13. Biosecurity and the Just-War Tradition¹

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Biosecurity and the just-war tradition occupy separate worlds. In debates and discussions about biosecurity and dual use, no references are made to just-war criteria. And in textbooks on just-war tradition, biosecurity and dual use hardly get any attention. This chapter will deal with the question of whether this separation is justified. First, an oversight will be provided of the just-war tradition and more especially of recent developments within it. Attention will be given to which questions this tradition deals with, why and how. The answers it offers will then be applied to biosecurity and dual-use issues.

Just-war tradition: Between past and present²

Thinking about what counts as a ‘just war’ can truly be called a tradition. It has its roots in authors such as Aristotle, Cicero, Augustine, Thomas Aquinas, Grotius, as well as Spanish theologians such as Vitoria and Suarez, and the Swiss diplomat de Vattel. They and many other philosophers, theologians and lawyers have contributed to debate about how to approach the notion of ‘just’ in the context of conflict.³ In recent years, debate has continued through authors such as Paul Ramsey, James T. Johnson, Michael Walzer, Jeff McMahan and—again—many others.⁴

Just-war *tradition* as a name for this normative approach to conflict is preferable to just-war *theory*. The use of the word theory implies a framework was developed at a certain time and has remained more or less static. In fact, just-war thinking has evolved and has been influenced by political, social, technological and military developments. The political situation of the Roman Empire cannot be compared with that of the Italian city-states or the Spanish colonial expeditions.

1 The views expressed in this chapter are those of the author and do not represent those of the Royal Netherlands Academy of Arts and Sciences.

2 See also: van der Bruggen, K. 2009, ‘Other wars, other norms?’ in G. Molier and E. Nieuwenhuys (eds), *Peace, Security and Development in an Era of Globalization. The Integrated Security Approach Viewed from a Multidisciplinary Perspective*, Martinus Nijhof, Dordrecht/Leiden/Boston, pp. 355–76.

3 An anthology of relevant texts is published by: Reichberg, G. M., Syse, H. and Begby, E. (eds) 2006, *The Ethics of War. Classic and Contemporary Readings*, Blackwell, Malden, Mass.

4 Classic studies are: Walzer, M. 1977, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, Basic Books, New York; Johnson, J. T. 1981, *Just War Tradition and the Restraint of War*, Princeton University Press, Princeton, NJ; Johnson, J. T. 1984, *Can Modern War Be Just?* Yale University Press, New Haven, Conn.

Also technical developments have impacted thinking. A well-known example involves a high-tech weapon of the Middle Ages: the crossbow. During the Second Lateran Council, its use was prohibited, at least against Christians.⁵ This ban can be seen as an early application of the principle of proportionality, at least for Christians. The example shows that debates about the moral acceptability of the use of weapons are longstanding. This certainly holds true for biological and chemical weapons. May and Crookston write that ‘for 2,500 years the use of poisons during battles has been forbidden’.⁶ The moral and legal rejections of poisons sometimes were even more rigorous than those of other means. From Roman authors such as the historian Valerius Maximus, we know the saying ‘*armis bella non venenis geri*’ (wars are fought with weapons, not with poison).⁷ In other words: poison was not seen as a legitimate weapon. This prohibition did not mean that no poisons have been used in times of war though. History provides many examples of poisoning:

Evidence can be found for the existence of forms of chemical and biological warfare in ancient and classical times. The evidence for chemical and toxin warfare is the clearest. Solon of Athens is said to have used hellebore roots (a purgative) to poison the water in an aqueduct leading from the Pleistrus River around 590 B.C. during the siege of Cirrha. Writings of the Mohist sect in China dating from the Fourth Century B.C. tell of the use of ox-hide bellows to pump smoke from furnaces in which balls of mustard and other toxic vegetable matter were being burnt into tunnels being dug by a besieging army to discourage the diggers. The use of a toxic cacodyl (arsenic trioxide) smoke is also mentioned in early Chinese manuscripts. Sparta used the toxic smoke generated by burning wood dipped in a mixture of tar and sulfur during one of its periodic wars with Athens.⁸

This overview can be extended with examples from the Middle Ages until the Iran–Iraq war in the 1980s.⁹ In spite of the use of poisons and other biological agents during wars, the saying of Valerius Maximus has always kept a kind of validity. Biological (and chemical) weapons never reached the status of ‘normal’ weapons, comparable with swords, spears, crossbows and later firearms. Using biological ‘weapons’ always had the smell of doing something foul. An example is the praise of Cicero for a Roman general who refused the offer of a deserter to

5 <<http://www.nuclearmuseum.org/online-museum/article/waging-peace-the-challenge-of-nuclear-stewardship/>> (viewed 2 January 2011).

6 May, L. and Crookston, E. 2008, ‘Introduction’, in L. May (ed.), *War. Essays in Political Philosophy*, Cambridge University Press, Cambridge, p. 2.

7 Valerius Maximus, *Factorum Et Dictorum Memorabilium Libri Nouem*, <<http://www.thelatinlibrary.com/valmax6.html>> (viewed 11 January 2011).

8 <<http://www.cbwinform.com/History/History.html#0001>> (viewed 2 January 2011).

9 Ibid.

poison King Pyrrhus.¹⁰ And Samuel von Pufendorff (1632–94) wrote that ‘the more civilized nations condemn certain ways of inflicting harm on an enemy: for instance the use of poison’.¹¹

Back to just-war thinking in general. New times and new situations ask for revisiting what moral and legal norms should be weighed and how in seeking to answer the question if (and under what conditions) the use of violence is justified. Sometimes developments lead to more than marginal adjustments of assessments. So after World War II, the issue was posed of whether the invention of nuclear weapons led to novel considerations in relation not only to the possible *use* of these weapons, but also to *deterrence*. Is it, for instance, morally justified to threaten their use if this would go against all prevailing criteria regarding what is appropriate in terms of violence? What if deterrence is the only way to prevent the actual use of nuclear weapons? Such complex questions raised by this case could lead to the conclusion that the just-war tradition has lost its relevance and significance.¹² But such a view is too rash given it is based on only one—however important and shocking—development in the waging of war. In the heydays of the Cold War, (too) many so-called conventional wars were fought in which just-war criteria could and should have provided good guidance. More than this: just-war thinking could provide criteria for moral argument on the paradoxes of nuclear deterrence, as is shown in the development of a theory of justified deterrence.¹³

Just-war criteria

In the just-war tradition, a distinction is made between the so-called *jus ad bellum* and the *jus in bello*. The *jus ad bellum* indicates if and when it can be justified to start a war. The criteria one to five below refer to this *jus ad bellum*. The sixth one belongs to both domains and the remaining two criteria deal with the question of the *jus in bello*: what behaviour is permitted or forbidden during a war. More recently a third domain has been added: the *jus post bellum*. There is much debate about whether this new distinction is useful and necessary for judging modern wars. Elsewhere I have questioned the utility for a *jus post*

10 Cicero, ‘On duties’, in Reichberg et al., op. cit., p. 53.

11 von Pufendorf, S. 2006, ‘On the duty of man and citizen’, in Reichberg et al., op. cit., p. 459.

12 A common way of thinking during the Cold War was that a nuclear war never could be a just war and that—by consequence—just-war tradition had lost its significance. Often this view was promoted by pacifists, who had already disputed just-war thinking by definition. But another group was the so-called nuclear pacifists, who limited their view to the conclusion that a just nuclear war was a contradiction in terms.

13 van der Bruggen, K. 1986, *Verzekerde Vrede of Verzekerde Vernietiging. Ontwikkeling van een Theorie van Gerechtaardigde Afschrikking* [Assured Peace or Assured Destruction. Development of a Theory of Justified Deterrence], Kok, Kampen.

bellum.¹⁴ Setting aside this wider question though, the *jus post bellum* will not be considered in this chapter, because it is not very relevant for biosecurity issues.

Jus ad bellum

1. The war must be waged by a legitimate government

This criterion expresses the assumption that only a legitimate government has and should have the monopoly on violence. In a sovereign state the government and the government alone is allowed to use violence. This may seem obvious, but in practice things often are not so obvious, because the legitimacy of a government is not always undisputed. Much violence (for example, in civil wars or anticolonial wars) stems from conflicts over who owns the legitimate authority. Often it works out that legitimacy can be decided only post hoc: the winner takes all. In addition, the notion of legitimate authority had varying meanings over time. Thomas Aquinas had a much different concept than Hugo Grotius, and also in our days definitions are changing. But the fact remains that the notion of 'legitimate authority' has a certain core holding. By convention—actually since the Peace of Westphalia in 1648—sovereign states hold the monopoly on violence.¹⁵ States and government embody the public domain and because of that they differ from all other (private) groups and entities. Given all disputes and discussions about sovereignty, this first just-war criterion certainly is not ideal, but something better is not available. If the public domain collapses, the war of all against all remains a possibility, even today. And in such a situation sovereign authority will be sought. Recent examples can be found in so-called failed states, where in practice the central government has virtually disappeared. Many people in that situation eventually accept the authority of terrorist movements, because—in the view of powerless groups—their violent and arbitrary exercise of power is always better than the absence of any authority. To give an example: it is no wonder that in Afghanistan many people accept (which is not the same as support) the authority of the Taliban instead of what they see as a condition of anarchy.

2. The war must be waged for a just cause

Fighting war for a just cause is the core of the *jus ad bellum*. Influenced by the Charter of the United Nations (1945), the interpretation of what counts under this category has become more and more restricted in recent times. Only a reaction against aggression or an intervention that is sanctioned by the UN

¹⁴ van der Bruggen, 2009, op. cit.

¹⁵ Schrijver, N. 1998, 'Begrensd soevereiniteit—350 jaar na de Vrede van Munster [Limited sovereignty—350 years after the Peace of Münster]', *Transaktie*, vol. 27, no. 2, pp. 141–74.

Security Council is taken as a legally acceptable base for waging war. This means that—to give some examples—retribution or recoveries of previously suffered injustices are not acceptable justifications.

In a sense the interpretation has also been extended. Since the end of the Cold War the idea has become widespread that the international community has the right—if not the duty—to use military force to intervene in cases of gross violations of human rights. The intervention in Kosovo in 1999 serves as one example, even though a UN Security Council authorisation was missing. A further extension came after 11 September 2001, when the ‘war against terror’ was added to the list of just wars by many people. The invasion of Afghanistan to expel the Taliban regime was not explicitly mandated by the UN Security Council, but the American action was widely seen as a legitimate form of self-defence supported by resolutions that were adopted after 9/11.¹⁶ In relation to biosecurity the question arises if and under which conditions the development or possession of biological weapons can be a reason to start a war. This is not a purely academic question as is shown below in the heated debates about the American–British intervention in Iraq.

3. The war must be waged with a right intention

This criterion is in line with the previous one, but it goes further. It says that it is not justified to have secondary intentions when fighting a war for a just cause. The only intention should be that just cause (as resisting the aggressor). If the defender succeeds in that objective, he must stop fighting. He is not allowed to aim at military or economic destruction of the opponent. According to the classical tradition, feelings of revenge also should play no role. Most recent wars have shown that standard proves unrealistic. In fact, in most wars, intentions other than the ‘official’ ones can be discerned. Economic (oil), political or personal secondary intentions are never far away. If and how these secondary intentions played a part in the Iraq war—formally intended to remove biological and chemical weapons—will be illustrated below.

4. All other means of conflict resolution must be exhausted; war is the last resort

This criterion is designed to prevent governments from taking up arms too quickly. The question that arises is: when is ‘too quickly’ and who is to decide? Parties that are contemplating force would likely argue that it is the only solution. The relevance of this criterion is that it is forcing the ‘aggressor’ to make the case for why aggression is necessary. Is a military intervention the

¹⁶ For example, United Nations Security Council (UNSC) Resolution 1373 (2001): <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>> (viewed 11 January 2011).

last remaining option? Are all other means really exhausted? These kinds of questions have to be asked and answered. The problem is that the answers to these and similar questions can never be given with mathematical certainty.

Fortunately, history also shows many examples where war could be prevented. Humankind has repeatedly escaped the battlefield.¹⁷ Of course we owe this to several causes, but certainly the message of the just-war tradition—and more specifically of this criterion—played a role in the idea that starting a war is a decision that has to be avoided if possible. This can be illustrated by the way political leaders try to persuade others that their war is justified and that they do not have any other possibility. One need not believe what is said to still note the importance of making a justification. Peace is the rule; war (unfortunately all too often) the exception.

5. There must be a reasonable chance that the intended purposes are reached through the war

The purpose of this criterion is to prevent a government from starting a war if it is clear beforehand that the intended targets cannot be reached. At least one objection to this criterion rises immediately: it seems to support the side of the strongest party. Yet military superiority is not always a guarantee for victory. The most famous example in recent history is the Vietnam War. Despite overwhelming military superiority, the Americans did not manage to reach their goals. Especially in a humanitarian intervention, the militarily stronger party does not always have the greatest interest in going on with fighting. The tragedy of Srebrenica seems an example. If the UN Protection Force (UNPROFOR, the UN troops in Bosnia) had used all available resources, the fall of Srebrenica could have been prevented. Among other factors, the fact that the self-interest of the Netherlands and the Dutch military was not at stake certainly played a role. The professional soldiers of Dutchbat had signed up for the army and realised that an ultimate consequence of this was to die, '[b]ut dying for Srebrenica. It was not worth it.'¹⁸

6. The objectives and means of war must be in a reasonable relationship to each other. This is the principle of proportionality

The principle of proportionality can relate to both the *jus ad bellum* and the *jus in bello*. In the first case, the principle refers to waging the war: is there a proportionate relationship between its (expected) cost and the aim to be reached? During the war the principle can be applied to judge if a concrete action or the

17 Gerrits, A. and de Wilde, J. 2000, *Aan het slagveld ontsnapt. Over oorlogen die niet plaatsvonden*, Waburg Pers, Zutphen. This book is about wars that did not take place.

18 Westerman, F. and Rijs, B. 1997, *Srebrenica. Het zwartste scenario* [Srebrenica. The Blackest Scenario], Atlas, Amsterdam/Antwerpen, p. 11. Quote from a Dutchbat soldier.

use of a certain kind of weapon is proportionate in relation to the goals to be reached. In both cases the discussion will concentrate on the issue of weighing and judging the factors that determine the aims and the means. Who is to decide on this and on the basis for weighing factors? This problem becomes even more complicated because it is almost impossible to know beforehand what the costs of a war or even a concrete action during a war will be. Who would have predicted that hundreds of thousands of French, British and German soldiers would be killed in the trenches of World War I? When these soldiers marched into the battlefields in August 1914, they expected to be home at Christmas in the same year, after having won a '*frischen und fröhlichen Kriege*'. Proportionality can become a salami-like criterion: the lives already lost become an argument for going on, because not doing so would mean that these victims lost their lives in vain.¹⁹ So the limits of what still is seen as proportional shift.

7. The use of force should be limited to the minimum that is necessary in order to resist the aggressor

This criterion has a certain affinity with the just mentioned proportionality principle. But it goes further by suggesting even less than proportionally acceptable violence has to be used, if that is enough for achieving the aims of war. Again the same questions return as in the preceding two criteria: what is minimal violence and who is to decide? Once started wars have their own momentum that often leads to more escalation. Von Clausewitz, the famous Prussian theorist of war, assumed that wars were by definition absolute and that they should be.²⁰ Only politics could prevent that absolute character.

Indeed, the influence of politics in the recent wars of intervention has been great, but that has not always led to restraint. Regarding the Kosovo war there has been much criticism of the decision to carry out aerial bombardment for strategic reasons on some civilian targets in Yugoslavia. First there was the question of whether it was necessary from a military perspective. The attack on the TV studio in Belgrade is one of the most infamous examples. This brings us to the final criterion of the just-war tradition to discuss here: the principle of noncombatants.

19 This was the reason that some parents of Dutch soldiers who had been killed in Afghanistan were among the people who resisted the return of Dutch troops. The same argument can be read in the memoir of George W. Bush, where he describes his meetings with parents of killed soldiers: George W. Bush 2010, *Decision Points*, Crown, New York, ch. 12, pp. 355–94.

20 von Clausewitz, C. 1982, *Over de oorlog*, Het Wereldvenster, Bussum, p. 15.

8. A distinction should be made between military and civilians; the latter group may not be involved in the fight. This is the noncombatants principle

The noncombatants principle has always played an important role in the just-war tradition and it still does. This principle has been 'translated' in international treaties like the Geneva conventions. What is important is that not only citizens belong to the category of noncombatants, but also soldiers who are not actively involved in the fight (for instance, those wounded, and prisoners). Developments in modern technology have, however, led to wars that are conducted in ways different than in the time when the noncombatants principle was developed. Massive battles seem at least in the Western world to belong to the past—and whoever remembers the images of the trenches of World War I can of course only be happy with it. But it begs the question of the actual meaning of the noncombatants principle.

Today's wars by major military powers are often wars at a distance. There is hardly direct physical contact with the combatants of the counterparty and most governments are reluctant to create situations in which such a direct confrontation is provided. The discussion about whether or not to proceed with a ground war during the intervention in Kosovo (1999) is such an example. At the other end of the spectrum—that of the noncombatants—there have been developments also. To give only one instance: the distinction between combatants and noncombatants coincided for centuries with the difference between civilians and soldiers. That is not true anymore. Most terrorists do not belong to the military, but they surely are to be categorised as combatants.

Despite this noncombatant criterion, the general trend is that attacks in which civilians are deliberately targeted have become the 'normal' picture of modern wars. Names of cities such as Guernica, Dresden and Hiroshima suffice as an illustration. And even when citizens are not deliberately chosen targets, questions can be asked—for instance, regarding the concept of collateral damage. A question in this context is whether this so-called collateral damage is too easily accepted. How unintended is unintended if you know that the chosen method of attack will lead almost by definition to civilian casualties or to victims because of destroyed infrastructure? Walzer stated in his famous *Just and Unjust Wars* that collateral damage in such a case cannot be morally justified.²¹ More recently, however, he was less convinced of this judgment. In a lecture in Amsterdam in 2007, Walzer states that the distribution of responsibility is the ultimate moral factor in judging if the killing of civilians can be justified. As an example he gives his view on the Lebanon war (2006):

21 Walzer, 1977, *op. cit.*, pp. 151–4.

In the Lebanon war, the Israeli army caused most of the civilian deaths, but some (or many) of the villages it attacked were being used by Hezbollah as bases for rocket attacks on Israeli cities, so the greater part of the responsibility for civilian deaths in those villages lay with Hezbollah—as did the greater part of the responsibility for the war itself, which began with a rocket barrage and a Hezbollah raid across the international frontier. Israel is responsible for deaths caused by unjustifiable bombings like the Qana raid or by the cluster bombs used late in the war. But (again) it shouldn't be the proportionality argument that guides our judgment of those deaths; they were wrong whether or not they were disproportionate. In Vietnam, Kosovo, and Lebanon, it is the balance of responsibility that is morally determinative.²²

Just-war tradition and biological weapons: The Iraq war of 2003

How can a link be made between just-war principles and the problems of biological weapons, or—more generally—biosecurity? At first sight the *jus ad bellum* is not directly linked to questions of biosecurity. Seen in the widest sense of the term though, some recent international conflicts, and more especially the Iraq war (2003), do make such a link. Albeit this is a link that evokes many questions!

Officially, one of the main arguments the United States and the United Kingdom used to justify their attack on Iraq was the consideration that Saddam Hussein had weapons of mass destruction (WMD), and as part of this arsenal, biological weapons. In his oral evidence before the Chilcot Inquiry Committee in 2010, former UK prime minister Tony Blair confirmed that he still maintains the possession of WMD by Iraq as a justification for the war against Saddam.²³

Is the development or possession of biological weapons by a country a 'just cause' for starting a war? Here it will be argued that this is not the case. The development of WMD—objectionable as it may be on legal or moral grounds—is not equal to aggression as defined in the UN Charter. This means that the only justification for an intervention in Iraq had to be found in a resolution under Chapter 7 of the UN Charter. This is what the United States and the United Kingdom tried to realise in the months before they invaded Iraq. When such a resolution appeared to be unattainable, however, they decided to start the war

22 <http://www.ru.nl/soeterbeeckprogramma/terugblik/terugblik-2007/teksten-2007/thomas_more_lezing_0/> (viewed 12 November 2010).

23 <<http://www.iraqinquiry.org.uk/media/45139/20100129-blair-final.pdf>> (viewed 4 October 2010).

without a (new) resolution. Attempts were made to justify this by an appeal to the so-called 'revival argument'. This contended that the whole range of UN resolutions against Saddam since 1991 could be legitimating for the war. This argument was defended by Peter Goldsmith, the then attorney-general for England and Wales.²⁴ Because the Dutch Government took his arguments on, the Dutch Committee of Inquiry on the War in Iraq analysed this argument in detail. They concluded that it was not a valid way of reasoning on the basis of public international law.²⁵

Of course this argument is based on legal judgments. A case on purely moral grounds could lead to a different judgment. This is acknowledged by the Dutch Committee of Inquiry:

[S]ome defend the position that a basis in international law alone cannot be the deciding factor for the justification of international action by states. The observance of international law rules is very important, so runs the argument, but cannot always be decisive. Sometimes, in an international conflict, values of such importance are at stake that states can feel compelled to act even when this may not be according to the prevailing international law. However, these are exceptional situations in which very compelling moral imperatives apply. The legal maxim, 'need before law', and the international law concept 'state of necessity' also offer safety valves within the law for finding a way out of this situation. It is striking that the debate on the possible justification for the Iraq war never went down this path.²⁶

In other words: none of the members of the 'coalition of the willing' used this 'need for law' argument. Such an argument usually is used as a reason for human intervention in case of genocide. It has never been used in the case of the (suspected or expected) development of weapons of mass destruction.²⁷

In the debates about the Iraq war the question has often been asked whether considerations or intentions other than the official ones played a part in the decision for intervention. And, if so, can these intentions be seen as proper? Many commentators have pointed to other motivations: the importance of oil interests, the—hardly hidden—wish for regime change and last but not perhaps

24 'Iraq resolution 1441 advice—original memo', *BBC News*, 7 March 2003, <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf> (viewed 4 October 2010).

25 Dutch Committee of Inquiry on the War in Iraq 2010, 'Report of Dutch Committee of Inquiry on the War in Iraq, Chapter 8: The basis in international law for the military intervention in Iraq', *Netherlands International Law Review*, vol. LVII, no. 1, pp. 126–8.

26 *Ibid.*, pp. 87–90.

27 Although not all (applications of) biological weapons lead to mass destruction, I will follow the usual terminology for chemical, biological, radiological and nuclear (CBRN) weapons as weapons of mass destruction.

not least the desire of President George W. Bush to finish the job of his father. Moreover, it is well known that Tony Blair had an almost religious zeal to restore human rights in Iraq.

Were all other means of conflict resolution exhausted and was war indeed the last resort?

This third criterion of the just-war tradition played an important role in the discussions about the Iraq war. Opponents did not stop to mention the efforts of the International Atomic Energy Agency (IAEA) and the UN Monitoring, Verification and Inspection Commission (UNMOVIC) in the search for possible WMD. Both organisations had confidence in the success of their efforts. Because of that they were opposed to the strategy of Bush and Blair, which was directed at starting a conflict—almost independently of the results of the IAEA and UNMOVIC. The United States and the United Kingdom had, however, developed their ‘plan of attack’ and they were not willing to make that plan dependent on the possible results of the inspections. The planning of the invading countries was related more to practical circumstances in and around Iraq.²⁸

Looking at the Iraq war, it seems that biological weapons hardly played any role in the final decision. But in the declaratory policy to justify the war as well as in the long lead-up to the war, the issues certainly were important. It helped to make war acceptable: if a country possesses and even uses chemical or biological weapons, it must be a very despicable regime and thus war is an acceptable way to get rid of that regime. In other words: the (supposed) possession of WMD as such is seen a *casus belli*.

The next criterion (number five) that should be taken into account is that there must be a reasonable chance that the intended purposes are reached by waging war. If the purpose of a war is eliminating possible stocks of WMD or dual-use capacities, the feasibility of this purpose is not only dependent on the outcome of the war. Of course it is helpful and perhaps even necessary to have military superiority in those areas where the WMD or other materials are stockpiled, but in addition an intensive scientific survey has to be set up. Anyone who takes a look at the complexity of the activities of the UN Special Commission (UNSCOM), UNMOVIC, the IAEA and—after the war—the Iraq Survey Group gets an impression of the work that has to be done to find, identify and eventually eliminate WMD materials. The inspectors Hans Blix (UNMOVIC) and Mohamed El Baradei (IAEA) had repeatedly declared that they would be able to finish their complex job without military intervention. This makes the argument that war is necessary to reach the goals of eliminating biological (and nuclear or chemical) weapons at least implausible. Assuming the ‘hidden’ goals or intentions of the

28 Woodward, R. 2004, *Plan of Attack*, Simon & Schuster, New York.

Iraq war, it can be argued that the goal of regime change indeed was reached. Within two months the regime of Saddam Hussein collapsed. But, as we know now, this was not the end of the fighting.

What can be said of proportionality (criterion six) as an argument for whether or not to start a war? Proportionality as a criterion of the *jus ad bellum* becomes relevant if—according to the other *ad bellum* criteria—starting a war can be justified. Proportionality in that case is an added criterion to judge if the relation between purposes and means is balanced. There is no need to consider the proportionality criterion if it has already been determined that the other *ad bellum* arguments define a war as unjust. Given the fact that despite all counterarguments the Iraq war took place, the *jus in bello* context of the proportionality criterion is applicable. But how to apply it to the specific aspect of biosecurity—or broader biological weapons—is not very obvious. The Iraq war—once started—led to many actions that were and could not be foreseen. This war is no exception to the rule that a war creates its own judgments on proportionality: the longer a war lasts, the less some actions are appreciated as disproportionate. The formal link with the search for biological weapons drifted out of sight and out of mind.

Finally, both parties have violated the noncombatant principle many, many times during the Iraq war. Many civilians were killed by Iraqi militants as well as by coalition troops.²⁹ But it is not possible to link these violations and the biosecurity issue. The only thing that can be said is that this war—at least partially—was based on handling the problem of weapons of mass destruction; however, this was a very exceptional situation. This evokes the question if and how just-war criteria are relevant for ‘everyday’ biosecurity policy. This question will be addressed by looking for elements of this policy to which just-war criteria could or should be applied.

Biosecurity, dual use and just-war tradition

The Iraq war was an exceptional event in the way in which the (alleged) development and possession of WMD led to an armed conflict. In this section, attention will be paid to some more mundane aspects of biosecurity, where there is no imminent threat of war. Is an appeal to criteria of the just-war tradition in these circumstances helpful?

29 The number of civilian deaths is registered at <www.iraqbodycount.org> (viewed 12 January 2011). See also: Hsiao-Rei Hicks, M., Dardagan, H., Guerrero Serdán, G., Bagnall, P. M., Sloboda, J. A. and Spagat, M. 2009, ‘The weapons that kill civilians—deaths of children and noncombatants in Iraq, 2003–2008’, *New England Journal of Medicine*, vol. 360, pp. 1585–8.

Suspicion of development of biological weapons

The cases of Iraq and also—more recently—Iran, North Korea and Syria are about states that are involved in or at least suspected of developing nuclear, biological or chemical weapons. What if the main actors threatening to develop WMD are non-state actors? Is it allowable to attack a state if inhabitants of this state are suspected of acting in such a way? Is there a right for third parties to start a war and, if so, under what conditions? At first sight, this right does not exist. Two scenarios can be discerned. First, it is possible that the government of a country itself is developing, producing, stockpiling or otherwise acquiring biological weapons. If this country is a state party of the BWC, it should act in accordance with Article 1 of the convention.

The second possibility is that the development, production, stockpiling or acquisition of biological weapons is taking place within the territory of a state or under its jurisdiction or control. In that case Article 4 of the BWC is violated. It seems evident that the first party that is to act in such a case is the involved national state. Each government has the duty to prevent the misuse of biological agents. The state should do all that is possible to put an end to this situation. This has been arranged in the BWC and in many more treaties and agreements, such as UN Security Council Resolution 1540.

The BWC also indicates what has to be done if there is a breach of an obligation of the convention. This is described in Articles 6 and 7 of the convention:

Article VI

(1) Any State Party to this convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to this Convention undertakes to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

Article VII

Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party

to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

Articles VI and VII determine that it is the UN Security Council which has to decide if any measures will be taken. This means that any attack by other states to end such a violation is not justified, unless there are other reasons that justify such an attack (such as an imminent threat or a resolution of the UN Security Council that justifies the use of 'any other means').

Of course there are other measures that can be taken to prevent a violation of Articles I and IV. Most important is to look for peaceful solutions: cooperation, helping to counter terrorist threats, education and training, and so on. These measures are especially fitting and relevant in cases where states are not the ones violating the BWC, but groups or organisations within a country. The importance of these measures has been stressed by Resolution 1540 of the Security Council on the nonproliferation of weapons of mass destruction. In this resolution attention is paid explicitly to the possibility that states need help in realising the goals of this resolution. The council

[r]ecognizes that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions.

This resolution has been adopted under Chapter VII of the UN Charter, so it has an obligatory character, but it does not entail any direct or indirect legitimation for using violence.

Biodefence as bio-offence

According to Article I, BWC state parties are allowed to undertake activities for prophylactic, protective or other peaceful purposes. This implies that biodefence is allowed as far as this is limited to protective or peaceful purposes. But who is to decide what purposes are protective and peaceful? In practice biodefence can coincide with bio-offence. And even this could be defended with an argument that is derived from the debate on nuclear deterrence. The argument could be that having the *ability* to produce biological weapons will deter another state or non-state actor from using their biological weapons because of fear of retaliation. This of course was the logic of the nuclear-deterrence policy during the Cold War. In those days many debates were devoted to the question of whether nuclear deterrence was justified from a moral point of view: was it

allowable to threaten using a weapon that clearly should lead to a violation of the proportionality and the noncombatant principles? Nothing like consensus was reached in this debate between people who were of the opinion that it could never be right to threaten with these WMD and others, who defended their view that deterrence was the only way to prevent the use of nuclear weapons.³⁰

If this latter view could be defended from a moral point of view—and there are some convincing arguments for it—then that was only possible in very specific circumstances. This includes the bilateral relationship between the United States and the Soviet Union during the Cold War in combination with the strategic importance of nuclear weapons. Biological weapons never had the same strategic importance in practice. During the Cold War there was never a situation that gave reason for a deterrence strategy with biological (or chemical) weapons. In fact, the United States and the Soviet Union even agreed on the BWC during the heyday of the Cold War, although the Soviet Union for at least some years still went ahead with expanding its program—in part because they thought the United States was doing the same.

If biological deterrence was not defensible during the Cold War, the same holds today. There can be no strategic or political argument that overrules the moral inhibitions of the proportionality principle and noncombatants principle. Moreover, there is reason to believe that such a policy of biological deterrence would undermine the BWC. A possible reasoning that biological deterrence is not directed at other states (let alone state parties of the BWC), but at non-state actors, is untenable. Terrorist groups are almost certainly not deterred by fear of retaliation. Besides, it is almost impossible to react with a targeted action. Terrorists are often not directly linked with a specific area or state. Of course it is conceivable, as happened after the 9/11 attacks, to attack the (presumed) host state of the terrorists; however, the case of the military actions against Afghanistan and al-Qaeda could be spoken of as proportionate and targeted actions, but using biological weapons is almost by definition disproportionate and untargeted.

In summary: biodefence may be allowed according to the BWC, but the margins of this research are limited. Caution is required, especially since the risk of dual use of biodefence is not at all imaginary. The anthrax letters of 2001 (which allegedly came from a biodefence laboratory) are an already classic example. And of course there is the risk of accidents. The Sverdlovsk accident (1979)

30 In 1996 the International Court of Justice gave this judgment on nuclear weapons: 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.' International Court of Justice 1996, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

suffices to draw attention to these kinds of risk. Although such accidents do not take place during a war, the 'collateral' damage that almost by definition will be caused by biological weapons can be seen as a violation of the noncombatants principle of the just-war tradition.

Conclusion

This chapter started with the observation that biosecurity and the just-war tradition occupy separate worlds. This observation has been confirmed. There are not many overlaps between both. But although the overlaps are few, some clear lines can be drawn between the two.

Biological weapons are in the category of weapons of mass destruction, but biological weapons have much less military value today in deterrence and in practice than nuclear weapons. The most important example of a war that was waged for reasons that were linked to biological weapons was the Iraq war of 2003. But this link existed more on paper and in the declaratory policy than in reality. As far as the argument was used, it cannot be accepted as a just cause for the war.

This does not mean that developing and storing biological weapons are justified from a just-war perspective. Most of these weapons (certainly the ones with contagious agents) are by definition indiscriminate, and using them would be a violation of the noncombatants principle. The same argument also applies to a possible bioterrorist use of biological agents. And for the category of non-indiscriminate biological weapons, the argument against their use can be found in the inhumane character of these means. From a more military point of view, the argument of Valerius Maximus (*'armis bella non venenis geri'*: wars are fought with weapons, not with poison) still can be seen as valid.

The consideration that possession of biological weapons could be legitimated for reasons of deterrence is refuted by the current political and military situation. Because of the BWC, which became possible because of the limited military value of biological weapons, there is no credible reasoning that these weapons have a deterring function.