of the security forces. Nonetheless, the history of the conflict indicated that *fellagha* terrorism was as intrinsically immoral as violations of the principle of discrimination as were similar French atrocities committed against Arab men and women.

It is easy to understand Massu's position. Harming Algerian noncombatants to defeat the terrorists was regrettable, but the FLN had radicalized the terms of battle with its unethical behavior. The *fellagha* intentionally sought shelter among Algerian civilians as shields from French attacks.⁴⁰ In doing so, they undermined the principle of Discrimination, making identification of combatants problematic.⁴¹ Algerian women played their role by intentionally carrying weapons and explosives under their *hijabs*, taking unjust advantage of respect for Islamic custom. While many Algerians did support the insurgency, the FLN had coerced Algerians into supporting the revolution, making Collective Responsibility somewhat credible. For

example, Pontecorvo's film shows FLN operatives killing a pimp, an informer, and an alcoholic for rejecting FLN revolutionary and Islamic ideals.

Algiers clearly shows the inadequacies of applying *jus in bello* in evaluating wars of independence or wars of national liberation. Philosophers and jurists applying *jus in bello* must realize the intent of the Just War. Its principles were originally intended for evaluating the conduct of soldiers of the sovereign, namely an emperor, prince, king, or more recently a national government. Since the Treaty of Westphalia, the Just War has applied to nation-states. The Algerian War was fought on one hand by France, a nation-state, against a non-state actor, the FLN. The incongruence between the two main actors makes the application of the Just War and its principles uneven to say the least. In comparing proper conduct between a nation-state and an amorphous non-state organization people, traditional principles do not appear to resonate as clearly. An objective analysis of Algiers may be too difficult to achieve at this time without a major re-structuring of *jus in bello* for Algerian-type wars. On one hand, evaluating the limited period of the battle (from September 1956 to October 1957) would fail to consider the injustices imposed on the Algerian people by the colonial regime.⁴² When the battle is evaluated from Massu's perspective, the battle appears all too readily like the atrocity of unprovoked slaughter of innocent noncombatants, at least within Algiers. Under the traditional principles of *jus in bello*, O'Brien would argue that the FLN had perpetrated war crimes, "committed on the occasion or on the pretext of hostilities is criminal unless justified by the laws and customs of war."⁴³ When an enemy fails to fight fairly, it would seem reasonable to override the rules when, as O'Brien notes, "it appears that the contemporary *jus in bello* (would have) left law abiding belligerents⁴⁴ very much at a disadvantage vis-à-vis law breaking belligerents." Christopher refers to Francisco de Vitoria, a Just War theorist, to assess the complexities of an urban battle like Algiers: "Sometimes it is right, in virtue of collateral circumstances, to slay the innocent . . . The proof is that war could not otherwise be waged against even the guilty and the justice of belligerents would be balked."⁴⁵ Vitoria has claimed, it "is never right to slay the guiltless, even as an indirect and unintended result, except when there is *no other means of carrying on*."⁴⁶ Such behavior was impermissible, even as the FLN argued France had committed similar transgressions in the mechtas of the Algerian countryside. In Just and Unjust Wars, Michael Walzer refers to the German doctrine of *kriegsraison* to describe the Moral Realist position; during wartime, morality should be irrelevant. *kriegsraison* reflects Clausewitz's concept of Ideal or Absolute War in which war logically has no limits, legal or moral. In Ideal or Absolute War, antagonists would fight ceaselessly, until one side is overthrown.⁴⁷ The doctrine justifies not only whatever is necessary to win the war, but also whatever is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in the course of the war primarily for soldiers in the field. If Walzer is correct, the doctrine is not about necessity at all; it is a way of speaking in code, or a hypothetical way of speaking, about the probability and risk.⁴⁸ Under of *kriegsraison*, morality becomes void or at least muted once soldiers take to the battlefield-and for good reason. Military ethics and morality act as a kind of friction. Just as sand may bind the moving parts of a machine, ethics and morality limit the prosecution of battle by the proverbial military machine. Tactics considered necessary for overthrowing the enemy must be examined, discussed, and evaluated. The delay on timely, decisive orders may be crucial, especially when engaging an elusive irregular foe like the *fellagha*. One need only see vintage photographs of limbless children and horribly maimed girls to understand the appeal of *kriegsraison* to the French security forces.

This doctrine may seem credible to people facing extreme conditions. During wartime or a crisis, many people might be inclined to embrace a liberal interpretation of militarily necessary tactics in the interests of security. Fighting shadowy non-state organizations like the FLN might require non-standard, extraordinary tactics. The same people might consider Algiers to be an emergency situation in which the traditional rules would not apply. Extraordinary measures might be permitted during a limited period, although the same measure would not be considered permissible under the Just War

Against shadowy terrorists, the *paras* would have been fighting under-equipped under *jus in bello*, instead of relying on efficiency as the critical military virtue. Massu certainly may have been a Clausewitzian fighting Ideal War, as he issued orders to men like Aussaresses. Pontecorvo represents his position by the character of Colonel Matthieu. To save French Algeria, he says in the film to the media, the French would have to fight all-out to win. Logically speaking from Clausewitz's point of view, Massu could do no less⁴⁹. His later arguments that *La gèzene* was a limited, but necessary adjunct to a dirty war sound hollow when

the world learned how Major Paul Aussaresses personally reported to Massu on the torture and killing apparatus.⁵⁰ We should now consider the ethical limitations Massu should have recognized.

LIMIT # 1: ETHICS AND MILITARY NECESSITY

Massu's drastic response could appear justified under Act Utilitarian terms. Act Utilitarians define morally right and obligatory actions as those providing the greatest good, measured by minimizing pain, for the greatest number of people. When people are considered in this calculation, some will benefit; those who do not may suffer greatly. The Just War stands in opposition to the Utilitarian point of view as a kind of moral friction staying the hand of the commander who could order wide-ranging death and destruction.

Utilitarians care little for staying the commander's hand, for doing so creates the inefficiency, the friction, which prevents attaining the greatest good. For Massu, the most favorable end - state would have meant an outcome favoring almost certain to benefit only France, Algiers' Europeans and his *paras*. The Algerians' fate would not be morally relevant; on this point, they would lack moral significance in French military calculations. In this case, Christopher notes that if *jus in bello* has been absorbed into international law but with Utilitarian flavor, the Just War concept would lose its original humanitarian dimension. *jus in bello* would also become a mere voluntary guideline which would be easily defeated by a Utilitarian formulation of morally right actions.⁵¹

William V. O'Brien interprets Military Necessity as composed of three principles: proportionality; discrimination of combatants, and prohibited means.⁵² Militarily necessary actions are legitimate tactical and operational business permitting "the use of only such force as is truly necessary for military success" (emphasis provided).⁵³ Military Necessity justly short-circuits *jus in bello* by practical discretion--*but only in specific episodes*.⁵⁴ "Violations of the laws of war . . . which include but are not limited to murder, ill-treatment of prisoners-of-war, or persons on the seas, killing of hostages, plunder of property, wanton destruction of cities, towns, or villages or devastated *not justified by military necessity*."⁵⁵ Walzer characterizes the nature of battlefield dynamics with a reference to Napoleon in order to create a stark contrast when explaining Military Necessity as an ethical principle. "Soldiers are made to be killed," according to Napoleon. Walzer reminds us that while soldiers are expected to take risks, civilians are not meant to be killed. For Walzer, herein lies the meaning of *jus in bello* and the ethics of war.⁵⁶ Civilians are members of a protected class who should be protected under international law *by every combatant*--including terrorists and freedom fighters.

O'Brien provides a more useful concept for defining Military Necessity that prevents the principles of *jus in bello* from becoming speed bumps on the operational highway to utilitarian success:

Actions are permissible and justified under military necessity if and only if:

1. Immediately indispensable and proportionate to a legitimate military end.
2. Not prohibited by the laws of war or natural law.
3. Ordered by a responsible commander, who is subject to judicial review.⁵⁷

Under O'Brien's theory, Military Necessity is not an extraordinary, but a contingent right: "It is the right to perform the normal, legitimate, unquestionably legal acts designated by the law as 'permissible violence.'"⁵⁸ Military tribunals at Nuremberg defined a permissible time frame for immediacy of action within a reasonable period against an expected threat. Under "imperative necessity," permissible necessity was distinguished from mere convenience or expedience.⁵⁹ In problematic circumstances, like Algiers, Discrimination and Proportionality must be balanced against achieving legitimate military ends.⁶⁰ Restoring peace and dispensing justice would only justify proportionate actions in defense of just applications of force. Even "perfectly lawful means of warfare become unlawful when their use is superfluous."⁶¹ O'Brien thus would have rejected the Act Utilitarian approach to ethics in war.

LIMIT # 2: ETHICAL OBLIGATIONS UNDER MILITARY LAW

War is the most serious of endeavors, "a matter of vital importance to the State; the province of life or death; the road to survival or ruin," according to Sun-Tzu.⁶² We should expect our soldiers will fight honorably in our names for such a vital task, using practical, but limited, levels of violence against their opponents because they fight for us. Their dishonor is also our shame. Citizens must consider whether commanders have acted justly and honorably. We should know whether commanders have empowered their soldiers to use tactics and strategies which reflect national values, let alone moral principles, or not. In

the interests of expedience and efficiency, governments may defer to commanders in the use of tactics and strategies, not already proscribed, as necessary and permissible for achieving policy objectives. When deference has been given to commanders, the public has an affirmative right to understand the influence of Military Necessity upon military operations.

International conventions have codified Just War principles in the precepts of military law. American military law encompasses *jus in bello* as a legal constraint on military force within a battle space. Commanders must consider specific standards for right conduct in the delivery of lethal force on the battlefield. American soldiers remain obliged to obey legal orders of their superiors by the Uniform Code of Military Justice (UCMJ) during war and peace. Thus American commanders cannot operate in a moral free-fire zone.

Military Necessity offers soldiers justifiable exceptions to the Law of War for two simple reasons. Soldiers already run risks. We cannot expect them to be so law abiding that they will have to be burdened with additional, unnecessary risks that, first, would undermine their motivation to fight for us, and second, run the risk of being so good, so lawful, they guarantee genuine evil will emerge victorious. It would seem reasonable to grant legitimate overrides of *jus in bello* as a means for achieving victory within acceptable limits. The caution herein lies in being reasonable. If commanders are allowed broad and elastic definitions of necessity, *jus in bello* becomes a mere speed bump in moral calculations. It is not necessary to be a military or battle lawyer experienced in operational law to recognize the role played by the Geneva and Hague Conventions. Treaty signatories are legally and ethically bound to avoiding the maximum levels of military force found in Clausewitz's conception of Ideal or Absolute War. Although the American and French militaries are different, they share relevant characteristics which makes it reasonable to argue by "Military Analogy" that French commanders faced legal constraints similar to those facing U.S. commanders, then and now.

U.S. Army field manuals establish doctrinally correct positions. Although Army Field Manual 27-10, The Law of Land Warfare, is not military law, it establishes the concept of *jus in bello* as proper conduct for American soldiers. It provides "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States."⁶³ FM 27-10 defines the Law of Land Warfare in consonance with *jus in bello* in discriminating combatants from noncombatants and limiting unnecessary suffering.

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace⁶⁴

American commanders are ethically obliged to abide by these constraints through their commissioning oaths to obey superiors and defend the Constitution. Article I, of the Constitution empowers Congress to raise and support armies and to make all laws necessary and proper for prosecuting war. Congress legislates the punitive articles of the Uniform Code of Military Justice (UCMJ), the American military's legal system. Article II empowers the President, as the Chief Executive, to command the military and enforce the law. Article VI affirms that treaties ratified by the Senate are considered the Supreme law of the Land.⁷⁴⁶⁵ France and the United States are both signatories to the Geneva and Hague Conventions. The Conventions require civilized, humanitarian behavior toward prisoners of war and norms for fighting against bona fide combatants.⁶⁶ American commanders are required to obey lawful orders of their superiors by the UCMJ, making them liable for prosecution for violating military law.⁶⁷

Military Necessity justifies overriding *jus in bello* only on a limited basis. Permissible conduct is defined not only by positive law but also "unwritten or customary law . . . firmly established by the custom of nations and well defined by recognized authorities on international law."⁶⁸ FM 27-10 further limits justifications of under Military Necessity:

The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies *those measures not forbidden by international law which are indispensable*

for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.⁶⁹ If the Military Analogy succeeds, Massu was similarly constrained by military law and the Geneva Conventions. In the end, commanders are not war lords; they are accountable to a national civilian leadership.

LIMIT # 3: OBLIGATIONS OWED TO CIVILIAN LEADERSHIP

Commanders of the armies of democratic states cannot normally choose which laws to ignore. Enacting laws is a political and a legislative function.⁷⁰ In democratic states, commanders function under the authority of civilian leaders who remain stewards of national values. They constitute the State's competent authority which alone can decide the terms for conducting war. Commanders may recommend policy alternatives but must follow policies or must resign. Elected officials alone can override *jus in bello* in response to the severest threat. Eugene Burdick's novel Fail Safe demonstrates the critical role of the American president in ordering the US Air Force to destroy New York City to compensate for the destruction of Moscow by an errant American nuclear weapon. Preventing a nuclear holocaust is a life and death decision which must remain the elected politician's responsibility. Eliot Cohen's Supreme Command argues that great wartime commanders, Lincoln, Clemenceau, Churchill, and Ben-Gurion, questioned their commanders' strategies precisely to retain civilian oversight over military operations involving their citizens. We should remember the timeless argument from On War offered by Clausewitz. War is a function of soldiers, but in the final analysis Clausewitz clarifies the nature of war: "War is the continuation of policy by other means."⁷¹ So long as war remains a continuation of policy, Fareed Zakaria writes, it "takes politicians to make political judgments."⁷²

Certain policies cannot lawfully be chosen by generals because they are laden with political significance. One political judgment not ordinarily permitted is the reprisal to punish the enemy, in this case the FLN, for not complying with *jus in bello*.⁷³ In the Military Analogy, an American commander in Massu's shoes would have been a middle manager in the national defense establishment. He could not order reprisals without receiving military and political authorization. American military law stipulates reprisals as "acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare." The theory of reprisal may be reformulated as follows from the Operational Law Handbook (2003):

A reprisal is morally permissible if and only if:

1. It is a timely response to an enemy violation of the Laws of War.
2. It follows the use of a series of lesser forms of redress.
3. It is a proportional response without attacking protected persons or prisoners of war, entire civilian populations, civilian property, cultural property, objects indispensable to the survival of a civilian population, including the natural environment.⁷⁴

FLN terrorists certainly could fit the description of an unscrupulous enemy who fight outside of *jus in bello*. FM 27-10 indicates the legal and moral limits of command: "On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of unlawful acts."⁷⁵ The time element and requirement to investigate and take redress required by conditions 2 and 3 undermine Massu's argument.

Waging war honorably requires moral disinterestedness. When generals personalize their experiences, they undermine the normative character of *jus in bello*. Reprisals can "never be adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices," as FM 27-10⁷⁶ explains. In American military law, individuals or units are not authorized to execute reprisals; this authority is reserved to the President and the Secretary of Defense.⁷⁷ Craven Fourth Republic politicians appeared to permit tacitly impermissible decisions they themselves would not make. The Nuremberg trials made superior, but immoral, orders invalid for moral justifications. Even when the competent authority is not clear, commanders must determine what is morally permissible as a function of command, according to Laurence Grafstein:

"There are simply no circumstances in which the premeditated targeting of innocent civilians is justified. And the widespread, institutionalized use of this illegitimate tactic . . . even in a supposedly legitimate cause, not only undermines that cause, but also calls into question the very legitimacy of that cause."⁷⁸

Nonetheless, field commanders cannot justly be modern day Attilas the Hun notwithstanding superior orders and emergency powers.

LIMIT # 4: SUPREME EMERGENCY AND JUSTICE

The final and possible justification for Military Necessity depends on what Michael Walzer calls "Supreme Emergency." In Just and Unjust Wars, he grapples with the most dramatic ethical crisis a political community could face in obeying or overriding *jus in bello*. In 1957, Algiers may have appeared to qualify as a true humanitarian emergency justifying special tactics. In order to understand Walzer's theory of Supreme Emergency, it will be necessary to reformulate his concept as follows:

A threat is a Supreme Emergency if and only if:

1. The survival of a political community is endangered with extinction.
2. The threat mentioned in paragraph 1 above is imminent.

One may easily rationalize the threat to a political community like French Algeria, but rationalization would have to ignore moral reality and historical precedent. Walzer is defining the threat as the extinction of a people by pogrom or genocide. The Armenians in Turkey, the Jews in Nazi Germany, or the Tutsis in Rwanda are obvious examples which could arguably justify extreme defensive measures using a sliding scale of morality. The sliding scale responds to the more severe the threat with increased justified leeway to defeat the gravest threat, such as a possible nuclear holocaust.⁷⁹ Such grave, imminent threats permit political community leaders to override *jus in bello*.⁸⁰

Algiers does not rise to the level of a Supreme Emergency on several levels. Walzer's intent concerns the extinction of a political community or a nation, not a colony like French Algeria. "Extinction" comes from the Latin verb *extinguer*. The American College Dictionary definition defines extinction as "No longer existing in living form."⁸¹ Under condition number 1, the threat would have had to have been an impending reality. Although the Algerians outnumbered the Europeans 9 to 1 nationwide, an FLN victory could have meant total military defeat of the French Army followed by a massacre of all Europeans. Neither seemed likely at the time. Under condition 2, Algiers would have had to be a grave or imminent threat. Hundreds of Europeans were harmed or killed during the wave of terror out of an urban population of one hundred thousand Europeans; these losses hardly constitute a grave threat. The FLN did sponsor a holocaust of an estimated 100,000 pro-French Arab collaborators, but as French Algeria died, Europeans departed for France in peace.

The ultimate nail in a coffin for claiming Supreme Emergency is its political nature. As in the Fail Safe example, elected leaders would have been the sole justified decision makers in this crisis.⁸² Massu might have felt pressure from Paris, but even using the rhetoric of Supreme Emergency would have been outside of his authority. By the Military Analogy, he would have been obligated to enforce *jus in bello* and would have remained responsible for crimes committed by command, according to the Operational Law Handbook (2005).⁸³ Even Clausewitz would agree, since real war is not the equivalent of Ideal or Absolute War. Clausewitz recognized theory must give to reality, including the prevailing political and ethical constraints.

We must, therefore, be prepared to develop our concept of war as it ought to be fought, not on the basis of its pure definition, but by leaving rood or every sort of extraneous matter. We must allow for natural inertia, for all the friction of its parts, for all the inconsistency, imprecision, and timidity of man; and finally we must face the fact that war and its forms result from ideas, emotions, and condition prevailing at the time . . . It follows that war is dependent on the interplay of possibilities and probabilities . . . in which strictly logical reasoning often plays no part at all and is always apt to be a most unsuitable and awkward intellectual tool.⁸⁴

Accordingly, in the absence of Supreme Emergency, he could not use a sliding scale of morality to justify impermissible tactics under Military Necessity.

The consequence of unjustifiably overriding *jus in bello* cost France dearly. When Massu ordered the *paras* to fight unethically, his orders compromised his country's values. While the *paras* might have ignored this

reality, Frenchmen at home did not. Terrorism expert Bard O'Neill summarizes the practical costs of acting unjustly during the battle of Algiers:

While the French won on the battlefield, the Algerians won the war. The reason for this paradox was that the Algerians were able to maintain widespread popular support and wear down the French resolve through skillful propaganda efforts and abroad, to exploit violent excesses by the French (torture and terrorism), and to pose the prospect of a costly and interminable struggle."⁸⁵

More succinctly, Paul Teitgen, who had opposed Massu's strategies while Algiers police commissioner, put it more frankly: "All right, Massu won the Battle of Algiers in 1957; but that meant losing the war."⁸⁶ Algiers should demonstrate that a shameful victory won without justice and honor should be rejected. According to Cicero, "It is a shameful victory **unless it is gained with honor . . . In truth, it is a noble thing for a man to refuse to gain the victory by foul acts.**"⁸⁷ Walzer brings home succinctly the final lesson that should be learned from the Battle for Algiers: "Do justice even if the heavens fall."⁸⁸ Otherwise, we will not respect ourselves in the morning.

CONCLUSION

Three lessons remain self-evidently clear. First, soldiers at all levels must recognize the moral differences between morally right and morally wrong orders. American soldiers cannot be compelled to execute blatantly immoral orders. Neither should the *paras* be compelled to fight like so many terrorists in battle fatigues. Massu should have known this lesson in his role as a commander and general officer, even in the French Army. Second, this moral stance is embedded in objective morality which stands outside of and independent of international and positive law. Military ethical principles are trump cards over man-made imperatives. The legacy of Nuremberg re-affirmed the just principles of *Jus ad bellum* for choosing a war policy. Soldiers must remember not only their military training but the moral training of Western moral and religious traditions which should influence their awareness of *jus in bello*. Finally, Military Necessity should authorize only truly legitimate-morally just-tactics and strategies. Clausewitz suggests how a narrowly technical, value-less military might operate should the ideal become the real war. Yet, he was wise enough to recognize that Real War would necessarily be influenced by an operational environment influenced by political and other limitations, including *jus in bello*. Sometimes commanders will require insight from military lawyers-"battle lawyers"-steeped in operational law. In the ideal war, not to be confused with Clausewitz's Ideal or Absolute War, commanders will understand their ethical limitations first as moral soldiers doing difficult but justified work but also as moral men who hear the echo of a millennia of Western and Christian injunctions for fighting war well. Victory should not come cheaply at the cost of justice and honor.

Walter A. Schrepel is an Associate Professor in the Social Sciences Division of the Kansas City Kansas Community College. Walt has been teaching Philosophy and Ethics for KCKCC since 1993. He has also taught a variety of courses at the following colleges and universities: U.S. Military Academy, U.S. Army Command and General Staff College, West Texas College, KCKCC, Saint Mary College, Park University, Keller Business School, Upper Iowa University, Friends University, and Fort Hays State University.

WORKS CITED

Ambler, John Steward. The French Army in Politics 1954-1962. Columbus: Ohio State University Press, 1966.

The American College Dictionary of the English Language. Ed. William Morris. American Heritage Publishing Company, Inc.: New York, 1970.

Christopher, Paul. The Ethics of War and Peace: An Introduction to Legal and Moral Issues. Prentice-Hall: Englewood-Cliffs, 1994.

_____. Just War Theory: A Historical and Philosophical Analysis. Dissertation, University of Massachusetts, 1990.

Clausewitz, Carl Von. On War, ed. and translated by Michael Howard and Peter Paret. Princeton University Press: Princeton: 1976.

Cordesman, Anthony H. "The Second *Intifada* and the Lessons of Jenin: The Grim Realities of Urban Warfare." Washington, D.C. Center of Strategic Studies, April 24, 2002.
http://www.csis.org/media/csis/pubs/israelvspale_intafada11.pdf.

Cohen, Eliot. Supreme Command : Soldiers, Statesmen, and Leadership in Wartime. New York: Free Press, 2002.

Derradji, Abder-Rahmane. The Algerian Guerilla Campaign: Strategy and Tactics. Queenstown: The Edwin Mellen Press, 1997.

Gorce, Paul-Marie de la. The French army: Political-Military History. trans. Kenneth Douglas. New York: George Braziller, 1963.

FM 27-10. Law of Land Warfare. 18 July 1956. <http://www.afsc.army.mil/gc/files/FM27-10.pdf>.

Grafstein, Laurence. "Age Limit," in The New Republic. June 4, 2002. Accessed 26 July 2007.
<http://www.ajiac.org.au/updates/Jun-02/050602.html>

Harriss, C.E. Analyzing Moral Theories. Belmont, California: Wadsworth, 1986.

Hartle, Anthony E. "Humanitarianism and the Laws of War," in Philosophy. 61. 1986, pp. 109- 113.

Horne, Alistair. A Savage War of Peace: Algeria 1954-1962. New York: The Viking Press, 1985.

Keegan, John, A History of Warfare. Toronto: 1994.

Irving, R.E.M. The First Indochina War. London: Croom Helm, 1975.

Jureidini, Paul A. and La Charte, Norman A., and Cooper Bert H. and Lybrand, William A. Casebook on Insurgency and Revolutionary War: 23 Summary Accounts. Special Operations Research Office: Washington, D.C., 1962.

Kelly, George Armstrong. Lost Soldiers: The French Army and Empire in Crisis, 1947-1962, Cambridge, Massachusetts: M.I.T Press, 1965.

Larteguy, Jean. The Centurions. Trans. Xan Fielding. New York: E.P. Dutton & Company, Inc., 1962.
 _____. "Lawyer: "Dirty Bomb Suspect's Rights Violated," 11 June 2002, CNN.
http://archives.cnn.com/2002/US/06/11/dirty_bomb_suspect/.

Lost Command. Directed Mark Robson. 1965.

Massu, Jacques. La Vraie Bataille d'Alger, Librairie Plon, Paris, 1971.

McMahan, Jeff. "War and Peace," in A Companion to Ethics, ed. Peter Singer, Cambridge, Massachusetts: Blackwell, 1993.

Moseley, Alex. "The Just War Theory," in Internet Encyclopedia of Philosophy.
<http://www.utm.edu/research/iep/j/justwar.htm#The Principles Of Jus In Bello>.

O'Brien, William V. The Conduct of Just and Limited War. New York: Praeger, 1981.
 _____. "The Meaning of Military Necessity In International Law" in World Polity, 1 (1957) pp. 109-176.

O'Brien, William. Operational Law Handbook (2003). Charlottesville, Virginia: The Judge Advocate General's School, 2003.

O'Neill, Bard. Insurgency and Terrorism: Inside Modern Revolutionary Warfare. Brassey's Inc. Maxwell and Macmillan Pergamon Publishing Corporation, New York, 1990.
 _____. "One Man's War," Al Ahram. <http://weekly.ahram.org.eg/2001/538/bo1.htm>. Accessed 5 August 2007.

Ramsey, Paul. The Just War. New York: Charles Scribner's Sons 1968.

Record, Jeffery. "A Note on Values, Interest, and the Use of Force, " in Parameters, Spring 2001, pp. 15-21. <http://carlisle-www.army.mil/usawc/parameters/01spring/record.htm>.

Schrepel, Walter. "*paras* and Centurions: Lessons Learned from the Battle of Algiers," Peace and Conflict, Volume 11, Number 1, 2005.

Stuart, Nicholas. "Finding the Hinge: The Western Way of War and the Elusive Search for Victory," Australian Army Journal, Volume 2, Number 2, p. 221.
http://www.defence.gov.au/Army/LWSC/Publications/journal/AJ_Autumn05/AJ_Autumn05_stuart_22.pdf.

Talbott, John E. The War Without a Name: France in Algeria, 1954-1962. New York: Alfred A. Knopf, 1980.
 _____. "The Myth and the Reality of the Paratrooper in the Algerian War," in Armed Forces and Society. Volume 3, Number 1, Fall 1976, pp. 69-87.

The Battle of Algiers. Director. Gillo Pontecorvo. 1965.

Trinquier, Roger. Modern Warfare: A French View of Counterinsurgency. New York: Frederick A. Praeger, 1961.

The Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/natural-law-ethics/>.

Uniform Code of Military Justice.

http://www.militarynetwork.com/main_ucmj/SUBCHAPTERX.html#892.92.

United States Constitution. Washington, D.C.: The Heritage Foundation, 2003.

Walzer, Michael. Just and Unjust Wars. New York: Basic Books Inc., 1977.

Zakaria, Fareed. "The President Must Command," The Washington Post, April 21, 2004; Page A23.

Accessed 26 July 2007. <http://www.washingtonpost.com/wp-dyn/articles/A29220-2004Apr20.html>

ENDNOTES

¹Carl von Clausewitz, On War, eds. and translated by Michael Howard and Peter Paret. Princeton University Press, Princeton: 1976, pp. 77.

²Clausewitz, p. 75.

³The allusion to "killer angels" comes from Michael Shaara's novel, The Killer Angels which discussed the role of leadership and commandship at the battle of Gettysburg.

⁴John Keegan's A History of Warfare discusses the Western way of war using the characterization of the battle of Marathon developed by Victor Davis Hanson's work on ancient Greece. Nicholas Stuart, "Finding the Hinge: The Western Way of War and the Elusive Search for Victory," Australian Army Journal, Volume 2, Number 2, p. 221. http://www.defence.gov.au/Army/LWSC/Publications/journal/AAJ_Autumn05/AAJ_Autumn05_stuart_22.pdf. Accessed 8 October 2007. Stuart describes the Western way of war as a search for decisive victory. The aim "of war is victory, and only decisive action aimed at destroying the enemy's capability to fight can guarantee that result." Like Stuart, Keegan writes that the desperate Athenian assault on the Persian invasion force indicates the tendency to seek a decisive battle to defend home, hearth, or territory. He characterizes the Eastern way of war as the raid, or *razzia*. The nomadic raid is akin to hit-and-run skirmishes which avoids the decisive battle. While the nomad may be content to deflect the decisive blow because his mobility and access to open space allows him to redeploy to other fields or oases, the Western general would fight on until the last oasis is conquered. The decisive battle forces the nomad to stand and fight the final battle to his destruction.

⁵Paul Christopher, The Ethics of War and Peace: An Introduction to Legal and Moral Issues, Englewood Cliffs, New Jersey: Prentice Hall, 1994, p. 1. Christopher was a colleague of this author while on the faculty of the Department of English at the U.S. Military Academy from 1987-88.

⁶Alistair Horne, A Savage War of Peace: Algeria 1954-1962. New York, The Viking Press, 1985. Horne strongly questions the justice and political legitimacy of French Algeria, the colonial regime in question.

⁷Alex Moseley, "The Just War Theory," in Internet Encyclopedia of Philosophy.

<http://www.utm.edu/research/iep/j/justwar.htm#The Principles Of Jus In Bello>. Accessed 26 July 2007.

"The rules of just conduct fall under the two broad principles of discrimination and proportionality. The principle of discrimination concerns who are legitimate targets in war, whilst the principle of proportionality concerns how much force is morally appropriate. One strong implication of being a separate topic of analysis for just war theorists, is that a nation fighting an unjust cause may still fight justly, or vice versa. A third principle can be added to the traditional two, namely the principle of responsibility, which demands an examination of where responsibility lies in war."

⁸Anthony E. Hartle, "Humanitarianism and the Laws of War," in Philosophy, 61, 1986, p. 109. Brigadier General Hartle (U.S. Army, Retired) is a Ph.D. (Philosophy), University of Texas, was Department Head, Department of English, U.S. Military Academy while this author was a member of faculty from 1985-88.

⁹Hartle, "Humanitarianism and the Laws of War," Philosophy, 61, 1986, p. 110.

¹⁰It is impossible for me to divorce myself from my religious and intellectual roots on this topic. Discussing the Just War doctrine in a philosophical manner would have required discussing in detail the doctrine's Christian roots which have been secularized and absorbed into the international legal norms. However, that treatment would have exceeded the scope of this paper. For the record, my understanding of Just War doctrine is colored by the lenses of Roman Catholic and American military traditions.

¹¹Horne entitles Chapter 2 as "Ici, c'est la France" ("Here, this is France"), p. 45. Former President Francois Mitterand spoke these words as a Fourth Republic government minister.

¹²*fellagha* are the Algerian rebels fighting for Algerian independence under the FLN's banner.

¹³Bard O'Neill defines terrorism as a "form of warfare in which violence is directed primarily against noncombatants (usually unarmed civilians), rather than operational military and police forces or economic assets (public or private)." in Insurgency and Terrorism: Inside Modern Revolutionary Warfare. Maxwell and Macmillan Pergamon Publishing Corporation, New York, 1990, p. 24.

- ¹⁴The author will use Algerian and Arab synonymously to refer to the native population of French Algeria.
- ¹⁵William V. O'Brien, *The Conduct of Just and Limited War*. Praeger, New York, 1981, p. 180. O'Neill, pp. 36-37.
- ¹⁶Jeff McMahan, "War and Peace," in *A Companion to Ethics*. ed. Peter Singer, Cambridge, Massachusetts, Blackwell, 1993, p. 389.
- ¹⁷Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. Basic Books Inc., New York, 1977, p. 204. Walzer rebuts Sartre's argument for liberation.
- ¹⁸During the conquest, the French committed atrocities against Arabs to awe them. Alastair Horne believes the historical starting point of the revolution followed a Muslim riot in Setif during a V-E Day celebration which killed tens of Europeans. The French response was brutally put down with thousands of Arabs being slaughtered, pp.25 - 28.
- ¹⁹*The Battle of Algiers*, directed by Gilo Pontecorvo, 1965. *Lost Command*, directed by Mark Robson, 1965 portrays the para's counter-terrorism fight based on Jean Larteguy's *The Centurions*, trans. Xan Fielding. E.P. Dutton & Company, Inc., New York, 1962.
- ²⁰Walzer, p. 205.
- ²¹Horne, pp. 208-210. "I can still see that beautiful young girl of eighteen with both legs blown off, lying unconscious, the blonde hair stained with blood." Fragments of feet were visible in the shoes lying aimlessly on the rubble.
- ²²George Armstrong Kelly, *Lost Soldiers: The French Army and Empire in Crisis, 1947-1962*, Cambridge, Massachusetts, M.I.T Press, 1965, p. 192. "Donnez-moi cent bons egorgeurs et je terroriserai la ville de Paris: Give me one hundred throat-cutting assassins and I could terrorize Paris."
- ²³"One Man's War," *Al Ahram*. <http://weekly.ahram.org.eg/2001/538/bo1.htm>. Accessed 5 August 2007.
- ²⁴Jacques Massu, *La Vraie Bataille d'Alger*, Librairie Plon, Paris, 1971, pp. 362-66. Talbot, p. 83.
- ²⁵Few books in English deal with Lacoste's delegation of authority to the army. Horne suggests that the government prosecuted few violations of law by soldiers. It is reasonable to infer that Lacoste did not intend to constrain overtly or rigorously Massu's counter-terrorism strategy.
- ²⁶John Talbot, *The War Without a Name: France in Algeria, 1954 - 1962*, Alfred A. Knopf, New York, 1980, p. 85. Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency*. New York, Frederick A. Praeger, 1961, p. 45. Abder-Rahmane Derradji, *The Algerian Guerilla Campaign: Strategy and Tactics*. Queenstown, The Edwin Mellen Press, 1997.
- ²⁷Clausewitz, pp. 75-76.
- ²⁸In the post 9 / 11 world, we see similar defenses by attorneys for terrorist suspects such Massaoui and Jose Padilla, as if they were mere common criminals. "Lawyer: Dirty bomb suspect's rights violated," <http://archives.cnn.com/2002/US/06/11/dirty.bomb.suspect>. Accessed 21 September 2007.
- ²⁹Paul-Marie de la Gorce, *The French Army: Political-Military History*. trans. Kenneth Douglas. New York: George Braziller, 1963, p. 450.
- ³⁰John Steward Ambler, *The French Army in Politics 1954-1962*. Columbus, Ohio State University Press, 1966, p. 173.
- ³¹Paul A. Jureidini, Norman A. La Charte, Bert H. Cooper, and William A. Lybrand, *Casebook on Insurgency and Revolutionary War: 23 Summary Accounts*. Special Operations Research Office, Washington, D.C., 1962, p. 258.
- ³²John Steward Ambler, *The French Army in Politics 1954-1962*. Columbus, Ohio State University Press, 1966, p. 174. De la Gorce, p. 452. It is fair to say that the counter-terrorism tactics of South American regimes, such as Argentina, used similar means for 'disappearing' accused terrorists.
- ³³Horne, pp. 195-96. "The first of the tortures consisted of suspending the two men completely naked by their feet, their hands bound, behind their backs, and plunging their heads for a long time into a bucket of water to make them talk. The second torture consisted of suspending them, their hand and feet tied behind their backs, this time their heads upwards. Underneath them was placed a trestle, and they were made to swing, by fist blows, in such a fashion that their sexual parts rubbed against the very sharp point of the trestle."
- ³⁴Trinquier, p. 47.
- ³⁵John E. Talbot, "The Myth and the Reality of the Paratrooper in the Algerian War," in *Armed Forces and Society*. Volume 3, Number 1, Fall 1976, pp. 76-77. Many victims were low-level operators, not terrorists.
- ³⁶Kelly, p. 202.

³⁷William V. O'Brien, "The Meaning of Military Necessity in International Law," p. 142-43. Francois de Menthon unsuccessfully argued the moral burden which should have been placed on rebellious groups. "Instead of saying that acts of violence committed in war are, in general, legitimate acts of public war . . . the French theory says that all acts of aggressive war are prima facie common law crimes, each of which must be justified by military necessity as a 'justifying fact'" on p. 144-45. The Tribunal held that national positive law was subordinate to international law, as did the French Constitution of October 1946.

³⁸Christopher, *The Ethics of War and Peace*, p. 166.

³⁹Paul Ramsey, *The Just War*. New York: Charles Scribner's Sons 1968, p. 429.

⁴⁰Horne, pp. 183 -218. He provides general background to the *fellagha* strategy in chapters Nine and Ten of using the Arab population as a shield and protective milieu with his treatment of "Yacef's Girls." Arab women dressed in their traditional garb were not initially searched by security patrols. "Yacef's Girls" were Arab women who dressed and coiffed like European women which allowed them to move easily from Arab to Europeans quarters of the city. The *fellagha* center of gravity for planning and supply remained inside the Casbah, the traditional Arab quarter. When the *paras* assumed control of the city, they cordoned off and searched the Casbah precisely because the Arab population sheltered the *fellagha*. Anthony H. Cordesman, "Israel versus the Palestinians: The "Second Intifada" and Asymmetric Warfare, Center for Strategic and International Studies, Working Draft, July 2002. Cordesman suggests the Palestinian fedayeen used similar tactics. From an ethical point of view, the choice of battle space is a moral choice. Israeli, like the French, operations cannot be completely judged in a moral vacuum when their opponents select battlegrounds almost certainly likely to cause collateral damage.

[http://www.csis.org/media/csis/pubs/israelvspale_intafada\[1\].pdf](http://www.csis.org/media/csis/pubs/israelvspale_intafada[1].pdf). Accessed 21 September 2007.

⁴¹O'Neill, pp. 126-32 and 138-40.

⁴²Horne provides a succinct outline of the inequities of the colonial regime. His summary identifies political and military injustices which had been imposed on the native peoples. The full extent of the injustices remained incomprehensible to this author for many years. During the research for another paper, the nature of some injustices became quite vivid for me, particularly the method of the Conquest and the suppression of the Setif riots in 1945. Walter Schrepel, "*paras* and Centurions: Lessons Learned from the Battle of Algiers," *Peace and Conflict*, Volume 11, Number 1, 2005.

⁴³William V. O'Brien, "The Meaning of Military Necessity in International Law," p. 143.

⁴⁴William V. O'Brien, *The Conduct of Just and Limited War*, p. 69. Ramsay, p. 434. He clarifies the challenge facing the counter-terrorist force. The reprisal cannot include actions that are malum in se. "Retaliation in kind" is justified as 'protective retribution' only when the kind of retaliation is a not intrinsically wrong."

⁴⁵Christopher, *The Ethics of War and Peace*, p. 62.

⁴⁶Christopher, *The Ethics of War and Peace*, p. 166.

⁴⁷Clausewitz, p. 77 and 580.

⁴⁸Walzer, p. 144.

⁴⁹William V. O'Brien, *The Conduct of Just and Limited Wars*, p. 123. O'Brien argues that in Vietnam American forces found themselves similarly fraught with logical and moral tension similar to Massu's challenges. "The US violations of "*jus in bello* were in substantial measure the result of deliberate Communist policies of using the population as a shield. Often it was impossible to get at the enemy without risking disproportionate actions." Ramsay, p. 436.

⁵⁰Paul Aussaresses, *The Battle of the Casbah*.

⁵¹Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, p. 188.

⁵²William V. O'Brien, p. 37.

⁵³William V. O'Brien, p. 178.

⁵⁴Paul Christopher, *Just War Theory: A Historical and Philosophical Analysis*. Dissertation, University of Massachusetts, 1990, p. 312.

⁵⁵Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*. Prentice-Hall: Englewood-Cliffs, 1994, p. 167.

⁵⁶Walzer, p. 136.

⁵⁷William V. O'Brien, "The Meaning of Military Necessity in International Law," in *World Polity: A Yearbook of Studies in International Law and Organization*. Volume 1. Washington D.C., Georgetown University Press: 1957, p. 138.

⁵⁸William V. O'Brien, "The Meaning of Military Necessity in International Law," p. 138.

- ⁵⁹William V. O'Brien, "The Meaning of Military Necessity in International Law," pp. 141-2.
- ⁶⁰William V. O'Brien, "The Meaning of Military Necessity in International Law," p. 142.
- ⁶¹William V. O'Brien, "The Meaning of Military Necessity in International Law," p. 149.
- ⁶²Sun Tzu, translated by Samuel B. Griffin, New York: Oxford University Press, p. 63.
- ⁶³FM 27-10, Law of Land Warfare. 18 July 1956. <http://faculty.ed.umuc.edu/~nstanton/Ch1.htm>. Accessed 21 September 2007.
- ⁶⁴FM 27-10, Chapter 1, Section I, Paragraph 2. <http://www.afsc.army.mil/gc/files/FM27-10.pdf>. Accessed 21 September 2007.
- ⁶⁵United States Constitution, "Article VI," Washington, D.C., The Heritage Foundation, 2003, pp. 27-28.
- ⁶⁶"International Humanitarian Law" <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>. Accessed 4 August 2007. This site shows both the United States and France were signatories to the Geneva and Hague Conventions during the period of the battle.
- ⁶⁷The Uniform Code of Military Justice, "Article 92: Failure to Obey Order or Regulation." "Any person subject to this chapter who--(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by any member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct." <http://www.ucmj.us/uniform-code-of-military-justice/sub-chapter-10-punitive-articles.shtml#892>. ART. 92. FAILURE TO OBEY ORDER OR REGULATION. Accessed 21 September 2007.
- ⁶⁸FM 27-10, Law of Land Warfare. 18 July 1956. <http://faculty.ed.umuc.edu/~nstanton/Ch1.htm>. Accessed 21 September 2007. "Chapter 1, Section I, Paragraph 4. Sources. The law of war is derived from two principal sources: a. Lawmaking Treaties (or Conventions), such as the Hague and Geneva Conventions. b. Custom. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. Lawmaking treaties may be compared with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law."
- ⁶⁹FM 27-10, Chapter 1, Section I, Paragraph 3. <http://faculty.ed.umuc.edu/~nstanton/Ch1.htm>. Accessed 21 September 2007.
- ⁷⁰The French Army had unfortunately experienced national political failure in 1940. General De Gaulle stepped into a vacuum as rebel leader of the Free French who refused to obey the armistice. Nonetheless, Algiers could not be equated to 1940.
- ⁷¹Clausewitz, p. 87.
- ⁷²Fareed Zakaria, "The President Must Command," Newsweek, 26 April 2004. <http://www.fareedzakaria.com/articles/newsweek/042604.html>. Accessed 6 August 2007.
- ⁷³FM 27-10, Article 497. <http://faculty.ed.umuc.edu/~nstanton/Ch8.htm#s1>. Accessed 21 September 2007.
- ⁷⁴Operational Law Handbook (2003), Charlottesville, Virginia, The Judge Advocate General's School, 2003, p. 5.
- ⁷⁵FM 27-10, Article 497. <http://faculty.ed.umuc.edu/~nstanton/Ch8.htm#s1>. Accessed 21 September 2007.
- ⁷⁶FM 27-10, Chapter 8, Section I, Article 497. <http://faculty.ed.umuc.edu/~nstanton/Ch8.htm#s1>. Accessed 21 September 2007.
- ⁷⁷Operational Law Handbook (2003), p. 5.
- ⁷⁸Laurence Grafstein, "Age Limit," in The New Republic, June 4, 2002, <http://www.ajjac.org.au/updates/Jun-02/050602.html>. Accessed 21 September 2007. "Nevertheless, an illegitimate tactic used in a legitimate cause, as part of a conflict with legitimate and illegitimate tactics and aspirations on both sides, is different from an illegitimate tactic used for purposes that are utterly crazed and malevolent. In short, circumstances matter."
- ⁷⁹When Dr. Walzer visited the United States Military Academy in 1986, he emphasized the standard of ultimate evil was Nazi Germany for state-sponsored, domestic evil.
- ⁸⁰Walzer, pp. 253-54.
- ⁸¹"Extinct." The American College Dictionary of the English Language. Ed. William Morris. American Heritage Publishing Company, Inc., New York, 1970, p. 465.
- ⁸²This point was aptly demonstrated when Charles de Gaulle ascended to the Presidency of the Fifth Republic. De Gaulle initially fought to retain French Algeria. When he made the momentous step to seek peace, the Algerian War came to a conclusion.

⁸³Operational Law Handbook (2005), Charlottesville, Virginia, The Judge Advocate General's Legal Center and School, 2005, p. 34 - 35.

⁸⁴Clausewitz, p. 580.

⁸⁵O'Neill, p. 39.

⁸⁶Horne, p. 207. Derradji, pp. 188-90.

⁸⁷Christopher, The Ethics of War and Peace, p. 28.

⁸⁸Walzer, p. 230.