America's Imperfect War:
The Ethics, Law, and Strategy of Drone Warfare

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ABSTRACT

This study explores the ethics, law, and strategy of targeted killings by drones in the War on Terror. It starts with an exploration of just war theory, its historical development and criteria, to create a foundational framework by which to analyze the ethics of drones as a tactic. Then it defines terrorism and insurgency, establishing how sub-state actors operate, and the strategies states will use to neutralize them as threats. This shows that the War on Terror is actually an armed conflict because terrorism and insurgency are forms of warfare under the law and in warfare theory. After looking at terrorism a broad concept, a history of the War on Terror, its operational context, and the specific nature of al-Qaeda and its affiliates are explained to give context to the ethical debate. Because of the actions of al-Qaeda and its affiliates, the U.S. is at war with these organizations and is allowed to use kinetic action against them. The study then approaches the history, law, geopolitics, and ethics of drone warfare to show targeted killings and strategic strikes are legitimate forms of kinetic action and are legal, ethical, and useful tactics to neutralize enemy combatants and terrorist organizations. Finally, using the cases of Pakistan, Afghanistan, Iraq, Yemen, and Somalia this study demonstrates that targeted killings by drones are proportional, discriminatory, and militarily necessary.

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CHAPTER ONE
INTRODUCTION

After the ending of the Thirty Years War and the Peace of Westphalia in 1648, the international order predicated itself on the centrality of the nation-state for sovereignty and legitimacy. Institutions, law makers, and sovereigns based their normative principles both ethically and legally on the fact states are the primary political actors in international relations. This raises problems when states have tensions with non-state actors and have to engage with them. Although there are several theoretical paradigms on which policy makers have justified their actions, the general consensus among them concerning ethics is adherence to the traditions of just war. Since the terrorist attacks on September 11, 2001 in New York and Washington, DC the U.S. has systematically targeted violent sub-state actors, which raises questions concerning ethics and warfare. The U.S. experience with the problems of warfare dates back to the Founding. The Founders did not appreciate calculated realism and preferred to justify conflict and its conduct on idealist grounds.

They found the country on "ideals," not realism and balance of power. Then when the Framers wrote the Constitution, they made it difficult for the President to go to war. Congress had significant power over the military, particularly the ability to raise armies and maintain a navy, but for some time in the 19th century America's military power would be meager at best. Presidents like Thomas Jefferson tried to expand naval power to deal with specific threats, but usually the Congress focused on defensive positions like forts. America had a sense of its own national exceptionalism and almost an overdose of idealism, seeing war as typical of the Old World. The country was protected by the Great Power conflicts by the European balance of power and a two ocean buffer. But over the two and half centuries of America's existence, it would learn about and adapt to "small wars." Small wars, also called limited or asymmetric wars,

are different than total wars. They are wars fought less than whole heartedly, wars where America intervenes in the internal affairs of others, wars without significant popular support, and "wars among the people." That is the type of war that President Bush would find himself engaging in after 9/11 and developing modern tools for the conflict.

America invaded Afghanistan to stop al-Qaeda, but the War on Terror would not remain within the borders of that country. Al-Qaeda spread through its affiliates into Pakistan, Iraq, Yemen, Somalia, and elsewhere. One weapon the United States has used widely is drones. Drones have become a regular tool used for warfare and paramilitary operations, and they are here to stay. As such, meaningful debate must take place on the ethics of their use if America wants to stay true to its democratic and Western values along with an adherence to the rule of law, domestic and international. If drones are ethical, legal, and useful for targeting and neutralizing terrorists, then they become one of the best tools in the protracted war against al-Qaeda and its affiliates. The U.S. government has argued that their drone policies are morally justified within the just war tradition (Brennan, 2012; Holder, 2012; Obama, 2013). However, there is significant debate within academia as to whether or not this is true. Many academics have approached the topic by merely raising the issues of drones and explaining how just war ethics might apply (Bataoel, 2011; Enemark, 2013; Cook, 2015; Welsh, 2015). Moral questions raised include the applicability of new technologies and their ability to discriminate between combatants and non-combatants. On the other hand, Strawser (2010) contends there is a moral obligation to use drones because they help protect the "just warfighter" when the use of force is justified.

Yet several academics take serious issue with drones, believing their use in targeted killings as unethical. Adams and Barrie (2013) argues that drones are problematic because of

their bureaucratization, meaning decisions become mechanical and a threat to the democratic process. Boyle (2015) delineates how the Obama administration's discrete choices and enunciation of a right to presumptive self-defense challenges the normal legal and ethical paradigms that would apply to drones. Brunstetter and Braun (2011) argue that the lack of transparency makes drones difficult to judge while the distance from the conflict may make killing easier. Enemark (2011) also raises the need for greater transparency while Rae (2014) worries that permanent conflict could arise because of the ease of killing the enemy. Braun and Brustetter (2013) also contend that the CIA's drone program is problematic because almost a quarter of attacks have collateral damage, which means a new moral language of *jus ad vim* (just use of force short of war) might be necessary. Kreps and Kaag (2012) follow this argument by stating that the distinction between combatants and non-combatants is incredibly challenging. On the other hand, Carvin (2015) thinks that proportionality is misapplied to the drone, especially because scholars cannot get an accurate count of civilian casualties.

Scholars offer competing ethical perspectives and a variety of problems associated with drones, but just war ethics provides a way to systematically evaluate these issues and problems. This study assesses drone warfare and targeted killings as a tactic within asymmetric warfare and counter-terrorism according to the criteria of *jus in bello*. To do this, I establish just war theory and give a detailed description of *jus in bello* and the ethics of targeted killings. Then I elucidate the definition, organization, and goals of terrorists and how targeted killings have utility in neutralizing them. Finally, I apply the ethics of just war theory to targeted killings by drones within the War on Terror, using the cases of Afghanistan/Pakistan, Iraq, and Yemen/Horn of Africa. A comparative historical analysis enlightens the nature of drone warfare as a tactic and the ethics of such actions for future conflicts.

Methodology

Because this study works to understand the ethics, laws, and strategic purpose of a tactic within asymmetric warfare, qualitative research and case studies are necessary to discuss normative principles and derive lessons from them. Qualitative research "is a means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem" (King, et al, 1994, p. 4). The development of just war theory happened to deal with the situation of war in a fallen world. Thinkers like St. Augustine understood that concupiscence played a role for leaders, and he formulated a way to bind that nature. Quantitative research cannot deal with ethics and how to be just because morality is not empirically measured. As this is qualitative research, comparative case studies are best suited for comparing and contrasting the actions of a state in warfare. Every use of drones is far too large for the confines of this study, and according to Barbara Geddes one can make valid inferences from a smaller sample when the entirety is too large to study (Geddes, 1990, p. 135). In addition, case studies should be comparative to allow for contribution to "an orderly, cumulative development of knowledge and theory about the phenomenon in question" while they "should be undertaken with a specific research objective in mind and a theoretical focus appropriate for that objective" (George & Bennett, 2005, p. 70).

The case study is the most effective means to assess ethical, legal, and strategic principles. Because of this I use a constructivist approach rather than positivist or pragmatic one. Constructivism "holds assumptions that individuals seek understanding of the world in which they live and work" (Creswell, 2009, p. 6). This worldview is necessary for ethical considerations because the foundation of just war theory is how Christians should deal with the real world problem of war when Jesus of Nazareth commanded a nigh pacifistic approach to life.

Just war's natural law basis is communitarian and delineates a position on how communities and individuals must deal with each other. Legal discussions also require significant discussion of how citizens and governments engage the world around them. Each method "produces its own special kind of knowledge, and each kind of knowledge is especially adapted to a certain kind of practical use" (Diesing, 1971, p. 259); the case study is the most practical method for the study of ethics, law, and strategy under the paradigm of just war theory. For complex events like wars, case studies are better for description, which increases accuracy, reliability, and explanatory abilities.

The problem with selecting the proper case studies comes from the biases of historiography and selecting a case to fit the theory. Ian Lustick raises the questions on how one knows whether a history is accurate or objective and "how to choose sources of data without permitting correspondence between the categories and implicit theoretical postulates used in the chosen sources to ensure positive answers to the questions being asked about the data" (Lustick, 1996, p. 608). The best case studies offer clarification of causal mechanisms in past situations and have similarities to current policy problems, which provides a better understanding for causal mechanisms in other cases and lessons on contemporary issues (McKeown, 2004, p. 163; Van Evera, 1997, p. 77). Considering these problems, I use broad historical examples in different geographic locations and socio-political situations in the War on Terror as the proper case studies to compare to just war theory, international law, and strategy as cases are needed that explain only one phenomenon (George and Bennett, 2005, p. 69). These include the U.S.'s drone program in Afghanistan, Pakistan, Yemen, Somalia, and Iraq. In particular, Pakistan proves an important case to examine the ethics of drones. By focusing on wars that fit these criteria, the

study is able to explain why "the outcome occurs, then identify causal conditions shared by these cases…" and explore "causal factors that produce the outcome" (Ragin, 2004 p. 126).

The way scholars have discussed cases of Afghanistan, Pakistan, Yemen, Somalia, and Iraq possess the problems of biased histories and non-objective analyses, but the benefits outweigh the difficulties. Historical research is based on the collection and evaluation of factual information that needs interpretation. Researching case studies must assess historical evidence for authenticity and significance by gathering as much documentary evidence as possible and comparing it to other primary and secondary sources (Brennen, 2013, pp. 98, 103-04). By having a diverse amount of evidentiary support, the researcher can "locate the characteristic pattern of distortion in a source, so that it can be taken into account in using later evidence from that source" (Diesing, 1971, p. 148). This is best means to guard against the bias of any one source. For instance, there is disagreement about when al-Qaeda started. Scholar Fawaz Gerges (2009) castigates those who believe that al-Qaeda began in the 1980's while the 9/11 Commission argues for that date of founding. Looking at multiple primary and secondary sources can help establish the best possible evidence for how particular events unfold.

Conducting Research

My research consists of five parts. First, I examine just war theory, laying out its argument, rationale, history, and theoretical basis. Important for this part are the works of scholars on just war theory that created an accepted list of just war criteria, both *jus ad bellum* and *jus in bello*. It also includes St. Augustine's theocentric basis for just war and why it is necessary. Although there is a tradition of righting wrongs within just war theory, I focus instead on the historical understanding that wars seeking peace and/or stability are legitimate. I do not

want to only use the "least common denominator" in just war, self-defense. Other thinkers that contributed to just war theory and ethical violence that I examine are Thomas Aquinas, Hugo Grotius, Reinhold Niebuhr, and among others. Then I examine the history of American statutory and common law and international law to understand the legalist paradigm in which drone warfare fits and for fighting asymmetric wars. Next I establish the definition and nature of terrorism and insurgency and strategies of counter-terrorism and counterinsurgency along with the American way of war. This is done by drawing from historical and contemporary experts on terrorism and insurgency like Bruce Hoffman, Louis Richardson, and Kenneth Pollack, and Carl von Clausewitz. All of this is to establish a framework that represents a broad stream of thought by which to analyze the case studies.

The fourth part looks at the history of each conflict, including the events that led to the war, the conduct and operations by both sides during the war, why such decisions were made, and the consequences of strategic, operational, and tactical choices. Case studies are undertaken in three phases: (1) identify the class of cases, (2) establish a research objective and research strategy, and (3) assessment of variables for contribution to the research objective (George and Bennett, 2005, p. 69). Important for this section are the leaders of each organization's own words like speeches and autobiographies, contemporary news about their terrorist attacks and battles, government documents like memos and strategic statements. Also, secondary sources are employed to fill in gaps of the timeline and possibly missing information. A variety of primary and secondary sources for this are necessary because "the reliability of a data-collecting instrument is the extent to which its results are independent of the person using it" (Diesing, 1971, p. 146). Then I look at the history of drones along with the legal, ethical, and strategic implications and problems. Finally, I compare the drone program in the aforementioned

countries and its conduct to the criteria of just war theory's *jus in bello*: proportionality, discrimination, and military necessity.

Outline of Chapters

Chapter Two starts from St. Augustine's development of just war theory through the Middle Ages into the Enlightenment and the twentieth century. It addresses modern academic literature on just war ethics and asymmetric warfare. Chapter Three delineates the criteria of *jus ad bellum* and *jus in bello*, explaining each criterion in detail and how they work with historical examples. Chapter Four addresses the concepts of terrorism, insurgency, counter-terrorism, and counter-insurgency. Chapters Five and Six give the history of the War on Terror, al-Qaeda, the Taliban, the war in Iraq, al-Qaeda in Iraq, al-Qaeda in the Arabian Peninsula, and al-Shabaab—explaining the context in which the drone program is used and the enemy neutralized.

Chapter Seven elucidates the legal, both domestic and international, underpinnings of the drone program and the executive authority the President has in using them. It also details the history of the drone. Chapter Eight addresses ethical issues and problems outside of the typical just war ethics, like societal problem, targeted killings, and the impersonalization of war. Chapter Nine explores the issues of sovereignty and drones before exploring the strategic and tactical utility of targeted killings with historical cases. Chapter Ten looks directly at the drone program in Afghanistan, Pakistan, Yemen, Somalia, and Iraq, applying *jus in bello* principles and amalgamate the study's analysis. Then Chapter Eleven summarizes the argument and place it in the context of American political thought and policy.

This study argues coming from the analysis that terrorism and insurgency are both forms of war, though asymmetric in nature, according to military and legal paradigms. Al-Qaeda and

its affiliates are terrorist and insurgent organizations at war with the US and her allies. Targeted killings and strategic strikes are legitimate forms of kinetic action and are legal, ethical, and useful tactics to neutralize enemy combatants and terrorist organizations. Drone strikes are merely a modern technological form of targeted killings and strategic strikes, and they fall within the ethical framework of *jus in bello*'s proportionality and discrimination. Therefore, drone strikes in the war against al-Qaeda and its affiliates are an ethical military tactic under Augustinian just war theory.

CHAPTER TWO
JUST WAR THEORY: HISTORICAL DEVELOPMENT AND MODERN INTERPRETATIONS

Inter arma enim silent leges.- Marcus Tullius Cicero, *Pro Milone*

"For everything there is a season, and a time for every matter under heaven… a time to love, and a time to hate; a time for war, and a time for peace."-Ecclesiastes 3:1, 8, *ESV*

"He shall judge between the nations, and shall decide disputes for many peoples; and they shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war anymore."-Isaiah 2:4, *ESV*

Introduction

As this is a study of applied philosophy and applied history, it is imperative to establish the philosophical paradigm by which drone warfare is analyzed. This chapter looks at the Augustinian foundation of just war theory through its historic development with Thomas Aquinas and Hugo Grotius. Other important thinkers, Martin Luther, John Calvin, and Reinhold Niebuhr, are also discussed because it is the amalgamation of all of this thought that produced the framework for the application of philosophy and history. In addition, there is a discussion of modern issues concerning just war theory and whether or not asymmetric wars can be just. All of these together are necessary as there are different traditions within just war theory, but the Augustinian tradition is unique. It focuses on the nature of man, a fallen and sinful nature, and the punishment of evil in the world. Secularization of just war theory attempts to move beyond such concepts to focus on limiting conflict too extensively as last resort, rather than a just cause, is the quintessential element. Augustinian just war theory steps away from that and accepts that evil and power are real issues with which statesmen must contend. By laying out fully this tradition and the modern issues, the study is able to fully apply the concepts to the war against transnational terrorism and Islamist insurgency throughout the world.

Augustinian Origins

Just war is the idea that states may use force for legitimate objectives and through ethical means. St. Augustine of Hippo is typically considered the founder of this concept in his monumental work *City of God*, although he did not lay out a systematic approach to the topic. Because he had no formal theory put forth, his ideas come from a combination of his works, especially *Reply to Faustus the Manichean* and *City of God*. The Catholic Church developed his strand of thought into a paradigm on how states in the modern world can ethically use violence. The fundamental premise of a just war is that war can be an instrument of justice and that it can correct the disorder that prevents peace (Elshtain, 2003, p. 50). Although ethically governments should try to avoid war, sometimes violence, or the threat of violence, is necessary for justice and order.

Aurelius Augustinus Hipponensis was born in 354 CE to a Christian mother, St. Monica, and a pagan father. Ethnically Berber, the family was fully assimilated into the Roman Empire and Augustine studied rhetoric in Carthage, a subject he would later teach. The eventual priest and Doctor of the church moved between various philosophies of his age. Manicheanism originally drew his attention, which was a theological system that held a dualistic cosmology between good and evil. The two sides were ever in constant conflict. Eventually Augustine would move on to neo-Platonism, and under the influence of St. Ambrose he would use this as a foundation to convert to Christianity. Ultimate his sojourn through these various perspectives would influence his approach to Christian doctrine and philosophy. For example, his view that evil was *privation boni* was a rejection of Manicheanism. Rather than see the world as bifurcated between good and evil, he argued that evil existed as a corruption of good, like a knot existing as the corruption and twisting up of rope.

Augustine believed that one could not understand the soteriological nature of Jesus's incarnation, crucifixion, and resurrection without first engaging why Christ needed to come. He came to the conclusion by focusing on the story of Adam and Eve, the Fall, and St. Paul's interpretation of this event. This is where he would develop the quintessential doctrine of Western Christianity, the notion of "original sin." Original sin for Augustine is rooted in egoistic pride and disobedience that lead to rebellion against God and the proper order of the universe (Deane, 1963, p. 17). Because of Adam's rebellion, the entire human race became sick and flawed—*massa damnata*—as "he who committed the first sin was punished, and along with him all the stock which had its roots in him" (Augustine, 2003, p. 989). The story of Adam and Eve primarily formed his understanding of why humanity behaves in the way it does. Augustine wrote *The City of God* to differentiate between the *Civitas Terrena* (earthly city) and the *Civitas Dei* (heavenly city/city of God). The earthly city is disordered and lacks justice because of man's sinful nature. Adam's action was the "original sin" that would ultimately taint all of his progenies, creating a debased nature (Augustine, 2003, p. 523, 533, 1065). Augustine would call this "concupiscence" and refer to man's *libido dominandi,* lust to dominate (Augustine, 2003, 5). Man's lust to dominate would lead to all sorts of ills for society, a quintessential one being the permanence of conflict. In fact, "self-love" becomes the source of evil, not just a symptom of it (Brown, 1986, p. 125). This is where Augustine departed from classical philosophy; because he used the Bible as his foundation, he rejected the notion that reason and rationality could bring justice to the polis (Brown, 1986, p. 124). Like Augustine, Thomas Hobbes would also adopt this thought with his insistence that man's life was "nasty, brutish, solitary, and short" and there was a "war of all against all." The earthly city, which is in Augustinian thought the human community, becomes divided and continuously conflictual.

Because Augustine saw the earthly city as full of sinners, the polity became necessary for the maintenance of order. Man's fallen nature led him to be "self-centered, covetous, lustful, and desirous of exercising power over others," which means the state exists to keep this nature from consuming the earthly city (Hallowell & Porter, 1997, p. 151). The state's coercive powers are a "remedy for [man's sinfulness] to the extent that it is able to impose order and to maintain a measure of domestic peace" (Hallowell & Porter, 1997, p. 151). The polity can only give a measure of domestic peace, though, because true peace only comes when man enters the heavenly city. What Augustine sought was the *tranquilitas ordinis,* an ordinary peace, which was not quixotic utopianism but a prevention of the Hobbesian *bellum omnium contra omnes*. Augustine did not limit his application of man's sinfulness and requisite coerciveness to the domestic affairs of the state. He wrote about how states must continuously fear the possible domination of one's state by another. Using the biblical narrative of the Judges and Solomon, he argued "that people never possessed the kingdom so securely as not to fear subjugation by their enemies; in fact, such is the instability of human affairs that no people has ever been allowed such a degree of tranquility as to remove all dread of hostile attacks on their life in this world" (Augustine, 2003, p. 743-744). Modern political scientists and neorealists would refer to this as the security dilemma, which they attribute to the system of the international order instead of man's nature.

As Augustine rejected "the formulation of the political problem as a problem of human perfection," he thought a state should seek "the limited goods of peace and security" (Bluhm, 1971, p. 196). This is better described in modern political parlance as stability in the international order because he notes that man's quest for "peace" can lead to empire, more domination, and the imposition of one's will on others. These are inherently unethical actions for Augustine. Even

though true justice cannot exist in the earthly city, it does not mean that the state's coercive powers are absolute. Augustine did not believe a "state is an absolute value, so no state can be defended absolutely through means that are, simply, unacceptable" (Elshtain, 1995, p. 107). States can only use coercive power for the limited goal of stability, but this is still a categorically important power. Now, the reason understanding Augustinian realism is important is due to the arguments about the nature of just wars. Jean Bethke Elshtain (2001, p. 22) criticizes a lack of Augustinian realism, saying just war versions without it are "mere variants on liberal institutionalism and quickly degenerate into internationalist sentimentalism." Analysis must take structures of power, man's propensity for conflict, and the security dilemma seriously if they are to have a constructive conversation about the ethics of violent coercion.

The theological approach to a just war has to do with the Christian concept of *caritas*, neighborly love. St. Ambrose believed that it is paramount for a Christian to protect one's neighbor from "unjustly inflicted harm (Hensel, 2008, p. 13)." Sometimes it is necessary for a Christian to use violence to fulfill his religious obligation to take care of his neighbor, which would supersede Jesus of Nazareth's call to non-violence and non-retaliation. According to the Gospels, Jesus declared that the second greatest commandment behind devotion to God is to love one's neighbor as oneself (Matthew 22:34-40, Mark 12:28-34, Luke 10:25-28). Jesus further stated that "[n]o one has greater love than this, to lay down one's life for one's friends" (John 15:13, English Standard Version). This is why St. Augustine believed the just cause was the *sine qua non* for a just war (Mattox, 2008, p. 46). He justified the use of punitive actions against those who did evil in the world and to help those who were in dire need and return the world to the *tranquilitas ordinis*. "[B]ecause Christians believe evil is real, both justice and charity may compel us to serve our neighbor and the common good by using force to stop wrongdoing and to

punish wrongdoers" (Elshtain, 2003, p. 52). In addition, he believed in self-defense. Although Augustine was typically critical of Roman expansion and its territorial ambition, he supported Roman military action when the "barbarians" attacked. St. Augustine also believed in a divinely decreed war that he derived from his reading of the Old Testament. However, this part of the Augustinian approach to a just war has no relevance for the modern, secular nation-state. Although war holds utility for punishing evil and attempting to bring about stability in order for people to live, it should be remembered that within the Augustinian tradition war is still to be regretted (Stevenson, 1987, 41). Death, destruction, and conflict are products of sin, and leaders must respond within a sinful world.

Against Realism and Pacifism

There are two main theoretical paradigms by which to reject just war theory: realism and pacifism. Realism as a theory on how to engage the enemy dates back to at least Thucydides's "Melian Dialogue" in which he lays out the argument that it is acceptable to destroy neutral parties in conflict as a means to prevent others from abandoning one's cause. Two of the most important advocates of a radical utilitarian approach to conflict are Machiavelli and Cardinal Richelieu. Machiavelli wrote *The Prince* and *The Discourses* after his fall from power in Florence when the Medici family took control of the city. He dedicated his short treatise on how princes could acquire and maintain power to Lorenzo de Medici in the hope Lorenzo would read it and bring Machiavelli back to the fold. Even though Lorenzo never read the text, it would still greatly influence Western political thought with its separation of personal and political ethics, which many found shocking at the time and still today. By separating politics from the dominant ethics of the age, Machiavelli argued that the highest good the prince could seek was maintaining

the security of the state. According to Machiavelli (1950, p. 66), "Let a prince therefore aim at conquering and maintaining the state, and the means will always be judged honourable and praised by everyone…" He also noted, the governing authority must put "all other considerations aside, [and] the only question should be, What course will save the life and liberty of the country?" (Machiavelli, 1950, p. 528).

This ratiocination became quintessential nearly a century later at the beginning of the Thirty Years War when Cardinal Richelieu applied such reasoning in a way to secure French, as opposed to Catholic, interests. When the Austro-Hungarian Emperor Ferdinand II sought the domination of Europe to establish a Roman Catholic and Habsburg Empire, Cardinal Richelieu as the first minister of France decided to act on the *raison d'état,* reason of the state (Kissinger, 1994, p. 59). "*Raison d'état* asserted that the wellbeing of the state justified whatever means were employed to further it; the national interest supplanted the medieval notion of a universal morality" (Kissinger 1994: 58). Because he put France's national interest first, Cardinal Richelieu sided with Protestant German princes and the Muslim Ottomans. Although he was a Cardinal and personally pious, he thought only in secular terms while he acted as a minister of France. In practice he separated personal morality from public ethics (Strayer, et al., 1971, p. 420). Cardinal Richelieu once said "Man is immortal, his salvation is hereafter. The state has no immortality; its salvation is now or never." Together Machiavelli and Richelieu laid a theoretical foundation and practice of a realist foreign policy based on the national interest and primarily the security of the state.

Pacifism, a deontological perspective, falls on the opposite end of the spectrum from realism's pragmatic approach. Those who accept pacifism argue that conflict is always inherently wrong. As was previously mentioned, some interpret the words of Jesus of Nazareth

as promoting a certain pacifist ethics, but this seems to be a philosophy developed during modernity. Religious movements like the Quakers and protest leaders like Martin Luther King, Jr. and Mahatma Gandhi categorically reject violence. Christian pacifists believe that "the teachings of Jesus rule out any use of force, even force deployed at the behest and under the limits of legitimate authority and ethical restraint" (Elshtain, 2003, p. 51). John Howard Yoder, a prominent 20th century Anabaptist, saw nonviolence and nonresistance as an act of love and Christian charity (Corey & Charles, 2012, p. 215). Yoder held an eschatological view that the Kingdom of God was here and now, though not completely here, and that individual Christians had to be pacifists because to kill is against Christ's injunction to love one's enemies. Essentially, pacifism argues from a deontological perspective that because violence is always evil, there can be no justification for its use.

Just war theorists reject realism and pacifism for similar reasons, particularly because neither is realistic nor can they produce a just society. Realism as an amoral approach views violence as a legitimate means to protect the state. This is something, depending on the circumstances, with which just warriors could agree. But power becomes the realist's only objective. Force must serve a greater purpose than stability and the further accumulation of power, but that's exactly what Thucydides to Richelieu to Machiavelli argued was the point. Such purely pragmatic calculations go against the Christian tradition; to accept the idea of *caritas* and *aequitas* means that the state must only use force to further these values. Furthermore, a realist competition for power ultimately does not produce stability. Historic examples would include many of the great power wars, such as the Napoleonic wars, World War I, and World II (both the European and Japanese fronts). States that seek power rarely stop accumulating it and bring about major conflicts. Pacifism also fails on the inability to bring about

a just society and does not conform to how the world works. Eschatologically and theologically a fully just society will happen with the Parousia. Utopia is a quixotic aim that cannot happen on earth as only God can bring it about. Therefore, Christians must deal with a complicated and fallen world that requires the use of force. One of the problems with the pacifist tradition in Christianity, especially its opposition to just war theory, is that it was practiced in the early church by those outside the theological mainstream like Origen and Tertullian. Since the Patristic period Christians have understood that the Fall produced a sinful world that cannot produce stability and justice merely through prayer. Realism and pacifism offer theories in contradistinction to the just war with the former focused on power and the latter focused on peace. However, neither can fully achieve the Christian objectives of love and justice in a corrupt and fallen world.

Natural and International Law

Thomas Aquinas, like Augustine, greatly contributed to the development of Christian theology, though he did so by combining Catholicism with Aristotelean philosophy that was reintroduced due to Arabic translations. Aquinas directly quotes Augustine in his *Summa Theologica* in order to defend the ethical nature of war and answer the question *utrum aliquod bellum sit licitum.* According to Aquinas in Question 40 of the s*ecunda secundae partis*, wars are just if they are waged by a proper authority (*auctoritas principis*), have a just cause, and the combatant has the right intention. It is interesting how Aquinas frames the question, which is slightly different than the Augustinian framework. *Auctoritas principis* was categorically important as it would legitimize actions that would be considered illegal or immoral if an individual did them, e.g. killing someone (Draper, 1990, p. 182). The question on the legitimacy

of war arises as Aquinas is responding to the idea that war is a sin because it opposes the virtue of peace (Corey & Charles, 2012, p. 79). Responding to the "Objections" laid out at the beginning of the question, Aquinas notes that those "who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace…" and that "[m]anly exercises in warlike feats of arms are not all forbidden, but those which are inordinate and perilous, and end in slaying or plundering." Essentially Thomist thought on war stems from a natural law understanding of the common good, an argument that holds the government is meant to stop disorder and chaos that threaten the community. Any policy, especially war, should adhere to helping the community as a whole and allow prosperity for all.

Hugo Grotius, the father of international law, did not begin his seminal and influential work *On the Law of War and Peace* as a treatise or textbook on international law (Dumbauld, 1969, p. 59). Rather, his objective was to write about universal laws common to every human society, *communis societas generis humani.* He published his work in 1625 during the middle of the Thirty Years War (1618-1648) as he thought Christians were not acting in a theologically sound manner. His work attempted "to establish rules aimed at regulating the conduct of wars already started" (Yasuaki, 1993, p. 60). Grotius thought of war as a type of law enforcement and that the laws of war and peace were laws that bound humanity, providing ways to adjudicate their enforcement, and had the two forms of natural and volitional. Natural law (*jus naturale*) is the right reason, rational, and moral act prohibited or commanded by God and is immutable, while volitional law (*jus voluntariusm*) comes from the will of man or God and can be changed.

Grotius saw a just war in juridical and moral terms, "as the lawful response to threatened or actual violation of a right known to the law, or to a refusal of reparation for such violation" (Draper, 1990, p. 192). He argues that war is permitted by both natural and volitional law when

an "injury" has occurred that violates substantive rights (Dumbauld, 1969, p. 66). Natural law allows for war as a means to correct an injury to rights because *ubi jus ibi remedium*. In addition, war should have peace as its ultimate goal in mind (Yasuaki, 1993, p. 58). A state cannot go to war for issues of power accumulation, subjugating enemies, or for religious reasons (what are referred to as *raison d'état* justifications). Because states are established in order to do good, i.e. protect the rights of citizens, they can legitimately go to war to protect rights with a formal declaration (Naoya, 1993, p. 255) Specifically, the state can go to war for defense, restitution, and punishment to correct injuries (Yasuaki, 199, p. 79). Defense is to prevent an imminent attack against person and property; restitution is about the violation of property, treaty, and diplomatic rights; punishment is going after those who do evil.

Protestantism Responds

Martin Luther was the primary progenitor of the Protestant Reformation, and as he abandoned the Catholic Church in the early 16th century he also abandoned its just war tradition (Corey & Charles, 2012, p. 85-87). He rejected the Thomist understanding of self-defense and resistance against tyranny, the Augustinian view of *caritas* by focusing on submission to temporal authority, and any notion of a holy war (Corey & Charles, 2012, p. 101). During the 1520's he wrote extensively on his own theological positions because the Church excommunicated him in 1521. His commentary on the ethics of violence surrounded several important geopolitical events, which ultimately gave rise to his views on temporal authority's ability to use force. First, there was a contentious battle between Luther and monarch in Europe; in 1521 at the Diet of Worms the Holy Roman Emperor Charles V articulated that he would bring the wayward reformers back into the Church even by force if necessary. Second, the

Peasants' Revolt of 1524-25 in the German principalities sought the abrogation of serfdom, and Luther would initially side with the peasants until he eventually took the side of the princes. Finally, the Ottoman Turks were a constant threat to Christian Europe by this time because they had extended their power to the Danube River and in 1526 had defeated King Louis II of Hungary, causing mass panic across the continent.

Like much of Luther's theology, he derived the foundation of his views from Paul of Tarsus's *Epistle to the Romans.* As many other Christian thinkers have done, Luther (like Calvin later on) turned to Paul's writing that stated, "Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God" (Romans 13:1, English Standard Version). Luther argued for a *die zwei Reiche* or "the two kingdoms" doctrine because humanity needed both sacred and temporal authority and obedience to the temporal authority was "both a theological and political virtue" (Corey & Charles, 2012, p. 101). Temporal authority should exist because man is born into sin, tempted to evil, and therefore temporal authority should do what's necessary to prevent that evil (Elshtain, 2008, p. 82). As Luther wrote in *On Secular Authority*, "[T]he Sword is a very great benefit and necessary to the whole world, to preserve peace, punish sin and prevent evil" (Rupp & Drewery, 1970, p. 110). Luther definitively states that Christians "are under obligation to serve and further the sword by whatever means [they] can, with body, soul, honour and goods" (Rupp & Drewery, 1970, p. 110). This is why he rejected the arguments of the peasants during the revolt, and wrote in *Against the Robbing and Murdering Hordes of Peasant* that they had been led astray and sinned against God and man as there is nothing more "poisonous, hurtful or devilish than a rebel (Rupp & Drewery, 1970, p. 122). Due to this, he openly supported their suppression through any means necessary, which fits with his view that the state is meant to use violence to punish evil.

This was not a new doctrine in Western Christianity, though. In the mid-490's Pope Gelasius I argued there were two swords, one spiritual and one secular, called s*acerdotium* and *regnum.* Sacred authority came from Matthew 16:18-1 where Jesus tells St. Peter, the Apostle who would become the first pope, that he would power to "bind and loose" on earth (Elshtain, 2008, 12). Pope Gelaisus also noted the nature of power was different between the spiritual and secular sword. Rome's bishop held *auctoritas* as he does not have coercive power, but the secular sword held *potestas* because the emperor has the ability to use force. If the prince does use the sword to stop chaos and evil from reigning, it will be a bloody affair. The ruler "is God's rod and vengeance" as the majority of people "need this coercive and punitive sword more than do true Christians" (Elshtain, 2008, p. 83). John Calvin's addition to this doctrine went beyond temporal authority just keeping evil at bay; he believed that secular authority would maintain order and would lift up man.

The other great thinker of the Protestant Reformation was Calvin, and he also contributed to the debate about the ethics of war. He differed from Luther in that he believed in holy wars as a legitimate use of force, accepted the Thomist view that one can oppose tyrants, and *caritas* as the theological motivation rather than obedience (Corey & Charles, 2012, p. 103). Calvin also differed from Luther because Christians could as Christians, not as subject to a secular authority, engage in violence to punish evil. According to the *Institutes,* he justified this violence against evil with Psalm 101. However, he did not just root his thought in the Bible, but he also based ethical violence on the idea of *naturalis aequitas*, which gives him a direct connection to Augustine's own political thought. For Calvin political authority should eliminate disorder, rebellion, oppression, and the wicked by force if necessary (Corey & Charles, 2012, p. 109). This is for both domestic and foreign issues. Such violence, therefore, is always in service of justice,

mercy, and love because those are God's characteristics (Cole, 2002, p. 35-36). Calvin would essentially combine the obedience to temporal authority from Luther with the motivation for violence from the Augustinian tradition.

Christian Realism of Reinhold Niebuhr

Reinhold Niebuhr's Christian realism developed significantly from Augustinian theology, and he applied it to the problems of the polity during the Cold War. This is important because Niebuhr thought Christian ethics that did not include strategic considerations were irrelevant (Rasmussen, 1988, p. 128). He ultimately sought the combination of historic realist thought and realpolitik with Augustinian theology and realism. Niebuhr (1996, p. 260-61), though, did not accept the Augustinian notion of inherited sin, which he considers to be a literalist error in the reading of St. Paul and St. Augustine. Rather he argued that "man's self-love and self-centeredness is inevitable, but not in such a way as to fit into the category of natural necessity" (Niebuhr, 1996, p. 263). Furthermore, the "behavior of collective man naturally has its source in the anatomy of human nature" (Niebuhr, 1959, p. 144). The important part of both St. Augustine and Niebuhr is that the world exists of people with a sinful nature, leading to a world of disorder and injustice that needs coercive politics.

Niebuhr (1932, p. 271) predicated his ethical system on a moral dualism that differentiated between the morality of the individual and the morality of the social or political system. *Agape*, a divine and self-sacrificial love of the will central to Christian morality, defined the ethics of individuals in relation to one another. However, justice as an outgrowth of love is the moral basis for the political system (Niebuhr, 1932, p. 258-59). Justice is the highest good in politics because groups cannot achieve a self-sacrificial love, and the basis of justice in a society,

according to Niebuhr, is order. According to Niebuhr "order precedes justice in the strategy of government; but that only an order which implicates justice can achieve a stable peace. An order quickly invites the resentment and rebellion which leads to its undoing" (Niebuhr, 1932, p. 258-59). His concept of justice had the "aspiration to harmony with our neighbors…" because we "pursue our desires and we protect our interests," but we also "want to have those aims recognized and protected by our neighbors…" (Lovin, 1995, p. 206). This is where the utility of force becomes relevant. Force and coercion are necessary to achieve the requisite order because humanity cannot achieve this on its own due to its fallen nature (McKeogh, 1997, p. 49). The separation of personal and political ethics, something Machiavelli had done four centuries earlier, was necessary because man could not maintain civilization if he focused on only the morally perfect actions stemming from agape love (Niebuhr, 1962, p. 5). Niebuhr ultimately sought a pragmatic approach in contradistinction to the idealism of American liberals, and his pragmatism did not seek the perfection of humanity and civil society on earth. Rather, at best practitioners of foreign policy could hope for was a form of stability. This is the great moral good to which they should aspire and because of which they must use violence.

The amalgamation of just war theory and Christian realism happens because the two frameworks both argue that to restore order and justice the state must use coercive force against the violating party. Many modern day theologians and ethicists tend to promote the criterion of last resort within just war theory as the primary consideration for using kinetic action. However, this goes against the Augustinian and Niebuhrian notions of the efficacy of force. Just war and Christian realism operate from the understanding of the presumption against injustice when force is necessary rather than the presumption of peace. This means they reject any sort of crypto-pacifism that is not theologically justified and merely a shallow defense of doing nothing. It is

important to note that the just war tradition and Christian realism to not offer a check list of right things to do but a framework for how to think about, fight, and critique a war. With the basis of Augustinian realism just war thinkers and Christian realists know they cannot create utopia or ever make a perfect peace. Instead they compel one to resist sentimentalism and offer moral control when trying to make the world more just while recognizing the limits of force.

Contemporary Issues of Just War Theory

The post-Cold War world produced conflict on multiple continents and produced debates on how just war theory would apply to the new global order. Just war became especially salient after Operation Iraqi Freedom, colloquially called the Iraq war, as academics and liberal elites would consistently claim the conflict was unjust and illegal while employing the moral language of this tradition. Modern thinkers and academics have engaged in reapplying the ideas of this tradition on several contemporary issues, but a few particular areas are relevant to the debate on drone warfare and asymmetric warfare today. Problems arise because the just war tradition focuses so heavily on state verses state conflict, and it also problematizes issues of the modern era. Augustine, Aquinas, Luther, and Calvin never had to deal with asymmetric warfare because they lived before the Peace of Westphalia that created the modern nation-state system. They also never had to deal with nuclear weapons or drones as these were obviously centuries away from creation. Therefore, it become important to analyze how just war theory operates in the current geopolitical environment as this work focuses on the Augustinian tradition's framework for a modern issue.

A contentious issue for modern just war theorists is over the "responsibility to protect," which essentially holds that when systemic, continuous, and egregious violations of and attack

on a civilian population occur that other global powers have a responsibility to protect non-combatant and civilians. George Lucas notes that the responsibility to protect is meant to prevent humanitarian crises and is a "body of proposals and recommended institutional arrangements adopted by the United Nations in 2005" (2016, p. 158-159). This idea became part of the normative discussion after the 2005 UN World Summit where the participants declared "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and the international community should help in this endeavor. Gareth Evans and Mohamed Sahnoun argue that for military "protection" operations to happen they must have a just cause, e.g. genocide, and done by the right authority (2002, p. 103); their argument is entirely similar to the language and paradigm of the just war. The International Commission on Intervention and State Sovereignty (ICISS) issued a report titled *The Responsibility to Protect* in 2001 that articulated these principles of laying out clear guidelines for intervention with a focus only for the purpose protection as a last resort. This further resembles the outline of a just war.

Also, the move toward responsibility to protect rather than humanitarian intervention was to assuage the tension between a right to intervention and a right to state sovereignty. Lucas places the responsibility to protect in the context of sovereignty, stating that when a state is sovereign it has duties within the international order to protect the rights of others. David Fisher thinks that such a doctrine would become arbitrary and lead to a responsibility for every problem throughout the world (2011, p. 238). Fisher explicitly states that "it is absurd to suppose that the governments who failed to intervene and those committing the genocide bear equal responsibility." What Fisher distinguishes is between those atrocities and evils that states can and cannot be held responsible for. The importance of such a distinction is related to how

governments should and should not act concerning such issues as ethnic cleansing, genocide, and terrorism. Duty exists when there is suffering of which the state is "fully ware, and that through our action we could prevent; and that, if we do nothing to prevent, we can be deemed to have consented to" (Fisher, 2011, p. 239). What this presupposes is that culpability is only present if there is also capability. States are only morally responsible to act if they have the capability to prevent or stop the evils in the world.

An historic issue reinterpreted for modern warfare, punitive action directly relates to how the United States and other countries can employ drones in counter-terrorism, which are often utilized for punishment and reprisal. Harry Gould (2009) delineates how punishment as just cause for war fell out of favor since the secularization of the theory and development of sovereignty in Western political thought. He focuses on Hugo Grotius's argument that punishment is legitimate, but shows that by the twentieth century sovereignty became an inviolable principle. Anthony Lang defined punishment as "a penalty imposed by a state, according to its judicial procedures, on someone who has violated the criminal law" (2005, p. 53). Punishment has a moral argument stemming from deterrence, rehabilitation, and retribution. Deterrence holds that if criminals are punished then other possible criminals will not engage in illicit activity. Rehabilitation attempts to alter the moral character and virtue of the criminal, and punishment would further this process. Retribution differs from the previous two because its goal is not behavioral change. Rather, retribution brings about justice by restoring balance and punishing criminals. Lang applies these concepts to intervention, which he states is a form of punitive action and punishment (2005, p. 56). Recent punitive interventions undertaken by American presidents, such as the airstrikes ordered by Reagan in Libya and Clinton in Iraq, Sudan, and Afghanistan, fit within this paradigm. He also notes that punishment has long been in

the just war tradition from Augustine to Grotius, but comes to the conclusion that international law and current just war ethics do not allow punishment (Lange, 2005, pp. 60, 67).

Academic and legal discussion on punishment misses a key aspect of defense. Eliminating an enemy combatant as punishment for a terrorist attack is a legitimate act for further self-defense and deterrence. After an attack, specific targets have significant utility for punishment because they built the bomb or planned the attack. In punishing such offenders, future attacks are mitigated before they happen, which makes it necessary kinetic action and ethical under just war theory. One academic who understands this is Suzanne Uniacke. She writes that retaliation is the "hostile or adverse reaction to the imposition of infliction of harm" (2007, p. 71). Her main contribution is to note that retaliation can be aggression, but it can also be self-defense. What matters is the context in which retaliation happens. When another state or aggressor has harmed a country, a state can use retaliation to correct the harm or prevent more harm, and this makes retaliation a matter of self-defense. As Uniacke elucidates, "[T]he use of force in self-defense can be and often is retaliatory when it involves a counterattack or an act of striking back at someone who has cast or caused harm." This creates the modern justification for punishment in conflict because retaliation and punishment are essentially equivalent.

One of the most recent developments of the just war tradition is to look at *jus post bellum,* the idea that states have an obligation to end a conflict in a just manner. Ending a war justly relates to the tradition, according to Brian Orend (2000), because a just warrior must apply similar criteria from *jus ad bellum* and *jus in bello*. Ethical criteria include a just cause for ending the war, right intention, proportionality, and discrimination (Orend, 2000, 226). Orend thought that a just end would vindicate "the fundamental rights of political communities, ultimately on behalf of the human rights of their individual citizens" (2002, p. 45). All of this is particularly

connected to the *jus ad bellum* criterion of comparative justice. According to Eric Patterson (2007) in "*Jus Post Bellum* and International Conflict," justice after conflict looks at the past, present, and future to answer the questions: (1) What is the cause and can it be mitigated? (2) Was it fought justly? (3) Will the end of the conflict lead to a just peace? Augustinian just war tradition has largely ignored this idea historically because Christian theologians from the Patristics to Neo-Orthodoxy focused on whether or not a Christian could fight and how he should (Patterson, 2007, p. 36). Now, the principles of order, justice, and reconciliation needed to be added to the final part of the war, which would hopefully "restrain future conflicts from breaking out over unresolved disputes and old grievances" (Patterson, 2007, p. 49).

In a similar strand of thought, Andrew Rigby (2005) adds a quasi-religious note to the argument by focusing on the role of forgiveness in the process of the post-war order. He argues that a post-conflict peace must be durable and for the peace to be durable there must be the wide perception by communities and elites that it is just. Although he offers a thoroughly secularized and psycho-social approach to forgiveness and its relationship to peace, Rigby stands within the Augustinian tradition and theology by noting that past grievances must be addressed through reconciliation. The point of forgiveness is to abrogate such "scars" from the current political thought in order for everyone to move beyond them. If all people can focus on is past grievances then peace, or at least stability, is impossible. Melissa Labonte (2009) relates *jus post bellum* to non-state actors and uses Operation Enduring Freedom in Afghanistan to explore how the concept relates to a real world experience. In particular, she looks at the Bonn Agreement following America's removal of the Taliban. The Bonn Agreement created the provisional government of the country and had as a principle within it national reconciliation based on human rights and social justice (Labonte, 2009, p. 219). Another important aspect is how the

provisional government would include and work with non-state actors like militia groups. Her argument goes that states like the U.S. must learn to engage non-state actors in the post-conflict peace building.

Just War Theory and Asymmetric Warfare

Because asymmetric wars like counter-terrorism and counterinsurgency present new ethical challenges, it is important to assess its morality based on the established norms of a just war and look at the current literature on the topic. There is a paucity of relevant literature concerning just war theorists that have tried to assess whether or not asymmetric wars fall within this ethical paradigm. Those that have engaged the ethics of the War on Terror have either focused on preventative war and humanitarian intervention. However, they ultimately fail to answer the question about asymmetric war and just war theory. Preventative war and humanitarian intervention fall within the paradigms of interstate or intrastate war, but asymmetric war is between a state and non-state actor. Those who deal directly with counter-terrorism argue that either it is not asymmetric war, that states should use police action, or primarily discuss insurgency rather than terrorism.

Although Michael Walzer does not address asymmetric warfare from the purview of states in his seminal work *Just and Unjust Wars,* his work is still considered the authoritative source on just war and its parameters. Walzer's book gives a systematic approach to just war theory and addresses several aspects of the use violence to achieve political ends. In the preface to the fourth edition Walzer (2007, p. xv) does take on the issue of preventative war and Operation Iraqi Freedom in the War on Terror. He firmly states that preventative war "is not justifiable either in standard just war theory or in international law…." This debate takes place

over preventative war against a state actor, and therefore does not address the issue of asymmetric wars. Walzer has many strengths in his text that make his argument stronger, primarily is the historical examples he uses. Throughout the book Walzer judges the morality of state action in both the cause of war and how states should fight in war. However, the work has a few weaknesses in applicability to the modern problem of counter-terrorism. Ultimately, he does not assess how states can ethically fight sub-state actors. His chapters on guerilla warfare, or partisan warfare, and terrorism only contemplate whether utilizing such tactics can be ethical.

Within the context of asymmetric warfare, Alia Brahimi (2010) makes an important contribution in *Jihad and Just War in the War on Terror* by distinguishing between preemption and prevention in war and the justness of each. Of primary importance is the imminent nature of the attack determines whether or not kinetic action is preemptive or preventative. If an attack is imminent, then states have a just cause to preemptively attack the aggressor. Within moral reasoning and international law the state that initiated the conflict may not be the state that fires the first shot. Like Walzer, Brahimi states that preventative war does not adhere to just war theory because it is not a war of necessity or defense. Steven Lee (2007) in "Preventative Intervention" makes a similar argument as Brahimi. The moral justification of preventative action in the post-9/11 world is that rogue regimes might support transnational terrorists with weapons of mass destruction (WMDs), and therefore a moral cause exists in preventative war. Lee definitively states, like Walzer and Brahimi, that preventative war does not meet the just cause criterion and that it is immoral to use it as policy. Yet a gap remains in their writings on just war theory, even though these authors address the War on Terror. They look at preventative war in the context of Iraq, but it does not answer the primary question on whether or not states can go to war ethically with non-state actors.

Jean Bethke Elshtain (2003) wrote *Just War Against Terror* after the United States' intervention in Afghanistan to topple the Taliban regime. The strength of her work is how she establishes the history, ethical foundation, and theory of just war before applying it to the War on Terror. Although Walzer preferred multiple historical examples to make his point, Elshtain only looks at the intervention in Afghanistan. The two authors were attempting to make different points, though. Walzer laid out broadly what is a just war while Elshtain only wanted to determine the morality of Operation Enduring Freedom. The primary problem with her work is that it determined whether intervention in Afghanistan and by extension intervention in general is just. She placed the problem within the framework of the War on Terror, but she does not evaluate asymmetric warfare as much as explaining the bellicosity of al-Qaeda and the Taliban and how the U.S. can ethically invade their country to stop them.

While Elshtain put intervention in the context of combatting transnational terrorists and the state that protected them, Davis Brown (2008) in *The Sword, The Cross, and the Eagle* discusses it in a purely humanitarian context. He describes the Christian history in both the Protestant and Catholic tradition and then goes through all the criteria of just war theory for humanitarian intervention. An important note is that theological traditions as diverse as Presbyterians, Methodists, Catholics, and Lutherans agree that humanitarian intervention are morally acceptable. Violations of human rights in the form of ethnic cleansing, genocide, or abusive actions in the midst of a civil war act as the just cause for intervention. Elshtain and Brown, though, fail to establish a normative principle for asymmetric warfare because they instead establish normative principles for intervention.

Alex J. Bellamy's (2005) "Is the War on Terror Just?" contributes significantly to the ethical debate of counter-terrorism by approaching it normatively, but his work is weakened by

his misunderstanding of the nature of terrorism. The piece's strength is that he tries to make normative principles of just war and asymmetric warfare. He is the only author to do this, but it still has flaws. Bellamy primarily does not think the War on Terror to be just because he thinks it "disproportionate." His greatest weakness is his understanding of the nature of terrorism and the threat it poses. According to Bellamy certain aspects of terrorism are just and that the word terrorism is used as an epithet to discredit one's opponent too often. This would create a disproportionate response by going after all who are considered terrorists, even the "just" ones. The weakness of his argument is that he could consider any terrorist just in his or her actions. He is correct that states will sometimes use the description of terrorism inappropriately, but because terrorists attack non-combatants they lose any ability to be considered just. A terrorist, by targeting non-combatants, has removed itself from normative principles by violating natural law.

Neta Crawford (2003) also wrote on counter-terrorism and just war theory in "Just War Theory and the U.S. Counterterror War," but she runs into many of the same problems as Bellamy. In her work she also advocates for police action because she incorrectly believes terrorism is not a means of war. Also, her critique of the War on Terror deals with its difficulty; she wrote, "If my evaluation of counterterror war in light of just war theory and the realities of contemporary war is correct—that counterterror war is unlikely to be just—then we are morally obliged to find a better alternative" (2003, p. 20). She specifically raises the issue that because transnational terrorism represents a type of warfare where the line between combatants and noncombatants the criteria of proportionality and discrimination are difficult to meet. Crawford's conclusion is that just war theory does not provide the appropriate ethical paradigm by which to judge counter-terrorism. This would maintain a gap in the research on establishing normative ethics for asymmetric warfare. Finally, Oliver O'Donovan (2003) also raises the issue of

asymmetric warfare, but he does so with a focus on counterinsurgency. He accurately distinguishes between insurgency and terrorism, but the moral issue he discusses is proportionality rather than just cause. Counterinsurgency and insurgency can be just, according to O'Donovan, and it is important to encourage both sides to act proportionally.

Conclusion

The historical just war thinkers all put forth a similar thesis on Christian ethics and violence: there is evil in this world, and evil produces conflict, chaos, and disorder. The state is an entity instituted by God to establish order in the world that has the right to use violence in order to re-establish stability, and states can use violence ethically if they do so motivated by love so that justice and the protection of rights may prevail. All of the thinkers were rooted in the Augustinian tradition that held man had a flawed nature and took a realistic view of power. Aquinas and Grotius focused on the natural law tradition and how this applied to those in authority. Luther and Calvin instead used Pauline theology and Bible as a basis for determining submission to temporal authority and the use of force. Niebuhr attempted to bring Augustinian realism to the twentieth century in order to deal with the Cold War and modern evils.

Contemporary scholars drew from this tradition in order to understand how states could seek a just political order when conflict occurs. As technology and geopolitics changed in the modern era, historic ideas needed reinterpretation and new applications. Scholars such as Jean Bethke Elshtain, Michael Walzer, and many others brought just war theory to present-day foreign policy debates. This chapter has looked at the origins and historic development of just war theory and its application to general modern problems. The next chapter delves in to the different parts of what makes a just war, *jus ad bellum* and *jus in bello*, and fully explore their

aspects. Just war theory demands than any use of force creates a more just political order, and therefore it is requisite that drones serve that ultimate purpose. Understanding the principles behind when force is allowed or requisite contextualizes the justification for the use of drones and how employing them as a tactic serves justice.

CHAPTER THREE
UNDERSTANDING JUS AD BELLUM AND JUS IN BELLO WITH HISTORICAL EXAMPLES

"While we should never give up our principles, we must also realize that we cannot maintain our principles unless we survive."-Henry Kissinger, *Nuclear Weapons and Foreign Policy*

"Now when victory goes to those who were fighting for the juster cause, can anyone doubt that the victory is a matter for rejoicing and the resulting peace is something to be desired?"-St. Augustine, *The City of God*

"Let love be genuine. Abhor what is evil; hold fast to what is good."-Romans 12:9, *ESV*

Introduction

The previous chapter delineated the theoretical foundation of historic and modern just war theory while this chapter delves into the specifics of *jus ad bellum* and *jus in bello.* The just war thinker does a form of normative ethics. Normative ethics is a part of moral philosophy that establishes the criteria for right and wrong, good and evil. It forms moral rules that determine what human actions, institutions, and lives should aspire to emulate. Those using just war ethics need to understand that these criteria do not offer a deontological check list in order to determine if any action is ethical or unethical. Also, it is important to note that these are not pure utilitarian calculations that can devolve into simple arithmetic problems, e.g. ten civilian deaths are acceptable because eleven combatants were killed. Rather the just war tradition offers a moral language by which to engage the politico-military problems of any particular conflict, battle, or engagement. Moral language allows just war thinkers to scrutinize cause, intentions, and means by combatants as a way to understand what should ethically happen.

Instead of deontology or utilitarianism, just war theory follows the tradition of virtue ethics and the Aristotelean understanding of what constitutes virtue. Aristotle thought a virtue rests between the extremes of a moral question. Courage is the mean between complete

cowardice and dangerous recklessness, or generosity is between complete miserliness and exuberant spending. Such is the thinking of a just war on questions like cause, intention, and means. Issues of a just war have also changed over time, incorporating new weapons, historic events, and the development of international law while remaining rooted in the criteria presented in this chapter. For each *just ad bellum* and *jus in bello* criterion discussed, an historical example follows to further elucidate the concept. Knowing the criteria of *just ad bellum* and *jus in bello* is important since the justification for the use of drones requires a just war to exist, which the War on Terror is, and produces the framework of analysis for drones as a tactic later in this study. The following are the just war criteria discussed, divided into *jus ad bellum* (just cause for war) and *jus in bello* (just action in war).

Just ad Bellum

- Just Cause: The cause of the war is to right a wrong, to help one's neighbor, to punish evil doers, or for self-defense.
- Competent Authority: The national government must be the one to go to war with proper approval.
- Comparative Justice: The benefits of going to war outweigh the damage done, and the aftermath will more likely lead to peace.
- Right Intention: The war cannot be one of aggression, to gain territory, or other similar actions, but for a more peaceful world.
- Probability of Success: A state cannot go to war if it knows it will lose.
- Last Resort: The state has considered all other options, especially diplomacy and negotiations, before resorting to war.

Jus in Bello

- Proportionality: The state must use the amount of force necessary to defeat the enemy, but no more.
- Discrimination: The state cannot target non-combatants.

Jus Ad Bellum

Just Cause

Those in authority must offer a compelling justification as a *casus belli*; as discussed in the previous chapter this takes on the forms of self-defense, political stability, punitive action,

opposing tyranny, and humanitarianism. The previous chapter discussed in detail the Augustinian tradition's approach to why war is necessary in certain circumstances, but it is important to see how the just cause of war is elucidated beyond the philosophical position of seeking a just political order. Augustine explained, "For it is the injustice of the opposing side that lays on the wise man the duty of waging wars; and this injustice is assuredly to be deplored by a human being, since it is the injustice of human beings, even though no necessity for war should arise from it" (2003, p. 862). Self-defense is the quintessential *casus belli*, and under international law any state may engage in self-defense to protect their territorial integrity and against aggression, which is the use of force or threat of force by another state or non-state actor. In addition, states may use preemptive action to stop an imminent threat. Beyond self-defense, humanitarian crises like genocide and ethnic cleansing provide a *casus belli* in which states that have the ability to stop them are morally allowed to use force to do so.

First, a just cause exists when there is a violation of political sovereignty or territorial integrity (Walzer, 1977, p. 52-53; Bell, 2009, p. 130). This allows for self-defense, but self-defense does not just relate to the integrity of any singular state. Defensive wars uphold the legal and moral system in which the state exists because such conflicts also defend the rights of the community of states (Coates, 2016, p. 173). Aggression is a crime because it violates the civic peace, what Walzer calls the "peace-with-rights," and forces men and women to choose between their political rights and their lives. The UN Charter unambiguously affirms the right to self-defense. Article 51 states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Even morally bad actors may engage in self-defense under this paradigm.

What constitutes an act of aggression that allows for self-defense? Article 2(4) states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations." An implication of this article is that uses of force and threats to use force are types of aggression, even if they are acts short of war, because any such action is prohibited (Lango, 2014, p. 110). Article 1 of the Charter also has this implication with the phrase "acts of aggression or other breaches of the peace." Threats of force reach the level of aggression when it is serious enough to threaten grave harm, human security, and state security (Lango, 2014, p. 114). The United Nations passed the *Report of the Special Committee on the Question of Defining Aggression* in 1974 to elucidate an interpretation of these articles. Article 1 of the report defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other many inconsistent with the Charter of the United Nations…." The report's Article 3 lists invasions, annexations, bombardments, blockades, attacks on armed forces, providing safe haven for attacks, and sending sub-state actors to attack states as all types of aggression, although Article 4 states this is not an exhaustive list.

Preemption is also considered an aspect of self-defense as a state does not necessarily have to wait to be attacked before engaging in defense (Coates, 2016, p. 175). Preemption means that the enemy is about to attack and the state knows the attack is imminent (Walzer, 1977, p. 81). Imminence is the key characteristic that justifies preemptions. Israel's Six Day War in 1967 is often held up as the exemplar preemptive war. The Israeli military had studied the Arab's battle plans since the 1956 conflict over the Suez Canal, and they had gathered phenomenal amounts of intelligence. Following that war United Nations peacekeepers were placed on the

Sinai Peninsula as there was continued tension between the two countries. Israel had explicitly stated a closure of the Suez Canal would constitute a *casus belli*, and the Egyptian government closed it to Israel only a week after amassing troops on the Sinai border. Before Egypt could attack, though, Israel put its long-time military plan into action.

The Israelis had developed an extremely comprehensive plan to take Arab militaries and knew that if they attacked first they would defeat the Arabs more acutely than if they waited for them to attack. The preparation for the military strikes included three important facets. First, the Israeli Air Force (IAF) trained its pilots and ground technicians extensively so they could fly four sorties a day when the normal was 1-2. In addition, the Israelis would send out sorties as "exercises" to make the Egyptians ignore them on the actual day of attack. This gave the IAF an enormous advantage for their first strike capabilities. Second, the Israeli Defense Forces (IDF) had studied the Sinai desert and how to effectively fight the Egyptians in that terrain. This included partially deflating their tanks tires so they could drive on softer sand and giving the Israeli soldiers a liter of water to drink per hour rather than one per day, increasing an individual soldier's fighting capabilities. Finally, Israeli intelligence had gathered information on the Syrian front that allowed them know the Arab defenses and air targets. The IDF and IAF's far-reaching preparations set the stage for the surprise, preemptive strike that would neutralize the Arab air forces and lead to victory.

Because the IDF had prepared comprehensively for the attack on the Arabs they were able to surprise them and eliminate as many targets as possible. On the morning of June 5 the Israelis began attacking the Egyptian air bases and targeted their aircrafts. Codenamed Operation Moked, the IAF sent out 183 aircrafts to go after their targets. In just over three hours the 189 Egyptian airplanes were eliminated; by the end of the day almost 300 planes were destroyed

(Bergman, 2002, p. 84). It was due to the preparation Israel could do this. They had located and mapped the entirety of the Egyptian air forces and timed the attack while the Egyptian officers were stuck in traffic. Even President Nasser admitted the surprise of the attacks. He said, "They came from the west when we expected them to come from the east" (Bergman, 2002, p. 85). The combination of the preparation and surprise created air superiority for the Israelis, so they sent three divisions against the Egyptian forces supported by constant air bombardment against the enemy. Then Israel moved against Jordan later on June 5 and then Syria on June 8. With just over 50 sorties the IAF neutralized Jordan's two air bases and quickly overran their forces, occupying the West Bank and East Jerusalem. With both Egypt and Jordan defeated the Israelis turned on the Syrians and celeritously devastated the Syrian army to occupy the Golan Heights. Israel's swift preemption was done effectively through preparation, and it was legitimate under just war ethics because of Egypt's aggression and imminent threat against Israel.

Self-defense is the primary justification for war, but there is also rectifying injustices (including restoration of property), punishing evil, and helping neighbors, i.e. correcting harms via the thought of Hugo Grotius. Such injustices in the world today often involve genocide and ethnic cleansing and may require what is called a humanitarian intervention. The definition under international law of such atrocities is found in the Rome Statute that established the International Criminal Court. The previous chapter discussed the responsibility to protect, which involves a moral imperative to correct such injustices and evil. Some have argued that this could actually be seen as an extension of the defense justification because it is the "defense of others" (Baer, 2015, p. 47). As Elshtain describes this argument, "[O]ne country may be called upon to protect citizens of another country, or a minority within that country, who are not in a position to defend themselves from harm" (2003, p. 150).

Rwanda experienced such a situation. After colonization, the Tutsi monarchy stayed in power despite being an ethnic minority, and they would often repress their Hutu counterparts. However, when the Europeans left the ethnic divide became greater because of Belgian exploitation. Although there was significant tension between the two groups, the country lost control of rule of law and justice when the genocide started. The initial spark to genocide happened when the president of the country, a Hutu, died when his plane exploded (BBC News, 2008). Within hours the Hutus began slaughtering the Tutsis; generally, it is estimated that the Hutus slaughtered 800,000 people in 100 days, the vast majority of them Tutsis. One of the leaders that started the impetus of mass slaughter was Colonel Theoneste Bagosora, the director of services in the Ministry of Defense. He coordinated the "final solution" while Defense Minister Major General Augustin Bizimana oversaw the logistics of the operations (Prunier, 1995, p. 240). During the genocide churches would become slaughter houses because refugees would flood the building in hope of security, but then Hutu soldiers would come and kill everyone in the church. Sometimes Hutus would hack children to death while they were sitting in their desks at school. Richer Tutsis would pay their killers to just shoot them with a bullet rather than them hacking the person to death with a machete. The killers would also rape women and throw babies into pit latrines while forcing relatives to watch (Prunier, 1995, p. 256).

Other countries did nothing to stop the slaughter of the Tutsis. The presidential guard initiated the genocide against the Tutsis as revenge for the death of the president. The government-led assault meant that the institution did not hold to the rule of law or justice. It violated the rules of popular, representative government and consistently violated the rights of its citizens. Every human has dignity, and the genocide violated this dignity. The systematic and egregious abuses by the government of Rwanda led by Hutu extremists establish clearly the evils

and injustices of genocide that create a just cause of war. Terrorism also represents a punishable evil, although retaliation might be considered self-defense as well. President Ronald Reagan retaliated against the Libyan regime when Muammar Gaddafi supported a bombing in Germany against American service members, and President Bill Clinton bombed Sudan after al-Qaeda first attacked the Unite States in the late 1990's.

Competent Authority

As Augustine wrote in *Contra Faustum*, Book XXII, question 75, "The natural order, which would have peace amongst men, requires that the decision and power to declare war should belong to princes." The authority to declare war must sufficiently represent the nation or state and be symbolic or in the position of the sovereign (Lucas, 2016, p. 71). Naturally this was an important development in Europe because just war thinkers wanted to limit the ability to declare conflict, removing the power of tribal leaders and placing it in the hands of kings, emperors, and popes. Although historically in the just war tradition authority did not mean "government," the state came to supersede other forms of authority (Temes, 2003, p. 15). Following the Peace of Westphalia, the nation-state became the dominant unit of governance and generally accepted as the legitimate form of authority. Requiring a competent authority promotes political order and the possibility of peace (Brown, 2008, p. 54). First, it attempts to limit private wars with hired mercenaries that would allow chaos; second, it allows those in government to make reasoned decisions not purely based on emotions over whatever has taken place. The constitution and laws of nation-states determine the domestic institutions and personnel that make decisions on war, and the UN Security Council make such decisions for the international community (Regan, 1996, p. 20).

The Constitution of the United States bifurcated war as a policy into declaration and making of war. Article I § 8 enumerates the powers of Congress, and the Framers gave the legislature the power to declare war and to create and support an army and a navy. Official declarations of war have only happened five times in the history of the United States (War of 1812, Mexican-American War, Spanish-American War, World War I, and World War II). Legally speaking, though, full declarations are not necessary for war to be legitimate. Congress has the power to authorize war through resolutions rather than declarations. For example, the Gulf of Tonkin Resolution authorized the Vietnam War and the *Authorization for the Use of Military Force* did the same for Operation Enduring Freedom. In addition, a state of war may exist without a declaration of war if the U.S. is attacked by a foreign power or if there is a rebellion (see *Bas v. Tingy, Talbot v. Seeman, Prize Cases,* and *Ex Parte Quirin*). When this happens, Congress is not required to issue a declaration, although the legislature typically will.

Article II gives the President of the United States the power to make war as the President is the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" (Article II § 2). Furthermore, because of the Vesting Clause the President is not limited considerably in this power. Alexander Hamilton interpreted these clauses in an expansive way in *The Federalist Papers,* which would become the accepted view of the war making powers of the presidency. Federalist 34 and 70 articulated the concept of a strong executive, what Hamilton called "energy in the executive," because only this would fully protect the nation. A strong executive is "essential to the protection of the community against foreign attacks" and "to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy" (Hamilton, 2009, p. 460). Now, Hamilton combines this with Federalist 23 in which he maintains that

national security is the first concern of the federal government and Federalist 74 that expounds a single executive is needed to conduct war. All of this together lays out the legitimate authority of the President to have broad powers to decide when and how to fight wars.

The global community established the United Nations in 1945 following World War II in the hope such an event would not occur again. In the UN is the Security Council made up of five permanent members (US, UK, France, Russia, and China) that according to Article 39 has the power to determine "the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations…" The Security Council would therefore decide if security situations existed and would have to authorize states to use force. Article 41 allows for members of the United Nations with authorization from the Security Council to use non-military means like the interruption of economic relations and the severance of diplomatic relations. Should this prove ineffective, Article 42 makes it so that the Security Council to authorize "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." And these include using the military for operations by air, sea, or land. The other international institution that acts as a legitimate authority over the United States that can lead to war is the North Atlantic Treaty Organization (NATO). Created in 1949 as a collective security organization, NATO balanced against the Warsaw Pact of the Soviet Union and prevented turning the Cold War into an active conflict. NATO acts as a legitimate authority because Article V of the North Atlantic Treaty holds that an armed attack against one member of the organization is an attack against all members, and "if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations…" assists the attacked country with necessary military action to

restore security. But NATO still must submit itself to the UN Security Council's authority and their resolutions.

Legitimate authority within the United States has multiple levels and facets at both the domestic and international levels. Under the Constitution, Congress and the President each have their part to play when looking at going to war as a policy, and the UN and NATO also contribute to the determination on whether or not war is legitimate on the international stage.

Comparative Justice (Proportionality)

The criterion of comparative justice means that the use of force will create a more peaceful and just world when the war concludes, answering the question "Is this just cause worth a war?" In a just war the "probable good to be achieved by successful recourse to armed coercion in pursuit of the just cause must outweigh the probable evil that the war will produce" (O'Brien, 1981, p. 28). Considerations on comparative justice have both temporal and moral dimensions as the just warrior could either make the argument that a war will produce a better material life and will defend basic rights like self-determination (Coates, 2016, p. 192). Comparative justice has three criteria in the just war tradition and is satisfied when the foreseeable good outweighs the foreseeable harm to the adversary, one's own state, and to the community of states (Brown, 2008, p. 100). A modern example is that of Operation Enduring Freedom that ended the totalitarian regime of the Taliban.

It is clear that al-Qaeda and its protectors in Afghanistan threatened civic peace, promoted disorder, and egregiously suppressed its people. The use of force would undeniably have made a better Afghanistan and world through the neutralization of al-Qaeda and the Taliban. Under the Taliban, a quarter of all children died before they were five; about one fifth of

the population was literate; life expectancy was barely over forty years old; and only 12 percent of the population had access to safe drinking water. Furthermore, within the five years that the Taliban ruled Afghanistan, they created one million refugees and led to a quarter of the population not having enough food to eat (Dexter, 2001). That is only a small part of how the Taliban violated the dignity of their people. They implemented one of the strictest forms of Shariah law that violated even arch-conservative interpretations. As punishment for adultery, they would either stone women or bury them alive. However, instead of applying normal Shariah practices of requiring four witnesses, they would punish the adulterer if there was even a rumor they committed licentious acts (Griffin, 2001, p. 61). The Taliban also had the Office for the Propagation of Virtue and the Prevention of Vice that would give twenty-nine lashes to women as the penalty for showing their face in public Griffin, 2001, p. 60). Furthermore, the Taliban engaged in ethnic cleansing against those who opposed them. In August 1999, to retaliate against Ahmad Shah Massoud, the leader of the Northern Alliance, the Taliban implemented ethnic cleansing in the Shomali Plain. After killing the people living there, they also burned all of the crops, which led to mass starvation in October of that year (Griffin, 2001, p. 228).

Although Afghanistan still faces many development and security challenges, few people would argue that the country is worse off than it was before Operation Enduring Freedom. Afghanistan has an inchoate, if imperfect, democracy with universal suffrage that seeks to represent the people. The United Nations Development Programme (UNDP) 2013 report declared that Afghanistan registered South Asia's fastest growth in human development with it achieving 3.9% growth compared to Pakistan's 1.7% and India's 1.5% (Malik, 2013, p. 150). Through the support of the United States Agency for International Development (USAID) Afghanistan has expanded access to health from less than 10% of the population to over 60% of

the country (USAID, 2012, p. 24; Collins, 2011, p. 66). Besides access to health increasing, the mortality rates of the country have drastically decreased. From 2002 to 2010 maternal mortality dropped from 1,600 per 100,000 births to 327 and infant mortality dropped from 115 per 1,000 live births to 97 (APHI, 2011, pp. 127-28). In addition, USAID points out that in 2002 only 900,000 boys and very few girls were in school and receiving an education; however, in 2011 there were nearly 8 million boys and girls enrolled in schools (USAID, 2012, p. 27). Susan Rice, at the time the U.S. Ambassador to the UN, said to the General Assembly, "Over the past decade, Afghan women have emerged from the total oppression imposed by Taliban rule…Afghan women hold office at the national, provincial, and local levels; serve on the High Peace Council and in provincial peace councils" (Rice, 2013, np). By a plethora of assessments Afghanistan is far better off today than it was under the Taliban, which means America met the criterion of comparative justice. The American intervention re-established order in Afghanistan and allowed justice to happen, which meets the principle of just war ethics.

Right Intention

States that go to war must have the intention of creating a more just and peaceful world. Conflict cannot be about spreading fear, claiming territory, acquiring wealth, or just accumulating power. This criterion as a subset of just cause recognizes that belligerents will use moral justification for conflict while having nefarious or harmful intentions (Coates, 2016, p. 177). Important to also remember is that the just war tradition does not exclude entirely wars that include national interests. Justice and the national interest are not mutually exclusive concepts and can exist simultaneously. In fact, having the right intention is meant to connect national interests to international peace by requiring a discussion on the way power and pluralism can

work towards peace (Baer, 2015, p. 56). Examining the cases of World War I and World War II demonstrates when leaders' lust to dominate offer immoral and unjust intentions.

Concerning World War I, the July crisis in 1914 led to a war that engulfed Europe because the state leadership sought domination over each other, not merely relative gains. Germany was in a precarious position surrounded on two fronts against France and Russia (Mearsheimer, 2003, p. 181). On June 28, 1914 Serb and Croatian nationalists killed Archduke Ferdinand of Austria while he was visiting Sarajevo. Beginning in 1903 with the ascension of the new dynasty the Serbians wanted to expand their country's frontiers to include all Serbs, including those living in Austria (Joll & Martel, 2007, p. 13). The Austrian response led by Emperor Franz Josef was to force the Serbian hand and make it a satellite state (Joll & Martel, 2007, p. 14). Germany agreed to join in because it had similar war aims through its inchoate imperialism under Kaiser Wilhelm, who want to establish an autarkic empire with the idea of *mitteleuropa* (Joll & Martel, 2007, pp. 141, 212). The motivating factor behind World War I was that Emperor Josef and Kaiser Wilhelm's personal desire to dominate middle Europe and the Balkans.

John Mearsheimer wrote, "There is no doubt that [Adolf] Hitler's aggression was motivated in good part by a deep-seated racist ideology. Nevertheless, straightforward power calculations were central to Hitler's thinking about international politics" (2003, p. 182). Hitler wanted a global war because he wanted to be a global hegemon, which was based on his beliefs in Aryan superiority and the need for *lebensraum*, living space. *Lebensraum* was the term commonly used in Germany in the 1920s and1930s to describe the territory they thought necessary to allow a nation to become autarkic (Overy, 2008, p. 40). The Italians called this concept *il spazio vitale*. The argument is about Hitler's megalomania and maniacal ideology that

had deep seated racism. Nazi Germany, led by Adolf Hitler, wanted to dominate Eastern Europe to have living space for the superior Aryans is a better explanation to why Hitler acted the way he did than an anarchic structure.

Contrast the intention of Germany during World War I and II with the intention of America and England during the same conflicts. After the Zimmerman Note and unrestricted U-boat warfare, President Woodrow Wilson gave an address to Congress asking for a declaration of war. After declaring that Germany's actions were an attack on all nations, President Wilson famous said the "world must be made safe for democracy" and that the United States would fight for the self-determination, liberty, and "a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free" (1917, np). Prime Minister Winston Churchill, the great foil to Hitler and defender of Western civilization, delivered in a speech in May 1940 to Parliament proclaiming Britain was waging war "war against a monstrous tyranny, never surpassed in the dark, lamentable catalogue of human crime." The war would be for the survival of the British Empire and all the values it stands for. Wilson and Churchill's intention during the World Wars were for survival, the defense of all nations, liberty, peace, and a just global order, which separate them from the malicious intentions of the Central and Axis powers.

Probability of Success and Last Resort

The final two criteria are the probability of success and using force as the last resort. These criteria are about assessing the current political and security situations to understand the possibility and utility of using military and non-military options. Knowing if a military action will be successful is a complicated endeavor of analysis that must integrate current and

theoretical capabilities along with historical knowledge. The primary objective of the criterion of "probability of success" is to prevent futile wars that would cost blood and treasure and while producing nothing of substance or a more just political order. Such calculations must be made by an informed politico-military hierarchy that can assess the security situation. An example of this is when General William Westmoreland knew that the North Vietnamese and Vietcong would use Mao's three stages of guerilla warfare to defeat the United States, which should have given him an advantage. However, his problem was that he inaccurately analyzed at which stage the insurgency was at. What this means is that theoretically Westmoreland had the knowledge and insight to operate a successful counterinsurgency even if he failed in the end. A major exception to this criterion is wars for survival, where loss would mean the complete destruction of one's community and way of life.

For a war to be just and to satisfy the criterion of last resort, the government does not have to try every possible option, but it must consider them before using force. As Elshtain noted, "Properly understood, last resort is a resort to armed force taken after deliberation rather than as an immediate reaction" (2003, p. 61). In fact, policies like blockades and sanctions intended to prevent war but still punish aggressors will more likely harm the civilian population, particularly the poorest and most vulnerable, while doing nothing to actually punish political and military leaders (Temes, 2003, p. 168). Take for example Iraq under Saddam Hussein during the 1990's. America imposed sanctions on the dictator following his expulsion from Kuwait and use of weapons of mass destruction, but these did not deter the regime. They only harmed the Iraqi citizens by the hundreds of thousands, which incidentally was one of Osama bin Laden's criticisms of the United States. The last resort criterion is to have policymakers take the idea of peace seriously and vigorously pursue a process that allows for justice to thrive and not seek,

unless necessary, escalation (Coates, 2016, p. 204). Reasonableness should be the standard for last resort and attempting alternative policies to war (Lango, 2014, p. 135). Standards for reasonable non-military action should answer the questions: Would the nonmilitary action achieve its stated objective? What is the feasibility of nonmilitary action? Are the benefits of nonmilitary action outweighed by the costs or harmed caused them?

Jus in Bello

Proportionality

The criteria of proportionality and discrimination dictate the ethical boundaries for how states should act within an armed conflict. Unlike the principles of *jus ad bellum,* the principles of *jus in bello* work symbiotically together when assessing whether to use a specific strategy or tactic. Proportionality makes the violence and force used by the state equivalent to the threat faced by the enemy and holds that possible costs, collateral damage, and unintended consequences are less than or equal to the sought after political and social benefits (Carmola, 2005, p. 93) There are two forms of proportionality—the war itself (comparative justice) and the means used by the state to achieve objectives (Carmola, 2005, p. 98). For instance, in the War on Terror it would be immoral to use nuclear weapons because it is not proportional to the threat of al-Qaeda, and it would cause indiscriminate violence and death of civilians. Proportionality and discrimination are also important because just wars are intended to establish a more peaceful and just world, but indiscriminate and disproportionate violence would diminish such a goal due to resentment and destruction.

For many just war theorists proportionality has come to mean the use of limited warfare when attacked by limited means, i.e. a state cannot use targeted missiles to respond to a rocket

attack. However, this limitation would create an unending war rather than ending it with greater celerity and establishing a just peace. As Clausewitz notes, "If you want to overcome your enemy you must match your effort against his power of resistance…" Therefore, for deciding whether kinetic action is ethical, it should be measured against the Clausewitzian principle as well; just war theory and Christian realism seek a just order and a just order can only happen if the enemy is truly defeated. Furthermore, this criterion is made difficult as it depends heavily upon military analysis of any particular situation, but such analyses are in the end uncertain and mostly conjecture (Coates, 2016, p. 233). Clausewitz referred to this as the "fog of war," where the complications of battles, intelligence, and decision making can never make any decision completely accurate based on perfect information. States have a moral obligation to not use a planned kinetic action if such action will cause grave harm and those violations are not outbalanced by preventing greater or further harm (Lango, 2014, p. 183). The question to meet proportionality: Are the size, duration, and amount of resources required of the proposed kinetic action the minimum necessary to eliminate the threat in question and achieve strategic objectives?

America developed a military doctrine around the notion of proportionality, commonly referred to as the Weinberger or Powell Doctrine developed by General Colin Powell, President Bush's Secretary of State during his first administration, and Secretary of Defense Caspar Weinberger under President Reagan. When the U.S. is to use force it must: be "deemed vital to our nation interests or that of our allies, have "the clear intention of winning," have "clearly defined political and military objectives," continuously reassess and adapt the "ends and means," have the support of the populace and Congress, and be a last resort, and have an exit strategy (Boot, 2002, p. 319). A more simplified understanding is that the U.S. should have clear

objectives, overwhelming force to achieve these objectives, support of the American people, and an exit strategy, i.e. matching ends and means.

Within a decade the United States and the United Kingdom both fought limited wars against autocracies invading foreign lands and attaining victory. The U.S. defeated Saddam Hussein's Baathist regime in six weeks in 1991 after it invaded Kuwait for its oil, while the U.K. defeated General Leopoldo Galtieri of Argentina's military junta when it invaded the Falkland Islands, which are British territory. Present George H.W. Bush and Prime Minister Margaret Thatcher went to war for the beliefs that aggressors should not succeed, international law should be upheld, and all peoples have right to self-determination free from tyranny. Both of these conflicts were limited wars with limited politics objectives and demonstrate proportionality in real world scenarios.

The Falklands War started from the political turmoil in Argentina during the late 1970's and early 1980's, which led the ascension of new commanders of the military junta, General Leopoldo Galtieri, Brigadier Basilio Lami Dozoand, and Admiral Jorge Anaya. Admiral Anaya firmly believed in a military solution to the Falklands problem and believed that England would never respond to aggression. The junta thought the Falklands belonged to Argentina, while England maintained under international law the islands were theirs. The conflict began with a surprise invasion of the Falklands by Argentina on April 2, 1982. Britain responded by sending a naval task force to deal with the invasion and established a War Cabinet to manage the operations.

Air power was an important part of the Falklands War where the combat operations were thousands of miles away from the United Kingdom. Britain started with Operation Black Buck, one of five Black Buck operations, to attack Port Stanley Airport's runway on the Falkland

Islands to limit Argentina's own air operations. The second mission also attempted to attack this runway. The other missions targeted Argentinian Air Force radar stations and Argentinian troops. Argentina later admitted the campaign led them to withdraw certain aircraft to defend the homeland. The British objective was to halt Argentina's ability to use the runway in Falklands rather than seriously damage the infrastructure because they were bombing their own territory.

The Falklands War is the last naval war in history to date, and it was a strategic advantage for the U.K. during the conflict. The British had effectively eliminated the Argentinian naval threat with the sinking of the ARA *General Belgrano*. Thatcher's government went in front of the House of Commons to argue for a Maritime Exclusion Zone, a 200 nautical mile radius that stated any Argentinian ship in the radius would be treated as hostile (Thatcher, 1993, p. 190). She also sought and achieved an embargo against Argentina. The *Belgrano* was a serious maritime threat to British forces and Argentina's strategic naval ship (Coates, 2016, p. 226). Due to this the U.K. changed its rules of engagement, and on May 2 the HMS *Conqueror* fired on the *Belgrano*. This operation successfully forced the Argentinian Navy to stay in port for the remainder of the war. Thatcher said, "The sinking of the *Belgrano* turned out to be one of the most decisive military actions of the war" (Thatcher, 1993, p. 215). After England sunk the *Belgrano* the Argentinian naval forces stayed in port, which allowed the British navy to launch an amphibious operation to land ashore East Falkland (Freedman & Gamba-Stonehouse, 1990, p. 260). Within a week the British handily defeated the Argentinians at the Battle of Goose Green on May 27-28 where they took almost 1,000 Argentinians captive; this allowed the British forces to move from their landing base at San Carlos on East Falkland.

Gulf War I started similarly to the Falklands War with the violation of a state's territorial sovereignty. Saddam Hussein laid claim to the land of Kuwait as belonging to Iraq (Bush &

Scowcroft, 1998, p. 314, 337). Iraq also wanted to dominate the oil market and OPEC as a means to become a superpower. Saddam's forces invaded on August 2, 1990 and overran the country within days. American and Kuwaiti representatives went to the United Nations and achieved a resolution calling for Iraq to remove its forces. The U.S. originally pursued a strategy of containment with further UN resolutions placing an embargo and sanctions. There was trepidation in using military force within the administration, mostly embodied in General Colin Powell who wanted to wait until the sanctions worked. However, President Bush refused to allow Saddam to continue his occupation of the Gulf state. UN Security Council Resolution 678 gave Saddam until January 15, 1991 to leave Kuwait before it would use military force to push him out (Bush & Scowcroft, 1998, p. 441). In the interim the U.S. began with Operation Desert Shield as a defensive operation to protect Saudi Arabia and the oil supply. Finally the U.S. put together a coalition of 34 countries to eliminate Iraq's incursion into Kuwait and restore order to the region.

Operation Desert Storm (ODS) had one of the most successful air campaigns in war history with its decimation of Iraqi forces in relatively quick time. The day after the deadline set by the UNSCR the coalition forces began an air campaign of over 1,000 sorties a day. It began with EF-111s, F-15s, and F-17s attacking strategic interests and air defenses (Pollack, 2002, p. 241). "The Iraqi air defense system succumbed within days-really hours-to an extremely sophisticated attack, and it managed to shoot down only a tiny fraction of the attacking aircraft" (Cohen, 1994, p. 111). This eliminated a fourth of the Republican Guard's armor, disrupted its logistical operations, and immobilized the military. In addition, Iraq's communications, oil refineries, and electrical grid practically stopped working (Cohen, 1994, p. 111; Pollack, 2002, p.

248). The air campaign effectively destroyed Iraq's military capabilities, which is primarily why the ground campaign went off almost effortlessly.

The ground forces in ODS were large while the campaign was short. Following the success of the air campaign the Coalition forces went into Kuwait on February 24, 1991 to push Saddam's forces out of the country. Coalition troops moved towards the capital of Kuwait City where they had some tank battles, but the Iraqis mostly surrendered before they could fight (Pollack, 2002, p. 248). It was decided that the Kuwaitis should liberate their own capital, and they did this on February 27. That day Saddam ordered a retreat of his troops and the last battle was to take back the Kuwait International airport. Concurrently the U.S. VII Corps entered Iraq, which surprised the Republican Guard. American and British forces defeated the Iraqi 26th Infantry Division and the Medina Division. The ground operation took only 100 hours before President Bush declared a ceasefire on February 28.

The operation only liberated a specific area rather than moving to the enemy's capital to overthrow the regime. Although Bush sent forces into Iraq, this was for tactical purpose to fully defeat the Iraqi forces. He did not send them to Baghdad to capture Saddam, although this would have been relatively easy. Instead he limited the operation to Kuwait and part of Iraq for the sole purpose of liberation and defeating the enemy. The ground forces were meant to put an end to the invasions by Iraq, and they did that. It was through the ground forces that the United States achieved a ceasefire and victory in the conflict. For the same reasons the Gulf War and Falklands War are examples of proportionality within a conflict. Bush and Thatcher had the limited political objective of removing an invader from a sovereign territory. Therefore, they matched the amount of force necessary with the stated objective. Bush did so by refusing to remove Saddam Hussein from power and implementing regime change, even though the Coalition had

the strength to do just that. Thatcher sunk the *Belgrano* to end the naval aspect of the war and allow British soldiers to retake the islands. Proportionality is matching the amount of force to ending the threat, and these conflicts demonstrate how states can proportionally use violence.

Discrimination

Discrimination separates legitimate from illegitimate military targets, i.e. combatants from non-combatants. States can never target non-combatants, but that does not mean non-combatants will not die (O'Donovan, 2003, p. 43). A legitimate military target must always be the objective, but discrimination combined with proportionality means that the amount of non-combatant death must be equal to the necessity of the strategic and military objective. Discrimination is violated when non-combatants are directly attacked with intention or with disproportionate collateral damage. Such a distinction maintains the moral difference between a soldier and a murderer, the difference between performing one's duty and committing a crime, and the difference between honor and shame (Kaurin, 2007, p. 116, see also O'Donovan, 2003, p. 36). Early Christian thinkers on just war theory focused on the nature of the soul and the consequences that illegitimate violence would have on the virtue of the individual (Carmola, 2005, p. 97). Augustine thought war was deleterious to soldiers when they engaged in unjust and disproportionate action. He wrote that "a man who experiences such evils, or even thinks about them, without heartfelt grief, is assuredly in a far more pitiable condition, if he thinks himself happy simply because he has lost all human feeling" (Augustine, 2003, p. 862). Chivalrous codes of knights would continue this line of thought during the Middle Ages as the warrior class could not kill non-combatants in conventional wars and remain warriors.

Modern warfare and counterinsurgency has seemingly problematized the issue of non-combatant immunity because "it is exceedingly difficult to distinguish the combatants from the non-combatants because they are often located in the same physical locations, often by enemy design" (Kaurin, 2007, p. 117). Examples like Somalia and the Balkans show how the intermingling of combatants and non-combatants becomes substantially more complicated. There is also the consideration of counterinsurgency in an urban setting where soldiers have to move house to house looking for insurgents and weapons caches. Soldiers are likely to consistently run into families during such an operation, but combatants could easily be a son or father even if the other members are innocent. How difficult will it be for soldiers to distinguish during the gun fight between combatants and non-combatants? Differentiating between the intent to target combatants and foreseeable harm to non-combatants is called the doctrine of double effect, although non-intention of harm does not immediately create permissibility. Foreseeable harm must be part of the calculation in order to ethical way the consequences of kinetic action.

Defining a military target can be problematic because a considerable amount of infrastructure has dual purposes. For example, a bridge that is a quintessential part of the enemy's logistics might also be quintessential to the local civilian economy. Is the bridge a military or civilian target? Counterinsurgents must be careful not to use the dubious logic that makes all of the civilian population culpable for the actions of the terrorists or insurgents when civilians do not actively aid the counterinsurgent (O'Brien, 1981, p. 180).

Non-combatant immunity's institutionalization in binding law began during the American Civil War in 1863 with the Lieber Code, officially titled "Instructions for the Government of Armies of the United States in the Field." It would take some time before international law officially established rules on the conduct of war, in particular the Hague and

Geneva Conventions. The Hague Convention IV of 1907 defined a belligerent in Article 1 as a person under someone's command wearing a distinctive sign, carrying arms openly, and conducting legal operations. Article 43 of the Geneva Protocol I further adds that belligerents are still combatants even if their superiors and/or government are not recognized entities. In order to distinguish combatants from non-combatants, Article 44 requires that combatants carry their arms openly during operations that do not require surreptitious activity. An important note is that the previous requirement focuses on interstate/international wars, which is why Geneva Protocol II of 1977 looks at internecine conflict and attempts to apply the same principles.

Article 50 of Geneva Protocol I (1977) defines civilians and the civilian population as those who do not fit Article 43, and a civilian population is still protected even if a combatant might hide amongst them. Offering guidelines to protect civilians, Article 51 lists prohibited actions that would become indiscriminate as "civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (see also Article 13 of Protocol II). For the purposes of the Protocol, indiscriminate attacks are those attacks with a specific military objective and those attacks that would strike military and civilian objects without distinction. Specific types of indiscriminate attacks include bombardment of cities, towns, and other areas made up of civilian objects and attacks with excessive civilian harm without specific military advantages. Geneva Convention IV's Article 53 allows for the destruction of apparent civilian targets if that "destruction is rendered absolutely necessary by military operations," creating a legitimate military target. States are also bound by Article 57 of Protocol I to make every effort to verify if the target is military or civilian in nature, use methods

that would limit collateral damage as much as possible, and only use kinetic action when the loss of civilian life would not outweigh the military objectives.

Insurgency and revolutionary warfare complicate international law in several ways as terrorists and insurgents do not abide by the rule, especially in how they move seamlessly within civilian populations without wearing insignia or openly carrying arms. Although the complications of counter-terrorism and counterinsurgency do not abrogate a state's obligation under international law, it does mean that states may have to reinterpret traditional doctrines or find ways to extract the principles that still bind them to apply the rules to new situations.

Conclusion

Just war theory's criteria establishes the framework of analysis in determining if a war is just in both the initiation and conduct of violence. Each criterion has a particular way of thinking through the issue instead of creating a "checklist" for governments. For example, the criterion of last resort does not mean that the state must literally do every policy alternative to war before using force. What the state must do, though, is consider every viable option besides war, determining their utility and previous success in dealing with the issue. Political and military leaders must use the moral reasoning of each criterion to determine if they meet them. In the case of jus in bello, this moral reasoning is continuously engaged throughout the conflict for the tactics used. Jus in bello criteria of proportionality and discrimination are the analytic tools for assessing the ethics of drones later in this study, and their moral reasoning applies to all cases in which the United States uses the tactic. Proportionality requires matching means and ends, so drones must be a tool that bring the United States closer to ending the conflict and contribute to a more just political order. Drones must also have the capacity to discriminate between combatants

and non-combatants, or at the very least not produce non-combatant death in excess of what is necessary to attain the just political objectives of the United States. This moral reasoning frames the ethical assessment in later chapters on the use of drones in counter-terrorism efforts in the Middle East and South Asia.

CHAPTER FOUR
SUB-STATE VIOLENCE: TERRORISM, INSURGENCY, AND IRREGULAR WARFARE

"Violence being instrumental by nature is rational to the extent that it is effective in reaching the end that must justify it."-Hannah Arendt, 1969

"Terrorism, then, is a weapon of warfare, which can neither be ignored nor minimized. It is as a weapon of warfare that we should study it."-Roger Trinquier, *Modern Warfare*

Why study terrorism?

When discussing the nature and utility of kinetic action, one must have appropriate understanding the enemy and what kind of force is necessary to achieve the state's strategic and operational objectives. There is widespread misunderstanding of what terrorist and insurgent organizations are, which creates confusion on how to neutralize them. It is important to first define these phenomena before engaging on how to fight it. Terrorism and insurgency are essentially types of warfare used by non-state actors, and because they are forms of warfare the state has the right to use force to eliminate them. War, terrorism, insurgency, civil war, ethnic cleansing, and genocide all have specific definitions to distinguish what type of violence is occurring. Without distinguishing between the types of violence, states could not craft policies to end them. Ethnic cleansing may target civilians like terrorism, but each requires a particular, different, and nuanced response. Therefore, this chapter explains what terrorism and insurgency are, their objectives and goals, the basics of strategy and counter-insurgency, and the legal framework the United States uses to understand them.

Defining and understanding terrorism and insurgency is also necessary to contextualize the moral debate on the use of drones conflicts involves sub-state violence. Drones are a tactic that must be placed within the context of the ends sought. The moral reasoning within proportionality and discrimination must include the nature of terrorism and insurgency in order

to appropriately assess whether or not the tactic is a proportional use of force (matching ends with means), weighing the amount of non-combatant deaths verses inaction, and the circumstances that will lead to higher non-combatant deaths compared to traditional forms of war. As discussed later in Chapter Ten, the amount of non-combatant deaths is significantly higher in Pakistan than Iraq. This is due to the drone program's targeting of terrorists hiding in rural Pakistan while targeting insurgents in Iraq in more traditional battlefields. America's enemies in the War on Terror are non-state actors, who behave differently than previous enemies in the past. Terrorists and insurgents operate distinctly from state actors, and understanding their nature is indispensable in determining how to defeat them ethically.

Terrorism: History of the Concept

In order to properly assess the most ethical manner in which to combat terrorists, establishing an appropriate definition of terrorism is requisite. Defining terrorism is a contentious issue in and of itself, even within the American government. In fact, the State Department, the Federal Bureau of Investigation, the Department of Homeland Security, and the Department of Defense all have different definitions for terrorism (Hoffman, 2006, p. 31-32). This problem exists even though terrorism is not a new phenomenon (Richardson, 2007). The phenomenon dates back at least 2,000 years with Zealots, an ethno-nationalist terrorist organization in the Roman occupied Palestine. During the first century Zealots, called Kanai in Hebrew because of their weapon of choice, would walk into a crowd and stab a Roman or Jewish official, put the knife back into his cloak, and move away. The official would fall dead and no one would know the perpetrator, which would cause fear in the population. Of course, the Zealots ultimately failed because soon the Romans grew tired of the unrest in Palestine and simply destroyed

Jerusalem in 70 CE. Other famous historic examples include the Assassins, a radical Shia sect in the 11th century, and the Thugi, devotees of Kali in India. However, the phenomenon began to significantly increase after the French Revolution and with the rise of industrial powers.

The word terrorism entered the English language after the French Revolution and the *regime de la terreur* of 1793-94 (Hoffman, 2006, p. 3; Richardson, 2007, p. 29), but unlike its usage today it had a positive connotation. Terrorism was associated with justice because the Committee of General security and the People's Court killed thousands of "enemies of the people" by the guillotine. Maximilien Robespierre, the revolutionary leader, attempted to use terrorism to bolster the ideals of the revolution including virtue and democracy. He said, "Terror is nothing else than justice, prompt, secure and inflexible." However, the excesses of the revolution and the regime's terrorism soon led to Robespierre's downfall. During the 19th century and early part of the 20th terrorism became associated with sub-state revolutionary and anti-monarchical movements in Europe, especially after the 1848 revolutions on the continent. The term revolutionary became synonymous with terrorism during this time (Nacos, 2010, p. 37). In the middle of the 20th century terrorism would come to mean brutal repression by totalitarian regimes like Nazi Germany and Stalinist Russia (Hoffman, 2006, p. 14-15). But this was a short interlude. After World War II and the beginning of the Cold War terrorism once again became associated with revolutionary movements, primarily anti-colonial movements, and within a few decades terrorism would become linked to ethno-nationalist and ideological movements.

Terrorists in fact will often name their organizations in way to eschew the word, usually including words like "liberation" or "defense" or use completely neutral names. Everyone seems to view the label as a pejorative, and terrorist organizations will typically claim the states they

are fighting are the "real" terrorists (Hoffman, 2006, p. 24; Richardson, 2007, p. 4). Terrorists will also attempt to say because their cause is justified, they are righteous and therefore are the "freedom fighters." Freedom fighter is the politically correct name terrorists or their sympathizers will assign to themselves. Yasser Arafat claimed at his 1974 United Nations Speech that the "difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists cannot possibly be called terrorist…" In his speech he also criticized those that attempted to thwart terrorism, arguing they "are the people who actions should be condemned, who should be called war criminals: for the justice of the cause determines the right to struggle." One of al-Qaeda's statements claimed, "When the victim tries to seek justice, he is described as a terrorist," implying that states only use the term to discredit those who challenge the state's power.

Terrorism: Causes, Motivation, and Tactics

There are multiple explanations for the causes and motivations for terrorists, including individual, state, societal, and transnational levels of explanation, but Louise Richardson states that terrorists require a disaffected individual that want revenge for themselves or someone else, an ideology to legitimize the use of violence, and a complicit society that is conducive or sympathetic to violence (2007, p. 41, 49, 216). Legitimizing ideologies have multiple forms and can take, including ethno-nationalism, Marxism, right-wing politics, and religion. There is considerable debate on religion's relationship to terrorism for a few reasons. In contemporary politics some will use the phrase "religion used for political purposes," meaning that religion itself is not the problem. Others say that religion cannot be a cause for terrorism because

terrorism is a type of political violence. Yet both of these arguments are wrong and misunderstand the relationship between religion, politics, and terrorism. Typically this debate surrounds Islam, but there have been terrorists that were Jewish, Buddhist, Hindu, etc. Religion in this context instead operates as a foundation for political thought, which means that religion can contribute to a terrorist's ideology.

Unlike other forms of violence, poverty does not have a direct link to terrorism; rather it is political, social, or economic inequality (Gurr, 2006, p. 86-87). Ted Robert Gurr notes that "systemic economic and political inequalities across groups coincide with sharp restrictions on political rights, disadvantaged groups are ripe for recruitment by political movements" (2006, p. 90). Within the 20th century rapid globalization contributed to this inequality. Atanas Gotchev (2006) argues that "[e]conomic disparities usually lead to political upheavals and could invite interested groups to resort to terrorism as a method of achieving the desired goals" (p. 106). Gurr (1998) also asserts that the "campaigns of political terrorists in democratic societies almost invariably emerge out of larger conflicts, and that they reflect, in however distorted a form, the political beliefs and aspirations of a larger segment of society" (p. 86). Like Richardson, Gurr argues that a support group is necessary for terrorism because they encourage radicalization and reaction to events. Leonard Weinberg (2006) maintains that "democracy seems to be a root cause [of terrorism] in the sense that open societies and transparent governments provide conditions in which those prepared to wage terrorist campaigns may operate at least for a while" (p. 55). All of this comes together to show there is no definitive cause to terrorism or single ideological motivation, but there are contributing factors like socio-political inequalities and rapidly changing societies that can increase the likelihood of political violence.

Many will want to assume that this means the individual is "insane," but the terrorist is a rational actor. Using terrorism is a "deliberate choice made in particular political environments…" (Nacos, 2010, p. 99). Martha Crenshaw (1998) discusses that terrorism is a strategic and rational choice; terrorists seeks changes in the status quo, which they believe violence can help them achieve. It is also the "weapon of the weak," meaning they do not have the political and military strength to counter their opposition through other tactics. Therefore, terrorists wil have short-term organizational objectives and long-term political objectives, and Richardson (2007) categorizes the short-term objectives as revenge, renown, and reaction. Long term goals vary by organization: a national state, a communist/fascist government, laws based on Islam. To achieve these, though, terrorists will use the short-term objectives in order to achieve their aim. Revenge is the most direct short-term objective of terrorist organizations. Al-Qaeda sought revenge for the support the U.S. gave to Israel, the suffering of Palestinians, and the Saudis allowing the U.S. to station troops in their holy land. The Palestinian Liberation Organization wanted revenge for Israel's establishment and expansion. Marxist terrorists in Europe would kill political figures they believed were corrupt capitalists, revenge for their harm to the economic order. Terrorist attacks can also bring the organization renown, which can give them more power or help them achieve their goals. Hoffman states, "One of the enduring axioms of terrorism is that it is designed to generate publicity and attract attention to the terrorists and their cause" (2006, p. 198). After the well-publicized Black September attacks at the Munich Olympics in 1972, Palestine achieved observer status at the United Nations and had significant diplomatic relations open up with other countries (Hoffman, 2006, p. 70). Terrorists also want to elicit a reaction to their attacks, either having the state acquiesce to their demands or having the state overreact to swell the organizations ranks. Al-Qaeda successfully got Spain to remove their

troops from Iraq after the 2004 Madrid bombings and the U.S. to entangle itself for over a decade in Afghanistan.

There are four main ways that terrorists will organize themselves: individually, cells, hierarchical structures, and a network. Individual terrorists are called lone wolves, meaning they plan and carry out the attack by themselves. Radicalization or inspiration may occur within a group, but they operate independently. Timothy McVeigh, the Oklahoma City bomber, and Nidal Malik Hassan, the Fort Hood Shooter, were both radicalized within groups, yet when they committed their attacks they did so by themselves. Terrorists might also organize themselves into independent cells of a few people, making them hard to penetrate. Cells are used by smaller organizations or those who want to be exclusive; these will include smaller Islamist groups or environmentalists like Earth Liberation Front. A hierarchical structure is used for more established groups like Hamas, Hezbollah, or the Tamil Tigers. There are definitive people in charge and levels of soldiers. Finally, terrorists might organize themselves into a network, much like al-Qaeda that has branches in Africa, the Middle East, and South Asia. Each organizational choice is dependent upon objectives and resources and is not exclusive to any ideological orientation.

Terrorists have specific tactics and strategies they will use to achieve their short and long-term objectives. Interestingly, terrorists have not changed their tactical approach for some time. They will produce "attacks on buildings or other inanimate objects deigned to commemorate, and thereby draw attention to some event of historic significance to the perpetrators" (Hoffman, 2006, p. 9). Their violence is meant to be symbolic, and "while the damage inflicted is real, the terrorists' main purpose is not to destroy property or obliterate tangible assets but to dramatize or call attention to a political cause" (Hoffman, 2006, p. 231). Al-Qaeda flew planes into the World

Trade Centers and the Pentagon because they represented America's economic and military power. Narodnaya Volya would kill Russian monarchs in attempt to bring down the czarist regime, and Red Army Faction in Germany would kill American citizens and NATO representatives that embodied "imperialism." Typical tactics for terrorists include bombings, suicide bombings, assassination, armed attacks, hijackings, kidnappings, and weapons of mass destruction (Nacos, 2010, p. 134). A terrorist's weapon of choice will depend upon their level of training, access to and protection of targets, financial resources, available weapons, and probability of success.

Bombings are the preferred method for terrorists "because no other weapons are as readily available as incendiary or explosive devices" (Nacos, 2010, p. 135). Kidnapping are a useful method in order to raise funds from countries willing to pay, something al-Qaeda in the Islamic Maghreb often uses to their advantage and taking tens of millions from European countries. One of the scariest possible methods, though the least likely, is the weapon of mass destruction. It is a terrifying thought that a terrorist organization should successfully utilize one of these, but that has not happened yet. Some groups like Aum Shinrikyo and Rajneeshpuram used chemical and biological weapons, but they killed very few people. Finally, sometimes terrorist organizations will not work alone or directly do the bidding of states. State-sponsored terrorists are not dependent upon local populations, so they do not have to care as much about possible backlash. States will sponsor terrorists in order to attack their enemies and achieve specific foreign policy objectives. In addition, these attacks are usually eight times more deadly than other non-sponsored attacks. The most difficult issue for state-sponsored terrorists is countering the threat; sanctions, embargos, and limited military reprisals have not proved effective in ending sponsorship (Hoffman, 2006, p. 263). Understanding the motivation, causes,

and tactics of terrorists is important when devising a strategy to prevent attacks and neutralize threats.

Terrorism: Definition

Combining the history, motivations, organization, and tactics of terrorist organizations, terrorism as a political phenomenon includes:

- Political motivation
- Violence or threats of violence
- Perpetuated by a sub-state or non-state actor, including individuals, cells, or organizations
- Attacking noncombatant targets that are meant to be symbolic
- An intention to have psychological effects and the deliberate creation and exploitation of fear beyond the victim(s) or target(s).
- Creation of publicity generated by violence to obtain leverage, influence, and power

For the purposes of this study terrorism is defined as politically motivated violence or the threat of violence by a sub-state actor against non-combatants in order to spread fear and achieve policy change (Hoffman, 2006, p. 40-41; see also Richardson, 2007, p. 4-5, 20; Nacos, 2010, p. 22-27).

Insurgency: Definition

Terrorism and insurgency have different organizational structures and tactics, which means understanding the differences is important in order to combat them effectively. Bruce Hoffman notes that terrorists and insurgents are similar by not wearing uniforms or insignia and are both irregular warfare, but there are key differences between terrorists, insurgents, and guerillas (Hoffman, 2006, p. 35). Hoffman argues that guerrillas and insurgents are large, armed groups that behave as a military, attack enemy military forces, take territory from the enemy to control (at least during daylight hours), and possess sovereignty over at least a small geographic

area. Insurgents, though, will move beyond hit-and-run attacks to irregular military tactics, psychological warfare to gain popular support against national governments, imperial powers, or foreign occupying forces. Terrorists do not function as a military unit, hold territory, do not engage in combat, have lower numbers and resources, and do not control the populace.

Two eminent warfare theorists from France derived their definitions and understanding of insurgency from their time in North Africa. David Galula was a French officer with significant experience in the Algerian insurgency and he became one of the preeminent counter-insurgency experts. He went to Harvard and under Samuel Huntington where he wrote his theory according to his experience. For Galula (2006) revolutionary wars are insurgency and counter insurgency. Revolutionary wars have specific characteristics: the objective is the population; it is political, protracted, and always unconventional; it is fluid and cheap for insurgents, rigid and expensive for governments; the insurgents need a serious cause. Insurgencies are protracted struggles "conducted methodically, step by step, in order to attain specific intermediate objectives leading finally to the overthrow of the existing order" (Galula, 2006, p. 2). Roger Trinquier, another preeminent warfare theorist coming from the Algerian conflict, wrote about what he called "modern warfare," which is another term for irregular warfare or insurgency. He writes that in modern warfare states "are not actually grappling with an army organized along traditional lines, but with a few armed elements acting clandestinely within a population manipulated by a special organization" (2006, p. 7).

The American government has also approached defining insurgency or irregular warfare through two documents: the Joint Operating Concept and the Counter-insurgency Field Manuel. The Department of Defense (2010) defines irregular warfare as a "violent struggle among state and non-state actors for legitimacy and influence over the relevant populations. [Irregular

warfare] favors indirect and asymmetric approaches, though it may employ the full range of military and other capabilities, in order to erode an adversary's power, influence, and will" (p. 9). According to *The U.S. Army / Marine Corps Counterinsurgency Field Manual*, insurgency is "an organized movement aimed at the overthrow of a constituted government through the use of subversion and armed conflict" (CFM, 2006,, 2006, 1-2). Other warfare theorists stick to similar thinking by defining insurgency as "a struggle between a nonruling group and the ruling authorities in which the nonruling group consciously uses political resources and violence to destroy, reformulate, or sustain the basis of legitimacy of one or more aspects of politics" (O'Neill, 2005, p. 15) or "engaging a civilian population, or a significant part of such a population, against the military forces of established or usurpative government authority" (Taber, 2002, p. 4). All of these approaches produce similar definitions of insurgency, irregular warfare, guerrilla warfare, and revolutionary war, which can all be used interchangeably. The differences arise in what stage of the conflict the sub-state group exists. Guerrilla warfare deals primarily with hit-and-run tactics while an insurgency has moved on to psychological warfare. Therefore, an insurgency is defined as a protracted armed conflict by a sub-state actor against a government or occupying force in which the group attacks military targets in order to weaken the regime's moral and resources while attempting to gain popular support and maintaining some geographical territory.

Insurgency: Objectives and Targets

The objectives of the counterinsurgent and the insurgent are different. Counterinsurgents have a military objective to destroy the insurgents while the guerrillas' objective is political. Guerrillas need to spread their revolutionary message so the population turns against the regime

(Taber, 2002, p. 16). At the same time the guerrillas will also have the military objective of wearing down the regime's military, morale, and resources, and they must recruit more fighters to their side. Political power is an essential objective in an insurgent conflict with both the insurgents and the counter insurgents seeking control of the population (CFM, 2006, 1-3). They fight to gain popular support in a "protracted politico-military struggle designed to weaken the control and legitimacy of an established government…." (CFM, 2006, 1-2). Achieving this requires a serious cause and ideology that can bring the people to their side. For example, a cause appealing to the proletariat against an industrial state can bring any workers to the group. In addition, "the cause must be such that the counterinsurgent cannot espouse it too or can do so only at the risk of losing his power, which is, after all, what he is fighting for" (Galula, 2006, p. 13). The British successfully turned the Malayan Communist Party's cause against it by setting a date for independence, so the populace did not have a reason to support the insurgency.

There are different forms of warfare that insurgents will use to be successful. Political warfare can include disseminating propaganda to the people and supporters, recruiting cadres, and providing material services to the people (O'Neill, 2005, p. 32). There are five ways to mobilize popular support: persuasion, coercion, reaction to abuses, foreign support, and apolitical motivations (CFM, 2006, 1-41). Persuasion can come from material, political, or security benefits provided by the insurgents, or they may use ideology or religion to bring people and elites to their side. Iraqi insurgents would bring people to their side because of concerns over electricity and sewer services. Coercion can happen through several avenues. Insurgents may use violence to make the population feel unsafe and that the government cannot protect them, or the insurgents might provide security or kill local leaders to dissuade working with the government. According to Trinquier (2006), terrorism is an important part of this objective. He argues that

terrorism is a form of warfare that sub-state actors will use to get the populace on their side by making them feel unsafe while the government can do nothing (p. 15). People may also join the insurgents as a reaction against abuses by the government or security forces like Palestinians joining Hamas because an Israeli airstrike killed their family members. Foreign support from external states, organizations, or diasporas can also encourage insurgencies, something that happened with the Irish Republican Army and Kurdish Worker's Party. Finally, insurgencies will attract criminals and mercenaries that only fight for pecuniary gain. They do not have an ideological stake in the war and will continue criminality after the conflict ends if there are not jobs available.

Organizationally, insurgencies will have five elements: movement leaders, combatants, political cadre (or the party), auxiliaries (support services), and mass bases (majority of the membership) (CFM, 2006, 1-59). Movement leaders are those that give strategic direction to the movement, while combatants are the ones who do the fighting. The political cadre may form a party to engage local areas about their grievances and to facilitate political activism. Auxiliaries are also important because they fill functions like running safe houses, acting as couriers, provide funding, or forge documents. The targets of guerrilla warfare are the government's armed forces, police, and support units instead of noncombatants like terrorism (O'Neill, 2005, p. 36). Guerrilla warfare by itself cannot defeat the government, unless the government does not dedicate sufficient resources. When the government cannot successfully neutralize the insurgent organization their popularity increases. The insurgent has a better position in his poverty because the government does not have territory to invade or garrisons to siege. However, the government has territory, armories, and hardware the insurgents can go after (Taber, 2002, p. 11). They can hide, even amongst the population, and hide from the government, but counterinsurgents must

have a significant presence (Taber, 2002, p. 13). A majority of what insurgents do will involve getting the population to accept their cause and possibly join them, and counterinsurgents must understand this essential aspect of the war.

Insurgents' Strategy

Two of the most important theorists and practitioners of guerrilla warfare are Mao Tse Tung and Che Guevara. Both led successful insurgencies, one in China and one in Cuba. However, they used completely different strategies when attempting to overthrow the respective governments. Mao's theory of guerrilla warfare is more popular amongst insurgents, though, and is based on a staged, protracted war. A majority of insurgencies post-World War II followed this strategy. He believed that revolutionary situations happened when governments did not provide a basic standard of life, which follows the materialism of his Marxist beliefs. During the early part of the 20th century Mao was the son of a farmer, but he would move to Beijing for university and help found the Community Party in 1921. After the Japanese invaded he began actively working against their occupation where he developed his theory on guerrilla warfare. In fact, he continued the thinking of Lenin's "partisan warfare," but he was also influenced by the work of Carl von Clausewitz. His work and theory would ultimately follow the development of the Chinese civil rather than purely academic analysis.

His three phases of guerilla warfare are to "first, to conduct a war on exterior lines, that is, in the rear of the enemy; second, to establish bases; and, last, to extend the war areas" (Mao, 2000, p. 95). As previously mentioned, guerrilla warfare focuses a tremendous effort on the population. Mao famously noted that insurgents are like fish and the people are the water in which they swim. This is why an important part of his overall strategy also includes efforts to

bring the population to the insurgents' side, especially through the use of propaganda by word and deed. For example, this is why he stated that guerrillas were to treat the people well by not stealing from them, not being selfish, being courteous, returning what they borrow, amongst other actions. He also argues that "political activities depend upon the indoctrination of both military and political leaders…" and that they further their "mission of destroying the enemy by propagandizing his troops, by treating his captured soldiers with consideration, and by caring for those of his wounded who fall into our hands." (p. 88, 93). For Mao the guerrilla must always be cognizant of the people and spreading their ideology.

The first phase is the "strategic defensive, a time when the enemy is on the offensive, and the insurgents must concentrate on survival, political organization, and low-level violence" (O'Neill, 2005, p. 50). This will happen when the government is in a relatively stronger position, and the insurgents must focus their energy on building their forces (CFM, 2006, 1-32). Phase one acts as a "pre-revolutionary" one with the aim to expand party organization and political infrastructure (Beckett, 2001, p. 74). Insurgents must consolidate their resources during this phase, including political connections and attempting popular support. Their military attacks will not be directly against combatants. Rather, this phase is when insurgents are most likely to use terrorism to weaken the government and bring people to their side or commit surreptitious and subversive activity. Such activity is meant to convince the populace that only siding with the insurgents will improve their lives. In addition, they might establish a "counterstate," a competing government infrastructure with the official regime that will eventually administer their own laws or forms of justice.

The second phase is the strategic stalemate, "which is characterized mainly by guerrilla warfare" (O'Neill, 2005, p. 50). This is when the insurgents have a proximately equal military

strength to their opponents, which is why they will begin using guerrilla tactics. Rural and urban insurgencies differ at this point. A rural insurgency will use a base area that they control to initiate their guerrilla tactics, but an urban insurgency will continue to operate in a clandestine and cellular manner (CFM, 2006, 1-33). They will also expand their military efforts to further weaken the government and bring people to their side. Beyond this they will continue and broaden their propaganda as the populace starts to lose faith in their government, which might also allow their counterstate to start operating. Phase two is meant to create a war of attrition between the government and insurgents (Beckett, 2001, p. 75). The third phase is the strategic offensive "during which the insurgents move from guerrilla warfare to mobile conventional attacks on a large scale, and the political and psychological effects of the insurgent victories lead to a collapse of the government" (O'Neill, 2005, p. 50). Insurgents can begin using conventional military tactics because their strength matches or is superior to the governments. They move to this stage in order to more quickly defeat the government as guerrilla warfare cannot militarily win a conflict. Besides magnifying their military efforts, they will also attempt to supplant the government with their already created counterstate. Mao did not believe these phases only had to happen linearly. Insurgents can move forward and backwards depending on their resources, successes, and failures, but they will continuously attempt to get to phase three.

Che Guevara took a different approach in the revolutionary war in Cuba meant to overthrow the Batista government. Born in Argentina to a leftist, anti-church aristocratic family, he was radicalized during one of his trips through Latin America in the early 1950s. Like Mao he took his theory from the revolution he led and it influenced his work, and like other theorists he also states that focusing on the people is essential (Guevara, 1998, p. 14). Unlike Mao he did not believe that insurgents needed to create a revolutionary situation because they could create it

themselves, popular support would come later (Guevara, 1998, p. 7). This would be called the "foco strategy" where a vanguard would operate from a rural area to attack the government and bring about a revolution. He wanted a small group to start the insurgency, but this would have to be highly mobile to evade capture. After the initial attacks, the group will start bringing people to their cause and they can establish a military base (Guevara, 1998, p. 78). After this more people will come to their side and territory, and after some time a revolution will happen that will abrogate existing institutions. Militarily for Che insurgents would use terrorism, sabotage, and guerrilla tactics all at the same time depending on the objective or availability of targets (Guevara, 1998, p. 20-21). Both of these strategies are important to understand because terrorists and insurgents vary in their strategies, and if counterinsurgents want to defeat them they must intimately understand how the terrorist or insurgent will behave.

Terrorism and Insurgency as War Under American Law

Although generally one could accept that if a foreign nation invaded the United States' territory then the executive branch would have the authority to expel the invaders, there were a few early issues concerning the nature of war that the judiciary needed to settle. The initial cases come from America's first conflict with a foreign power during the late 1790s called the Quasi-War. The U.S. engaged in a limited maritime war from 1798-1800 with France. Congress did not declare war on France, but it did give statutory authorization for Adams to wage limited war (DiClerico, 2000, p. 32). President Adams considered this sufficient authorization for him to wage limited war (Fisher, 2004, p. 24). The issue in *Bas v. Tingy* (1800) was whether or not Bas had to pay Tingy, a captain that reclaimed the *Eliza*, based on a law from 1798 or 1799. According the Supreme Court, Bas had to pay Tingy based on the 1799 law because it stated that

half the salvage value will be paid for ships reclaimed from the enemy. The Court had to decide whether France was the enemy during the Quasi-War, which they by separating wars into perfect and imperfect ones.

Justice Washington asserted that "every contention by force between two nations in external matters, under the authority of their respective governments, is not only war, but public war." He further argued that those in an imperfect war are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission." Justice Chase in the same case agreed with Justice Washington by noting that Congress has the power to declare general and limited wars. The difference is that if "a general war is declared, its extent and operations are only restricted and regulated by the *jus belli,* forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws." A year later in 1801, the Supreme Court once again ruled on the issue of salvaging during the Quasi-War in *Talbot v. Seeman*. Chief Justice John Marshall wrote in support of both Justice Washington and Justice Chase's position stating, "Congress may authorize general hostilities, in which case the general laws of war apply to our situation, or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." These cases establish in American common law that there is a difference between general and limited wars (also call perfect/imperfect or total/limited) and that Congress only has to give authorization, not a declaration, for limited wars.

Over forty years later the Supreme Court would decide another case on imperfect wars and whether or not they initiated a state of war with all that legally implies. During the American Civil War President Abraham Lincoln refused to declare war against the Confederacy because that acknowledged them as a legitimate state. The Confederacy's hostilities led to the blockade

of Southern ports in April 1861, in order to deleteriously affect the Confederacy both economically and militarily (McGinty, 2008, p. 121). Southern agriculture, especially cotton, required exporting to foreign markets because the South had a paucity of industry. In addition, the South had to import almost all of its manufactured products. In July 1861, blockading vessels boarded *Amy Warwick,* a merchant ship headed for Virginia carrying coffee, to determine if the merchant ship intended to violate the blockade. A Richmond firm had chartered the ship to bring coffee back to Virginia, but after the ship was taken to Boston after the Union captured it and seized the coffee as a "prize of war." This case along with three others was combined in the Supreme Court case. William Evarts, one of the lawyers representing the government's case, argued that the Southern rebellion was both an insurrection and war, and that a state of war can exist without a declaration of war by Congress (McGinty, 2008, p. 135-36). The insurrection by the South created such an insurrection, according to Evarts. Richard Henry Dana, Jr., another district attorney arguing the government's side, said capturing the enemy's property was a preferred option in war to killing him (McGinty, 2008, p. 136). Because there was no declaration of war the plaintiff's lawyers argued the Union's seizing of ships was piracy. James Carlisle, an attorney for one of the ships, declared that President Lincoln had violated the Constitution by acting unilaterally and without congressional authorization.

The court ruled in the *Prize Cases* (1863), though, that a "state of actual war may exist without any formal declaration of it by either party" and "it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States." What this establishes is a *de facto* state of war; a state of war for the Court was when a state prosecutes its rights by force. Civil wars are never truly declared, *eo nomine,* according to the Justice Grier, rather when the rebel group organizing, declares independence, and commences hostilities does a

state of war exist. For support, Justice Grier references the legislation that declared war on Mexico in 1846. The act states clearly that a state of war existed with Mexico before the act passed Congress. Furthermore, "the President is not only authorized but bound to resist force by force…without waiting for any special legislative authority." There are other important parts of the ruling that apply to the President's war powers. Justice Grier specifically declared that the President, as Commander-in-Chief, "was the proper person to make such notification has not been, and cannot be disputed."

Lincoln's beliefs on not acknowledging an illegitimate enemy stem from a significant part of the English and European understanding of the declarations of war. Declarations of war established the rights and responsibilities of the state to its citizens and the prisoners of war. On the other hand, an insurrection is "an organized armed uprising which seriously threatens the stability of government and endangers social order" (Randall, 1951, p. 60). When an insurrection or rebellion takes place, insurgents fight against the government, and an insurgent is one who uses force against the government and is not recognized as a belligerent (legitimate party in war) (Randall, 1951, p. 60). Such an uprising is not considered war in normal sense of two belligerents fighting, which means different rules apply. The President has the authority to declare action an insurrection, and by doing so call out the militias and suspend habeas corpus (Randall, 1951, p. 62). A present day application means when a terrorist attacks the United States it puts the country in a state of war, even without a formal declaration by Congress and terrorists are non-state actors. The nature of the President's war powers means that the Constitution dictates he defend the country when a state of war exists. As this case shows, an insurrection or rebellion by a non-state actors fits that criteria, and this is one of the most important cases in the constitutional debates on foreign policy. Together these three cases separate general and limited

wars, holding that limited wars still operate within the state and laws of war, that Congress only has give authorization for the government to use force, and that a state of war can exist without a declaration if a sub-state actor initiates the conflict.

American military action against those considered stateless and lawless, what are now called sub-state actors, is considered different than conflict with a sovereign state, which allowed the executive branch to increase its power by presidents deciding that such "police actions" did not require "special congressional appropriations, did not rise to the dignity of formal congressional concern" (Schlesinger, 1973, p. 50). For example, the American Navy used kinetic action against Sumatra, the Fiji Islands, and in Africa multiple times without congressional authorization. President John Quincy Adams claimed that the "experience of fifty years has proved that in numberless cases [the president] has and must have exercised the power" without consulting Congress (Schlesinger, 1973, p. 51). One of the earliest large scale deployments of the military without congressional approval occurred in 1852 when President Millard Fillmore sent Matthew Perry to open Japan (McDonald, 1994, p. 393). Secretary of State Daniel Webster had told Perry that he was sent on a peaceful mission, but Perry took with him ten ships and 2,000 officers and men, ten percent of American armed forces. Conflict did not break out and Secretary Webster told Perry he could only act in self-defense, but again Congress did not vote on this issue.

President William McKinley also acted without congressional authorization when he sent 5,000 troops into China in 1900 to protect American interests, primarily lives and property. Such an event is momentous because "it marks the first time that an American president unilaterally committed troops to combat against another sovereign state outside of the Western Hemisphere" (DiClerico, 2000, p. 33). Presidents Theodore Roosevelt and Woodrow Wilson also justified

intervention in several Caribbean countries without congressional approval similarly to McKinley; they were protecting American life and property. Roosevelt would also not seek congressional approval to put down the insurrection in the Philippines after America had taken the country from Spain. Such thinking goes back to Justice Story's opinion in *Martin v. Mott* as the president decides the exigency of the situation, which allows him to use powers for situations not explicitly stated in the Constitution. Furthermore, Congress willingly did not challenge these presidents on the issue of unilateral action. Continuing this train of thought, World War II taught America an important lesson: "lost forever was the luxury of time and distance that had permitted the United States to arm itself at leisure when a threat loomed" (Polsky, 2012, p.15). Presidential war power would therefore significantly increase during times of war because the new geopolitical realities called for it. The American military and presidential power would never return to its 19th century limitations. Because the majority of post-World War II military engagements have involved irregular warfare, the executive branch had to determine their military and intelligence powers to fight sub-state actors, especially during the War on Terror. One of the first decisions on how to confront sub-state violence actually comes from World War II. President Franklin Roosevelt began to accumulate major war power within the office of the president, and these powers did not "revert to the people—to whom they belong" as Roosevelt claimed (McDonald, 1994, p. 407).

During World War II Nazi agents sought to sabotage U.S. targets in the homeland in what was called Operation Pastorius. After the declarations of war between the U.S. and Germany eight agents traveled to the U.S. by submarine and landed in Long Island, NY in June 1942. They carried with them explosives, but soon after one of the conspirators turned himself into the FBI the rest were arrested. President Roosevelt ordered the agents be tried by military

commission for violations of the law of war and the Articles of War; they were found guilty and sentenced to death. Seven of the agents filed suit in federal court claiming the military commission violated the Fifth and Sixth Amendments and filed a petition of habeas corpus. The Supreme Court unanimously ruled in *Ex Parte Quirin* (1942) that the President did not exceed his constitutional authority and therefore did not violate their Fifth and Sixth Amendment rights. Chief Justice Stone stated the President's executive power as Commander-in-Chief with the power to wage war combined with Congress's declaration of war and procedures laid out in the Articles of War demonstrated that the government operated within its constitutional authority. He then drew the distinction between lawful and unlawful combatants. A lawful combatant when captured is a prisoner of war, while an unlawful combatant is subjected to a trial and punishment by a military tribunal. The central point in determining whether the German agents were lawful or unlawful is whether or not they followed the laws of war, which they did not. "[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," Chief Justice Stone wrote, "are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

The actions of the German agents acting in a clandestine manner in order to sabotage American industry and materials were an unlawful action because they did not follow the rule of how soldiers behave. Therefore, they are not given the protection of the Fifth and Sixth Amendments. This case, like the *Prize Cases*, deals with an enemy that does not fit the legal definition of a belligerent. Laws of war dictate that soldiers must behave in a certain manner in order to receive legal protection, but that does not mean non-belligerents cannot engage in hostilities. Clandestine actions are equally capable of starting a war as direct actions by the

military. However, spies are not soldiers, and they should not be treated as such. *Ex parte Quirin* explicitly states this principle, which gives several constitutional implications for later cases. If an individual does not follow the laws of war, then he or she cannot be protected by the very same laws of war, especially habeas corpus issues. Habeas corpus was designed in British law to prevent unjust imprisonments by the king, but these rights did not extend to every person in the world. They were only intended for British subjects. Now, *Quirin* does not negate the application of habeas corpus to all enemies, only those that are unlawful combatants. This is where Chief Justice Stone's differentiation is so important. By law not all enemies are the same; one must be a signatory to international treaties and follow the dictates of that treaty. Separating lawful and unlawful combatants is necessary because laws only matter if people subscribe to them. When the rules prohibiting certain actions apply to everyone, no matter if an individual does not subscribe to or follow the rules, then the rules lose their meaning. The laws of war are meant to protect belligerents, soldiers, and civilians during an armed conflict because both sides have agreed to the operational paradigm. Extending such protection to unlawful combatants denudes the law of binding force by declaring it meaningless.

Nature and Point of War

Carl von Clausewitz was a soldier from a young age. He was teenage soldier during the Napoleonic wars and worked for Russia when Prussia sided with France during the war. After the war, he was put in charge of the war college, the Krieg's Academy. Clausewitz is considered the most influential of the Western military thinkers, but he only came to prominence during the 20th century. Before that military theorists preferred the "scientific" approach of Antoine-Henri Jomini. The structure of his work is convoluted because his wife published the work after his

death and had rearranged the text. In addition, there are things "missing" from his work. Everyone had the same basic military technology during this period; the innovations at that time had to deal with people. Future warfare today is all about technology. Undoubtedly one must engage Clausewitz to know the best possibly military strategy from the early 19th century forward. For Clausewitz (1989) the "political object-the original motive for the war-will thus determine both the military objective to be reached and the amount of effort it requires" (p. 81). He argues that two types of war exist, one to overthrow the enemy (politically/militarily) and the other to occupy part of his land for negotiation purposes or annexation (p. 69). There are many paths to victory in these wars: destruction of the enemy's forces, the conquest of his territory, temporary occupation or invasion, and passively awaiting the enemy's attacks; "[w]ar is thus an act of force to compel our enemy to do our will" (p. 75). Imposing one's will is the object of war and to secure this objective the government must neutralize the enemy's power. Fighting forces should destroy the enemy's forces, occupy the country to prevent the rise of another military, and break the enemy's will. Thomas Schelling puts it another way: "The power to hurt is bargaining power. To exploit it is diplomacy—vicious diplomacy, but diplomacy" (2008, p. 2). It is the threat of damage and the threat of damage to come that can coerce the enemy and force them to change their behavior (Schelling, 2008, p. 3).

What is strategy?

Clausewitz is clear that men of military genius are the ones that win, especially those that have an iron will, which is why the commander is in the trinity. Commanders along with political leaders will have to establish a successful strategy in order to neutralize the enemy and bring about a resolution to the conflict. According to Clausewitz, strategy is the defined aim for the

military operations within the war to achieve the political objectives. Therefore, the strategist "will draft the plan of the war, and aim will determine the series of actions intended to achieve it" (Clausewitz, 1989, p. 177). Knowing and establishing the strategy is not only important during the conflict, but it is also quintessential to war preparation. How the military institutions conceive of war and strategy will determine how they prepare, train, and acquire material for the fights to come (Builder, 1989, p. 127). Counter-insurgency, though, requires different strategic reasoning than conventional wars and warfare. As Galula (2006, p. 50) notes, counter-insurgency "is primarily a problem of strategy and tactics, of methods and organization." In addition, the counterinsurgent should not attempt to use the same strategy as the insurgent, instead relying on the already established strength and resources (Galula, 2006, p. 51). Strategists of counter-insurgency have to chart a middle path between conventional and unconventional warfare because victory in a counter-insurgency is to separate the insurgents from the population with the support of the population, not the complete destruction of enemy forces or limited political objectives like in conventional wars (Galula, 2006, p. 54). As control of the population is the quintessential piece of counter-insurgency "the first objective is to assure the people their protection by giving them the means of defending themselves, especially against terrorism" (Trinquier, 2006, p. 27).

One of the most important concepts from Clausewitz's work is the trinity: the people (Violence, hatred, and enmity/passion), the commander and his army (chance, skills, and probability), and the government (reason and policy). He says the political objectives rule, but they are not a tyrant. If the objective is there, but the means are not there, militaries have to change the objectives. Ends, ways, and means must all work in unison together. One important thing in civil-military relations today is that the people like there to be a "separation" between

policy and the military, but Clausewitz thought the senior commanders should be both soldiers and statesmen. Strategy is essentially matching means and ends, and the amount and type of force necessary will depend on the political objectives of the counterinsurgent (Builder, 1989, p. 49; Clausewitz, 1989, p. 585). The counterinsurgent must act "on the principle of using no greater force, and setting himself no greater military aim, than would be sufficient for the achievement of his political purpose" (Clausewitz, 1989, p. 585) Warfare by necessity seeks to disarm and overcome the enemy, and the amount of force to do that varies depending of the nature of the enemy, e.g. third-world state or a sub-state actor. This lead to Clausewitz's basic understanding of the exertion of states in war: it should be absolute if the political objectives demand it. His third "extreme" of warfare is that if one "wants to overcome your enemy you must match your effort against his power of resistance" (Clausewitz 1989, 77). To completely dominate another country a state must put its complete military, diplomatic, and political will behind the kinetic action.

When Clausewitz discussed limited war he split it into a dichotomy of offensive and defensive, each having its own prescriptions and utility. A state should use limited war when it does not have the superiority in forces to completely overtake the enemy or does not have the will undertake an action with serious risks (Clausewitz 1989, 601). The choice to use offensive or defensive depends on what is the better advantage for the opponent. If prolonging the conflict is better for the enemy it is advantageous to use offensive action, while if the inverse is true it is better to use defensive action. For Clausewitz an offensive limited action is to occupy only part of the enemy's territory to reduce its relative strength to the state that attacked (Clausewitz 1989, 611). On the other hand, states should use defensive action to exhaust the enemy's resources and make it impossible for them to occupy territory (Clausewitz 1989, 613). This is use when it is

impossible to defeat the other state through the use of force in their territory. It is important to understand Clausewitz's theoretical paradigm on absolute and limited wars because it demonstrates how strategists can accurately match means and ends.

Counter-insurgency Strategy

The first action the counterinsurgent must take is to identify the enemy in order to accurately strike them (Trinquier 2006, 24); successful counter-insurgency "depends on an accurate, substantive, and comprehensive profile of the adversary and the environmental context within which he operates" (O'Neill 2005, 155). The American military notes that all insurgents have political objectives and are motivated by specific ideologies and grievances. These grievances, either real or perceived, can allow the counterinsurgent to understand and if possible redress the underlying causes of the insurgency (CFM, 2006, 3-79). Once the enemy is identified, the counterinsurgent must create a grid of the territory where the conflict is happening based on who the population supports (Trinquier 2006, 57-59; Galula 2006, 49). This grid will be divided into three types of areas: red, pink, and white. Any scheme will work, but Galula uses the red, pink, and white, which is why I am using them. Red areas are those where the insurgents have control of the population and can engage in operations. Pink areas are those where the insurgent attempts to expand his influence and bring the population to his side. White areas are controlled by the counterinsurgent, but the insurgent will attempt subversion there when possible. The U.S. military uses the terms of area superiority/area supremacy to describe these areas (DA 1961, 103). Area superiority is when the insurgent only has temporary control, usually during the night; area supremacy is when the insurgent has complete control, but this rarely happens through only unconventional warfare.

At the beginning of the counter-insurgency and after the grid is completed, the counterinsurgent must establish an intelligence network, which is the quintessential part of asymmetric warfare. Intelligence in the conflict is about people and the counterinsurgent "must understand the people of the host nation, the insurgents, and the host-nation government" (CFM, 2006, 3-2). Things to understand include social structure, institutions, social norms, networks, identity, culture, beliefs, values, language, and authorities. Trinquier most forcefully argues for intelligence in order to detect and prevent any attempt at infiltration and attack (Trinquier 2006, 31). Types of intelligence: human intelligence (HUMINT), signals intelligence (SIGINT), open-source intelligence (OSINT), imagery intelligence (IMINT), technical intelligence, measurement and signatures intelligence (MASINT), and geospatial intelligence (GEOINT). HUMINT is the collection of information by human agents "from people and their associated documents and media sources to identify elements, intentions, composition, strength, dispositions, tactics, equipment, personnel, and capabilities" (CFM, 2006, 3-130). This type of intelligence can also be gained through detainees and interrogation, which can be one of the most controversial parts of asymmetric warfare. As Trinquier (2006, 19) reasons, "Interrogations in modern warfare should be conducted by specialists perfectly versed in the techniques to be employed." Enhanced interrogation might become requisite in order to successfully extract information from insurgents and terrorists if normal methods are not successful.

The other forms of intelligence are primarily based on technology and infrastructure. SIGINT determines "enemy locations, intentions, capabilities, and morale" and is used to deny/confirm HUMINT (CFM, 2006, 3-141). OSINT is used to better understand the operational environment by looking at public attitudes and public support (CFM, 2006, 3-143), and IMINT is used for surveillance of insurgents and insurgent facilities (CFM, 2006, 3-144). Although

intelligence is categorically important, information "is nothing in itself, particularly during a crisis, if it is not quickly exploited" (Trinquier 2006, 32). Counterinsurgents must immediately apply the intelligence they gather, especially when they need to kill a particular terrorist or insurgent. Killing specific terrorists and insurgents within the organizations hierarchy can disrupt their networks and make it difficult for them to effectively plan and carry out operations. If terrorists are on the run or the limited number of experts dies, then terrorism decreases. However, this requires a significant intelligence network that can swiftly and accurately determine who should die, when it is possible to kill them, and to limit civilian casualties (Byman, 2008, pp. 116-119). Without the gathering of all possible sources of intelligence and quickly exploiting them, the counterinsurgent cannot hope to be successful in unconventional wars and neutralize strategic targets.

Counterinsurgents have the capability to "clean" an area, so what is important is maintaining the defense of the cleared area so the counterinsurgent can move on to the next target. To effectively do this the counterinsurgent must acquire and maintain the support of the population, which requires the "synchronized application of military, paramilitary, political, economic, psychological, and civic actions (CFM, 2006, 5-1). Effective counter-insurgency is the amalgamation of these efforts (Galula 2006, 61). These efforts are as follows:

- **Military:** expelling insurgent forces, preventing return, protecting the local population, and tracking down the rest of the insurgents.
- **Police/judicial:** identify, arrest, and interrogate insurgent political agents.
- **Political:** Contact with the population and establishing government/nation building and social services.

"The population, therefore, becomes the objective for the counterinsurgent as it was for his enemy" (Galula 2006, 52). First, they must effectively disseminate propaganda of his cause to bring the neutral majority to his cause, demonstrating that the counterinsurgent's cause is better

than the insurgent's (Galula 2006, 53). When military operations begin, the U.S. and the host-nation's government and military will have to move through the red and pink areas, especially going after the population centers in order to secure support for the government and maintain legitimacy (CFM, 2006, 5-2). In addition, there will be a need to create mobile and static forces; mobile forces go after the enemy while static forces defend cleared areas (Galula 2006, 65). Depending on the specific context of each area, the mobile and static forces will use a clear-hold-build strategy, combined action, or limited support (CFM, 2006, 5-50). Clear-hold-build starts at a secure area where the counterinsurgent will mount an offensive against the insurgents to remove them from the area and eliminate organized resistance (CFM, 2006, 5-57). Specific targets during these operations will depend upon criticality, vulnerability, accessibility, and recuperability (DA 1961, 111). Critical targets are ones that will significantly limit the ability of the insurgent to conduct or support operations like bridges, mountain passes, weapons stores, and lines of communication. Vulnerable targets are those that are most susceptible, accessible targets are those with access by the counterinsurgent, and recuperability determines how quickly the insurgent can restore capacity to normal. In addition, the counterinsurgent will have to neutralize or destroy enemy bases in foreign territory to mitigate and end material, financial, and logistical support (Trinquier 2006, 77-78).

Then the counterinsurgent will use static forces in concert with the host-nation to maintain security of the population and key infrastructure (CFM, 2006, 5-60:5-61). In addition, static forces will also go after the remaining insurgents in the area, but always keeping in mind that protecting the population is the primary goal of their mission. To go after any remaining insurgents, the military will have to utilize "broad police operations" (Trinquier 2006, 37). These police operations are "not merely to seek a few individuals who have carried out terrorist attacks,

but to eliminate from the midst of the population the entire enemy organization that has infiltrated it and is manipulating it at will" (Trinquier 2006, 37). Physical and psychological security of the population is the most important job of the static forces and should be prioritized over any nation or state building. The population must not fear retaliation from the insurgents and be free from insurgent control. Once security for the population and their families exists, nation and state building can further bring the population to the side of the counter-insurgent (Galula, 2006, p. 55; CFM, 2006, 3-67). Part of the mission for the static forces will also include controlling the population and implementing nation/state building to use as "pull factors," factors that will encourage the neutral population to side with the counterinsurgents. The static forces must clearly inform the local population about the war aims and try to convince them they should join the counterinsurgents because their cause it more just (Trinquier, 2006, p. 41). Propaganda (psychological operations) is necessary to support the efforts of the counterinsurgent during unconventional warfare (DA, 1961, p. 169). State building activities that can improve the lives of the population include building infrastructure, starting social services like trash collection, distributing supplies, building up indigenous local security forces, and providing education (CFM, 2006, 5-70). Besides state building, the counterinsurgent will also have to control the population. Controlling the population will have to start with a census to know who should and should not be in the area, issuing identification cards, and enforcing curfews, checkpoints, and travel restrictions (CFM, 2006, 5-71:5-73).

Conclusion

Terrorism and insurgency are unique forms of political violence, and their nature will determine the extent of force required to neutralize the targets. Their behavior and structure are

operationally different than state actors, and this influences strategic and tactical choices by the counter-terrorist and counterinsurgent. For example, terrorists specifically target noncombatants and insurgents use hit-and-run tactics in order to gain advantage against the counterinsurgent. In addition, unlike state militaries terrorist and insurgent organizations require significantly more degrading. They will continue even with large losses because only a few non-state actors can do substantial damage. Taking such factors into account aids the state in asymmetric warfare, matching the requisite force to ending the conflict. Analysis of drone warfare must include the nature, structure, and objectives of terrorists and insurgents.

Strategic considerations like these are central to reasoning through proportional responses concerning acts of aggression by the enemy. Clausewitz particularly notes this. An ethically proportional response will incorporate the most efficient way to defeat terrorists and insurgents. Furthermore, insurgents try to build up to regular forces in the three phases described, but drones can continuously push back their organizational advancement through the strategic strikes. As Clausewitz notes, offensive action is best when prolonged conflict aids the enemy. He also argues force is meant to bend enemy to state's will, but this can only happen through neutralization with terrorists and insurgents. Galula and Trinquier's frameworks are also useful in assessing what a proportional use of force would include. Creating a grid and knowing which places offensive forces and move into the red (counterinsurgent control) allows the counterinsurgent to integrate drones in neutralizing targets to clear and maintain the territory. Drones can target centers of gravity and critical targets for the clearing of an area. As Trinquier also describes, going after specific members of an insurgent organization to ultimately hollow out their structure and cause the insurgency to collapse. This will also have the goal of making the population feel safe in contested areas.

Terrorists are rational actors using the violence they think will lead to their objectives, which means the state must take this into account as well. They use the reaction of their targets in order to swell their ranks, so any kinetic action needs analysis on the effects of collateral damage. Based on the organizational structure of terrorist and insurgent groups, drones can form an important tactic in breaking their hierarchies through killing leaders, combatants, and the political cadre. The law surrounding terrorism and insurgency also matters for ethical analysis because legal conflict reduces the hurdles of the government to use lethal force. Consistently in American legal history sub-state actors can go to war with the government, which means the president's war powers come into effect. Presidents can then use more force, especially lethal force, when a state of war exists. Whenever terrorists or insurgents threaten or engage in aggression, the government can then legally neutralize targets with kinetic action. Drones must be a proportional tactic within this strategic and legal framework in order to be ethical, and later chapters will further explore the interaction between law, strategic, and ethics of killing terrorists and insurgents through drones.

CHAPTER FIVE
OPERATIONAL CONTEXT: AL-QAEDA, THE TALIBAN, AND THE WAR ON TERROR

"There is no better corrective of human behavior than knowledge of past events."-Polybius, *The Histories*, Book I(1)

"If you know the enemy and know yourself, you need not fear the result of a hundred battles."-Sun Tzu, *The Art of War*

Introduction

To take a full assessment of the ethics of drone warfare, it is important to understand the enemy America faces and the historical and contemporary context in which the tactic is employed. Al-Qaeda has posed a relatively unique problem for security experts due to its nature as a transnational terrorist organization. The utility of targeted killings with drones depends on the nature of the enemy and how they have responded to violence in the past. In addition, it is important to understand the geopolitical, ideological, and legal context in which this conflict takes place. Policy decisions are not made in a vacuum and the history of the war against al-Qaeda determines how policy makers will choose when and where to use violence against. President Bush's administration chose to lay out a particular legal paradigm that would become useful later on, seeing al-Qaeda as enemy combatants and removing several protections given during conventional wars. Appreciating the nature and threat of al-Qaeda, its affiliates, and the Taliban provide justification for the continued war against them and the tactics involved.

Al-Qaeda

America's primary enemy in the War on Terror is al-Qaeda, an Islamist terrorist organization with global reach and aspiration. It was founded by Osama Bin Laden, who would become one the most significant terrorist leaders in history. Bin Laden was his father's 17th son,

born in 1958 to a prominent and devoutly religious family that gained its wealth from construction. His father, Muhammad Bin Laden, was also close to the royal family (Wright, 2006, p. 82-83). Muhammad would go on to build several palaces, roads, and renovate the Prophet's Mosque for the royal family. Bin Laden's father would divorce his wives and often marry them off to one of his employees. Alia, Bin Laden's mother, would marry Muhammad al-Attas after the divorce and raise Bin Laden with four younger half-siblings. Early in his life Bin Laden developed a religious fundamentalism, often quizzing those he played soccer with on the Quran and Islam. Bin Laden's education included a significant amount of study concerning the Quran, Islamic history, and the Sunnah (Scheuer, 2011, p. 29). His violent Islamism partially came from his devotion to Taqi al-Din Ahmad Ibn Taymiyyah (Scheuer, 2011, p. 25). Ibn Taymiyyah (1263-1328) fought against the caliph and was one of the principle architects of Salafism; he argued that Muslims must fight against governments that do not adhere to Sharia Law, which came from his observations of the Mongols that conquered the Middle East. Bin Laden married early at 17, and he would go to work for the BinLaden Group, where he learned to work with people and how to effectively use logistics.

Although there is some disagreement about the exact beginning of al-Qaeda, the group has its origins in the Soviet invasion and occupation of Afghanistan. Osama Bin Laden travelled to Pakistan and Afghanistan to help facilitate the transfer of funds and operatives to support the jihad, but while he was there he also began to train an Arab-only unit because the Afghan commanders did not trust the Arabs (Scheuer, 2011, p. 61). The unit had one "successful" battle by standing up to the Soviets at Jaji, which helped solidify Bin Laden's reputation. Moscow would hand a victory to the mujahedeen in 1988 by deciding to withdraw from Afghanistan, and that year Bin Laden would help found the organization that would become al-Qaeda (the Base in

Arabic) (Kean & Hamilton, 2004, p. 83; Bergen, 2011, p. 18). Bin Laden wanted al-Qaeda to "maintain momentum for the nascent worldwide Islamist movement into the post-Afghan jihad era" (Scheuer, 2011, p. 72). Ayman al-Zawahiri, an Egyptian physician, was an important member of Bin Laden's new group. Zawahiri was a leader in the Egyptian Islamic Jihad and participated in the assassination of Anwar Sadat. After the Egyptians released Zawahiri, he went to Saudi Arabia to restart his life. There he met Bin Laden, and the two would work intermittently together across the globe.

The following year Hassan al-Turabi, leader of the National Islamic Front, would invite Bin Laden to Sudan, although he would not move there till 1991 (Kean & Hamilton, 2004, p. 85; Scheuer, 2011, p. 87). In the intervening year Bin Laden tried to lead a fight against Saddam Hussein after the Iraqi dictator invaded Kuwait. He appealed to the Saudi monarchy to raise an army of mujahedeen under his leadership that would expel the Iraqis. However, the Saudis chose to side with the United States in the conflict and would bring American troops to the Arabian Peninsula. This would become one of the major criticisms Bin Laden would have of the monarchy and the U.S. In Sudan Bin Laden would help finance construction while also establishing bases to train Islamist fighters. Following intense international pressure, Sudan would rescind its welcome to Bin Laden, so he went to Jalalabad, Afghanistan (Kean & Hamilton, 2004, p. 93; Scheuer, 2011, p. 105). The Taliban controlled most of Afghanistan at the time, but Bin Laden would not align al-Qaeda with them until 1996 when they took over Jalalabad (Kean and Hamilton, 2004, p. 96; Scheuer, 2011, p. 72). By 1998 Zawahiri and Bin Laden merged their individual organizations with terrorists from Pakistan and Bangladesh to form the World Islamic Front for Jihad against Jews and Crusaders, i.e. al-Qaeda (Kean & Hamilton, 2004, p. 99; Reidel, 2008, pp. 23-24; Bergen, 2011, p. 24).

Al-Qaeda became relatively unique amongst terrorists organizations and possesses a specific ideological orientation that made it target the United States as opposed to the more usual targets of Islamists, like local autocrats or sectarian targets. First, leaders of al-Qaeda argue that this is purely a defensive movement to protect the *ummah* against the Crusaders that have attacked Muslims (Hoffman, 2006, p. 289). Perceived grievances against the Islamic community included the plight of the Palestinians, American sanctions against Iraq, and stationed troops in Saudi Arabia. Second, Bin Laden argued that to defend the *ummah* jihadists should attack the "far enemy," the United States, as a means to bring down the "near enemy," the corrupt Arab leaders. His intention of attacking the U.S. was to bring them into a protracted war that would "[bleed] America to the point of bankruptcy," which is what he thought the mujahedeen did against the Soviet Union (Hoffman, 2006, p. 290; Reidel, 2008, p. 122). Finally, Bin Laden wanted to re-establish the Islamic caliphate that would continue to protect the Islamic community and unite them against the outside enemy.

The fight against the United States started in the late 1990's through declarations of war against the U.S. and by several terrorist attacks. Bin Laden issued his first fatwa in August 1996, which is a lengthy diatribe listing the many "crimes" of the United States. He thought it "should not be hidden from you that the people of Islam had suffered from aggression, iniquity and injustice imposed on them by the Zionist-Crusaders [i.e. America, its allies, and Israel]…" These "injustices" were numerous and involved any perceived attack against any Muslim. They include Israel's shelling Qana in response to Hezbollah attacks, U.S. troops stationed in Saudi Arabia, and the sanctions against Iraq. Bin Laden argued "there is no more important duty than pushing the American enemy out of the holy land" and urged all Muslims to "take part in fighting against the enemy -- your enemy and their enemy -- the Americans and the Israelis.

They are asking you to do whatever you can, with one's own means and ability, to expel the enemy, humiliated and defeated, out of the sanctities of Islam." The second fatwa came in February 1998, and this one was not signed by only by Bin Laden but also by Zawahiri, Sheikh Mir Hamzah of Jumiat-ut-Ulema-e-Pakistan, Fazlul Rahman of the Jihad Movement in Bangladesh, and Abu-Yasir Rafa'l Ahmad Taha of the Islamic Group. This one also declared war on America. They demanded that all Muslims "kill the Americans and plunder their money wherever and whenever they find it" and for Muslims "to launch the raid on Satan's U.S. troops and the devil's supporters allying with them, and to displace those who are behind them so that they may learn a lesson." These are clear declarations of war against the United States even before al-Qaeda began their assaults on American targets.

Even though Bin Laden and his companions declared war on the United States through two fatwas, they also declared war by targeting America in Africa, the Gulf, and in the Homeland. The first attacks came on August 7, 1998 when two truck bombs exploded at the U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya. These combined attacks killed over 200 people and injured at least 5,000. The second attack happened on October 12, 2000, in the Port of Aden in Yemen where the USS Cole was stationed. For this attack the terrorists used a small naval craft to approach the Cole where they placed explosive charges on the side. The attack killed 17 and wounded 39 sailors. The final and most well-known assault that became the *casus belli* for what would be called the War on Terror happened on September 11, 2001. During this attack 19 men boarded four civilian aircraft and soon after takeoff they seized the vessels. The hijackers then used the planes as missiles and flew them into both World Trade Centers and the Pentagon. The fourth plane did not make its intended target because the passengers commandeered the aircraft and flew into the ground in Pennsylvania to prevent the terrorists

from achieving their goals. Over 3,000 civilians died, including almost 400 foreign nationals. After 9/11, al-Qaeda core continued to attack American and Western targets across the world (Hoffman & Reinares, 2014, p. 637). More well-known attacks include the Madrid train bombings in 2004 that led the Spanish government to withdraw from Iraq, the 7/7 bombings in the United Kingdom that used suicide bombers on busses, and further plots to blow up planes in 2006. Because of the consistent attacks against the United States and the West, America would use force against the organization by invading Afghanistan. However, the fight would not stop there and America would have to continuously use kinetic action across the world. During this period al-Qaeda would also diversify and have organizations in northern Africa, Iraq, Syria, and the Arabian Peninsula.

The Taliban

Like al-Qaeda, the Taliban emerged out of the fight against the Soviets in the 1980s, although they would not come to power till after the Soviets left and the civil war began. After the Soviets left, a variety of groups began to fight the communist regime of President Mohammad Najibullah. A significant part of the civil war happened because Kabul did not fall to the Pashtuns, but rather the Tajiks under Burhanuddin Rabani and the Uzbeks under General Rashid Dostum (Rashid, 2001, p. 21). This was the first time in 300 years that the Pashtuns did not control the city. The Taliban emerged from the Pashtuns in 1994 during the height of the conflict, and their objectives were to "restore peace, disarm the population, enforce Sharia law and defend the Islamic character of Afghanistan (Rashid, 2001, p. 22). Mullah Omar was chosen as the Taliban's leader primarily because of his piety and religion was the driving force of the organization. Soon the Taliban would become the dominant militant organization, and by March

1995 would control 12 of Afghanistan's 31 provinces (Rashid, 2001, p. 31). Omar grew up in poverty, but he was educated in a madrassa in Pakistan before opening his own. He famously lost an eye during the fight against the Soviets, but little more in known about Omar due to his reclusive nature.

Because of the Taliban's victories, tens of thousands of young Afghani men would rally to their cause. In 1996 roughly 1,200 mullahs would trek to Kandahar under the invitation of Mullah Omar in order to legitimize his organization. Afghanistan's internecine conflict became a strategic geopolitical issue for great and regional powers. Russia and Iran continued to support the regime while Saudi Arabia and Pakistan attempted to funnel oil, money, and supplies to the Taliban to continue the fight against communists and Shias. By fall 1996 the Taliban had taken both Jalalabad and Kabul with the continued aid from the Saudis and Pakistanis, and their first act was to publicly execute Najibullah by hanging. In addition, the Taliban would go on to ethnicaly cleanse the Hazaras, possibly executing as many as 2,000 in Mazar-i-Sharif (Silinsky, 2014, p. 22). However, this would not bring about an end to the conflict. The civil war in Afghanistan would continue till America's invasion in 2001.

Like other revolutionary and totalitarian movements, the Taliban would recruit the unemployed young males or religious zealots to their cause in order to solidify a base of power. The young men would have to go through brutal socialization rituals that would eliminate any of their humanity (Silinsky, 2014, p. 29). Most forms of entertainment were outright banned in the country during their rule, including television, internet, chess, kite flying, dancing, and music. One of the more brutal aspects of the regimes, harkening back to a bygone era of barbarity, was the public executions and amputations held in the Kabul Sports Stadium, followed by a soccer game (Silinsky, 2014, p. 34). Soccer was allowed, but fans could only cheer "Allahu Akbar."

Also, Afghanistan under the Taliban was not a well-liked power, even by its neighbors. Parts of Pakistan and Pakistan's intelligence services (called the ISI), had warm relations with the Taliban, but Iran was a constant source of consternation (Silinsky, 2014, p. 40). Iran is a Shia country—fundamentalist Sunnis loathe the Shias, and the two countries threatened each other several times during the late 1990's. Yet an incident from March 2001 shows the truest nature of the Taliban regime. They so hated anything non-Islamic, any part of history not connected to Muhammad, the Taliban could not even allow 1,400 year old statues of Buddha to stand in Bamyan. Despite pleadings from countries like Saudi Arabia, they destroyed them. History was not even safe with this totalitarian regime.

The Taliban are important not just because they controlled the majority territory of a strategic country, but they also aligned themselves with al-Qaeda and provided them a safe-haven. After Bin Laden returned to Jalalabad in May 1996, he was protected by the local Shura till the Taliban took control of the city in September. He would then develop a relationship with Mullah Omar and come under the protection of the Taliban (Rashid, 2001, p. 133). Mullah Omar would prevent Bin Laden from being handed over to the United States after the 1998 African bombings and 9/11; the former event led to Saudi Arabia severing ties with the Taliban. This was not an entirely symbiotic relationship, though, and significant friction existed. Bin Laden continued terrorist attacks and media appearances that brought sustained attention and pressure on the Taliban from the United States (Scheuer, 2011, p. 125). Following the 1998 attacks on the embassies on Kenya and Tanzania, the U.S. responded by launching 70 cruise missiles at al-Qaeda training bases in Khost and Jalalabad (Rashid, 2001, p. 134).

Around this time Bin Laden would fully solidify his relationship with the Taliban and Mullah Omar by providing soldiers to fight in northern Afghanistan. In order to "protect" the

Islamic nature of the Afghani regime under Mullah Omar, the Taliban and al-Qaeda worked together against Ahmed Shah Massoud's Northern Alliance (Scheuer, 2011, p. 127). Their combined strength pushed back Massoud's Northern Alliance to the northeast of Afghanistan, less than 20% of the country. Bin Laden decided to kill Massoud for several strategic purposes: strengthen Taliban control of the country, re-pay the Taliban for the liability al-Qaeda brought, and prevent the U.S. from having a local ally once they responded to the upcoming terrorist attacks planned for September 2001. Al-Qaeda was able to kill Massoud by pretending to send journalists to interview him, but the agents had carried explosives in their camera equipment and used a suicide bombing to kill him on September 9, 2001. Because Mullah Omar and Bin Laden had so closely aligned their organizations, despite the consistent friction between them, the United States decided that significant force had to be used against both of them, removing the Taliban from power and neutralizing al-Qaeda, which led to the invasion of Afghanistan in October 2001.

The Bush War Cabinet

When looking at the strategic and operational decision making within the War on Terror, it is important to keep the personalities and ideologies of the National Security Council in mind as this would establish the institutional culture and warfare paradigms. Many of these people became known as "neoconservatives," a political philosophy that dominated the Reagan administration during the 1980's. Neoconservatism had its roots in a little known intellectual at the University of Chicago: Leo Strauss. "Strauss's influence is surprising because his voluminous, often esoteric writings say virtually nothing specific about issues of policy, foreign or domestic" (Mann, 2004, p. 26). The ultimate conclusion of Strauss, though, is a strong critique

of the moral relativism of modern liberalism, something he referred to as gentle nihilism. He wanted to critique the idea all points of view are equal and that none of them are worth passionately analyzing or defending. In this way Strauss spoke of the need for a group of elite policy makers that could convince the public and president that there was good and it is necessary to confront evil. As David Rothkopf put it, "Strauss called, metaphorically, for a morally motivated NSC" (2005, p. 399).

Because Dr. Rice led the NSC as national security advisor, her strategic beliefs and view of her role are important to understand many of the decisions were made and why. Dr. Rice and President Bush became close as soon as they met, and he and Laura basically adopted her into their family after her father died in 2000. The two of them shared a love of sports, exercise, and faith in God (Daalder & Destler, 2009, p. 259). This gave her extreme access to the President, who would often listen to her views when she spoke. She did not give them often, but they undoubtedly influenced President Bush's ultimate decisions. Dr. Rice believes that "America's role in this new era is to lead the spread of democracy and freedom worldwide-both because it is right and because it advances our national interests by producing a safer, more stable world…" (Rothkopf, p. 396). Such a view of America's role was also shared by men like Donald Rumsfeld, Paul Wolfowitz, and Dick Cheney, which showed the ultimate influence of Strauss on the Bush administration. However, Colin Powell and his deputy Richard Armitage held a more traditional view of American foreign policy. Looking at Rice's view on her role as national security advisor then would determine how these debates would be settled. She said that her job "is to organize the decision-making for the president, not to impose my own views" (Daalder & Destler, 2009, p. 257). In addition, she said, "I'm the National Security Advisor; what I do is coordinate policy. I don't operate, I don't implement, I coordinate" (Daalder & Destler, 2009, p.

260). Even though she agreed with the framework by which Rumsfeld and Cheney saw the world, she did not try to impose this ideology, even if it won out in the end.

"War Footing"

One of the unifying beliefs of the Bush's war cabinet was that 9-11 was a declaration of war by al-Qaeda against the United States (Bush, 2010, p. 141; Tenet, 2007, p. 175-76). Some would criticize later on the use of the term "war on terror" because this was not actually a war on a tactic or because that indicated a purely military response, but the Bush administration definitively and correctly categorized this as a war. Because Bush believed the War on Terror was an actual war, he sought and received authorization from Congress and the United Nations. Congress passed a joint resolution, commonly referred to as the *Authorization for the Use of Military Force Against Terrorist,* on September 18, 2001 that gave the President the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons…" Even though a state of war already existed with al-Qaeda, this fulfilled the requirement of Article 1, Section 8, Clause 11 of the U.S. Constitution and therefore maintained that a legitimate authority lead the war. Besides domestic authority President Bush sought international legitimization through the United Nations by invoking Article 51 of the UN Charter that allows for the use of arms in self-defense. The UN Security Council passed Resolution 1368 that condemned the terrorist attacks on 9-11, recognized the right to self-defense, and called on all states to help bring al-Qaeda and its sponsors to justice.

This would not be a normal armed confrontation that exclusively relied upon the military; America would needs to use all of the tools at its disposal, including intelligence, law enforcement, public diplomacy, the private sector, and finance as well as the military. Therefore, before military confrontation could begin, Bush believed it necessary to lay down a foundation to prevent further attacks by al-Qaeda; he referred to this as "war footing." These would be done during the first few months after 9-11 and some in early 2002. First, there was a deficiency in American intelligence because of "the wall." The wall referred to the separation between organizations in the intelligence community and between the intelligence community and law enforcement. To correct this deficiency he sought for the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, more colloquially known as the Patriot Act (Bush, 2010, p. 160). The Patriot Act would alleviate the problem of the wall by allowing the intelligence and law enforcement agencies to implement roving wiretaps to deal with ever changing cell-phone numbers and emails, financial powers to tackle terrorist financing, and the ability for the government to examine business records, credit card history, and library checkouts of suspected terrorists.

The Patriot Act defines domestic terrorism as actions dangerous to human life through mass destruction, assassination, and kidnapping within the U.S. that violate criminal law and seek to coerce the government or people to change policy (§802). In response to terrorism, the Patriot Act partially reorganized the intelligence agencies and security apparatuses. Now the Director of Central Intelligence is to aid the Attorney General under FISA to use surveillance and intelligence that will be used "efficiently and effectively for foreign intelligence purposes" (§902). In addition, international terrorism will also be under the purview of the National Security Council. Powers given to the intelligence and law enforcement community include

expanded roving surveillance, longer duration on surveillance of non-U.S. citizens, and the ability to intercept certain computer trespasses (§§20, 207, 217). An important part of the Patriot Act seeks to use the Department of the Treasury to go after and halt terrorist attacks as well. The Secretary of the Treasury is instructed to "adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities…" in order for them to share information on suspected terrorists and their money laundering activities (§314(a)1). These regulations would protect institutions that share information with each other or the government on possible terrorist activities. Finally, the Patriot Act places the jurisdiction for any individual or institution engaged in money laundering for terrorism under district courts.

Now, some have argued that the provisions of the Patriot Act go too far and are unconstitutional, but this is not true. The government must still seek warrants under FISA. Laws must keep up with changing technologies, or they because useless and fail. This law does not allow for unlimited wiretapping or warrantless wiretapping, which is why there was such a furor over the recent National Security Agency's wireless wiretapping (even though those were on primarily foreign nationals). As a tool the Patriot Act proved useful by helping law enforcement stop plots in New York, Oregon, Virginia, and Florida. In addition to the Patriot Act, the Bush administration established the Terrorist Surveillance Program within the National Security Agency (NSA) (Bush, 2010, p. 164). The NSA typically had to follow FISA's rules on wiretapping and surveillance, but that act was written in 1978 and did not provide the necessary tools to deal with the modern, technologically driven world. With the Terrorist Surveillance Program the NSA could follow dirty numbers, those belonging to al-Qaeda operatives, more easily, and the NSA would only listen to conversations between someone in the US and someone

outside of the country. They would not listen to purely domestic calls. According to Bush's legal counsel, this power is constitutional during times of war.

Economics is typically tied to war time because conflicts are extremely expensive or because contractors receive funds from the government and profit extensively. However, an important war footing for the administration was the application of economic tools to fighting al-Qaeda and its affiliates. Executive Order 13224 froze terrorist assets and disrupted their funding, and luckily early on in the Bush administration National Security Policy Directive 1 brought in Treasury to the NSC. Dr. Rice notes that one of the most important parts of the Patriot Act was Section 311 that "enhanced the Treasury Department's ability to prevent, detect, and prosecute international money laundering and the financing of terrorism" (Rice, 2011, p. 113). Due to the importance of the economy as well, Vice President Cheney thought it important to work with the Chairman of the Federal Reserve Alan Greenspan (Cheney, 2011, pp. 339-40). They had previously worked closely together during Gulf War I, which was important because Greenspan could have forewarning and hopefully implement sound policy to limits its influence on the markets. The economic impact of 9-11 had already been felt when the markets opened up four days after the attack and it dropped 700 points. Clearly the economic, both financing terrorism and protecting domestic markets, would be an imperative focus during the War on Terror.

Another significant problem for the administration was what to do with captured terrorists during the operation in Afghanistan. To solve this problem the administration established military tribunals as way to administer justice during war time. Detainees could not be tried in normal courts for the primary reason that the evidentiary protocols of criminal courts could easily reveal American intelligence methods (Rice, 2011, pp. 105-06). Also, the detainees would not be given prisoner of war status because the Geneva convention does not apply to non-

state actors; it only applies to states that signed the treaty. President Bush believed the War on Terror to be a completely new type of conflict, and he therefore wanted to establish appropriate tools that the military and intelligence agencies could utilize. He laid out how to deal with the detention of terrorists caught in Afghanistan in a military order on November 13, 2001 titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order applied to non-U.S. citizens that had or currently were members of al-Qaeda; anyone that helped terrorists, committed acts of transnational terrorism, or prepared to harm the U.S. in any way; anyone that harbored the aforementioned individuals.

The Secretary of Defense would place such suspected terrorists in a detention facility of his choosing while giving them humane treatment by not discriminating against them and allowing them to practice their religion. To further the cause of justice, captured terrorists would have a military trial that could legally punish them for their crimes. Orders and regulations related to the trial are under the purview of the Secretary of Defense, and he may apply regulations to the pre-trial, trial, post-trial, and evidentiary procedures. Finally, any suspect under the jurisdiction of the order cannot seek remedy in a U.S. court, state court, foreign court, or international tribunal. What would become a political issue, though, was the length of time required to detain terrorists because the War on Terror promised to be a lengthy engagement. Combatants could only be detained for the length of the war, but this one could last for decades. This is why he set up military commissions so that captured combatants could receive justice and their detention could last as long as their prison terms. But these commissions would become contentious and go before the Supreme Court that would ultimately limit the powers of detention.

In 2002 the U.S. captured two Australians and twelve Kuwaitis in Afghanistan during the conflict against the Taliban. They were held at Guantanamo Bay, but through relatives they petitioned the court for a writ of habeas corpus claiming they had never been terrorists or fought the U.S. The District Court dismissed their petitions for a lack a jurisdiction because aliens under military custody do not have standing in the court for litigation. But in *Rasul v. Bush* (2004) Justice Stevens invokes the historic nature of habeas corpus to say it applies to those detained at Guantanamo. Justice Kennedy wrote a concurring opinion, but differed with Justice Stevens on why habeas corpus applied. For Justice Kennedy, the issue is that Guantanamo is under U.S. jurisdiction and practically a territory, which means the U.S. Constitution applies. However, Justice Scalia gave a powerful dissent showing the folly of such a decision. He argued that the Court should not have basically abandoned *Johnson v. Eisentrager* because it could force soldiers in combat to bring all enemy soldiers to court. Furthermore, he explains how Justice Stevens does not ever justify how America's control Guantanamo Bay means it is sovereign territory. Yet the Court sided with the detainees and gave federal courts jurisdiction of the matter.

Another captured terrorist in Afghanistan was Yaser Hamdi, but he was an American citizen born in Louisiana and raised in Saudi Arabia. After the Northern Alliance captured him and gave him to the U.S. he was declared him an enemy combatant for working with the Taliban and placed him in prison. His father filed a habeas corpus petition, and the case made its way to the Supreme Court in *Hamdi v. Rumsfeld* (2004). The petition argued that because Hamdi was an American citizen he should enjoy the protections of the Constitution, and the government cannot hold him without pressing charges. Like in other cases, Justice O'Connor sought to "strike a balance" between rights of an individual and the responsibilities of national defense. She

ultimately sides with Hamdi and states that U.S. citizens must be given due process rights and rejected the argument that the judiciary could not hear Hamdi's case. Importantly, though, Justice O'Connor recognizes that Congress authorized Hamdi's detention and that his detention was legal, just not the prevention of due process. Because Congress had passed the *Authorization for Use of Military Force* in 2001 to target al-Qaeda, "the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war a to be an exercise of the 'necessary and appropriate force' Congress has authorize the President to use."

There are two other cases of importance concerning the due process rights of suspected terrorists and the authority of the executive during war. The first is *Hamdan v. Rumsfeld* (2006) where Salim Ahmed Hamdan, Osama Bin Laden's chauffeur, was captured and placed in Guantanamo Bay prison. At Guantanamo the military gave him a hearing through a military tribunal because he was an enemy combatant. However, the District Court had granted Hamdan's petition for habeas corpus. Hamdan argued that the military did not have the right to try him because he had not violated the laws of war and they had not followed appropriate procedures. The Court determined that President Bush did not have the authority to establish military tribunals because it was not authorized by an act of Congress, the laws of war were not violated, and the procedures violated the Uniform Code of Military Justice Article 36 and the Geneva Conventions Common Article 3. A few years later the Court ruled in the case *Boumediene v. Bush* (2008) against the government again. After the Court's decision in *Hamdan,* Congress passed the Military Commissions Act of 2006 to establish appropriate procedures to try enemy combatants. The MCA had determined that federal courts did not have jurisdiction over alien enemy combatants, but *Boumediene* overturned §7 of the MCA by declaring the petitioners

had due process rights. Lakhdar Boumediene and five other Algerians were held by Bosnian police due to his connection to a terrorist plot, and the U.S. government declared them enemy combatants and moved them Guantanamo Bay. Like in the *Rasul* case, Justice Kennedy looked at where the persons were held to determine if habeas corpus applies, and like Justice Stevens in *Rasul* he uses a historic review of the habeas corpus petition (beginning with the Magna Carta here and going through American jurisprudence) to make his case. Justice Kennedy rejects that de jure sovereignty is required; the fact the U.S. is in control of Guantanamo means that habeas corpus applies.

Finally, the Bush administration decided after the capture of Abu Zubaydah that enhanced interrogation techniques could be used on terrorists to extract key intelligence from them (Bush, 2010, p. 169). The primary memos concerning the detention and treatment of captured terrorists and suspected terrorists during the War on Terror were written by Alberto Gonzales, John Yoo, Robert Delahunty, and Jay Bybee. John Yoo and Robert Delahunty wrote the first one on January 30, 2001 titled "Treaties and Laws Applicable to the Conflict in Afghanistan And to the Treatment of Person Captured by U.S. Armed Force In that Conflict." Yoo argued that the laws of armed conflict do not apply to al-Qaeda or the Taliban because they are sub-state actors not part of any international agreements on war. Common Article 2 of the Geneva Conventions does not apply, according to Yoo and Delahunty, because it only covers conflict, whether declared or not, between two High Contracting Parties. Common Article 3, meant to supplement Common Article 2, only applies to a conflict within a territory, i.e. civil wars. Furthermore, this interpretation is supported by the congressional record when Congress incorporated Common Article 3 into the War Crimes Act; the House understood it to apply to civil and interstate wars. In addition, the Geneva Convention 3's Article 4 on the treatment of

prisoners of war might apply to al-Qaeda, but the organization forfeited those rights by not following Hague Convention IV, being commanded by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war.

This interpretation would apply to the Taliban as well because Afghanistan had become a failed, illegitimate state that could no longer inherit the treaty obligations previously signed. Not to mention the Taliban only controlled part of the country, and only Pakistan recognized them as legitimate. Yoo and Delahunty articulated this argument again on January 9, 2002, in a memo titled "Application of Treaties and Laws to al Qaeda and Taliban Detainees," which is also the title of Jay Bybee's January 22, 2002, memo that reiterates much of Yoo and Delahunty's analysis. Alberto Gonzalez, writing to President Bush after he had decided to not apply the Geneva Conventions to the war in Afghanistan, elucidated ramifications of that decision in his January 25, 2002, memo titled "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban." Gonzalez noted the Office of Legal Council's interpretation was "definitive," but the State Department's lawyer took a different view. The positives of Bush's decision, according to Gonzalez, was that it gave the President more flexibility in how the prisoners are treated, gave him the ability to treat all detainees the same rather than on a case by case basis, and maintain options for future counter-terrorism operations. He also dismisses concerns with not applying the Geneva Conventions, like this was unprecedented (it was not), would encourage the Taliban to treat U.S. prisoners of war better (something that has never worked), and that other countries would criticize the U.S.

The Response

Invoking Article V of NATO, the United States would seek an international coalition to eliminate al-Qaeda and the Taliban. This force would be called the International Security Assistance Force (ISAF) in December 2001, created by UN Security Council Resolution 1386. The primary decision making period of the Bush administration was September 15 and 16, the weekend following the terrorist attacks. The Principals and the Deputies of the National Security Council met at Camp David to discuss the plethora of policy options available to the administration to respond to al-Qaeda's aggression. Secretary Rumsfeld describes the primary purpose of America's response to al-Qaeda is to prevent another attack while protecting the American citizenry; it was not punishment or retaliation (Rumsfeld, 2012, p. 355). This is why Vice President Cheney wanted to focus on offense as he believed an offensive response was the best way to eliminate future threats to the homeland (Cheney, 2011, p. 334). As Rumsfeld wrote, "The only way to protect ourselves is to go after the terrorists wherever they may be" (Rumsfeld, 2012, p. 355). This is the geo-strategic paradigm that Rumsfeld laid out for President Bush:

> The U.S. strategic theme should be aiding local peoples to rid themselves of terrorists and to free themselves of regimes that support terrorism. U.S. Special Operations Forces and intelligence personnel should make allies of Afghanis, Iraqis, Lebanese, Sudanese and others who would use U.S. equipment, training, financial, military and humanitarian support to root out and attack the common enemies (Rumsfeld, 2012, p 373).

For CIA Director George Tenet the same principle held as well. He wanted to hit the enemy "fast, hard and light" without falling into the same pitfalls as the Soviets when they had entered Afghanistan (Tenet, 2007, p. 207). The policy options before President Bush could roughly be categorized into four categories: covert actions, military response, diplomatic support, and developmental relief. Bush had said early on that he did not just want to attack al-Qaeda and remove the Taliban, but he wanted to leave the country better off than it was under the Taliban.

Director Tenet told Bush that he wanted broad authority for covert action to kill or capture al-Qaeda members as the first kinetic response. Then he wanted to deploy "CIA teams to arm, fund, and join forces with the Northern Alliance [a group of war lords and their followers made up primarily of people from the Uzbek and Tajik tribes]" (Bush, 2010, p. 187). According to Tenet, the initial strategy of the US needed "to close off Afghanistan by providing immediate assistance to the Northern Alliance and their remaining leaders, and accelerate [US] contacts with southern Pashtun leaders, including six senior Taliban military commanders…" (Tenet, 2007, p. 177). The CIA's plan consisted of helping the Northern Alliance with CIA and Special Forces teams take over the north-central town of Mazar-i-Sharif, which would connect them with bases in Uzbekistan that could resupply the soldiers. Then at the same time other members of the Northern Alliance would go to Bamiyan and reclaim the central territory of Afghanistan. This would create a direct path to Kabul for the US and Northern Alliance. In addition, bombings would be used on military and symbolic targets of the Taliban so as not to alienate the southern Pashtuns. Essentially, the CIA would work with the locals and provide intelligence while Special Forces would neutralize al-Qaeda and Taliban units. Their objectives would be Mazar-i-Sharif, Khandahar Mullah Omar's headquarters), getting the east and west under Northern Alliance control, and to take Kabul (Tenet, 2007, pp. 213-14).

Even though Tenet had offered a response with agents on the ground, he also included other options as a means to put continued pressure on al-Qaeda. He wanted to use Predator drones (unmanned aerial vehicles, or UAVs) to kill al-Qaeda agents and its leadership while also using CIA contacts to disrupt their funding by targeting non-governmental organizations and individuals that gave al-Qaeda money (Tenet, 2007, p. 178). The point was to completely strangle the organization by going after them in Afghanistan, go after the leadership, go after

their money, and go after them globally. Unlike the military at this time the CIA was completely prepared to begin operations against al-Qaeda immediately. The Central Intelligence Agency had some foresight and maintained contact with the Northern Alliance after the Taliban took over the country (Bergen, 2011, p. 55). For two years before 9-11 the CIA had sent five teams to meet with Ahmed Shah Masood, the leader of the Northern Alliance who died on September 9, 2001. They also had contact with other war lords in the region. CIA senior officer Gary Schroen would set up contact with Fahim Kahn of the Northern Alliance and other tribal leaders while Hank Crumpton would lead the Counter-terrorism Center Special Operations to coordinate the agents and Special Forces on the ground (Tenet, 2007, p. 211). Besides all of this, Tenet had implemented two changes in the CIA to further the flexibility in their response. First, he flattened the bureaucracy and gave greater discretion to agents and officers in the field. He would also bring these agents and officers directly to the president rather than an assistant director so they could give the best and most relevant information to the commander-in-chief (Tenet, 2007, pp. 183-84). Second, he would create a team of contrarians dubbed the Red Cell whose sole job was thinking thoughts and attempting to put themselves in the minds of the terrorists. The second most senior analyst of the CIA, Jami Miscik, would lead the Red Cell.

Bin Laden misjudged how the United States would respond to such an act of terrorism due to previous responses (Bergen, 2011, p. 59). He thought that either the U.S. would pull out of the Middle East, like they did in Somalia, or just send a few cruise missiles, like they did following the east African attacks in 1998. Although he was not entirely wrong as Defense did lay out three options that the president would have: bombing Afghanistan through the use of missiles, combining missiles with long-range bombers, or missiles, long-range bombers, and ground forces. The first option of using cruise missile strikes was how President Clinton had

responded to al-Qaeda during the 1990's, but this was seen as a "half-measure" by Bush. The second option would use cruise missiles along with bombings that would last for several days. Again, Bush disliked this option. The final option combined the cruise missiles and bombings with ground troops. This option was problematic because deploying a large number of troops would take months, especially to the landlocked country of Afghanistan (Rumsfeld, 2012, p. 359). President Bush made clear that he wanted the third option because only having boots on the ground could be effective.

There existed a multiplicity of problems with trying to put military forces in Afghanistan that had to be addressed before this option could be fully realized. Afghanistan was known as the graveyard of empires because no ground army had successfully occupied them, including Alexander the Great, the British, and the Soviets. Geo-spatial and human intelligence in the country was also lacking. Defense did not know how the locals would respond and did not have accurate pictures of the terrain. The Navy would be practically useless in the conflict because Afghanistan is landlocked, and the treacherous mountains of Afghanistan would make it difficult on the ground forces that actually made it there. Furthermore, Afghanistan was surrounded by enemies of the US or countries that had no relationship with America (Rumsfeld, 2012, p. 370). All of this together created an almost impossible situation and would take months to overcome, which came with its own difficulties. If the US waited, two months being the minimum for a large invasion, it would allow the Taliban to prepare for the attack, al-Qaeda to relocate, and may have eroded popular support for the war.

The US needed to bring the Central Asian republics to their side, particularly Uzbekistan and its leader Islam Karimov, for logistical purposes. Uzbekistan and Tajikistan would provide valuable logistical support necessary for a ground invasion. Because Afghanistan is landlocked,

the U.S. would need bases close to the country to move personnel and supplies into it. This is why President Bush sought the aid of President Vladimir Putin of Russia to get the former Soviet republics to help America (Bush, 2010, p. 196). Finally, Secretary Rumsfeld successfully met with Sultan Qaboos of Oman to enlist his support in the conflict. Sultan Qaboos immediately agreed to help the United States because he firmly believed that Islamists were a grave threat to his country and the West. Rumsfeld got the Sultan to agree to a U.S. base on Masira Island off the coast of Oman where America could place its C-130 aircraft (Rumsfeld, 2012, p. 381).

Deputy Secretary Paul Wolfowitz laid out the possible option of invading Iraq instead of Afghanistan, but this was quickly dismissed by everyone involved. Wolfowitz did contribute by saying Special Forces should definitely be part of the first response. Unconventional warfare would go through the Special Operations Command (SOCOM) during the War on Terror and SOCOM's Special Operation Forces. SOCOM "believed that small guerrilla-like groups of men, armed with linguistic and cultural expertise, were more effective than industrial-age tank and infantry divisions manned by citizen conscripts…" (Kaplan, 2005, p. 192). The Combined Joint Special Operations Task Force knew that this was meant to be a war by, with, and through the local Afghans (Herd, 2013, p. 80). They were meant to give the tools necessary to win to the local fighters, not entirely take the fight on themselves. Counterinsurgency operations by occupying powers that do not utilize indigenous populations, even if for their benefit, are perceived as attacks on the entire community, not just the insurgents. By working with the Northern Alliance, a combination of Tajiks, Hazarra, and Uzbeks, and anti-Taliban Pashtuns, the U.S. focused on providing air support to the local fighters (Collins, 2011, p. 48).

An important aspect to all of this was both Rumsfeld and Bush's concern that Afghanistan would become another Vietnam. Bush thought one of the problems in Vietnam was

President Johnson's obsessive micromanaging, something he wanted to avoid (Bush, 2010, p. 195; Rice, 2011, p. 96). Johnson would pour over maps of Vietnam and try to control the entire campaign. This allowed the enemy to practically tell when sorties would happen and plan accordingly. Rumsfeld also did not want to see the Vietnamization of the war happen the same way. According to Rumsfeld, President Nixon and Secretary of Defense Laird would have been more efficacious if the South Vietnamese had been required to fight for themselves since the beginning (Rumsfeld, 2012, p. 373). Many have since compared America's operation in Afghanistan to Vietnam, so it is interesting to note that in the early decision making this was something the administration wanted to avoid.

Operation Enduring Freedom

The final plan by the Pentagon was a marked improvement on the previous ones offered at Camp David and would become the basis for Operation Enduring Freedom. It would start with the first two options previously offered by using cruise missiles and bombers to target the Taliban's military installations (radars, air-defense systems, command-and-control facilities) (Rumsfeld, 2012, p. 374). Then strike fighters from aircraft carriers from the USS *Enterprise* and the USS *Carl Vinson*, B-2 bombers from Whiteman Air Force Base, and B-52 bombers from Diego Garcia would go after terrorist targets in Afghanistan. Special Forces would penetrate the country by helicopter to join the Northern Alliance and other anti-Taliban fighters. These Special Forces would have the ability to call in American air power and offer support for locals. Following all of this would be several thousand regular forces to eliminate the remaining enemy forces. Combined with all of this would be the CIA's efforts in the country that would have already begun working with the Northern Alliance. Operation Enduring Freedom would have

two parts: October 2001-March 2002, which was primarily conventional fighting, and after that was primarily counterinsurgency (Collins, 2011, p. 47). America started the bombing campaign in Afghanistan on October 7 and began sending in Special Forces and paramilitary units the following day. Despite hitting the compound of Mullah Omar and killing several of people in his household, the leader of the Taliban would escape (Grenier, 2015, pp. 134-35).

Along with the initial bombing campaign, the US wanted to alleviate the problems that had accrued under the Taliban's regime and encouraged relief efforts. As previously mentioned, the Taliban led one of the most brutish totalitarian states in the world where women had no rights and minor offenses could lead to harsh corporal punishments. This is why Andrew Natsios, the director of the US Agency for International Development, was told to come up with a plan to support assistance. In fact, before America began bombing military targets it dropped several tons of food supplies for the Afghanis. As another way to alleviate the problems caused by the regime, Dr. Rice also added freeing Afghan women to America's policy goals early on.

On November 12, the Taliban fled the capital of Kabul, and around the same time the CIA sent a special forces squad to Jalalabad to go after Bin Laden (Bergen, 2011, p. 70). But Bin Laden had moved to Tora Bora, located near the Khyber Pass and Federally Administered Tribal Areas. The Battle of Tora Bora in early December happened between the CIA and Afghan militias on one side and al-Qaeda fighters on the other. Although this was meant to be a decisive battle, taking out the majority of al-Qaeda and its leader, problems ensued for two reasons. First, General Tommy Franks did not send more troops to supplant the forces on the ground based on the "light footprint" argument, and he was not convinced that Bin Laden was actually there. As America had already successfully taken most of the country with few soldiers, General Franks did not want to increase the forces there and get bogged down. Not to mention, America's

supposed allies at Tora Bora under Hazrat Ali took bribes to let al-Qaeda fighters escape (Naylor, 2005, p. 24). Second, the military assumed that the Pakistanis would cut off al-Qaeda fighters going into their country. Pakistani troops had moved to the Indian border after a terrorist attack on the Indian Parliament that led to Indian mobilization on the border as well and could not catch al-Qaeda fighters that came through the Afghan border (Grenier, 2015, p. 307). By not having troops in position to take out al-Qaeda, the U.S. would have to continue this conflict for over a decade, which is what would lead to the drone program in Pakistan.

On December 5, 2001, the opposing sides signed an agreement that appointed Hamid Karzai as the interim executive, allowed an international peace keeping force into Kabul with the Northern Alliance vacating the area, called for international assistance in fighting crime, narcotics and terrorism, and instituted the 1964 constitution until they formed a new one (Collins, 2011, p. 65). Karzai, the future president of Afghanistan, was one of the Pashtun tribal leaders who opposed the Taliban that the CIA had attempted to assist with an uprising in spring 2001 (Grenier, 2015, p. 137). He surreptitiously entered Afghanistan through Kandahar and would actively participate in several battles, including at Deru Juy, Tarin Kowt, and Shawali Kowt. From December 13, 2003, to January 4, 2004, a 502 member Constitutional Loya Jirga, meaning "grand assembly," met to create the government of Afghanistan. The constitution would establish a presidency with a five-year term; the president could be elected twice and served as both Head of State and Head of Government. It created a bicameral legislature with a lower house, Wolesi Jirga, and an upper house, Meshrano Jirga. The constitution also guaranteed the rights of women, allowed the establishment of political parties that do not clash with Islam, and formed a secular supreme court. This was the basis for building up Afghan governance.

In January 2002, when allied commanders and diplomats came to Afghanistan they found a country in a dire situation where 80% of the schools were destroyed and lew economic opportunities existed (Collins, 2011, p. 63). The last battle of the conventional phase was Operation Anaconda that neutralized a Taliban and al-Qaeda stronghold in the Shahikot valley in March 2002. This was a complicated affair that revealed several problems in military hierarchy, but an important endeavor nonetheless. U.S. forces most likely killed 150-300 al-Qaeda fighters, but probably just as many escaped (Naylor, 2005, p. 376). Lieutenant Colonel Pete Blaber, the Delta Force officer commanding the Advance Force Operations, knew that Operation Anaconda was not the end at all. Comparing the border with Pakistan to Cambodia during the Vietnam War, he argued for cross-border missions as the border became "a barrier to U.S. troops behind which their enemies found succor" (Naylor, 2005, p. 377). This would become a prescient observation still influencing American policy today. Sanctuary in Pakistan allowed the Taliban to rebuild its forces through the drug trade, charity, and al-Qaeda (Collins, 2011, p. 72). They would use this to redouble their efforts against the American and NATO forces. For example, from 2004-09, suicide bombings increased fortyfold, but the Taliban focused on the Pashtun controlled territory. One of the reasons the U.S. had comparatively lower causalities to other conflicts is due to how poorly trained the Taliban were. As some soldiers noted, the Taliban do not need to aim because Allah will have the bullet hit the target if the deity so chooses (Herd, 2013, p. 137).

One of the most important events during the counterinsurgency phase came with the surge, originally designed by the Bush administration in 2008; it came to fruition under the Obama administration in 2009 and 2010 (Collins, 2011, p. 81). There were 38,000 American troops and 30,000 allied forces in Afghanistan, but the surge would add another 21,000

American troops in 2009 and 30,000 American troops and 10,000 allied troops in 2010. Also importantly, General Stanley McChrystal would take over as the U.S. and ISAF commander. General McChrystal was an especially astute choice as he understood the fundamentals of counterinsurgency and occupation. For example, he would regularly visit different tribal leaders simply to have tea with them. This may seem like a waste of time, but General McChrystal knew in Afghan culture that such behavior was expected between friends. Afghans are not purely motivated by economic interests; culture and religion matter to them. Part of that is a basis of trust, which can only come from spending copious amounts of time with the tribal leaders. Once trust is established, they will be more willing to give intelligence over that could help neutralize targets. Important operations during the surge were in Helmand and Kandahar where U.S. forces successfully "cleared" these provinces of the Taliban, but holding onto them and building up the economies and infrastructure was difficult (Collins, 2011, p. 86).

Seeking improved relations with Pakistan was also important for the surge, but this would have mixed results. The U.S. had to utilize diplomacy as a means to achieve its military and intelligence objectives. There were a number of countries that the U.S. needed to convince to support its cause in fighting al-Qaeda. The first was Pakistan, the only country that had officially recognized Taliban Afghanistan. In addition, the intelligence services of Pakistan often worked with Islamists in Afghanistan and Kashmir, adding a layer of complexity to the situation. However, President Bush had laid out the strategy that those who were not with the United States were enemies; the world had become black and white. At the beginning of the war Deputy Secretary of State Richard Armitage first contacted Pervez Musharraf, the president of Pakistan, and let him know the new conditions of the world. Either Pakistan would support American efforts in Afghanistan and end its relationship with Islamists or American power would turn on

them next (Rice, 2011, p. 91). Tenet joined Armitage's efforts by appealing to General Mahmood Ahmed, Pakistan's intelligence chief, by arguing it would benefit the country to side with the United States (Tenet, 2007, p. 180). This would prove to be a complicated relationship throughout the War on Terror and plagues decision making today towards drones.

President Obama, though, did not believe in what he called an "endless war," and in July 2011 he explicitly stated that America's troops would return. Unlike previous great powers and hegemons, America has usually balked at the idea of a never-ending state of war (Kaplan, 2005, p. 186). Previously, President Bush stated on September 20, "Our war on terror begins with al-Qaeda but it does not end there. It will not end until every terrorist group of global reach has been defeated." These competing ideas were in contradistinction to each other and would problematize how the U.S. engaged the War on Terror. Niall Ferguson, the popular historian and defender of empire from Harvard, predicted in 2004 how both Afghanistan and Iraq would go when he discussed historic overseas excursions by American based on previous interventions (Ferguson, 2004, p. 48). He pointed out that America will usually have an impressive initial military success followed by a misunderstanding of indigenous sentiment and a strategy of limited war with gradual escalation of forces. Then the American electorate will become disillusioned with the idea of a prolonged war, prematurely bring democracy to the country, but then Americans' economic consideration will supersede foreign policy concerns. Finally, the United States will prematurely withdraw its forces before fully achieving their strategic objectives. Ferguson perceptively delineated exactly what would happen in both conflicts.

Looking Forward

The raid that killed Osama Bin Laden on May 1, 2011 by Special Forces was the end of a ten year odyssey. Bin Laden was located in Abbottabad, only a short distance from Islamabad. Because he was located in an urban terrain it would have been impractical, and possibly unethical, to unleash a Hellfire missile to neutralize him. Although one might argue for the ethical nature of such a bombing, it would have done little more than produce a crater without verification of Bin Laden's corpse (Mazzetti et al., 2011, np). Instead the U.S. sent in SEAL Team 6 in Operation Neptune Spear to capture or kill Osama Bin Laden. The SEAL team entered Pakistan with two specially equipped helicopters and dozens of commandos. Then they penetrated the compound in which Bin Laden hid, corralled the non-combatants into a room, and shot the head of al-Qaeda in the head. After intelligence analysts confirmed the body was Bin Laden's, the SEAL team exited Pakistan, leaving behind only four other corpses (Gall, 2011, np). Yet this was not the end of al-Qaeda as Zawahiri would take over following Bin Laden's death and other branches of the organization would continue to flourish. Although Operation Enduring Freedom officially ended in December 2014, the United States has kept a presence in the country as al-Qaeda and the Taliban still remain in the region, despite not having their former strength. In fact, the Taliban has committed multiple attacks since the majority of American troops have left and continue to gain ground, and al-Qaeda still plots terrorist attacks around the world under the guidance of Zawahiri. Operation Freedom's Sentinel (America) and Operation Resolute Support (NATO) continue to aid Afghan security forces through training and counter-terrorism, which creates a basis for drone warfare still happening.

Michael Scheuer, who was the CIA's al-Qaeda expert, wrote, "The first job of an insurgent organization like al Qaeda is neither to stand and fight nor to be able to hit its foe with

a single, fatal blow. Its first responsibility always is to be positioned to prevent its annihilation by a single, comprehensive military strike or campaign by its always more powerful enemy" (2004, p. 60). Survive they did. After 2001 and Operation Enduring Freedom, it seemed that America decimated al-Qaeda as a terrorist organization. Al-Qaeda would evolve as an organization and change its network model (Vidino, 2014, p. 21-22). One way was to encourage domestic radicalization and homegrown terrorism, like the Boston Marathon bombers in which the Tsarnaev brothers acted independently. The other way al-Qaeda would change is where the domestic terrorist gains contact and training with the organization, like both Najibullah Zazi and Faisal Shazad who planned attacks in New York City. This evolution does not preclude externally led attacks like Umar Farouk Abdulmutallab's attempt to blow up Northwest flight 253 with explosives hidden in his underwear. Global jihadism would become "a polymorphous phenomenon—not an amorphous one" (Hoffman & Reinares, 2014, p. 618). Besides encouraging domestic radicalization, al-Qaeda also decentralized and allowed the creation of branches across the globe, including al-Qaeda in the Arabian Peninsula (AQAP), al-Qaeda in Iraq (AQI), and al-Qaeda in the Islamic Maghreb (AQIM). Al-Qaeda core has survived the invasion of Afghanistan, evolved, and consistently directed jihadist attacks across the world.

Conclusion

The War on Terror against al-Qaeda and its affiliates is a long-term war, so this has to be part of the moral calculation for a more just political order. Al-Qaeda's history, beliefs, and organizational structure show that the group requires special attention when considering drone warfare. It is a hierarchical and network organization based on Islamism, and it is transnational with connections and attacks across the globe. Osama Bin Laden directed his organization to

attack the homeland of the United States because he thought it would bring down the Middle Eastern authoritarians he opposed. His ideology, rooted in a particular branch of Islamic jurisprudence, allows al-Qaeda to kill as many non-combatants as possible. Terrorists are always cognizant of their audience, but al-Qaeda's is only Allah. Like other religious terrorist groups, they do not mind killing high numbers of non-combatants to achieve their objectives. Moreover, as long as the U.S. continues to see the Middle East as a strategic interest, then they will have troops in the region and intervene when necessary. Therefore, al-Qaeda will never stop going after America and its allies and attacking military and civilian targets. Also, like other terrorist groups, al-Qaeda relies on its hierarchy and specialization of combatants like bomb makers and trainers. Killing these terrorists undermine and degrade al-Qaeda's abilities to further attack non-combatants. Understanding al-Qaeda and its affiliates is important to know why drones are a useful tool to use against them. America will have to use a continuous offensive against al-Qaeda, its affiliates, and other Islamist organization in order to eliminate the threat.

President Bush's ideological orientation and legal interpretation would frame how the administration would approach the conflict, and the legal paradigm shifted to providing stronger tools for war. Bush thought of the conflict with al-Qaeda as a war, which is why he sought and received an authorization for the use of military force. This would place the War on Terror with the law of armed conflict. In addition, Bush would push for the Patriot Act and use the legal and constitutional interpretations of John Yoo and Jay Bybee. Terrorists would be treated as unlawful combatants under American law, which has a long tradition in warfare. Unlawful combatants do not receive the same level of protection that lawful combatants do, and it is easier to use lethal force against them. Also, this is why the CIA would be a central organization in this fight as unlawful combatants mean para-military and clandestine tactics are more acceptable. Drones fit

within the ideological and legal paradigm of war against lawful and unlawful combatants, but especially the latter. Targeting killings are a legitimate, effective, and accepted tactic in warfare, particularly against terrorist and insurgent organizations as discussed later in this study. Much of the foundational justification in the use of drones against al-Qaeda came at the start of the War on Terror, which is why it is important to start with contextualizing the conflict.

CHAPTER SIX
OPERATIONAL CONTEXT: IRAQ, ISIS, AND AL-QAEDA'S AFFILIATES

Introduction

Since invading Iraq in 2003, the United States has consistently failed to achieve its objectives of full democracy, a legitimate government, and security as jihadist terrorism has flourished there since the civil war began. Daniel Byman noted, "U.S. efforts against jihadists in Iraq are bound up in the broader campaign to bring peace and good government to Iraq" (2008, p. 232). Byman further predicted that once the U.S. left Iraq, the jihadists "who would rise from Iraq's ashes would be far more capable fighters than they were when they first arrived in the land of the two rivers" (2008, p. 240). The Arab Spring further complicated matters by allowing jihadist to spread further throughout the region. Al-Qaeda core was America's primary enemy because of their attack on 9/11, but the fight against Islamist terrorism has spread with wars in Afghanistan and Iraq. Now the United States must fight ISIS and al-Qaeda affiliates like al-Qaeda in the Islamic Maghreb, al-Qaeda in the Arabian Peninsula, and al-Shabaab in Somalia. All of these threats have spread American counter-terrorism operations beyond Afghanistan and Pakistan, and it important to understand them, like understanding al-Qaeda core, as drone warfare has been and will be used further to contain these threats.

Operation Iraqi Freedom

Afghanistan was the opening salvo of the War on Terror, but the Bush administration did not stop with removing the Taliban and trying to neutralize al-Qaeda. President Bush would establish a justification for going after totalitarian regimes that sponsored terrorism and sought weapons of mass destruction. His first target under what would become known as the Bush

Doctrine was Saddam Hussein's Iraq, a country the U.S. had already fought in 1991. Iraq was a monarchy and colonized until 1958 when Iraq had its "revolution" and different factions of Sunni Arab nationalists vied for power until 1968 when under the Baathists won. It was not until 1968 when a secular, nationalist, Arab, Baathist (socialism) state existed. In 1925 the Constitution Iraq was a Kurdish and Arab state, but the development of oil and the emergence of a police state changed that. Baathism was a secular ideology that suppressed the discord of Sunni and Shia sectarianism. Under Baathism, Iraq also became a generous rentier state like in the Gulf. Iraq was a convoluted, if highly authoritarian. There was an urbanized middle class in Baghdad and tribal in the West, South, and North. Saddam also negotiated autonomy with the Kurds, creating a relationship between the Kurds and central government. It was far more complicated than just the Kurds hating Saddam. There was an administrative separation over time for the Kurds. By the time of Operation Iraqi Freedom, Saddam Hussein led a fascist state that made all the different aspects of society almost entirely dependent upon the government for their material lives.

Justification for Invasion

As mentioned in the previous chapter, the Bush administration was dominated by neoconservatives in many foreign policy posts. Based on their Straussian philosophical foundation, neoconservatives advocated a certain type of "freedom agenda." A salient argument during the Cold War when men like Lech Walesa and Aleksandr Solzhenitsyn fought totalitarianism, but it did not play out the same way in the Middle East. The fundamental idealism of the neoconservatives and the freedom agenda put democracy first and stability second. Dr. Rice argued that the United States had sought stability at the expense of democracy

for six decades, but that by doing so America achieved neither (2011, p. 325). Liberty could only exist, they further argued, if everyone else is free as well, rejecting almost entirely the realist tradition. But they attempted to redefine realism by redefining what constituted the national interest—interests and values would become combined under this administration. Following this train of thought, the Bush administration would articulate the Bush doctrine that has four parts (Bush, 2010, pp. 396-97). First, the U.S. would not make a distinction between terrorists and the states that harbor them as they will be equally culpable. Second, America would go abroad to seek and eliminate threats. Third, the U.S. will now use preemptive/preventive kinetic action in order to avert further attacks. As President Bush said in his 2002 State of the Union, "I will not wait on events while dangers gather. I will not stand by as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons." Fourth, the United States will "advance liberty and hope as an alternative to the enemy's ideology of repression and fear." All of this would create the ideological framework and justification for America's invasion, regime change, and occupation of Iraq.

Besides an ideological justification and belief in universal human liberty, there was a religious layer to the administration's thinking. Along the lines of the Augustinian thought, Bush believed in evil and that it must be confronted (Bush, 2010, p. 368). One quote he liked came from Edmund Burke, the eighteenth-century British Whig. "The only thing needed for the triumph of evil is for good men to do nothing." Such religiosity and belief in the moral imperative of fighting evil in Iraq did not just stay with President Bush. Much of the military accepted this view of the world. One poignant event comes from soldiers waiting to deploy in Kuwait (Kaplan, 2005, pp. 315-16). The chaplain gave a sermon from Deuteronomy 26:4-10

about the Hebrews' bondage in Egypt and how the Lord brought them out of it. The implication being that the soldiers moving forward would be doing the Lord's work by removing Saddam's bondage of the Iraqi people.

The Bush administration also put forth specific arguments justifying an invasion of Iraq rooted in Saddam's violations of international law and threats to American security (Bush, 2010, pp. 228-229; Tenet, 2007, pp. 289, 335). Saddam Hussein was a state-sponsor of terrorism, especially Palestinian terrorists by paying the families of suicide bombers, had fired seven hundred times at pilots enforcing the no-fly zone, attempted to assassinate President George H.W. Bush, defied sixteen UNSC resolutions, engaged in significant violations of human rights, pursued weapons of mass destruction, and had used weapons of mass destruction on his own people (the Kurds in 1988). They would further use legal justification as to why the United States should remove Saddam from power. In the late 1990's, Congress passed the Iraq Liberation Act, compelling the U.S. to "support efforts to remove the regime headed by Saddam Hussein from power in Iraq to promote the emergence of a democratic government." In October 2002 Bush would receive official statutory authorization from Congress to invade Iraq. Later in November 2002 the UN Security Council passed Resolution 1441, stating that "the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations." All of this, the Bush administration argued, created a *casus belli* and legal justification for war.

Yet the weakest argument the Bush administration created was the connection between Iraq and al-Qaeda. Contrary to what the Bush administration argued, there was not a strong connection between Saddam Hussein's Iraq and al-Qaeda. President Bush had argued in his 2002 State of the Union address that "Saddam Hussein aids and protects terrorists, including members

of al-Qaeda." As previously mentioned, Bin Laden actually tried to fight Saddam after the latter invaded Kuwait, viewing such a fight as a holy war. Certain al-Qaeda members most certainly met with Iraqi officials while the group resided in Sudan, but this relationship did not extend to state sponsorship of terrorism against the West (Bergen, 2011, p. 135-36). The other supposed major evidence for a connection between Iraq and al-Qaeda came from a meeting between Mohammad Atta, lead 9/11 hijacker, and Ahmed Khalil Ibrahim Samir al-Ani, an Iraqi agent. This meeting is unlikely to have happened. The final personal connection was Saddam harboring Abu Musab al-Zarqawi, which was a key argument by Colin Powell at the United Nations (Bergen, 2011, p. 143). However, Zarqawi ran an organization entirely independent from al-Qaeda until 2004, and even then he did not take directions well from Bin Laden. The CIA officially eliminated a link between Saddam and Zarqawi in 2005.

Invasion and Occupation

America's strategy for Iraq was to provide sufficient security in the country before giving power over to the newly democratic and civilian lead government while continuing to train security forces (Byman, 2008, p. 232). Note this is exactly how Ferguson described American overseas operations, typically with the same dire result. Rumsfeld tried to apply lessons he thought he learned from Afghanistan to Iraq, like using a significantly smaller force (F. Kaplan, 2013, p. 56). Of course, his dismissal of General Tommy Franks and rejection of the Joint Chief's suggestion to use four hundred thousand troops would prove to become a disaster for Iraq during the occupation. Although the military did not need such forces to defeat Saddam's military, the lack of troops would prevent the occupiers from preventing chaos, looting, and eventually civil war. Rumsfeld's greatest strategic mistake and failure of leadership came from

his lack of post-war planning (F. Kaplan, 2013, p. 59). He did not want to create a "quagmire" and get bogged down in reconstruction and stabilization efforts, so he simply did not seek or approve plans to do so. This was a considered mistake by Rumsfeld as nation-building was not part of his view of American power. Bush created the Coalition Provisional Authority (CPA) finally in order to manage the occupation of Iraq. The CPA operated under the delusional fantasy that they could revolutionize the culture and society to turn it into a free-market capitalist economy and liberal democracy in only a few short years (Bergen, 2011, p. 155).

L. Paul Bremer, the administrator of the CPA, claims to have foreseen that this would be a long occupation and sought to convince Iraqis and Americans (Bremer, 2006, p. 12). The CPA would have the executive, legislative, and judicial functions of government, practically acting like a Roman proconsul. Bremer would go against this very concept of a long occupation by disastrously implementing CPA Orders No. 1 and 2. Order No. 1 from the CPA, de-Baathification, removed about 30,000 members from the government, including the administrators of government departments, hospitals, and state-run industries (Bergen, 2011, p. 156). De-Baathification efforts would undermine the already difficult rebuilding men like General David Petraeus had done in places like Mosul. Even Mosul University was closed due to this order, the very university Petraeus assiduously worked to reopen and the provisional councils he helped create (F. Kaplan, 2013, p. 75). What the CPA seemed to have missed is that people only joined the Baath Party in order to get government jobs, not out of ideological devotion. Order No. 2 de-militarized the government and removed 400,000 men from the army, intelligence agencies, and the Republican Guard. Bremer believed this would encourage trust in the government from Shias and the Kurds who had suffered historical discrimination under the Saddam regime (Bremer, 2006, p. 55). These orders would surprise American and Iraqi officials,

but Bremer gave a public statement defending his actions as showing "the Iraqi people that the Saddam regime is gone and never will return" (F. Kaplan, 2013, p. 74). But they would create the foundation for the coming insurgency and civil war in the country.

Civil War

Iraq would quickly descend into a civil war and full on insurgency, even though the Bush administration refused to acknowledge this fact for a few years. President Bush forbade people in his administration to call it an insurgency in the beginning. There are three main reasons for violence: latent sectarian violence that Saddam had put down, the incompetence of the CPA that eliminated the army and started de-Baathification (which everyone sees as attacking the Sunnis), and the behavior of the US army itself, which pursued a policy of aggressive kinetic action and an indiscriminate policy of going after anyone connected to the regime. Nor did the U.S. military collect and secure the stores of weapons (ammunition, RPGs, firearms, etc.) from the Iraqi army, and these weapons would be openly sold throughout the country, which would give a means to those disaffected by the decisions of the Coalition forces. The collapse of the Iraqi state, especially due to the fact it was totalitarian, brought about chaos. It had provided stability in an impossibly difficult country to govern. Some neighborhoods of west Baghdad that were upper middle-class seemed governed by the "law of nature" after the state broke up.

America's invasion in 2003 fractured the country, and made re-building the Iraqi state incredibly difficult. When attempting to reassemble the country, the U.S. started with the assumption of federalism to prevent another dictator and to protect ethnic and religious minorities. But only the Kurds had any ability to negotiate. What came out of the rubble was a federalist state with an extremely weak form of federalism and a weak central government. Iraq's

2005 constitution was entirely vague on the devolution of powers and gave only one line about oil. Hence the power struggles began. American led reconstruction activities created provincial levels, but there were still Ottoman structures and administration in the works in the north. The people still expected the central government to provide social welfare. There are three fundamental issues at stake between the north and the rest of Iraq: payments, national hydro-carbon laws, and disputed territories. When the central government started to "Arabize" the Iraqi state, there was a slow movement of populations out. Furthermore, Shias were initially America's friends when the U.S. was hunting Baathists and al-Qaeda, but the civil war really started with the Shia campaign against the Sunnis to settle sectarian grievances. For example, there was an elite Bader corps that takes out part of the former regime and the Mahdi army that was focused on pushing Sunnis out of mixed neighborhoods.

On February 22, 2006, Sunni extremists of an unknown group bombed al-Askari mosque (also called the Golden Mosque), which would bring about a new phase of the intensity in the civil war and represent the plummet into chaos the country faced. Fallujah in Anbar province would become the primary focus of Iraq's Sunni insurgency, bringing al-Qaeda to the fight (Bergen, 2011, p. 164). Fallujah's most salient moment happened on March 31, 2004, when insurgents killed four American Blackwater contractors, set them on fire, and hanged them from a bridge (Bergen, 2011, p. 165). The U.S. Marines responded by killing hundreds of insurgents in Fallujah, which also led to mass civilian deaths. Bremer would stop the operation under pressure from Iraqi leaders; this was widely perceived as a victory for the Sunni insurgents. One reason the American forces had such difficultly eliminating the insurgency was that U.S. forces preferred fighting fixed engagements rather than providing "policing" actions to secure Iraqi cities (Byman, 2008, p. 234). American security forces, for logical reasons, stayed within

compounds instead of venturing out into the population, but that is exactly where insurgents are wont to hide. However, this is exactly what led to the mass terror of the insurgents' campaign. They would go after areas where U.S. force deployment was weak and force the communities to aid them; otherwise the locals would face reprisals without an American presence to protect them.

Military campaigns succeed when they are aligned and subject to political goals, and before the surge one man in the military successfully combined the two. Colonel H.R. McMaster gave one of the defining victories in the Iraqi counterinsurgency when he successfully defended Tal Afar and expelled the insurgent population (F. Kaplan, 2013, pp. 172-73). McMaster was known as a rebellious figure for publishing a book critical of how the generals behaved during the Vietnam War, and he was also known for a lack of administrative skills. He would successfully apply counterinsurgency theory and doctrine to Tal Afar during the summer of 2005. Tal Afar is in the Nineveh province about 40 miles west of Mosul. He achieved his operational objectives by bringing in tribal and town leaders, convincing them to provide intelligence to the military. In addition, he placed his troops in the town and had them sleep, eat, and live amongst the people to gain their trust. McMaster furthered his population centric strategy by building an 8 foot high wall around the town to prevent insurgents from entering in the middle of the night and dolling out large sums from the commander's discretionary funds to pay for civil servants, public works, and local security forces. Despite the best efforts of several other military leaders, McMaster was one of the few to efficaciously apply previous knowledge about counterinsurgency and succeed. His report on his efforts became suggested reading to Rumsfeld from retired General Jack Keane along with Galula's work. Most importantly,

McMaster along with a few others would form the basis for the successfully counterinsurgency during the Surge.

The Surge

As the violence in Iraq increased, Congress put together the Iraq Study Group, later called the Baker-Hamilton Commission after its chairmen, in the summer of 2006. They would produce *The Iraq Study Group Report* on possible solutions to the problem. Their observations were not well received by the Bush administration and were not favorable towards continuing the conflict. Many units in Iraq did not have fully functioning equipment as the desert environment in Iraq is harsh and wears out equipment. The Iraqi army and police were ill equipped, lacked requisite personnel, had poor readiness, and had questionable loyalties of the soldiers and police (Baker & Hamilton, 2006, p. 8-10). Sectarian conflict in politics was also on full display. Since de-Baathification, Sunnis were consistently excluded from participation in the political process, and reconciliation efforts were slow at best. Shia militias killed indiscriminately as a means to dominate the Iraqi state, but the Sunnis militias try to overthrow the state (Baker & Hamilton, 2006, p. 19). Another strategic difficulty for the American occupation was the differing military and political objectives of the coalition forces and the Iraqis (F. Kaplan, 2013, p. 210). Americans wanted to create a representative democracy that respects human rights, an ally in the War on Terror, and to prevent a safe haven for terrorism. Iraq's government wanted, or at least behaved in a way that seemed to want, Shia domination of the government and security forces while punishing Sunnis economically.

Possible military solutions suggested by the Iraq Study Group included withdrawal, staying the course, a surge, or devolution of the state. They rejected withdrawal, but their

suggestion for military policy was to increase the support and strength of the Iraqi military through imbedding more American soldiers in Iraqi units and providing better equipment (Baker & Hamilton, 2006, p. 70-74). Although the Iraq Study Group did directly reject a surge as a policy solution, the Bush administration relied heavily on one sentence from the report as justification for the surge while rejecting practically the rest of it (Baker & Hamilton, 2006, p. 38; F. Kaplan, 2013, p. 207). The Commission did acquiesce and say they "could, however, support a short-term redeployment or surge of American combat forces to stabilize Baghdad, or to speed up the training and equipping mission, if the U.S. commander in Iraq determines that such steps would be effective" (Baker & Hamilton, 2006, p. 73).

National Security Adviser Steve Hadley brought the requisite people and material to President Bush in order to properly implement the Surge and counterinsurgency (Bush, 2010, p. 364-65). These people included Fred Kagan, Eliot Cohen, Colonel H.R. McMaster, and General David Petraeus. President Bush decided that he would send five brigades to Baghdad and two Marine battalions to Anbar province. He did listen partially to the Iraq Study Group by having the troops imbedded with the Iraqis to provide further training. While General Petraeus applied the lessons of counterinsurgency with the Surge, the Anbar Awakening occurred in Iraq in the fall of 2006. Anbar, about 70 miles west of Baghdad, became a place where Sunni insurgents and al-Qaeda operated freely, but roughly 6,000 troops using counterinsurgency along with changing socio-political conditions helped produce stability (F. Kaplan, 2013, p. 243). Al-Qaeda had attacked a police station on August 21 and murdered Sheikh Abu Ali-Jassim; the police successfully fought back while other sheikhs sided with America over the murder. The community responded well, the police force increased forty times its size, combined American-Iraqi outposts went from four to twenty four, and most of the tribes in the province joined the

Awakening. In order to mobilize against al-Qaeda, Sunnis would organize the Sons of Iraq, a large militia group to fight the Islamist organization.

Anbar was important to al-Qaeda as it was meant to be a forward operating position for their terrorist campaign. American soldiers had discovered a document in which al-Qaeda outlined a governance strategy for the province, including a department of education and an execution unit (Bush, 2010, p. 383). Favorable conditions helped with al-Qaeda entrenching itself in Anbar. The province was religiously conservative and had a strong tribal network distrustful of central authority (Philips, 2009, p. 71). Locals and al-Qaeda also had converging interests in the country, but al-Qaeda was especially skilled at "hijacking local grievances" and supporting "insurgencies that typically began for nationalistic or ethnic reasons" (Byman, 2008, p. 230). Al-Qaeda shared enemies with the locals, the Shia and Coalition forces, and provided a financial network to strengthen their economic position. The insurgents and al-Qaeda would eventually split, though, because the Islamist organization flaunted tradition and attempted to impose its will on the tribes (Philips, 2009, pp. 72-73). Members of al-Qaeda tried to marry into the prominent tribes, but local custom forbade marriages to those outside the tribe. In addition, al-Qaeda tried to impose their harsh Salafism on the tribes by breaking the fingers of cigarette smokers, killing women who did not wear the niqab, and stop the veneration of ancestor's tombs. Finally, al-Qaeda interfered in the tribes' pecuniary interests by attempting to usurp their control of the illicit economy established in the province. These issues would help turn the local population away from al-Qaeda and towards the Coalition forces that offered a better way.

Democrats in Congress erroneously opposed the Surge and did not understand how it would be useful when combined with historic counterinsurgency theory. For example, Senator Harry Reid stated, "This war is lost, the surge is not accomplishing anything" (Bush, 2010, p.

382). Secretary of Defense Robert Gates loathed Reid's commentary, and he told his staff a quote by President Lincoln about how Congressmen who "damage morale and undermine the military are saboteurs and should arrested, exiled, or hanged" (Gates, 2014, p. 60). The Surge proved to be a brilliant politico-military endeavor: roadside bomb explosions went from about 500 a month to less than 100, eventually to about 20; civilian deaths went from thousands a month to nearly zero; American combat casualties also went from over 100 a month to fewer than 20 (F. Kaplan, 2013, pp. 266-67). Another important metric of success was the amount of intelligence gathered from local residents. Previously they would have feared reprisals from terrorists and insurgents, but now they started to just the American forces. This would further allow the occupation to be successful as intelligence is the quintessential element of counterinsurgency.

Operation New Dawn

The Iraq war would change from Operation Iraqi Freedom to Operation New Dawn on September 1, 2010. Operation New Dawn would keep troops in Iraq in order to advise and assist the security forces, support counter-terrorism missions, and protect civilians (Panetta, 2014, p. 392). Although the Democrats had opposed the Surge, President Obama could bring the conflict to a close because it seemed Iraq had entered a new era of stability (Gates, 2014, p. 473). Obama gave a speech at Fort Bliss, Texas on August 31, the day before Operation New Dawn would start, where he appeared optimistic yet cautious about Iraq's future. Before America had withdrawn its forces, leaders in Iraq had told Secretary of Defense Panetta privately that they want some U.S. forces to stay in the country to prevent sectarian violence. The Pentagon knew that the U.S. had to keep some forces there in order to maintain stability, but the White House

refused to acknowledge this fact. A key problem with keeping forces in Iraq was the Status of Forces Agreement; Prime Minister Maliki wanted it to go through parliament, which meant it was unlikely to make it. Not many members of the parliament could publicly back a continued American occupation. President Obama and his administration, it turned out, were completely wrong about the future of Iraq. Due to the Arab Spring, chaos spread throughout the region and led to a civil war in Syria. A terrorist organization that had its roots in Iraq and that country's civil war would now pose a threat to Syria, Iraq, Turkey, Jordan, and beyond. Al-Qaeda in Iraq morphed into the Islamic State of Iraq and Syria (ISIS), which now is the biggest terrorist and insurgent threat in the region and took previously liberated cities like Mosul and Tal Afar (Panetta, 2014, p. 394). The Iraq war's failures in execution and withdraw would create the stage for ISIS, a terrorist organization at the center of America's continued fight against terrorism.

Al-Qaeda in Iraq

Abu Musab al-Zarqawi established and led Jamaat al-Tawhid wal-Jihad (Monotheism and Jihad Group) until October 2004 when the group merged with al-Qaeda and became known as the al-Qaeda Organization in the Land of Two Rivers (al-Qaeda in Iraq, AQI) (Byman, 2008, p. 225; Kirdar, 2011, p. 3). Tawhid was in reference to the monistic view of Allah in Islam. AQI would be one of the greatest progenitors of conflict and death during the Iraqi civil war. Zarqawi had his roots, like bin Laden, in Afghanistan and the fight against the Soviet Union. He returned to Jordan a hardened mujaheed and conspired against the Hashemite monarchy, wanting to overthrow the regime (Bergen, 2011, p. 161). The Jordanians would put in him jail for most of the 1990's, but then King Abdullah II granted amnesty to political prisoners upon his ascension to the throne. One particular target of Zarqawi's was the Jordanian kingdom, and al-Qaeda would

give his organization money, an organization that targeted hotels and tourist sites for the millennium celebration in 2000 (Byman, 2008, p. 225). AQI was more successful targeting hotels in 2005 when that November they bombed the Radisson, Hyatt, and Days Inn in Amman, killing 60.

Under Zarqawi's leadership, AQI had a four part strategy by which to confront and defeat the Coalition forces (Kirdar, 2011, p. 4). They wanted to isolate the United States by attacking Coalition partners, like when AQI attacked the UN headquarters in August 2003. Then they would isolate the United States from the Iraqis by going after police stations and politicians and prevent reconstruction efforts by targeting civilian contractors and humanitarian aid. Finally, Zarqawi's primary effort in Iraq was to engage in a form of *takfirism,* or to go after those he considered apostates. This would include extensively going after the Shia as they are one of the most hated targets of AQI/ISIS. Suicide bombers regularly went after Shia shrines and religious processions in the country (Bergen, 2011, p. 168). A strategic decision on his part, he wanted to start a civil war to entrap U.S. forces, which is why one of most important attacks was against Shia leader Sayyid Muhammad al-Hakim in Najaf, a holy city for Shi'as (Kirdar, 2011, p. 4).

Ayman al-Zawahiri, al-Qaeda's second-in-command, noted the problems of Zaraqwi's actions, though. In one letter he wrote to Zarqawi he clearly stated that discrimination between Shia civilians and combatants was necessary. He even wrote, "It is better to leave a thousand atheists than to shed the blood of one Muslim" (Byman, 2008, p. 227). Like the later iteration of his organization, Zarqawi was particularly effective at using the most brutal form of violence to bring attention to his cause. It is even supposed that Zarqawi personally beheaded Nicholas Berg, an American captive in Iraq (Bergen, 2011, p. 163). AQI filmed the beheading and posted the video online, titled "Sheikh Abu Musab Al Zarqawi Slays an American Infidel," which garnered

millions of views. Because of the attention from his brutality, Arabs and Muslims joining the jihad against the Americans would turn to Zarqawi and his organization. ISIS would use similar tactics in the future to reap attention and followers. A modern behavior of AQI that other jihadist organization did not utilize was the use of female suicide bombers along with husband-wife suicide bombing teams (Bergen, 2011, p. 169). Diyala province alone had 27 female suicide bombers from 2007-09.

America would successfully eliminate Zarqawi by following his spiritual adviser until they tracked AQI's leader to a desert compound (Bergen, 2011, p. 269). For good measure the U.S. dropped two five-hundred-pound bombs on the compound in June 2006. After Coalition forces neutralized Zarqawi with the air strike, his second-in-command, Abu Ayyub al-Masri (aka Abu Hamza al-Muhajir), took over the organization. During the Surge and Anbar Awakening, AQI was beat back. So they reformed themselves into the Islamic State of Iraq (ISI) in October 2006 with Abu Omar al-Baghdadi (aka Abdullah Rashid al-Baghdadi) taking the helm. Al-Masri had to play a difficult game and walk a tight rope between al-Qaeda's leadership and the public through the transition (McCants, 2015, p. 16-17). Many around the world did not know where ISI was still part of al-Qaeda or something new entirely. Al-Masri tried to do this by telling al-Qaeda core that Abu Omar al-Baghdadi had pledged his allegiance to Bin Laden, but they did not disclose this publicly because of political consideration. This would become one of their first moves to have other jihadists and countries see the ISI as an actual state. Al-Qaeda's leadership was not pleased with the ISI both for not seeking their approval and establishing a caliphate too soon.

Other jihadists also distrusted the ISI's declaration because the organization was so weak. Their forces would become decimated during this time, and the ISI was moribund. They went

from a force of almost 15,000 to only 3,500 after America killed 2,400 fights and captured another 8,800 in 2008 (Bergen, 2011, p. 271). By 2010, "80% of AQI's leaders were dead or captured…and internal AQI documents later captured paint a picture of devastation" (Byaman, 2015, p. 119). Due to significantly reduced numbers, the organization had to move from a guerilla campaign to traditional terrorist tactics. However, both Abu Ayyub and Abu Omar would die in April 2010 from a counter-terrorism operation (Kirdar, 2011, p. 5). As such, Abu Bakr al-Baghdadi would become the emir of ISI and set the organization on a new path.

Abu Bakr al-Baghdadi

Abu Bakr al-Baghdadi, born in 1971 as Ibrahim Awad Ibrahim al-Badri to a Sunni imam, was a lover of soccer and religion in his youth and incredibly shy. Abu Bakr would wear the white dishdasha consistently and attend mosque rather than spend time with other boys. Religious fervor would inform his education, and his intellectual curiosity was focused on *fiqh*, the legal interpretation of sayings and edicts in holy texts (Warrick, 2015, p. 253). In 1996 he received a bachelor's degree from the University of Baghdad, studying Islamic law and Quranic studies (McCants, 2015, p. 74-75). He would follow this with a master's degree in 1999 from Saddam University, his thesis was to edit a medieval book on Quranic recitation, and then completed his PhD in 2007, after he had joined al-Qaeda. His doctoral work further inquired into Quranic recitation by analyzing a poem on the topic. While he was at university in the 1990's, Abu Bakr joined the Muslim Brotherhood and sided with the ultraconservative Salafist side of the group.

He joined jihadists in Iraq at the latest in 2004 to oppose the American occupation, but the U.S. captured and detained him. Abu Bakr would go to Camp Bucca, a large prison of 24,000

inmates, after his seizure in February (McCants, 2015, p. 75). The U.S. released him as they did not deem Abu Bakr a threat, but he then quickly joined al-Qaeda in Iraq (Byman, 2015, p. 165). While he was detained, the authorities listed him as a "civilian detainee" because there was no evidence against him. The guards actually liked Abu Bakr and saw him as a leader over the other inmates, capable of calming conflict between factions. Camp Bucca was entirely dysfunctional, which is probably why the guards were fond of Abu Bakr (Warrick, 2015, p. 256). Like American prisons, it is not necessarily the guards who will control the prison. In Camp Bucca, the inmates self-segregated based upon sectarian lines, and the Sunni camp at Compound 30 strictly followed Sharia Law. Sunni leaders would also punish with beatings anyone friendly with the guards.

This is also why Abu Bakr's time there was so important. Camp Bucca acted like a meeting place for jihadis, and he would come into contact with Zarqawi's disciple Abu Muhammad al-Adnani (Warrick, 2015, p. 256). Then in detention Abu Bakr formed connections with former members of Saddam's military and intelligence officers (McCants, 2015, p. 76). Abu Bakr's religious expertise and qualifications were also serendipitous for his time there. He could lead prayers and interpret Sharia rules for this Islamist camp. All of this would be training in leadership and networking for Abu Bakr for when he rejoined the jihad against the United States. Abu Bakr took over ISI in 2010 before they moved to Syria. Interestingly, Bin Laden distrusted Abu Bakr's appointment, but ISI's Shura Council claimed he was loyal to Bin Laden. He was an unusual choice as he lacked military experience, but his other qualifications would prove useful. The greatest asset was his doctorate that allowed Abu Bakr to give an authoritative religious justification for the brutality and violence of the group, like the beheadings, kidnappings, and suicide bombings (Warrick, 2015, p. 259). The other major qualification was

coming from Muhammad's tribe. But in 2014 on the first night of Ramadan his life would reach its zenith; Abu Bakr declared the return of the caliphate and renamed himself Caliph Ibrahim (Byman, 2015, p. 165).

ISIS's Beliefs

The foundation of ISIS's ideology is Salafi-Jihadism (*al-Salafiyya al-Jihadiyya*) as described by Abu Omar (Bunzel, 2015, p. 7). (See the ideological history of this in the previous chapter on al-Qaeda). ISIS claims to be a legitimate state and laid out the justification under Islamic law as to why they can claim legitimacy: election by an elite group of electors, designation by the preceding ruler, and taking of power by force (Bunzel, 2015, p. 18). According to its own justification, Alliance of the Scented Ones provided the legitimization by election. This is why ISIS took *baqiyah wa-tatamadad* (lasting and expanding) as its motto (Byman, 2015, p. 170). Along these lines is Abu Bakr's claim to have re-established the caliphate, the temporal authority over the *ummah.* With the downfall of the Ottoman Empire, the caliphate disappeared from the world. Requirements for a legitimate caliph are "being a Muslim adult man of Quraysh descent; exhibiting moral probity and physical and mental integrity; and having *'amr*, or authority" (Wood, 2015, np). Quraysh is the tribe of Muhammad. Furthermore, the caliphate must strictly follow the most fundamentalist form of Sharia Law.

There are also spiritual dimensions to the caliphate, both soteriological and eschatological. If there is a valid caliph, Muslims are obliged to pledge *baya'a*. Otherwise they will die in a state of disbelief and not reap the rewards of the afterlife. In addition, by re-establishing the caliphate the Islamic State could bring about the end of the world (McCants, 2015, pp. 114-16). They accept a specific apocalyptic vision of the world stemming from a

prophecy by Muhammad. After twelve caliphs that were Qurayshi, then the world can end. As there have already been far more than twelve Qurayshi caliphs, ISIS reinterpreted this strain of thought to mean twelve just caliphs, of which there have at most been seven.

ISIS is not entirely limited to spiritual or Islamic matters in their motivations. The caliphate is also a challenge to the Westphalian order of nation-states generally and the Sykes-Picot Agreement specifically. Abu Bakr said upon their victories in 2014, "This blessed advance will not stop until we hit the last nail in the coffin of the Sykes-Picot conspiracy" (Wright, 2016, np). Sir Mark Sykes plotted a design for the Middle East after the British and French would defeat the Ottoman Empire in World War I. Sykes and François Georges-Picot agreed in 1916 to partition the lands between them, which would lead to the modern-day states in the region. Britain had originally told Arabs they could exercise self-determination after the war, but as can be seen, the British reneged on that promise. Many Arabs see the Sykes-Picot Agreement as colonialism, changing one imperial master for another. Besides rejecting Sykes-Picot, ISIS also rejects any notion of joining the United Nations despite claiming to be a legitimate state (Wood, 2015, np). To do so, according to their theological position, would be *shirk* (polytheism). Therefore, joining the Westphalian order would be an act of apostasy; they must bring down the current nation-state system as it currently stands.

ISIS: History and Activities

Although ISI only had about 1,000 fighters in 2010, over the next few years Abu Bakr would engage in the "Destroying the Wall" campaign that freed prisoners from Basra, Baghdad, and Tikrit in order to gain new members (Fishman, 2016, p. 161). An act of protest in Tunisia on December 17, 2010, a fruit vendor's self-immolation, led to revolution throughout the Middle

East. The Arab Spring, as it is now called, provided the geopolitical cover necessary for ISI to get a stronghold outside of Iraq. Following the protests in other countries, Syrians began demanding democratic reforms from President Bashar al-Assad, but he had no intention of allowing his power to diminish. Soon revolt ensued, leading to a civil war, and ISI had the perfect opportunity to gain strength. The group sent an initial cell to make contact with former members of Zarqawi's network about six months after the start of the revolt (Warrick, 2015, p. 251). Syria was a perfect amalgamation of chaos, violence, and lawlessness without the presence of the United States. There they formed Jabhat al-Nusra (the Support Front for the People of Greater Syria), hoping to join the rebellion against Assad. However, in a bit of historic irony, Jabhat al-Nusra would become independent to its parent organization and act as al-Qaeda's branch in the country. ISIS and Jabhat al-Nusra would initially quarrel over oil and how to share in the millions of revenue (McCants, 2015, p. 90). Zawahiri became exasperated with both groups, telling Jabhat al-Nusra to stay in Syria and ISIS to stay in Iraq. This would lead to Abu Bakr declaring his independence fully from al-Qaeda and chastised Zawahiri for patronizingly telling ISIS to stay within colonial borders (McCants, 2015, p. 93). Establishing itself in Syria, though, allowed Abu Bakr to declare them the Islamic State of Iraq and Syria.

ISIS made gains in early 2014 that would set the stage for expanding its power and territory. They successfully took Fallujah in January 2014 and then parts of Ramadi (Fishman, 2016, p. 183). Around this time President Obama made the unfortunate observation that ISIS was only a "JV team" compared to other jihadist groups. His words would soon prove false. Mosul would fall to ISIS in June 2014, becoming their most important acquisition. They did not take the city through traditional means. Rather, they had sleeper cells move into the city to create chaos, and despite ISIS's inferior numbers, they took on the Iraqi army (Fishman, 2016, p. 199). The

battle only lasted a few days. Besides going to war with the Iraqi and Syrian governments, ISIS would also attempt to shore up its power by going after other jihadis (Fishman, 2016, p. 188). They would take Raqqah, which became the capital of the Islamic State, and killed Jabhat al-Nusra's emir in September 2013. Such attacks on other jihadists led Zawahiri to officially declare the connection between the two organizations over. A controversial issue surrounding ISIS is oil, but the group threatened the global oil market by taking over fields in Syria and Iraq. Most significantly the Qayyarah, Omar, Ajeel, and Hamrin-2 fields. They would take the oil directly from the pipeline or tanks, which would yield three million dollars a day for them (Daiss, 2016, np). It would also provide important targets for the United States because oil trucks would have to line up in order to receive the material as they typically sold most of it locally.

Raqqah became important for ISIS both strategically and as a matter of governance (Fishman, 2016, p. 192). The city is only an hour and a half from the Turkish border to the north, near the highway intersection going towards Mosul in Iraq, and leads to Aleppo in the west. Also, ISIS released its *Informing the People About the Islamic State of Iraq* that listed the nine obligations of Islamic governance, including *hudud* (punishment for crimes against divine intent). Such punishments could include stoning, crucifixion, amputation, and flogging for adultery, homosexuality, and drinking amongst other crimes. The city would also allow ISIS to bring back that most horrific of institutions: slavery. ISIS decided that Islamic law allows for slavery when a person is not protected by the Quran (McCants, 2015, p. 112). Yazidis fit that description for them as ISIS accused the religious minority of polytheism because the group believes the devil, though a fallen angel, had repented of his sins. ISIS even allowed the sexual assault of girls that are minors who have not reached puberty.

Disruption of oil markets, slavery, and civil war are all negative, but they are not necessarily threatening directly to the United States. America should care about ISIS as a terrorist organization because of the attacks that are inspired or directed by them. In May 2014, Mehdi Nemmouche attacked the Jewish Museum of Belgium, killing four people. In June 2016, Omar Mateen killed 49 people and wounded over 50 when he shot up a gay night club in Orlando, FL. Paris, France saw one of the worst terrorist attacks in November 2015 when there were three suicide bombers during a soccer game combined with a mass shooting at the Bataclan theatre and other bombings. This attack killed 130 and wounded 368. These are but a few examples of the dozens of terrorist attacks across the globe that has killed thousands. ISIS may view itself as a state, a caliphate, but it is also a sponsor and inspirer of transnational terrorism. What started as an organization to counter the American occupation of Iraq grew into a formidable opponent spreading death and destruction throughout the world.

Beyond Afghanistan and Iraq: AQIM, AQAP, al-Shabaab

Having gone through the biggest operational theaters of the War on Terror, it is also necessary to note and explain al-Qaeda's affiliate organizations and the smaller theaters of the war. The three main threats come from al-Qaeda in the Islamic Maghreb (AQIM), al-Qaeda in the Arabian Peninsula (AQAP), and al-Shabaab in Somalia. As President Obama noted in a speech at the National Defense University in May 2013, America has seen "the emergence of various al-Qaida affiliates. From Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse, with al-Qaida's affiliates in the Arabian Peninsula, AQAP, the most active in plotting against our homeland" (Obama, 2013, np). Al-Qaeda joined with other organization in order "to expand the scope and scale of its operations, gain the benefits of greater local expertise,

better spread innovations and–most important–endow itself and its mission with greater legitimacy" (Byman, 2014, p. 433). As these affiliates are important to al-Qaeda's global strategy, they become important to America's counter-terrorism efforts.

Algeria has seen decades of conflict dating back to decolonization, but the Algerian jihad of the 1990's would form the basis for al-Qaeda's branch in northern Africa. The Salafist Group for Preaching and Combat (GSPC) became the core of AQIM (Byman, 2015, p. 144). From 2003-06 several leaders of the GSPC declared allegiance to Bin Laden, but in September 2006 the group had a "blessed union" with al-Qaeda, as described by Zawahiri.

Al-Qaeda in the Islamic Maghreb has slowly become a terrorist threat to Europe and the West. After the Arab Spring, AQIM took advantage of the situation to amass and acquire weapons, including surface-to-air missiles. They have committee several kidnappings in the last few years, earning as much as $10 million recently from the Spanish government for a kidnap victim. This allows them to buy more arms, and there is a real possibility of AQIM getting some of the MANPADS Libya had in its arsenal. A heavily armed AQIM would allow them to fight counter-terrorist efforts by shooting down helicopters or using SAMs to blow up tanks. Some attack by AQIM has including murdering a family of French tourists (Dec 2007), trying to attack the Israeli embassy (Feb 2008), murdering a US aid worker (June 2009), and trying car bomb attacks in Mauritania (Feb 2011). AQIM is becoming a transnational threat, similar to its parent organization. Besides Algeria, their attacks have also included targets in Libya, Mali, Mauritania, and Niger. They also have very distinct connections with Boko Haram and al-Shabaab. AQIM helped Boko Haram transform from a gang that robbed banks and attacked Christians to committing more lethal terrorist acts, most recently killing 185 people in Kano, Nigeria. It

clearly had the mark of al-Qaeda: suicide bombings and gunmen. Al-Shabaab has also had closer connections to al-Qaeda since 2007, and they have also increased their use of suicide bombers.

The Arabian Peninsula, especially Saudi Arabia and Yemen, have always been a stronghold of Salafism and an important funding source for jihadist terrorists. Bin Laden helped establish AQAP following the 9/11 attacks in order to lead a campaign against Saudi Arabia (Byman, 2015, p. 142). Saudi Arabia successfully neutralized the organization in their country, which forced AQAP to flee to Yemen as its new base of operations. AQAP focused their efforts against the Yemeni government, taking control of several parts of southern Yemen. Their strength would come, like ISIS, after the Arab Spring came to the country. Ali Abdullah Saleh was removed from power in 2012, which gave AQAP the chance to participate in the chaos and power struggle.

One member is especially important to note for several reasons. Anwar al-Awlaki, an American born jihadist, became an influential member in the organization. America would neutralize him with a drone strike, but that was after he had done considerable damage. Anwar al-Awlaki was able to inspire possible jihadists in the West because through "English-language propaganda outlets, like *Inspire* magazine, Awlaki communicated directly to potential recruits living in the West in a colloquial English backed by his own personal story of radicalization in the United State" (Fishman, 2016, p. 167). *Inspire* had an impressive magazine that ran articles on American politics, drone attacks, and one famous article on how to build a bomb (Byman, 2015, p. 143). They also tried to attack the United States on Christmas Day 2009 with Umar Farouk Abdulmutallab's underwear bomb meant to take down a flight. They also tried to bomb US-bound cargo planes in 2010, and again in 2012.

Al-Shabaab is a terrorist group located in Somalia; their name means "the young men" in Arabic. In February 2012 they declared loyalty to al-Qaeda, cementing a previously tenuous relationship (Byman, 2015, p. 145). Somalia was devastated by civil war in the 1990's, and America even tried to intervene in the country to provide humanitarian aid. This would backfire completely for the United States, and their withdrawal from the country would lead Bin Laden to describe America as a "paper tiger." In 2006 Ethiopia invaded Somalia and removed the Islamic Courts Union from power, so al-Shabaab split from them as a far more radical group. The organizations became entwined when al-Qaeda militants from Afghanistan trained al-Shabaab fighters, and now "the two groups currently cooperate closely on everything from indoctrination and basic infantry skills to advanced training in explosives and assassination" (Byman, 2015, p. 146). More of a regional terrorist organization, al-Shabaab has not yet started attacking American and European targets. Al-Shabaab is infamous for its September 2013 four-day assault on a Kenyan shopping mall that killed 67 and injured 200.

Conclusion

Like al-Qaeda core, the affiliate organizations of AQIM, AQAP, and al-Shabaab will endlessly brutalize the local populations and attack targets important to America's strategic interest. These groups, along with al-Qaeda core and ISIS, are the main terrorist threats in the War on Terror, and they will form the basis by which to analyze the ethics of drone warfare. Such groups have been the primary targets of the Bush and Obama administrations with their drone campaign. Fully understanding the context of the global War on Terror, the already successful and failed efforts against transnational terrorists, and the threats they pose will create the foundation by which to analyze the ethics of drone warfare used against them. Continuous

offensive warfare and targeted killings will be necessary because they refuse to negotiate on any of their beliefs. ISIS in particular represents why this is necessary. It is a millenarian group who believe that they can re-establish the caliphate on earth, abrogate the Westphalian nation-state system, and bring about the eschaton. However, ISIS differs from al-Qaeda and other Islamist groups because of their level of brutality. Even Bin Laden balked at the violence from Zarqawi, seeing the high death rate of Muslims leading to a turning away from the population. They have engaged in ethnic cleansing and promoting attacks in Europe and the United States. In addition, the United States has the legal authority to go after these groups because of the statutory authorization for the wars in Afghanistan and Iraq and a Security Council resolution that legitimized the occupation of the country. The activities of the other groups and their connection to al-Qaeda core means the United States is also at war these groups. Drones should be placed within this context because analysis must measure the benefits of targeted killings, the level of collateral damage, and level of force required to stop these atrocities and secure American interests.

CHAPTER SEVEN
DRONES: HISTORY AND LAW

"And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?"-Thomas More, *A Man for All Seasons,* (Act One, scene seven)

Introduction

Conflicts are governed by the laws of war, and it is imperative for any tactic used by the United States to conform to these laws. There are protections for states to use force under international law, and America has met all of the needed criteria to justify its use of force. In addition, there are constitutional, statutory, and common law protections that the executive branch of the government has when waging war. Presidents Bush and Obama have consistently adhered to the legal framework of domestic law and used force within its confines. This chapter looks at the history of drones, how they developed, and then describes the legal justifications for force that the Obama administration in particular has used to argue for the ability to use drones. It ends by describing other bases for presidential power and how they would allow the President to use drones when necessary.

History of Drones

Since 9/11 and the beginning of Operation Enduring Freedom, drones have become quintessential to America's counter-terrorism operations around the world. By 2013 the Department of Defense would possess almost 11,000 drones (Plaw et al., 2016, p. 13). The rise of drones happened in a dramatic fashion with tremendous celerity. Between 2004 and 2007 President Bush only used 9 drone strikes outside of an active war zone, but in his last year that number jumped to 36 (Kaag & Kreps, 2014, p. 4). Compare this to President Obama who used

295 strikes in Pakistan alone between 2009 and 2012. The end of the Bush administration and beginning of the Obama administration certainly saw the creation of the modern drone program. While drone strikes in Pakistan peaked in 2010 and slowly decreased, they would increase elsewhere like Yemen and Somalia.

Drones are meant to have three purposes: air support for troops on the ground, gather intelligence on the enemies and neutralize it, and for targeted killings of enemy combatants. They are preferred by the military and intelligence community for several reasons. First, drones operate differently than manned aircraft and satellites; they can more effectively watch targets than the alternative. Manned aircraft cannot stay airborne for as long of periods as drones, only lasting a few hours before running out of fuel. Contrary to what happens in the cinematic universe of Hollywood, satellites cannot simply be moved in position to see the details on the surface of the earth. Film makers have heard the government can read license plate numbers from satellites and that the U.S. has geostationary satellites. These are not synonymous. Satellites cannot hover; they move very fast, especially the ones that take spy satellites. At 200 kilometers, the satellite will have a 1 foot resolution. At 22,000 kilometers it will have a 100 foot resolution. This means that geostationary orbits are not good for spy satellites. Satellites operate by circling the planet and can only capture so much information for short periods of time. When the altitude is 200 kilometers, the period to go around the earth is 88 minutes and the satellite can see about 1.5% of the earth's surface at any one moment. If the altitude is 500 kilometers, the period is 94 minutes, seeing 3.6% of the earth's surface. If the altitude is 1000 KM, the period is 105 minutes. The satellite is going to get a certain view of a place at a certain time because the plane on which the satellite moves stays the same while the earth rotates. On the other hand, drones can stay in a

location for days and track specific people or vehicles. Technicians can then place the imagery in an archive for further analysis.

Drones, therefore, help "in the mapping of insurgent networks and patterns of life as well as in locating arms caches and hiding places …[there is] a massive archive of drone surveillance footage that can be rewound so that analysts can work back along an insurgent network…." (Gusterson, 2016, p. 22). Combine all of this, and drones have substantial precision capabilities. The lingering of drones over targets means pilots can wait for the best possible moment to neutralize them. Also, the military and intelligence communities argue for the use of drones because they do not require a pilot in the craft, and currently half of pilots trained by the U.S. Air Force are for drones. General David Deptula noted, "The real advantage of unmanned aerial systems is that they allow you to project power without projecting vulnerability" (Gusterson, 2016, p. 22). Many can remember the extreme geopolitical difficulties that came from the incident in 1960 when the Soviets shot down a U-2 spy plane. Francis Gary Powers, the pilot, was sent to prison, interrogated by the KGB, and eventually participated in a prisoner exchange. With unmanned vehicles the U.S. does not have to worry about the capture of pilots or their possible deaths should an accident happen. Although this has operational advantages by not allowing the enemy to extract intelligence from captured pilots, it also provides political advantages. Presidents can use force without having caskets paraded in front of new cameras, which limits the criticism levied against the policy as the threat is only to foreign individuals.

America's drone bases span across the globe from Afghanistan to Djibouti to Seychelles to beyond like a mechanical empire. The United States, typically through the Central Intelligence Agency, keeps bases around the world in order to use drones to neutralize terrorist targets (Turse, 2012, pp. 21-22). One of the key bases, Creech Air Force Base, sits in the desert outside of Las

Vegas, Nevada, far away from any battlefield. There pilots in flight suits direct MQ-9 Reapers and MQ-1 Predators in counter-terrorism operations, but this is far from the only base in the country to do so. Florida, Arizona, Missouri, California, New Mexico, and Ohio all have bases that have important functions in drone warfare. Another aspect to the military program is constant, real-time analysis by soldiers at Langley Air Force Base in Virginia (Turse, 2012, p. 25). The MQ-9 Reapers and MQ-1B Predators are the typical drones used in counter-terrorism and intelligence gathering operations, although the RQ-170 Sentinel and RQ-4 Global Hawks (long-range, high altitude surveillance) can also be used (Kaag & Kreps, 2014, p. 22; Plaw et al., 2016, p. 24). For nomenclature, Q means the craft is a drone; R means the craft is for reconnaissance; M means the craft is armed. The MQ-9 Reaper is for intelligence gathering and reconnaissance. They can go up to 230 miles per hour, have a two pilot crew, maximum altitude of 50,000 feet, and cost about $57 million. The MQ-1B Predator is armed and does reconnaissance, surveillance, and target acquisition. They can go up to 135 miles per hour, have a two person crew, maximum altitude of 25,000 feet, and cost about $20 million.

During World War II the United States sought to emulate the British and used drones as target practice (Gusterson, 2016, p. 9). Soon they would use them as guided missiles in kamikaze-like missions by attaching explosive to the plane and the pilot would parachute out while another pilot in a different plane steered the aircraft. President John F. Kennedy's brother died in a drone operation in Germany when the plane exploded before he could parachute out. Although drones had their origins in World War II in order to aid in navigation, the 1960's saw an expansion of interest after multiple U-2 spy planes went down during the Vietnam War (Plaw et al., 2016, p. 14). Lightning Bugs, as they were called then, were used for intelligence gathering, but they were also useful for bringing down the Vietnamese's MiG jets that would

attempt to intercept them while getting too close to surface-to-air missile bases. These drones did not become popular because transmission of data was not instantaneous. Rather, the film in the drones had to be sent outside the country for development and analysis, limiting their utility for battlefields. Drones came into use by a few different countries in the 1970's and 1980's (Gusterson, 2016, p. 10-11). Israel would effectively utilize them in the Yom Kippur War in 1973 and the First Lebanon War in 1982. While the Israelis fought the Egyptians in the Yom Kippur War, they had a problem with Egyptian air defense, losing several planes to their missile batteries. In order to counteract Egypt's air defenses, Israel would send drones for them to shoot at, which revealed their location. Then Israel would send manned aircraft in a sortie to destroy the target. Iran also used primitive drones when they fought Iraq in the 1980's.

The 1990's saw significantly more interest in unmanned aerial vehicles; the machines would prove useful for Operation Desert Storm and the issues in the Balkans. For Operation Desert Storm, America bought an Israeli drone, the Pioneer, for intelligence gathering. The production of the RQ-1 Predator drones started in 1994, and they were used for surveillance during the Bosnian conflict to gather intelligence on refugee movement and Serbian air defenses. As Major General Kenneth R. Israel noted, the Predator drone "gave NATO commanders the key piece of intelligence that underlay their decision to resume the bombing campaign that, in turn, led to the Dayton Accords" (Plaw et al., 2016, p. 19). Predator drones came from Abraham Karem, an Israeli aviation engineer nicknamed the "Moses of modern drones," who produced the designs for the aircraft in the 1980's (Benjamin, 2013, p. 13). GPS technology and the ability to transmit large amounts of data would allow for pilots to direct drones from thousands of miles away. While the conflict happened in Bosnia, CIA Director James Woosey asked Karem and General Atomics to aid in their intelligence gathering capabilities. Predators were immensely

attractive to the Department of Defense and national security community for its cost-effectiveness and collection capabilities (Plaw et al., 2016, p. 18). First, the long wingspan (48.7 feet) and 115 horsepower engine (a smaller engine that uses less fuel) allowed the Predator to stay in the air for up to forty hours. Second, because the aircraft was unmanned and controlled by a ground station that could rotate soldiers, the Predator could stay in the air for the entirety of the time. Third, its cost was only about one percent ($1.5 million) to that of the F-22 Raptor ($137 million) or the F-35 Joint Strike Fighter ($110 million).

In January 2001 was the first time the U.S. weaponized the Predator when the Air Force added two Hellfire antitank missiles to the craft, along with a daylight camera and a long-range laser designator in order to have up-to-date video intelligence and five-mile targeting capabilities (Plaw et al., 2016, p. 20-21). By 2009 Scorpion missiles would replace Hellfires because they are more precise and cause less explosive damage. Military personnel decided they could arm the Predator because the 1987 Intermediate-Range Nuclear Force Treaty did not apply (Whittle, 2014, p. 183). Richard Clarke, who worked at the NSC, pointed out that cruise missiles have warheads while Predators do not. Therefore it was legal under international law to arm them. They tested the armed Predator on a tank, and the missile would become known as a "tank killer." There were several technical problems with attempting to arm the Predator drone so that it could kill an individual person, not just operate as an anti-tank weapon (Whittle, 2014, p. 193). The C-model Hellfire missile used for the test in the Nevada desert came from the design for missiles used by helicopters only at an altitude of two thousand feet, although the K-model might work. Furthermore, the laser designator used at the time by the Predator did not have a range of five miles, which was needed to accurately fire a missile at ten thousand feet. Eliminating a soft target (the military's preferred euphemism for a person rather than a tank) would work

completely differently than destroying a tank. On impact the missile would send a stream of molten molybdenum formed by a precursor explosion, and this stream of molten molybdenum would create a hole in the side of the tank and provide an entrance for a less-than twenty pounds warhead to enter. Within the confines of the tank the explosion would burn everything in the vehicle. A soft target does not have the walls of the tank, so the missile could go through the hole and explode on the ground.

Before 9/11 the U.S. still wanted to kill Bin Laden. Osama Bin Laden would earlier prove important in the development of the drone. In 2000 the U.S. flew drones over Afghanistan to search for him and other members of al-Qaeda, which was not a new use for them, but the military did not need a base near their target during the "Summer Project." Members of the Air Force stationed at Ramstein Airbase in Germany directed the drones while crews in Uzbekistan directed their take offs and landings (Plaw et al., 2016, p. 20). After the military tested the Predator with a Hellfire missile, the CIA began a cunning plan to kill Bin Laden with this new technology. While CIA officials met with the military and civilian officials behind the Hellfire test, they showed footage captured by a Predator of the "Tall Man in White," Bin Laden in Tarnak Farms, along with other al-Qaeda figures (Whittle, 2014, p. 192). The CIA wanted to kill Bin Laden with Hellfire missiles attached to Predators, and they wanted the military to help them with this project. General Atomics, Raytheon, and the Air Force had only fired a few Hellfire missiles from two thousand feet at a tank, but the CIA wanted them to neutralize a smaller, moving target from at least ten thousand feet. In contrast to the military, the CIA officials openly talked about killing Osama Bin Laden. The military personnel were slightly horrified at the thought because assassinations were illegal and preferred to use euphemisms like "kinetic action." Even just helping the CIA create a weapon to be used for a targeted assassination could

get them all in legal trouble (Whittle, 2014, p. 194). But it would come at an opportune time as Condoleezza Rice, then National Security Adviser, had Richard Clarke draft an executive order for President Bush to begin lethal operations in Afghanistan.

The first day of Operation Enduring Freedom was also the first time a Predator strike occurred in Kandahar, Afghanistan (Plaw et al., 2016, p. 21). Mullah Omar's security team was the target as General Tommy Franks believed the leader of the Taliban was in a mosque. They wanted to bring him out of the building, but he escaped. Directed from a command in a parking lot in Virginia, the CIA and Air Force worked together to target Mullah Omar (Gusterson, 2016, pp. 12-13). Interestingly, the first Predator strike in Afghanistan had a command problem within the military. General Chuck Wald was in control of the operations on October 7, and he was ready to strike Mullah Omar with a few 1000-pound bombs. Then he heard on the radio another person's voice clearing the shot. Neither he nor his deputy knew who had fired the missile. Another of the first drone strikes at the beginning of the War on Terror attempted to eliminate Osama Bin Laden in Afghanistan (Hasian, 2016, p. 32). People saw a "tall man" there with men acting reverently towards him, which indicated this was Bin Laden. However, it turned out not to be him; they killed three non-combatants. This would start, but not finish, the debate on "unknown militants" and whether they were still legitimate targets. Does suspicious behavior meet the requirement? If so, what kind of behavior? Is preemptive action not a legitimate act of warfare, and shouldn't soldiers eliminate threats before they fully materialize? These are called "signature strikes" and do not rely on intelligence, but "patterns of behavior." Signature strikes raise ethical questions of their own and are discussed later.

The wars in Afghanistan and Iraq would be the primary places for drone warfare for much of the program's history. Afghanistan has had over a thousand strikes, making up about

one-fourth of all air strikes in the country (Gusterson, 2016, p. 14). Iraq would also have a high level of strikes, but this would not last long in the Obama administration because the President began withdrawing troops and trying to end the war. But drones would be used outside of active combat zones early in the War on Terror. America first used a drone in Pakistan in June 2004, killing at least four militants in Waziristan (Kaag & Kreps, 2014, p. 28). In 2010 the military decided to move beyond the Predator and started purchasing the Reaper, a more technologically advanced and more expensive aircraft ($20 million). As the Air Force Chief of Staff General T. Michael Mosely said, "We've moved from using UAVs primarily in intelligence, surveillance, and reconnaissance roles before Operation Iraqi Freedom, to a true hunter-killer role with the Reaper" (Plaw et al., 2016, p. 23). This model would have far more destructive power by carrying AGM-114 Hellfire missiles, GBU-12 Paveway II laser-guided bombs, and GBU-38 Joint Direct Attack Munitions. Predators were only capable of carrying two Hellfire missiles. The Reaper could also stay airborne for 42 hours.

What some have seen as problematic with drones is the distance between drone pilots and those they kill, but that was also offered as a justification for the program. Fewer American men and women would have to be placed in harm's way while still able to eliminate threats to the republic. There were similar issues in the early 1990's during the Balkans conflict. The United States spent considerable effort on an air campaign to bring leaders like Slobodan Milošević to the negotiating table. Yet some critics of the war said America was fighting it "at 10,000 feet" with the threat only to the combatants and civilians on the ground. Furthermore, the U.S. would not have to have an extended presence or footprint in a country while still achieving strategic objectives. Although a critique based in a type of "warrior ethos," it would return again for drone warfare. Not everything is perfect with drones themselves either, and the program has had

several short-comings and setbacks (Benjamin, 2013, p. 22-24). In 2009 the Air Force astoundingly admitted that one third of Predators had crashed, primarily in Iraq and Afghanistan. There were a total of 38 drones lost in those two countries. One example includes a crash near Kandahar Air Base because the pilot pressed the wrong button. A drone has also crashed into a C-130 cargo plane in Afghanistan. Technical and human error are the not the only problems. As if from a dystopian film about the usurpation by robots, a drone stopped communicating with its pilot in 2009 in Afghanistan and the military had to shoot it down. The same problem occurred in Chad a year earlier when a drone stopped communications and tried to return to Ireland, crashing along the way.

The Obama Administration and Drones

The drone program was only officially acknowledged by the Obama administration in spring 2012 when John Brennan, who was Obama's counter-terrorism adviser and then his CIA director, gave a speech in defense of the administration's counter-terrorism efforts. This is interesting because the public has known about the drone program since the Bush administration, but as a classified program the intelligence community could neither confirm nor deny its existence. Embassy officials would call drones "Voldemorts," after the villain in the fictional *Harry Potter* series because characters called him "he who must not be named." The Obama administration has given a strong defense of the drone program, and several members of the administration adhere to the logic that it is an appropriate tool for the U.S. during an armed conflict. As President Obama stated during his speech at National Defense University, "Under domestic law and international law, the United States is at war with al-Qaida, the Taliban, and

their associated forces" (2013, np). He would further add, "So this is a just war, a war waged proportionally, in last resort and in self-defense."

Brennan's speech at the Woodrow Wilson Center articulated the administration's defense of the program. He also noted that the United States was at war with al-Qaeda and its affiliates under international law. Brennan offered a specific defense of the drone program when he argued, "There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat" (2012, np). His argument essentially states that because the action is not prohibited by specific international law, it is allowed. Although the latter part of his statement also adds to the legal debate. Can the U.S. use lethal force outside of a "hot battlefield?" Brennan answers yes to that question because he states that neither the UN Charter nor the Geneva Conventions hold that combatant activity and self-defense are limited to a myopic view of "battlefields." In addition, he defends the violation of sovereignty when a country is unwilling to enforce the law and eliminate threats within their own borders.

Brennan also defends the drone program as comporting with the just war values of discrimination, proportionality, and militarily necessary. Because non-combatant immunity is so important to just war theory and international law, Brennan emphasizes that drones only go after military objectives and that unmanned vehicles can more precisely follow this rule by mitigating collateral damage. Drones allow the military and intelligence services to distinguish efficaciously between combatant and civilian. The nature of drones also allow for the criterion of proportionality to be followed, according to Brennan. As an individual terrorist or a small group of terrorists are the targets, the U.S. can limit the number of civilian deaths. Not to mention the

type of ordnances drones employ will also limit destruction and death. Concerning military necessity, Brennan compares the al-Qaeda leaders targeted to commanders of the German and Japanese militaries during World War II. This comparison might seem plausible, but the situation is actually more difficult because the commanders of Germany and Japan were on battlefields and wore uniforms. However, the basic principle holds; leaders in a combatant organization who plan attacks are legitimate targets.

In addition, Brennan laid out the standards and process of review before neutralizing a target on the list. CIA analysts and legal counsel will first determine whether or not the target is lawful, i.e. a military objective. If not, Brennan states they cannot be placed on the list. Next, they will determine "whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security" (Brennan, 2012, np). Just because the person is a legitimate military target does not mean it is strategically wise to use force. Determining strategic importance focuses on significant threats to the national interest, which Brennan defines as an operational leader of al-Qaeda (or an affiliate), an operative training for or planning an attack, or an operative that possesses unique technical skills used for attacks. This is meant as a preemptive action to stop a plot from coming to fruition. As Brennan notes and many counter-terrorism experts accept, capturing terrorists is the preferable action, but that is not always feasible or desirable. One of the more famous cases of targeted killing where capture would have been preferred is Osama Bin Laden, but he was unwilling to leave his compound alive. Important for a democratic-republic, Brennan emphasizes that the process of review is strict, comporting with American ethical and legal considerations. The use of drones is not based on mercurial or capricious decision making. All relevant departments and agencies influence the decision by giving their analysis and input on a particular individual or case. Finally, the

government will also consider issues like sovereignty and whether acting unilaterally in another country is strategically or politically possible.

The Department of Justice under the Obama administration also issued a white paper on the killing of U.S. citizens abroad if they were a senior-level member of al-Qaeda or an affiliate, not in a warzone in which the U.S. was engaged, and actively plotting an attack against America. In order for the government to neutralize the threat, the terrorist must meet three criteria. First, the individual must pose an imminent threat; second, capture is infeasible; third, the operation would be within the laws of war. The paper argues that such members of al-Qaeda described, though U.S. citizens, are not constitutionally protected individuals either through the Due Process Clause or the Fourth Amendment. In *Hamdi v. Rumsfeld,* the Supreme Court followed the reasoning from *Mathews v. Eldrige* in stating that due process is the government weighing the interests of the individual (the right to live) with that of government action (protecting other lives). The plurality opinion in *Hamdi* noted that due to the realities of war kinetic action can be "necessary and appropriate," even against U.S. citizens. Fourth Amendment considerations must undertake a similar balancing of interests. The white paper sought to expand what "imminent threat" meant. Different aspects are laid out on what imminent threat means in the age of global terrorism. First, imminent does not mean that "clear evidence of a specific attack on U.S. persons and interests will take place in the immediate future" (2011, p. 7). Al-Qaeda operatives might disappear before the attack is about to happen, and there might only be a small timeframe in which to neutralize the target. Because al-Qaeda leaders continuously plot attacks against the U.S., the window of opportunity must be relevant, and if he has already engaged in attacks, there is no reason to believe he has abandoned his goal of more attacks. Second, if capturing the target would not be feasible because of undue risk or inability to get the relevant country's government

to help then neutralization would be the only option. Third, all such operations would adhere to the law of war principles: necessity, distinction, proportionality, and humanity.

These issues were addressed more specifically in a memo to Attorney General Eric Holder by David Barron of the Office of Legal Counsel titled *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi.* Barron specifically looks at Federal Criminal Law 18 U.S.C. § 1119(b), "Foreign murder of United States nationals," and what this means for targeting U.S. citizens engaged in terrorism abroad. The memo states, "[A] person who, being a national of the United States, kills or attempts to kill a national of the United States while such a national is outside the United States but within the jurisdiction of another country shall be punished.…" Barron argues that the primary justification by which this law does not apply is "public authority," which means that if the proper public authority, i.e. the government, takes a life or property it is not a crime (2010, p. 15). For example, the government can put someone in confinement and execute them through the means of a trial; a regular citizen could not do this. Congress meant for section 1119 to close a loophole over jurisdiction because of a recent murder that took place in South Korea. Because the public authority justification applies, Barron lays out how counter-terrorism operations against a U.S. citizen by the DoD and CIA fall under it. The DoD's operations constitute the "lawful conduct of war," which is "a well-established variant of the public authority justification" (Barron, 2010, p. 20). Soldiers that follow the rules of war and kill the enemy have not committed murder. In addition, because Congress passed the *Authorization for the Use of Military Force* (AMUF) that sanctioned the President to use requisite force against al-Qaeda and its affiliates, the military's authority was at its maximum. Anwar al-Awlaki was a senior leader of al-Qaeda in the Arabian Peninsula (AQAP), an associate organization of al-Qaeda core; this

makes AQAP a legitimate target under AMUF. Al-Awlaki had plotted unsuccessful attacks against the U.S. already, therefore his citizenship did not matter because the Supreme Court noted in *Ex Parte Quirin* that citizens who work with the enemy may be treated as the enemy under the law of war. The memo uses all of the same reasoning for the CIA part of the operation as well. Two other key points matter. Barron stated that these operations would not violate the laws of war, primarily Common Article 3, because the DoD would only target al-Awlaki while attempting to limit civilian causalities and his continued status as a planner of attacks with AQAP made him a viable military target.

The Bush and Obama administrations utilized both the military and the Central Intelligence Agency to carry out drone warfare (Hasian, 2016, p. 55). Within the Department of Defense Special Forces were placed under the Special Operations Command (SOC) during the Bush administration. Counter-terrorism operations became the responsibility of the Joint Special Operations Command (JSOC), which is where the military's drone warfare program is housed. For over a decade only the military's program was publicly acknowledged, and the CIA's remains heavily classified and covert. JSOC's focus was in "hot battlefields," like Iraq and Afghanistan. But the CIA's program is not limited to traditional battlefields, especially due to the fact terrorists do not typically operate on them. President Obama, though, has tried to transfer most of the authority for the drone program to JSOC from the CIA, forcing the intelligence agency to only gather and analyze intelligence instead of killing combatants. However, there are multiple problems with President Obama's attempt. For example, the CIA and JSOC use different surveillance and communications equipment that can be incompatible with each other.

The CIA's targeting capability is supposedly more proficient and efficient than JSOC's as the CIA can determine if a person is a member of al-Qaeda through signal intercepts, protocols

for leaders to travel, and general behavior. For instance, JSOC sent three separate drones to strike Anwar al-Awlaki and missed all three times in 2010. The CIA set up a base in Saudi Arabia in August 2011 and killed him six weeks later. So, for now, both organizations operate drone warfare. Another important difference between the two programs is the statutory law under which they function. The CIA's missions are classified by Title 50 as "covert actions," which are "activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly…" (50 U.S. Code § 3093). Military and law enforcement activity are not included as covert action. JSOC's activities are under Title 10 (armed forces) that are available to the public, acknowledged by the government, and subject to greater legislative scrutiny. President Obama's administration has taken care to lay out an ethical and legal argument for the drone program and establishing the best institutional support for the operations.

The Legal Right of Self-Defense

The quintessential principle for the use of force under international law is self-defense in which drone warfare as a tactic used in the War on Terror undoubtedly is placed. Self-defense is the ability to respond to aggression, and aggression under international law exists when there is a serious enough conspiracy to threaten grave harm, human security, and state security. Previous chapters describing the conflict between the United States and al-Qaeda (both al-Qaeda core and its affiliates) demonstrate that an armed conflict exists practically and legally. After multiple attacks by al-Qaeda on American targets (Kenya, Tanzania, Yemen, New York, and Washington), under America common law a state of war exists according to *Bas v. Tingy, Talbot*

v. Seeman, and the *Prize Cases* even though al-Qaeda is a sub-state actor. The Court held in *Bas v. Tingy* that there are such conflicts as perfect and imperfect wars. An imperfect war does not contain a full declaration, but hostilities between combatants still exist. In *Talbot v. Seeman* the Supreme Court found that even when full hostilities are not declared, the government can use force and is bound by the laws of war. The *Prize Cases* maintain that a legitimate state is not the only entity that can create a state of war; the state and a sub-state actor can be at war with each other under the Constitution. Osama Bin Laden had also declared war on the United States in his 1996 and 1998 fatwas, bringing about a state of war even without direct hostilities.

A state of war also exists between the United States and the other iterations of al-Qaeda, like al-Qaeda in the Arabian Peninsula and the Islamic State of Iraq and Syria. AQAP has plotted to attack the U.S. and inspired terrorism in the homeland. For example, Umar Farouk Abdulmutallab's underwear bomb in 2009 and Faisal Shahzad's attack in 2010 were inspired through training from Anwar al-Awlaki or communication over the internet with him. ISIS has inspired attacks against the U.S. like the gay night club attack in Florida in 2016 and against American allies like France with the brutal assault in Paris also in 2016. AQIM and al-Shabaab have focused on regional terrorist attacks, but this does not mean a state of war is absent. Both organizations are connected to al-Qaeda core either through direct affiliation or a pledge of allegiance. As such, they are also in a state of war with the United States. Furthermore, they threaten regional stability and allies, which falls under the definition of aggression. Al-Qaeda core, AQAP, ISIS, AQIM, and al-Shabaab continuously threaten the United States and its allies in Europe, Africa, and the Middle East through direct and inspired terrorist attacks. Ongoing acts of aggression by these organizations mean the United States is in a state of war with all of them, which allows for the legal right of self-defense.

The statutory authorization of the *AUMF* in 2001 gives the executive the power to target al-Qaeda members and affiliates to defend the country, no matter where they reside. An important part of the legal tradition of conflict is the declaration of war. Although American common law does not require one for a state of war to exist, like the Quasi-War and the Civil War, the majority of conflicts have had either a declaration of war or statutory authorization. This exists for two reasons. First, a declaration of war eliminates any obfuscation that war or conflict exists. When the United States gives congressional approval for the use of force, it is clear to the public, the government, allies, and the entire international community that a state of war exists. Second, it is considered the moral act of a nation. After 9/11 the Bush administration debated whether or not they should give warning to the Taliban regime or should send in military forces by surprise. Secretary of State Colin Powell said not doing so would make the U.S. similar to Japan during World War II when the Japanese Empire used a surprise kamikaze attack at Pearl Harbor. By passing the *Authorization for the Use of Military Force* the United States met both of these criteria and gave a full legal affirmation of a state of war.

Because an armed conflict exists, the laws of armed conflict apply, which gives greater latitude to the U.S. government in using force against enemy combatants as all combatants are legitimate targets. Geneva Convention Protocol I Article 43 holds that combatants and belligerents do not have to be recognized entities, which means al-Qaeda still operates as a combatant organization under international law. Furthermore, under international law, UN Charter Article 2(4) and 51, a state is allowed to defend itself against attacks, clearly placing the American actions under an armed conflict and an act of self-defense. The UN Security Council passed several resolutions acknowledging the United States' ability to use force as self-defense in Afghanistan and Iraq. UNSC Resolution 1368 condemned the terrorist attacks on September

11 and recognized the rights to individual and collective self-defense, and Resolution 1386 allowed for the creation of the International Security Assistance Force to operate in Afghanistan. Resolution 1441 called for action against Iraq should Saddam Hussein not submit to weapons inspectors, and Resolution 1483 acknowledged the U.S. and U.K. were legitimate occupying powers.

All of these together places the War on Terror within the legal bounds of war/armed conflict and allows for targeted killing as a tactic. And with the changing nature and evolution of al-Qaeda to a multi-headed, network organization, the armed conflict has moved beyond South Asia to the Middle East and North Africa. Drones as a tactic fall within the confines of an armed conflict and a legitimate act of self-defense. This tactic is utilized to eliminate a military target and weaken the organization by neutralizing technical experts and leadership, which is synonymous with other forms of violence used in war. Tanks, guns, bombs, manned aircraft, naval ships, etc. are all tactics used by militaries to achieve theirs objectives of killing combatants and destroying the enemy's hardware. The only difference is that drones are unmanned and a more recent technological innovation, but they still are a tactic of self-defense against a constant threat.

Assassination

Critics of the drone program will often argue that there is not a difference between targeted killings and assassinations, which is problematic because the latter is illegal under international law and banned by executive orders in America. In the UN's *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* in 2013, Christof Heyns acknowledges that signature strikes (another name for targeted killings by drones) is not

established in international humanitarian law. According to Heyns, signature strikes become illegal when there is not sufficient information to determine whether or not the individual is a combatant or non-combatant as the right to life supersedes security considerations in an indeterminate situation. His critique of signature strikes relates to assassination because there is not a direct prohibition on targeted killings by drones, but certain types of signature strikes would be illegal. There exist qualitative differences between the killings of individuals depending on circumstances.

Article 101 of the Lieber Code from 1863 "allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them." Article 148 does not allow under the laws of war someone to "be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage." The Hague Convention (1907) in Article 23(b) prohibits killing or wounding "treacherously individuals belonging to the hostile nation or army." American presidents would ban assassination in several executive orders, especially following the controversial practices of the Central Intelligence Agency and attempted assassinations of Fidel Castro. In 1976 President Gerald Ford issued E.O. 11905 that stated, "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Two years later President Jimmy Carter would expand this ban in E.O. 12036 by including those acting on behalf of the U.S. government. President Ronald Reagan reiterated this ban in 1981 with E.O. 12333. All of this would seem to be problematic for using drones in targeted killings, but there are important differences between an assassination and a targeted killing.

The issue, though, is that no one quite defines assassination. *Black's Law Dictionary* defines assassination as the "act of deliberately killing someone, esp. a public figure, usu. for hire or for political reasons." This definition follows the thought of previous thinkers on international law. Emer de Vattel, a diplomat and legal theorist in the 18th century, helped establish what would become international law through his comprehensive work *The Law of Nations.* Vattel defines assassination as a treacherous murder and condones such activity as a violation of the laws of nations. However, he describes as lawful "surprise" attacks (Vattel, 2008, p. 558). Like when Pepin, the father of Charlemagne, surreptitiously killed his enemy at his chamber, it is lawful to attack and kill specific enemies through surprise such as sneaking into an enemy camp and killing the general in his tent. Grotius slightly differed from Vattel in that he thought "the Law of Nations sanctions the killing of all persons found in enemy territory and of all enemies wherever found, as also the killing of captives and those of whose surrender is not accepted" (Draper, 1990, p. 198). In this argument, Grotius is defending the use of targeted killings in order to protect the security of the country. Eric Holder, then Attorney General, in a speech to the Northwestern University School of Law in March 2012 defended targeted killings as different from assassinations. According to Holder, assassinations are "unlawful killings" (2012, np). During his speech Holder argued the U.S. government's use of lethal force against al-Qaeda and its affiliates is a matter of self-defense, which makes it lawful under international law. As the killing is lawful, it cannot be an assassination and therefore does not violate the executive orders or criminal statutes.

W. Hays Parks attempted to solve the legal problem of assassination coming from E.O. 12333, its meaning and application, in a memo for the Office of the Judge Advocate General of the Army in November 1989. He looks at the meaning and application for conventional military

operations, counterinsurgency operations, and peacetime counter-terrorist operations. Parks defines assassination as a "murder of a targeted individual for political purposes," but it can include the "murder of a private person, if carried out for political purposes" (1989, p. 2). Within a conventional war, the assassination ban does not preclude the use of surprise military attacks against combatants and attacks on combat service support (any participant in hostilities, logistical support, communications, administration, and staff planners). Furthermore, there is no legal distinction between types of weapons used for an attack. Parks argues that "enemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of attack" (1989, p. 4). Counterinsurgency does not have significant legal differences with conventional war concerning targeted killings. Simply because a combatant wears civilians clothes instead of a uniform does not protect the person from becoming a legitimate target. In addition, if the insurgent "falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be assassination" (Parks, 1989, p. 6-7). Finally, Parks addresses the ability for America to use targeted killings during peace time. The United States maintained the right to use force during peace time when another state did not uphold its international responsibilities to prevent violence "originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities" (Parks, 1989, p. 7).

Targeted killing is different from other kinds of killings generally and assassinations specifically because it occurs in the context of war but not in a battle. Assassinations, legally and historically speaking, are the treacherous murder of an individual. Treachery, as understood by Hugo Grotius and Emer de Vattel, involved violating the obligations of good faith a person had to the individual. Typically, this means killing a political figure or the sovereign, but it can also

include the murder of a person through devious means like pretending to be a civilian or refugee. Targeted killings are qualitatively and therefore legally different as they are the killing of an individual combatant to further military objectives, which is legitimate kinetic action.

Executive Authority

Drones raise the issue over whether or not the executive branch has the authority to independently make the decision to neutralize targets under domestic and international law. Constitutional authority previously discussed shows that war making powers are given to the president in Article II of the Constitution. John Yoo and Julian Ku further argue that the executive branch of the government and the president should have the power to interpret international law because the office contains the majority of foreign policy powers (2012, p. 127). The court case that solidified executive authority in the making of foreign policy was *US v. Curtiss-Wright.* In May 1934 Congress passed a resolution that gave power to President Franklin Roosevelt to place a weapons embargo on countries involved in the Chaco War, a conflict in South America between Bolivia and Paraguay over territory. The Joint Resolution (chapter 365, 48 Stat. 811) stated that if the president believes an embargo of arms and munitions will increase the likelihood of peace there, he can make a "proclamation to that effect, [and] it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict." After Roosevelt issued an order that prevented companies from selling weapons to those involved, the government indicted the Curtiss-Wright Export Corporation for breaking this executive order. Curtiss-Wright argued that this amounted to the delegation of power from the legislature to the executive, and therefore it was unconstitutional. However, the Court did not

accept this argument, and in fact, it laid out a strong endorsement of executive powers in foreign policy. Legislatively, there is an extensive list of acts by Congress that give the president significant powers in foreign policy dating back to 1794. Powers these acts give the President at different times include the powers to use embargos, selling of arms, board foreign vessels in American ports, suspend trade, and stop exports.

As Justice Sutherland noted, there is "sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected countries." The primary justification for allowing the President to have broad powers comes from the fact the statute dealt with foreign policy, which is qualitatively and constitutionally different than domestic policy. In domestic policy, the government may only act under enumerated powers and implied powers when necessary and proper. Instead Justice Sutherland appeals to the inherent powers of the federal government of any country to make the necessary foreign policy that is best for their respective country. This power would exist even if the Framers had not written the Constitution because each State in the Union did not have "external sovereignty." The powers of the President in foreign policy are varied, even with specific constitutional checks. He and the executive government will negotiate and make treaties; the Senate cannot interfere in the negotiations and only ratifies the finished version. This is not only a constitutional issue but a practical one as well, which is why the Framers also gave the power to make war to the executive rather than legislative branch. Only the president and the executive branch have the infrastructure and means to successfully execute foreign policy around the world (Yoo & Ku, 2012, p. 133). In addition, foreign affairs require clandestine actions, which Members of Congress or their staff would

readily leak to the public. Therefore, according to the Supreme Court, the executive branch has the power to enforce and implement foreign policy based on the wisdom of the president.

Multiple examples of American history dating back to the Founding show that the executive has been the primary interpreter of international law in order to serve American interests (Yoo & Ku, 2012, p. 141). President George Washington gave a Proclamation of Neutrality in 1793 following the French Revolution; he used the interpretation of Alexander Hamilton in which the change of France's government voided the Treaty of Alliance. Articles 11, 17, and 22 all require the United States to defend France through protecting territories and assets in the French West Indies and on the continent. Washington did this to prevent hostilities from Britain. This was a new interpretation of how treaties would operate as Thomas Jefferson noted. Jefferson argued that international law did not allow the suspension or annulling of treaties when a government changed (Yoo & Ku, 2012, p. 143). President Abraham Lincoln and President John F. Kennedy would also benefit during the Civil War and Cold War interpreting international law for the government to aid the national interest.

An important statutory law that determines the legality of the president using force is the War Powers Resolution. President Richard Nixon's actions during the Vietnam War, primarily those involving the secret bombings into Laos and Cambodia, raised several issues on executive war powers. Therefore, Congress passed the War Powers Resolution in 1973 that laid out specific guidelines for the President on how he must inform Congress of his actions. The Resolution states that the President can only exercise his military authority if Congress declares war, gives statutory authority, or someone attacks the U.S. or its territories. To limit the President's ability to utilize kinetic action, the Resolution requires that the President consult with Congress whenever possible before hostilities. The President is required to report to Congress

within 48 hours should he know of imminent hostilities, send the military into a foreign nation for combat, or sending troops that enlarge the forces already present. After submitting the report to Congress, the President must begin to withdraw troops sixty days after deployment if he does not receive authorization from Congress through a declaration of war or a joint resolution, unless an armed attack occurs that makes it physically unsafe to remove the troops. In addition, the President may have an additional thirty days to withdraw the troops if their safety requires it.

President Nixon immediately opposed the legislation as unconstitutional and vetoed it (Congress obviously overrode his veto). Other presidents have questioned its constitutionality as well. Those who argue for its constitutionality place it under Congress's war powers as they "can regulate also hostilities short of war which plausibly might lead to U.S. involvement in war" (Henkin, 1996, p. 108). The resolution may not have had its intended consequences. Several times after the resolution passed the executive has gone to war without congressional authorization or used "force short of war" like bombings. Examples include President Reagan's invasions of Grenada and Panama, his bombing of Libya, President Clinton's bombing of Sudan and Iraq, and President Obama's use of force in Libya. This Resolution effectively legitimized executive authority to use force at the president's discretion by allowing kinetic action without direct Congressional approval *ex ante*. Combined with *US v. Curtiss-Wright,* there exists wide discretion for the president to legally use force depending on executive preferences and needs. Such power and options conform with the intentions of the Framers to the Constitution because they "designed the executive branch to be a government always in being that could respond quickly and with vigor to unforeseen emergencies and crises" (Yoo, 2009, p. 417). Drones as a tactic fall into this wide latitude as the president has the power to use lethal force and bomb

enemies under this paradigm according to executive discretion. American statutory and common law provide the president with the legal authority to make these decisions.

Conclusion

Considering the previously explained history and context of the War on Terror, the Obama administration gave a justification for the drone program based on the continuous threat that al-Qaeda and its affiliates posed to the United States and its allies. The Obama administration offered the legal justification that there is no direct prohibition against the use of lethal force outside of an active battlefield. They also offered the broader and more accepted justification that the use of drones is an act of self-defense. Self-defense is both legally and ethically allowed when there are threats of aggression or acts of aggression. Al-Qaeda and its affiliates threaten aggression constantly and engage in terrorism regularly, which means self-defense is allowed. It also makes drones legal under statutory and international law. Besides giving a strong legal justification for the use of drones, the Obama administration also established ethical guidelines in order to carry out a signature strike. Government officials will only go after military targets and weigh the costs verses the benefits of neutralizing a target, e.g. looking at the amount of collateral damage and possibility of capture.

Two other legal and ethical issues concerning drones are about authority and assassination. The president has the legal authority to order targeted killings due to *US v. Curtiss-Wright,* the War Powers Resolution, and the historical ability of presidents to have such discretion. Congress, the Supreme Court, and the presidency have all accepted the latitude the commander-in-chief has to use force short of war and engage in self-defense without prior statutory authorization. In addition, targeted killings are not assassinations because it is lawful

and not treacherous, according to the strand of thought from Vattel. Targeted killings are the neutralization of an individual combatant during war but not in a battle. Because the president has the legal authority to order signature strikes and there is procedure to only use force for legitimate military targets, targeted killings by drones are qualitatively different than assassinations. The Obama administration established the legal and ethical justification for the drone program and rooted it in self-defense, military authority, and ethical application.

CHAPTER EIGHT
ETHICS OF DRONES AND TARGETED KILLINGS

Introduction

This chapter looks at the literature and conceptual ethical problems associated with drone warfare in the War on Terror. Chapter One engaged literature that broadly addressed the issues of just war theory and asymmetric warfare, but this chapter focuses on the ethical problems of targeted killings and drones. Although similar in character, targeted killings and drones raise a different set of ethical problems both from just war theory and other war ethics. Questions that arise from these tactics include: Is killing a specific individual ethical? Under what circumstances? What are the societal consequences to drone ware? Is there a problem with the imperalization of war? What does motivation have to do with targeted killings? There are differing ethical perspectives to these questions, and this chapter engages how ethical thinkers have asked and answered these questions.

Targeted Killing

Although the subject of assassination and targeted killings were previously addressed concerning its relationship to the law, there are also ethical concerns of assassination. Assassination evokes a moral uneasiness, which is not a modern phenomenon. It is usually seen as something secret and underhanded, and even the Bible has prohibitions on secret killings. David Whetham asks the question about creating a framework that accepts not all assassinations are morally wrong, just as there is a difference between murders and killing someone in battle. As he says, "Rather than abandoning the rules against assassination completely perhaps there are more satisfying rationales to be found in the existing principles of self-defense or protecting the

innocent" (Whetham, 2013, p. 73). A targeted killing could be considered neutralizing an individual that is a combatant not in the military or on the battlefield. Civilians lose their non-combatant status when they pick up arms or aid the enemy. As long the state following the norms of proportionality and military necessity and does not use treachery, then the killing is morally acceptable (Whetham, 2013, p. 74). Whetham even says that the use of the phrase "targeted killing" may not be necessary as the action could be considered a standard military operation. What separates them from standard military operations, though, is that a targeted killing neutralizes unlawful combatants rather than soldiers in a battle (Whetham, 2013, p. 76).

Whitley R.P. Kaufman addresses this ethical dilemma and starts with distinguishing between military and political leaders. Military leaders are combatant targets and legitimate under just war theory to target, but some leaders fall into an amorphous category (Kaufman, 2007, p. 173). Saddam Hussein and Fidel Castro are military leaders who also govern the country, so are they a military or political target? Political targets are illegitimate by their nature because they lead the polity; killing them leads to chaos. For Kaufman, only those soldiers in ongoing combat are legitimate targets as the just war tradition allows. Other problems that stem from the assassination/targeted killing debate are about the justification or motivation for such an attack. Setting aside the consequentialist and realist justifications, he places assassinations as either punitive or defensive (Kaufman, 2007, p. 174). The ethics of targeted killings partially relies on determining what exactly a terrorist is: a combatant or a criminal. If a terrorist is a regular combatant, a moral problem does not exist. However, what if the terrorist is a criminal instead of a combatant? Then the confines of law enforcement would apply (Gross, 2010, p. 106). Criminals, no matter how horrific their actions or heinous their crimes, do not lose due process rights, and the authorities do not have a legal ability to summarily execute them. Michael

Gross argues that capital punishment requires a trial and due process to be a justifiable killing. Just war theory recognizes the right to kill a target should they pose a consistent threat even if that threat is not fully materialized, but a right to punish an offender after the fact might not exist. The ethical justification for a targeted killing becomes similar to the legal one. Terrorists have already committed an attack, and it is logical and probable that they are continuously plotting future attacks. This makes terrorists combatants as they are in constant battle even if they are not engaged on a "battlefield" at any particular moment. A terrorist has not laid down arms merely because he is in hiding.

George Lucas points out that if a drone strike happened on an internationally defined zone of combat then the ethical and legal questions would be moot. Killing a regular combatant on the field of battle with ground troops or a piloted aircraft is no different from drones in the same context (Lucas, 2016, p. 171). If the mission could be done with an F-16 and is not problematic, then the same action can be done by a drone as there are already clearly established legal and ethical guidelines the soldier must follow. Because drones are no different than other methods of violence, the real ethical objection is about targeted killings themselves rather than drones. Yet few people who criticize drones will also criticize the use of Special Forces or other methods. Drones elicit a unique fear due to their technologically superiority and conjure an image of a global super power using innovative means to advance an imperialist agenda (Lucas, 2016, p. 175). A morally complex issue related to targeted killing is whether or not civilian services can appropriate kill on behalf of the state. Though broadly accepted that soldiers are morally permissible to kill, spies have historically held a special place in the debate on warfare. However, spycraft and surreptitious means are commonplace in warfare today, especially during

the Cold War. Drones may mostly come from the Central Intelligence Agency, but that does not negate the Agency's legal and moral right to defend the security of the country.

An issue with creating a norm of targeted killing is that other states and non-state actors can use it as a justification for their own causes (Whetham, 2013, p. 78). Whetham thinks abuse could follow the normalization of targeted killings. For example, dictators like Gaddafi and Robert Mugabe branded members of the opposition and even the press as terrorists. If the state designates someone a terrorist (unlawful combatant), then they can ethically (at least according to them) use targeted killings to defend the security of the state. Dictators throughout the world could claim their extrajudicial executions are ethical targeted killings under this paradigm. Whetham brings up a legitimate objection to the moral normalization of targeted killings, but the logic of this objection applies to any ethical reasoning. The just war tradition itself can be used by dictators and authoritarians to justify their actions, even if they are not just. States can declare they have a just cause of self-defense or humanitarian intervention, despite the lack of one. The abuse of an ethical paradigm is not a reason to abandon establishing one, especially if the framework follows acknowledged ethical rules.

Social Problems

Michael Boyle criticizes drones at a societal level. According to him, drones "have an invidious and subtle effect on the social fabric of the societies where they occur. Drones do not just affect their targets, but spread fear and suspicion throughout the society in unexpected ways" (Boyle, 2013, p. 21). The psychological effects, according to Boyle, include "anticipatory anxiety" and terror in the civilian population. People will be too afraid to help victims of drone attacks because of the "double tap." In addition, normal economic and social activities are

disrupted by this fear. Distrust is created between neighbors and tribes because informants will place trackers on possible drone targets. Some argue that these are not legitimate targets, but the personal enemies of informants. Informants themselves contribute to this distrust as communities do not know who will turn them over to the United States to be killed. Then there are the political effects drones have on governments where the program operates. As drones spread fear through the communities this will create a popular backlash against the governments, which threaten their legitimacy. An illegitimate government has a tendency to produce revolutionary politics and can "multiply the ranks of enemies in insurgencies and undermine the social fabric that allows many of these societies to function" (Boyle, 2013, p. 21). This has led some in Yemen to even consider the United States as great a threat as al-Qaeda, which creates new problems for the American fight against terrorists (Boyle, 2015, p. 116).

Boyle offers a different ethical critique than other scholars by discussing the social fabric of society as a moral good. Augustinian just war ethics acknowledge the *tranquilitas ordinis* as the first order of government, and Boyle argues that drones break that down. He acknowledges, though, the social problems possibly created by drones are not a universal problem. Educated, urban-dwelling Pakistanis and Yemenis, for example, understand that on balance the drones are better than unchecked aggression from terrorists who most definitely kill indiscriminately (Boyle, 2015, p. 116). Besides the social problems themselves, Boyle also argues this may violate the proportionality doctrine of just war theory. Moving away from merely a "body count" account approach of proportionality, he brings in the argument that the threat from terrorism may be exaggerated, populations turning against the U.S. should count in the calculations, and that this turning of the population may outweigh the benefits of the drone program in those regions. Boyle adds onto this the criterion of distinction within just war theory. America "may be

subjecting the civilian population to an environment of constant fear and uncertainty that is at variance with the normal interpretation of non-combatant immunity" (Boyle, 2015, p. 117). He is not wrong that some social calculations must be incorporated into the moral reasoning of military action, but none of his ethical challenges fully go against the justness of drone strikes.

First, he underestimates the threat terrorism poses. Transnational terrorism is not an existential threat to the United States, but that does not mean it does not fully disrupt the *tranquilitas ordinis* of America or its allies. The hundreds of deaths from terrorism that have occurred in Europe cause consistent disruption to the ordinary peace and cost significant blood and treasure. Second, even if social disruption happens in places like Yemen and Pakistan, these countries are the most affected by Islamist terrorism. Ending the threat from organizations like al-Qaeda and the Taliban far outweighs the short-term social costs that come from conflict there. Finally, what Boyle describes is an effect generally found in war and is not endemic just to the use of drones. Civilians suffer from whatever kind of war happens. World War I and II caused mass torment, destruction, and death throughout the continent of Europe that tore entire countries apart. The social effects would be seen for decades after, but that did not eliminate the justness of the causes or actions by the Allies.

Along the lines of proportionality, Megan Braun and Daniel Brunstetter criticize the notion of "relative proportionality" in the debate on drones. Many who defend the use of drones compare the weapon's proportionality to other weapons of war. But Braun and Brunstetter think this misunderstands the fundamentals of proportionality (2013, p. 306). They start by separating proportionality from precision in munitions. Drones use hellfire missiles that carry significantly smaller payloads than other bombs and missiles and have a radius of only 40 feet compared to 400 feet. In addition, Hellfire missiles are capable of being diverted at the last moment should a

non-combatant enter the field of vision; this is called "going cold." Then there are other weapons and means of warfare in history. Defenders of drones will argue that other wars in history produced far more casualties, but Braun and Brunstetter note that determination of proportionality have to be case specific within just war ethics (2013, p. 309).

Drones may be more precise than other munitions or weapons, but that does not make them proportional. Braun and Brunstetter apply the ethics of what they call *jus ad vim* (just use of force), which they contend is an ethical paradigm for the use of force short of war. According to this ethical standard, they believe the use of drones in Pakistan has become immoral based on the amount civilian death and destruction. Proportionality must include concerns with the loss of civilian life along with "more subtle harms including property destruction, post-traumatic stress disorder and social disruption caused by the persistent threat of drones" (Braun & Brunstetter, 2013, p. 319). However, they fall into some of the same problems that Boyle does. Proportionality is about meeting political and military objectives with the amount of force necessary. In order to criticize the use of drones by the United States, they would need to effectively show that the social deterioration outweighed the threat from transnational terrorism and national security needs of America and its allies. They are right to bring up the relativism of some proportionality arguments as just war theory is based in casuistry, but these cases still allow for the use of drones to neutralize threats.

Impersonalization

Looking at other aspects of just war theory, in particular *jus ad bellum*, Braun and Brunstetter argue that drones could meet criteria like just cause and challenge criteria like last resort. Last resort does not mean having to try every policy option before engaging in violence,

but it does mean to seriously consider what is possible. Last resort is "an index of necessity, meaning the legitimization of force is based not only on perceptions of imminence but especially on the nature of the threat and the potential of other means to quell it" (Brunstetter & Braun, 2011, p. 344). Drones allow the state to use force in a minor capacity without having to resort to a full scale war or invasion. States can neutralize terrorist threats without having to send forces directly to the country in order to achieve a military objective. Therefore, war is pushed further back as a last resort. Their discussion continues by looking at drones as compared to full scale invasions to meet the proportionality doctrine. There are several benefits to drones over military forces that could disrupt a region less than full war. Like other commentators, Braun and Brunstetter also engage the issue of the distance between the pilot and the target. However, they bring in a new perspective on this issue. While others have argued the impersonalization of distance will make it easier to kill targets, Braun and Brunstetter think that distance from the conflict will lead drone operators to prioritize the safety of troops on the ground of possible issues of discrimination (Brunstetter & Braun, 2011, p 349). They ask more questions than give answers, but Braun and Brunstetter contribute to the ongoing dialectic of the just war tradition.

Bureaucratization, according to Richard Adams and Chris Barrie, represents a moral problem for the drone program. For them the problem arises from the impersonalization of killing targets. This is not a new argument as it relates to the warrior's ethos and goes back to when the Catholic Church banned the use of the crossbow as un-Christian. Adams and Barrie argue that bureaucracies are not attentive enough to moral problems, and this affects how one should approach drones. As an "ingenious instrument and bureaucratic mechanism cast an anodyne camouflage over deathly force" (Adams & Barrie, 2013, p. 247). The debate on drones tends towards the technical, mechanical, and strategic parts within the government, but the moral

question is set aside as the program becomes institutionalized and routine. Adams and Barrie acknowledge that drones by themselves do not pose moral problems. What they seek is the infusion of moral debate and compassion into the decision making behind the drone program.

In order to make their point Adams and Barrie make reference to Hannah Arendt and the banality of evil. Arendt had attended the trial of the Nazi Adolf Eichmann, and when she wrote her famous tome on this subject she delineated how Eichmann consistently maintained he was not animated by anti-Semitism. Rather, he was only "doing his job," a defense rejected at war crimes tribunals. The problem of civil servants merely doing their jobs raises the moral problem of bureaucracies not incorporating moral calculations into policies. Eichmann was only interested in efficiently implementing the logistics of moving Jews to where the government sent them. Applying this logic to drones, the operators would not question who or why they're killing a target, only firing when told by their superiors. An agent's "moral acumen [is] tranquilized by the bureaucracy's procedural regimen, [and] individuals exercise the State's lethal force without compassion or compunction" (Adams & Barrie, 2013, p. 249). Furthermore, the bureaucratization problematizes democratic principles and a democracy's commitment to peace. The people are isolated from the decision making process inside the bureaucracy, and they are nowhere near the war to see the horrors (Adams & Barrie, 2013, p. 252). They reference Immanuel Kant's democratic peace theory and how the people would oppose war because they know about the suffering, but the bureaucratization removes them from having to confront these evils.

The impersonalization of drones falls into the same category as that of riskless war; both concepts have been debated as a feature of war since the 1990's. During that decade, particularly with the conflict in the Balkans, many academics and policy makers discussed what fighting a

war almost exclusively from the air meant for ethics. Modernization of warfare means that a state can be "so superior in military and technological terms that it is able to kill the enemy without having to risk the lives of its own soldiers" (Henriksen & Ringsmose, 2015, p. 286). Riskless war becomes a problem because of the historical just war principle that each side will expose themselves to possible risks. Killing a defenseless people is morally wrong; there must be reciprocity. However, only the first part is true. Terrorists engage in armed warfare against the state and therefore cannot claim to be defenseless. When looking at a particular target, the consideration must be if it is military in nature or not. What is not part of the consideration for ethics is if the enemy should get a chance to attack back. Furthermore, the gradations of risk determining the ethical nature of a particular action become pedantic, if not impossible. What counts as sufficient risk? John Kaag and Sarah Kreps look at the situation of drones as creating a moral hazard, which is a "situation in which individuals are willing to take part in increasingly risky behaviors if they are shielded from the negative consequences of said behavior" (2014, p. 107). The moral hazard argument comes from the riskless war and impersonalization criticisms. Kaag and Kreps believe that because states do not have to risk the lives of soldiers and the greater possibility of public censure, then government officials will be more likely to use drones. This is the moral hazard for them.

Bradley Strawser gives a response to those who argue that the impersonalization of drones and riskless war are morally problematic. According to Strawser, "remotely controlled weapons systems are merely an extension of a long historical trajectory of removing a warrior ever farther from his foe for the warrior's better protection" (2010, p. 343). Drones exist in the same moral category as other munitions and weapons. Strawser goes further than other authors because he argues that drones are not only ethically acceptable but ethically obligatory. He

makes his argument using the principle of unnecessary risk. If state X seeks a morally good goal, then everything else being equal state X is ethically obligated to choose a means to accomplish said goal that is just and only to take on risk if a less risky means is unavailable (Strawser, 2010, p. 344). Therefore, it is ethically wrong to force a soldier to take on unnecessary risks unless there is a compelling reason to do so. The most important part of this equation is there must be a moral good sought by the just warrior. If a moral good exists, then it becomes acceptable to use methods that have less risk in order to achieve it. The onus is on the commander or political leader to justify why more risk should be taken on by the just warrior. Conforming to just war theory, Strawser argues that "the risk one orders another to incur must track exactly with the necessity of that risk in relation to the accomplishment of the purported good" (2010, p. 346).

Uwe Steinhoff thinks there "is a general problem with generating extreme military superiority and that the use of automated weapons and of 'remote control killing' is part of this more general problem" (2013, p. 179). He criticizes Strawser's use of the principle of unnecessary risk. Steinhoff first attempts to deconstruct Strawser's logic by taking his obligatory argument to the extreme and uses the example of poison gas. Setting aside the legality of chemical weapons, poison gas would remove unnecessary risks from the soldiers on the battlefield. He also attempts to undermine the contractual nature of the principle of unnecessary risk by saying there are always "countervailing reasons" (Steinhoff, 2013, p. 198). The critique breaks down because Steinhoff offers "countervailing reasons" that are only useful for philosophical argumentation rather than applicable to the real world. For example, he offers up a countervailing reason that pilots would lose their job if drone operators took over the use of air power. Just war theory is meant to offer ethical guidelines for practical politics, originating with ideas on how Christian could engage the real problems of the political sphere. Strawser applies a

generally acceptable ethical principle to the problems of drones, but Steinhoff takes it into an extreme direction. Decisions in just wars are balanced between the needs of the individual and society and between competing principles like achieving political objectives, non-combatant immunity, and proportional force. Drones are a tool like any other and can be judged based on that, and any countervailing reasons offered must be legitimate. The job loss of a pilot is not one, but the indiscriminate violence of poison gas is.

Strawser answers certain objections to the ethical nature of drones, like proportionality, and defends them within the framework of just war theory. One objection is that drones violate the *jus in bello* principles. He responds that if drones did not protect non-combatants, they would be unethical like any other type of weapon or use of force (Strawser, 2010, p. 351). The principle of unnecessary risk requires both *jus ad bellum* and *jus in bell* criteria to be met first. Yet the current evidence clearly demonstrates drones have an augmented ability to discriminate between combatants and non-combatants, which allow them to meet both the discrimination and proportionality criteria. Other objections include the cognitive dissonance with operators and the asymmetry of the war (riskless war). His response the problem of cognitive dissonance is that rather than make committing violations easier, the distance allows the drone operator to make more reasoned and calculated decisions (Strawser, 2010, p. 353). They can assess situations calmly from a distance that could not happen if they were in the fog of battle.

Drone operators may be able to engage in greater ethical reasoning based on their distance from the conflict, but Kaag and Kreps think the distance instead of the greater latitude is a problem (2014, p. 115). Apparently this will confuse soldiers on what is a just war and what is an unjust war. They think the moral decision making will move almost entirely to the soldier rather than political or military leaders. Following this logic, Kaag and Kreps advocate giving

real decision making ability to drone operators because of their "leisure." Philosophically speaking, this may have merit, but it is wholly problematic and deleterious for military command. Individual soldiers are moral agents who have an obligation to ignore illegal or immoral commands, but these are broad concepts easily understood, e.g. do not torture or target a civilian. However, individual soldiers, despite "leisure," do not have the authority to make decisions about the just cause of a war or operational decisions; that is the role of military commanders and political leaders.

Finally, Strawser rejects the asymmetry argument because it happened decades ago with the development of fighter jets and other technology. More importantly, though, if the warrior is just in his cause and action and the enemy is unjust, then it is good the just warrior has the superior weapons and protection (Strawser, 2010, p. 356). He compares calls for a "fair fight" to 18th century commanders demanding that soldiers line up to shoot the other side. There is no moral obligation to have symmetry in warfare. Kaag and Kreps attack Strawser's position on the moral obligation of drones based on his assumptions (2014, p. 130). For them Strawser's argument makes ethical sense if the war is just, but they raise the issue that drones would be used by policy makers without determining whether or not their cause and action are just. This argument is tenuous at best and is not unique to drones, which means it is a misleading objection. All tactics must be assessed with the provision that the war is just. Cruise missiles, Special Forces, F-16s, etc. are all tactics that can be used justly or unjustly. There is nothing unique about drones to raise this objection just for this tactic.

Anti-war advocate Madea Benjamin also believes that drones make it easier to go to war. Drawing from the Vietnam War and World War II, she argues that the public does not see the horrors of war and are not personally affected by conflict (Benjamin, 2013, p. 150). During the

late 1960's when the draft was happening, practically everyone knew someone who went to and experienced war. They saw the coffins returning. Her example on the more lax ability to go to war was when President Obama used airpower and Predator drones in 2011 when NATO contributed to the removal of Muammar Gaddafi from power in Libya. He did so without congressional authorization and justified doing so because the government only used airpower, not ground troops (Benjamin, 2013, p. 153). Obama argued that under the War Powers Resolution, he did not need authority from Congress if there was not sustained conflict. Benjamin's argument is fallacious and lacks strong foundational reasoning. Presidents have consistently sought greater autonomy in making national security decisions since the founding of the country. This debate goes back to George Washington's Neutrality Proclamation. Drones have not made it easier to go to war. The consistent delegation of power from Congress to the executive and congressional and judicial acquiescence to an expanded war making power of the executive allowed President Obama to make the argument he did in Libya. Drones do not contribute to the ease of going to war any more than other technological advancements in the late 20th century. Critics believe that drones are somehow qualitatively different weapon and use that assumption to make moral claims, but because drones are no different they come to misguided conclusions.

Endless War

Kreps and Kaag also look at how proportionality would function in a word with endless war. Proportionality brings together ends and means, but the ends of the War on Terror seem to always be over the horizon. President Bush claimed to want to rid the world of evil doers, but that goal "has no spatial boundaries as evil might exist in the most unexpected places" (Kreps &

Kaag, 2012, p. 377). In purely Clausewitzian terms, a war without end becomes meaningless as all conflict should lead to achieving specific political objectives. Kreps and Kaag do not think President Obama's rhetorical change did much to mitigate the problems of ends and means (Kreps & Kaag, 2012, p. 379). The Obama administration may have started calling the War on Terror "Overseas Contingency Operations," but the technical change in language did not alter the unlimited ends sought by the United States. Bush sought the elimination of evil, but it seems Obama sought the end to contingent threats of which there are numerous. Drones are also morally problematic because "minimizing one's own casualties at the expense of those on the opposing side constitutes a substantial transgression" (Kreps & Kaag, 2012, p. 282). Soldiers must risk their own safety if there is the possibility of civilian casualties, according to their argument. Kreps and Kaag use the argument of riskless war to criticize drones, but they fail to fully or accurately establish that this would violate just war principles.

Just war theory requires reasoning about individual cases with multiple principles coming into effect. Civilians must be protected, but the essential nature of proportionality is that if there are civilian deaths it will match the ends sought. To do so might require risk to soldiers, but it might not. Individual cases matter in assessing that particular issue. What Kreps and Kaag accurately note, though, is that the Bush and Obama administrations did not fully articulate the political and military objectives sought and how drones would help as a tactic. This does not mean such political and military objective were not established; the *AUMF* and National Security Strategies did lay out less grandiose objective than the elimination of evil. Another objection Kaag and Kreps have that they claim is a moral issue is the degrading effect that drones have on democracy and transparent decision making (2014, p. 131). Like several of their objections, this one also fails to be a serious problem for drones on ethical grounds. One can make the argument

that because drones are located primarily within the Central Intelligence Agency that they inhibit democratic commentary on their use, but that is not a moral problem. It is a governance problem. Americans have generally accepted that clandestine operations would be outside the purview of the public and that only certain elected officials on select committees in the Senate and House would have access to intelligence. This is an argument of politics, not morality.

Double Effect

An aspect of just war theory coming from the virtue ethics and natural law reasoning of the Catholic Church is the "doctrine of double effect." The doctrine of double effect partially measures ethical actions based on the motivation of the moral agent. Negative consequences cannot be the intention of the action for it to remain ethical. Even if a target turns out to be a group of non-combatants, it does not negate the ethical nature of the strike because the perpetrator of the violence intended to hit a legitimate target. The question that comes from the doctrine of double effect is: what is intention? Philosophers of law typically follow the British utilitarian argument in which any foreseeable outcome to result from a contemplated action is an intended one (Gould, 2014, p. 134). On the other side are philosophers of action who argue that the logical outcomes count as intention. Jeremy Bentham developed the utilitarian approach, separating direct and oblique intentions. Responses and challenges to the utilitarian approach go after the equation of intention with foresight (Gould, 2014, p. 135). One challenge to the utilitarian approach uses sought ends to establish intention, i.e. why an agent commits an act. If someone does an action to accomplish something, there is intention. If the action is done without a sought accomplishment or done reflexively, there is no intention. Another challenge holds that

if someone seeks an objective with knowledge that the action will lead to a different effect, this does not mean the different effect had intention (Gould, 2014, p. 136).

In a scathing critique of the use by military and political leaders of the doctrine of double effect, Laurie Calhoun writes that it is a "*carte blanche* to wield the weapons of war in lieu of non-homicidal political tools such as diplomacy or the pursuit of suspects through orthodox means of criminal investigation" (2015, p. 442). Calhoun's argument becomes inaccurate when she then equates the use of force by the United States with that of al-Qaeda on 9/11. The problem is in how she looks at the use of violence. In order to justify her argument, she equates all "unarmed" persons and that neither drones nor terrorists tell others an attack is imminent (Calhoun, 2015, p. 446). Her argument uses a false equivalency, though. Terrorists target non-combatants because they are non-combatants as a means to spread fear throughout the population. Signature strikes and the drone program kill terrorists to prevent them from using violence on non-combatants and attempts to limit collateral damage. Yet her criticism of the doctrine of double effect does contribute to the debate on drones. Assessing the ethics of drones must accept the doctrine, but just war ethics adds onto this proportionality. The intention of hitting a military rather than civilian targets matters, but merely claiming to have a good intention does not make an action moral. Consequences also matter, and a defense of the drone program must show the outcome of the aggregate attacks is balanced towards the moral good.

The U.S.'s drone program meets the doctrine of double effect readily because the War on Terror against al-Qaeda and its affiliates seek specific military and political objectives acceptable to the just war tradition. Al-Qaeda is a transnational terrorist organization who targets large quantities of civilians. The Taliban and ISIS are equally villainous in their tyrannical governance. Eliminating these organizations is a moral good and demonstrates a strong, ethical

motivation. Moving to the operational and tactical level, the United States still maintains an ethical intention. Every operation and tactical move by the military and intelligence community is to bring about the end of al-Qaeda and spread of political stability. Non-combatant deaths are a direct possibility of these actions, but that is a foreseeable outcome incorporated into the reasoning of the drone program. Multiple precautions are taken to limit non-combatant deaths, something even acknowledged by adamant drone critics. Drone operators foresee possible harmful consequences and attempt to limit them. There are problems that arise when drones are used and accidents happen, but those accidents are not foreseeable directly and are not sought. By the utilitarian approach to double effect and others, the drone program does not reach a level as to have non-combatant deaths as intentional.

Tyrannicide

A tradition also exists in the Christian ethics of violence that legitimizing killing a tyrant, a person so evil they can no longer be allowed to continue living. This is a form of targeted killing, even if for political reasons. Cicero was probably the first defender of tyrannicide when he argued that the assassination of Julius Caesar was justified. Rome's Senate had declared Caesar "dictator in perpetuity," which was antithetical to Cicero's republicanism. Biblical history also has a long tradition of targeted killings of those monarchs and military leaders who threated the Israelites. The Book of Judges in the Old Testament has several stories of targeted killings for the common good. Ehud, a judge, surreptitiously brings a dagger into the palace of the Moabite King Eglon while delivering the Israelites' tribute. He stabs and kills the king in order to prevent Moabite domination of the Israelites (Judges 3). After the prophetess Deborah and the judge Barak lead an attack on King Jabin and the Canaanites and wins, the enemy general,

Sisera, runs away and hides in the tent of Jael. Jael lures him into a false sense of security and then drove a tent peg through his head with a mallet, which Deborah praises (Judges 5). Abimelech has the tables turned on him because he is a "wicked" judge. A woman drops a large rock on his head, but he kills himself to prevent a woman from having killed him (Judges 9). The books of Samuel and Kings also contain such examples.

St. Augustine would completely reject the notion of tyrannicide in *City of God* because according to him all authority was derived from God for some purpose. John Calvin followed this strand of thought and believed Christians should just obey and suffer. The great Christian defense of tyrannicide came from John of Salisbury (1115-1180). He was a 12th century bishop and political theorist who worked as the Secretary to the Archbishop of Canterbury under Theobald and Thomas Beckett. He published his *Policraticus* in 1159, which articulated a doctrine about tyrannicide. This medieval concept of tyrannicide applies to today's geopolitics, although in a redacted form. Tyrants were different than kings because the former no longer adhered to the rule of law; a tyrant became plenipotentiary. This means he was above the law, and through his voluntaristic nature his will was all that mattered. John of Salisbury wrote, "Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant" (Book IV, chapter 1). The thought is best expressed at the Diet of Roncaglia in 1158 when the doctors of the law said to Emperor Frederick Barbarosssa, "You, being the living Law, can give, loosen, and proclaim law…kings rule while you are the judge; anything you wish, you carry on as the animate Law" (Kantorowicz, 1957, p. 129). For the Medieval thinker a tyrant was a man who became above positive law and natural law. This sort of ruler lost the ability to be sovereign because he worked outside of the delineated behavior that binds authorities. Although tyrants and

kings are similar, the term king comes with a normative prescription of behavior in ruling the people. The normative behavior includes a dedication to the rule of law, putting the king under the law, and adhering to justice.

Often considered one of the most evil tyrants in history, Adolf Hitler offers an insightful example on the ethics of targeted killings. His National Socialist Party falls into the category of a totalitarian movement, and Hannah Arendt elucidated the nature of this kind of governance—similar to how the Taliban and ISIS would operate. She was a political theorist who studied philosophy under Martin Heidegger, a known Nazi. The Vichy government backed by the Nazis placed her in a concentration camp in southern France before an American diplomat got her to New York. Trying to understand the Nazis, Arendt differentiated between authoritarianism and totalitarianism, seeing the latter as attempting to abolish the identity of their enemies, making it nihilistic rather than just reactionary; they want to make the enemy's humanity superfluous (1976, p. 457). Furthermore, totalitarian regimes used terror as state policy merely to use terror (1976, p. 464-66). Hitler's totalitarianism led one of the great theologians of the twentieth century to participate in a plot to assassinate him. Dietrich Bonhoeffer was a Lutheran pastor and theologian born into a prominent German family, but Hitler's decisions caused him to turn to rebellion against evil. Originally this involved Bonhoeffer leading a dissenting movement called the Confessing Church; he did this along with other famous theologians like Karl Barth. However, Bonhoeffer would eventually realize that merely preaching against the Nazis was not enough. Direct action needed to be taken, and Bonhoeffer turned to participating in the conspiracy against Hitler after the Germans quickly defeated the Dutch and overran Paris (Metaxas, 2010, p. 361). Of course, this conspiracy, like the others, would fail. Bonhoeffer would hang for his treason against the Reich, and the Nazis hanged him only weeks before the

United States liberated the concentration camp in which he resided. While he was in prison, though, Bonhoeffer wrote one of most influential (though unfinished) works that provides justification for the targeted killing of Adolf Hitler.

Bonhoeffer argued for an ethical position that is contemporarily called "dirty hands," although he placed it in the context of accepting guilt within Christian theology. What ethicists mean when they say "dirty hands" is that for the greater or common good soldiers, spies, and policy makers must possibly do something sinful and/or wrong. Bonhoeffer takes this idea a step further by arguing that a person also sins by not assuming this guilt. "If any man tries to escape guilt in responsibility, he detaches himself from the ultimate reality of human existence, and what is more he cuts himself off from the redeeming mystery of Christ's bearing guilt without sin.…" (Bonhoeffer, 1995, p. 237). Christian ethics require a person to participate in the realities of this world even if it means taking on guilt in certain circumstances. The question then arises: what are these circumstances? Bonhoeffer believed that historic events can put statutory law and social norms in violent conflict with the necessities of life. When such events take place, "responsible and pertinent action leaves behind it the domain of principle and convention, the domain of the normal and regular, and is confronted by the extraordinary situation of ultimate necessities.…" (Bonhoeffer, 1995, p. 235). Acting on the necessities of these circumstances should not become the normal course of events, turning the *ultima ratio* into something common. The tension that exists is between seeing the law and rules as the ultimate concern or the freedom to act for the benefit of security. Bonhoeffer explicitly states that this tension should always exist because circumstances change and history is not static. States need the law and the freedom to act for security; allowing one or the other to always take precedence would create a disordered world. Ultimately, only God can and will judge the statesmen for choosing between the two.

Arendt moved away from the notion of radical evil to the banality of evil, which is the idea that evil comes from the thoughtlessness of average people, and elucidated how to confront such evil in the same manner Bonhoeffer did. She would actually become ostracized from the Jewish intellectual community for her commentary on the Nazi Adolf Eichmann. As Arendt commented, "The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal" (2006, p. 276). This would not stop Arendt from condemning those Nazis who had succumbed to the banality of evil, though. She stated outright, "And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you" (2006, p. 279). The terrorist operates in many ways like the tyrant by acting voluntaristically against natural and international law through the targeting of non-combatants and attempting to abrogate the established political order. Tyrannicide ethics contribute to the moral debate on the targeted killings of terrorists by offering a tradition that defends eliminating a single, evil person to aid the common good. Counter-terrorism efforts against Islamist terrorists like Osama Bin Laden are comparable to the efforts to eliminate tyrants of the past. Terrorism is an insidious form of violence, much like revolutionary activity by demagogues seeking tyranny. The terrorist and the tyrant refuse to acknowledge the humanity of their victims, seeing them as sub-human at best. Islamist terrorists will try to kill as many people as possible to appease their divine audience, but that propitiation means the violation of human rights and non-combatant immunity.

Conclusion

Just war theory offers a framework by which to judge tactics in warfare, but there are other ethical considerations to take into account. This chapter went through different perspectives on the drone debate besides purely analyzing traditional proportionality and discrimination. Some scholars have argued that drones cause social disruption to the communities in which they operate. Places like Pakistan and Yemen must deal with the constant threat of drones overhead, and the places where strikes happened lead to distrust between people and hatred of America. The ethicists that include this part in their analysis argue psychological factors must be including in the discussion on proportionality. Communities may break apart should neighbors no longer be able to trust one another as informants typically produce intelligence for drone operators. Other ethicists raise the question about how communities can operate when the threat of strike is ever present.

Drones also contribute to the impersonalization of war, which some ethicists think makes war easier and collateral damage more acceptable. Historically, soldiers would battle each on equal footing, but drones have changed how states can kill targets. The visceral connection to violence is gone, and policy makers may think it significantly easier to go to war or use kinetic action. Just war theory requires violence to be a last resort, so lowering the bar for war is problematic. Finally, there is a distinct tradition in Western political thought about the right to kill certain kinds of evil people because they are evil. This comes from the notion of tyrannicide, the killing of tyrants. Tyrants are morally different than kings as they violate both positive and natural law, which allows citizens to kill them ethically. Terrorists may fall into this category because they directly target non-combatants in violation of natural, statutory, and international law while also trying to de-humanize their victims. These considerations can play a role in the

ethical analysis of drones, but they are different from traditional just war theory and the considerations on proportionality and discrimination. Drones must first meet the *jus in bello* criteria before other considerations are included.

CHAPTER NINE
STRATEGY AND GEOPOLITICS OF DRONES

"An eye for an eye leaves the whole world blind."-Attributed to Mahatma Gandhi

"In the country of the blind, the one-eyed man is king."-H.G. Wells, "The Country of the Blind"

Introduction

Ethical considerations are not the only issues arising from drones. A lethal act may be legally and morally justifiable, but the President and national security community must also be concerned with geopolitics and the strategy of targeted killings. Geopolitics becomes an issue because the United States must violate the sovereign territory of states in order to neutralize terrorists. They may do so under international law under two circumstances. Either the state consents or if the state is unable and/or unwilling to govern their territory effectively enough to stop terrorism. This is obviously of direct concern to the drone program in Pakistan, Yemen, and Somalia that have all given consent in some form or another and are unable to eliminate the threats emanating from their country. This chapter will go through the sovereignty issues and then discuss the strategic considerations of targeted killings and decapitation as a strategy for counter-terrorism. There is significant debate over whether or not this is actually an effective tactic, but warfare theory and historical experience indicate that it can be effective. Israel's war against Hamas in the Second Intifada, the Phoenix Program during the Vietnam War, and Sri Lanka's war against the Tamil Tigers will serve as cases to assess how targeted killing has worked in the past against terrorists and insurgents.

Sovereignty

The violability of sovereignty is an enduring concern in international law; the ability and responsibility to intervene in another country typically involved a discussion of humanitarian crises. A state engages in humanitarian intervention because its people believe there is a moral responsibility to help. This raises the question on when it is appropriate to intervene in a country and violate a state's sovereignty to help others. Friedrich Kratochwil wrote, "It would seem that [intervention] would be justifiable only via specific stipulations circumscribing sovereignty in general…" (1995, p. 39). This creates a definitive problem when a state wishes to intervene to help others because in the Westphalian international order sovereignty is an inviolable principle, which makes dealing with humanitarian crises incredibly problematic. According to Thomas Weiss and Jarat Chopra, "[l]ike private ownership, sovereignty implies absolute rights to territory and the prohibition of trespass by others" (1995, p. 88). They argue that sovereignty is not a sacrosanct principle and the humanitarian cause would outweigh the principle. For them this is why it is important to codify humanitarian intervention. Although historically speaking, aggressive states have masked their belligerence with humanitarian causes. Russia started the Crimean War to "protect" Orthodox Christians within the Ottoman Empire. England and France, though, sided with the Ottomans because they did not believe Russia should violate the sovereignty rule. The United States began an imperialist war against Spain under the pretense of avenging the *Maine.* Japan invaded Manchuria in 1931 with similar pretensions, and Adolf Hitler led the invasion of Czechoslovakia in 1938 because he claimed the Germans there had a right to self-determination.

Edward Luck argues the concern over sovereignty comes from both the North (developed countries) and the South (developing countries). The former fears that the responsibility to

protect (discussed in Chapter Two) will infringe on the state's ability to make decisions that are in its own interest, giving that power over to multilateral organizations (Luck, 2009, p. 19). Developing countries, on the other hand, do not want to give over power to developed countries that will allow them to violate their territory. As Luck notes, "[T]he concern among many states that RtoP principles might be misused by powerful states or groups of states to justify coercive interventions undertaken for other reasons is eminently understandable." (2009, p. 17). Christopher Joyner sees a solution in this by connecting the concept of sovereignty as responsibility. For him this comes from the increasing influence of human rights norms and the belief governments should secure the welfare of its citizenry (Joyner, 2007, p. 706-07). Joyner wrote, "If that government is unable or unwilling to perform that protective role, or if it itself is the perpetrator of massive human rights crimes, then the responsibility devolves to the international community to act in its place." (2007, p. 708). The inability or unwillingness to protect also frames the debate on the use of drones in territories not in armed conflict.

The use of drones also requires addressing the legal and geopolitical issue of territorial integrity following the Peace of Westphalia and the UN Charter. The Peace of Westphalia in 1648 ended the Thirty Years War that ravaged the continent of Europe; it also creates the modern nation-state system the world uses. No longer were the European states based on an ethnic group or particular noble. A citizen belonged to a particular state as a whole and there was a specific relationship between the state and individual. Furthermore, another state could not intervene to interfere with the domestic politics of another country, particularly over issues of religion. The UN Charter has made territorial integrity a quintessential element of international law (see Article 2). One of the problems is that America's fight against al-Qaeda and its affiliates does not fit into either the definition of an international armed conflict or a non-international armed

conflict. Therefore, it becomes necessary to engage whether or not the United States can use drones in the territory of another country outside of a battlefield in order to neutralize threats. Eric Holder explicitly defended the right to use force outside of the battlefield of Afghanistan in his 2012 speech. He said,

> Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks – fortunately, unsuccessful – against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

Both Grotius and Vattel defended the right to neutralize the enemy in foreign territories, although for different reasons. No matter where the enemy resided, Grotius thought killing the target was legitimate action (Draper, 1990, p. 198). As Grotius wrote, "Justifiable causes [of war] include defense, the obtaining of that which belongs to us or is our due, and the infliction of punishment" (Gould, 2009, p. 75). In this manner, when another country has allowed a sub-state actor to attack the United States, the government is justified to use force wherever necessary. Vattel discussed the right to violate territorial integrity within the context of the law. States can use force against another when any one particular nation who openly violates the laws of the society which nature has established between them, or who directly attacks the welfare and safety of that society" (Vattel, 2008, p. 77). All states are bound by the law, so violations of the law create a justification for repression and invasion. Heyns partially addresses this issue his report submitted to the UN Concerning the right to self-defense, use of force is allowed in another state's territory when it is authorized by the Security Council, the state attacked another, there is an imminent attack, and consent from the sovereign in control of the territory (Heyns, 2013, p. 17-19). Legal authority for America's right to self-defense is well established and comes

from the UN Security Council through Resolution 1368 and others, and the terms of aggression from UN General Assembly Resolution 3314 were met by al-Qaeda. The other two issues of imminent attack and consent problematize the use of drones in territories outside of an armed conflict, but a careful examination of the situations give legal support to America's drone program in such territories.

Imminent Attack

Under international law, preemptive action to halt or eliminate an imminent attack is legitimate, but it must meet certain criteria. Heyns write that drone attacks in another country "must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to that end" (2013, p. 18). Typically when assessing whether an attack is imminent or not, the *Caroline* doctrine acts as the central legal test (McDonald, 2017, p. 101). William Lyon McKenzie led a failed insurgent movement seeking independence for Canada from Britain, and he had many supporters in America. After the British quickly defeated McKenzie in December 1837, he fled to Navy Island over the border to declare a republic. Loyalist forces crossed the U.S. border, captured his ship the *Caroline,* set it on fire, and sent it over Niagara Falls. An American died in the incursion. Secretary of State Daniel Webster and Lord Ashburton settled the issue in the Webster-Ashburton Treaty of 1842 in which the countries settled border issues and the right to self-defense in another territory was acknowledged, although Secretary Webster maintained the conditions did not exist for such an incursion. From this case came the principle that imminent threats are "instant, overwhelming, leaving no choice of means, and no moment for deliberation" (McDonald, 2017, p. 101). Eric Holder addressed the Obama administration's own understanding of an imminent threat of individual. He argued that the case

of the imminent threat of an individual would incorporate "the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States" (Holder, 2012, np). These additions are necessary because al-Qaeda has the ability to attack the U.S. and allies without notice, and al-Qaeda's leaders are constantly planning terrorist activity. As such, the President does not legally have to wait until terrorists are in the end-stage of planning or committing the act. Doing so would lead to high rates of failure and deaths of civilians.

Unable or Unwilling to Act

Consent allows another state to violate the territory of another country, but this is not always possible. Therefore, self-defense "against an armed group on the territory of another State is permissible only if the host State is unable or unwilling to act against that group (Heyns, 2013, p. 19). UN Security Council Resolution 1377 called on all states to fight terrorism, but some have failed to live up to this call either willingly or unwillingly. Evidence of consent within Pakistan and Yemen is contradictory (O'Connell, 2015, p. 69). President Pervez Musharraf of Pakistan and Presidents Ali Abdullah and Abdu Rabbu Mansour of Yemen have praised drones and allowed them in their countries (Byman, 2013, p. 38). Pakistan has even hosted drone bases to fight terrorists. Wikileaks documents and other sources show that certain leaders in the two countries have given consent, but it seems only members of Inter-Services Intelligence has done so, which does not lead to consent under international law. Only the leader of a state can give consent (Heyns, 2013, p. 17). Yet these states cannot necessarily give their consent. Yemen has been in a civil war since 2015, and Pakistan is a well-known state sponsor of terrorism. Determining if a state is unable to fight terrorism is rooted in the government's ability to make

sovereign decisions. Max Weber conceived of the sovereign state as having the monopoly on power, the control of boundaries, and recognized by the international community. The theories on the sovereignty of states vary, but there are three primary parts to the concept. Some argue that a state is sovereign if it has supreme legal authority. That is to say that there is a supreme constitution that has the "ultimate legal authority that is not subordinate to any other authority" (Kurtulus, 2005, p. 54). America's Constitution represents this strand of thought. The people measure all laws and governing officials to the Constitution, which determines its ultimate legal status. The Supreme Court will strike down a law if it violates the Constitution or Congress can impeach a politician or justice who also violates it. Johannes Althusius (1563-1638) was the first person to push for this conceptualization; according to him, "sovereignty, with the organization of powers which it implies, is not independent of the law and outside it but rather is rooted in the law" (Krabbe, 1930, p. 18). For people who adhere to this paradigm, the law determines whether a state or person is sovereign rather than the sovereign determining what is legal.

Others, on the other hand, prefer the idea of "supreme coercive power," i.e. the ability to compel one to do the state's will, determining whether a state is sovereign (Kurtulus, 2005, p. 54). Following this theory those in power are sovereign if they can collect taxes, maintain order, and force the citizenry into war. Thomas Hobbes greatly preferred this model compared to the other. Supreme legal authority derives its power from the community's ability to say what is right or wrong. Hobbes worked from a different foundation. To him the ruler gained sovereignty through a social contract with each individual in the supposed area (Krabbe, 1930, p. 22). He believed in a "war of all against all" and that life was "solitary, poor, nasty, brutish, and short," his idea of the state of nature. Because the state of nature is so abhorrent, the people need the Leviathan, the one with supreme coercive power, to maintain order. He wrote in Leviathan, "I

authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that you give up your right to him, and authorize all his actions in like manner…this is the generation of that great Leviathan…to which we owe…our peace and defense" (Chapter XVII). Therefore, Hobbes believed community came from the supreme authority that gained its power from the individuals.

Rousseau approached the idea of sovereignty from a popular perspective. He believed that the citizenry or community was the state or sovereign and moved away from the personal authority previously assumed with other thinkers on sovereignty (Krabbe, 1930, p. 28). For him the state and authority would become impersonal, an institution that did not reside with the personhood of one man. The community, instead of the state, had a will of its own, and Rousseau gave the community voluntaristic qualities normally held by absolute monarchs because there is no higher authority than the will of the people expressed in the law (Krabbe, 1930, p. 29). His strand of thought is exemplified in the opening line of the American Constitution, which states that "We the people" are the ones putting the law together. This type of sovereignty significantly differs from the other two because the first places sovereignty in the law itself while the second places it in a singular individual or group of individuals. Finally, most theorists on sovereignty argue that territoriality integrity is paramount (Kurtulus, 2005, p. 54). This means that the state must be able to control its borders, who immigrates and emigrates, and that political autonomy remains, i.e. no foreign power occupies the region. It is with this basis that a state which cannot prevent people from freely entering the country cannot be sovereign; neither can a colony or occupied country. During the era of empires when the European continent occupied much of the world, the colonies under their control did not possess its own sovereignty.

In the current literature there are two terms to describe those states that do not meet the definition of a sovereign state: quasi-state and failed state. Robert Jackson has approached the issue by describing the notion of negative sovereignty in the post-colonial era. Since the end of World War II, there is only one constitutional category: sovereign state. Countries can no longer have colonies, protectorates, etc (Jackson, 1990, p. 17). Self-determination became one of the foundations for the new international order, and ex-colonial states attained negative sovereignty. This form of sovereignty is defined "as freedom from outside interference…Non-intervention and sovereignty in this meaning are basically two sides of the same coin" (Jackson, 1990, p. 27). They have become sovereign because they declared themselves that without achieving political, social, or economic development. Furthermore, these states that have negative sovereignty do not have the other prerequisites for sovereignty according to classical international law, which includes a lack of institutional authority and the ability to protect rights or offer social welfare (Jackson, 1990, p. 21). He named them quasi-states because they only possess negative sovereignty, i.e. the right of non-intervention, and not positive sovereignty, i.e. internal order and protection of rights.

Another possible description is the "failed state," which was popularized by Gerald Helman and Steven Ratner in their *Foreign Policy* article in the early 1990's. For them failed states were "simply unable to function as independent entities" (1992, p. 4). Jean-Germain Gros described the failed state as one where the public authorities were "unable or unwilling" to carry out their responsibilities (1996, p. 456). Furthermore, Gros argued there is an "overall breakdown of the corpus of formal and informal rules governing society, accompanied by the disappearance of formal authority or its emancipation" (1996, p. 458). Charles Call shows how these descriptions of failed or fragile states have become a large part of foreign policy discourse

with the need to transfer aid to them as a way to prevent harbingers of terrorism (2008, p. 1493). The failed state narrative, though, usually includes an aspect of chaos, instability, and anarchy exist, which means it could be too exclusive a description. The Taliban run Afghanistan was not an anarchic state; it had a judicial system based on an extremist interpretation of Shariah, control of most of the country, suppressed crime, and offered certain social services. Yet few would consider this a sovereign state due to its connection to al-Qaeda and terrorism; only Pakistan recognized them as legitimate. Failed state as a normative description does not include those states run by totalitarians or government that are no longer legitimate.

America can utilize this paradigm in order to assess whether or not the central authority and top leadership have the ability to effectively counter terrorism. Does the political or military leadership have coercive ability? Is there legal authority and enforcement ability? Can the state actually control its territory? Yemen, Pakistan, and Somalia all have problems affirmatively answering these questions, and Somalia can even be considered a failed state. Yemeni authority is in the midst of a civil war and has had consistent problems since the Arab Spring came to the country. Al-Qaeda in the Arabian Peninsula has considerable free reign in the country, and Saudi Arabia and Iran are fighting a proxy war there. Pakistan's ISI has elements that willingly cooperate with Islamist groups like the Taliban, so even if the political leadership did not give consent the fact parts of the government work with the enemy would mean the country is unable to confront terrorism effectively. Somalia has been in a civil war since the late 1980's and has a weak, ineffective central authority. Going after terrorists in the likes of Pakistan, Yemen, and Somalia is extremely problematic. There is little control in the remote areas of the countries, and if the U.S. used Special Forces to kill terrorists then it is also likely that government officials working with the terrorists could inform them, leading to prolonged firefights and more

casualties (Byman, 2013, p. 34). Because of the consistent, egregious, and endemic problems of these countries, they lack full control of their sovereignty and meet the standard that they are unable or unwilling to stop transnational terrorists. This gives the United States full legal authority to use drones in those countries in order to neutralize threats from al-Qaeda and its affiliates.

Strategy of Targeted Killings

"Mowing the Grass"

Leadership decapitation, either through capturing or killing, is meant to eliminate a terrorist organization without having to target every part of it. By capturing or killing a terrorist leader, the organization loses operational capabilities because they lose their most skilled members and diverting resources to protecting the leaders (Price, 2012, p. 9). Targeted killings work because terrorist organizations have a limited number of experts, like passport forgers, bomb makers, trainers, and fundraisers (Byman, 2006, p. 103). Training to take the place of such individuals takes months and reduce expertise in the organization. In addition, by eliminating leaders the U.S. can send these organizations into internal conflict with different members trying to take control, which further reduces their operational effectiveness. Violent organizations like terrorist groups are more cohesive by nature and led by charismatic leaders, so succession of leaders is difficult and problematic (Price, 2012, p. 17). Also, killing leaders strains organizations on a personal level. They cannot communicate with family members and must live increasingly secret lives. Terrorists will have to constantly be on the run and cannot establish effective safe houses for long-term use. There are several cases—Shining Path, Kurdistan People's Party, and the Red Brigades—one can point to that show some support for the utility of targeted killings of

terrorist leadership (Johnston, 2012, p. 48). In 1992 the capture of Abimeal Guzman seriously limited Shining Path's pursuit of power; in 1999 the capture of Abdullah Ocalan did the same for Kurdistan People's Party; in Italy captured leaders of the Red Brigades led to their complete downfall.

Clausewitz's paradigm should create the foundational understanding of how drones fit within the strategic considerations of counter-terrorism. According to Clausewitz, the goal of war is to achieve political objectives; in this case it would be the elimination of al-Qaeda as a threat to the republic. Because al-Qaeda will obviously not submit to America's will or abandon its totalitarian ideology, the only choice is to neutralize them for national security. As such, America must match the ends, ways, and means available in warfare. Drones are part of the "ways" to achieve the political ends and are a tactic by which to kill targets who threaten security. Galula and Trinquier's thoughts on counterinsurgency also play into this paradigm and how drones are useful as a tactic. Various types of intelligence gathering mechanisms and observations provide knowledge on targets that are training for or planning operations against the United States. The three available ways to employ counterinsurgency and counter-terrorism are military, judicial, and political, and drones are military by nature. As Galula emphasized, counterinsurgents must clear areas of combatants, and drones are one tool to do this. They eliminate specific threats in a community or region that traditional tactics of force like Special Forces cannot reach. Also, continuous drone warfare prevents the insurgents or terrorists from recuperating their abilities, both technical and personnel. Al-Qaeda core continuously faces such problems in Afghanistan-Pakistan because the U.S. has killed so many of their second and third-level leaders. A long term strategy should incorporate drones as a tactic to kill terrorists, achieve

security, and implement other policies like development aid and static forces to achieve fully political objectives.

Some studies argue that decapitation as a strategy does not work against terrorist organizations. Audrey Kurth Cronin concludes that targeted killings do not end terrorism based on the cases she assessed. She argues that "state-directed assassinations result mainly in tactical gains, because the resulting tit-for-tat equivalence between state and group over time hurts the strategic position of the government as the rightful actor" (2009, p. 33). Besides arguing that targeted killings harm strategic objectives, Cronin also uses the typical arguments about removing leadership. First, capturing terrorists will supposedly bring about a greater amount of legitimacy to the cause of counter-terrorism (Cronin, 2009, p. 17). After capture, the state can put the terrorist on trial in order to follow the rule of law and demonstrate justice, appeasing public sentiment. Second, removing leaders may lead to a more violent successor (Cronin, 2009, p. 26). Counter-narcotics operations in South America have experienced this problem after removing the leaders of cartels. More violent progenies tend to take the place of the leaders, and this may happen in counter-terrorism operations as well.

Mohamad Hafez and Joseph Hatfield look at the effectiveness of Israel's targeted killing program during the Second Intifada. They come to the conclusion that targeted killings by Israel neither increased violence from Palestinian terrorists nor reduced them. "Targeted assassinations did indeed remove some of the most capable commanders available for planning and carrying out terrorist attacks, but by themselves they did not impact the number of attacks or the rate of successful attacks as the analysis indicates" (2006, p. 378). Hafez and Hatfield make the alternative case that reductions in violence could have been the effect of defensive measures, like increasing law enforcement and using checkpoints. Jenna Jordan assesses organizational strength

and resiliency through their bureaucratic development. Bureaucracies are more resilient, which gives an advantage to well established terrorist organizations. Also, like any insurgent organization, popular support provides strength as the people can give resources that are desperately needed (Jordan, 2014, p. 15). Popular support allows terrorists and insurgents to operate in secret, which is another important contribution, and could encourage further violent attacks. Jordan is critical of the idea that targeted killings have been effective against al-Qaeda. According to Jordan, "despite a sizable decline in 2006 and a smaller dip in 2009, the number of attacks carried out by al-Qaida rose steadily after the September 11 attacks with the beginning of the United States' sustained targeting campaign" (2014, p. 31). She concludes with arguing that using targeted killings as counter-terrorism policy will turn the people against the United States and towards the terrorists, encouraging organizational support, and possible retaliation.

Patrick Johnston criticizes studies on targeted killings because of their methodologies (2012, p. 48-49). According to Johnston, it is inappropriate that they use no-variance designs that limit credible causal inferences and use restrictive coding that only shows success if decapitation immediately leads to the end of the organization that can only determine proximate effects of the targeted killing. To correct these problems, he uses natural experiments to assess the viability of decapitation as a strategy. Johnston found that leadership decapitation will increase the chances of war termination and probability of government victory while reducing the intensity of militant violence and the frequency of insurgent attacks (2012, p. 50). A decapitation strategy will increase the probability of war termination by 27%, and when counterinsurgents kill leaders there is a 32% increase in the defeat of the insurgency as opposed to failed attempts (Johnston, 2012, p. 63). Other important conclusions from the data include looking at Islamist terrorism and the longevity of organizations. He finds a small positive relationship between government

victory and decapitation of Islamist organizations, but this relationship is tentative because he does not have post-9/11 data. Unlike other studies, Johnston also finds that decapitation will continue to work even after organizations have existed for ten years. Finally, he finds that killing terrorist leaders is more effective than capturing them, even when accounting for intelligence gathering. Although capturing can lead to extracting intelligence through interrogations, "high-value targeting operations themselves can yield tangible information through sensitive site-exploitation techniques and other activities that may lead to additional operations (Johnston, 2012, p. 76).

Bryan C. Price looks at the effects of leadership decapitation on the survival rate of 207 terrorist groups from 1970 to 2008, and his data include 204 observations of leadership decapitation along with 95 incidents of the leader leaving for other reasons (death from natural causes, resignation, expulsion, and ceasefire). He only looks at the primary leader of the organization, not high-ranking members or other important participants. Price's results support the argument that decapitation as a strategy contributes to ending terrorist organizations. Terrorist groups that lost a leader were 3.6 to 6.7 times more likely to end than those that did not (Price, 2012, p. 37). Another important part of his analysis is that the longer a terrorist organization exists, the less likely decapitation is to work in leading to the end of the group. In the first year, decapitation is 8.757 more likely to end an organization, but after ten years this effect is cut in half (Price, 2012, p. 38).

Daniel Byman specifically lays out the case for why drones work as a method of targeted killings. Drone strikes "are just another tactic in America's lethal toolkit—just another means of delivering death, not inherently any worse or any better than any other to kill people" (Brooks, 2013, p. 11). It is possible to look at drones the same way one assesses previous methods of

targeted killings. During Obama's first administration, drones neutralized over 50 senior leaders of al-Qaeda, which had a significant impact on the organization (Byman, 2013, p. 33). Osama Bin Laden recognized the problem of drone strikes when he told one of his lieutenants that after a leader is killed he is replaced by a less experienced individual. A lack of experience in leadership mitigates the ability for the terrorist group to achieve its goals. Furthermore, drone attacks have eliminated several key technical members of the organization, like passport forgers, bomb makers, and fundraisers. Then there is the problem of communication. Because of the drone program, al-Qaeda can no longer have large gatherings for training or recruiting and cannot use electronic communications; otherwise the U.S. can track their whereabouts. As Byman puts it, "Drones have turned al Qaedas command and training structures into a liability, forcing the group to choose between having no leaders and risking dead leaders" (2013, p. 33).

Counter-terrorism policy must always consider the possibility of "blowback" when looking at the efficacy of a particular tactic. Blowback is the term used for terrorism activity in response to kinetic action by the state or turning popular opinion towards supporting the terrorists. Some argue that al-Qaeda's attacks and 9/11 were blowback for American policies in the Middle East, especially the support for Israel, stationed troops in Saudi Arabia, and sanctions on Iraq. The war in Iraq partially inspired Faisal Shahzad, Anwar al-Awlaki, and the Tsarnaev brothers. Taliban leaders use drone strikes to rally people to their cause by acting as defenders of the disenfranchised from an advanced military (Byman, 2015, p. 204). Cronin even thinks that targeting the leaders of terrorist organizations could lead them to go after leaders of governments (2009, p. 25). Blowback is an inevitable part of policy making, but it should still be part of the consideration. However, the mere existence of blowback does not create justification for not using a policy. Rather, the positive consequences of any action, i.e. achieving military and

political objectives, should outweigh the negative consequences caused. Drones may limit the importance of blowback. By killing leadership and technical experts, more terrorists joining does not necessarily strengthen the organization's position (Byman, 2015, p. 206). In addition, terrorists seem to have a litany of justifications for their attacks, even caused by legitimate actions from the U.S. government. America sent troops to Saudi Arabia at the behest of the government and defended Muslim countries. But this was still seen as an affront to the Islamic community by Bin Laden. Balancing of interests and consequences, therefore, must guide tactical decision making.

Cases of Targeted Killings

Israel

Israel offers one of the most extensive and best examples of a targeted killing campaign, especially during the al-Aqsa Intifada. They referred to this as "mowing the grass." But this was not the first time that the Israeli government had used targeted killings to achieve political and military objectives. One of the more infamous examples comes from the 1970's. Before 1972, few people knew about the Palestinian issue until the Black September Organization kidnapped and killed eleven Israeli athletes at the Munich Olympics. Black September wanted to exchange the Israeli athletes for 236 Palestinians held by the "Zionist occupiers" and five terrorists held by Germany. Although Black September failed to achieve their objective of exchanging the athletes for Palestinian prisoners, what they did achieve was unrivaled attention by the world media. According to Bruce Hoffman, "[D]espite the worldwide condemnation of the terrorists' actions at the time, it soon became apparent that, for the Palestinians, Munich was in fact a spectacular publicity coup" (2006, p. 69). Because they committed terrorism at the Olympics, an estimated

four thousand print and radio journalists and two thousand television reporters covered the news, which allowed 900 million people to see the crises. Israel responded with a far reaching mission named Operation Wrath of God that went after Black September members throughout Europe. Although ostensibly a counter-terrorism operation in order to prevent further attacks, it was primarily a mission of revenge. They intended to kill all of those responsible for the attacks to deter further action by Palestinian terrorists. This would differ from their future targeted killing operations.

Other attacks happened during the 1990's, some that were successful and others that were a failure (Byman, 2006, p. 98). In 1996 Israel killed Yahya "The Engineer" Ayyash, known for his ability to make suicide bombs. A year later they tried to poison Hamas leader Khaled Mashaal, but they were unsuccessful. The failed plot happened in Jordan and led King Hussein to demand the release of Sheik Ahmed Yassin in order to give the caught Mossad agents back. The targeted killings would really become state policy during the Al-Aqsa Intifada. The Intifada started after Ariel Sharon, the right-wing opposition leader, visited the Temple Mount in Jerusalem on September 28, 2000 (Bregman, 2002, p. 204). Sharon's visit outraged Palestinian Muslims for several reasons. First, the Temple Mount, though under Israeli control, is home to several important mosques, including the al-Aqsa mosque built over the second temple of the Israelites. His visit also raised the thorny issue of who gets to control Jerusalem as the city is quintessential to the identity and religion of both groups. Second, his visit occurred on the anniversary of the massacres at Sabra and Shatilla during the First Lebanon War. Sharon's involvement in these massacres would lead to his lifetime ban from being minister of defense again in Israel. American and Israeli officials had warned Sharon not to undergo the visit, but he ignored their advice as he thought it was political maneuvering by his opponents. The roots of

the discontent leading to the Intifada, though, are found in the failed Camp David summit under President Bill Clinton. Clinton's summit failed to negotiate a settlement to the Palestinian-Israeli issues, even though Israel had offered most of what Palestine wanted.

Following Sharon's visit, the violence would escalate rather quickly (Bregman, 2002, p. 2010). The next day an imam gave a sermon calling for defense of the holy sites, and Palestinians dutifully responded. They began throwing stones at people praying at the Western wall, so Israeli police retaliated by firing rubber covered metal bullets that killed five and injured 200. In the clash sixty Israelis would also be injured. Violence would quickly spread throughout the territories, reaching Bethlehem, Ramallah, and the Gaza Strip by that afternoon and the rest of the territories in the next few days. Another event would cause the violence to become entrenched. On September 30 Mohammed al-Dura, only twelve years old, died in the middle of cross fire on the road to a Jewish settlement (Bregman, 2002, p. 210). Not normally a catalyzing event, a French television crew caught footage of the young man's death that was shown throughout the Palestinian territories. That same day 400 Palestinians would be injured and 13 would die in clashes. Israel's government would have to deal with the excessive violence and constant suicide bombings from Palestinian terrorists during this conflict, and targeted killings would become one of their key tools.

Israel became increasingly creative with how they would carry out targeted killings (Byman, 2011, p. 312). In the beginning they used Hellfire missiles from helicopters, but these proved to create too much collateral damage, which led Israel to develop missiles with a smaller yield to kill one or two people in a crowd without killing those around the targets. They would also start to use drones, regularly used snipers, and even booby-trapped cars. Israel's Supreme Court would defend the program under the basic legal paradigm of self-defense. They rejected

the argument that because Israel occupied the Palestinian territories only law enforcement mechanisms were legal. A constant, low-grade conflict existed between Israel and terrorist organizations, which allowed for military tactics. An imminent threat does not have to exist because terrorists are presumed to be engaged in possible attacks. The Supreme Court would also maintain that the Geneva Conventions applied to Israel's war against terrorists in the territories, but the targeted killing program met the criteria of international law. Also, to meet the legal requirement Israeli authorities are required to attempt capturing the target first, but if this is infeasible it is legal to kill the terrorist.

The 2002 case of Salah Shehada offers a singular example of the ethical approach and strategic justification for Israel's policy of targeted killing. Shehada was a leader of the terrorist organization Hamas and led a deadly campaign against Israel, killing 220 non-combatants and 16 soldiers in over fifty attacks (Byman, 2006, p. 95). A targeted killing became Israel's last result. The government had gone to the Palestinian Authority to hand over Shehada, but the PA refused to do so. Then Israel considered operations to capture him, but his location in the middle of Gaza City made that an implausible choice as that incursion would most likely create more chaos in the city. Initially Israel gave up killing Shehada several times because his daughter was always with him, but eventually Shin Bet determined he was alone in an apartment. It turned out that Israeli intelligence was completely wrong, and fourteen non-combatants, including eight children and his daughter, would die in the attack (Byman, 2006, p. 95). All of this fits within normal ethical reasoning on violence, despite the unfortunate loss of life. Israel's security forces only went after Shehada because he had continuously plotted against the country and carried out deadly terrorist attacks. They attempted to mitigate civilian deaths and make their strike proportional and to go after only their military target. Even with the non-combatant deaths, the

attack was still proportional based on the amount of death and carnage Shehada had carried out previously.

Was Israel's program of targeted killings effective? Essentially, yes. Since the beginning of the Second Intifada to the end of December 2008, Israel used 234 targeted killings that would lead to 387 Palestinian deaths (Byman, 2011, p. 311). Israel's policy of targeted killing actually worked; they successfully disrupted Hamas, al-Aqsa Martyrs Brigade, and the Palestinian Islamic Jihad through neutralizing key members with technical skills. The Abayat family and leaders of Fatah cell demonstrate the effectiveness of disruption through targeted killings (Byman, 2011, p. 320). Israel would kill Husayn Abayat in Bethlehem, so his brother Atef took control of the cell. The Palestinian Authority refused to give Atef to the Israeli authorities because the Abayat family was politically powerful. But they did pretend to place him jail to appease the Israelis. Security forces blew up the vehicle a car thief gave him, which put the PA in awkward position. How could Atef die in the explosion if he was supposedly in jail? Atef's death would lead to Ibrahim Abayat taking power, but he had no leadership experience and the cell declined. In addition, terrorists have to go into hiding and cannot plot as effectively. Studies from Shin Bet have concluded that killing a possible suicide bomber will save sixteen to twenty people (Byman, 2011, p. 313). Besides directly saving lives from killing potential bomb makers, the living bomb makers are poor substitutions. Israel estimates that they stop over 80 percent of suicide bombing attempts, and they are capable of doing so because of poor execution by terrorists, like having wires stick out of their jacket (David, 2003, p. 120). Another example of the effectiveness comes from Hamas themselves. When negotiating a ceasefire in 2002, their first condition to stopping attacks was the end to the targeted killings. Israel's counter-terrorism

policy of targeted killings, therefore, is a useful paradigm for understanding the legal, moral, and strategic utility of the program and its applicability to drones.

Vietnam

The Vietnam War was a controversial conflict in America and the world, but an even more controversial program within the war was the CIA's counter-terrorism program called Project Phoenix. Vietnam's conflict with the communists started during World War II when Ho Chi Minh led the Communist Party in the north of the country. Though communism was on the rise in Vietnam, the French attempted to maintain control of their empire through the 1950's. In 1954, the communists achieved a victory at Dien Bien Phu, and the French decided to abandon their empire in the country. Vietnam would be divided into north and south at the Geneva Accords with the north being communist and the south supported by the United States. Minh continued revolutionary warfare, attacking the rich in North Vietnam, and infiltrating South Vietnam with future militants. The following decade the U.S. would send over 100,000 troops to bolster the fight against the communists under the Johnson administration. General William Westmoreland would lead the effort and focus on search-and-destroy missions in order to defeat the Viet Cong. The CIA would help implement a counter-terrorism program to go after the Viet Cong called the Phoenix Program. Although the CIA had been in the country for several years, the Phoenix Program would not take full form till 1968 (Moyar, 2007, p. 52). Members of Phoenix would target the Viet Cong to neutralize them as a threat and root them out of the villages through infiltration and targeted killings.

Phoenix differed from the regular operations that military leaders like General Westmoreland used as the program was meant to be a "scalpel," as compare to the "bludgeon" of

search-and-destroy missions (Valentine, 1990, p. 13). Provincial Reconnaissance Units (PRUs) carried out the majority of the targeted killing operations, and they seemed to have killed several thousand people even though this represents a minor part of all combatants who died in the war (Moyar, 2007, p. 171). Between 1967 and 1972 the PRUs most likely killed or captured between 700 to 1500 communists per month leading to over 20,000 enemies killed, which would prove to be severe losses for the enemy (Moyar, 2007, pp. 173, 224). The Phoenix Program would successfully neutralize the Viet Cong in several villages and eliminate the terrorists' infrastructure to damage their ability to conduct operations. Communists have admitted that years after the military success of the Tet Offensive the pacification efforts and Phoenix took out a significant number of their cadre (Moyar, 2007, p. 244). An effect of this neutralization effort was the same as other targeted killing programs. Viet Cong members would go into hiding and retreat from villages from fear of further attacks and the possibility of being killed. For example, America liberated My Thuy Phong in 1968 by setting up a base in the village, causing the shadow government of the Viet Cong to leave, and weakening the remaining cells severely. Many villages experienced this effect, and Viet Cong operations diminished as a result (Moyar, 2007, p. 256). According to Nguyen Co Thatch, a North Vietnamese diplomat, the Phoenix Program had successfully eliminated 95 percent of the communist cadre in certain provinces in South Vietnam (Moyar, 2007, p. 246).

Despite the successes of the Phoenix Program's counter-terrorism and counterinsurgency operations, America would ultimately lose the war in Vietnam. Dr. Henry Kissinger negotiated an end to American involvement in the war in 1973, and despite his best efforts South Vietnam would fall to the communists two years later at the Fall of Saigon as the Congress refused to continue funding the South Vietnamese government's fight. The effectiveness of the Phoenix

Program is readily demonstrable in military terms, but that does not mean the counter-terrorism effort operated ethically. In the CIA's attempt to extricate the communists from the population, they in fact committed atrocities in the country. The most famous example of this is the My Lai massacre. At My Lai Phoenix operatives decided to kill all Viet Cong sympathizers as well as those on the blacklist (Valentine, 1990, p. 344). Over four hundred civilians would die in the massacre at My Lai and the surrounding hamlets. Such examples negate the ethical nature of these missions, but they do not negate the demonstrated tactical utility of targeted killings. Had the CIA only focused on the Viet Cong and their supporters then the program could have maintained its ethical nature. Proportionality is what matters, and on average the Phoenix excursions followed this rule. This did not always happen, though, and the indiscriminate violence harmed the reputation, utility, and legitimacy of the program.

Sri Lanka

Sri Lanka's campaign against the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) shows how the targeted killing of a charismatic leader of a terrorist organization can neutralize the organization as a whole. Thiruvenkadam Velupillai Prabhakaran founded the Tamil Tigers in 1976 and led a violent independence campaign against the Sri Lankan government. During the 1960's and 1970's the Tamil Liberation Front were a relatively peaceful movement. They wanted to remain part of Sri Lanka, but sought better representation in the government. By the late 1970's and 1980's it was clear they would not reach these goals peacefully. The Tamil Tigers quickly established themselves as the pre-eminent militant organization. In 1983 Prabhakaran studied suicide bombers and how to utilize them in his militant campaign. Until Operation Iraqi Freedom the Tamil Tigers held the majority of suicide

bombings. After 9-11 Tamil Tigers lost significant funding from the diaspora in Canada and Europe. Furthermore, tourism plummeted after the Tamils began their terrorism campaign and attacked civilian airliners, and the insurance fees went up concerning the ports.

In 2001 the Tamil diaspora, the LTTE, and the Sri Lankan military, were all ready for a cease fire. Norway helped broker that agreement, and the cease fire promoted autonomy that ultimately promoted secession. The north would be under the Tamil's control until a final agreement happened. Within 2-3 years both sides were violating the cease fire, so Sri Lanka began a strong military campaign to terminate the conflict. In 2004 Colonel Karuna, a nom de guerre, defected from the Tamil Tigers, fracturing the LTTE, and went to the government with intelligence. Sri Lanka also greatly expanded their military efforts, and the navy bought a large number of small boats—needed to go after the naval suicide bombers and smugglers. By 2006 Sri Lanka inducted a large military package and started taking territory back from the militants. They drove LTTE up to the north and pinched them the Tamils off. Yet it was singular event that would be the beginning of the end for the Tamil Tigers. Sri Lankan security services killed Prabhakaran in May 2009, and this would eliminate the terrorist organization. The Tamil Tigers had acted like a cult for some time, and Prabhakaran's leadership role was quintessential to the nature of the organization. By killing him, Sri Lanka brought a 25 year conflict to an end, and the government successfully neutralized a militant organization.

Conclusion

Consideration of drones must take geopolitics and strategy into account when thinking through their effectiveness and ethics. Sovereignty is the quintessential element of the international order, and territorial integratory is paramount for sovereignty. America's drone

program operates in countries like Pakistan, Yemen, and Somalia without always the direct cooperation or authorization of the governments. However, there are legal and philosophical justifications to override territorial integrity and sovereignty. First, the threat of an imminent attack from another state or sub-state actor provides a self-defense justification stemming from the *Caroline* test. The previous discussion of al-Qaeda and its affiliates show they are constantly plotting against America and its allies, which means the threat of aggression and acts of aggression allow for kinetic action in the territory of other states. Another justification for violating the sovereignty of other countries is their inability or unwillingness to prevent aggression from terrorist organizations residing in their country. If the government is unable or unwilling to stop terrorists, the United States has the right of self-defense and to intrude on that state's sovereignty.

Historical examples in Israel, Vietnam, and Sri Lanka of targeted killings demonstrate the strategic value the tactic holds in eliminating terrorist threats. Israel's war against Palestinian terrorists in the occupied territories has included targeted killings of their political and military leaders, which led to significant results in harming the organizations. Although they did not eliminate whole organizations, terrorist cells were degraded and neutralized and reduced possible attacks on the Jewish state. A contentious use of targeted killings happened in the Vietnam War in the Phoenix Program. Known for using extreme tactics, the Phoenix Program's use of targeted killings was militarily effective but unethical based on the extent of the collateral damage. Sri Lanka holds one of the most successful examples of targeted killings because the government neutralized the leader of the Tamil Tigers, and this insurgent organization basically created a cult around their leader. By killing him, Sri Lanka brought an end to the organization. The strategic and tactical value of targeted killings is well established, but that does not mean using the tactic

is always ethical. The following chapter will look at the direct use of the drone program and compare it to the established legal, strategic, and ethical paradigms to assess if they are.

CHAPTER TEN
DRONES: PROPORTIONALITY, DISCRIMINATION, AND MILITARY NECESSITY

Ceterum autem censeo Carthaginem esse delendam.-Cato the Elder

Si vis pacem para bellum.

Introduction

Having established just war principles in a philosophical and legal framework, along with laying out other philosophical and legal principles, this study will now look directly at drone strikes in different countries and how they relate to proportionality, discrimination, and military necessity. There exist significant problems in how critics of the drone program approached proportionality because they typically do not fully comprehend the threat from terrorism or the implications of not neutralizing requisite targets. This chapter applies the ethical, legal, and strategic principles to the cases of drone warfare, looking at both specific cases and the general program. Specific cases allow for demonstrating the broader ethical principles of the tactic, but understanding the overall program is necessary because a single strike may be ethical while its general use is not. The Geneva Convention Protocol I defines inappropriate military action as "an attack which may be expected to cause incidental loss of civilian life…which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 51). This is the standard by which the U.S. military and intelligence services have to measure drone attacks and the use of Special Forces for targeted killings. Michael Walzer notes, "The targeted killing of insurgents and terrorists in wartime is subject to the same constraints as any other act of war" (2013, np). He cautions about the use of drones because of criteria President Barack Obama uses and relaxed standards of proportionality. However, Walzer and other critics of the drone program fail to apply the approved standards because of supposed amount of collateral

damage. This chapter will hopefully correct some of these problems based on the previously established history and objectives of Islamist terrorists and their threat to American interests and lives.

Judging the general drone program has several strategic and methodological problems as Daniel Byman and C. Christian Fair have pointed out. Byman wrote,

> The truth is that all the public numbers are unreliable. Who constitutes a civilian is often unclear; when trying to kill the Pakistani Taliban leader Baitullah Mehsud, for example, the United States also killed his doctor. The doctor was not targeting U.S. or allied forces, but he was aiding a known terrorist leader. In addition, most strikes are carried out in such remote locations that it is nearly impossible for independent sources to verify who was killed. In Pakistan, for example, the overwhelming majority of drone killings occur in tribal areas that lie outside the government's control and are prohibitively dangerous for Westerners and independent local journalists (2013, p. 36).

Fair agrees with Byman. She observes,

> While drone strikes have occurred in all agencies [districts], the vast majority of them have taken place in the two agencies of FATA known as North and South Waziristan. Because international media cannot travel to FATA legally and because the U.S. government refuses to speak about the covert program, most reports rely upon the often conflicting claims made by militant groups or parts of the Pakistani government (2014b, np).

To correct these problems, the assessment of the ethics of drone strikes will approach them from different perspectives: specific numbers, types of strikes, and individual cases. By amalgamating the differing sources and data, a less amorphous picture can take form that can elucidate the ethical nature of the drone program.

Below are the general numbers for Pakistan, Yemen, and Somalia from the Bureau of Investigative Journalism and the New America Foundation; they are the two organizations cited widely for keeping track of the drone program in those countries.

Figures for Overall Death (Bureau of Investigative Journalism, 2017; New America Foundation, 2017)**:**

Bureau of Investigative Journalism:	**New America Foundation:**
Pakistan: 2004-January 2017 Total strikes: 424 Total killed: 2,499-4,001 Civilians killed: 424-966 Injured: 1,161-1,744	Pakistan: 2004-January 2017 Total Strikes: 403 Total Killed: 2281 - 3672 Civilians Killed: 255 - 315 Unknown Killed: 176 – 278
Yemen: 2002-January 2017 Confirmed drone strikes: 145-165 Total killed: 601-871 Civilians killed: 65-101 Injured: 100-234 Possible extra drone strikes: 90-107 Total killed: 357-509 Civilians killed: 26-61 Injured: 82-109	Yemen: 2002-January 2017 Total Strikes: 185 Total Killed: 1103 - 1389 Civilians Killed: 87 - 93 Unknown Killed: 33 – 52
Somalia: 2007-January 2017 Drone strikes: 32-36 Total killed: 242-418 Civilians killed: 3-12 Injured: 5-24	Somalia: 2002-January 2017 Total Strikes: 41 Total Killed: 348 - 415 Civilians Killed: 31 - 40 Unknown Killed: 10 - 29

AfPak: al-Qaeda and the Taliban

Drones in Afghanistan would not come into full use until 2009-10 when they were used for "pattern of life" operations, watching an insurgent continuously until action could be taken (Waltz, 2015, p. 209). Targets were usually in Pakistan because that is where the enemy resided, waiting for the opportunity to attack America and its allies. Though their utility in battle was exceptionally high in Afghanistan, it is not usually heralded as an ethical or legal problem for drones as that was an active battlefield. There does not seem to be an objection to their use in Afghanistan in battlefield circumstances as the military has an "accepted threshold of 10 percent

and… [an] actual collateral damage rate of 1 per cent" (Braun and Brunstetter, 2013, p. 315). To acceptably have collateral damage, the military would need approval from the National Command Authority, i.e. the President or the Secretary of Defense. On the other hand, Pakistan is a strategically important state in which to target terrorists not on a battlefield because groups like the Taliban and al-Qaeda operate relatively freely in the northwestern tribal areas and attack Afghan and allied forces. The majority of U.S. targeted killings from drones outside of a conventional battlefield have happened in Pakistan. Pakistanis are generally opposed to the drone program because "they think the strikes kill too many innocent people, and that they are slightly more likely to believe that the United States carries out the strikes without the consent of the Pakistani government" (Fair et al., 2016, p. 412). In addition, those who think of the United States as an enemy are more likely to oppose the drone program.

The CIA limited its drone strikes to the areas of FATA controlled by the Taliban, primarily in North and South Waziristan (Williams, 2010, p. 876). FATA is the Federally Administered Tribal areas and is located in the northwestern part of Pakistan that borders Afghanistan. It is a majority Pashtun region, which is the dominant ethnic group of the Taliban, although there are tribes and clans within the ethnic Pashtuns. The region is incredibly mountainous and difficult to travel, and it has a large number of militant groups that go back to the anti-Soviet mujahideen. In addition, FATA is governed by the Frontier Crimes Regulation (FCR) stemming from British colonial rule (Fair et al., 2016, p. 393). The FCR prevents foreign journalists from going to FATA without approval from the ministry of interior and a military/intelligence escort. Pakistanis also are not allowed to go there unless they have a family connection. There seven agencies and six frontier regions controlled by maliks (tribal leaders) that have about three million people, and because of the FCR there are no police forces. Instead

paramilitary and militia forces act in that capacity, which means "the arrest of militants, collection of evidence, and subsequent prosecution in Pakistan's courts is not a viable option in FATA" (Fair et al., 2016, p. 395). Although the drone strikes were mostly used in FATA for security reasons as that's where the terrorists resided, this was also done through an agreement with Pakistan's military. Security services in Pakistan did not want American drones flying where they could see nuclear facilities or Kashmiri terrorist training camps (Fair, 2014a, p. 207). ISI also wanted the U.S. to fly drones under a Title 50 covert mission so that they could never acknowledge the strikes that happened.

The first drone strike in Pakistan occurred in June 2004 when Nek Muhammad, a Pakistan Taliban leader, violated a peace deal; so he became a target and died in South Waziristan from an AGM-114 Hellfire missile (Ranjan, 2014, p. 458). Muhammad had offered to protect al-Qaeda and Uzbek affiliates and attacked American and allied forces in Afghanistan (Williams, 2010, p. 873). Events leading up to the U.S. neutralizing Muhammad show the proportional ability of drones over traditional military methods. In the spring of 2004 the Pakistani government had ordered the local Frontier Corps to capture Tahir Yuldashev, leader of the Islamic Movement of Uzbekistan, but it would fail miserably (Woods, 2015, p. 101). So, Pakistan sent in the regular military, an unprecedented move, to remove Muhammad and his allies. In the operation villages were destroyed, hundreds of civilians died, and hundreds of soldiers died. Pakistan was forced to sign a peace treaty, but that was immediately ignored by the Islamist terrorists. Muhammad's death would set off several other drone strikes in Pakistan to counter the rising Islamist forces there working against American and allied troops (Williams, 2010, p. 875). In May 2005 the U.S. killed Haitham al-Yemini, an al-Qaeda weapons expert, in North Waziristan. Again in North Waziristan, al-Qaeda number three Abu Hamza Rabia and four

others died in December 2005 in a drone strike. The next strike would prove disastrous for the United States though. In January 2006 American forces targeted the location they thought Zawihiri was at. This turned out not to be the case, and after firing ten missiles eighteen civilians died, including ten women and children. Thousands of Pakistanis marched in protest, and the CIA did not engage in another strike for eight months. As opposed to the previous strike, the one in October 2006 was extraordinarily effective (Williams, 2010, p. 876). A drone targeted the madrassa led by Mullah Liaqatullah in Chenagai and eighty students died. Islamists tried to say these were innocent students, but Pakistani intelligence showed the school was a training facility—this means eighty militants died that day.

The madrassa strike in Chenagai was not without its controversy (Woods, 2015, p. 94). Besides Islamists, some people like British barrister Shazadi Beg have claimed that the strike killed only children and students. This attack is another example of why determining the exact amount of civilian deaths can be difficult. First, just because the men were young does not mean they were not militants, although one of the claims of critiques is that the youngest person to die in the attack was seven years old. Such a young age would obviously preclude a description as a militant. Second, the accounts of what happened differ too substantially and come from biased sources to fully articulate what might have happened. There is an interest in claiming that all of those who died were militants, but there is also an interest from critics in claiming only civilians died. In 2007 the CIA would use five more strikes in Pakistan. Starting at this time the United States also started dropping leaflets warning people that if they worked with or harbored al-Qaeda or Taliban members they would be bombed (Williams, 2010, p. 876). Strikes would begin significantly increasing after this; in 2008 there were 36 strikes and 51 strikes in 2009.

Baitullah Mehsud was a man in his mid-forties and diabetic when he died on the evening of August 5, 2009 from a drone strike on his father-in-law's house (Enemark, 2011, p. 218). The strike happened in South Waziristan town of Zanghara in northwestern Pakistan while Mehsud was on the rooftop of the house receiving a massage and intravenous drip for stomach issues. Along with Mehsud, his wife, father-in-law, seven body guards died, and two others died. Mehsud was the leader of Tehrik-i-Taliban Pakistan (TTP), the mastermind behind former Prime Minister Benazir Bhutto's death that also killed over twenty other people, and was responsible for several suicide attacks in Afghanistan. Targeting the TTP was an exchange President Obama made with the Pakistanis so that he could go after the other safe havens in FATA (Woods, 2015, p. 155). The TTP were a deadly force inside Pakistan, and in President Obama's first term alone they killed 3,200 civilians in over 200 attacks. Mehsud rose to power following Muhammad's death and proved to be an adept leader. In response to Mehsud's death, Pakistani-American Faisal Shahzad attempted to set off a bomb in Times Square in June 2010 (Boyle, 2013, p. 1). He also claimed his motivations included the American occupation of Iraq and Afghanistan and the drone program. Shahzad stated in open court that he accepted killing civilians because America already does that. America kills women and children and all Muslims.

A list of other high-value targets in Pakistan include: Saad Bin Laden, Bin Laden's son connected to attacks in North Africa; Abu Laith al-Libi, al-Qaeda number three responsible for a suicide bombing at Bagram Airbase; Osama al-Kini, Al Qaeda's external operations chief connected to the bombings against the U.S. embassies in Kenya and Tanzania; Khalid Habib, the commander of the Lashkar al-Zil; Abu Khabab al-Masri, the chief of al Qaeda's weapons of mass destruction program; Rashid Rauf, the suspected mastermind of the 2006 Heathrow airliner

plot; Saleh al Somali, head of al-Qaeda's operations outside of Afghanistan (Williams, 2010, p. 878; Plaw et al., 2016, p. 45).

Looking at an aggregate of data sources, Plaw et al. found that from 2004 to 2015 civilian deaths in Pakistan made up between 5.25 percent and 21.7 percent of fatalities, and only 2.39 percent when the dates are restricted to January 1, 2012 to March 18, 2015 (2016, p. 49). One study that looked at Pakistani and American news reports of drones between 2004 and June 2010 found that 1,372 people were killed of which only 68 could clearly be described as civilians and 206 as "unknown" (Enemark, 2014, p. 47). Even if all of the unknown victims were civilians, that is a ratio of four militants killed for one civilian. Avery Plaw looked at the four studies from the New American Foundation, Bureau of Investigative Journalism, *Long War Journal*, and University of Massachusetts data sets and found that "the best available evidence suggest that civilian casualties are moderate to low in relation to suspected militant casualties" (2013, p. 152). However, there are major differences between the datasets with the *Long War Journal* and University of Massachusetts having significantly lower numbers of civilians than New America Foundation and Bureau of Investigative Journalism. This most likely stems from the different way they count possible civilians with the latter including in that category anyone who cannot be identified as a militant (Plaw, 2013, p. 140). However, a comprehensive assessment from the specific cases of men like Muhammad and Mehsud to the general data overwhelmingly demonstrates the ethical nature of drone strikes in Pakistan.

Braun and Brunstetter have a different method than looking at aggregate numbers, and instead they look at the number of attacks that had collateral damage as a measure of proportionality. Based on their assessment, they think the CIA's program is disproportionate, especially when compared to the military's extremely low rate of collateral damage. From 2004

to 2012 there were 343 strikes in Pakistan, and 80 of them had civilian casualties, which is a rate of 23 percent (Braun and Brunstetter, 2013, p. 312). Also, 300 of the strikes (87 percent) were against regular militants (not leaders), and 238 of those strikes only killed militants (69 percent of total strikes) (Braun and Brunstetter, 2013, p. 314). There were 20 strikes that only killed civilians (6 percent). Strikes against militant leaders during this time period had an average of eight civilian deaths while strikes against regular militants only had two, but only two percent of deaths were militant leaders (Braun and Brunstetter, 2013, p. 313). Braun and Brunstetter argue that the apparent military advantage is to deny terrorists a safe haven based on the limited number of strikes against leaders, and that this is disproportionate and violates *jus in bello* principles.

Yemen and Somalia

Ali Qaed Sunian al-Harithi was the first target outside of a warzone by a drone, and he died in Yemen in November 2002 in an attack in Marib Province (Plaw et al., 2016, p. 86). Al-Harithi was a high-level al-Qaeda operative, and he was wanted by the U.S. in connection to the USS *Cole* bombing. Yemeni forces had initially attempted to capture al-Harithi, but he had gone into hiding in the Marib Province. Negotiating with the local tribes failed because of their tradition of protecting guests, and when Yemen sent in the military to remove al-Harithi, the tribes fought back and he escaped. In the raid to get him, nineteen soldiers were killed and thirty five captured (Plaw et al., 2016, p. 87). Because of the failure to capture him, the CIA instead used a lethal drone strike that would prove advantageous. Using a French base in Djibouti as part of the Combined Joint Task Force-Horn of Africa, the U.S. found him through drone surveillance and the U.S. ambassador to Yemen paying off local tribesmen. After monitoring al-

Harithi's cellphone activity, the NSA gave intelligence to the CIA who sent out a drone to neutralize the target. Five other al-Qaeda operative would die along with al-Harithi. This strike was important for several reasons: it was done with approval from and coordination with the Yemeni government, the target was a high-level al-Qaeda operative outside of Afghanistan, and an American-Yemeni, Kamal Darwish, also died in the attack. Darwish would be the first American killed in a drone strike. Al-Harithi was quintessential to al-Qaeda in the country, and the organization lost significant infrastructure and capabilities without him. After the strike became public, the Yemeni government was furious as the Americans had promised it would remain secret. Another strike would not happen in the country for seven years.

Al-Qaeda would start gaining strength back in February 2006 following the escape of twenty-three AQ inmates from prison, along with Nasir al-Wuhayshi—the future leader of AQAP (Plaw et al., 2016, p. 88). Al-Wuhayshi learned from al-Harithi's mistakes and did not create an organization solely based on his leadership, and he would die in June 2015 from a drone strike. AQAP's first transnational attack was the attempted Christmas bombing by Umar Farouk Abdulmutallab, which probably turned the Obama administration to focusing back on Yemen and AQAP. The drone program in Yemen has been different from the one in Pakistan because they are more frequently used to support the military there, destroying AQAP's ammunition depots and defensive positions (Plaw et al., 2016, p. 91). Civilian deaths compared to militant deaths yield a ratio of about 1:10, which is better than the strikes in Pakistan.

Somalia was not originally of high concern when it came to the War on Terror because most of its militant activity was inwardly directed. Far fewer strikes have happened in this country than other ones, but there were some important strikes that did take place. Bilal al-Berjawi was a former UK national and a key liaison between al-Qaeda and al-Shabaab (Woods,

2015, p. 215). The first attack on him failed, but JSOC neutralized al-Berjawi six months later. There were also strikes on al-Shabaab training camps. Somalia is also like Yemen in that the ratio of civilian to militant deaths is about 1:10 and less than Pakistan, most likely due to the more diffuse nature of those living in the country.

Anwar al-Awlaki

Anwar al-Awlaki was an American-born, Islamic cleric that had connections to Islamist terrorists pre-dating 9-11. The FBI began watching him because of his connection to three of the 9-11 hijackers before he left the United States in 2002, and al-Awlaki became a central leader in al-Qaeda in the Arabian Peninsula. He had once been respected by the American government, even leading prayers at the Pentagon after 9/11 (Woods, 2015, p. 119). America's intervention and occupation of Iraq started to drive him towards extremism, though. When he went to Yemen in the mid-2000's the government would detain him for about eighteen months after the U.S. asked them to do so (Woods, 2015, p. 138). FBI agents routinely interrogated him, and the Yemeni government was told by the Director of National Intelligence the Americans did not object to his continued imprisonment. By the end of 2007 Yemen would release him, and he would move towards joining AQAP. The U.S. would first try to kill al-Awlaki in December 2009 due to his possible connection to the Ford Hood Shooter.

President Obama decided to add al-Awlaki to the list of approved targets in February 2010 after determining that he was a high-level al-Qaeda operative who directed attacks against the United States (Panetta, 2014, p. 385). Even though the al-Awlaki case was different "in that he was an American citizen, the underlying rationale that he was an enemy combatant waging war against the United States was identical [to other targets], and that position was supported by

the Justice Department" (Panetta, 2014, p. 386; see chapter 7 for legal discussion). Al-Awlaki's father filed suit in court after his son was placed on the kill list (Kebriaei, 2015, p. 196). The legal argument by those who brought the suit is that war is only limited to where there is protracted armed conflict between organized armed groups, and Yemen was not included in that. They then argued that even if the conflict had moved beyond Afghanistan, AQAP was not an affiliate force of al-Qaeda covered under the *AUMF*. The more controversial kill that went along with al-Awlaki was that of his son, Abd al-Rahman al-Awlaki (Wood, 2015, p. 141). Although the U.S. government would claim he was a member of al-Qaeda, many who knew Abd al-Rahman did not think this was the case. In October 2011, only a month after his father's death, a U.S. drone killed him and several of his friends.

Military forces were the ones going after al-Awlaki with intelligence support from the CIA, and they would prove to be ineffective at neutralizing him. The first attack on al-Awlaki missed, but they killed thirty militants in Shabwa Province in Yemen (Plaw et al., 2016, p. 90). The military tried again in May 2011, targeting al-Awlaki twice within a forty-five minute period, again in the Shabwa Province. Drones fired three missiles at al-Awlaki in a truck, but they missed. Al-Awlaki then switched vehicles with other AQAP operatives. Another drone fired at the same truck as before, but the target was no longer in the vehicle. Because these attempts by the military ended in failure, the CIA took up the responsibility of killing al-Awlaki. In August the CIA established an air base in the Persian Gulf after the failed attempt in May, and would kill al-Awlaki that September. Although al-Awlaki only gave tangential support to Nidal Malik Hassan, the Fort Hood shooter, before his terrorist act, al-Awlaki was an instrumental radicalizer for Umar Farouk Abdulmutallab, who tried to blow up a plane headed for Detroit, and other terrorists (Panetta, 2014, p. 386). Umar received training, explosives, and sanctioning of his

mission from AQAP of which Anwar helped lead. On December 25, 2009 Umar attempted to take down Northwestern Airlines Flight 253 by placing explosives in his underwear. The aircraft carried 290 people on board, and if Umar had succeeded all of them would have died.

Al-Awlaki was killed on September 30, 2011 while having breakfast in Jawf Province. Apparently he and his men heard the drone above them and ran for their trucks to escape, but they did not run fast enough. By neutralizing Anwar the U.S. prevented further attacks with no collateral damage; only a hand full of radical Islamists died in the attack. Accounts differ as to how many other people died; it was between 2 and 7. This followed the Geneva Convention's understanding for the use of kinetic action by severely limiting the amount of innocent lives lost and eliminated his ability to radicalize any more terrorists, undoubtedly saving more lives than were lost when the U.S. neutralized him. Furthermore, he was a militant in a war against the United States and was most definitely a military target. He motivated and directed attacks against America and did so up until his death (Panetta, 2014, p. 387). Looking at particular cases like al-Awlaki shows the moral case for the drone program on a smaller scale. He was a terrorist that threatened the United States and supported attacks, which made him a combatant under international law even if he was not on an active battlefield. The U.S. killed him and saved hundreds of lives from future attacks that he would have inspired and help direct. Proportionality was easily met by this attack. And even if the larger number of people that died with him are accepted and are not counted as militants (though some most likely were), then proportionality and discrimination were met together. He was a necessary military target that was an imminent threat by continuously planning attacks. America met all the just war principles in this targeted killing, and it is prime example of the ethical nature of the drone program.

Iraq

Although al-Qaeda did not initially have a presence in Iraq, President Bush's invasion and occupation of the country would allow the terrorist organization to flourish there. Drones would become an important part of the counter-terrorism and counterinsurgency strategy against al-Qaeda in Iraq. Pattern of life operations in Iraq, like they were in Afghanistan, were quintessential to the mission and protecting troops, but they are different than the signature strikes used. JSOC attempted to expand the use of drones in Iraq after the death of Zarqawi in June 2006 in order to continue the moment of dismantling AQI's top leadership (Woods, 2015, p. 83). At the battles in Fallujah and Najaf, drones worked in concert with ground troops for surveillance and coordinating air strikes. They were primarily in the background for the war in Iraq. That is until ISIS started taking control of territory and threatening American interests, security, and committing crimes against humanity. The vast majority of strikes against ISIS have not come from drones, but the CIA and JSOC are using drones " aimed primarily at leadership figures in the Islamic State as well as operatives suspected of being involved in efforts to build a terrorist network beyond the borders of its declared caliphate. Al-Qaeda militants also are approved targets" (Miller, 2015, np).

Other important targets from the drone campaign against ISIS include Boubaker Hakim and Wael Adel Salman. Hakim, also known as Abu Muqatil, was born in Paris and of Tunisian descent, and he had operated in Iraq during the war before receiving a prison sentence for activity (Cruickshank, 2016, np). He was connected to a terrorist attack in Tunis that killed 38, including 30 British citizens, and the U.S. neutralized him in a strike in November 2016. Salman, also known as Abu Muhammed Furqan, was ISIS's information minister and one of the few people with access to al-Baghdadi (Starr & Browne, 2016, np). His death was only a week after

Mohammad al-Adnani's, another high-level ISIS member. As ISIS's information minister, Salman was responsible for producing and distributing the propaganda of torture and execution videos. As drones are primarily used in a combat role in concert with other sorties and Special Forces, the strikes against ISIS have not produced the same outcomes as Pakistan, Yemen, or Somalia. They are used in an active battlefield, and it seems they are less controversial in this theater of operation as several strikes happen in places like Raqqa that are occupied by ISIS.

Analysis

Proportionality does not just look at the number of militants dead compared to the number of civilians dead, but also how much the violence moved the state towards achieving its political and military objectives. David Kilcullan, a former US Central Command advisor, argued that the U.S. should suspend the use of drone because the kill rate of militants was only 2%; he argued that drones only killed one terrorist for every fifty civilian deaths (Killculan & McDonald, 200, np). Except the pre-eminent South Asian expert Dr. Christine Fair soundly debunks this critique of drones (2010, np). She aptly notes that the sources of civilian deaths that scholars like Kilcullan use come from the Pakistani Taliban, not reputable sources. In fact, the U.S. and Pakistani officials note that few civilians die in drone strikes. The numbers of deaths critics cite only work if they include air strikes in Afghanistan that support NATO troops. As shown from looking at the aggregate information of Pakistan, Yemen, and Somalia, the death toll for civilians is exceptionally low. With a high of about 21 percent of fatalities being civilians, Pakistan had the highest amount. That means for every four terrorists and militants neutralized only one non-combatant does. Any loss of innocent life is tragic, but the numbers do not show a

disproportionate amount of force compared to the advantages gained from neutralizing the enemy.

Particular cases also show the proportional and discriminatory nature of attacks. To analyze drone warfare as a tactic, it is important to connect the criteria of proportionality and discrimination. Mehsud, Muhammad, and al-Awlaki are all examples of high value targets in which their deaths were only accompanied by a handful of civilian deaths. Preventing their future attacks significantly outweigh the human cost of the strike. An interesting point comes from where the majority of civilian deaths occur. In Pakistan about three times more low-level militants are killed than civilians, but according to some data strikes of high-value targets actually account for the majority or about half of civilian deaths (Plaw, 201, p. 143). This would also fit well with proportionality because those are the ones plotting against America and killing civilians in much larger numbers. Comparing the amount of civilian deaths from terrorist attacks to drone strikes shows a clear balance towards drone a proportional response. Al-Qaeda and its affiliates were responsible for almost 4,500 civilian deaths, over 6,500 injuries, almost 200 military death, and about 340 military injuries through 2011 (Plaw, 2013, p. 145). From 2007 to 2011, the Taliban was responsible for about 7,800 civilian deaths. Even if the largest amount of civilian deaths from drones are accepted for the same time period (638), that is seven times smaller than al-Qaeda's victims and nineteen times smaller than al-Qaeda and the Taliban combined (Plaw, 2013, p. 146).

The Air Force's tactic of "double tap" may contribute to more civilian deaths. Firing two missiles to ensure the target is neutralized leads to the death of those who go to help after the first explosion. At least fifty civilians have died in the second strike (Benjamin, 2013, p. 26). According to some reports the United States assumes that all military-age men in strike zones are

militants until there is evidence to prove they are not (Ahmad, 2014, p. 70). Mahmood Ahmad criticizes this targeting technique on the just war criterion of discrimination because terrorist networks like the Haqqani network and others operate in close proximity to civilian populations. The drone strikes take place in tribal areas in which people live in large groups together, which limits the ability to only target and kill combatants. The problem with this argumentation is that the CIA must neutralize terrorists where they exist, not where they wish they were. It would be preferential to neutralize targets away from any collateral damage, but as Mao pointed out in his work on insurgency the terrorist and insurgent must operate within the population. That is the only way for them to succeed. Considering that terrorists and insurgents infiltrate civilian populations, there must be reconsideration on collateral damage. The alternatives would be to send in soldiers, but that comes with its own cost in human life. Without the use of drones in FATA, the Pakistani military may very well "return to the indiscriminate artillery fire and aerial attacks the military has employed in the past" (Waston & Fair, 2015, p. 91). From 2002 to 2007 Pakistani military operations in FATA killed 1,440 people, 451 of whom were civilians, which is 31.2 percent compared to between 3.86 and 23.85 for drone strikes (Plaw, 2013, p. 148-149). And the continuous threat from terrorism in Pakistan is extensive; terrorists in the country have killed almost 19,000 civilians and over 5,700 security personnel between January 2003 and June 2014 (Watson & Fair, 2015, p. 83).

The military necessity of the attacks even with higher civilian casualties also comes from the stated objectives of al-Qaeda and its affiliates who adhere to the radical theological position of Osama Bin Laden. Bin Laden wanted to destroy the United States through a continuous jihad against the West, and along with other Islamists he has an eschatological, totalitarian vision for the world. He wrote in his 1996 fatwa, "It is no secret that warding off that American enemy is

the top duty after faith, and nothing should take priority over it, as decreed by the ulema." Two years later in his next fatwa he wrote, "The ruling to kill the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it…," and then called on Muslims "to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it." Attacks and plots by al-Qaeda and its affiliates following 9/11 include: the 2002 bombings in Bali, 2003 attack in Riyadh, the 2003 bombings in Istanbul, the 2004 Madrid train bombing, Pendennis plot in Australia, the 2005 London bombings, the 2006 airline hijacking plot, 2008 bombing plot in Barcelona, 2008 Mumbai shootings and bombings, and countless attacks in Afghanistan, Pakistan, and other non-Western countries. Clearly al-Qaeda and its affiliates will wage a continuous and bloody campaign against the United States and its allies until one completely defeats the other. Therefore, application of proportionality and military necessity principles must acknowledge this fact.

Drone strikes have proved especially effective tool against al-Qaeda and achieved disrupting the organization's activities, according to both government officials and the organization itself (Williams, 2010, p. 879). Leon Panetta, then CIA director, stated that the operations were seriously disrupting al-Qaeda and preventing them from successfully coordinating attacks outside of the Afghanistan-Pakistan border (Warrick & Finn, 2010, np). Al-Qaeda operatives live in constant fear of being a target by a drone, and they complain of the surreptitious destruction of terrorist infrastructure, even referring to the drones as wasps and Satan. Pashtun tribesmen turned away from even associating Taliban members due to this. As connection to the population is important for insurgent campaigns, this would limit the Taliban's effectiveness and make them less secure. Al-Qaeda and the Taliban also had to abandon training

camps due to the strikes. In addition, drone strikes in Pakistan seemed to have had a mitigating effect on terrorist activity and lethality. In the week of a drone strike, the number of attacks decreases by 5% and the lethality of terrorist attacks declined by 25%, which shows there is a disruption effect that drones have on terrorist organizations (Johnston & Sarbahi, 2016, p. 211-212). Based on the threat from al-Qaeda and its affiliates, the drone program has proven to be a strategically effective tool for counter-terrorism and meets the proportionality, discrimination, and military necessity principles by limiting civilian deaths and only using the amount of force necessary to degrade and disrupt a persistent threat to American interests, security, and lives.

Conclusion

In analyzing the ethical nature of a particular tactic, scholar must ask a series of questions: 1) Who is the enemy? What is their nature? What are their objectives? 2) What are the state's political-military objectives? 3) What type and amount of force is necessary to stop the enemy and prevent them from achieving their objectives? What type and amount of force is necessary to achieve the state's political-military objectives? 4) How many non-combatants will die in the use of force? What are the foreseeable consequences of the use of force? Does this outweigh the need for the political-military objectives? 5) What will the effect be on the society and political order? Will it maintain stability? Will it be more just?

The enemy is al-Qaeda and its affiliates (AQAP, al-Shabaab, the Taliban, and ISIS). They are terrorist and insurgent organizations. Under statutory, common, and international laws, the state is at war with the organizations and can use lethal force. Al-Qaeda and its affiliates seek the elimination of the far enemy in order to bring down the near enemy; breaking the Westphalian order to establish a caliphate. Their objectives are violent and absolute. Because of

al-Qaeda's objectives, the United States pursues: elimination of al-Qaeda and its affiliates as a security threat to the homeland, promotion of stability in the regions and countries to prevent future attacks, and spreading liberal values. The structure and objectives of al-Qaeda and its affiliates require significant kinetic action, if not full war, because of the absolute objectives of the organization and its nature. Drones are included as a form of kinetic actions, and they are used to neutralize leaders and technical experts of terrorist organizations. Targeted killings by drones, though, have consequences as terrorists and insurgents live and operate within civilian populations. Considering the nature of al-Qaeda (terrorist and insurgent), a higher rate of civilian casualties should be expected. Possible social consequences of drones include breaking up of communities through fear, problems with the warrior ethos, and the bureaucratization of war/ease of going to war. However, drones as a tactic will lead to the degradation of the enemy and increased security for the U.S. and local communities.

CHAPTER ELEVEN
CONCLUSION

Summary of Study

The argument of this study is thus: Terrorism and insurgency are both forms of war, though asymmetric in nature, according to military and legal paradigms. Al-Qaeda and its affiliates are terrorist and insurgent organizations at war with the U.S. and its allies. Targeted killings and strategic strikes are legitimate forms of kinetic action and are legal, ethical, and useful tactics to neutralize enemy combatants and terrorist organizations. Drone strikes are a modern, technological form of targeted killings and strategic strikes, and they fall within the ethical framework of *jus in bello*'s proportionality and discrimination. Therefore, drone strikes in the war against al-Qaeda and its affiliates are an ethical military tactic under Augustinian just war theory.

Terrorism is politically motivated violence or the threat of violence against non-combatants as a means to spread fear, and it is an act of warfare because it is political in nature. Violence against the polity is violence against the entire community and threatens the security of all within it. In addition, terrorism is an illegitimate form of political violence because the target is non-combatants, which goes against an ethical paradigm of war. Terrorists and other violent sub-state actors seek to upend the current political order and impose their own usually quixotic utopianism instead. Al-Qaeda declared war against the United States in two ways. First, Osama Bin Laden issued a declaration of war in 1996 with a fatwa calling for all out conflict against America. This was part of his strategy to eliminate the "far enemy" so that the "near enemy" (Arab authoritarian regimes) would collapse. Second, al-Qaeda attacked the U.S. in 1998 at the embassies in Kenya and Tanzania, in 2000 against the USS *Cole*, and on 9/11 when terrorist

operatives flew planes into the World Trade Centers and the Pentagon. Under American common law, al-Qaeda and America were in a state of war. *Bas v. Tingy* held that a "perfect" war did not have to exist (two militaries on the battlefield facing each other) for a state of war to also exist; the Supreme Court called this an imperfect war. The Prize Cases decided by the Court also maintained that a state of war exists between the state and a non-state actor when acts of aggression happen. Lastly, *Ex Parte Qurin* recognized that unlawful combatants were still at war with the state even if they did not form to the customary laws of war. Al-Qaeda fit all of these criteria under the law.

Because a state of war exists between the U.S. and al-Qaeda, America is given legal authority to use force to protect its security. Following the attacks on 9/11, Congress passed the *Authorization for the Use of Military Force* that gave the President the power to go after al-Qaeda and its affiliates to prevent any future terrorist attack. This meant that through congressional authorization the President had the authority to neutralize al-Qaeda wherever they were in the world and all who aided them in their jihad, including the Taliban, al-Qaeda in the Arabian Peninsula, al-Qaeda in Iraq/Islamic State, and al-Shabaab. Furthermore, the President already possessed broad executive authority stemming from the Constitution, statutory law, and the common law. The Vesting Clause and Commander-in-Chief Clause give the President significant war making powers, and the War Powers Resolution gave congressional authorization for the President to use force wherever he saw fit for a short duration of time. In *U.S. v. Curtiss-Wright* the Court held the executive had the sole foreign policy making powers as well. Under international law the U.S. was also within its legal rights to go after al-Qaeda and its affiliates coming from the doctrine of self-defense. Article 51 of the UN Charter protects the right to collective and individual self-defense, and Article 39 stipulates Security Authorization for legal

wars, which the U.S. received from UNS.C. Resolutions 1368, 1386, and 1483. International law similarly protects the right to stop imminent attacks, the *Caroline* doctrine, and America established the criteria of an imminent threat from a terrorist as one who has already committed an attack, continues to plot against the U.S. and its allies, and capturing the individual is not feasible.

Drones are a form of targeted killing, which is neutralizing a single individual in a war. This means it is not qualitatively different than using Special Forces or a manned aircraft, and it is legally and ethically different from assassination as treachery is not involved and political leaders are not the targets. Targeted killings are an effective strategy against terrorists and insurgents as decapitation has been an effective counter-terrorism tool used in Vietnam, Israel, and Sri Lanka before. In addition, targeted killings fit well within the Clausewitzian paradigm of going after centers of gravity, which in the case of terrorists usually mean their training bases, hideouts, and leadership. Galula and Trinquier's counter-insurgency framework also notes the importance of eliminating the bases of activity for the terrorists. Mao and Che Guevara particularly argue the importance of the population for maintaining guerilla warfare, but drones remove terrorists from them because the militants do not know if they can trust the people around them. Decapitation and targeted killings also prevent effective terrorist leadership from coordinating and plotting attacks and technical experts from building better bombs.

Finally, drones meet the criteria of *jus in bello*: proportionality, discrimination, and necessity. The fight against al-Qaeda and its affiliates will continue until the terrorists are fully eliminated. They have declared an endless war against the United States and its allies, and killing their leaders and even low-level militants is important to stop their constant plots and attacks. Drone strikes have not killed many civilians in comparison to other forms of warfare like

manned aircraft bombings or ground forces. A drone can also go where soldiers cannot. The nature of terrorists and insurgents means they will live amongst the civilian population, so collateral damage is inevitable. But drones have significantly limited collateral damage more than the alternatives. The amount of force used by the United States is necessary and proportional to the threat faced by its enemies. America also sought, as is expected from the just war tradition, a more just global order by containing threats to civilians at home and abroad.

Constant Reflection

Just because a military tactic is widely accepted as morally acceptable does not make it right. This study looks at drone warfare as a tactic to assess its morality and demonstrate that it is an ethical tactic in warfare. When thinking about just war theory, there is a different logic to the use of force in each case in order to vindicate what is right. There is an appeal to God in the theological tradition, and war is a way to put the dispute in God's hands. This makes sense when soldiers fight each other evenly on the battlefield and embodied human beings are on equal footing. However, it is more problematic when it comes to asymmetric wars in which technologically advanced countries fight a weaker party. The actual, empirical nature of drones makes it difficult to appeal to the theological tradition. Therefore, it is important to ask: Is there something just in the use of drones? The answer is yes. Drones are a just tactic because it is an effective tool in neutralizing terrorists and disrupting their network while limiting potential harm to American soldiers and restricting the amount of civilian death. This study contributes to the understanding of the ethics of warfare by accurately assessing drones in the proper military, legal, and ethical context.

Not every scholar within the theological perspective accepts this study's interpretation of just war theory and drones. For example, Bishop Richard E Pates gave remarks to the Princeton Theological Seminary Interfaith conference on Drone Warfare in which he stated it is "difficult to justify targeted killings by drones under Catholic just war teaching" (2015, np). He raised the questions the morality of drone warfare based on the technology, distance, signature strikes, lack of due process, collateral damage, riskless war, and lowering the bar to use kinetic action. Bishop Pates also thinks American "usage of this technology far outstrips the amount of reflection we've done on the subject" (2015, np). This study goes through each of those issues and demonstrates how the use of drones is ethical even with these problems. In addition, it does exactly what Bishop Pates wants by continuing to reflect on the weighty moral issue of drone warfare. The importance of this study is to further such reflections, even if the study comes to different conclusions than the Bishop. Just war theory is meant to be a framework by which scholars, theologians, and policy makers can constantly update their analysis by deliberating these issues.

Future Research

Future research should focus on two areas: better data and long-term social consequences. The data on the victims of drone warfare is difficult to fully assess because of where the strikes happen. Although ethicists must take the information that they have, future research must endeavor to retrieve better data on civilian deaths and the effects on terrorist organizations. This will be difficult, especially in places like FATA, but better data on civilian deaths will allow ethical work to more accurately inform the application of just war theory. In addition, scholars must look at how drones affect societies in the long-term. Such research will take patience, but the influence drones have local populations matter for the ethical nature of the

tactic. Finally, future research must constantly update the ethical assessment with just war theory. Even though this study found that drone warfare is ethical up to this point, in the future the United States could engage drones in a manner that is unethical. Just war ethics requires scholars, theologians, and policy makers to reassess and think through their actions on a constant basis.

By assessing and critiquing drone warfare through the framework of just war theory and Christian realism, one can then apply these normative ethics to other asymmetric wars and the tactics used by states. As previously stated, non-state actors can engage in warfare with states, and it is important that states fight these wars ethically. These normative ethics do not only apply to the United States but any state that has to go to war with a non-state actor. Because just war theory offers a framework from which to judge military actions it can constantly criticize other modern asymmetric wars. The French in Mali, Israel in Palestine, Russia in Chechnya, India in Kashmir, etc. are all asymmetric wars that just war thinkers can look at with objective criteria to determine if the states are acting morally. Not all future wars will meet just war criteria, but the United States and others have normative principles they can use to determine whether military action is necessary to bring order to a country or the world community. Order is necessary for justice to thrive, and transnational terrorism continuously threatens that order. States need to constantly seek ways to maintain this order, but their actions must be ethical if this is to be a just order. The normative ethics of just war theory offer a way for states to do that when fighting terrorists and other non-state actors.

Implications

The scholarly implications are multifaceted for this study. The most important implication for this paper will be re-thinking the foundations of counter-terrorism and just war. Terrorism is a specific phenomenon; terrorists seek to change public policy and have therefore entered the *polis*. Any assessment of just war theory and terrorism must work from the foundation that terrorism is a means of war because of its political motivation. The other contribution will be to use a theocentric just war theory, rather than a secularized version, for a modern, technological issue. Augustine dealt well with many of the issues facing modernity through his work. He articulated the distinct notion of the *tranquillitas ordinis*, civic and ordinary peace, and how the role of government is to maintain this civic peace. Terrorism threatens this civic peace by promoting fear in the population and targeting non-combatants, which perniciously affects everyday life. One of the points of terrorism is to create the idea that it could happen anywhere at any time, and the government must use effective policies to neutralize this threat. The supplementation of Christian realism helps further this argument when Niebuhr argues that governments must take action for justice.

Another implication will be to establish how the normative principles of just war theory can be used for analysis of current counter-terrorism tactics. Scholars have tried to look at counter-terrorism through just war theory, but each of them did not systematically address drones as a tactic. As technology develops such issues will continue to arise, and scholars will need a common standard and language to consider the specific incidents. By engaging these norms it will be easier to discuss whether a particular counter-terrorism tactic is just or unjust. There are a plethora of contemporary asymmetric wars that scholars can consider how just the actions of states are in their own counterterror wars. Israel is fighting Hamas, al-Aqsa Martyrs' Brigade,

Palestine Liberation Front, Popular Front for the Liberation of Palestine, Hezbollah, and other at the present moment. This has led to direct confrontation in recent years like the Second Lebanon War, Operation Cast Lead, and Operation Pillar of Defense. India has to deal with the Naxalites and Indian Mujahedeen. African nations must deal with the Lord's Resistance Army, al-Shabaab, and Boko Haram. Turkey continues its struggle of the Kurdish Workers' Party, and the United Kingdom is still fighting the Real Irish Republican Army. The United States must also continue to fight al-Qaeda core, al-Qaeda in the Islamic Maghreb, and al-Qaeda in the Arabian Peninsula. There is a multiplicity of other terrorists that states must fight, but the point is that wars against terrorism will continue for years to come. While each of these states engages in their counter-terror operations, there must be a common language to judge their actions. This study will contribute to that common language and the debate on fighting terrorism ethically.

Although this is more directly a work of applied philosophy, the policy implications are also important. It does not purport to give tactical or operational advice, but policy makers must offer justifications for their policies, especially warfare. Many thinkers have dealt with the need to justify war, whether it was Cicero in Rome or Biblical texts with the Israelites. For policy makers today the important implication is how to justify counter-terror operations. Those who argue against the drone program will call it morally wrong or illegitimate either do not understand that terrorists are at war with the United States or that drones are allowed within *jus in bello*. Policy makers therefore can use these normative principles to demonstrate the rightness of their cause and actions against transnational terrorists. Analysts can argue that when terrorists attack the United States they have declared war and therefore the rules of war apply. In addition, because the U.S. does not target civilians and has significantly limited collateral damage, discrimination and proportionality exist.

American Values

Besides conforming to the principles of just war theory the drone program also conforms to America's historical democratic values by staying true to its idealism. Since the first colonist arrived from Britain, those living in America have always held themselves to a higher standard than the rest of the world. European values were rooted in aristocracy and amoral realism while America would be a "model of Christian charity" and a "city upon a hill." The Mayflower Compact of 1620 called for the new colony's governance to seek a "better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices…" Justice was one of the foundational principles for the American colonies. Thomas Jefferson would call back to this great tradition in the Declaration of Independence that declared the colonies would not be ruled by an unjust monarch, whose usurpations and transgression violated man's natural rights.

President Abraham Lincoln, in the midst of the bloody and brutal Civil War, inspiringly said, "It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced…that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth." Lincoln sought to remind the people that war and conflict had a purpose, and that was to allow those who survived the war to push for a more just political order rooted in democratic values. Even when the United States used power abroad, it had the purpose of creating that more just order. President James Monroe describes in his famous doctrine at his seventh annual speech before Congress that America was different from the European powers due to its democratic values and would therefore protect and defend independent nations in the Western Hemisphere against imperial aggression. President Theodore Roosevelt gave a

Corollary to the Monroe Doctrine that United States would not only prevent imperial aggression, but would enforce the proper norms of behavior expected of free and democratic states. Drone warfare during the conflict against al-Qaeda and its affiliates has stayed true to this great American idealistic tradition of using force to seek a more just political order, not for the aggrandizement of power or for revenge. Rather power is to serve justice, which was the lesson Augustine taught centuries ago.

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