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## WAR AND JUSTICE. By Robert L. Phillips.\* Norman: University of Oklahoma Press, 1984.

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## BOOK REVIEW

WAR AND JUSTICE. By Robert L. Phillips.\* Norman: University of Oklahoma Press, 1984.

*Reviewed by Charles J. Reid, Jr.\*\**

The dust jacket of Robert Phillips' book, *War and Justice*, juxtaposes in the upper left corner a medieval knight mounted on horseback, axe in hand, with a stylized intercontinental ballistic missile poised for liftoff in the lower right corner. The illustration neatly captures the question Phillips grapples with in his book: that is, what relevance does the "just war" theory, conceived of in nascent form by churchmen in the waning years of the Roman Empire and brought to full flower by the lawyers and philosophers of the twelfth through seventeenth centuries, have for policymakers today? Some authors have taken the position that traditional just war theory has little contemporary importance.<sup>1</sup> Just war scholarship, however, has been the focus of a considerable revival in the last several years.<sup>2</sup> Recently, for exam-

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1. Robert Tucker, for example, has criticized just war thought in the following terms: Now as in the past, the doctrine of *bellum justum* does not attempt to deal with the critical issue of means simply by abandoning statecraft. In most of its contemporary versions, as in its traditional versions, it seeks instead to square the circle by acknowledging that the state has its necessities and at the same time by insisting that the measures by which these necessities may be preserved must remain limited.

R. TUCKER, *THE JUST WAR: EXPOSITION OF THE AMERICAN CONCEPT* 12 (1960), *quoted in* R. PHILLIPS, *WAR AND JUSTICE* 3-4 (1984).

Phillips takes issue with Tucker's assertion and argues that, for reasons of morality and national self-interest, just war doctrine should be adhered to as a means of keeping conflicts limited and just. Far from being incompatible with the needs of statecraft, Phillips argues that such modern conditions as nuclear deterrence doctrine and guerilla insurgency movements require a restraint such as just war doctrine on the means of pursuing necessities of state.

2. Some significant books include: D. HOLLENBACH, *NUCLEAR ETHICS: A CHRISTIAN MORAL ARGUMENT* (1983); M. NOVAK, *MORAL CLARITY IN THE NUCLEAR AGE* (1983); W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* (1981) [hereinafter cited as *THE CONDUCT OF JUST AND LIMITED WAR*]; W. O'BRIEN, *NUCLEAR WAR, DETERRENCE, AND MORALITY* (1967); P. RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY*

ple, the American Catholic Bishops, in their pastoral letter, *The Challenge of Peace: God's Promise and Our Response*,<sup>3</sup> have sought to apply just war teaching to the dilemmas of nuclear deterrence. Phillips fits squarely into the latter school of thought, finding that just war teaching remains the only moral approach to the application of armed force in foreign affairs.

Phillips' book is a work of moral philosophy; it is not directly concerned with international legal questions. Nonetheless, international lawyers and other international affairs professionals can profit from reading it. It has the twin virtues of providing a rather conventional summary of just war thought and of surveying a number of different issues. Yet, unlike much of the current just war literature, which seems transfixed by the horror that would ensue from full scale nuclear war at the expense of other concerns, *War and Justice* examines a wide range of issues. It covers not only nuclear deterrence, but guerrilla insurgency movements, the conduct of conventional war, and the place of pacifism and realpolitik in the contemporary international order. Essentially an argument in behalf of the continued validity of just war theory, not an in-depth analysis of particular issues, the volume is somewhat weakened by its failure to examine more thoroughly some of its more provocative and controversial statements. Even so, it is a helpful introduction to the issues and the jargon of just war analysis. Although this review will at points be critical, this should not detract from the overall conclusion that *War and Justice* is a useful contribution to the literature.

The volume begins with a brief excursus on the history of the Christian response to the moral dilemmas of war. Phillips points out that the initial Christian response to war was fundamentally pacifist. This response, however, was based more on a desire to be "total[ly] disengage[d] from statecraft and from the things of this world generally,"<sup>4</sup> than on a reasoned opposition

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(1968); P. RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* (1961); R. SPAETH, *NO EASY ANSWERS* (1983); M. WALZER, *JUST AND UNJUST WARS* (1977); *JUSTICE AND WAR IN THE NUCLEAR AGE* (P. Lawler, ed. 1983); *PEACE IN A NUCLEAR AGE* (C. Reid ed., to be published 1986). Some important articles include: Childress, *Just-War Criteria*, in *WAR OR PEACE? THE SEARCH FOR NEW ANSWERS* 40 (T. Shannon ed. 1980); Hehir, *The Just War Ethic and Catholic Theology: Dynamics of Change and Continuity*, in *WAR OR PEACE: THE SEARCH FOR NEW ANSWERS* 15 (T. Shannon ed. 1980); Ramsey, *A Political Ethics Context for Strategic Thinking*, in *STRATEGIC THINKING AND ITS MORAL SIGNIFICANCE* 101 (M. Kaplan ed. 1973); Reilly, *In Proportion to What? The Nature of the Conflict*, in *JUSTICE AND WAR IN THE NUCLEAR AGE* 5 (P. Lawler ed. 1983); Grisez, *The Moral Implications of a Nuclear Deterrent*, 2 *CENTER J.* 9 (1982); Childress, *Just-War Theories*, 39 *THEOLOGICAL STUDIES* 427 (1978). The following are still of value: Ford, *The Morality of Obliteration Bombing*, 5 *THEOLOGICAL STUDIES* 261 (1944); Kunz, *Bellum Justum and Bellum Legale: Editorial Comment*, 45 *AM. J. INT'L L.* 528 (1951).

3. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* (1983).

4. *WAR AND JUSTICE*, *supra* note 1, at 5-6. This assessment of early Christian attitudes

to warfare. During the fourth century, however, the Empire first began to tolerate Christianity and finally recognized it as the legally preferred faith. As a result of this reversal, Christians became responsible for affairs of state and suddenly became aware of the need to reconcile faith with political realities. Augustine, Phillips notes, was the seminal figure in this reconciliation. Even though Augustine was not the first Christian author to justify the use of armed force under certain circumstances, his writings were later to form the core of the Christian just war analysis.<sup>5</sup>

Subsequent Christian authors<sup>6</sup> worked the earlier tradition into a usable method of moral analysis. Phillips closes his introductory chapter with an outline of the classic just war theory. It consists of two primary elements, the *jus ad bellum*, the right to go to war, and the *jus in bello*, the legal and ethical principles governing the proper conduct of war. The *jus ad bellum* additionally consists of the following subcomponents: (1) War must be the last resort, all peaceful means of resolving the dispute having been exhausted; (2) it must be "[d]eclared by legitimate authority;" and, (3) it must be "[m]orally justifiable." According to Phillips, any of the following four grounds satisfy the requirement of moral justification: (a) "[d]efense against aggression;" (b) "[c]orrection of an injustice that has gone uncorrected by legitimate authority, 'in another place;'" (c) "[r]eestablishment of a social

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seems to be correct. On the early Christian response to war, see L. SWIFT, *THE EARLY FATHERS ON WAR AND MILITARY SERVICE* (1983); Helgeland, *Christians and the Roman Army from Marcus Aurelius to Constantine*, II. 23,1 AUFSTIEG UND NIEDERGANG DER ROEMISCHEN WELT 724 (1979); *Christians and the Roman Army: A.D. 173-337*, 43 CHURCH HISTORY 149 (1974); Swift, *War and the Christian Conscience: The Early Years*, II. 23,1 AUFSTIEG UND NIEDERGANG DER ROEMISCHEN WELT 835 (1979); Grant, *War—Just, Holy, Unjust—in Hellenistic and Early Christian Thought*, 20 AUGUSTINIANUM 173 (1980).

5. On Augustine, see: Hartigan, *Saint Augustine on War and Killing: The Problem of the Innocent*, 27 J. HISTORY OF IDEAS 195 (1965). F. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (1975) has a helpful discussion of the development of Augustine's ideas and their utilization by medieval canonists and scholastics.

6. The growth of just war thought was a gradual process. Raymond of Penyafort (c. 1225), for example, isolated five elements to just war analysis: The fighting must be done by laymen; a just cause must be present; the war must be unavoidable; those waging the war must have the proper intent; and the war must be conducted under the proper authorities. See F. RUSSELL, *supra* note 5; Russell, *The Historical Perspective of the Bishops Pastoral Letter: The View of One Medievalist*, in *PEACE IN A NUCLEAR AGE* (Reid ed. to be published 1986) [hereinafter cited as Russell, *Historical Perspective*]. Thomas Aquinas isolated three elements: legitimate authority must declare the war; there must be just cause; and the parties must possess a proper intention. See F. RUSSELL, *supra* note 5; Russell, *Historical Perspective, supra*. On the growth of the doctrine in the middle ages, see F. RUSSELL, *supra* note 5; Russell, *Historical Perspective, supra*; Brundage, *The Limits of the War-Making Power: The Contribution of the Medieval Canonists*, in *PEACE IN A NUCLEAR AGE* (Reid ed. to be published 1986). Just War doctrine remained fluid for years. For post-medieval developments, see Elbe, *The Evolution of the Just War in International Law*, 33 AM. J. INT'L L. 665 (1939); Nussbaum, *Just War—A Legal Concept?*, 42 MICH. L. REV. 453 (1943).

order which will distribute justice;" and (d) "[u]ndertaken with the intention of bringing about peace."<sup>7</sup>

The *jus in bello* has two subcomponents: proportionality and discrimination. Phillips defines proportionality: "[t]he quantity of force employed or threatened must always be morally proportionate to the end being sought in war;" and he defines discrimination: "Force must never be applied in such a way as to make noncombatants and innocent persons the intentional objects of attack. The only appropriate targets in war are combatants."<sup>8</sup>

Phillips also recognizes "double effect," a basic principle of Catholic moral reasoning. This principle undergirds the operation of the *jus in bello* and permits the use of force, even where some evil effects can be foreseen, as long as several conditions are satisfied: (1) "[t]he action must carry the intention to produce morally good consequences;" (2) "[t]he evil effects are not intended as ends in themselves or as means to other ends, good or evil;" and, (3) "[t]he permission of collateral evil must be justified by considerations of proportionate moral weight."<sup>9</sup>

Phillips opens the substantive portion of his volume with a chapter on the *jus ad bellum*. His analysis of two of the components of the *jus ad bellum*, the competent authority to declare war, and the requirement for moral justification of war, are worthy of note. The issue of the competent authority to declare war is a crucial one today, especially in many parts of the developing world, where insurgency movements seem endemic. The justness or unjustness of the Vietnam War, for example, in large measure turns on the question of who was the legitimate authority to conduct the war. Identification of legitimate authority would similarly be a central part of any moral analysis of the insurgencies currently being waged by the *contra* freedom-fighters in Nicaragua, the Afghan revolt against the Soviet imposed Babrak Karmal government, or the Khmer Rouge and non-Communist resistance movements to the Vietnamese occupation of Cambodia. Phillips states that "[t]he claim that war may be undertaken only by legitimate authority reflects a political reality."<sup>10</sup> Unfortunately, Phillips eschews any discussion of methods for determining the legitimacy of competing claims because such an effort "ramifies into larger issues in political philosophy . . ."<sup>11</sup> Although Phillips is probably correct in deciding that such an effort would take him far afield, his decision not to engage in some examination of the issue is

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7. WAR AND JUSTICE, *supra* note 1, at 12.

8. *Id.* at 12-13.

9. *Id.* at 13.

10. *Id.* at 17.

11. *Id.*

regretable because the just war doctrine is in need of such analysis.<sup>12</sup>

Commentators have pointed out that current international law regarding the *jus ad bellum* is remarkably devoid of considerations of justice.<sup>13</sup> In his treatment of the requirement for moral justification before resorting to arms, Phillips seeks to remedy this defect by taking issue with two tenets of international law. The first is the contemporary emphasis on the definition of aggression as the first crossing of borders.<sup>14</sup> Phillips would allow the use of preemptive strikes where a "state is morally certain that it is about to be attacked."<sup>15</sup> Phillips also disagrees with contemporary international practice when he asserts that under some circumstances a state may be obliged "to intervene in the affairs of another state if there is an injustice there that continues to be uncorrected by legitimate authority."<sup>16</sup> Phillips recognizes that contemporary international law has greatly circumscribed this traditional moral justification for war. He raises the not infrequently voiced criticism that current international law would have permitted the Nazi regime to slaughter any number of Jews within the borders of Germany, as long as that regime did not engage in aggression against other sovereign states.<sup>17</sup> Phillips states:

It may seem perverse to accept *any* amount of localized evil rather than intervene in the affairs of a sovereign state. After all, is sovereignty all that important? I believe we have to say that states ought not to interfere in the affairs of sovereign states for three reasons: (1) such intrusions risk escalation to nuclear war, (2) they impede the establishment of an international order, and (3) they abrogate the obligation of peoples to sort out their own political and social problems.

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12. O'Brien has stated:

Logically, there should be an elaborate *jus ad bellum* and *jus in bello* for revolutionary war, but development of such a doctrine has never been seriously attempted. As a result, the issues of revolutionary war tend to be treated on an ad hoc basis as special cases vaguely related to the regular categories of just war.

See THE CONDUCT OF JUST AND LIMITED WAR, *supra* note 2, at 18.

13. This argument is made by J. T. Johnson. See Johnson, *Toward Reconstructing the Jus Ad Bellum* THE MONIST 461 (1973); Johnson, *Ideology and the Jus Ad Bellum: Justice in the Initiation of War*, 41 J. AMER. ACADEMY OF RELIGION 212 (June, 1973); see also H. MEYROWITZ, *LE PRINCIPE DE L'EGALITE DES BELLIGERENTS DEVANT LE DROIT DE LA GUERRE* (1970).

14. Article 2 of the U.N. Consensus Definition of Aggression provides that the "first use of armed force" establishes "prima facie evidence of an act of aggression." G.A. Res. 3314, U.N. GAOR, Supp. No. 31, 142, U.N. Doc. A/9631 (1974).

15. WAR AND JUSTICE, *supra* note 1, at 19.

16. *Id.* at 20.

17. See THE CONDUCT OF JUST AND LIMITED WAR, *supra* note 2, at 22-23, for criticism of this sort; see also Lillich, *Forcible Intervention to Protect Human Rights*, 15 MCGILL L.J. 205 (1969) (international law permits humanitarian intervention).

We ought to be prepared, however, to override this rule where a state fails to guarantee those minimal rights which justify its existence. For if it consistently fails to protect the "life, liberty, and property," of its inhabitants, one might very well argue that the sovereignty is dissolved anyway and that therefore there *is* no intervention in the affairs of a sovereign state.<sup>18</sup>

While this effort to revive a long dormant component of the *jus ad bellum* deserves applause, its implementation presents some practical difficulties. The *jus ad bellum* has evolved the way it has in part because of the lack of consensus as to what constitutes "fail[ure] to protect the 'life, liberty, and property' of its inhabitants."<sup>19</sup> The adoption of a principle permitting intervention into the affairs of another state as a tenet of international law ought, in order to be effective, to presuppose international agreement on a set of values the violation of which could be deemed sufficiently grave to justify armed intervention. Such an agreement may be difficult to come by in the present international order. Failing such agreement, a principle of intervention could be subjected to abuse and even to charges of "western moral imperialism." It seems, however, that Phillips is saying that it may be morally incumbent on states to intervene to prevent certain actions by another sovereign state, whatever the consequences at international law. In extreme circumstances intervention may well be the just action and not to intervene could itself be unjust.

In his next chapter, Phillips discusses the *jus in bello*. This chapter is largely an analysis of the principle of discrimination. Phillips takes as a premise the belief that, if any action is to be considered immoral, it is a violent attack upon another person with the intent to kill or do grave bodily harm. Thus, one can only kill morally in wartime if one's intent is not murderous; that is, one must be intending something other than a violent attack upon a person *qua* person.

This seems at first glance to be an exercise in logic chopping. Phillips avoids this charge through the use of the principle of double effect. Double effect, as pointed out above, permits one to engage in certain acts that have evil collateral effects where one's intention is to achieve good consequences, and where one does not intend the evil effects either in themselves or as means to other ends. The soldier in the double effect model does not intend to kill the enemy. His intent rather is to disable the "combatant *in* the man,"<sup>20</sup> and not to kill the man himself. This intent may, and usually does, result in the enemy's death, but the killing of the enemy is not willed as such.

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18. WAR AND JUSTICE, *supra* note 1, at 21 (emphasis in original).

19. *Id.*

20. *Id.* at 33.

The distinction may be explained as one between doing *X* intending *Y* as the result and doing *X* knowing that *Y* will result.<sup>21</sup>

The logic of this argument may appear strained to the uninitiated. Phillips anticipates criticism and counters with an example that demonstrates the applicability of double effect to moral issues in warfare. Jones and Smith both go to war, Jones intending only to restrain the enemy, Smith intending to kill as many opponents as he can. Each kills one enemy. The difference in approach is not apparent at this level but becomes so once one raises the issue of prisoners of war. Jones, whose intent is only to disable the combatant, is logically obliged to take prisoners. Smith, whose intent is to kill as many enemies as he can, lacks this obligation. Similarly, Jones is restricted to killing combatants. Smith would not be so obliged. Smith could logically engage in total war, since he could consider the enemy's entire populace, instead of only the combatants within it, as subject to attack.

The principles of discrimination and double effect are essential to the moral conduct of limited war. Ignorance of these principles has led to much of the tragedy of modern war, whether it be the incendiary bombing of Dresden, the systematic abuse of prisoners of war by communist forces in the Korean and Vietnamese wars, the atomic bombings of Hiroshima and Nagasaki, or terrorist attacks on civilian populations in the Middle East and elsewhere. Phillips makes a strong appeal to return to the principles of discrimination and double effect, an appeal that should be followed in theory as well as in practice.

The issue of proportionality receives only abbreviated treatment. Phillips expands on his earlier definition of proportionality:

The principle of proportionality holds that in cases where the use of force is justified it cannot be employed in absolutely any measure. Obviously, if the aim of war is the correction of injustice, then the level of force must not be such as to create new and greater injustices. This principle is sometimes confused with the doctrine of 'minimal force,' which holds that the least amount of force consistent with effecting the desired ends ought to be our goal. While minimal force should always be used, we also have to consider the *degree* of violence, for some military tasks might very well require a minimum of force which would be disproportionate. That is, our calculations must include not only a forecast of necessary minimal means but also of consequences.

This distinction is of crucial importance because it directs our attention to the means of waging war and thus to the moral questions provoked by certain types of weaponry. In effect, proportion-

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21. *Id.* at 34.



ality is not to be calculated relative to a weapons system taken as a 'given' but, rather, in terms of a calculus which will include the weapons themselves. So, for example, it may not be morally acceptable to say the following sort of thing: Given the fact of nuclear weapons deployed for massive retaliation, what casualty level is acceptable within the possibilities of these devices? Now this is precisely what some military thinkers have attempted to do . . . but my contention here is that this move renders the whole conception of proportionality vacuous by making its significance dependent upon whatever weapons happen to exist at a given time.<sup>22</sup>

It is instructive to point out that certain weapons systems might be objectively disproportionate. However, Phillips' argument could benefit from further refinement. Although this reviewer agrees that some weapons, such as bacteriological weaponry and much of the nuclear weaponry designed for use within the context of mutual assured destruction doctrine (M.A.D.), should be classified as objectively disproportionate, he disagrees with any effort to group all nuclear weapons under the label of "objectively disproportionate." Some tactical battlefield uses of nuclear weapons could well be proportionate in the appropriate circumstances, such as when national survival is at stake. The application of proportionality also requires knowledge of the values for which one is willing to fight. Phillips omits consideration of this point. It seems self-evident, however, that the survival of a nation or a way of life could permit the use of a weapons system that lesser objectives might not permit.<sup>23</sup> Thus, for example, Britain could not have justified under any circumstances the use of nuclear weapons in the Falklands conflict; but Britain could conceivably justify the use of tactical nuclear weapons to repel an invasion of the British Isles. This caveat should not, however, detract from the thrust of Phillips' argument: Some weapons systems possess such a destructive capacity that their use could never be justified.

Following his discussion of *jus in bello*, Phillips turns his attention to two twentieth century problems, nuclear war and guerrilla insurgency. His chapter on nuclear arms is preoccupied almost entirely with strategic deterrence. Equating strategic deterrence to M.A.D., Phillips finds that nuclear war would be both indiscriminate and disproportionate. Phillips condemns any use of nuclear weapons, since, he argues, nuclear weapons represent a difference not in degree, but in kind, to conventional weapons. This is true, he asserts, of all nuclear weapons, from tactical weapons for use on the battlefield to strategic missiles with MIRV's (multiple independently targeted

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22. *Id.* at 28-29 (emphasis in original).

23. This is the approach of W. O'Brien. See *THE CONDUCT OF JUST AND LIMITED WAR*, *supra* note 2, at 19-21.

reentry vehicles). He also determines that “[t]o threaten to use nuclear weapons is necessarily to threaten the unjustified killing of innocent people and thereby to violate on a titanic scale the absolute right of life.”<sup>24</sup> Nonetheless, Phillips does not advocate unilateral nuclear disarmament since present deterrence policies represent a “balance.” Phillips analogizes nuclear weaponry to a deadly bacillus to which deterrence is only a partially effective vaccine, not a cure. Phillips recommends arms control, but finds that it has had little historical success. In a “throwaway” paragraph at the close of his analysis, Phillips claims that, even though present strategic arsenals may be maintained for the sake of balance, their use as a deterrent to a conventional attack on western Europe is “wholly disproportionate to the goal.”<sup>25</sup>

Phillips’ analysis of the ethics of nuclear weaponry requires some clarification. First, Phillips would lump various nuclear strategies, including massive retaliation, mutual assured destruction, flexible response, and various strategic and tactical nuclear weaponry, into an indistinguishable whole. He then criticizes this nuclear capability as being different in kind from conventional weapons and inherently indiscriminate and disproportionate. This approach is fundamentally ahistorical. Current American strategic targeting plans are substantially different from those of a decade or two or three ago. During the 1970’s U.S. targeting doctrine shifted from being primarily countervalue (directed against population centers) to counterforce (directed against military targets).<sup>26</sup> Current targeting plans might still be criticized for being excessively preoccupied with the destruction of “economic assets” (which translates into the destruction of some population centers),<sup>27</sup> but one must recognize that targeting philosophy has undergone some fairly dramatic shifts, as have nuclear weapons themselves. Recent history, moreover, does not support Phillips’ claim that nuclear weapons have not become more discriminate or proportionate. In fact, current nuclear weapons systems are considerably more sophisticated than those of earlier generations. Guidance systems have improved, making weapon delivery more precise. This improvement in guidance systems has also allowed the megatonnage of each warhead to be reduced. Furthermore, tactical nuclear weapons now exist which could be used on a battlefield without endangering population centers. None of this is to say that devastation from a nuclear war, even if limited to battlefield exchanges of tactical nuclear weapons, would not be enormous. It

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24. WAR AND JUSTICE, *supra* note 1, at 83.

25. *Id.* at 85.

26. See D. BALL, TARGETING FOR STRATEGIC DETERRENCE (Adelphi Paper No. 185, 1983).

27. *Id.* at 25-34.

is cited, however, to demonstrate that since the technical questions are more complicated than Phillips makes them out to be, the moral issues implicated may be similarly complex.

Phillips also maintains a significant silence on the matter of defensive weapons systems, such as the Strategic Defense Initiative (SDI) (popularly known as "Star Wars"), which may or may not be a workable concept.<sup>28</sup> At present, SDI is only in the planning stages and in as much need of scrutiny from moralists as from scientists and diplomats. Abstractly speaking, it seems more moral to construct a system that would allow a nation to move away from a deterrent that threatens wholesale destruction. But construction of a defensive system may threaten the balance that Phillips sees as essential to retaining the morality of the present system of deterrence. A serious shortcoming of the volume is Phillips' failure to consider whether a continued nuclear "balance," accompanied by arms control negotiations, is a preferable moral course to efforts to change the "character" of deterrence to a defensive posture.

Finally, the issue of abandoning the nuclear defense of western Europe should not be reduced to a single insignificant paragraph. Presently there is no balance of conventional forces in Europe.<sup>29</sup> The defense of western Europe is largely dependent on the U.S. nuclear umbrella. A shift from a nuclear to a conventional defense in Europe would likely entail both the reestablishment of a draft<sup>30</sup> and increased defense budgets for both the United States and its North Atlantic Treaty Organization (N.A.T.O.) allies.<sup>31</sup> A conventional rather than nuclear defense of Europe would be a more moral stance but it is clear that such an option would not be pain free.

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28. The Strategic Defense Initiative has already generated a great deal of literature. Some helpful books and articles include: OFFICE OF TECHNOLOGY ASSESSMENT, *BALLISTIC MISSILE DEFENSE TECHNOLOGIES* (1985); OFFICE OF TECHNOLOGY ASSESSMENT, *ANTI-SATELLITE WEAPONS, COUNTERMEASURES, AND ARMS CONTROL* (1985); R. JASTROW, *HOW TO MAKE NUCLEAR WEAPONS OBSOLETE* (1985); Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control*, 63 *FOREIGN AFFAIRS* 264 (1984); Burrows, *Ballistic Missile Defense: The Illusion of Security*, 62 *FOREIGN AFFAIRS* 843 (1984); Jastrow, *Reagan vs. the Scientists: Why the President is Right about Missile Defense*, 77 *COMMENTARY* 23 (Jan. 1984); Payne & Gray, *Nuclear Policy and the Defensive Transition*, 62 *FOREIGN AFFAIRS* 820 (1984); Keyworth, *Ganging Up on Star Wars*, *Wash. Post*, Dec. 24, 1984, at A15, col. 3; Rensberger, *"Star Wars" Splits Experts Into Two Camps*, *Wash. Post*, Mar. 3, 1985, at A1, col. 4.

29. See Luttwak, *How to Think About Nuclear War*, 74 *COMMENTARY* 21-25 (Aug. 1982), for a summary of the relative conventional fighting capabilities of N.A.T.O. and Warsaw Pact forces.

30. On potential shortfalls of troops in a European conflict, see N.A.T.O. Commander General Bernard Rogers' statements in Wilson, *General Urges Reviving Draft*, *Wash. Post*, Mar. 2, 1985, at A7, col. 4.

31. See *Without the Bomb*, *THE ECONOMIST*, July 31, 1982, at 11-12.

Guerrilla insurgencies have been depicted as the antithesis of nuclear deterrence. While the nature of deterrence demands state-of-the-art sophistication in such matters as computers, guidance and tracking systems, and launch vehicles, guerrilla war is often viewed as unstructured and essentially primitive. The popular imagination sees small bands striking out in a haphazard fashion from remote jungle or desert bases.

Guerrilla insurgency movements, however, generally possess certain common features. Phillips summarizes Mao Zedong, who identified three phases as common to guerrilla conflict:

According to Mao, guerrilla war develops in three stages. In the first stage, the insurgent forces, which are likely to be small in number, engage in hit-and-run encounters with regular forces. . . . These opening guns pave the way for the second stage, which consists of building a political infrastructure which will parallel that of the government in power. This creates a country within a country and is a necessary move toward the third stage, which sees the insurgents emerging openly in order to do battle with the army of the government in a more or less conventional manner.<sup>32</sup>

Phillips makes several points worth bearing in mind. The first is that there is no necessary relationship between guerrilla warfare and terrorism. Terrorism can never be justified. This is so for both moral and prudential reasons. Terrorism is immoral because it erases the distinction between combatant and noncombatant. Phillips illustrates this with a quote from George Habbash, head of the Popular Front for the Liberation of Palestine: "In the age of the revolution of the peoples oppressed by the world imperialist system there can be no geographical or political boundaries or moral limits to the operations of the people's camp. In today's world, no one is 'innocent,' and no one is a 'neutral.'"<sup>33</sup> Such a proposition voids any application of discrimination; no protected group of noncombatants exempt from attack would exist in the Habbash view.

Not only is it immoral, it is also imprudent to engage in terror tactics. The use of terrorism as a "short cut" to power is frequently the opening of a Pandora's box. Subsequent groups seeking to gain power often attempt to justify their resort to terror by reference to the record of the party in power. As an example of this phenomenon, Phillips cites the frequency with which Arab militant groups justify their use of terror "by pointing to Prime Minister Begin's participation in the massacre at Dir Yasin."<sup>34</sup>

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32. WAR AND JUSTICE, *supra* note 1, at 90.

33. *Id.* at 86-87 (quoting Habbash, TIME MAGAZINE, April 1970, at 32).

34. *Id.* at 88.

Phillips also focuses on the conduct of counterinsurgency. It is to the counterinsurgent's advantage to defeat the insurgency while it is still in Mao's first stage, before the guerillas have had a chance to establish an alternative political structure. Phillips sees the resort to conventional military tactics by the counterinsurgent as a weakness. It often leads to indiscriminate and disproportionate responses, thus threatening the morality of the counterinsurgent's efforts.

Phillips alternatively proposes that counterinsurgency be conducted on the analogy of a "constabulary action," and that guerillas, at least in the first stage of operations, be considered as analogous to criminals. Phillips recommends that an elite force be deployed to act essentially as police officers, in an effort to prevent the insurgency from spreading. This force, Phillips suggests, would rely on greatly enhanced intelligence gathering to perform effectively.<sup>35</sup>

Phillips' proposal is a creative and quite possibly workable one. It raises several questions of interest: How should such a force operate? Should infiltration of guerrilla cells be permitted? Should torture of captured guerrillas be allowed? Would criminal justice systems need to be modified to accommodate this new class of criminal? These issues would need to be addressed before any counterinsurgent could practically utilize Phillips' analogy.

Phillips also criticizes a frequently employed and always immoral guer-

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35. The 1977 Geneva Protocol II (formally known as the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts, U.N. Doc. A/32/144), designed specifically to deal with internal conflicts offers some guidance to insurgents and counter-insurgents alike as to when an insurgent movement should be considered as war and not as criminal activity. Article I holds that the Protocol covers:

[A]ll armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military activities

Not covered by the Protocol are: "[S]ituations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." Article 1(2).

It would appear that the treaty allows counterinsurgents to consider guerrilla movements in Mao's first stage to be subject to domestic criminal law. Successful creation of a political infrastructure, however, would seem to bring the guerillas within the terms of Protocol II.

A federal district court has recently had the opportunity to consider whether insurgents should be treated as criminals or "political" prisoners. The question in *In re Requested Extradition of Doherty* by the Gov't. of the U.K. & N. Ir., 599 F. Supp. 270 (S.D.N.Y. 1984), was whether Doherty, a member of the Irish Republican Army convicted of murder for the death of a British soldier, could be extradited by the United Kingdom or whether he fit the "political offense" exception of the extradition treaty. The court rejected the extradition request, finding Doherty to be a political offender. The case illustrates the complexity involved in treating insurgents as subject to criminal laws.

rilla tactic. Guerrillas often operate within the populace at large, frequently intending to use population centers as a shield, thereby making counterinsurgency efforts prohibitively costly in terms of innocent life, or, where the counterinsurgent government attacks, embarrassing it internationally for having taken the lives of noncombatants. Guerrilla strategy of this sort is immoral, Phillips asserts, because it fails to respect noncombatant immunity. Such a situation can be remedied only where combat can be limited to a specified class of individuals, clearly designated as combatants.

Finally, an omission in Phillip's analysis should be noted. His section on guerrilla war is written with an American (or at least a western) audience in mind and it rests on the premise that western governments will inevitably be aligning with counterinsurgent governments against guerrilla movements primarily of a Marxist nature. He does not consider the moral issues involved in providing support to insurgency movements. This is a not uncommon failing among writers on moral issues. Writing on guerrilla war, William O'Brien could state in 1981 that "I do not foresee the likelihood of U.S. intervention on the side of revolutionaries."<sup>36</sup> Yet the United States has done precisely that in the last several years. "Covert" aid to the rebels in Afghanistan is well-documented. Similarly, the provision of aid to the *contra* freedom fighters in Nicaragua has been an issue before the last two Congresses. Aid is also being supplied to the non-Communist resistance in Cambodia. Finally, the House of Representatives has recently voted to repeal the Clark Amendment, which had prohibited assistance to non-Communist forces in Angola. The failure to include moral issues in debates considering the backing of insurgent movements is not unique to Phillips. It appears that while moralists have become accustomed to thinking of western states solely as being on the "defensive" against an onslaught of guerrilla insurgencies, the developments of the last several years seem to demand a shift in perspective.

Phillips next examines the two standard alternatives invoked by those who reject the just war approach, pacifism and realpolitik. Phillips makes a telling case against pacifism, finding that a fundamental flaw in the pacifist outlook is the inability to draw distinctions among various forms of aggression. The pacifist is unable to accept differences based on the intent of the parties: "The pacifist can see no difference between wars which are fought in self-defense and wars of brutal and blatant conquest."<sup>37</sup>

On the other hand, Phillips does not advocate that an individual acquiesce in every foreign adventure in which his state chooses to become involved.

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36. THE CONDUCT OF JUST AND LIMITED WAR, *supra* note 2, at 159.

37. WAR AND JUSTICE, *supra* note 1, at 109.

The just war doctrine provides a means of moral analysis by which both states and individuals may measure the morality of a given conflict.<sup>38</sup> This leads necessarily to selective conscientious objection.

Selective conscientious objection is specifically disallowed under present selective service law.<sup>39</sup> Yet an individual is not absolved from wrong-doing by the claim that he was merely following orders.<sup>40</sup> An order to report for induction at a time of unjust war could very easily be an order requiring an individual to participate in immorality that he is duty-bound to resist. Those who take seriously the tenets of the just war theory should lobby to change this feature of selective service law. While the odds of success are not great, it is possible that some form of alternative service could be rendered by selective conscientious objectors.<sup>41</sup>

According to Phillips, realpolitik shares the same central weakness as pacifism: it is unable to distinguish between just and unjust exertions of armed force. The practitioner of realpolitik may initiate war blithely, since he lacks the restraints that the *jus ad bellum* places on the adherent of just war. Similarly, war, once engaged, can escalate easily to total war since the realpolitik model lacks the restraints of the *jus in bello*. The just war doctrine can thus be seen as offering a middle ground between pacifism and realpolitik; it provides the criteria to distinguish between just and unjust encounters, and, once begun, to restrain war from escalating beyond the causes of justice that might be served.

Perhaps Phillips' most important contribution to just war thinking is to reiterate the fact that war, to be just, must be limited. In his closing remarks on the "future of war," Phillips refers to Clausewitz, the nineteenth century German theoretician of warfare. Clausewitz hypothesized an absolute form of war, "an instantaneous blow without duration," and contrasted it with

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38. See Genovesi, *The Just War Doctrine: A Warrant for Resistance*, 45 THE THOMIST 503 (1981).

39. See *Gillette v. United States*, 401 U.S. 437 (1971) (presenting the issue of selective conscientious objection). *Negre v. Larsen*, 401 U.S. 437 (1971), a companion case to *Gillette*, presented squarely the case of a Catholic objecting to service in the Vietnam War on just war grounds.

40. For a thumbnail sketch of the role of individual responsibility in war time from the middle ages through the Nuremberg Trials and the My Lai Massacre, see Marcin, *Individual Conscience Under Military Compulsion*, 57 A.B.A. J. 1222 (1971).

41. 50 U.S.C. app. § 456(j) (1982) currently exempts those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form," and permits alternative service to be substituted. See also 32 C.F.R. §§ 1656.1-.20 (1984) for regulations implementing this statute. Phillips is not sanguine about the possibility of a government ever authorizing selective conscientious objector status. Yet there would seem logically to be no obstacle to applying the alternative service provision to selective conscientious objectors as well as to those opposed to war in any form.

war as conducted in the nineteenth century, a war slowed by the many “frictions” that accompanied it.<sup>42</sup> Countervalue nuclear war would close the gap that Clausewitz imagined would always exist between war as an absolute and war as actually conducted. A total strategic nuclear war could render extinct most or all life on the planet. Just war thinking is an essential check to both the planning of war and its conduct in a world in which statecraft can no longer be conducted without limit. War engaged in for light or trivial reasons is not war; it is the murderous taking of life; so also is war fought without discrimination or proportionality. Phillips’ essential argument is a sound one, despite this reviewer’s cavils with some of its individual components. The just war theory, of ancient and noble lineage, is still a valid means of moral analysis and restraint in war.

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42. WAR AND JUSTICE, *supra* note 1, at 131-39.



