The Ethics of Armed Conflict

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CHAPTER 7

LAST RESORT AND NONCOMBATANT IMMUNITY

To counterbalance overemphasis of the just cause principle, I am devoting two chapters to the last resort principle. In the first part of this chapter, the idea of last resort is interrelated with the idea of ‘coercive military threat’. In the second part, a ‘penultimate’ (or ‘next-to-last’) resort principle concerning coercive military threats is proposed and supported. Additionally, in the second and third parts, four other resort principles are proposed and supported. In the third part, the idea of last resort is interrelated with the idea of noncombatant immunity. Finally, in the fourth part, the core noncombatant immunity principle is introduced.

I. DETERRENCE AND COMPELLENSCE

We will maintain a safe, secure, and effective nuclear arsenal to deter attack on the United States, and on our allies and partners.

*Nuclear Posture Review Report* (DOD 2010b: vi)

A. NUCLEAR DETERRENCE

During the Cold War, writings on the subject of ‘nuclear ethics’ were primarily concerned with the ethics of nuclear deterrence. The central question was this: is it morally permissible to deter a nuclear attack by threatening nuclear retaliation? There was also the related question of ‘first use’. Is it morally permissible to deter a conventional attack – in particular, a Soviet invasion of Western Europe – by threatening nuclear retaliation?

The subject of nuclear ethics might presently appear to be outmoded, now that the Cold War has ended. However, it has been revivified by the threat of ‘rogue states’ and terrorist groups armed with nuclear weapons. Additionally, there is the threat of such actors armed with weapons of mass destruction (WMD) of other sorts – namely, biological, chemical and radiological
weapons. Therefore, in this post-Cold War era, it is important to consider a broader topic than that of nuclear ethics – namely, the ethics of weapons of mass destruction. More briefly, this broader topic may be called ‘the ethics of WMD’ (Hasmi and Lee 2004: 1) or ‘WMD ethics’.

Consequently, in addition to the stated questions about nuclear deterrence, a just war theory should be concerned with other questions regarding ‘WMD deterrence’. For example, is it morally permissible to deter an attack with chemical and biological weapons (CBW) by threatening nuclear retaliation? That this question is not fanciful is evidenced by an implicit declaratory threat made by the United States to ‘states not in compliance with their nuclear non-proliferation obligations’ (e.g. North Korea) – namely, that ‘U.S. nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners’ (DOD 2010b: viii).

My view is that the mere possession of nuclear weapons by any state – whether by a ‘rogue state’, such as North Korea, or by a ‘responsible’ member of the international community, such as the United States – is a grave threat to world peace. The Nuclear Non-Proliferation Treaty incorporates the goal of the abolition of nuclear weapons. Significantly, during his speech in Prague on 5 April 2009, Obama promulgated the goal of ‘a world without nuclear weapons’, but he also stated: ‘This goal will not be reached quickly – perhaps not in my lifetime’ (2009b). Accordingly, immediately preceding the block quotation from the 2010 US Nuclear Posture Review Report, there is the following sentence: ‘Until such time as the Administration’s goal of a world free of nuclear weapons is achieved, nuclear capabilities will be maintained as a core mission for the Department of Defense’ (DOD 2010b: vi).

B. CONVENTIONAL DETERRENCE

In addition to questions about WMD deterrence, a just war theory should address questions about conventional deterrence. For example, is it morally permissible to deter an armed invasion by threatening to use conventional weapons?

Even if it is morally obligatory not to threaten to use nuclear weapons, it does not follow (conceptually or logically) that it is morally obligatory not to threaten to use conventional weapons. The ethics of conventional deterrence is distinguishable from, albeit interrelated with, the ethics of nuclear deterrence.

Arguably, under some circumstances, it is morally permissible – and sometimes even morally obligatory – to threaten to use conventional weapons. For instance, should the Security Council threaten to authorise armed humanitarian intervention, in order to deter genocide? Consider again the case of Darfur, from the temporal standpoint of 29 March 2005. In Resolution 1591 (2005), the Security Council demands that the Sudanese
Government ‘immediately cease conducting offensive military flights in and over the Darfur region’. Should the Security Council also threaten to impose a no-fly zone, in order to deter the Sudanese Government from continuing to conduct such flights?

In general, then, a just war theory should address moral questions about military deterrence. Is it morally permissible to deter the use of armed force by threatening to use armed force? Additionally, moral questions about ‘compellent’ threats should be addressed.

C. ARE MILITARY THREATS NONMILITARY MEASURES?

Today [1965] we are beginning again the comprehensive pursuit of new ideas and new procedures. We realize that, terrible as these [nuclear] weapons are, they exist, and therefore they may be used. In any case, their use will be threatened, and such threats are a kind of use.

Herman Kahn, *On Escalation* (1965: 199)

Herman Kahn – a prestigious but controversial Cold War military strategist – was especially concerned with nuclear threats. Granted that nuclear weapons still exist and that they still might be used, I want to distinguish two questions. Is the threat to use them a kind of use of them? Alternatively, is the threat to use them a kind of nonmilitary measure?

In this section, I investigate a generalisation of these questions. Is the threat to use armed force a kind of use of armed force or a kind of nonmilitary measure? In other words, should ‘coercive military threats’ be conceptualised as military actions or as coercive nonmilitary measures? As a clue to how these questions might be answered, let me add that the word ‘or’ is used inclusively.

The concept of ‘coercive military threat’ encompasses both deterrent threats and ‘compellent’ threats. As Thomas Schelling explained, the usual idea of deterrence can be distinguished from a conception of ‘compellence’ (1966: 70–1). For example, during the Cold War, NATO made (roughly) the following deterrent threat: if the Soviet Army invades Western Europe, NATO might counterattack with tactical nuclear weapons. And had the Soviet Army invaded Western Europe, NATO could have made (roughly) the following compellent threat: if the Soviet Army does not withdraw from Western Europe immediately, NATO might counterattack with tactical nuclear weapons.

Some coercive threats to use armed force are both deterrent and compellent. For instance, from the temporal standpoint of 25 March 2004, imagine that the Security Council threatens to impose a no-fly zone in Darfur. The purpose of this coercive military threat may be described as either ‘to deter the Sudanese government from continuing to conduct offensive military flights’
or ‘to compel the Sudanese government to cease conducting offensive military flights’.

In addition to such ‘declaratory threats’, the concepts of deterrence and compellence encompass a wide range of actions of other kinds – for example, troop mobilisations and ‘demonstration shots’. For instance, from the temporal standpoint of 25 March 2004, imagine that the Security Council calls upon members of NATO to transport ‘a squadron of twelve to eighteen Harrier fighter aircraft’ to an airfield in Chad (ICG 2006: 12). The mobilisation of these aircraft would signal the resolve of the Security Council to authorise the imposition of a no-fly zone in Darfur, if necessary. Imagine also that the Security Council calls upon the United States to launch a single cruise missile against parked Sudanese military aircraft, thereby ‘demonstrating the resolve’ to enforce a no-fly zone by means of the use of armed force, if necessary.

During the Cold War, McGeorge Bundy developed a conception of ‘existential [nuclear] deterrence’ – roughly, that the mere existence of nuclear weapons, apart from any explicit threat or intention or commitment to use them, generates ‘terrible and unavoidable uncertainties’, uncertainties that suffice to deter attacks (1984: 8–9). Comparably, there is a conception of ‘existential conventional deterrence’. For example, the mere existence of military forces that might be used to counter aggression poses, even if only implicitly, a deterrent threat to counter aggression, if necessary.

Also, the mere presence in a Chad airfield of NATO aircraft that might be used to counter Sudanese aircraft poses, even if only implicitly, a deterrent (or compellent) threat to counter them, if necessary.

Analogously, the mere firing of a demonstration shot against a military target poses, even if only implicitly, a deterrent (or compellent) threat to use armed force against other military targets, if necessary. Inherently, a demonstration shot is both a use of armed force and a threat to use armed force. In short, demonstration shots are overlap cases.

Let me return to the main question of this section. Is a threat to use armed force a use of armed force or a nonmilitary measure? My answer is that, seemingly paradoxically, coercive military threats are coercive nonmilitary measures. According to the last resort principle, it is morally obligatory not to use armed force, if every reasonable threat to use armed force has not been attempted.

However, I want to stress that some coercive military threats are overlap cases, in that they are both coercive nonmilitary measures and military actions – for instance, demonstration shots. Thus cases of coercive military threats are intermediate cases, in that they are neither paradigm cases of coercive nonmilitary measures nor paradigm cases of military actions. A main thesis is that, among the various kinds of coercive nonmilitary measures, coercive
military threats resemble military actions most closely. (This use of the term ‘resemble’ is inclusive of ‘identity’, since some coercive military threats are military actions.)

D. A LAST RESORT THREAT
Sincere and credible commitment to the last resort principle constitutes a form of existential deterrence. Suppose that, in a particular case, the other core just war principles are satisfied. Roughly, the last resort principle mandates that, before we (the responsible agents) resort to the use of armed force against you (our adversaries), we must attempt every reasonable nonmilitary measure. Accordingly, we could make (explicitly or implicitly) the following deterrent threat: if we satisfy the burden of proving that we have attempted every reasonable nonmilitary measure, we will use armed force against you. This ‘last resort threat’ does not have to be voiced, for it is inherent in the very idea of ‘attempting every reasonable nonmilitary measure, before using armed force’. A concept of ‘deterrent military threat’ is inherent in the idea of last resort.

II. A LADDER OF RESORTS
In addition to morally constraining uses of armed force, a just war theory should morally constrain threats to use armed force. Characteristically, uses of armed force are highly destructive, and threats to use armed force are highly dangerous. The arms races of the Cold War, the mobilisation race that was a proximate cause of the First World War and the ‘coercive diplomacy’ of Vietnam War aerial bombardments evidence that acts of deterrence and compellence can be extremely dangerous and even destructive. There is a slippery slope from the existential threat of the mere possession of military forces to greatly destructive acts of ‘intrawar’ deterrence and compellence.
Paradigmatically, a deterrent military threat by agents to targets is conditional: ‘if’ you (the targets) perform a specified action, ‘then’ we (the agents) will use specified armed force against you. Presumably, when such a conditional threat is made, harms of armed conflict would be avoided were the targets to refrain from performing the action specified in the condition. Furthermore, by endeavouring to make the threat credible, not only would the agents intend to coerce the targets to refrain from performing the specified action, but they also might expect and even predict that the targets will refrain from performing it. Nonetheless, even though unintended, unexpected or unpredicted, the targets could still perform it. Deterrence could fail. And then the agents could respond by using the specified armed force against the targets, especially because their threat was meant to be credible. Consequently, in making the deterrent threat, agents create for themselves the serious risk
of having to perform acts of killing or grievously injuring human beings. Paradigmatically, such deterrent threats are highly dangerous. (For brevity, I make remarks about deterrent threats, but parallel remarks also hold of compellent threats.)

A. A PENULTIMATE RESORT PRINCIPLE

Truly, among the various kinds of coercive nonmilitary measures, coercive military threats resemble military actions most closely. Accordingly, a main thesis is that coercive military threats should be a ‘next-to-last’ resort. Before threatening to use armed force, every reasonable ‘nonforceful’ measure should be exhausted. The term ‘nonforceful measure’ is stipulated to mean ‘a nonmilitary measure that is not a coercive military threat’. Specifically, the set of ‘coercive nonforceful measures’ contain all those coercive nonmilitary measures that are not coercive military threats.

Therefore, supplementary to the last resort principle for actual uses of armed force, I propose to formulate a principle of ‘penultimate resort’ for deterrent and compellent threats to use armed force as follows.

*Penultimate resort principle*. It is morally obligatory not to attempt to achieve a goal by means of a threat to use armed force, if it is reasonable to attempt to achieve that goal by means of a nonforceful measure.

Because threats to use armed force can be highly dangerous, a just war theory should morally constrain them. When we deliberate about whether to threaten to use armed force, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that the penultimate resort principle is satisfied. To ascertain that the principle is satisfied, we have to morally presume that it is reasonable to attempt a nonforceful measure, and we have the burden of proving that it is not.

What are the standards for determining that it is not reasonable to attempt a nonforceful measure? The reasonableness standards for the last resort principle are also standards of reasonableness for the penultimate resort principle. To satisfy the penultimate resort principle, we have to prove with clear and convincing evidence that each sufficiently detailed nonforceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

In the preceding chapter, a related principle is advocated:

*Coercive resort principle*. It is morally obligatory not to attempt to achieve a goal by means of a coercive nonmilitary measure, if it is reasonable to attempt to achieve that goal by means of a peaceful measure.
The reasonableness standards for the last resort principle are also standards of reasonableness for the coercive resort principle. To satisfy the coercive resort principle, we have to prove with clear and convincing evidence that each sufficiently detailed peaceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

Indeed, there is a gamut of kinds of nonmilitary measures, from ones that are genuinely pacific to ones that are exceedingly coercive. Together, the coercive resort, penultimate resort and last resort principles establish a ‘ladder of resorts’ – roughly, peaceful measures before coercive nonforceful measures, coercive nonforceful measures before threats to use armed force and threats to use armed force before uses of armed force.

Instead of a simple dichotomy between nonmilitary measures and uses of armed force, I am advocating what may be termed a ‘polychotomy’. A dichotomy has two primary parts, whereas a polychotomy has many primary parts. The resort ladder involves a polychotomy, the primary parts of which are peaceful measures, coercive nonforceful measures, threats to use armed force and uses of armed force. Although jointly exhaustive, these primary parts are not mutually exclusive, insofar as there are overlap cases.

B. COMPOUND NONMILITARY MEASURES

The impasse over deploying a major UN peacekeeping force to Darfur results directly from the international community’s three-year failure to apply effective diplomatic and economic pressure on Sudan’s government and its senior officials . . . [for example] targeted sanctions against regime leaders and their business interests.

Getting the UN into Darfur, 12 October 2006 (ICG 2006: 1)

Let us consider again the case of Darfur, but from the temporal standpoint of 12 October 2006. Presumably, deploying a UN peacekeeping mission is a nonmilitary measure, as is imposing targeted economic sanctions. The block quotation illustrates the idea of a ‘compound nonmilitary measure’ – for example, imposing targeted economic sanctions, in order to ‘pressure’ the Sudanese Government to consent to the deployment of a UN peacekeeping mission. Another example is ‘pressuring’ the Sudanese Government to consent to that deployment, by ‘immediately planning for the establishment and enforcement of a no-fly zone over Darfur’ (ICG 2006: 1).

Paradigmatically, as the term ‘pressure’ signals, peaceful measures can be buttressed by coercive nonmilitary measures. (Often, the verb ‘pressure’ is used as a euphemism for the verb ‘coerce’.)

Compound nonmilitary measures involve relations of means to goals – for instance, imposing targeted economic sanctions, ‘in order to’ deploy a UN peacekeeping mission. More explicitly, the compound nonmilitary measure
is as follows. Imposing targeted economic sanctions is intended as a means of achieving the goal of deploying a UN peacekeeping mission, and deploying the UN peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. Another example is threatening prosecution by the International Criminal Court, in order to ‘pressure’ parties to an armed conflict to negotiate a peace agreement. More explicitly, this compound nonmilitary measure is as follows. Threatening ICC prosecution is intended as a means of achieving the goal of negotiating a peace agreement, and negotiating the peace agreement is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. In each example, two nonmilitary measures are compounded by relations of means to goals.

Significantly, coercive military threats and nonforceful measures can be thus compounded. Let me sketch an important illustration. From the temporal standpoint of 12 October 2006, imagine that the Security Council threatens to authorise armed humanitarian intervention in Darfur, if the Sudanese Government does not allow a UN peacekeeping mission to deploy there. Threatening to authorise armed humanitarian intervention is intended as a means of achieving the goal of deploying a UN peacekeeping mission, and deploying the UN peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights.

Furthermore, peaceful measures can be buttressed by peaceful measures – for instance, diplomatic measures to facilitate negotiations. Coercive nonforceful measures can be buttressed by coercive nonforceful measures – for example, a threat of economic sanctions against a spoiler of an economic sanctions regime. And so forth.

C. A PROXIMATE RESORT PRINCIPLE

Paradigmatically, when military measures are employed, basic human rights are gravely violated; whereas, when peaceful measures are employed, basic human rights are not gravely violated. Although there is this crucial moral difference between paradigmatic military measures and paradigmatic peaceful measures, there are problems in cases that are not paradigmatic.

Under some circumstances, when we buttress peaceful measures by coercive nonmilitary measures, we actually violate gravely or seriously risk gravely violating basic human rights. For example, economic pressure to negotiate might actually violate gravely or seriously risk gravely violating basic economic rights.

I call such compound nonmilitary measures ‘coercive–peaceful measures’. A ‘coercive–peaceful measure’ is a compound nonmilitary measure that employs a coercive nonmilitary measure as a means of achieving, as a goal, the employment of a peaceful measure. Coercive–peaceful measures
are ‘indirectly’ coercive. In the preceding example, imposing economic sanctions is intended as a means of achieving the goal of negotiating a peace agreement, and negotiating a peace agreement is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. Despite the word ‘peaceful’, coercive–peaceful measures are coercive nonmilitary measures, even if not paradigmatic ones.

By contrast, some nonmilitary measures are ‘entirely peaceful’ and some are ‘entirely coercive’. Roughly, a peaceful measure is ‘entirely peaceful’ when it is not compounded with a coercive measure, and a coercive nonmilitary measure is ‘entirely coercive’ when it is not compounded with a peaceful measure. Entirely coercive nonmilitary measures can be ‘directly’ coercive. Under some circumstances, imposing targeted economic sanctions on adversaries is directly intended as a means of achieving the goal of stopping those adversaries from gravely violating basic human rights.

Among the various kinds of coercive nonmilitary measures, coercive–peaceful measures resemble entirely peaceful measures most closely. Analogous to the crucial moral difference between peaceful measures and coercive nonmilitary measures, there is a crucial moral difference between coercive–peaceful measures and entirely coercive nonmilitary measures. Accordingly, a main thesis is that coercive–peaceful measures should be a ‘proximate’ (or ‘next-to-first’) resort. Before attempting an entirely coercive nonmilitary measure, every reasonable coercive–peaceful measure should be exhausted.

Therefore, I propose to formulate a resort principle about coercive–peaceful measures as follows.

**Proximate resort principle.** It is morally obligatory not to attempt to achieve a goal by means of an entirely coercive nonmilitary measure, if it is reasonable to attempt to achieve that goal by means of a coercive–peaceful measure.

What are the standards for determining that it is not reasonable to attempt a coercive–peaceful measure? The reasonableness standards for the last resort principle are also standards of reasonableness for the proximate resort principle. To satisfy the latter principle, we have to prove with clear and convincing evidence that each sufficiently detailed coercive–peaceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

Nonviolent actions are nonmilitary measures. Under some circumstances, we could buttress consensual peaceful measures by means of peaceful actions that are unilateral. For instance, we might promote negotiations by means of demonstrations. Analogous to the proximate resort principle,
should there also be a ‘nonviolent resort principle’? I would answer this question negatively. Paradigmatically, when we perform nonviolent actions, we do not gravely violate basic human rights.

In conclusion, because there are now four resort principles, the ladder of resorts needs to have additional rungs – roughly, entirely peaceful measures before coercive–peaceful measures, coercive–peaceful measures before entirely coercive nonforceful measures and so forth. Correspondingly, the stated polychotomy needs to be more fine-grained. Together, the four resort principles partition the set of nonmilitary and military measures into the following primary parts: entirely peaceful measures, coercive–peaceful measures, entirely coercive nonforceful measures, entirely coercive threats to use armed force and uses of armed force. These primary parts are jointly exhaustive, but they are not mutually exclusive, insofar as there are overlap cases.

According to the coequality thesis, the just cause principle and the other core just war principles are deontological principles coequally. Therefore, the last resort principle must be satisfied, even when the just cause principle is not satisfied. Let me extend this coequality thesis as follows. Even when we fail to satisfy the just cause principle, we are still morally constrained by the four resort principles. It is still morally obligatory for us not to use armed force to achieve a goal that is not a just goal, if we have not attempted (first) every reasonable entirely peaceful measure, (second) every reasonable coercive–peaceful measure, (third) every reasonable entirely coercive nonforceful measure and (fourth) every reasonable entirely coercive threat to use armed force. Under some circumstances, because of the time requisite for attempting all of the nonmilitary measures that are reasonable, the destructiveness of unjust armed conflict could be circumvented.

D. THRESHOLDS

And as Commander-in-Chief, I have determined that it is in our vital national interest to send an additional 30,000 U.S. troops to Afghanistan. After 18 months, our troops will begin to come home. These are the resources that we need to seize the initiative, while building the Afghan capacity that can allow for a responsible transition of our forces out of Afghanistan.

Barack Obama, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (1 December 2009) (2009c)

A presupposition of the ladder of resorts is that the set of nonmilitary measures is partitioned into four primary parts. Should the set of military measures also be partitioned into primary parts? Should the stated polychotomy be even more fine-grained?
There is a ‘spectrum’ of military actions, ranging from actions that are very small-scale to ones that are very large-scale. Frequently, when there is armed conflict, there is a process of escalation from smaller-scale to larger-scale military actions. A chief function of just war principles should be to morally constrain processes of escalation – notably, ‘nuclear escalation’.

The block quotation above provides another illustration – namely, the US ‘surge strategy’ in Afghanistan. From the temporal standpoint of 1 December 2009, the sending of 30,000 additional US troops to Afghanistan is part of a process of escalating the US counterinsurgency operation there. Disputably, even if this military operation satisfies just war principles presently, it might cease to satisfy them after this ‘surge’. A chief function of just war principles should be to morally constrain such processes of ‘conventional escalation’.

During the Cold War, Kahn studied a ‘spectrum of international crises’, from ‘low-level’ crises to ‘all-out’ wars (1965: 37). Instructively, he arranged international crises in ‘roughly increasing levels of intensity’ on an ‘escalation ladder’ with forty-four rungs (1965: 38–9). As we climb, rung by rung, up the escalation ladder, we cross ‘six basic thresholds’ – most importantly, the ‘nuclear threshold’ (1965: 94). Each threshold on the escalation ladder is a sharp ‘line of demarcation’ in the spectrum of international crises (1965: 95). Significantly, these thresholds can function as ‘constraints’ or ‘restraints’ on the process of escalation (1965: 97). As a US military strategist, he constructed this escalation ladder primarily from the standpoint of US national security. Disputably, during the Cold War, it was vital to have such thresholds as practical constraints. Presently, there is a spectrum of crises, both international and internal – for instance, crises of genocide, terrorism and nuclear proliferation. In terms of a cosmopolitan conception of global security, an escalation ladder might be constructed, with thresholds as practical constraints. In Chapter 5 (‘Just Cause’), I mentioned the idea of ‘mission creep’ – that is, a somewhat gradual process of escalation, which might occur during a military operation. Thresholds on a cosmopolitan escalation ladder might function as practical constraints on mission creep.

From the universalist moral standpoint of a cosmopolitan just war theory, I want to raise a key question. Given that there are practical constraints on the process of escalation, what are the moral constraints? In answer to this question, I propose to enlarge the ladder of resorts, by constructing rungs within the spectrum of military actions. In what follows, two resort principles concerning military measures are proposed and supported. Additionally, the stated polychotomy is augmented, by partitioning the set of military measures into primary parts.
E. A POLICING RESORT PRINCIPLE

Analogous to compound nonmilitary measures, there are compound military measures. A coercive–peaceful measure is a compound nonmilitary measure that employs a coercive nonmilitary measure as a means of achieving, as a goal, the employment of a peaceful measure. Analogously, a ‘circuitous military measure’ is a compound military measure that employs a military measure as a means of achieving, as a goal, the employment of a nonmilitary measure. Even though a nonmilitary measure is employed, such a compound measure should be conceptualised as a military measure, because a military measure is also employed. Circuitous military measures use armed force ‘indirectly’.

For example, an armed humanitarian intervention might be circuitous. From the temporal standpoint of 12 October 2006, let me consider again the ‘impasse over deploying a major UN peacekeeping force to Darfur’ (ICG 2006: 1). Imagine that the Security Council authorises very limited military strikes against a few military targets in Sudan, in order to ‘convince’ the Sudanese Government to allow the deployment of such a peacekeeping mission. More explicitly, this circuitous military measure is as follows. Relatively small-scale military strikes are intended as a means of achieving the goal of deploying the peacekeeping mission, and deploying the peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights.

Frequently, when armed force is used, the overarching goal is to ‘defeat’ adversaries, or ‘prevail’ against them. Frequently, by contrast, circuitous military measures can involve goals of compromise and accommodation. For an illustration, let us return to the case of Rwanda. On 9 April 1994, Dallaire attempted unsuccessfully to obtain additional troops and logistical support. ‘If we were given a new mandate and the necessary force’, he remarked, ‘we might be able to get the two parties back to the negotiating table’ (2004: 276). When the purpose is to ‘pressure’ adversaries to negotiate, circuitous military measures should not be employed so destructively as to undermine or obviate negotiation. Comparable remarks hold for peaceful measures of other kinds. In brief, sometimes military measures that are circuitous should also be sufficiently targeted.

Disputably, the imagined circuitous armed humanitarian intervention in Darfur is an ‘overlap military action’: it resembles sufficiently in relevant respects paradigm military actions, but it also resembles sufficiently in relevant respects paradigm police actions. To generalise, some circuitous military measures can also be conceptualised as police actions. As another example, armed force might be used to police an economic sanctions regime. Furthermore, some targeted military operations that are not circuitous military measures can be conceptualised as police actions. Disputably,
for instance, the one that killed Osama bin Laden – although resembling sufficiently in relevant respects paradigm military actions – also resembles sufficiently in relevant respects paradigm police actions.

Characteristically, the scale, duration and intensity of a military action that is also a police action (i.e. an ‘overlap military action’) are less than the scale, duration and intensity of a military action that is not also a police action (i.e. a ‘nonoverlap military action’). Paradigmatically, large-scale nonoverlap military actions are significantly more destructive than small-scale overlap military actions. A main thesis is that, among the various kinds of military actions, overlap military actions resemble coercive nonmilitary measures most closely. Indeed, there is a crucial moral difference between overlap military actions and nonoverlap military actions.

Therefore, supplementary to the last resort principle about military actions generally, I propose to formulate a ‘first-of-last’ resort principle about overlap military actions specifically.

**Policing resort principle.** It is morally obligatory not to attempt to achieve a goal by means of a military action that is not also a police action, if it is reasonable to attempt to achieve that goal by means of a military action that is also a police action.

That there can be armed interventions that conform to this principle is confirmed by the case of ‘light intervention’ in Bougainville (Regan 2010).

The last resort principle is a core just war principle, whereas the policing resort principle is not. The last resort principle is a necessary moral criterion for determining whether a proposed military action would be just. By contrast, the policing resort principle is especially relevant to a question explored in Chapter 9, ‘All Things Considered’: among alternative proposed military actions, each of which would be just, which one would be best?

In conclusion, there are now five resort principles, so the ladder of resorts needs to have an additional rung – roughly, overlap military actions before nonoverlap military actions. In the next part, the set of military measures is further polychotomised.

### III. LAST RESORT AND NONCOMBATANTS

In accordance with coherentism, it is illuminating to investigate how the last resort principle is interrelated with other just war principles. In this part of the chapter, the idea of last resort is interrelated with the idea of noncombatant immunity. Specifically, a resort principle protecting noncombatants is proposed and supported. In the fourth part of this chapter, the core noncombatant immunity principle is introduced. A purpose of the
two parts is to elucidate how the permissiveness of the just cause principle is counterbalanced by the prohibitiveness of the last resort and noncombatant immunity principles.

As explained in Chapter 3 (‘Moral Theory’), the concept of ‘harming’ encompasses both the concept of ‘actually harming’ and the concept of ‘seriously risking harming’. Roughly, noncombatants should be protected not only from actual grievous harm, but also from the serious risk of grievous harm. Accordingly, the phrase ‘grievously harm’ should be understood as abbreviating the phrase ‘actually grievously harm or seriously risk grievously harming’. Similarly, the phrase ‘gravely violate basic human rights’ should be understood as abbreviating the phrase ‘actually violate gravely or seriously risk gravely violating basic human rights’.

A CIVILIAN CASUALTIES IN AFGHANISTAN

I expect leaders at all levels to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties . . . Following this intent requires a cultural shift within our forces – and complete understanding at every level – down to the most junior soldiers.

General Stanley McChrystal, Commander of NATO’s International Security Assistance Force (ISAF) in Afghanistan, 6 July 2009

A main thesis is that the core just war principles are applicable to all forms of armed conflict by all sorts of responsible agents. In the words of the above block quotation, these principles are applicable ‘down to the most junior soldiers’. Every combatant, no matter how subordinate in the hierarchy of command, must satisfy the just cause, last resort, proportionality and noncombatant immunity principles.

In January 2009, the United Nations Assistance Mission in Afghanistan (UNAMA) reported that, during the year 2008, there were 2,118 ‘civilian casualties’, 1,160 caused by ‘antigovernment elements’ and 828 caused by ‘pro-government forces’ (UNAMA 2009a: ii). In July 2009, UNAMA reported ‘an increase of 24% of civilian casualties in the first six months of 2009 as compared to the same period in 2008’ (UNAMA 2009b: 1).

On 6 July 2009, with the goal of reducing civilian casualties in Afghanistan, General McChrystal issued a ‘Tactical Directive’ to US and NATO forces there; the block quotation is taken from this directive. (He was Commander then and is now retired.)

In March 2011, UNAMA reported that, during the year 2010, there were 2,777 civilian deaths, 2,080 caused by ‘Anti-Government Elements’ and 440 caused by ‘Pro-Government Forces’ (UNAMA 2011: i). Apparently, the
Tactical Directive was effective. ‘Notably’, as UNAMA reported, ‘there was a 52 per cent decline in civilian deaths from air attacks compared to 2009’ (UNAMA 2011: i). The number of civilians killed by the 2010 air attacks was 171 (UNAMA 2011: i).

What do such numbers mean? In the Second World War, the US firebombing of Tokyo during 9–10 March 1945 killed ‘at least 83,793 Japanese civilians’ (Searle 2002: 103). Is there a morally relevant difference between the larger number of 83,793 and the smaller number of 171? Because the number 171 is so small, did the US and NATO air attacks in Afghanistan during 2010 satisfy the received noncombatant immunity principle? Plainly, there can be principled moral disagreement about how such questions should be answered.

B. A SINGULAR MORAL DILEMMA

Every citizen of Afghanistan must know ISAF will continue to do all we can to reduce casualties that affect the Afghan civilian population. This data is promising but there is more work to be done . . . Even one civilian casualty is a tragedy and I will continue to direct each member of the coalition to work to drive the number of ISAF-caused civilian casualties to zero.

General John R. Allen, Commander of NATO’s International Security Assistance Force (ISAF) in Afghanistan (4 February 2012)

My view is that the death of a single noncombatant is one death too many. For each and every noncombatant has the basic human right to life. And according to the nonharm principle, it is morally obligatory not to gravely violate basic human rights, even of a single noncombatant.

It is also my view (as explained in Chapter 5, ‘Just Cause’) that there can be a just cause for a targeted military operation to stop the killing of a single human being. For according to the counterharm principle, it is morally obligatory to attempt, as much as possible, to stop other persons from gravely violating the basic human right to life, even of a single human being.

Therefore, it is my view (as explained in Chapter 3, ‘Moral Theory’) that there can be a moral dilemma about even a single noncombatant. Let me sketch one schematically. Under the particular circumstances of a particular targeted military operation, it is impossible to stop the killing of a single innocent human being without killing a single noncombatant. One of the horns of the moral dilemma is that it is morally obligatory to stop the killing of the single innocent human being; and the other horn is that it is morally obligatory not to kill the single noncombatant. The subject of moral dilemmas is discussed further in Chapter 9, ‘All Things Considered’.
C. A NONCOMBATANT RESORT PRINCIPLE

Therefore, supplementary to the last resort principle, I propose to formulate a resort principle about noncombatants as follows.

Noncombatant resort principle. It is morally obligatory not to attempt to achieve a goal by means of a military action that would grievously harm noncombatants, if it is reasonable to attempt to achieve that goal by means of a military action that would not grievously harm noncombatants.

More explicitly, it is morally obligatory not to attempt to achieve a goal by means of a planned course of military actions that would actually violate gravely (or seriously risk gravely violating) noncombatants’ basic human rights (whether intentionally, knowingly, recklessly or negligently), if it is reasonable to attempt to achieve that goal by means of a planned course of military actions that would not thus harm noncombatants.

Roughly, the noncombatant immunity principle morally prohibits grievously harming noncombatants intentionally. Even if we ignore, reject or otherwise fail to satisfy the noncombatant immunity principle, we are still morally constrained by the noncombatant resort principle.

In light of the great destructiveness of the most memorable armed conflicts, it might be thought that the noncombatant resort principle is pointless or naively aspirational, but this thought is mistaken. Domestically, police officers must attempt to stop criminals without any collateral damage whatsoever. Analogously, when we perform a military action that is also a police action, it is not pointless, nor is it naively aspirational, that we must satisfy the noncombatant resort principle. Relatedly, targeted military operations are narrowly limited in fire-power, length of time, geographical extent and so forth. It is neither pointless nor naively aspirational to mandate that they must satisfy the noncombatant resort principle.

Let me sketch an illustration. Truly, US drone strikes against military targets have produced collateral damage. Drones are also employed in intelligence, surveillance and reconnaissance (ISR) operations. When drones are employed in targeted military operations, they ‘can linger over an area with their video cameras gathering intelligence for as long as 20 hours, and then strike without warning’ (Drew 2010a). On the other hand, they can hover over a target, gather intelligence about the presence of noncombatants and ensure that a mission is safely aborted (Chivers 2012). Therefore, it is not pointless, nor is it naively aspirational, to command human agents responsible for remotely piloting drones to satisfy the noncombatant resort principle.

The last resort principle is a core just war principle, whereas the
noncombatant resort principle is not. The last resort principle is a necessary moral criterion for determining whether a proposed military action would be just. By contrast, the noncombatant resort principle is especially relevant to a question explored in Chapter 9, ‘All Things Considered’: among alternative proposed military actions, each of which would be just, which one would be best?

D. THE NONCOMBATANT AND POLICING RESORT PRINCIPLES

The noncombatant resort principle should be applied conjointly with the policing resort principle. In light of these two principles, we may distinguish military actions that both are police actions and do not grievously harm noncombatants from military actions that either grievously harm noncombatants or are not police actions. Together, the two principles partition the set of military measures into the following primary parts: (type 1) military actions that are police actions and do not grievously harm noncombatants; (type 2) military actions that do not grievously harm noncombatants, but are not police actions; (type 3) military actions that are police actions, but grievously harm noncombatants; and (type 4) military actions that are not police actions and grievously harm noncombatants.

The metaphor of a ‘ladder’ suggests that the primary parts of a polychotomy are ordered ‘linearly’ (or ‘serially’). Nevertheless, for the sake of full generality, it is presupposed that a polychotomy can have primary parts that are ordered ‘nonlinearly’. Generally, actions of type 1 are less harmful than actions of the other three types, actions of type 2 are less harmful than actions of type 4 and actions of type 3 are less harmful than actions of type 4. Generally, however, actions of type 2 are neither more harmful than, nor less harmful than, actions of type 3. Metaphorically, a ‘ladder’ of resorts can have branches.

More precisely, it is presupposed that a polychotomy can have primary parts that are ordered ‘partially’. A relation is a ‘partial ordering’ just in case it is reflexive, antisymmetric and transitive (Suppes 1957: 221). (Roughly, a relation $R$ is ‘antisymmetric’ just in case, if $xRy$ and $x$ is not identical to $y$, then it is not the case that $yRx$.) Note that the subsets of a set are partially ordered by the relation of set-inclusion. Accordingly, the primary parts of a polychotomy may be depicted on a Venn diagram (Suppes 1957: 195–201).

In the first chapter, I conjecture that the cluster of recent targeted military operations might prove to be an epochal event that is pivotal for just war theory. A chief function of a just war theory should be to morally constrain processes of conventional escalation. A main thesis is that a cosmopolitan just war theory should morally constrain escalation from a military operation that is fittingly targeted to one that is unwarrantedly not targeted. Specifically, when a proposed targeted military operation would be a police action
that would not grievously harm noncombatants (type 1), the policing and noncombatant resort principles should together morally constrain escalation. When a proposed targeted military operation would not grievously harm noncombatants, but would not be a police action (type 2), the noncombatant resort principle should morally constrain escalation. And when a proposed targeted military operation would be a police action that would grievously harm noncombatants (type 3), the policing resort principle should morally constrain escalation.

In summary, there is a spectrum of nonmilitary measures, from ones that are very pacific to ones that are very coercive. And there is also a spectrum of military measures, from ones that are very small-scale to ones that are very large-scale. In short, there is a spectrum of measures, from nonmilitary measures that are very pacific to military measures that are very large-scale. To control or stop escalation from less destructive measures to more destructive measures, there should be various moral constraints. Supplementary to the last resort principle, I am proposing five additional resort principles: the coercive resort principle, the proximate resort principle, the penultimate resort principle, the policing resort principle and the noncombatant resort principle. Together, these six resort principles establish a (nonlinear) ‘ladder of resorts’.

IV. NONCOMBATANT IMMUNITY

The civilian population as such, as well as individual civilians, shall not be the object of attack.

*Protocols Additional to the Geneva Conventions*

(ICRC 1997a and ICRC 1997b)

That civilians are not to be targeted is an old, very salient rule, and can be crucial to the kind of peace that follows a war.

Herman Kahn, *On Escalation* (1965: 161)

In the just war tradition, the targeting of civilians is morally prohibited by a noncombatant immunity principle. Such a moral prohibition is embodied in international humanitarian law (IHL). The first block quotation above is from the two 1977 Protocols to the Geneva Conventions. In Protocol I, the quoted legal prohibition pertains to ‘International Armed Conflicts’ (ICRC 1977a: Article 51). In Protocol II, the quoted legal prohibition is extended to ‘Non-International Armed Conflicts’ (ICRC 1977b: Article 13).

In this final part, a noncombatant immunity principle is introduced. A goal is to elucidate how the prohibitiveness of this principle can serve to counterbalance the permissiveness of the just cause principle. But the
The controversial subject of noncombatant immunity is discussed incompletely. In various writings about just war theory, there is a labyrinth of argumentation about this subject, a labyrinth with many corridors, only some of which can be explored in this book.

A. TARGETING NONCOMBATANTS

In Chapter 2 (‘Just War Theory’), I suggest that the five legitimacy criteria in the High-level Panel Report should be augmented by a sixth criterion: is it clear that the proposed military action will not involve the deliberate targeting of noncombatants? Presumably, the words ‘deliberate’ and ‘intentional’ may be used interchangeably. Provisionally, a noncombatant immunity principle might be formulated as follows. It is morally obligatory not to target noncombatants intentionally.

My view is that the received noncombatant immunity principle should be revised, so as to allow (under some circumstances) the intentional targeting of noncombatants by ‘nonlethal’ weapons (Lango 2010c). The website of the US Department of Defense Non-Lethal Weapons Program provides some examples, which ‘range from non-lethal munitions and acoustic devices to non-lethal optical distractors and vehicle stopping devices’ – for instance, the M-84 Flash Bang Grenade and the Portable Vehicle Arresting Barrier. Granted, nonlethal weapons might unintentionally or inadvertently cause deaths, injuries and other damage. Accordingly, alternative terms – for instance, ‘less than lethal weapon’ – are sometimes used instead (Koplow 2006: 9–10).

Apparently, before effective nonlethal weapons were sufficiently envisaged, many just war theorists assumed (roughly) that to target means to (intend to) kill. Consider, for instance, the following relationship between targeting and killing stated by Douglas Lackey: ‘the killing of civilians is intentional if, and only if, they are the chosen targets of military force’ (1989: 60 [emphasis in original]). Now that effective nonlethal weapons have been envisaged, it should be clear that there is no conceptual (or logically necessary) connection between intentionally targeting and intentionally killing. For when nonlethal weapons are used, there can be intentional targeting without intentional killing.

B. A NONCOMBATANT IMMUNITY PRINCIPLE

Therefore, I think that a noncombatant immunity principle should only morally prohibit targeting that would kill or otherwise gravely violate basic human rights of noncombatants. Moreover, in accordance with the nonharm principle, targeting that would seriously risk gravely violating their basic human rights should also be morally prohibited. Accordingly, a noncombatant immunity principle might be formulated as follows. It is morally obligatory
not to actually harm grievously or seriously risk grievously harming noncombatants intentionally.

Heretofore, I have formulated noncombatant immunity principles as unconditional prohibitions. More revealingly, I propose now to formulate a cosmopolitan noncombatant immunity principle as a conditional prohibition:

**Noncombatant immunity principle.** It is morally obligatory not to perform a military action, if that military action would grievously harm noncombatants intentionally.

In other words:

**Noncombatant immunity principle.** It is morally obligatory not to follow a planned course of military actions, if noncombatants would be grievously harmed intentionally.

More explicitly, it is morally obligatory not to perform a military action, if that military action would actually harm grievously or seriously risk grievously harming noncombatants intentionally. Even more explicitly, it is morally obligatory not to perform a military action, if that military action would actually violate gravely or seriously risk gravely violating basic human rights of noncombatants intentionally.

In accordance with moral universalism, it is presupposed that this principle is applicable by all sorts of responsible agents. It is morally obligatory for any responsible agent not to perform a military action, if he or she would thereby grievously harm noncombatants intentionally. Moreover, the principle is applicable to all forms of armed conflict. It is applicable to every military action, however large scale or small scale. The most junior soldier must not grievously harm noncombatants intentionally, but also the loftiest head of state must not devise a war plan that involves the intention to grievously harm noncombatants.

The noncombatant immunity principle and the other core just war principles are coequal deontological principles. According to this coequality thesis, each must be satisfied, even when others are not satisfied. For instance, even when we fail to satisfy the just cause principle, we are still morally constrained by the noncombatant immunity principle. It is still morally obligatory for us not to use armed force to achieve a goal that is not just – even if that goal is a right goal – if we would grievously harm noncombatants intentionally.

When we apply the principle to a particular military action, we have to morally presume that we would grievously harm noncombatants intentionally, and we have the burden of proving that we would not. On the one hand, suppose that we fail to satisfy this burden of proof. Our moral presumption
becomes determinative: we have to decide that we would grievously harm noncombatants intentionally. Therefore, we have to conclude that it is morally obligatory not to perform the military action. Formulated thus as a conditional prohibition, the principle functions clearly as a moral constraint.

On the other hand, suppose that we succeed in satisfying the burden of proving that we would not grievously harm noncombatants intentionally. The noncombatant immunity principle is a conditional prohibition. It is not a conditional permission. It does not say: ‘it is morally permissible to perform a military action, if that military action would not grievously harm noncombatants intentionally’. Therefore, we cannot conclude, even tentatively, that it is morally permissible to perform the military action. Because the principle does not include such a moral permission, it functions clearly again as a moral constraint.

C. IMMUNITY STANDARDS
What are the standards for determining whether we have satisfied this burden of proof? In brief, what are the ‘immunity standards’? In addition to the epistemic standard of clear and convincing evidence, there is the specificity standard of sufficient detail. Sometimes, for example, to ensure that a sufficiently detailed targeted military action (e.g. a drone strike) does not violate the noncombatant immunity principle, we must obtain clear and convincing battlefield intelligence (Lango 2011).

There is a third immunity standard. Admittedly, the concepts of ‘combatant’ and ‘noncombatant’ are somewhat indeterminate. Notice that Protocol I asserts that, ‘in case of doubt whether a person is a civilian, that person shall be considered to be a civilian’ (ICRC 1977a: Article 50(1)). In other words, it must be presumed that the person is a civilian. ‘Protocol I of 1977 expands protection of civilians considerably’, Ingrid Detter de Lupis explained, ‘especially by a paramount presumption that anyone who is not proved to be a combatant has civilian status’ (1987: 243). Analogously, when we apply the noncombatant immunity principle, we must morally presume that any person whom we would grievously harm by our military action is a noncombatant, and we have the burden of proving that he or she is a combatant. Therefore, I propose to formulate a third immunity standard as follows.

**Indeterminacy standard.** Human beings must be classified as noncombatants, unless there is clear and convincing evidence that they are combatants.

D. NONCOMBATANT IMMUNITY AND PROPORTIONALITY
According to a traditional noncombatant immunity principle, it is morally permissible to cause foreseen proportionate but unintended harms to non-
combatants. However, I prefer not to complicate a noncombatant immunity principle by incorporating such a qualification. Instead, for simplicity and clarity, I am proposing proportionality and noncombatant immunity principles as separate core just war principles. Suppose that, when we apply the core just war principles to a particular military action, we succeed in satisfying the burden of proving that we would not grievously harm noncombatants intentionally. We still have the burden of proving (among other things) that we would not collaterally damage noncombatants disproportionately.

I return to the subject of noncombatant immunity in the section ‘Risk Acceptance and Noncombatant Immunity’ within Chapter 8 (‘Proportionality and Authority’) and the sections ‘Noncombatants and Stringency’ and ‘Collaterally Damaging Noncombatants’ within Chapter 9 (‘All Things Considered’).

NOTES

1. Quoted in ISAF (2012).
2. Compare this part with the chapter entitled ‘Noncombatant immunity’ in Coates (1997).