

## IN DEFENCE OF GUERRILLAS

- Uwe Steinhoff -

Although “guerrilla” is not a pejorative term – as “terrorist” surely is and “warlord” seems to be – there appears nevertheless to be a considerable uneasiness among just war theorists when it comes to guerrillas. Many do not really discuss the phenomenon, and the few who do mostly seem to sympathize with the counter-insurgents. This is so in the first place because of *ius in bello* considerations. Allegedly, guerrillas are here in a morally very difficult position. On the other hand, that guerrillas could fulfil *ius ad bellum* requirements is today hardly denied by anyone. This is not to say that all just war theorists would think that guerrilla war – especially revolutionary guerrilla war – is from the *ius ad bellum* perspective completely on a par with conventional state war. Yet, only very few philosophers display what I will call an extreme pro-state bias in this matter.

I propose, without being able to provide further argument for this definition here, the following definition of “guerrilla movement” and “guerrilla”:

*A guerrilla movement* is an armed movement with a seriously and publicly avowed goal or ideology that functions as its unifying force. It starts out operating with small and mobile combat groups, using primarily tactics like ambush, hit-and-run and the cutting of communication and supply lines, but it can in later phases of the conflict take the form of or create a regular army ready to fight pitched battles. It ceases to be a guerrilla movement when it defeats its enemy and establishes itself as the ruling power within the once contested territory (or turns into a non-armed movement or is destroyed).

*A guerrilla* is a member of a guerrilla movement.

### A. INSURGENCY, COUNTER-INSURGENCY AND *IUS IN BELLO*

#### 1. What Are the Perceived Problems?

Let me first turn to the *ius in bello* side. What bothers just war theorists – and, indeed, international law – about guerrillas has been aptly put by Michael Walzer:

Their struggle is subversive not merely with reference to the occupation or to their own government, but with reference to the war convention itself. Wearing peasant clothes and hiding among the civilian population, they challenge the most fundamental principle of the rules of war. For it is the purpose of those rules to specify for each individual a single identity; he must be either a soldier or a civilian.<sup>1</sup>

And if the guerrillas do not maintain the distinction of soldiers and civilians, why should their enemies, for example the counter-insurgents?

This question is not rhetorical in Walzer, but it becomes so in Paul Ramsey. In fact, if one is looking for a patron saint for trigger-happy, area-bombarding counter-insurgents, the “Christian” philosopher Ramsey would probably be the first port of call. His conservative bias already becomes clear when, writing in the 1960s, he declares

that the most urgent, practical, military and political question during our lifetime is, How is it possible ... to mount an *effective* counter-insurgency war, and to deliver such retribution upon it that future insurgency will be deterred, and thus precarious, politically-embodied justice in the world be given some protection.<sup>2</sup>

The idea that in many cases *injustice* will be given some protection by deterring insurgency – the Nazi regime, to mention only one case, was certainly not politically embodied justice – apparently does not even occur to him. To be sure, to the question whether he means “with Luther to side always against those who make revolution and with those who oppose it” he answers that “neither in theory nor in practice is this the conclusion to be drawn”.<sup>3</sup> However, in the light of what he is really saying – and how he is saying it – this statement appears to be mere lip service. In fact, he is quite incapable of bringing himself to the explicit concession that revolutions may sometimes be justified.<sup>4</sup>

Since Ramsey is so concerned about the efficacy of counter-insurgency, he sets out to be as lenient towards counter-insurgents as possible. He achieves this by blaming any lack of discrimination between civilians and combatants on the insurgents/guerrillas. Before going into this, it is useful to first have a formulation of the principle of discrimination. Ramsey himself gives a more or less accurate rendering of the traditional account. This account rests heavily on the doctrine of

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<sup>1</sup> Walzer [2000] p. 179. It should be noted that Walzer’s discussion of guerrillas is rather sympathetic.

<sup>2</sup> Ramsey [2002] p. 428.

<sup>3</sup> *Ibidem*, p. 458.

<sup>4</sup> See the particularly revealing beginning of the new paragraph (“As for ...”) *ibidem*, p. 460.

double effect, which claims that to kill someone is worse when this killing is an end in itself or a means to some other end than when it is only a foreseen “side-effect”:<sup>5</sup>

The principle of discrimination is shorthand for “the moral immunity of non-combatants from direct attack.” This does not require that civilians never be knowingly killed. It means rather that military action should, in its primary (objective) thrust as well as in its subjective purpose, discriminate between directly attacking combatants or military objectives and directly attacking non-combatants or destroying the structures of civil society as a means of victory. ... the latter is the meaning of murder ...; while the former ... can be justified, including the collateral and foreseeable but unavoidable destruction of non-combatants in the course of attacking military objectives.<sup>6</sup>

Now, why is guerrilla war, according to Ramsey, intrinsically so dirty, and why can the counter-insurgents so relatively easily stay clean? It is worthwhile quoting Ramsey’s central and quite remarkable argument at length:

In contemporary insurgency, the fact is that a peasant is often a civilian by day and a combatant by night. Others are close cooperators all or some of the time, and therefore technically combatants also. In short, the decision of the insurgents to conduct war by selective terror results in a situation in which a whole area is inhabited mainly by “combatants” in the ethically and politically relevant sense that a great number of the people *are* from consent or from constraint the bearers of the force to be repressed. “There is no profound difference between the farmer and the soldier,” wrote Mao Tse-tung; and so saying made it so. *The insurgents themselves* have enlarged the target it is legitimate for counter-insurgents to attack, so far as the principle of discrimination is concerned; and it is therefore mainly the principle of proportion that limits what should be done to oppose them. Since in the nature of insurgency the line between combatant and non-combatant runs right

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<sup>5</sup> The doctrine of double effect, as it is usually presented today, holds that an act with certain predictable negative consequences is allowed when the following conditions are met: (1.) The agent acts with good intention, and attempts to bring about a good effect (or at least a morally permissible one). (2.) The agent does not want to bring about the predicted negative consequences or side-effects, and attempts to avoid or mitigate them as much as possible. (3.) The agent treats the negative repercussions or side-effects neither as ends in themselves, nor as a means to another end. (4.) There is an acceptable proportion between the predicted negative consequences and the positive effect. Cf. Davis [1984] p. 108. Walzer [2000] p. 153, demands, as the first condition, that the act be good in itself, “which means, for our purposes, that it is a legitimate act of war”. If we know from the beginning that the act is legitimate, why do we need the other conditions?

<sup>6</sup> Ramsey [2002] p. 428f.

through a great number of the able-bodied people in a given area, male or female, above, say, ten years of age, and since anyone may cross over this line in either direction by the hour, it is not the business of any moralist to tell the soldiers and military commanders who are attempting to mount an effective counter-insurgency operation that this cannot be done in a morally acceptable way because under these circumstances they have no legitimate military target. In devising a military riposte, it will not be those who are directing the counter-insurgency who illicitly enlarged the target and chose to fight the war indiscriminately. Instead, the tragedy is that they *have* an enlarged legitimate target because of the decision of the insurgency to fight the war by means of peasants. ...

Also it is the insurgency and not counter-insurgency that has enlarged the area of civilian death and damage that is legitimately collateral. ... The principle of discrimination has already been violated by the practice of Mao Tse-tung's maxim, with the result that not only is the category of combatancy enlarged but also the extent of permissible collateral damage.<sup>7</sup>

According to Ramsey, apparently, one moral obligation of the just war theorist is to give counter-insurgents considerable space for manoeuvre and to inform them right away that they do not even face the *peril* of violating the principle of discrimination: "[It] is proportion and not discrimination which counter-insurgency is in peril of violating."<sup>8</sup> Unfortunately, his eagerness to comply with this demanding moral obligation interferes seriously with the quality of his reasoning. Let us see how.

First of all, we have to distinguish – which Ramsey does not – between at least *three* questions. 1. Is the principle of discrimination indeed violated by the practice of Mao Tse-tung's maxim? 2. Do counter-insurgents – in contrast to an army fighting against another regular state army – have an "enlarged" legitimate target and can therefore, as it were, more easily abide by the principle of discrimination? 3. Do counter-insurgents violate the principle of discrimination by taking "a whole area" as "inhabited mainly by combatants" or civilians "unavoidably within range of justified collateral damage"<sup>9</sup> and subjecting it to area bombardment – a practice Ramsey considers to be justified?<sup>10</sup>

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<sup>7</sup> *Ibidem*, pp. 435f. If not otherwise indicated, all Ramsey quotes below stem from this passage.

<sup>8</sup> *Ibidem*, p. 436.

<sup>9</sup> *Ibidem*, p. 441.

<sup>10</sup> *Ibidem*, esp. p. 439ff.

## 2. Do Farmers Violate the Principle of Discrimination by Taking Up Arms?

Let us turn to the first question first. The certain answer is, *pace* Ramsey, “No”. The reasons for this are straightforward and follow logically directly from Ramsey’s own characterization of the principle of discrimination (and also from other common characterizations of it, for that matter). This principle is, to quote Ramsey’s rendering of it again, “shorthand for ‘the moral immunity of non-combatants from direct attack’ and it means “that military action should, in its primary (objective) thrust as well as in its subjective purpose, discriminate between directly attacking combatants or military objectives and directly attacking non-combatants or destroying the structures of civil society as a means of victory”.<sup>11</sup> Does a farmer, by taking up weapons and joining the guerrillas, attack non-combatants? Obviously not. If he shoots at a non-combatant, he attacks a non-combatant; if he merely joins the guerrilla he might for the whole war only attack combatants. The one has nothing to do with the other. Does a guerrilla combatant who wears the distinctive marks of a combatant and carries his arms openly attack a non-combatant by taking off his marks and hiding his weapons? Obviously not. The one has nothing to do with the other.

At this point it might be objected that guerrillas do make civilians more susceptible to direct attack when they dress like them, for counter-insurgents, to be on the safe side, then might shoot first and ask questions later. That is absolutely correct. It is also completely beside the point. Counter-insurgents, after all, also make civilians more susceptible to direct attack (this time by the insurgents) when they use civilians as informants. But making someone more susceptible to direct attack and actually attacking him is not the same. Thus, the fact remains that by practising Mao Tse-tung’s maxim one does *not* yet violate the principle of discrimination. This is not to be glossed over.

Still, there remains also the fact, it might be said, that by using certain camouflage tactics the guerrillas do make civilians more susceptible to “indirect” attack, and that by moving among the civilian population “like the fish in the ocean” they also do enlarge the “area of civilian death and damage that is legitimately collateral”. (By the way, the practice of the American military in Vietnam of allowing its soldiers to frequent civilian installations like restaurants, cafés, bars and brothels had the same effect. But Ramsey does not worry too much about these ways of enlarging the area of civilian death that is legitimately collateral.) However, that in itself can hardly be a valid argument against guerrillas. If it were, it would also be an argument for downright pacifism, an argument against any mili-

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<sup>11</sup> *Ibidem*, p. 429.

tary forces whatsoever, whether regular or irregular. For without military targets there can, after all, be no legitimate collateral damage. Only forces that operate so far away from civilians – and never have leave from the front – to rule out “inviting” collateral damage could be justifiable (and these are science fiction conditions). Thus, *any* enlarging of one’s military – and already, at a previous stage, the creation of an armed force – is also an enlarging of the scope of legitimate collateral damage.

The justifiability of enlarging the scope of legitimate death can also be seen from another perspective. Ramsey, as we have seen, is at pains to make clear that collateral damage is justifiable. Collateral damage consists in the “foreseeable but unavoidable destruction of non-combatants in the course of attacking military objectives”.<sup>12</sup> Now, if it can be justifiable to *foreseeably kill* civilians (for example, in the course of an attack on military targets), why can it not also be justifiable to *foreseeably heighten the danger of civilians to be killed by others* (for example, by avoiding being detected as a combatant)? Many politicians who “do not negotiate with terrorists” do precisely that. Is that unjustifiable? I do not think so. The relevant criterion here is not discrimination. It is proportionality. And that can be fulfilled. As with the counter-insurgents – *and* the insurgents. Incidentally, many moral philosophers think that allowing people to be killed by someone is less evil than killing them oneself.

So much for the first question, as to whether the principle of discrimination is indeed violated by the practice of Mao Tse-tung’s maxim. The answer is a definitive “No”.

### **3. Do Counter-Insurgents Have an “Enlarged” Legitimate Target?**

Let us now turn to the second question, whether counter-insurgents – in comparison to an army fighting against another regular state army – have an “enlarged” legitimate target (a legitimate *target* is to be distinguished from the “range of justified collateral damage”) and can therefore more easily observe the principle of discrimination.

The answer to this, again, is “No”. First of all, what is “selective terror”? With this, Ramsey means deliberately striking at “a selected number of the civil population, in order to subvert a whole country’s traditions and institutions and to bring down the government”.<sup>13</sup> Again, one should note that a whole country’s

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<sup>12</sup> *Ibidem*. I would actually say that the unavoidability condition overstates things, but I need not go into that here.

<sup>13</sup> *Ibidem*, p. 432.

traditions and institutions can be subverted by *propping up* a government that does not have the support of the population, through money, weapons, diplomacy or colonialist intervention. One might also add that one way for such a government to keep its power is to strike – by incarcerating, torturing, or illegally executing them – at a selected number of the civil population, for example at opposition leaders, unionists, and all kinds of dissidents. And this can well be called terror, namely state terror. On the other hand, the selective elimination of collaborators with, and informants of, the enemy in a war situation hardly deserves to be called terror. These people might still be civilians, but they chose to take part in the war effort. They certainly qualify as “close collaborators”, who according to Ramsey, as we saw, are “technically combatants also”. The police and the secret service in a country at war, after all, also strike against collaborators, saboteurs and spies. Of course, one might say that the best way to deal with them is by the criminal justice procedure. This may often well be the case, but it depends on the resources the party confronted with collaborators has at its disposal. Ramsey himself, after all, says that “it can be questioned whether a soldier who has surrendered may not remain a ‘combatant’ in some fluid, jungle warfare situations in which it is impossible to insure that he will stay ‘surrendered’”.<sup>14</sup> But don’t guerrillas face the same situation with regard to collaborators with the enemy? Detention will for the most part be an impracticable option.

Be that as it may, there is a much more fundamental problem with Ramsey’s position. Even if “selective terror” were indeed unjustifiable – why does “the decision of the insurgents to conduct war by selective terror [result] in a situation in which a whole area is inhabited mainly by ‘combatants’”? There is no logical connection here whatsoever. Imagine there is an area mainly filled with peasants, let us say 90 per cent. There are, however, also some mayors, let us say, 0.2 per cent. The guerrillas in the area kill off half of the mayors. How is that supposed to turn the larger part of the peasants into guerrillas? Even if the guerrillas would kill all the mayors and, let us say, 40 per cent of the peasants (or 99.9 percent) – how could that possibly turn the other peasants into combatants? The answer is it cannot.

What is a combatant, anyway? Ramsey gives this answer:

... a “combatant” means anyone who is an actual bearer of the force one seeks to repress by resorting to arms. While in conventional warfare this seems easily determined by whether or not a man is in military uniform, it is still the case that

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<sup>14</sup> *Ibidem*, p. 435.

(a) persons in command positions are “combatants” even though they wear tweed suits; (b) closeness of material cooperation may define a civilian as a “combatant”; (c) a man still in uniform after he surrenders is not one of the “combatants” it is just to repress; yet (d) it can be questioned whether a soldier who has surrendered may not remain a “combatant” in some fluid, jungle warfare situations in which it is impossible to insure that he will stay “surrendered.”<sup>15</sup>

The question is, what does “material cooperation” mean? Ramsey does not clarify this. Jeffrie G. Murphy, however, has offered a very useful explanation of the term “combatant”:

Combatants are those anywhere within the *chain of command or responsibility*—from bottom to top. ... the links of the chain (like the links between motives and actions) are held together logically and not merely causally, i.e. all held together, in this case, under the notion of who it is that is *engaged in an attempt* to destroy you. The farmer qua farmer is, like the general, performing actions which are causally necessary for your destruction; but, unlike the general, he is not necessarily engaged in an attempt to destroy you. ... The farmer’s role bears a contingent connection to the war effort whereas the general’s role bears a necessary connection to the war effort ... The farmer is aiding the soldier qua human being whereas the general is aiding the soldier qua soldier or fighting man.<sup>16</sup>

From this it follows that not only those fighting in the strict sense – those firing upon the enemy or carrying weapons in order to do so – may be attacked, but also those giving orders, presidents and ministers included, which corresponds to Ramsey’s point (a). It is important to emphasize that the engagement Murphy is talking about has something to do with an ongoing project, not with a present conscious effort. The enemy soldier’s engagement in an attempt to destroy you does not stop when he is sleeping or oiling his weapon instead of being actually shooting at you. Someone is also engaged in an attempt to murder you when he ties you up and takes a nap before actually killing you. If your only chance of survival is to kill him in his sleep, you may do so. He is liable to your attack, because his sleep does not cancel his plan and his engagement.

As regards Ramsey’s point (b), it is also clear that workers in an ammunition factory support – not necessarily in a chain of command, but in a chain of responsibility – the soldier (or guerrilla) qua soldier (or guerrilla). This is not true,

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<sup>15</sup> *Ibidem*, p. 435.

<sup>16</sup> Murphy [1973] pp. 532-534.



however, of a peasant who simply provides the guerrillas with food supplies. Ammunition factories are – morally and in the laws of war – legitimate military targets. Bakeries and bakers or farms and farmers who do nothing more than supply soldiers with food or other things they need qua human beings and not merely qua soldiers are not. And it is irrelevant whether the bakers or farmers wish the soldiers’ or guerrillas’ cause success or not. As Ramsey himself says in the sentences immediately following the indented quote above: “Guilt or innocence in the sense of malice or good will (even if it were possible in war to weigh hearts) would scarcely assist us to apply the principle of discrimination in the conduct of war.”<sup>17</sup>

Now, having clarified the concept of “combatant”, how is it that insurgents enlarge the legitimate target? Because of the decision, says Ramsey, “to fight the war by means of peasants”.<sup>18</sup> Again, Ramsey’s reasoning is devoid of any logic. Logically, the size of “the” legitimate target or the number of the legitimate targets depends, well, on the number and size of the legitimate targets, namely on the number and size of military objects (tanks, weapons factories, helicopters, barracks, command centres, military airstrips, and so forth) and the number and size of combatants. Now suppose a revolutionary movement decides to face an incumbent army of 10,000 soldiers with its own regular forces of 5,000 fighters, consisting mainly of the party members, none of whom is a peasant. After severe losses, the remaining party members decide that they are not up to the task, dissolve the regular army and keep themselves out of the fighting while asking some peasants to do it for them. Some 1,000 peasants agree and engage in a guerrilla war. I would surmise that the following is a simple mathematical truth: if the 1,000 peasants engaging in the guerrilla war aren’t on average at least five times bigger than the average fighter of the former regular force, then the decision to fight the war with 1,000 peasants instead of with 5,000 non-peasants has *diminished* the size of the legitimate target, not enlarged it. (It should be borne in mind that at the moment I am only talking about legitimate *targets*, not about the “range of justified collateral damage”. I will return to the latter point.)

It has to be admitted, though, that the decision of an opposition movement to engage in war at all – whether by means of peasants, professional soldiers or dentists – indeed enlarges the legitimate target for the enemy forces. However, the decision of the United States in the Second World War to call for a mass mobilization and to turn a huge number of peasants, dentists, actors, painters, cowboys,

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<sup>17</sup> Ramsey [2002] p. 435.

<sup>18</sup> *Ibidem*, p. 436.

singers, electricians and what have you into combatants enlarged the size of the legitimate target *hugely*. I doubt, however, that Ramsey would see a problem in that. In fact, if war fought with conscripts can be justified at all – and Ramsey nowhere objects to the turning of young American civilians into combatants – then enlarging the size of the legitimate target can hardly be wrong in itself.

This last paragraph took up the first of the three questions again, again answering it negatively. Where are we with regard to the second question? Well, it has been established that there is nothing about fighting the war by means of peasants that would enlarge the legitimate target to a higher degree than would fighting the war by means of conscripted regular soldiers. In fact, often – although not always – the insurgency's armed forces are smaller than those of their regular enemy. This means that counter-insurgency war can at least as easily violate the principle of discrimination as warfare against a regular army.

Ramsey's claim that "a peasant is often a civilian by day and a combatant by night" and that others are "close cooperators ... and therefore technically combatants" does not affect this result at all (a claim, incidentally, that has nothing to do with conducting war by "selective terror", contrary to what Ramsey's use of "in short" in the long quote above suggests). First, a peasant who is engaged in a guerrilla campaign against an incumbent force does not stop being a combatant only because he is not at the moment shooting at an enemy soldier but attending to the rice field. The regular soldier, too, does not cease being a combatant only because he is not at the moment shooting at the enemy but is sitting in the barracks (or on leave at home, for that matter) writing a poem. So the peasant who is engaged at night in guerrilla warfare is also a combatant by day. On the other hand, the peasants who are not engaged in guerrilla warfare and not supporting the guerrillas *qua* combatants are not combatants at all.

It is also rather funny to say, as Ramsey does, "'There is no profound difference between the farmer and the soldier,' wrote Mao Tse-tung; and so saying made it so." If George W. Bush, who has, after all, a track record for unwise remarks, had claimed that "we Americans are all combatants in a war against terror", this would not make all Americans combatants in a war against terror. The situation is not different if it comes to Mao Tse-tung.

To be sure, Ramsey is quite right in saying that in an insurgency it can be the case that "the line between combatant and non-combatant runs right through a number of the able-bodied people in a given area, male or female, above, say, ten years of age" (although he is wrong in claiming that this lies in the nature of insurgency). But precisely since the line runs through them (so there obviously *is* a line), those on the one side of the line are combatants while the ones on the other

are not. And although he might be also right (but I doubt it) that “anyone may cross over this line in either direction by the hour”, this does not change the fact that as long as they are on one side of the line they are on that side of the line and not on the other. That makes it more difficult for the counter-insurgents to discriminate between combatants, not easier. And therefore it seems, if anything, to be rather in the nature of *counter-insurgency* to violate the principle of discrimination, and not in the nature of *insurgency* and *guerrilla warfare*.

At this point it might be suggested that Ramsey’s point might have been precisely that it is more difficult for counter-insurgents to discriminate, and not that it is somehow easier for them. And he might have wanted to adduce this as an excuse for the counter-insurgents. Well, his whole discourse about the “enlarged legitimate target” suggests otherwise. If the target is enlarged, there is more you can shoot at, and that would make it easier to abide by the principle of discrimination. He also nowhere excuses them – he attempts to justify them. Besides, he explicitly says, as already quoted: “[It] is proportion and not discrimination which counter-insurgency is in peril of violating.”<sup>19</sup> They do not even face the *peril* of violating the principle . . .

But, indeed, his text also intimates – actually quite in accord with his assessment just quoted – that because it is more difficult for counter-insurgents to discriminate between mere peasants and guerrilla-peasants, they might be justified in shooting at more or less all peasants. But if this is really what he wants to suggest – and I am not completely sure and hope he does not – it has simply to be stated that he nowhere adduces an *argument* to support that suggestion. Moreover, such an argument, that the counter-insurgents might be justified to shoot at more or less all peasants, would not show that by doing so they still abide by the principle of discrimination, but only that they might be justified in *not* abiding by the principle of discrimination. Besides, while such an argument is, in my view, theoretically and in extreme circumstances available, it can be much more easily employed by the insurgents – as normally the militarily weaker party they might have no other means available – than by the counter-insurgents.<sup>20</sup>

The answer to the second question, as to whether counter-insurgents – in contrast to an army fighting against another regular state army – have an “enlarged” legitimate target and can therefore more easily abide by the principle of discrimination, thus is “No”.

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<sup>19</sup> *Ibidem*.

<sup>20</sup> See Steinhoff [2007] pp. 135-37.

#### 4. Counter-Insurgents and the Principle of Discrimination

Let us then turn to the third question, whether counter-insurgents violate the principle of discrimination by taking “a whole area” as “inhabited mainly by ‘combatants’” or civilians “unavoidably within range of justified collateral damage”<sup>21</sup> and subjecting it to area bombardment.

The answer to this question is “not necessarily, but in most cases”. It depends, obviously, on whether the area is *indeed* inhabited mainly by combatants. However, simply to *take* whole areas as so inhabited, for example by making, as we have seen, patently wrong and illogical claims like “the decision of the insurgent to conduct war by selective terror results in a situation in which a whole area is inhabited mainly by ‘combatants’”, is certainly illicit. The same holds for claims like “a peasant is often a civilian by day and a combatant by night” and even for the claim that peasants are often combatants. *How* often? It would be difficult to find any insurgency war in which as much as 10 per cent of the peasants are or were guerrillas. (Ramsey seems to suppose otherwise. That would only show that he is badly informed.) That is, 10 per cent would already be a lot. But it definitely does not turn the other 90 per cent into combatants. Of course, Ramsey could claim that *every kind* of support for the guerrillas makes the supporter into a “combatant”. But first, that claim does not deserve any credit and runs completely counter to the just war tradition Ramsey avowedly propounds; and second, following the same line of reasoning, every supporter and supplier of a regular soldier, too, would be turned into a “combatant”. Finally, it would probably still not make the whole area mainly inhabited by “combatants”.

There is a further problem. Let us recall what the principle of discrimination says. In Ramsey’s words it “is shorthand for ‘the moral immunity of non-combatants from direct attack’”.<sup>22</sup> But what exactly does “direct attack” and “indirect attack” mean, respectively? One idea that might come to one’s mind naturally is this: if Jones shoots at Smith, that is a case of a direct attack on Smith; if, however, Jones shoots at Brown, who is in a window above Jones, so that Brown falls and squashes Jones, that is a case of an indirect attack on Jones.

But this cannot be what is meant with “direct” and “indirect” attack in just war theory. For in just war theory it is assumed that shelling a village in which a lot of enemy soldiers have entrenched themselves does not violate the principle of discrimination, even if the village is still filled with its civilian inhabitants. But shells are not a very precise weapon, which is why it is quite accurate to talk of

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<sup>21</sup> Ramsey [2002] p. 441.

<sup>22</sup> *Ibidem*, p. 429.

shelling the village instead of shelling the soldiers. You cannot target the soldiers with the mortars as you can target them with a rifle. You can just fire the shells roughly in their direction, but that is the direction of the village and hence also the direction of its civilian inhabitants. If one and the same shell kills two soldiers as well as two civilians, it seems a little odd to claim that the former were attacked “directly” while the latter were attacked “indirectly”. Having shells thrown in one’s direction which will tear one into pieces seems to be as direct a form of attack as ever there was.

Why, then, is it assumed in just war theory that the principle of discrimination is not violated in the case of the shelling of the village? In shelling the village it seems after all that a soldier does not and cannot, for simple technical reasons, discriminate between enemy soldiers and civilians.

The answer is that this “technical” discrimination is not what is meant. In order to discriminate between enemy soldiers and civilians the soldier does not in each case have to be able to steer the dangerous projectile or substance or energy he is releasing in such a way that enemy soldiers are more or even much more likely to be harmed than civilians. However, it is also not sufficient “not to intend” to kill civilians but to “merely foresee” it. Rather, “discrimination” refers to an *attitude and effort*. As Michael Walzer nicely puts it:

What we look for in such cases is some sign of a positive commitment to save civilian lives. Not merely to apply the proportionality rule and kill no more civilians than is militarily necessary—that rule applies to soldiers as well; no one can be killed for trivial purposes. Civilians have a right to something more. And if saving civilian lives means risking soldier’s lives, the risk must be accepted. But there is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.<sup>23</sup>

Let us apply this to the example of the shelled village. When the soldiers and their commanders have carefully considered whether there are ways to achieve the military goal that would be less dangerous for the civilian population of the village than shelling and yet not unacceptably risky for one’s own side, and they have then come to the correct (as we suppose in this case) conclusion that

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<sup>23</sup> Walzer [2000] pp. 155f. Walzer goes so far to claim: “The limits of risk are fixed, then, roughly at that point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated”, *ibidem*, p. 157. I think this overstates the case.

there is not and accordingly start shelling the village, they are discriminating between civilians and soldiers. The discrimination in this case lies precisely in that they have undertaken the honest intellectual effort of raising the said question and risking acceptable dangers for their own side in order to reduce civilian injuries and damages. The discrimination lies, in this case, not in the physical movements of the soldiers, in the way they handle their weapons and direct the projectiles; nor does it completely lie in the intentions of the soldiers during the shelling. It lies very largely in the (intellectual) effort, guided by the will to discriminate between soldiers and civilians, that was undertaken before starting the shelling.

Thus, where is the further problem for Ramsey I was alluding to? Well, let us modify the example. Suppose the soldiers considered whether there were ways to achieve the military goal which would be less dangerous for the civilian population of the village than shelling and not unacceptably risky for one's own side and have then come to the correct conclusion that there are such ways and that therefore shelling the village would be disproportionate – but they shell it anyway. Or they shell it right away, not caring about considerations of proportion at all. In both cases, they show a lack of will to discriminate between soldiers and civilians. In shelling the village, they would *not* discriminate between legitimate and illegitimate targets. But this demonstrates that the principle of discrimination is, *pace* Ramsey, *not* independent of the principle of proportionality. By violating the principle of proportionality with respect to “collateral damage”, that is, with respect to the harming of civilians (or the harming of innocents), one violates the principle of discrimination.

Applying this to the question of area bombardment it has to be said that, yes, theoretically area bombardment can be proportionate and discriminate. But in the real world, area bombardment is rarely – probably never – undertaken after having made a serious and honest effort to find ways of warfare that are less damaging for the civilian population. The decision of area bombardment in counter-insurgency will, rather, take the form of “There must be guerrillas in that area. Let's bomb it.” (Vietnam is a case in point.) There are rarely, if ever, attempts to find out – even if we are talking only about very rough estimates – how many guerrillas there are in a given area, and how many civilians, and what the military effect and the collateral damage of the area bombardment is likely to be. To this, let me just add that not only soldiers or politicians can violate the principle of discrimination. Philosophers do so, too, who do not urge counter-insurgents to abide by the principle of discrimination but rather declare that they are not in peril of violating it in the first place.

## B. GUERRILLAS AND *IUS AD BELLUM*

So far we have seen that there is no reason in principle why guerrillas should not be able to fight within the constraints of *ius in bello*. Let us now turn to the question of *ius ad bellum*. Can guerrillas justifiably take up arms in the first place? And are there, from a moral point of view, any special problems involved, problems that, for example, states do not face?

Most people today believe that revolutions, even if undertaken with violent methods, can be justified. Most philosophers agree. Therefore it is not necessary here to carry coals to Newcastle. On the other hand, the topic cannot be skipped here altogether. It is worth being reminded by some arguments *that* and *why* revolution and guerrilla war can comply with *ius ad bellum* requirements. I shall be doing this in discussing William V. O'Brien's stance on the issue. He is extremely sceptical with regard to the possibilities for revolutionary movements to satisfy *ius ad bellum*. Therefore, challenging his arguments suggests itself as a good way to challenge the pro-state-bias itself.<sup>24</sup>

Already early on in his discussion of revolutionary war he states:

the far-reaching political and ideological aims of revolutionary war lend it a character that tends to clash with the limitations of the just war as well as of positive international law. In this discussion I will use the term *revolutionary war* to mean a revolutionary struggle to change or maintain a national political-economic-social system where the revolutionaries and their allies use unconventional means of warfare, principally guerrilla warfare.<sup>25</sup>

It is unclear why a struggle, and be it with guerrilla methods, to *maintain* the status quo of a Yanonami tribe in the Amazon, a tribal society in Africa or Arabia or the liberal democracy in Switzerland should be called "revolutionary". It is also unclear why it should have "far-reaching political and ideological aims". Moreover, there is also no reason why a revolution (proper) should have such far-reaching aims. O'Brien simply claims this.

Yet, this unwarranted claim guides his critical remarks on the issue of proportionality (both *ad* and *in bello*). He says:

Revolutionaries often have as their end referent an open-ended utopia. Even if they conceded in principle that the utopia did not justify all and any means, it would still serve as the justification for means that would be very hard to define

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<sup>24</sup> I also provide an argument against the pro-state-bias in Steinhoff [2007] ch. 1.

<sup>25</sup> O'Brien [1981] p. 154f.

and limit. The counter-insurgents, on the other hand, are at an inherent disadvantage. The best that they can usually offer as the just cause is the continuation of the status quo, perhaps substantially reformed. Even a reformed status quo, in the typical revolutionary situation, will usually look unattractive and unworthy of the cost of war compared with the vague but idyllic utopia promised by the revolutionaries.<sup>26</sup>

However, he himself correctly points out that “the revolutionaries must not be permitted to justify otherwise disproportionate means [which might include the war itself] on the argument that the utopia to be established will make everything worthwhile.” After all, there is the just war requirement “that there be a solid probability of success.”<sup>27</sup> In fact, proportionality cannot – in contrast to what O’Brien seems to be suggesting here – be assessed by comparing the evil of the war with the good it (officially) aims at. In fact, for lack of omniscience one cannot *ex ante* compare the evil of the war with anything at all – only the *expected evil*. The same, however, holds for the good. This can only mean the *expected* (moral) utility. Once this is realized, it also is clear that there exists no inherent disadvantage for the counter-insurgents with regard to proportionality. There is no reason why the moral utility *reasonably* to be expected for the war they are waging or about to wage should not outweigh the utility reasonably to be expected with regard to the (potential or real) war effort of the enemy. The same, however, holds vice versa. Revolutionary wars can fulfil the proportionality requirements of *ius ad bellum* as well as of *ius in bello*.

Of course, revolutionaries sometimes do justify their resort to arms or their way of wielding them by an appeal to some utopia. However, that is irrelevant for the question whether the war is proportionate. That a party waging a war defends the war’s proportionality with the wrong reasons does not prevent it from actually being proportionate.

Conversely, counter-insurgents may well claim that they have to prop up an authoritarian regime in order to defend it against utter evil (like communism, perhaps in a Stalinist or, worse, anti-American form) which would once and for all keep the society repressed by this regime from slowly, but in the long run inevitably transforming itself because of some developmental logic (the Western counterpart to the communist law of history) into a liberal democracy and abundant capitalist society at the “end of history”. This example is, unfortunately, not invented.

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<sup>26</sup> *Ibidem*, p. 164.

<sup>27</sup> *Ibidem*, p. 164f.



The argument was adduced in the context of the Western, especially the US, propping up (sometimes with military “advisors”) of repressive regimes in Latin America, Africa and Asia. Especially in Latin America it was also used within these societies, with little restraint noticeable on the side of the counter-insurgents as to the choice of means. After all, what means could be disproportionate in a fight against utter evil?

O’Brien sees the biggest problem for “revolutionary” war in the requirement of competent (legitimate) authority. In this respect, he displays his biggest pro-state bias. His discussion of legitimate authority has also to be seen in the light of his discussion of just cause. Describing the natural-law tradition of the just war theory he explains:

If a regime is so oppressive that it threatens the fundamental rights of the members of the community and the common good it may be resisted by force. Or, if the government acts in ways contrary to the conditions established for the legitimate exercise of power, the people, as the original repository of political authority, have a right to reclaim that authority and vest it in a new government.

These just causes are integrally related to the issue of competent authority just discussed. ... it is easy to claim to speak for the people and their rights and difficult to determine whose voice should be heeded as the true revolutionary competent authority.<sup>28</sup>

The interesting thing, though, is that he completely ignores this difficulty of determining who is really speaking for the people if it comes to the state or the incumbent regime. He even says: “I would argue that the regime has competent authority until it is defeated altogether and the war ended.”<sup>29</sup>

In other words, threatening fundamental rights of the members of the community or violating the constitution seems, if it comes to the state, not to undermine legitimate authority – at least not the authority to invite foreign intervention – in O’Brien’s view. His double standard is also revealed in the following statement:

To be sure, it has been argued that the right of self-defense resides in the people or nation. But, except in colonial wars, it is rarely possible to equate the people or na-

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<sup>28</sup> *Ibidem*, p. 162.

<sup>29</sup> *Ibidem*, p. 158, see also p. 172. At least he recognizes that this position is “contrary to what seems to be the prevailing view recently”, *ibidem*, p. 159.

tion with revolutionary movements and forces, notwithstanding their claims to be the sole representatives of the people or nation.<sup>30</sup>

Actually, I would go even further: not even in colonial wars is it possible to *equate* a revolutionary movement with “the people”. An obvious reason for this is that it is quite unclear who or what “the people” is. Attempts to clarify that notion have, in my view, not come to much. If, on the other hand, “the people” is not to mean more than “the citizens” (or “the long-term residents”) it still remains obvious that a revolutionary movement cannot be equated with the citizens, for not all citizens will participate in or at least support the revolutionary movement. The same, however, is true of *governments*. Governments neither *are* nor do they *represent* the citizens. They might represent some or more, but surely not all of them.<sup>31</sup> Therefore, “representation of the people” becomes a rather relative if not outright metaphorical notion. And there is no reason to be seen – and O’Brien certainly does not adduce any – why governments should from a moral point of view have the benefit of the doubt if it comes to the “representation” of their people while guerrillas should not. It quite simply depends on the actual circumstances.<sup>32</sup>

On the other hand, while O’Brien is extremely reluctant to allow for a state’s authority being legitimately challenged by a subnational guerrilla movement, the picture suddenly changes if the challenge comes from *another state*. It is worth while to quote this at length:

Yet, the fact of frequent violation in practice of the principle of nonintervention suggests that, in at least some cases, the states violating this principle are not callous lawbreakers, but actors pursuing some other fundamental values that they believe to be of greater normative weight and relevance than the principles of equality of sovereign states and self-determination. It surely is conceivable that there may be circumstances where nonintervention may mean failure to uphold justice. ... Surely it cannot be the case that no matter how repugnant to law and morality the behaviour of the majority toward the minority may become, there is no war-

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<sup>30</sup> *Ibidem*, p. 160.

<sup>31</sup> This is, in my view, quite convincingly shown by philosophical anarchists like Simmons [1981], and Green [2008].

<sup>32</sup> It may perhaps be noted, by the way, that much of the shortcomings in O’Brien’s exposition might stem from the fact that in his moral discussion he treats international law and state practice as something like holy scriptures or revelations – as something that *determines* what the moral norms are. He is, it seems to me, throughout taking legality for morality.

rant for foreign intervention on behalf of the victims of inhuman, perhaps genocidal, treatment.<sup>33</sup>

I certainly agree with O'Brien in this matter. Given this stance and his earlier concession that the people are "the original repository of legitimate authority",<sup>34</sup> it is, however, rather mysterious why he claims, as seen above, that "the regime has competent authority until it is defeated altogether and the war ended."<sup>35</sup> An inhuman or genocidal regime can hardly have legitimate authority, it seems, let alone legitimate authority with regard to the group of people on whom it is practising genocide. If, then, a state can intervene on behalf of the minority, *why shouldn't parts of the minority intervene on behalf of this minority?* It is entirely unclear why such a minority should face any special difficulties with regard to legitimate authority, while, on the other hand, it is very easy to say why the regime should not have the legitimate authority to invite foreign interventions on its own behalf.

Finally, O'Brien briefly mentions right intention and claims that it

has historically been difficult to achieve in revolutionary/counterinsurgency war. ... each party seeks ... complete control of the country's political-economic-social system. There is usually a total commitment on each side to control the same things. Limitations to the pursuit of this total commitment [right intention requires limitation to the pursuit of the just cause] is no limitation."<sup>36</sup>

Here, at least, O'Brien sees the problem on both sides. However, his reading of history is wrong. Revolutionary wars do not have to be unlimited in this way. Many were not.

To sum up, there is no convincing reason to assume that guerrilla war faces greater difficulties to comply with *ius ad bellum* or *ius in bello* requirements than conventional or counter-insurgency war does.

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<sup>33</sup> O'Brien [1981] p. 169ff.

<sup>34</sup> *Ibidem*, p. 162.

<sup>35</sup> *Ibidem*, p. 158.

<sup>36</sup> *Ibidem*, p. 166.

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