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The Drone Question: Legality, Ethics, and the Need to Recognize Transnational Armed Conflict

An Honors College Project Presented to
the Faculty of the Undergraduate
College of Arts and Letters
James Madison University

by Matthew Thomas Mueller

May 2017

Accepted by the faculty of the Department of Political Science, James Madison University, in partial fulfillment of the requirements for the Honors College.

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Abstract

This work focuses on the legality and ethics of targeted killings via drones conducted by the United States. The first section of this work looks at the use of drone strikes by the U.S. government as they fall outside of the traditional notion of a zone of armed conflict, that being one that can be defined geographically and temporally, and explores whether these strikes *could* be considered legal under international humanitarian law and the international law of self-defense. This work assumes that an armed conflict exists between the United States and the non-state armed actors that have been targeted by these drone strikes to explore whether the strikes could be considered legal under those two international legal regimes. The second section looks at these strikes from an ethics perspective. It explores if the ethical questions raised by drones are indeed novel, if drone strikes conducted by the United States satisfy the principles provided under Just War Theory, the impact drones have on the application of military ethics, and the ethical concerns raised by fully-autonomous weapon systems. This work argues that drones can be a legal and ethical weapon system, but the failure of international law to recognize a new, hybrid category of armed conflict has clouded the debate surrounding drones. The adoption of transnational armed conflict as a new type of conflict classification is presented as a solution to the problem posed by drones and contemporary conflict dynamics to better define and explain conflicts involving a state and a non-state armed actor that crosses and/or maintains bases of operations across international borders.

Introduction

Since the beginning of the War on Terror, the use of drones in targeted killing operations has expanded dramatically. The United States has been using drones consistently since their first use in a targeted killing mission of a high-level Al-Qaeda commander in Yemen in 2002. Since then, their effectiveness has prompted a rapid expansion of the U.S. Air Force's drone fleet. Drones are used extensively for surveillance of terrorist groups and potential terrorists. In addition to surveillance, drones are used routinely for targeted killing of terrorists. This program has proven to be controversial, with many saying that the United States' use of targeted killing to be illegal under international humanitarian law (IHL). The United States says that the international law of self-defense allows for the use of the targeted killing program. The debate surrounding the problem raises many legal, policy, and ethical questions. This necessitates research into the topic to evaluate its future and to ensure that it adheres to the international legal principles that increasingly govern military operations.

From a tactical perspective, drones are an incredibly efficient weapon. As opposed to other methods of targeted killing, such as an airstrike or a commando strike team, drones are more discriminate and save lives. In counterterrorism operations drones allow for around the clock surveillance of terrorist organizations and can engage targets faster than other methods of targeted killing. Due to the secretive nature of the program, critics of targeted killings say that drone strikes kill a high number of civilians and violate the principle of distinction under IHL. Critics also raise questions as to whether a drone strike is truly a proportional response, especially when the strike is preemptive in nature. The targeted killing program is composed of several different parts. The first part is the portion run by the U.S. military. The military operates armed drones in Afghanistan and has deployed them in several other countries, such as Libya

and Iraq, and has focused on targeting those who have been fighting U.S. and North Atlantic Treaty Organization (NATO) troops in those countries. Recently the U.S. military has deployed drone strikes against the Islamic State of Iraq and Syria (ISIS) militants in Syria. (Gross 2015, 2-3). The second portion of the program is much more controversial. This is the covert program run by the Central Intelligence Agency (CIA), which has been focused on targeting and killing Al-Qaeda and Taliban commanders who are mostly based in Pakistan's northwest region. The CIA program has targeted Al-Qaeda leaders, its external operations network, the group's bases of operations in Pakistan, and Taliban leaders and fighters (Gross 2015, 3). Drones are here to stay. They have become the poster child for counterterrorism under the Obama Administration, with President Obama issuing more drone strikes in the first ten months of his presidency than President Bush issued in his entire eight years in office. The Bureau of Investigative Journalism (BIJ) estimates that 424 strikes have been used in Pakistan since 2004 and 136 strikes have been used in Yemen since 2002 (BIJ 2017). The use of drones in targeted killing operations does not appear to be changing under the Trump Administration, with President Trump reversing Obama Administration rules limiting the CIA's paramilitary role according to a Wall Street Journal report on March 13th, 2017. This decision allows for the CIA to once again launch drone strikes on their own against suspected terrorists and is a stark departure from the cooperative approach taken by the CIA and the military under the Obama Administration (Lubold & Harris, 2017).

As of 2010, the U.S. military has over 7000 drones at its disposal and since 2011, the U.S. Air Force has trained more drone pilots than fighter and bomber pilots combined (Gross 2015, 7-8). The Department of Defense (DOD) currently has five types of drones in large numbers. Out of these five, the MQ-1B Predator and the MQ-9 Reaper have been used by the U.S. Air Force and the CIA to conduct targeted killing operations. The Predator has been used

for “medium-altitude, long endurance missions,” because of its dual intelligence gathering and munitions capabilities. The Reaper takes on the role of a “hunter/killer,” with a secondary intelligence gathering role (Gross 2015, 17-18). Drones rely on a global positioning system (GPS), long-range data links, lightweight materials, and visual sensors for navigation, stabilization, and focusing on targets. Aerial drone capabilities have also been improved by the capability to land at sea on aircraft carriers. In July 2013, Northrop Grumman’s X-47B Unmanned Combat Air System (UCAS), a strike fighter sized drone, made the first drone landing on the carrier, U.S.S. George H.W. Bush. By using GPS data, the X-47B could refine its flight path twenty times per second, forty times faster than the best human pilot. In addition to conducting carrier landings, the X-47B is capable of autonomous air refueling (Gross 2015, 19). With technological advancements, such as the X-47B, it is incredibly likely that drones will continue to be used in counterterrorism operations.

As mentioned above, there are a series of questions raised by drone usage. Most of these questions regarding the ethics and legality of drones are raised because of the CIA’s covert drone program, even though the U.S. military has conducted a significantly higher number of drone strikes since the early 2000s (Gross 2015, 15). This work seeks to provide answers to the questions raised by targeted killing by drones outside areas of active hostilities, which is an area that can be defined both geographically and temporally. By working within the framework presented by the United States, that an armed conflict exists between it and Al-Qaeda and its affiliates, this work looks as to whether drone strikes could be legal under IHL and the international law of self-defense. The first chapter of this thesis seeks the answer to this question by looking at the principles of distinction and proportionality under IHL to see if drone strikes in Yemen and Pakistan could be legal under IHL, even though they fall outside of the areas of active

hostilities in Iraq and Afghanistan. Normally, actions taken outside of an area of active hostilities, which is governed by IHL, are governed by international human rights law (IHRL), which specifically forbids the arbitrary deprivation of life. For this work, I choose to analyze the drone strikes in Yemen and Pakistan within the framework of IHL to determine if they could be legal under IHL. To do this I assume that the United States is in an armed conflict with Al-Qaeda and its affiliate groups, therefore, extending the application of IHL to members of those groups to Yemen and Pakistan due to the heavy presence of these groups in those countries. This armed conflict does not fit nicely into the two types of armed conflicts present in the Geneva Conventions, those being international armed conflict (IAC) and non-international armed conflict (NIAC), and instead takes on some aspects of both. In addition to IHL, I also look at the legality of drone strikes under the international law of self-defense since the United States uses both IHL and self-defense to justify its strikes.

The second chapter of this thesis presents an overview of the ethical issues raised by using drone strikes. It looks at whether the questions surrounding drone use are novel issues or simply an extension of questions raised by previous weapon systems. This chapter provides an in-depth discussion into whether drone strikes are justifiable under Just War Theory (JWT). I look at drone strikes under both *jus ad bellum* (just entry into war) and *jus in bello* (just conduct in war) and consider the applicability of the new concept of *jus ad vim* (just use of force short of war) for judging drone strikes as opposed to traditional JWT analysis. This chapter also offers commentary on the effect that drones have had on military ethics and looks at the future of drone technology by considering the ethics of fully autonomous weapon systems. The last chapter of this thesis argues for the adoption of a new conflict classification under the Geneva Conventions. This new type of conflict is known as transnational armed conflict, which is defined as an armed

conflict between state military forces and a foreign non-state armed actor that takes place beyond state borders (Benvenisti 2010, 341). This chapter argues that the adoption of this new type of armed conflict is needed to best understand and regulate the armed conflicts that exist today between states and non-state armed actors. The adoption of this type of armed conflict is especially important because conflict classification is essential for determining the rights and obligations of the parties involved in hostilities (Corn 2009, 209). A visualization of transnational armed conflict is also presented in this chapter through the example of the United States' conflict with Al-Qaeda and the contemporary conflict with ISIS.

The timeliness of this topic cannot be understated. The expansion of the targeted killing program and the recent re-approval of the CIA to conduct drone strikes has shown the need for a detailed inquiry into the legality and ethics surrounding such a program. It is important to note that this thesis is only focused on the international legality of the U.S. drone program since the U.S. government has conducted the most extensive targeted killing program via drones in the world. I also do not focus on the domestic legal questions raised by the drone program. This should not be interpreted as a dismissal of these questions, but rather they are not part of the scope of this thesis and could easily warrant a work as extensive as this one about them. The nature of warfare is changing and historically, the law has lagged behind the technological developments in the present. This work hopes to correct this and answer the questions raised about the drone program and to also present a new type of conflict classification, transnational armed conflict, to better understand the nature of contemporary conflicts and ensure that no conflict falls outside of the guiding principles laid down by international law underneath the United Nations (UN) Charter and the Geneva Conventions of 1949.

Literature Review

The purpose of this thesis is to look at what is the proper form of legal analysis to evaluate the use of drone strikes outside of zones of armed conflict. There is an intense debate among scholars as to the legality of drone strikes outside of defined zones of armed conflict, those being areas that can be defined as both temporally and geographically. To help solve this debate, this thesis will be looking at whether there is a possibility that current international legal paradigms are inadequate at evaluating drone strikes outside of zones of armed conflict because of definitional issues. After analyzing this the possibility of a new international legal paradigm will be proposed. Before I get into a discussion of the literature already written on the topic, I will first provide a brief overview of the three applicable portions of international law.

The three applicable parts of international law that are concerned when assessing drone strikes are IHL, IHRL, and the international law of self-defense. IHL is the body of law that governs conduct in warfare and is drawn from the Geneva Conventions adopted after World War II. It finds its philosophical foundations in *jus in bello*, literally justice in war. The first principle of IHL is the principle of distinction which states that armed force must distinguish between combatants and civilians to protect civilian lives. Only enemy combatants can be targeted. The next principle is the prohibition on attacks *hors de combat*, those that are sick or wounded. There is also a prohibition on infliction of unnecessary suffering to prevent superfluous injury. The principle of proportionality limits the potential harm to civilians by ensuring that the least amount of harm is inflicted upon them. While it is accepted that some collateral damage is legal, the damage done must be proportional to the military advantage gained. The principle of military necessity acknowledges that damage will occur in wartime and is allowed so long as it suits a military goal. The last principle is the principle of humanity, this states that humans must show

respect for their enemy. IHRL applies more broadly than IHL and extends to all areas of the world absent armed conflict. The key portions of IHRL that are important for drones is that IHRL prohibits the taking of a life without due process and it states that force must be use as the absolute last option. The last portion of the law relevant is the international law of self-defense, which is drawn from Article 51 of the UN Charter. It is the law that governs the introduction into hostilities and stems from *jus ad bellum*, just entry into war. Its key principles are that there must an armed attack on a state and that the victim state's response must be proportional to the damage suffered.

Ever since the United States introduced drones as a weapons platform in 2001 in Afghanistan a lively debate has developed between numerous scholars in regards to the legality of these strikes. Three primary lines of analysis have developed among the literature base for looking at drones, those being their interaction with IHL, the international law of self-defense, and the ethical and moral implications of these strikes. Over the past five years a scholarly consensus has emerged that the United States' actions regarding drones in places such as Afghanistan fall within the traditional battlefield context, which is defined as a battlespace which can be temporally and geographically defined (Blanchard 2015, 122). This fits the normal definition underneath IHL, so it has been accepted that it is appropriate to use drones in Afghanistan, since it is a zone of armed conflict, so long as they adhere to the principles of IHL. This debate has now been replaced with a larger focus on the legality of U.S. drone attacks outside of zones of armed conflict, leaving an unusual twilight zone between conventional wartime and conventional peacetime that international law has not been fully developed to address (Banks 2015, 144). Legal scholars continuously debate what paradigm is best tailored to address drone strikes and the criteria necessary to evaluate them. This debate stems from a much

deeper debate about what is the best paradigm to respond to terrorism in general. Some argue for an IHL-armed conflict approach, while others argue for an IHRL-centered law enforcement approach (Bachman 2015, 900). Regardless of what side of the debate scholars are on, one clear consensus appears to be that the legal principles that apply to targeted killing remain ambiguous (Falk 2014, 311).

Part A: Drones and International Humanitarian Law

The interaction drones have with IHL is contentious at best. International terrorism as a phenomenon has stretched the traditional notions of what is considered to be a battlefield. Historically the battlefield as understood by IHL can be defined both temporally and geographically (Blank 2011, 8). Laurie Blank notes that contemporary conflicts have made this difficult and have raised questions as to how the parameters of a conflict should be understood (Blank 2011, 20). The conflict with Al-Qaeda and other terrorist organizations operates in a global context, with terrorists using states outside of active battlefields like Afghanistan and Iraq for safe havens (Rae 2014, 56). Eyal Benvenisti, argues that the contemporary spread of technology ensures that the prevalence of asymmetric warfare will increase and that a new type of conflict, called transnational armed conflict might need to be considered by IHL (Benvenisti 2010, 339 & 359). The two types of armed conflict that fall under the Geneva Conventions are IAC and NIAC. The U.S. government under the Bush Administration asserted that it is in an IAC with Al-Qaeda since the 9/11 attacks and that the 2001 Authorization for the Use of Military Force (AUMF) against Al-Qaeda establishes this condition of IAC. The literature basis has seemed to reached a consensus that this interpretation of IAC is outside of the norm and does not have any historical backing, especially since prior to 9/11 terrorism was traditionally treated as a law enforcement problem, rather than a military issue (Bachman 2015, 902). These issues are

important to understand the context in which drones operate because the two types of armed conflict present a series of questions about the applicability of IHL and the amount of force that is appropriate to use.

The divide then comes as to whether a NIAC exists between the United States, its Middle Eastern allies, and Al-Qaeda. IHL treats terrorists as somewhere between combatant and civilian (Coleman & Gray 2014, 45). The existence of a NIAC between the United States and Al-Qaeda could exist and is helpful to understand how drone strikes interact with IHL since IHL is regarded as *lex specialis*, meaning that it only applies in times of armed conflict (Bachman 2015, 904). This nature is precisely what makes the use of drones under IHL contentious because the source of disagreement is whether IHL even applies. One of the most prominent authors on the topic, Mary Ellen O'Connell, strongly asserts that IHL's traditional conception of the battlefield still applies and that the United States is limited geographically to Afghanistan, Iraq, and Libya. O'Connell argues that any drone strike outside of these active battlefields is illegal because IHL does not apply (O'Connell 2015, 67). She is not alone in her analysis, nor is she completely wrong. In the absence of armed conflict, IHRL applies and two of its guiding principles are force as a last resort and the protection of civilian life. Pakistan offers a perfect example as to what degree IHL applies. Some argue that the legal justification for targeted killings should be the link between the target and the conflict in Afghanistan and that a drone strike launched in Pakistan is illegal because it is not a zone of armed conflict (Ahmad 2014, 67-68). In the absence of an armed conflict in Pakistan the governing body of international law would be IHRL, in which case the killing of civilians, even unintentionally, would be illegal (Ahmad 2014, 70).

The issue of whether drones strikes outside of zones of armed conflict trigger the application of IHL has become the central debate in the literature base on drones. On the face, it

appears they do not and that drone strikes that occur in places like Pakistan or Yemen are illegal (Rae 2014, 58). This question becomes more difficult considering that these countries have given backdoor approval as multiple WikiLeaks cables have shown (Rae 2014, 59). Under IHL, should it apply, there are two main principles that must be assessed, the principles of distinction and proportionality. There is a growing camp of scholars that argues that drones are quite possibly the most discriminating use of force in history (Issacharoff & Pildes 2015, 398). The pilots of drones have a host of intelligence gleaned from the drone's cameras and by the ability to hover over a target for hours on end to make sure that they meet the principle of distinction (Drake 2011, 642). In addition to the technical advances that allow for this, drone pilots have strong incentives to obey IHL. The rules of engagement developed by the military place strong constraints on strikes that may cause collateral damage and the chain of command empowers commanders to ensure compliance with IHL (Drake 2011, 644 & 655). A newer argument that has emerged in recent years argues that advances like drones require a return to a more traditional understanding of the principle of distinction that allows for the targeting of civilians that are aiding enemy efforts (Rabkin & Yoo 2014, 1226). This understanding is coupled with the current state practice of "presumption of guilt" for terror suspects since 9/11 (Rae 2014, 65). The scholarly community is slowly adopting the idea that drone strikes are legal under IHL in the scenarios of armed conflict, but outside of these so-called "hot battlefields" there is an increasing concern that IHL alone cannot be used to evaluate strikes. "Hot battlefields" refers to the traditional conception of a battlefield in which troops are deployed and the conflict is located within an easily defined geographic space. Previous iterations of the drone debate emphasized that even in zones of armed conflict drones were illegal under IHL in places like Afghanistan

because they violated the principle of distinction based on the targeting guidelines issued by the U.S. government.

As mentioned above, the principle of proportionality is one of the two guiding principles used when assessing drone strikes. Charles Trumbull IV points out that the current understanding of proportionality inside of zones of armed conflict is difficult to apply to contemporary conflicts, because the enemy character of civilians cannot be presumed (Trumbull IV 2015, 560). This is directly a reaction to the state practice of assuming guilt by association. This leads some scholars to advocate for a balanced approach between the application of IHL and IHRL (Rylatt 2013, 72). By doing this, they argue that civilian lives are better protected since the primary purpose of IHRL is to ensure the safety of civilians. The unconventional environments that terrorists operate in require military operators to take special precautions to avoid the deaths of civilians (True 2015, 295). These unconventional battles have also raised interesting questions about the legal status of the operators of the drones themselves. Many have questioned whether CIA drone pilots are unlawful combatants because they are civilians committing acts of war. The primary thread that has developed in the literature is that CIA operators are not protected under IHL. These scholars have conceded, however; that as a policy position this is likely to continue and in a NIAC the CIA operators should probably be awarded some of the protections of IHL (Henderson 2010, 170).

The final camp of scholars underneath the IHL wing argue that IHL is perfectly suited to deal with terrorism and the issue of drone strikes. These scholars assume that when a drone strike is launched, IHL is triggered for that location because the fight follows the fighter (Barnidge, Jr. 2012, 437). They say that there is nothing wrong with drone strikes and that they have the same arguments raised against them as previous iterations of targeted killing, such as sniper rifles

(Issacharoff & Pildes 2015, 397). IHL has more than enough provisions to govern the use of drones (Vogel 2011, 137). These scholars are also quick to point out that by placing geographical limitations on drones, their effectiveness drops (Lewis 2012, 314). This is a common theme inside the IHL camp; scholars that argue for their legality under IHL often back up their arguments with effectiveness claims. Since drones are no different than any other form of weapons platform, the use of them in targeted killing cannot properly be called unlawful (Perez 2012, 622). Instead, drone strikes should be assessed under IHL by a case by case basis (Schmitt 2010, 325).

Part B: Drones and the International Law of Self-Defense

Another central line of inquiry in the literature relates to the international law of self-defense, mainly the question as to whether drones can be used under the self-defense justification to respond to an ‘imminent’ attack. O’Connell continues her argument in opposition to drones here as well, arguing that the right to self-defense is only restricted to responding to an attack from another state (O’Connell 2015, 68). This argument does not sit well with many scholars, because absent the United Nations Security Council (UNSC) approval of the intervention in Afghanistan the United States would not have been able to legally respond to 9/11 since Al-Qaeda is a non-state actor, however; state practice has made it seem as though the right to self-defense does extend to attacks made by non-state actors (Banks 2015, 144). Other scholars point to the famous *Caroline* paradigm to argue that the United States cannot legally justify drone strikes against terrorist groups because of the lack of an overwhelming or instant necessity of self-defense (Davies 2009, 433). The *Caroline* Incident occurred in 1837 when a group of British soldiers crossed into New York to seize the *Caroline*, which was a steamboat carrying assistance to Canadian rebels on behalf of a group of sympathizers in the United States. The British

government claimed that the attack was in self-defense since the boat was being used to aid an insurrection in Canada. The Secretary of State at the time, Daniel Webster, created what became known as the *Caroline* Test. This test determines that for the right to anticipatory self-defense to exist there must be an overwhelming and immediate threat that leaves no moment for deliberation. In addition, the broad interpretation that the United States gives to the right of self-defense against Al-Qaeda is problematic, especially given the historical interpretation of it (Ahmad 2014, 67). An example that Mahmood Ahmad raises with this is that when militants from Pakistan attack U.S. soldiers in Afghanistan, the militants are technically attacking Afghanistan and not the United States because the right of self-defense has traditionally been defined by attacks on territory (Ahmad 2014, 67-68). The debate over this portion of international law is significant because the United States consistently argues that the strikes are conducted in accordance with self-defense (Banks 2015, 144). These issues do not only extend to just the use of drones, but they are important to look at since the international law of self-defense is used to justify drone strikes in state practice.

The U.S. government focuses on the imminence portion of self-defense. They argue that the strikes are necessary to disrupt imminent Al-Qaeda plots and that the states in which the strikes are conducted are unwilling or unable to remove the threat (Banks 2015, 144). More questions are then generated as to what members of a terrorist organization the United States can target with its drone strikes. John Odle discusses this question at length and determines that self-defense does not prohibit the targeted killing of high-level terrorist leaders like Osama Bin Laden, where the problem lies is when the United States targets low-level terrorists who are unlikely to be of immediate threat to the United States relative to the high-level commanders (Odle 2013, 659). The United States has asserted that the right to self-defense includes

preventive strikes. The *Caroline* paradigm mentioned above does not allow for that, but it does allow for preemptive strikes, only if there is overwhelming evidence of an imminent attack.¹

Some scholars assert that preventative strikes are justified by the law of self-defense and that the definition of imminent threat needs to be relaxed because of the nature posed by Al-Qaeda and other international terrorist organizations (Coleman & Gray 2014, 42). What is interesting about the pro-international law of self-defense camp is that they disagree with the application of IHL (Paust 2015, 167-168). They argue that because groups like Al-Qaeda are non-state actors, a state of war cannot exist, therefore, the legality of future strikes can only be addressed underneath the law of self-defense (Paust 2015, 203). While both IHL and the law of self-defense are separate avenues of legal analysis, they are not mutually exclusive. If the requirements for self-defense are justified that usually indicates the beginning of hostilities or armed conflict, meaning that IHL would apply. Jordan Paust is one of the most vocal members of the literature basis when it comes to defending drone strikes under the law of self-defense. He has developed an interesting rationale as to why they are legal as well. He argues that since nothing in the language of Article 51 of the UN Charter requires consent for actions of self-defense the United States can launch self-defense strikes against militants that attack U.S. troops in Afghanistan even if they cross the border back into Pakistan because Pakistan has already given implicit consent for the strikes when they became a member of the UN and recognized Article 51 (Paust 2010, 249). He goes on to argue that Pakistan's sovereignty also is not violated in this case because the militants being targeted are non-state actors and not officially part of Pakistan. They also exist in an area of Pakistan that Pakistan has shown to be unable to

¹ It is important to note the difference between preemptive and preventative strikes. Preemptive strikes are strikes that are taken in response to a more certain, imminent threat, whereas preventative strikes are taken against potential threats that are of a less-certain, long-term nature.

effectively govern, lowering the threshold for legality. Since Pakistan is a party to the UN they have accepted that Article 51 applies in this sense and the strikes are legal (Paust 2010, 256-257). This by far the most creative argument present in the literature base, but not without standing.

While IHL and the law of self-defense are two separate avenues of legal analysis regarding the use of force in the international arena, the former being *jus in bello* and the latter being *jus ad bellum*, there have been concerns raised recently about the United States' application of both paradigms to justify its use of drone strikes. The United States' case as to the legality of drone strikes is built upon three elements, domestic statutory authority, self-defense, and host state consent under IHL (Rae 2014, 56). Laurie Blank argues that the lines between IHL and self-defense have become blurred through consistent parallel use (Blank 2012, 1661). The concern raised by blurring the paradigms is that it might endanger more civilians by expanding the zone of conflict (Blank 2012, 1697).

Part C: Drones and Ethics

In addition to the legal issues raised by the usage of drones for targeted killings outside of zones of armed conflict, there are several ethical concerns raised by scholars. These scholars are worried that drone warfare makes it too easy to use force and that states will be more likely to take riskier decisions as a result (Rae 2014, 83). Being able to strike a target in a state outside of a defined battlespace makes many scholars and policymakers in other states nervous, especially as drone technology begins to proliferate around the world. This ease might make the persistence of armed conflict permanent (Rae 2014, 83). Drone strikes have become a very easily deployable tactical weapon in the hands of counterterrorism officials that it might become too ingrained as an immediate response to dealing with a suspected terrorist. This is coupled with a legitimate

fear that if the war against groups such as Al-Qaeda continues into the indefinite future than sustained targeted killing will no longer have any strategic effect (Cook 2015, 61-62).

This lack of strategic effect is an issue that is explored quite extensively by scholars. There is a very persuasive argument that because drones kill innocent civilians they end up creating more terrorists than they take out. While Al-Qaeda's high-level leadership has suffered greatly at the hands of sustained drone strikes, there are questions raised as whether it is indeed ethical to continue the use of a weapon that may be making it harder to end Al-Qaeda (Cronin 2015, 103 & 108). Since the risk traditionally associated with warfare is transferred away from the combatant and onto the noncombatant in noncombatant territories, more terrorism may come from this as a result (Rae 2014, 80). As technology advances and drones become more advanced the criteria for use may become even more relaxed and that poses serious ethical concerns (Welsh 2015, 25).

JWT has been the guiding Western principle for determining whether armed conflict is justified. The use of armed conflict must meet two criteria under Just War for it indeed to be just, the first being *jus ad bellum* and the second being *jus in bello*. The former deals with the just conditions to initiate armed conflict, these conditions revolve primarily around self-defense and having a proportional response. The latter deals with just actions inside of conflict and is the philosophical basis for IHL. JWT places a heavy emphasis on the protection of civilians, for any armed conflict to be justified all possible risks to civilians must be mitigated at all costs. There is a legitimate concern that because drones shift the risks to noncombatants that Just War is made obsolete (Rae 2014, 80). These increased risks to civilians not only pose a legal challenge, but it also stretches the concept of ethical conduct in war (Cook 2015, 59). If drones follow the principle of distinction then they can meet *jus in bello*. The real concern is that drones cause

more problems for *jus ad bellum* and make the entrance into armed conflict easier and destroys the concept that it should be a last resort (Welsh 2015, 26).

In addition to making the use of armed conflict easier, there is a lot of concern over the impact that the lack of proximity has on the relationship between the principal adversaries in an armed conflict (Rae 2014, 80). The concern here is that the dangers of armed conflict have completely shifted to one side. When a drone strike is launched, the target has no way to respond before the Hellfire missile comes crashing down on them. While this argument has been raised since the introduction of sniper rifles into warfare, drones are particularly salient because the pilot can be sitting on the other side of the world when the strike is launched. This leads some scholars to worry about the potential loss of martial virtues that are etched into the warrior class. These include physical and moral courage, loyalty, honor, mercy, and willingness to risk their life for the group (Rae 2014, 84). With the loss of these virtues, the prospect of warfare turning into a video game like atmosphere could become a reality. Multiple scholars bring up the example of *Star Trek* episode “A Taste of Armageddon,” in which the crew of the U.S.S. Enterprise comes upon an advanced civilization that conducts completely computerized warfare in which supercomputers declare the winners and losers and demand actual deaths, to which the members of this society willing submit. While this is obviously an extreme scenario, there are legitimate concerns that drones are the first step on a slippery slope towards full on robotic warfare (Rae 2014, 91).

While there are certainly numerous ethical concerns raised about drone strikes, there are those that argue drones make conduct outside of zones of armed conflict more ethical. The first argument that is put forward is that drones allows pilots to make more ethical decisions (Rae 2014, 89). This is because a drone pilot usually spends hours watching their designated target;

they can launch the strike when they are certain when no noncombatants are in the vicinity. This is seen as a double-edged sword, however; since the drone pilots then build up an unusual relationship with the person they are targeting (Rae 2014, 89). Since the drone pilot is forced to observe their target and builds up this unusual relationship, questions are raised as to whether it is ethical or even healthy to make soldiers go through this since growing numbers of drone pilots are being diagnosed with post-traumatic stress disorder (PTSD). The other main argument as to why drones improve the ethics of armed conflict is that they provide more chances for justified humanitarian interventions due to their superb ability to gather intelligence and ability to take out immediate threats to local communities (Rae 2014, 85).

Part D: The Way Forward

The usage of drones outside of zones of armed conflict does not show any signs of stopping. U.S. state practice has put forth the only real world example of the use of drones in this context, which many scholars feel raise multiple legal and ethical issues. There has been an evolving scholarly consensus that if a zone of armed conflict exists then drones are a legal weapon if they adhere to the principles of IHL. With most drone strikes occurring in places like Pakistan, Yemen, and Somalia the debate has shifted as to whether IHL should be extended to this and a new type of armed conflict, transnational armed conflict, should be recognized. Many scholars argue that this would undermine the purpose of IHL and would unnecessarily endanger civilians. They also worry about whether it is ethical to strike targets outside of a defined warzone since the relationship between the principle adversaries has been disrupted by the use of drones. In the coming chapters I will look at the legality of drone strikes under IHL and the international law of self-defense outside of zones of armed conflict and whether it is ethical or not for drones strikes to occur outside of zones of armed conflict. This will be followed

by a discussion of whether a new international conflict classification is needed to evaluate contemporary conflicts.

Chapter One: Do Rules Apply? The Legality of Drone Strikes Outside Zones of Armed

Conflict

The world is changing and with it the nature of armed conflict. New technologies, such as drones, have raised questions of legality amongst the scholarly and policy community. The question to be examined in this chapter is whether drone strikes are legal under international law outside zones of armed conflict. This is a tricky question because the traditional notion of what constitutes a zone of armed conflict, that being a battlespace that can be defined geographically, has rapidly eroded in the face of the War on Terror. The conflicts seen today have made it difficult for zones of armed conflict to be defined as they once were and raises many questions about how the parameters of armed conflict should be understood (Blank 2011, 20). Despite this conundrum I argue that drone strikes could be legal outside the current, traditional notion of a zone of armed conflict, given that they still adhere to the principles of IHL and the international law of self-defense. For this thesis, the phrase “outside the traditional notion of a zone of armed conflict” means drone strikes that occur outside of Afghanistan and Iraq since a consensus has emerged that strikes that occur there fall within the traditional battlefield context, that being a battlefield that is defined temporally and geographically (Blanchard 2015, 122).²

IHL is the governing body of international law for armed conflict. It provides guidelines for determining conflict status and for assessing whether an action taken in an armed conflict is indeed legal. In the context of drone strikes, a strike would be legal so long as it met certain principles under IHL. Those principles being the principle of distinction, the prohibition of attacks against those *hors de combat* (those who are sick and wounded or prisoners of war), the prohibition on the infliction of unnecessary suffering, the principle of proportionality, the notion

² It is important to note that this thesis focuses solely on U.S. drone strikes, since the United States is the one country using drone strikes consistently as a tool in counterterrorism operations.

of necessity, and the principle of humanity. Should an act in an armed conflict meet these six principles then it would be considered legal. As discussed in the literature review, there is a lot of debate between scholars about whether IHL should be applied to these strikes since they fall outside the traditional notion of a zone of armed conflict. I argue that IHL should be applied in these cases because of current state practice. The United States' use of drones to attack members of terrorist groups that it declares itself to be in an armed conflict occur with regularly outside of the conflict zones in Iraq and Afghanistan. U.S. practice follows from DOD directive 5100.77 that states military commanders are required to, "ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all operations (Solis 2010, 167)." Directive 5100.77 makes it clear that the United States is required to follow the laws of war in fighting Al-Qaeda, ISIS, and other terrorist groups. Since state practice is to apply the IHL to all conflict situations I will be following this format in determining whether a particular drone strike is legal so long it is directed at a non-state armed actor that the United States has designated it is in armed conflict with, ex. Al-Qaeda and its affiliated organizations.

The international law of self-defense is the body of law that governs the introduction into hostilities in response to armed attack. It is drawn from Article 51 of the UN Charter. The law of self-defense makes it clear that states do have a right to respond to an armed attack, but their response must be proportional to the action taken. The law of self-defense allows for a response to be given in the face of an immediate act to stop that act from occurring, but there must be overwhelming evidence of an immediate attack. The U.S. government consistently holds that the strikes against terrorists are necessary to disrupt immediate terrorist plots and that the states in which these terrorist organizations find refuge in are unwilling or unable to remove the threat

(Banks 2015, 144). In addition to IHL the law of self-defense has been used by the United States to justify its strikes so it is also necessary to examine in greater detail whether drone strikes are meeting the principle of necessity and the principle of proportionality.

The purpose of this thesis is to examine whether drone strikes *could* be used outside zones of armed conflict underneath IHL and the international law of self-defense. To do this, one must accept the United States' statement that the United States is in an armed conflict with Al-Qaeda and its affiliate organizations. The former legal adviser to the State Department Harold Koh explained this at the 2010 annual meeting of the American Society of International Law: "as a matter of international law, the United States is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law (Barnidge Jr. 2012, 434)." I accept that the United States is in an armed conflict with Al-Qaeda, ISIS, the Taliban, and associated organizations and that this armed conflict has elements of both international and non-international armed conflicts (Coleman & Gray 2014, 44). This thesis does not explore whether an armed conflict exists between the United States and the organizations listed and nor does it explore what type of armed conflict exists underneath IHL until later. These are both important questions, but both could be subject to a separate thesis examining them, since they are both highly complicated legal issues. If an armed conflict indeed does not exist, then IHL would not apply at all and IHRL would apply and that forbids the killing of any person and only allows lethal force to be used as an absolute last resort. If this was the case than this thesis would be irrelevant since almost all drone strikes would be illegal under IHRL. While this appears like it should be a major question that should be addressed before my analysis can even begin about IHL, I have chosen to assume that an armed conflict exists because current state practice by the

United States operates in a world where an armed conflict exists between it and groups such as Al-Qaeda. To engage productively about whether drone strikes could be legal I have chosen to make the same assumption as the U.S. government. There has also been an emerging view amongst scholars post-9/11, that non-state actors can conduct armed attacks significant enough to trigger self-defense absent state sponsorship, bolstering the idea that an armed conflict can exist between a government and a non-state armed actor (Barnidge Jr. 2012, 428-429). The question about what type of armed conflict the fight between the United States and the listed terrorist organizations is will be addressed later in last chapter of this thesis. This is because regardless of the classification of the conflict, IHL principles apply (Drake 2011, 641). The discussion that will occur in the last chapter will be about whether the current definitions of armed conflict are still appropriate to classify the contemporary conflicts the world sees today.

With the reasoning for the assumptions made by this chapter explained, the chapter will go as follows. The first two parts will consider the two principles of IHL in which the debate in the literature has been centered on to see if drone strikes are adhering to IHL. Part A will look into the principle of distinction and attempt to analyze whether or not proper targets are being selected in drone strikes based off of casualty numbers released by the U.S. government, The BIJ's causality estimates, *The Long War Journal's* data on strikes in Pakistan and Yemen, New America's International Security Database Program, and "The Civilian Impact of Drones: Unexamined Costs and Unanswered Questions" report by the Center for Civilians in Conflict at Columbia Law School. Part B will focus on the principle of proportionality will look whether civilian casualties caused by collateral damage from drone strikes are proportional, specific attention will be given to the 2009 drone strike of Tehrik-i-Taliban leader Baitullah Mehsud in Pakistan. Attention will also be given to the BIJ average casualty rates per strike in Pakistan and

proposes that a more limited version of the principle of proportionality might be necessary to better protect civilian lives outside of zones of armed conflict. Part C will look at the two relevant principles of the international law of self-defense: necessity and proportionality. Part D will have some concluding remarks about the legality of drone strikes and the current state of international law.

Part A: The Principle of Distinction under International Humanitarian Law

Distinction is regarded to be the most important battlefield concept that a combatant must observe. In a two-volume study done by the International Committee of the Red Cross (ICRC) it is stated: “Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. (Solis 2010, 251).” The principle of distinction can be traced back through history and can be seen first written down in the 1868 St. Petersburg Declaration and in the Lieber Code written after the U.S. Civil War on the proper conduct in warfare (Solis 2010, 251-252). The current principle of distinction stems from Additional Protocol I of the Geneva Conventions, it states:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives (International Committee on the Red Cross (ICRC) I 1977, Art. 48).”

The principle is straightforward and when applied to drones there is nothing in the principle of distinction that makes targeted killing with drone strikes inherently illegal so long as civilians are not being purposefully targeted or that drone strikes are being used indiscriminately (Perez 2012, 621).

From face value, drones should be able to better distinguish between civilians and combatants outside of zones of armed conflict (Drake 2011, 642). The sensor technology on drones is incredibly sophisticated and coupled with the ability of a drone to hold over an area to examine a potential target, drones can facilitate a greater compliance with IHL (Trumbull IV 2015, 523-524). There is a common perception among many that because of the secretive nature of the drone program that there is no accountability to ensure that drone pilots in the military and in the CIA are following the rules of IHL when conducting strikes. Lt. Colonel T. Mark McCurley is a retired Air Force pilot and was a drone operator. He recalls in an article published by POLITICO Magazine how in all his years as a drone pilot he only witnessed one strike that would have been determined to be illegal and intervened and cancelled the strike because it would have targeted a civilian by mistake. He says:

“Drone pilots don’t want to kill innocents, and our leaders don’t want us to either. We are governed by rules of engagement that are more stringent than for manned aircraft. At times, strikes must be cleared by general officers or even politicians. These people do not hesitate to stop a strike if innocents are known to be present (McCurley 2015).”

In a speech given by Stephen Preston, the then General Counsel of the CIA, in 2012, he acknowledges:

“The Agency would implement its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity. Great care would be taken in the planning and execution of actions to satisfy these four principles and, in the process, to minimize civilian casualties (Holewinski 2015, 48).”

As a piece of military technology and by the legal processes used by the U.S. military and the CIA to conduct drone strikes, a strike that meets the principle of distinction passes the first hurdle in a legal analysis of a strike. This is not to say that a strike could be ruled illegal under IHL, but because there has been an instance in which an illegal act occurred does not wholly render an entire weapon platform from being illegal. This is especially true given that there are

no current international treaties banning the use of drones inside of armed conflict. In the world in which an armed conflict exists between the United States and Al-Qaeda, drone strikes that target combatants belonging to Al-Qaeda satisfy the principle of distinction.

Determining who is a combatant and who is a civilian in contemporary conflicts is one of the most controversial questions present in IHL (Grzebyk 2015, 57). The difficulty comes from the fact that there is no treaty law and very little customary international law governing today's conflicts and there is only one court case in the entire world that directly addresses this question in relation to targeted killing. In 2005 the Public Committee Against Torture in Israel sued the Israeli government over its targeted killing policy against terrorist groups in Palestine, mainly Hamas. The case reached the Supreme Court of Israel, which is the highest court in Israel, and it was decided that the targeted killing policy was not only legal under Israeli domestic law, but also under IHL. President Emeritus Barak gave the opinion of the Court and stated that terrorists are unlawful combatants because they indiscriminately target civilians, but the court did not take a stance on the existence of such a category in international law, citing the lack of customary law on it. The Court did state though that protection from attack is not afforded to unlawful combatants taking direct participation in hostilities, for example laying bombs or firing a gun at Israeli soldiers (*Public Committee Against Torture in Israel v. The Government of Israel* 2005, para. 25-29). Following from this logic, members of Al-Qaeda, the Taliban, and ISIS are direct participants in hostilities and, therefore, forfeit their immunity because they are taking on a continued combat function. The ICRC states that, "An individual whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities assume a continuous combat function (Coleman & Gray 2014, 45)." The only way for a member of a terrorist group to regain their civilian immunity is for them to

renounce the organization they were a part of and no longer participate directly in hostilities (Coleman & Gray 2014, 45). The Israeli Supreme Court identifies:

“Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities (see Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 116 (1990), hereinafter "Parks"), or beyond those issues (see Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may (*Public Committee v. Israel* 2005, para. 35).”

Should a strike follow these criteria then it would be lawful under the principle of distinction.

The strike needs to target a person who is a direct participant in hostilities undertaking a continuous combat function. If it meets that, it satisfies the principle of distinction. Related to this is the difficulty in identifying who is a terrorist and who is a civilian. Without a reliable definition of what a terrorist is, there is significant fear that it is anyone who happens to be holding a gun. The use of signature strikes, drone strikes that are not directed at specific individuals, but rather based upon a specific set of observed actions and indicators, have appeared to have confirmed this fear for some commentators (Holewinski 2015, 46). The development of a definition of what a terrorist is would help to settle debate about whether drone strikes are meeting the principle of distinction. For this commentary personality strikes are assumed to meet the principle of distinction because they are directed against specific targets, whose identities are known to the U.S. government (Holewinski 2015, 45). While this thesis does not attempt to establish a definition for terrorism, in terms of laying out criteria for legitimate target, the target must be involved in supporting, planning, or carrying out armed attacks on the

United States and/or its interests.³ The criteria presented above give at least some form of baseline for evaluating whether drone strikes meet the principle of distinction.

While in theory drone strikes conducted by the U.S. government outside of zones of armed conflict can satisfy the principle of distinction, an analysis of the casualty numbers that have been released from numerous different sources is required to see if this is the case. In a report released by the Office of the Director of National Intelligence (ODNI) on July 1st, 2016 the ODNI releases a summary of information that was provided to the ODNI regarding the number of strikes taken outside areas of active hostilities (defined as outside Afghanistan, Iraq, and Syria by the White House) and the assessed number of noncombatant deaths that have resulted from the drone program from January 20, 2009 to December 31, 2015. Between those dates there were 473 strikes that killed an estimated 2372-2581 combatants and 64-116 noncombatants (ODNI 2016, 1). These numbers appear to confirm that many strikes are adhering to the principle of distinction since some collateral damage is allowed under IHL and will be discussed in Part B of this chapter. The numbers, however; do not show whether those 64-116 noncombatants were killed because of mistaken targeting or as collateral damage. In the report the ODNI elaborates on how this data was gathered; it is a result of processes that ensure the careful review of all strikes after they happen and includes, “the best available all-source intelligence, media reporting, and other information and may result in reassessments of strikes if new information becomes available that alters the original judgment (ODNI 2016, 1).” The report does acknowledge the discrepancies between the government’s numbers and those of nongovernmental organizations and states that such discrepancies occur because

³ I prefer to use these broader criteria for targeting because in the future targets for drone strikes may not be just terrorists, but rather they may be part of other types of non-state armed actors or even uniformed members of another state’s military.

nongovernmental organizations do not have access to the same kind of information that the government does (ODNI 2016, 2). While to some this reasoning seems doubtful it appears the United States is trying to comply with the principle of distinction.⁴ Included in the report is an executive order signed by President Obama that requires relevant agencies to develop and implement intensive training to ensure compliance with IHL, especially the principle of distinction and limiting civilian casualties. The executive order goes on to detail different methods that would be taken in the event of civilian casualties and states that the United States would take responsibility for such a thing and acknowledge openly (White House 2016, 2-3). The government's numbers appear to show that, in general, drone strikes are adhering to the principle of distinction, but it is difficult to accurately state that.

The BIJ has conducted extensive analysis of the number of drone strikes conducted in Pakistan and Yemen. They offer a good starting point to look at whether drone strikes are meeting the principle of distinction.

Figure 1

⁴ The U.S. government has come under criticism from human rights groups because of their policy of not disclosing who is targeted in drone strikes. Publicly available government statistics also show significantly lower civilian casualty numbers than statistics provided by human rights groups. It is likely that the real numbers fall somewhere in between the two, but the discrepancy and lack of transparency has led many to level accusations that the government is violating distinction and proportionality and harming civilians. It is also unclear how the United States defines a "civilian," meaning there could be civilians who were killed because they were erroneously labelled as combatants. The secretive nature of the program and the decision to not reveal details about the processes used when selecting targets have led many critics to hedge that unnecessary harm is being done to civilian populations by U.S. drone strikes (Holewinski 2015, 42-44). It should also be noted that both sides have something to gain by misrepresenting the numbers of civilian casualties. By presenting lower numbers the government can bolster its case that it is abiding by international law. On the flip side, by inflating the numbers of casualties, human rights organizations can bolster their argument that the government is violating international law. This is not to say that either the U.S. government or human rights organizations are purposefully doing this, but it could be a possibility.

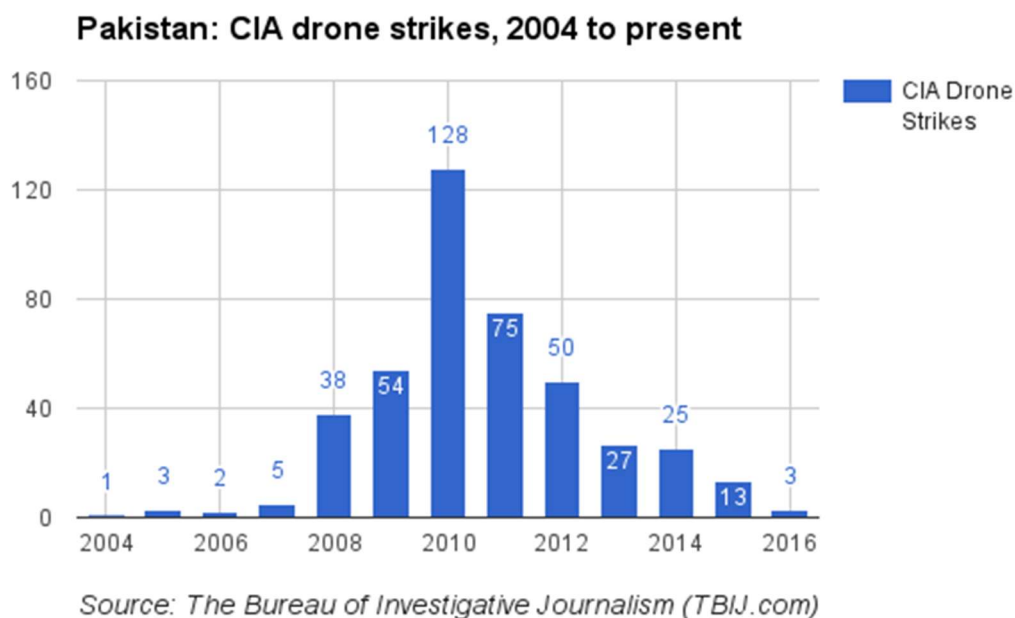


Figure 1 looks at all the drone strikes conducted by the United States inside of Pakistan, which per BIJ have all been conducted by the CIA and not the U.S. military. This raises the sticky question of whether CIA officers, who are civilians, are violating international law. It seems that if they are not given combatant status they are not acting illegally under international law, but are not shielded from domestic laws of foreign countries (Henderson 2010, 170). There is nothing the language of Common Article 3 of the Geneva Conventions or Additional Protocol II that would explicitly forbid the participation of CIA officers in a NIAC, they would, however; forfeit the limited protections afforded to civilians under Common Article 3 (Henderson 2010, 150-151). In an IAC, IHL authorizes combatants to use lethal force against combatants and civilians taking a direct part in hostilities. Civilians lose the immunity from domestic criminal prosecution afforded uniformed members of the armed forces, but do not, by mere act of contributing to an IAC commit a crime under international law. In a NIAC, IHL is silent on who may be considered a combatant for government forces and governments may authorize any of their agents to use

lethal force. Henderson argues in this case civilian intelligence officers do have immunity from domestic criminal prosecution so long as they act within the bounds of IHL (Henderson 2010, 169-170). Regardless, if a CIA officer does not follow the principles of IHL a strike can still be illegal, but just like drones, the participation of civilian intelligence agency employees in the drone strike program is not inherently illegal under international law.

Figure 2

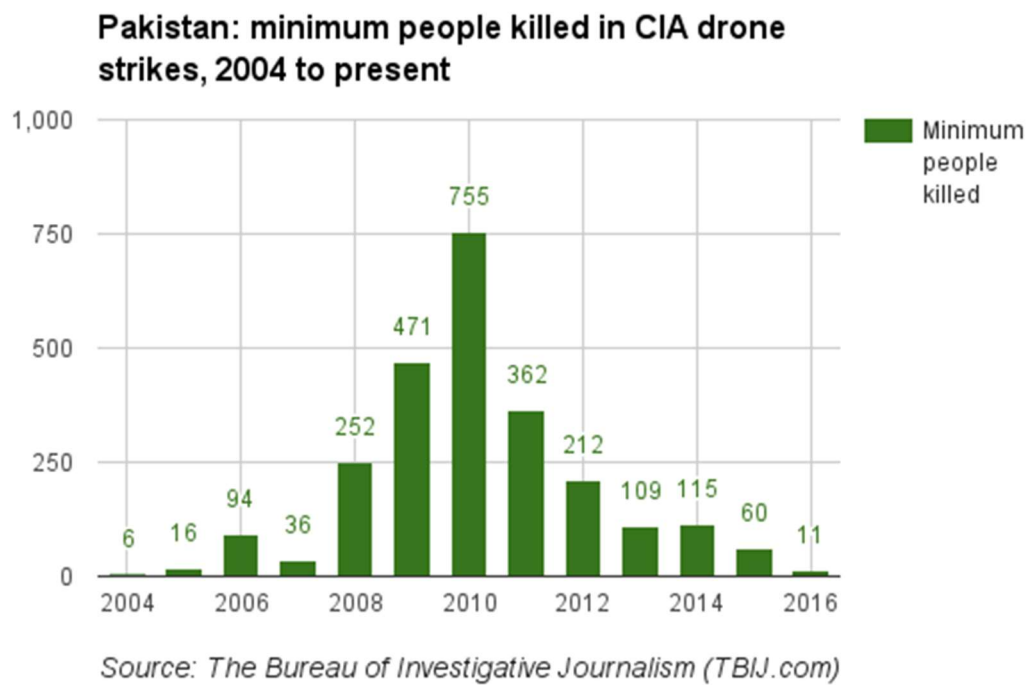


Figure 3

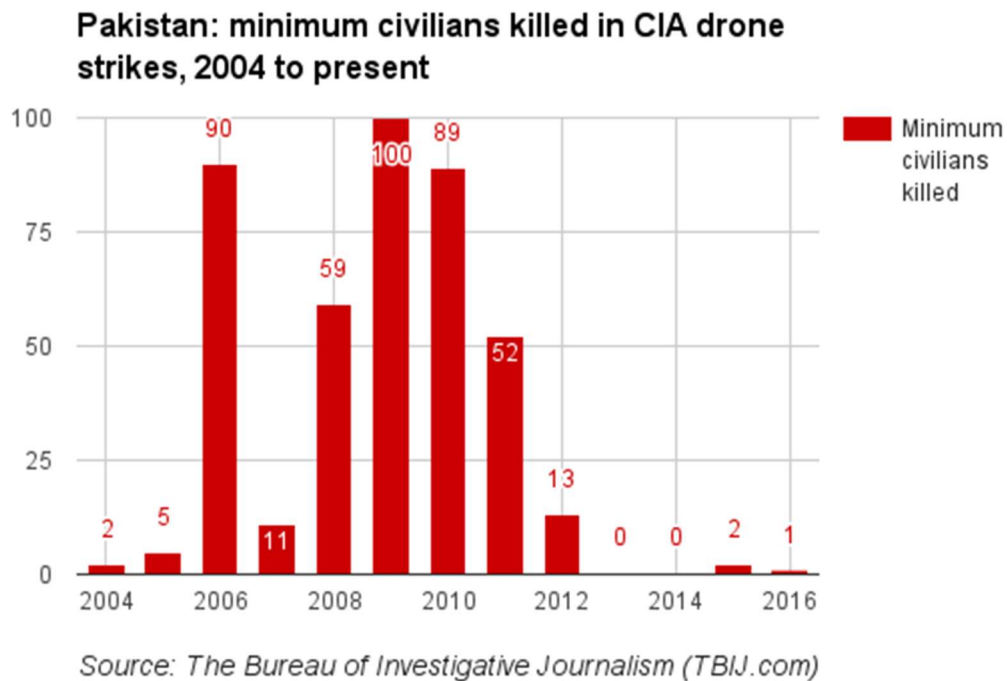
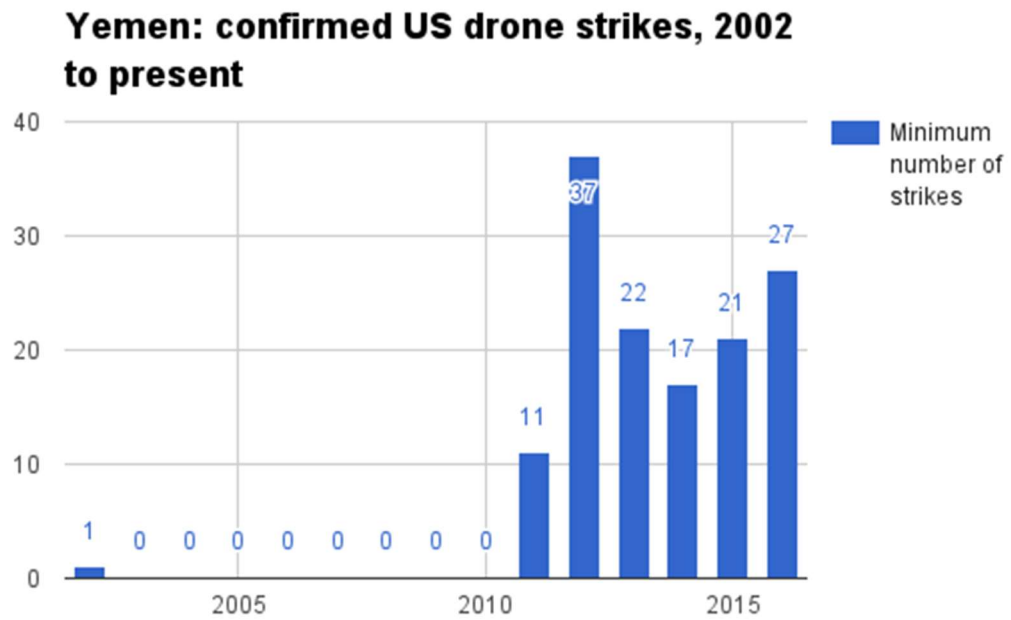


Figure 2 shows the minimum number of people, regardless of combatant status, killed in CIA drone strikes in Pakistan from 2004 until the present day. Figure 3 shows the minimum number of civilians killed in CIA drone strikes in Pakistan from 2004 to the present day. The charts when compared together show a remarkable decline in the number of civilian deaths related to the drone program in Pakistan. This data stands in stark contrast to statements made by Pakistani authorities estimating that the civilian casualty rate stands at around 75-80% over the life of the drone program. In a report published in 2010 in *Dawn*, one of Pakistan's leading English newspapers, Pakistani authorities claimed that for every militant killed in a drone strike in 2009, 140 civilian casualties occurred. This is widely different from BIJ's numbers. BIJ estimates 471 people, regardless of status, were killed by drone strikes in Pakistan for 2009, meaning that if Pakistani authorities were correct only three of that number would have been combatants. Recent statements given to journalists by senior Pakistani officials seem to suggest that the numbers that show extreme civilian casualties are myths designed to get Pakistani

civilians riled up about U.S. drone strikes for political reasons (Bergen & Rowland 2015, 20). This is further supported by an internal Pakistani government report on drone strike casualties leaked in 2013. The report finds that from 2006 through 2009 only 147 civilians were killed out of a total of 742 deaths. This estimate is lower than any of the datasets looked at in this chapter (Bergen & Rowland 2015, 21).

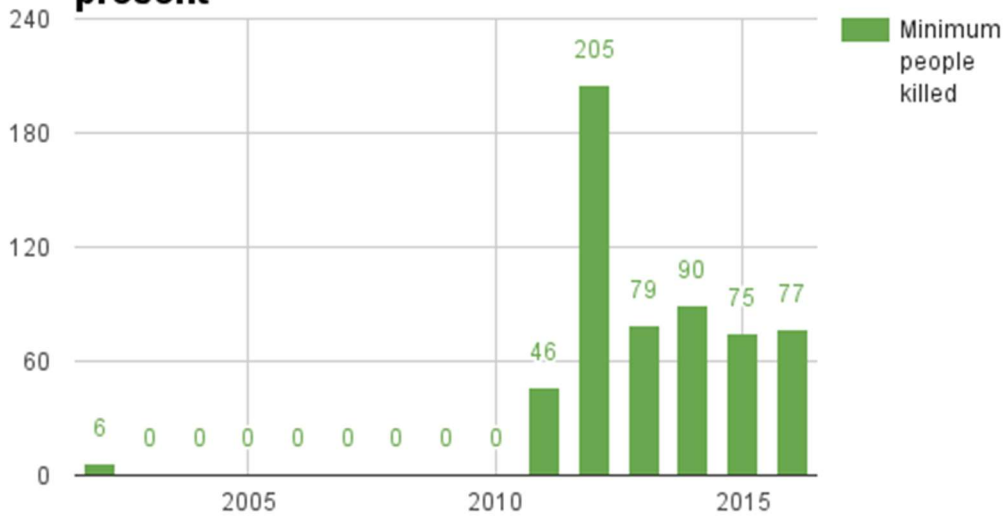
Figure 4



Source: *The Bureau of Investigative Journalism (TBIJ.com)*

Figure 5

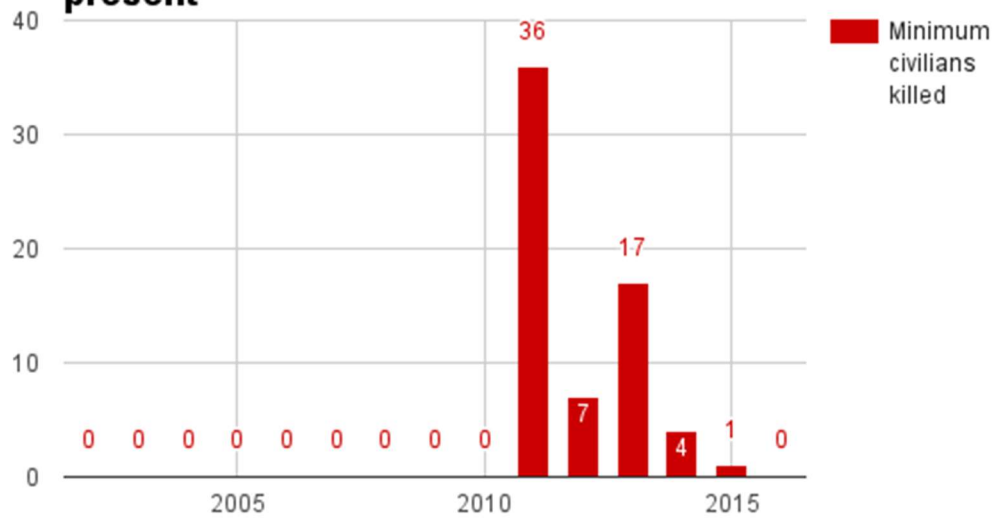
Yemen: minimum people killed in confirmed US drone strikes, 2002 to present



Source: The Bureau of Investigative Journalism (TBIJ.com)

Figure 6

Yemen: minimum civilians reported killed in confirmed US drone strikes, 2002 to present

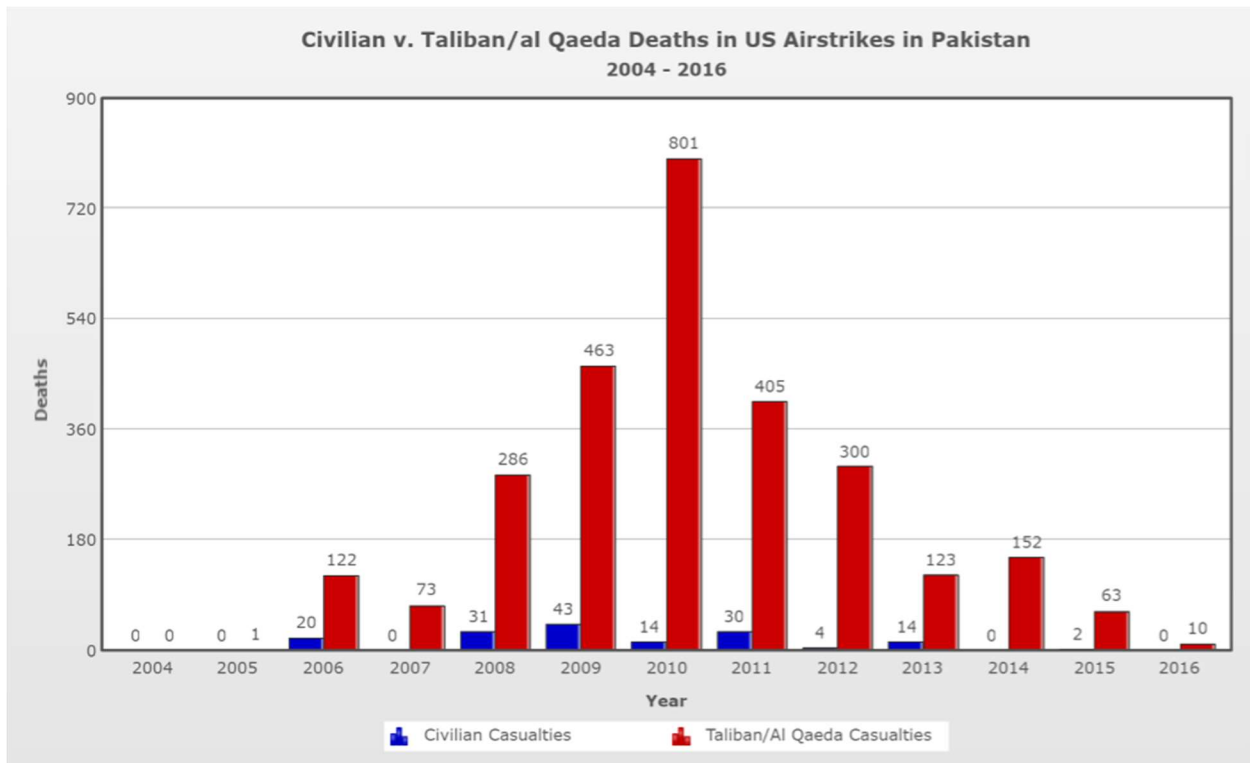


Source: The Bureau of Investigative Journalism (TBIJ.com)

Figures 4, 5, and 6 present the data collected by the BIJ related to drone strikes in Yemen. It is important to note that there is a flaw in the data from Yemen. It is difficult to ascertain whether a strike was conducted by fighter jets or a drone due to conflicting accounts from witnesses to the strikes (Bergen & Rowland 2015, 27). The data from Yemen appears to show the same downward trend in civilian deaths just like in Pakistan. The BIJ data lends some credence to the claims that the principle of distinction is being followed by the U.S. government and the civilian casualties are more than likely because of collateral damage (which could render a strike illegal still on grounds of proportionality, which will be discussed in Part B).

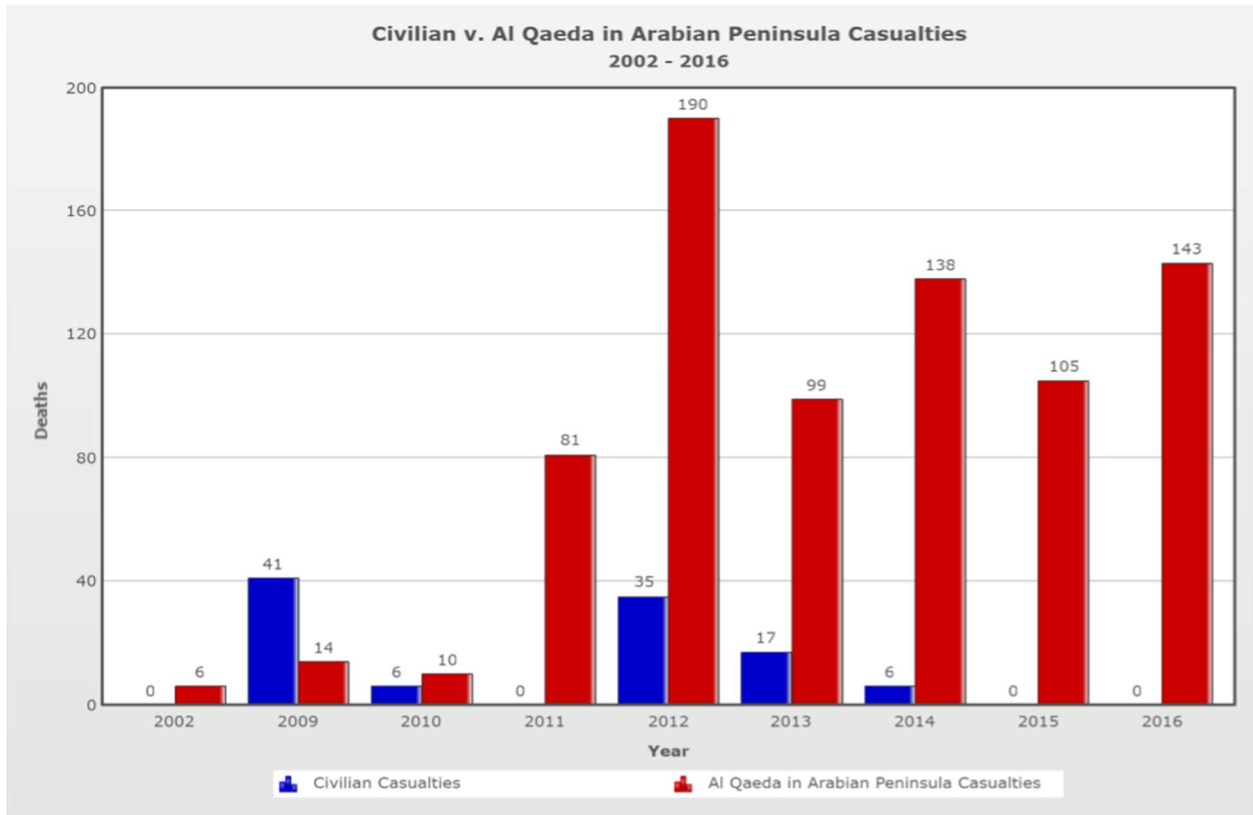
The data presented by *The Long War Journal* shows the same trend, although they report a lower number of civilian deaths. It should be noted that *The Long War Journal* does not discriminate between an airstrike conducted by a manned aircraft or a strike conducted by a drone.

Figure 7



Source: *The Long War Journal* (longwarjournal.org)

Figure 8



Source: *The Long War Journal* (longwarjournal.org)

Figure 7 displays the combatant casualties versus the civilian casualties in Pakistan and Figure 8 displays the same for Yemen. This data also confirms that there is a high chance drone strikes follow the principle of distinction.

New America's International Security Database Program also confirms the trends seen in all the previous sets of data. Over the life of the drone program in Pakistan New America reports 403 strikes, 255-313 civilians killed, 1850-3079 militants killed, and 176-278 unknowns killed (New America 2017a). Unknowns being people that the researchers at New America cannot accurately identify based on multiple conflicting media reports regarding the identity of the

person killed in the strike. In Yemen, the data shows a total of 172 strikes, 87-93 civilians killed, 939-1186 militants killed, and 33-52 unknowns killed (New America 2017b).

To sum up all the data presented the Center for Civilians in Conflict at Columbia Law School released a 2012 report titled, “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions.” The chart provided by them allows for side by side comparison of the data presented above for Pakistan, minus that provided by the government, up to 2012. It also includes data from the Pakistan Institute for Peace Studies. They do not have data for Yemen in the report.

Figure 9

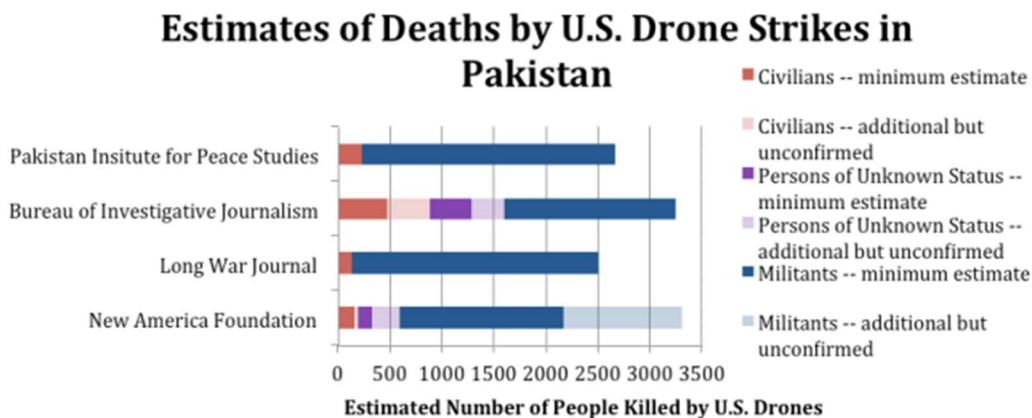


Figure 1.1 Estimates of Drone Strike Deaths as of August 2012¹

Long War Journal's estimates date from 2006, while the other organizations date their estimates from 2004. Pakistan Institute for Peace Studies has estimate current to July 2012 only, although more recent subscription-only data may be available. The Bureau considers all of its estimates of militants to be alleged, but not proven.

Source: Center for Civilians in Conflict (civiliansinconflict.org)

The data from the five sources presented appears to show that the United States is distinguishing between legitimate targets and illegitimate targets. Based off this, it appears that on average, many U.S. drone strikes succeed in meeting the principle of distinction. Even though there have been strikes that have mistakenly targeted civilians, the data appears to show that this is likely a small fraction of the total number of drone strikes launched in Pakistan and Yemen. This

conclusion supports the argument made by this chapter, that drone strikes could be carried outside of traditional combat zones in a way that is consistent with international law.

Part B: The Principle of Proportionality under International Humanitarian Law

The principle of proportionality is the second of the two main principles under IHL that are debated when it comes to drone usage. It too was officially codified by the Additional Protocol I of the Geneva Conventions in 1977. It is defined in two separate articles, the first being Article 51.5(b) which states:

“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (ICRC I 1977, Art. 51.5(b)).”

The second article is Article 57.2(b) and it states that:

“an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (ICRC I 1977, Art. 57.2(b)).”

Article 51.5(b) relates directly to the protection of civilians and states what would constitute a violation of the principle of proportionality. Article 57.2(b) relates to the precautions that a military must take in an attack of a military objective (Solis 2010, 273). The principle is not a total prohibition on civilian casualties, but rather it seeks to minimize civilian casualties in attacks on military targets. The difficulty in determining whether a use of force is proportional is due to the lack of specificity on the word, “excessive.” It is clear that to violate proportionality, “the discrepancy between the loss of civilian life and the destruction of civilian objects must be *clearly* disproportionate to the direct military advantage anticipated (Solis 2010, 274).”

Proportionality is a principle that is easily stated, but is very complicated to apply in practice. It

is not clear how much care is required of an attacker and the degree of risk that they must be prepared to take in an armed conflict. It is impossible to measure human lives against the value gained by accomplishing a military objective. Thus, proportionality is assessed on a case by case basis and only the most blatant uses of disproportionate attacks are considered violations, but in a battlefield environment that has civilians present, violations are possible (Solis 2010, 278, 283).

Since the inception of the drone program there has been an extensive debate as to whether drone strikes meet the principle of proportionality. This is mainly due to the widely different casualty numbers that were discussed in Part A of this chapter. Some have asserted that drones are inherently disproportionate uses of force because the military advantage gained from killing what are predominantly low-level militants cannot justify the civilian casualties caused as a result. It is important to note that under IHL the weapon system used is irrelevant when assessing proportionality (Schmitt 2010, 322-323). There is nothing inherently illegal about drones as a weapons system under IHL, but rather opponents to the drone program try to advance morality based arguments as to why drones should be illegal under IHL. IHL's job is to determine legality, not morality (Pejic 2014, 69).

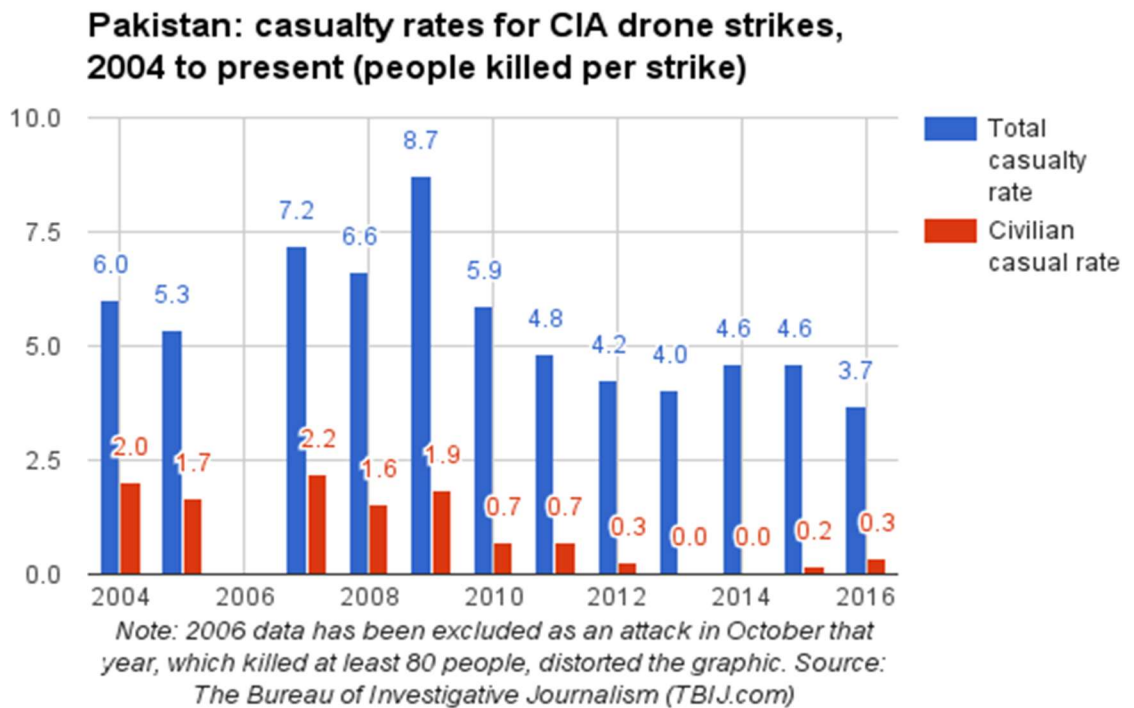
In assessing proportionality outside of a zone of armed conflict, numerous questions are raised. In the conflict with Al-Qaeda, ISIS, and the Taliban the fight follows the fighter (Barnidge, Jr. 2012, 437). Inside a geographically defined zone of armed conflict, such as Afghanistan, proportionality is an easier question to satisfy because of the sustained fighting that is occurring on the ground in Afghanistan between U.S. ground troops and Taliban fighters. In an area such as Pakistan it is harder to satisfy the principle of proportionality because it is harder to see the military advantage of a drone strike of militants that kills civilians in an area far away from active hostilities. It is easier to understand the military advantage gained by killing a group

of Taliban fighters in Afghanistan that regularly engage in firefights with U.S. ground forces. I argue for the approach that the fight follows the fighter and that IHL should follow that fighter even if they cross the border from Afghanistan into Pakistan, but it appears that the traditional principle of proportionality cannot be applied wholesale to areas that lay outside the zone of armed conflict (Trumbull IV 2015, 525). This is because the principle of proportionality was developed by the wars of the past in which state fought state and significant civilian casualties were permitted because civilians of the enemy state were deemed partially responsible for the conflict. This cannot stand outside the context of traditional zones of armed conflict because civilians outside of those zones may not be complicit in the underlying conflict (Trumbull IV 2015, 525-525). It should be noted that Charles Trumbull IV intends his argument to be based off moral grounds, which is not an argument that determines the legality of something under IHL. Instead I agree his idea of a limited principle of proportionality as a better legal principle for addressing the use of force outside areas of armed conflict.

A limited principle of proportionality would acknowledge that while the combatants that have left a zone of armed conflict are still legitimate targets, the target is no longer on a battlefield in the traditional sense and has likely moved into a civilian area. This limited idea of proportionality should also recognize that there is the possibility of a greater chance that the civilians in the area that the target has gone to are less likely to be involved in the conflict that the target was involved in. Thus, more care should go into the protection of these civilians since they are not linked to the hostilities neither directly nor indirectly. By imposing a higher threshold on what is acceptable in terms of proportionality outside of zones of armed conflict it appears as that not only are drone strikes legal, they may be even more acceptable than other forms of targeted killing, such as an airstrike by a manned aircraft. This is a theoretical

observation on how the principle of proportionality should work, but proportionality is not an exact science and can be calculated in different ways depending on the type of target. I will be using this higher standard when looking at the causality rates for drone strikes in Pakistan calculated by the BIJ. In terms of evaluating this limited notion I add in the question of whether the civilians present could be reasonably assumed to be complicit in the armed conflict. In the context of asymmetric conflicts this question is important to answer since strikes can occur in predominantly civilian areas.

Figure 10



The data that the BIJ has on casualty rates in drone strikes in Pakistan shows a sharp decline in the average of civilian deaths per strike since 2007. This shows a better adherence to the stricter view of proportionality that Trumbull IV talks about. Per the graphic it appears, on average, many drone strikes would meet the current principle of proportionality under Additional Protocol I. Under the strict interpretation that is less certain. Looking at the data for 2004 there

was an average of two civilian deaths per strike and four combatant deaths per strike. While it would depend on the importance of the combatants killed, strikes that were not targeting leaders might not be acceptable under the limited notion of proportionality when civilians were a third of the casualty rate per strike in 2004. The difficulty, however; with determining an appropriate ratio for proportionality is that per Figure 1, there was only one CIA drone strike in Pakistan in 2004. That one drone strike killed six people, two of them being civilians. Since the data presented is based on averages, it is difficult to determine an appropriate ratio because we do not know the outliers in the chart. Since numbers do not answer the question of whether the civilians killed were complicit in the conflict, it is hard to devise a ratio to determine proportionality. As mentioned above, this means that only strikes that severely disproportionately kill civilians would be illegal. These complications presented by the ratio approach under a limited notion of proportionality emphasizes the importance of looking at each strike on a case-by-case basis to determine proportionality by looking at the absolute numbers of casualties and the military advantage gained. The drone strike of Baitullah Mehsud in 2009 provides a good example for examining the principle of proportionality as it is now understood and the limited notion addressed above under the absolute numbers approach.

On the evening of August 5th, 2009 Baitullah Mehsud is sitting on the roof of his father-in-law's home in South Waziristan, Pakistan. He is a diabetic and has to receive an intravenous drip to treat his symptoms. On the roof with him are his wife, father-in-law, and his uncle. Mehsud is the number one most wanted by Pakistan for his suspected role in the 2007 assassination of former Pakistani Prime Minister Benazir Bhutto and the 2008 bombing of the Marriot Hotel in Islamabad. Circling above the house that evening is a Predator drone operated by the CIA. Based on the intelligence and images that they were receiving from the drone the

CIA decides to launch two Hellfire missiles at the roof of the house, killing all four of the people on the roof, Mehsud's mother-in-law, a lieutenant, and seven bodyguards (Harwood 2012, 2-3). Out of the 13 people killed in the strike, four of them were civilians. This clearly meets the limited version of proportionality and the current principle of proportionality. Let us explore a hypothetical then; what if only Mehsud, his father-in-law, wife, and uncle were killed, would this meet the principle of proportionality? In this hypothetical three out of the four that were killed were civilians whose guilt was that they were related to Mehsud by blood or law. Per the currently accepted principle of proportionality this would be a relatively simplistic decision, the strike was legal because the military objective gained by Mehsud's death was clearly proportional to the deaths of three civilians. In the limited sense of proportionality there is an important question that must be asked first before determining the strikes legality: Were the civilians killed complicit in the conflict that combatant was a party to? In the case of Mehsud it seems likely that his family members were at least indirectly if not directly complicit in the conflict that Mehsud was a party to. In this case the strike on Mehsud would have met the limited principle of proportionality because the civilians present were complicit in the armed conflict he was a party to and his status as the leader of the Taliban made the strike satisfy proportionality because the military advantage gained by killing him was proportional to the loss of civilian life. This case sets up how the limited principle of proportionality should work: first there must be an understanding that there will be, more than likely than not, a greater amount of civilians in areas outside a zone of armed conflict; second there should be an attempt to determine whether or not the civilians that are present in the target zone are complicit in the conflict the target is a party to in order to reduce the amount of civilian casualties in strikes outside of zones of armed conflict. This limited notion of proportionality still presents the same difficulties as the currently accepted

one, but adoption of the limited principle may result in a reduction of civilian casualties while still retaining the ability for states to act.

It was mentioned above that drones may well be a more acceptable weapons system under the limited principle of proportionality. This is because of the sophistication of drone technology coupled with current U.S. rules of engagement (ROE). If an operator believes that lethal force is necessary to eliminate a target there is a process that must be followed for the strike order to go through. In most cases, operators will have considerable time to monitor and track a target due to a drone's ability to stay over a target for long periods of time undetected. In preparation for a strike, the operator piloting the drone positions so the drone has optimal observation of the target and deployment of weapons. The mission intelligence coordinator will analyze all the images collected of the target to determine if the target is a legitimate target and to gauge possible collateral damage. At all times, all members of the drone crew are constantly on the lookout for civilians and civilian objects. Proportionality is key in determining if a strike will occur. While the relevant portions of the ROE are classified, lower level operators might not be in a position to determine the excessiveness of collateral damage in relation to the direct military advantage and as such higher-level approval is required (Drake 2011, 643-644). An example of this was during the 2003 invasion of Iraq and for a time afterwards any use of force that had the potential to result in more than 30 civilian casualties had to be approved by Donald Rumsfeld, the Secretary of Defense at the time (Drake 2011, 644). This process encourages operators to adhere to principle of proportionality and can be used to advance the limited principle of proportionality.

After considering the principle of proportionality, it appears U.S. drone strikes, for the most part, succeed in meeting the principle of proportionality as currently stated by Additional

Protocol I of the Geneva Conventions. While drone strikes do succeed in meeting this principle there have still been incidents of civilian casualties as shown by Figure 10 above. This does not make drones illegal outright, but it raises the question of whether a more limited principle of proportionality is needed. A rough outline of what that should be was presented in this section and will be discussed further in Chapter Three. Under this more limited standard the question of whether or drone strikes are legal is harder to discern, but it does appear that on average drone strikes would meet this limited notion of proportionality and indeed might be more acceptable than other weapon systems under it.⁵

Part C: Jus ad Bellum: The International Law of Self-Defense against Armed Attacks

Jus ad Bellum or the international law of self-defense stems directly from the UN Charter. Article 51 of the UN Charter states that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (UN 1945, Art. 51).”

Besides this Article, the Charter places a restriction on the use of force by any member state as a method for resolving disputes in Article 2(4) which 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 (UN 1945, Art. 2(4)).”

⁵ This is of course completely subjective to how the actor using the weapon system chooses to use it. Since this thesis is focused on the use of drone strikes by the United States, I argue that given the way the United States uses drones, they are a more proportional tool than other weapon systems currently employed by the U.S. military. Drones have the capability to be more proportional than manned aircraft, but this does not guarantee they will be used in this way and again this thesis is focused on the question of *could* be legal.

In addition, there are two recognized exemptions to this Article, that being when an action is taken with consent of the host state or when an action is carried out in self-defense as a response to an armed attack or to deter an imminent threat (Ahmad 2014, 65). There are two main principles that compose the law of self-defense, those being necessity and proportionality. The principle of necessity means that there is no alternative to the use of force to respond to the attack or to stop an imminent attack (Schaller 2015, 202). The principle of proportionality under the law of self-defense means that the force used in response must be proportionate to the harm suffered in an armed attack or the anticipated harm that would be suffered by an imminent attack (Solis 2010, 281).

Under the law of self-defense an attack must have occurred or it must be imminent for a state to legally be able to respond by claiming self-defense. The controversy surrounding whether an armed attack has occurred in the context of attacks by a non-state armed actor has subsided in recent years. There are still some that argue under Article 51 the use of force in self-defense is restricted to the state responsible for the attack (O’Connell 2015, 68). The former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, Professor Philip Alston, questioned in a report submitted to the UN Human Rights Council in 2010 whether self-defense could be used to justify attacks against an actor that did not have state sponsorship (Tiberi-Szabó 2015, 385). The defenders of this view hold to an advisory opinion issued by the International Court of Justice (ICJ) in 2004 that ruled on the consequences of Israel building a wall in the occupied Palestinian territories. The ICJ stated that, “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004, para. 64).” Recent history has changed this view for many people and the more

widely accepted view is the consensus view of armed conflicts prior to 9/11 has collapsed and that the attacks on the Twin Towers of the World Trade Center has shown that a non-state armed actor acting without state sponsorship is capable of an armed attack (Barnidge Jr. 2012, 428-429). In a case involving a use of force by Uganda against the Democratic Republic of the Congo (DRC), the ICJ examined whether Uganda's claim of self-defense in response to attacks by non-state actors allegedly connected to the government of the DRC justified Uganda's invasion of the DRC. The ICJ concluded that Uganda's use of force against the DRC was illegal because they were not able to provide a tenable enough link between the non-state armed actor and the DRC government, but the case leaves the door open on the question of whether Uganda could have used force legally against the non-state armed actor harassing its border villages (*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005, para. 133). The debate surrounding what can be described as an imminent attack is also unresolved (Schaller 2015, 204). Without a consensus of what is to be thought of as an imminent attack, states are left to make their own judgements on the notion of imminence.

The United States views the threat posed by Al-Qaeda, the Taliban, and ISIS as a threat that is, "a continuing, imminent threat to US persons," and as such reserves the right to use force (Schaller 2015, 198). The drone policy is based on a flexible understanding of what counts as an imminent attack to give maximum freedom to decision-makers (Tams & Devaney 2015, 37). In 2012 the Attorney General at the time, Eric Holder, outlined the criteria for lethal force to be used, the first criterion was that, "an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States. (Rylatt 2013, 48)." In 2013 NBC News acquired a leaked Department of Justice

White Paper that laid out the legal justifications used by the U.S. government with regards to targeted killing; their definition of imminence is worth quoting in whole:

“By its nature, therefore, the threat posed by al-Qa’ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans. Thus, a decision maker determining whether an al-Qa’ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa’ida (including any potential target of lethal force) are continually plotting attacks against the United States; that al-Qa’ida would engage in such attacks regularly to the extent if they were able to do so; that the U.S. government may not be aware of all al-Qa’ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a likelihood of success and reduces the probability of American casualties (DOJ 2013, 7-8).”

This presents an incredibly flexible notion of imminence that does not sit well with many in the scholarly community, but also with other governments.⁶ Several nations do not regard U.S. drone strikes conducted under the justification of self-defense as being legal (Ahmad 2014, 67).

Regardless of the broad interpretation of imminence, it does appear as though the legal basis for targeted killings via drone strikes is found in Article 51 of the UN Charter (Harwood 2012, 12).

If there is a legal basis for targeted killing under Article 51, then there should be a checklist for self-defense to be used as the justification for such a use of force. The attacked state must: “(i) prioritize consent or cooperation with the territorial state over unilateral uses of force;

⁶ There is concern that this flexible notion of immediacy could be used to justify preemptive self-defense, which does away with the requirement of immediacy completely (Shah 2010, 93). Critics point out that the use of drone strikes against individuals that the United States classifies as Al-Qaeda is not based on the existence of an imminent threat and are preemptive in nature, with the goal of exterminating the leadership to prevent future terrorist attacks (Shah 2010, 116). While this appears to be the right course of action when dealing with a terrorist group, there is real concern that this erodes the concept of immediacy because even though members of Al-Qaeda leadership are being targeted, there is no imminent attack. The acquiescence to an expansive right of self-defense in the name of fighting global terrorism raises fears that it could allow a powerful state to attack a weaker state unilaterally and preemptively in the name of fighting terrorism because the weaker state is unable or unwilling to deal with the threat on its own (Shah 2010, 89).

(ii) ask the territorial state to address the threat and provide adequate time for the latter to respond; (iii) reasonably assess the territorial state's control and capacity in the relevant region; (iv) reasonably assess the territorial state's proposed means to suppress the threat; and (v) evaluate its prior interactions with the territorial state (Schaller 2015, 203-204).” By working through this checklist drone strikes conducted by the United States would be considered legal under the law of self-defense. In recent years, a new question has been asked; what if the state from which the non-state armed actor is operating out of is unwilling or unable to address the threat? It appears military action falls in line with the principle of necessity in this case if the state from which the group operates out of is unwilling or unable to address the threat (Schaller 2015, 202). In the case of the 9/11 attacks, Al-Qaeda was operating out of Taliban controlled Afghanistan at the time. The Taliban, the de facto government of Afghanistan, refused to hand over Al-Qaeda leaders identified as responsible for the attack to U.S. authorities. As noted above by the White Paper, it is likely that Al-Qaeda was planning additional attacks in that time and as such the only way to prevent the threat was to employ military force since the Taliban government was unwilling to deal with the threat. Some commentators have remarked on the fact that the strikes are a violation of the sovereignty of Pakistan and that they are preemptive in nature (Shah 2010, 116-119). While this would be a persuasive argument against the legality of drone strikes under self-defense analysis, recent leaked diplomatic cables published on WikiLeaks show that Pakistan has given consent secretly and that when their Parliament protests the strikes, it is for domestic political purposes rather than legal ones (Schaller 2015, 196).⁷ A

⁷ Shah's argument also hinges on the assumption that Pakistan is willing and able to deal with the targets of the drone strikes. If they are not, his argument is significantly weakened by the principle of necessity, because Pakistan is either not able to eliminate the threat posed by these targets or they are not willing to deal with them. If either is the case, military action is necessary to take out the threat posed by these targets and is lawful under the principle of necessity (Schaller 2015, 202).

leaked diplomatic cable from 2008 showed that President Asif Ali Zardari agreed to drone strikes in Pakistan and former President Pervez Musharraf admitted that he signed off secretly on drone strikes as well (Bergen & Rowland 2015, 21). The President of Yemen, Abed Rabbo Mansour publicly told the Washington Post in 2012 that he signs off on all U.S. drone strikes (Bergen and Rowland 2015, 27). Given that countries outside the zone of armed conflict have consented to the strikes taken by the by the United States the legal analysis is thus simplified.

One final paradigm is important when analyzing whether drone strikes are legal under self-defense. The *Caroline* test was famously created by Secretary of State Daniel Webster in 1837. In 1837 a group of rebels began to fight against British rule in Canada and their leader toured through upper New York trying to court support from sympathetic Americans. Men and weapons were being shipped into Canada to the rebels' stronghold on Navy Island onboard the American steamer, the *Caroline*. On December 29, 1837, British soldiers crossed the Niagara River and set the *Caroline* ablaze and left her to drift down river, one American civilian was also killed in the raid. In a series of notes exchanged between Webster and British diplomat Lord Ashburton, Webster made it clear that for an action to be justified under the right of self-defense, "It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation (Davies 2009, 430-432)." Given the *Caroline* test it appears only some drone strikes can be justified under the law of self-defense.⁸ If the government can prove that an imminent attack is coming then a drone strike against those that will be the perpetrators and planners of that attack is justified. It seems that self-defense would not prohibit the targeted killing of high-level terrorist leaders like Osama Bin Laden, but

⁸ The logic presented by the DOJ White Paper referenced above calls into question the continued relevance of the *Caroline* test in today's conflicts. The White Paper specifically argues that there are minimal windows of opportunity to launch a strike and there is an inability to determine how imminent attacks are (DOJ 2013, 7-8).

rather the targeting of low-level terrorists probably does not satisfy the imminence question in relation to that threat posed by that of a higher-level commander (Odle 2013, 659).⁹ The strike must also be proportional to the attack or to the projected damage of the imminent attack. The principle of proportionality is not debated among the numerous commentators. The focus, as addressed above is on that of the principle of necessity and whether the drone strikes are preventing imminent attacks.

It appears drone strikes can be considered legal underneath the law of self-defense. The international community seems willing to accept that force can be used to counter a future attack if the government conducting the use of force possesses reliable evidence of the attack's imminence (Tams & Devaney 2015, 44). Regardless it is still important to continue to assess drone strikes on a case by case basis under the law of self-defense (Schmitt 2010, 325).

Part D: Concluding Remarks

In the above discussion regarding the legality of drone strikes under IHL and the international law of self-defense it appears the conclusion reached is that the legality of drone strikes is neither that of complete legality nor complete illegality. I reject instances of criticism that state drone strikes are wholly illegal under IHL (Schmitt 2010, 325). These arguments are based in the rooted notion that IHL is not a flexible body of law and cannot be updated. While I do find that drones can meet the principles of distinction and proportionality under IHL, they do

⁹ The distinction between and low-level terrorist and a high-level terrorist depends upon the person's function in the terrorist organization. For the purpose of this commentary, the distinction will be along the same lines that the United States uses. In a speech given in 2011 by John Brennan, then Assistant to the President for Homeland Security and Counterterrorism, he states that there are higher level commanders who, in the construction of terrorist plots, "is orchestrating that, engineering it, preparing materials, thinking about plans." He then goes onto say that there are, "the individuals, the operatives, the facilitators, [the ones] who are carrying [the threats] out, the suicide bombers (Odle 2013, 610)." The leadership level would be permissible to target under self-defense when it comes to an immediate threat because they are critical to the planning of the attack before it happens. The operational or low-level would be able to be targeted in the aftermath of an attack under the law of self-defense or would be able to be targeted in the midst of an attack under IHL.

not always do so. The same applies for the international law of self-defense. Some of these problems come from the fact that there is no good understanding in international law of the contemporary conflicts that the United States is engaged in. They are not international in nature because they do not involve an armed conflict between two states. They are also not completely non-international in nature as the U.S. government suggests since the non-state armed actors engaged in these conflicts span across borders and are transnational in nature. While drone strikes are adequately addressed by the current bodies of law as interpreted, there is serious work to do in understanding the current nature of conflicts and codifying them into IHL. Until that point, the debate about whether drone strikes are legal will continue around in circles when looking at individual strikes since there is no definition as to the limits of contemporary conflicts and how the principles of IHL and the international law of self-defense interact with them. The issue surrounding transnational armed conflict will be addressed in depth in the third chapter of this work.

Chapter Two: Do Ethics Apply? Ethical and Moral Implications of Targeted Killing via Drones Outside Zones of Armed Conflict

As noted in the introduction of Chapter One, the nature of warfare is changing due to rapidly advancing military technologies. In the case of drones, numerous ethical quandaries have been raised regarding the use of drones in general and more specifically their use in the practice of targeted killing. Drones are a unique weapons platform in the sense that they completely remove their operators from the theater of conflict, meaning there is little, if any risk to the operators. This idea is known as the separation factor and from it stems many the ethical dilemmas raised by drones. Throughout history, humanity has found more efficient ways to kill one another and most of those inventions have involved increasing the distance between the combatants. In this sense, drones are only the next step in a long historical trend. Each new invention has been accused of making war immoral and this line of argument stretches back to at least the invention of the crossbow, which was widely condemned for allowing peasants to kill armored knights at a distance (Sparrow 2013, 6). As technology evolves, law and ethics inevitably lag behind and struggle to keep pace with these challenges (Cook 2015, 47).

Before I delve into the specific challenges, I will go ahead and outline the moral framework that I am using for this chapter. I start from the assumption that the killing of another person is inherently immoral and, therefore, a wrong act. Wrong acts should not be committed by people who are moral agents, therefore, people who are moral agents should not kill people. If this argument was wholly true, there would be no use for this thesis, since killing would not be occurring if the world was perfectly moral. This must mean there is a caveat to the above argument. That caveat is that some instances of killing are moral if they are done in legitimate self-defense. While this string of arguments applies on the individual level, it can be extrapolated

to apply to an entire nation and to the conduct of war. This is what is known as JWT, which is a broad collection of historical literature on the justifications for war and what counts as just conduct in war (Hallgarth 2013, 5). JWT is the ethical framework which I will be using to evaluate the use of drones in targeted killing and I will begin this chapter by giving an outline of the two components of JWT and their respective principles.

JWT is composed of two separate components, *jus ad bellum* (just entry into war) and *jus in bello* (just conduct in war). Both components must be met for a war to be considered just. Since war is very destructive, the decision to enter war must be morally justified. *Jus ad bellum* is comprised of seven principles, all which must be satisfied for a decision to go to war to be just. The first is legitimate authority. Legitimate authority means that war can only be declared by agents of political leadership that have the authority to do so (Hallgarth 2013, 8). The second principle is just cause; just cause is viewed as the moral backbone of *jus ad bellum* because a war that is entered into for an unjust reason is immoral, even if the war is fought with moral restraint (Hallgarth 2013, 8). While there are a multitude of reasons that may satisfy just cause, the one that will be focused on in this chapter is self-defense. The third principle is declaration, war must be announced publicly to the community of nations, but specifically to one's foe. This is because declaring war provides one last chance for a war to be avoided before actual hostilities commence (Hallgarth 2013, 8-9). The fourth principle is last resort, war must be a last resort to solving a dispute and a nation must make a good faith effort to ensure that measures short of war have been attempted before resulting to war (Hallgarth 2013, 9). The fifth principle is reasonable chance of success. This principle means that a use of force must have some reasonable chance of halting future attacks (Plaw & Colon 2015, 186). The sixth principle is right intention; it is the requirement that wars be fought with the right motives. Morally justified wars are fought to right

an injustice and to restore peace following the termination of the conflict (Hallgarth 2013, 9).

The seventh and final criterion under *jus ad bellum* is proportionality. This criterion requires that the benefits of the war be compared against the costs of the war. The injustice suffered must be significant enough to satisfy the immense cost and sacrifice required by war (Hallgarth 2013, 10). *Jus in bello* is composed of two main principles: discrimination and proportionality. These criteria describe the moral responsibilities of those engaged in hostilities to ensure that specific military operations inside of a war are morally justified. Discrimination is the idea that violent military action must discriminate between combatant and noncombatant targets and that noncombatants cannot purposefully be targeted. Proportionality under *jus in bello* means that the costs of a military action must be proportional to the objectives sought (Hallgarth 2013, 10). *Jus in bello* also includes supplementary criteria that change over time, such as the banning of certain types of weapons (ex. chemical weapons) and banning certain practices that are considered evil in themselves, such as genocide (Hallgarth 2013, 11).

Jus ad bellum and *jus in bello* have a tenuous relationship with one another because of the long held view that soldiers on both sides of a conflict are morally equivalent with one another (Hallgarth 2013, 11). This moral equivalence of soldiers means that they cannot be held accountable for the war itself, only the actions they undertake inside the war. Soldiers fighting for an unjust cause may fight justly, whereas soldiers fighting for a just cause may fight unjustly. This irony is not a terminal problem for JWT because military conflicts are, unfortunately, a fact of life. Regardless of which side of a conflict has a just cause, both parties to the conflict have a responsibility to behave justly inside the conflict. In many cases, it is difficult to truly determine which side in a conflict truly has a just cause. National propaganda is produced on both sides of a conflict to justify a state's decision for war. Soldiers on both sides of a conflict are likely to, or at

least want to believe they fight for the right side (Hallgarth 2013, 11-12). In both clear and unclear cases of just cause, it still falls upon combatants to obey the principles of discrimination and proportionality and any supplementary criteria under *jus in bello*.

This chapter starts from the standpoint that there is no absolute moral problem with the use of drones and no serious contribution to the literature on the ethics of the use of drones argues such (Strawser 2013, 9). Instead there are a set of ethical concerns that are raised by numerous commentators regarding the specific ways drones are used currently. The purpose of this chapter is to determine whether drones *could* be used ethically in targeted killing operations that fall outside of zones of armed conflict. I argue that drones are indeed ethical and eventually conclude that we have an ethical obligation to use drones for targeted killing outside of the traditional zone of armed conflict. This chapter is divided into five sections. Part A looks at whether the ethical concerns raised by drones are truly novel or just following a long historical trend. Part B will look at the effect that drones have had on the application of JWT in contemporary conflicts and whether a new view of just acts in conflict is needed to properly assess the environment that drone strikes have operated in. Part C looks at the effect that drones have had on the operators themselves and how the development of drones has impacted military ethics: the ethical guidelines by which a military sets for itself. Part D will consider the future of drone technology and whether autonomous weapon systems (AWS) are ethical weapon systems to deploy in combat. Part E will offer some concluding remarks regarding the usage of drones in targeted killing operations and the ethical and moral concerns raised by commentators regarding their use.

Part A: Same Old, Same Old: The Novelty of Ethical Questions Surrounding Drone Use

As touched on briefly in the introduction of this chapter, drones are the next step in a continued evolution of military technology. Humans have, throughout history, developed more efficient ways to kill one another and drone technology is the next step in this trend. These advancements in technology inevitably raise ethical questions regarding their use in conflict and whether such a weapon could be used in conflict and be ethical. Drones are no exception to this, but there is debate about whether the questions raised about drones are new or not. The separation factor mentioned above in the introduction has, according to some commentators, increased so much that the very nature of warfare has been completely revolutionized. This in turn, raises new ethical questions that were not previously applicable to other weapon systems in the past. I disagree with this line of argument and instead I argue that the current line of criticism of drones is based on an old line of thinking that dates back to the introduction of artillery in the 16th century (Keller 2015, 137). While I do not claim that this diminishes the relevance of the ethical questions raised by commentators, it is important to understand that there is a deep historical context for these questions.

Throughout history there has been a long seated distaste surrounding killing from a safe distance (Keller 2015, 121). It has been frequently thought of as being dishonorable and disruptive to the traditional notions of warfare. After the Battle of Crécy in 1346 that saw French knights decimated by Welsh archers, they were shocked, “that a crude, treacherous weapon should be used against them, a weapon that allows a cowardly warrior under cover to hurl a projectile indiscriminately against a valiant [knight] who, watchful and ready, naively waits to engage in single combat (Keller 2015, 121).¹⁰” With each improvement in weaponry, this same

¹⁰ This quote comes from the author’s own translation of R Caillois’ *Bellone ou la pente de la guerre*, which is a reflection on the conduct of war from a historical perspective and argues that war is the highest form of social activity prominent in aristocratic societies.

sentiment has been echoed time and time again. The novelty of a weapon has frequently been used as a reason for its rejection because it threatens to overturn the traditional notions about methods of warfare (Keller 2015, 122). From this viewpoint, there is nothing new with the use of drones in warfare; it is simply a continuation of the ancient belief that the physical risk of hand-to-hand combat is the only measure that can be used to determine the morality of a soldier (Keller 2015, 121). The introduction of artillery in the 16th Century is remarkable parallel to the introduction of drones in warfare today. Artillery emerged at a time of immense technological innovation and made its mark because of its efficacy in battle and was rejected by many because of the devastation that it wreaked on opposing forces. Critics of drones raise the same objections as 16th Century critics of artillery, including the lack of moral accountability for the weapon, turning war into a spectacle, and accusing those who use the weapon as being cowardly (Keller 2015, 137). There is a serious problem with continuing to argue that all the questions raised by drones are inherent to that weapons system, it completely ignores the evolution of technology. It also rests on an outdated concept, that war is a duel between two opponents (Keller 2015, 137). Contemporary conflicts have not resembled a dual for a long time and conflict should no longer be considered one, doing so skews ethical analysis by divorcing it from the reality of the world. Instead the focus should be on the application of the weapon system rather than the weapon itself (Keller 2015, 137).

The ethical issues that will be tackled in the following sections are just extensions of old arguments, but that does not diminish their importance and I do not want to convey such an idea in this section. New weapon systems should be looked at individually to see if there is the possibility that they can be employed ethically in warfare. As history has found, some weapon systems cannot be employed in an ethical manner and as such they have been banned. Examples

of these include chemical and biological weapons. It is important to look at drones as part of a long historical trend in the development of weaponry. If one tries to portend that drones are so unique that new ethical questions are raised, it divorces ethical analysis from the reality of the development of weapon systems over time.

Part B: Just War Theory and Drones

There has been a large amount of debate as to whether JWT can appropriately discipline drones in today's conflicts.¹¹ Critics of drones assert that drones have broken down key principles of JWT, such as the principle of last resort, making it easier to go to war. Supporters argue that drones increase adherence to JWT by making it easier to adhere to the principles of discrimination and proportionality. Others argue that JWT can no longer be used to evaluate drones because of the changing nature of conflict. Daniel Brunstetter and Megan Braun argue for what is known as *jus ad vim* or just use of force short of war. They argue that the use of drone strikes in areas outside of Afghanistan and Iraq do not amount to acts of war, necessitating the need for a new category to evaluate them ethically (Braun & Brunstetter 2013). I argue that JWT does provide an adequate framework for assessing the morality and ethical implications of drone strikes under *jus ad bellum* and *jus in bello*. I begin this section by looking at drone strikes under *jus ad bellum* and *jus in bello* before discussing *jus ad vim* at length and some of the shortfalls associated with it.

The most common concern with drones is that they lower the threshold for war under *jus ad bellum* (Beauchamp & Savulescu 2013, 2). The principle of last resort states that war may only be considered after all options short of war have been exhausted and the conflict has still

¹¹ It should be noted that a lot of the debate about JWT is very similar to the legal debate presented in Chapter One. Since IHL and the international law of self-defense are drawn from *jus in bello* and *jus ad bellum* respectively, this chapter will only focus on issues that are unique in the application of JWT and will try to limit the amount of overlap. Some overlap is necessary, however; to understand the ethical and moral dimension that JWT imposes.

not been resolved. In the case of drone strikes in areas such as Pakistan or Yemen, critics say that it has not been adequately shown that other methods, such as capture, have been tried or considered. Instead, the use of force is becoming a first-choice solution rather than a last resort. While it is certainly true that technological advantages posed by drones allow for governments to undertake missions that would have been considered risky absent the availability of drones, it is uncertain if this always can be considered a violation of *jus ad bellum*. The resort to use air power in contemporary conflicts might be quick in today's conflicts, but it is difficult to draw an ethical line between quick and too quick (Enemark 2013, 330). There is no denying that the use of force today is certainly quicker than it was in the past and that raises the question about whether drones truly do damage the principle of last resort.

Launching a drone strike against a terrorist leader is, technologically speaking, easy to do. The technological barriers to launching the strike are very few. This decrease in the technological barriers has led many to assert that the threshold of last resort has been lowered. Drones certainly hold the potential to change the principle of last resort because of how they are used to hunt down terrorists outside of zones of armed conflict. I argue that drones do change the principle of last resort, but not for the worse. By providing an alternative means for addressing the threat posed by someone such as a terrorist leader that is planning to attack the United States, the use of drones can up the threshold for full-scale war (Welsh 2015, 26). By offering a means to take out a threat quickly, there is less reason for war. While this make the resort to use force quicker, it may end up being more ethical to do so because it will not require the initiation of a war to achieve the objectives set out. This idea follows the logic of *jus ad vim*, or just use of force short of war. Brunstetter and Braun specifically argue that *jus ad vim* should be thought of as a set of alternative options to war. *Jus ad vim* still requires the strike to be conducting in self-

defense, but the threshold for the use of force is lower than that of *jus ad bellum* (Brunstetter and Braun 2013, 95-97). *Jus ad vim* even contains requires that an armed action not escalate into armed conflict, thereby providing an alternative means of addressing the threat without entering a state of war (Brunstetter & Braun 2013, 98-99). By avoiding the destruction of a war, the other principles of *jus ad bellum* and *jus in bello* can be potentially better satisfied through the application of *jus ad vim*.¹² While not completely linked to targeted killing, the success in using drones in targeted killings may present a positive externality with respect to the principle of last resort. It has long been presumed that lowering the costs of war has been a bad thing (Beauchamp & Savulescu 2013, 11). Drones certainly lower the cost of war because their operators are not put in any danger flying missions and because of this, critics argue that drones should not be used in targeted killing. By lowering the cost to war it may make it more likely for states to engage in wars that they would have not normally because it is easier to do so. On its face this is a troubling concern, however; there may be one type of war that this lower threshold is more ethical for: humanitarian intervention. Currently humanitarian interventions are difficult because of political and military realities and because of this states often fail to intervene when there is a just cause (Beauchamp & Savulescu 2013, 3-4). There are currently three main problems that limit humanitarian interventions: 1) interventions do not occur when they should; 2) if they do occur, strategic and tactical choices made to limit military casualties end up costing civilian lives; and 3) interventions in many cases end up killing more than they save (Beauchamp & Savulescu 2013, 5). Drones can solve these problems by removing the concerns of putting one's own troops into harm's way. Drones would be able handle the riskier missions in a humanitarian intervention, such as targeting the leaders perpetrating the humanitarian

¹² *Jus ad vim* will be discussed in detail beginning on page 70.

catastrophe. This effect of the use of drones contradicts the traditional notion that lowering the cost of entering war is always bad (Beauchamp & Savulescu 2013, 11).

The reduction of the *jus ad bellum* threshold on last resort appears to be one of the biggest objections to the use of drones in targeted killing. It is assumed by many critics that because drones make it easier to carry out uses of armed force, they will be used to carry out unjust uses of force more frequently. The erosion of the principle of last resort causes many to worry that the principle of just cause also will not be adhered to either, because of the ease to launch strikes on targets. As I have demonstrated above, the reduction of the last resort threshold is not necessarily a negative thing. The argument that drones will also cause more unjust uses of force also fails because of something that Bradley Strawser calls the principle of unnecessary risk (PUR). PUR is the idea that it is wrong to command someone to take on unnecessary potentially lethal risks in an effort to carry out a just action for some good and any potentially lethal risk must be justified by some strong countervailing reason (Strawser 2010, 344). Under the PUR, drones are ethically obligatory because they remove potential lethal risks to an actor who is potentially carrying out a just action. I do not mean to suggest that all drone strikes are just, but in the cases in which they are, the PUR justifies their use. A nation's armed forces have an obligation to protect the lives of their service members and the use of technology that limits the risk to those service members and is not banned under the laws of war should be used. The normative focus of the PUR on present actions is strong enough to overcome predictive calculations such as the argument that drones will definitely cause states to engage in more unjust conflicts because the barriers to entry into conflict are lower (Strawser 2010, 359). The argument that drones lower the threshold of last resort because they are technologically advanced and give an advantage to one actor over the other quickly spirals into the realm of there should

be no more military technological improvements to prevent unjust wars. Perhaps this is true, perhaps there should be no more militaries, but this is not the world that we live in. We live in a world where conflict is real and we cannot make assumptions that one particular technology will cause more incidents of unjust wars (Strawser 2010, 359). It is also interesting to note that arguments that say drones will lower the threshold of last resort, likely do not consider recent research on risk aversion within conflicts. Research in international relations has demonstrated the importance of a leader's individual risk behaviors in understanding the conduct of war, but no one had previously looked at the role that individual risk behaviors influenced decisions on the way in which wars are fought (Macdonald & Schneider 2015, 2). Macdonald and Schneider look at the role risk matters to leadership decisions made about how wars are fought and does so through a case study analysis of the decision to use manned or unmanned weapons by President Bush and President Obama (Macdonald & Schneider 2015). Their findings show that leaders are likely to view some weapon systems and operations to be inherently riskier and thus are less likely to be used by leaders who have more risk-adverse orientations (Macdonald & Schneider 2015, 18). Their study finds that Bush was overall risk acceptant and drone strikes are less common during his tenure, unlike Obama who was more risk adverse and made large use of drones (Macdonald & Schneider 2015, 14). These results seem to indicate that drones are used by leaders who are more risk adverse and are likely to use them when risks are low, potentially making it less likely they would make decisions that would violate last resort. While there is certainly the possibility that drones will lower the threshold of war for the worse and will cause states to engage in more unjust wars, such assumptions cannot call for a violation of the PUR. We cannot actively advocate putting people, even if they are combatants, in inherently riskier situations when we have an alternative that can adhere by all the principles laid out by *jus ad*

bellum. This is, unfortunately, an unhappy conclusion. The worries that drones will cause more unjust wars are legitimate, but in the event that a just war must be fought we are obligated to protect the just combatants who are fighting it (Strawser 2010, 361).

Many commentators have raised concerns about the ability of drones to meet the principles of discrimination and proportionality under *jus in bello*. These objections are very similar to those raised about drones under international humanitarian law. From an ethical standpoint, it appears as though drones have the potential to better meet both principles under *jus in bello* because of the technical capabilities of drones (Welsh 2015, 26). The ability to observe a target for hours makes it easier to determine whether the target is actually a noncombatant or not. Some argue that while drones can better protect just combatants, they do so at the expense of weakening the principle of discrimination. Brunstetter and Braun argue that the use of drones, especially in areas outside of defined combat zones, can potentially weaken the principle of discrimination because there could be insufficient and potentially unreliable ground information that makes it difficult to contextualize the tactical situation. This lack of contextual knowledge can make it harder to ensure that the principles of *jus in bello* are being met (Brunstetter & Braun 2011, 351). It should certainly be true that if the use of drones weakens the ability to discriminate between combatants and noncombatants then they should not be used. However, there is good reason to think that the opposite is true about drones. The technological advancements that have been made to drone technology over the last decade have made it easier to adhere to the principle of discrimination. Advancements have been made to the missiles used by drones to allow for what is known as fire, observe, and update mode. Traditionally missiles are fired in what is known as fire and forget mode, meaning that once a missile is fired the actor who launched the missile does not stick around to observe the impact of the warhead since there is nothing that

they can do to change the trajectory of the missile. It is going to hit where the actor aimed it. In fire, observe, and update mode the drone operator can update the course of the missile by constantly adjusting its trajectory with a control panel and in the case of the intended target ending up being a civilian, steering the missile off course to where it will do no physical harm (Strawser 2010, 351-352). The evidence presented in the first chapter of this thesis also lends credence to the fact that drones can discriminate among combatants and noncombatants. Drones can theoretically lead to greater adherence to the principles of discrimination and proportionality, but as the data from the first chapter demonstrated it is required to look at adherence on a case by case basis.¹³ The wide difference in the casualty numbers makes it difficult to render a judgement about whether or not drones adhere to the ethical principles set forth by JWT, but as was noted in the first chapter a lot of these problems stem from the fact that there is no definition of the contemporary armed conflicts under international law.

In recent years, the technological advantages of drones have caused a change in the perceptions of targeted killing (Brunstetter & Braun 2011, 343). Scholars have begun to argue that drones do not appear to be captured in the essence of the principle of last resort under *jus ad bellum* (Brunstetter & Braun 2011, 344). Thus, a new view has surfaced among just war theorists, *jus ad vim*, the just use of force short of war. Brunstetter and Braun are the primary advocates for this new view of thinking and draw the ideas of *jus ad vim* from the preface to eighth edition of Michael Walzer's book *Just and Unjust Wars*. They argue that drones have not actually increased instances of armed conflict, but rather have increased instances of *jus ad vim* (Brunstetter & Braun 2013, 87 & 89). They outline three principles: 1) just cause and last resort;

¹³ I have deliberately chosen to limit the discussion about adherence to the principles of discrimination and proportionality in this section because of the high amount of overlap with the section on international humanitarian law in the first chapter. To not be repetitive, I have chosen to keep the discussion about *jus in bello* short since the issues raised by drones are the same as those addressed in the first chapter.

2) proportionality and the probability of escalation; and 3) right intention and legitimate authority. The idea of *jus ad vim* is an interesting one, it appears to grapple with, at least from the ethical side, the nature of contemporary armed conflicts. Brunstetter and Braun expand upon their three criteria and argue for a higher standard of proportionality, since they are in a sense arguing for relaxing the criteria of *jus ad bellum* to use armed force. As mentioned previously, they argue that *jus ad vim* should not be thought as part of the actions leading up to war, but rather as an alternative set of options. Use of force under *jus ad vim* must still be in self-defense, but the use of force is more permissible than under *jus ad bellum*. Defense is interpreted more broadly (Brunstetter & Braun 2013, 95-97). Under this interpretation, a drone strike launched in Yemen in response to terrorist attack in the United States would meet the self-defense criteria under *jus ad vim*. Brunstetter and Braun acknowledge the fact that is impossible to make precise proportionality calculations so an additional category is added, the probability of escalation. In *jus ad vim*, the use of force must not lead to escalation. They use both Pakistan and Yemen as an example in which they state that even though there is anger over U.S. drone strikes, it does not appear that this will cause any escalation (Brunstetter & Braun 2013, 98-99). The last portion of *jus ad vim* is that of right intention and legitimate authority. Right intention means stopping a specific threat, while causing the least amount of damage possible by protecting civilians. They argue that since the provocation that allows for actions of *jus ad vim* is lower, there is less moral latitude for harming civilians. The last point emphasized under *jus ad vim* is legitimate authority and it is argued that the UN Security Council should be the one to authorize all *jus ad vim* actions (Brunstetter & Braun 2013, 100-103). In a separate article Brunstetter and Braun look at use of drone strikes in Pakistan and how *jus ad vim* could be used to better assess whether the strikes constitute a just use of force.

The authors start from the premise that there is no ongoing armed conflict in Pakistan and that the self-defense justifications for strikes inside Pakistan do not hold up to scrutiny (Braun & Brunstetter 2013, 317). They argue that the belief that drones better satisfy proportionality than other weapon systems has created a relaxed set of moral standards, weakening traditional just war theory. Since the U.S. government sees drones as being more proportionate than other weapon systems, the United States, the authors argue, always sees them as being proportionate (Braun & Brunstetter 2013, 305-306). The authors look at the New America International Security Database that is used in the first chapter of this thesis to determine whether drone strikes in Pakistan are adhering to the principle of proportionality under *jus in bello*. To determine whether proportionality is being met, the collateral damage ratio - the strikes that produced collateral damage compared to total strikes - is used. They argue that the collateral damage ratio better captures the individualized examination required by *jus in bello* proportionality. Out of the 343 strikes conducted by the United States in Pakistan by the CIA from 2004-2012, 80 produced collateral damage, meaning 23% of all strikes produced some amount of collateral damage (Braun & Brunstetter 2013, 311-312). The authors then compare the use of drones by the military and the CIA and show that the military has a 10% threshold on the chances for collateral damage and as a result the drone strikes in Afghanistan have a 1% collateral damage ratio. Brunstetter and Braun acknowledge that the collateral damage ration between the CIA and the military can never be the same because of different strategic objectives, but they argue that the 23% collateral damage ratio in Pakistan is too high to be consider proportional under *jus in bello*. Instead, they argue that *jus ad vim* should be used to judge the CIA strikes because the threshold for civilian casualties is higher than in war. Under this they find that the CIA proportionality balancing is troubling because the percentage of civilian deaths is higher than what would be

acceptable in war. *Jus ad vim* would also prevent attacks against targets based on patterns of suspicious behavior, signature strikes, and would also prevent attacks on terrorists who are several steps away from any potential attack on the United States because of the strict adherence to the principle of self-defense. While the authors do not argue for a complete prohibition on CIA drone strikes, they argue that currently CIA drone strikes do not meet the requirements set by traditional just war nor *jus ad vim* (Braun & Brunstetter 2013, 318-319).

Jus ad vim provides a good starting point for looking at the changing nature of conflict and how drones will affect the battlefields of tomorrow. It should be noted that *jus ad vim* is still a hotly contested topic in the current literature looking at drones and just war theory. All sides of the debate about drones acknowledge that the most contested aspect of drone strikes is the number of civilian casualties and whether those casualties have exceeded what is legally or ethically justified (Plaw & Colon 2015, 163). Critics of *jus ad vim* argue that it is unrealistic and that a realistic application of traditional just war theory is more appropriate. Plaw and Colon also issue a scathing critique of Braun and Brunstetter's work on applying *jus ad vim* to CIA drone strikes in Pakistan. They argue that Pakistan is indeed a zone of armed conflict and as such *jus ad vim* is not applicable because it governs acts of force short of war and even if a state of armed conflict did not exist in Pakistan the case that drone strikes do not meet the higher standard of proportionality is not convincing. This is because Braun and Brunstetter conflate the categories of "civilians and/or unknowns killed" with "non-militants killed" or "collateral damage" or even "civilians killed" in their analysis of the New America data (Plaw & Colon 2015, 171). This produces misleading results because they combine all of the above terms into collateral damage. By conflating civilians and unknowns killed, Braun and Brunstetter are overestimating the number of civilians killed since some of the unknowns could also be militants, but New America

was unable to identify their status either way. Plaw and Colon come to the same conclusion that the first chapter of this thesis does and that is that the drone strikes appear to meet the principle of proportionality. They lastly attack the use of the collateral damage ratio as a measure of proportionality as inherently limited because it only takes into account of when civilians were killed, not how many civilians were killed. While it is true that 23 percent of strikes did kill civilians from 2004-2012 in Pakistan, this percentage does not tell us how many civilians were actually killed in those strikes (Plaw & Colon 2015, 171).

I tend to agree with Plaw and Colon that *jus ad vim* currently is unrealistic, but I do think that it is a useful starting point for the discussion on transnational armed conflict that will occur in Chapter 3 of this thesis. JWT does still provide an adequate framework for addressing the use of drones in targeted killing operations that occur outside of zones of armed conflict, but still grapples with the same problems that plague international humanitarian law and the international law of self-defense. This makes the importance of defining what type of conflict that the United States is currently in even greater because the longer that discussion is deferred, the more problems it will raise for attempts to discuss whether JWT needs to evolve to better understand just uses of force. Supporters of *jus ad vim* do make a good point when arguing that drone strikes are not captured adequately by the last resort principle of *jus ad bellum*. Even still, until there is a definition under international law defining the type of conflict that the United States is in currently with terrorist organizations such as Al-Qaeda or ISIS JWT should be continued to be applied because the U.S. considers itself to be in an armed conflict. By looking at the United States' actions through a JWT lens, commentators can better criticize the United States' policy on the same grounds that United States says it is playing on, rather than on grounds that the United States does not even recognize. Again, I reach the same conclusion as in the first chapter,

while there can be certain instances where drones can violate JWT, their use does not constitute an immediate violation of JWT.

Part C: Drone Strikes and Military Ethics

Most works dealing with the ethical implications of drones deal with their effect on JWT, with a specific focus on civilians and enemy combatants. While this is a very important dimension it overlooks the impact that the use of drones may have on the operators themselves. Critics of drone use worry that drones will separate soldier from the moral weight of their actions because of the distance between them and their target (Cook 2015, 60). Psychological literature has consistently shown that people find it difficult to kill others at close range, drones get rid of this concern (Welsh 2015, 43). Another concern that critics have is the psychological toll that drones exhibit on the operators themselves because of how close the operator is to their target, figuratively speaking (Welsh 2015, 43). These two concerns are both contradictory since one argues that operators are too removed from their targets and the other asserts that they are too close. I will examine both viewpoints to determine if either of them is true and whether they present a large enough ethical barrier to the use of drones in targeted killing.

The notions of martial virtue have played an important role in shaping the behavior of the military (Sparrow 2013, 3). In the United States, many of these virtues are codified in the Uniform Code of Military Justice and extolled in military academies around the country as how U.S. soldiers are expected to behave. In recruiting ads for the U.S. Marine Corps, the virtue of courage is always emphasized in how Marines run toward the sound of tyranny to vanquish it. Even outside the military, intelligence agencies such as the CIA also extoll the values of courage, service, and integrity. Critics argue that by transforming combat into a “desk job” the relevance of military ethics is called into the question (Sparrow 2013, 4). Drones are the first regularly

employed conventional weapon that has succeeded in completely removing operators from the theater of war (Sparrow 2013, 6). An operator can pilot a drone over Pakistan from an Air Force base in Nevada in without any fear of a counterattack. This asymmetrical distance factor has made some critics question whether operators will become more detached from the targets they are ordered to kill.

Robert Sparrow lines out four marital values that are emphasized by almost all armed forces: courage, loyalty, honor, and mercy. Courage is the most important virtue; a soldier must have both physical and moral courage in order perform on the battlefield in the face of death. Sparrow defines physical courage as, “the willingness to face fear of bodily discomfort, injury, or death,” and moral courage as, “the willingness to face and overcome fear of the social and personal sanctions that may be incurred by doing what is right rather than what is popular, expected, or prudential (Sparrow 2013, 7).” Loyalty is the other virtue that Sparrow highlights as being absolutely essential for military service. In war, soldiers need to be prepared to place themselves at risk for the sake of the larger objective. It is also very likely that these risks will almost never be in the self-interest of the soldier taking them. Sparrow defines loyalty in the military context as meaning a, “willingness to suffer physical hardships and even to risk death for the sake of the other members of a combat unit, and its commander (Sparrow 2013, 8).” A large amount of military training is dedicated to achieving small group cohesion to generate such a commitment to one’s squad mates. Loyalty to larger institutions (“the Marines,” the “Commander in Chief”, or the country) and values (liberty or democracy) also play a key role in promoting ethical behavior among the armed forces because it reminds individual soldiers that they stand for something greater than themselves when they wear the uniform (Sparrow 2013, 8). The virtue of honor is related to loyalty and plays an important role in encouraging soldiers to

abide by the principles of *jus in bello*. Sparrow defines honor as the, “concern for how well one lives up to one’s chosen ideals (Sparrow 2013, 9).” Honor is important in the sense that it plays a vital role in motivating soldiers to risk themselves for the cause that they fight for and in motivating themselves to live up to their ethical ideals (Sparrow 2013, 9). The final virtue mentioned by Sparrow is mercy. While mercy does not appear on the websites of national armed services, mercy is an important virtue that is exercised by military services and is central to what it means to be a soldier. Sparrow defines mercy as being able, “to refrain, out of compassion, from killing or causing suffering when one is both able and would be justified in doing so (Sparrow 2013, 10).” The demonstration of mercy distinguishes soldiers from killers because it demonstrates their respect for human life even in the midst of war (Sparrow 2013, 10). Walzer incorporates into his discussion of the War Convention a story that appears again and again throughout history, “a soldier on patrol or on sniper duty catches an enemy soldier unaware, holds him in his gunsight, easy to kill, and then must decide whether to shoot him or let the opportunity pass (Walzer 2015, 138-139). He goes onto say that many of these moments in which soldiers choose not to shoot. He presents the example of the naked soldier, in which during World War I a British sniper saw a German soldier taking a bath and refused to shoot because there was no military gain to be had. The sniper saw the naked German as another human rather than a soldier. The sniper’s sergeant ended up killing the German, but the sniper’s refusal to shoot because he disliked the thought of killing a naked man is a morally important recognition (Walzer 2015, 139-140). This episode helps give some visualization to the demonstration of mercy that Sparrow presents.

The introduction of drones into warfare has raised questions about the effects this has had on military virtues. Drone operations have called into question the need for courage in operators.

Since the operators are not in the theater of war there is little need for physical courage because the operators are in physical danger. It is also ambiguous if moral courage is needed to kill someone through a screen. Moral courage plays an important role for soldiers on the battlefield because it includes the ability to be willing to resist an illegal order. Interestingly, Sparrow concludes moral courage is not needed for drone operators because they are less likely to receive an illegal order because all actions taken by drone operators are recorded (Sparrow 2013, 14).

There is no doubt that physical courage is not needed by drone operators, but I dispute the notion that moral courage is not needed. Drone operators are still asked to make life or death decisions and even though there is a geographical separation factor, drone operators are arguably closer to their targets than most soldiers. Those flying drones begin to understand people in other countries because they are forced to observe their day-to-day patterns. They spend hours observing a target to make sure that the intended target is indeed a combatant and can be legally and ethically targeted. Drone operators also see everything before and after a strike is carried out (Drone Pilot 2015, 115). Fighter pilots, in contrast, are only able to see a relatively quick glimpse of their intended targets before a strike is launched and they do not stick around after a missile strike or bombing run. Due to the technological capabilities, drones can hover over an intended target for extended period of time and then stay after the strike to confirm the death of the target and if there was any collateral damage. Overall, targeting is more intimate because the operator sees everything (Drone Pilot 2015, 116). Even though drone operators are not physically present they still must have moral courage to make the life and death decisions required by their superiors. Sparrow argues that saying drone operators have moral courage fails to distinguish them from professions such as surgeons who also should make moral decisions, but are physically present (Sparrow 2013, 12). Sparrow's line of argument essentially boils down to the

premise that one cannot make a moral decision unless they are physically present in the area that the decision affects. If this were true, then the majority of policies enacted by the government are not moral decisions because it is likely that those policymakers will be in the direct area that the policy will affect. While physical courage may not be necessary, moral courage is still required for operators to carry out their duty and conduct strikes on targets that they have observed for hours prior to making the decision about whether to end their life.

Sparrow goes on to argue that drones pose a significant challenge to loyalty because the operators are not forced to fight alongside one another in a warzone. As a result, the operators have little need for loyalty to one another since there is a greatly reduced capacity to demonstrate it and little opportunity to cultivate it (Sparrow 2013, 14-15). Since the operators are in no danger from opposing forces, there is little need for loyalty between the operators. Sparrow does acknowledge that there might still be loyalty toward the institution, such as the U.S. Air Force, but even that relationship is extended in the sense that there is nothing “martial” about it since the operators are not making the same types of sacrifices that soldiers in the field have to make (Sparrow 2013, 15-16). While I agree that Sparrow is correct about the idea drone operators do not have the same capacities to demonstrate loyalty as do soldiers in the field, this does not mean that the value of loyalty is lost on the drone operators. As explained in the first chapter drones are usually piloted by a crew that includes several operators outside of the pilot. There are mission intelligence coordinators that constantly analyze the images being acquired by the drone to ensure that the rules of engagement are being met. At all times, all members of the drone crew are on the lookout for civilians (Drake 2011, 643-644). This is the small group cohesion that Sparrow talks about in his discussion of loyalty. The operators all need to trust one another’s judgement to make sure that a strike is compiling with the rules of engagement. While this is not

the same degree of loyalty that Sparrow talks about, I believe that his broad dismissal of the virtue among drone operators is to general a rejection that does not accurately understand that dynamics between drone operators.

Sparrow argues that if operators face less challenges to acting ethically, they may not cultivate a sense of honor as soldiers operating in the field. He argues that the distance factor may make it harder for operators to respect the person that they are killing, even if the criteria for conducting the strike is held at a higher ethical standard. This stems from the idea that killing through a screen is inherently dishonorable (Sparrow 2013, 17-18). Sparrow argues that even though the ethical criteria for launching a drone strike may require a higher threshold, this does not automatically make the operators honorable (Sparrow 2013, 17). He is correct, just because a decision requires a high ethical standard just not automatically make a person honorable. Sparrow's definition of honor makes it something that is cultivated overtime by adhering to one's ethical ideas, in the case of warriors the principles of *jus in bello*. Drone operators are still able to display honor when they consistently adhere to the principles laid forth by *jus in bello* because they are living up to their ethical ideals. Sparrow's rejection again fails along the lines of a blanket rejection of black and white. In the world of drones, however; there is rarely every black and white and the failure to engage with the gray simplifies his conclusions too much. This is the same for his conclusions about mercy. He argues that sensor systems are incapable of projecting the moral reality necessary for ground compassion (Sparrow 2013, 21). This, however; fails to acknowledge the reality discuss above, that drone operators are rather close to their targets because they are forced to observe them for hours on end. I argue that drone operators have a greater capacity to understand mercy because they are forced to observe the daily patterns of their intended targets, including in some cases their interactions with their

families. They get to know their target and in the process, develop a sense of attachment that is necessary to determine whether a target is a legitimate target or not. It is also important to note that unlike other types of weapon systems, operators can choose to abort a drone strike at the last minute because of complications in the target area, such as an innocent civilian wandering into the target area. An operator doing so is demonstrating the virtue of mercy. Armed with a weapon system that can cancel an attack at the last minute, it seems likely that drone operators are still capable of demonstrating mercy on the battlefield. Sparrow cautions against the abandoning of military virtues, which is something that I agree with. We should not abandon military virtues to make killing more expedient, but drones do not pose as fundamental a challenge as he suggests. Instead of abandoning virtue, drones simply change the way that they are understood and applied in contemporary conflicts.

The second position presented by critics is the psychological toll placed on operators because they are required to become too close to their targets. Since operators are so close to their intended targets, the moral burden on them is increased more so than those operating other weapons systems (Welsh 2015, 43). Critics are concerned that the cognitive dissonance that results from forcing operators to kill at work and then go home to dinner and their child's soccer match places an unjust psychological burden on them that puts them at greater risk for PTSD. The second worry is that this burden will weaken their will to fight because it makes war look too much like a video game (Strawser 2010, 352). I argue that this is not necessarily the case because drone technology gives operators greater potential to ensure that ethical decisions are being made because the operator is not at risk, giving them more time to make a decision. Even if the separation factor does increase the psychological burden on the operators, this in and of itself is not a knock on the ethical justification for drones since there are ways to help operators

cope with the stress placed on them. Even if there is some level of psychological discomfort suffered by drone operators it is, regrettably, something that cannot be overcome. (Strawser 2010, 353). Combatants of all types are prone to PTSD and to say that drones are immoral because they cause PTSD is more of an attack on the morality of warfare rather than a particular weapons system. It is a sad fact of life that warfare exists, but we are ethically obligated to use a system that increases the potential for soldiers to act ethically.

Drones do not pose enough of an ethical concern for operators that they should not be used in targeted killing operations. Drones do not completely do away with military virtues, instead they change the way they are applied in practice by the drone operators. Arguments to the contrary rely too much on broad rejections that do not consider the actual process of targeted killing by drone. While drones do make it so that their operators are indeed closer to their targets than they would be otherwise when using another weapons system, this does not constitute a strong enough of an objection to drones as a whole. This is offset by the greater potential for drone operators to make ethical decisions. It is regrettable that this may put the operator at a higher level of psychological stress, but this only reaffirms the necessity of support systems in place for all members of the military to help them cope with the stress placed upon them by their jobs.

Part D: The Future of Drones: The Ethical Implications of Autonomous Weapon Systems

No discussion about the ethical implications of drone technology is complete without a look to the future. While the Air Force does not have any plan to develop weapon systems that would take a human out of the kill chain, there are many who think that fully AWS are on the way (Dahm 2015, 349). Currently drones are not fully autonomous because there is a human in the kill chain, meaning that ultimately the decision about whether to take a life comes down to a

human actor (Dahm 2015, 349). An AWS would remove the human from the kill chain and would act according to its programming about whether to take a life. There are many who are concerned about this technology and the effect it would have on the way we fight our wars. Currently there is no international ban on AWS weapons platforms, but there is a movement by Human Rights Watch to make sure that they are made illegal before they are rolled out as a mass-produced weapon systems. There is, however; significant ethical objections to the use of AWS weapons.

Critics are concerned that AWS weapons will lower the barriers to war because there is a lack of human casualties on the side that employs them. They avoid the necessary “blood-sacrifice” that just war requires (Abney 2013, 340-341). The vague rules under international humanitarian law and JWT would make it difficult for literal minded robots to properly adhere to them. The debate about whether drones, or any weapons systems adhere to them, demonstrates the vagueness of the rules governing warfare. Robots operate in a world that is very black and white because they are constrained by their programming. As such they would need more than vague rules on war to be considered virtuous (Abney 2013, 345-346). By handing over the decision to target to a machine, we are jeopardizing the moral bedrock on which JWT is formed, the idea that a human is the one doing the targeting (Roff 2013, 352). This stems from the idea that robots are not moral agents. This is because the autonomy required for moral decision-making is different than lethal autonomy. AWS weapons are not autonomous in the sense that they can make complex ethical and moral decisions that human operators are currently required to do so (Lucas 2013, 9). While AWS weapons may be able to adhere to black and white legal requirements better than humans are, there is a difference between an action being legal and an action being ethical. In the case of the laws of war, the gray area is much greater than in criminal

law for example. The laws as codified in the Geneva Conventions are rather vague when it comes to law, it is much easier to convict for a person for murder under domestic criminal law than it is for a war crime under international humanitarian law. It is even harder to determine whether an action is ethical in war under JWT. Since AWS weapons do not have a moral intention they are not able to commit war crimes. For a crime to be committed in war there must be a deliberate intention to do so. It then becomes a messy game of who the blame is assigned to, ranging from the engineers who programmed the robots to the policymakers who decided to use them (Lucas 2013, 10).

Since AWS weapons are not moral agents they do not meet the moral equality of soldiers because they lack the capacity to be morally responsible for their actions (Roff 2013, 355). This is a frightening conclusion. As a result, AWS weapons would almost certainly remove the need for military virtues because of the lack of humans fighting on the battlefield. An extreme example cited by many critics is of an episode from *Star Trek* called “A Taste of Armageddon.” In the episode, the crew of the Enterprise encounters an advanced civilization that settles its conflicts through computer-on-computer warfare. At the end of each of the simulations the computers declare the winners and losers and the requisite amount of civilians from both sides present themselves to disintegration machines to be killed. Only when these machines are destroyed and the crew of the Enterprise reinstates the possibility of the full reality of the destructiveness of war do the opposing sides realize that they should seek peace (Cook 2015, 61). The full costs of war are necessary for societies to realize that there are other alternatives to conflict, such as negotiations. The leaders of the civilization in the *Star Trek* episode argued that their form of conflict was indeed more ethical because it minimized the disruption to civilian life and infrastructure, but it locked them into an almost unending cycle of war (Cook 2015, 61).

This is what robots could do to conflict. They would threaten to make war the path of least resistance and would encourage nations to settle disputes through war rather than peaceful negotiations (Abney 2013, 346).

I argue that AWS weapons do present significant ethical problems with their usage because they remove the human from the kill chain and would strongly urge against their usage. Currently drones still retain the human cost of war because they leave all targeting decisions to humans who must decide whether a particular use of force is both legal and ethical. The threat that removing the human from the kill chain is too ethically justify the usage of robots to conduct lethal operations. This does not disqualify robots from being used by the military in things such as maintenance or search and rescue, but does and should limit their deployment as a lethal weapon systems.

Part E: Concluding Remarks

I find that ultimately drones do not pose any novel ethical issues that prevents them from being used in targeted killing operations. While the separation factor is increased to the point that one side is no longer in the warzone, this does not present a strong enough ethical problem to justify banning the use of drones. The ability for drones to give operators a greater capacity to make ethical decisions outweighs the arguments against their usage and is something that needs to be exploited and in fact makes drones ethically mandatory in situation in which their usage could accomplish a military objective and limit the potential for collateral damage. The implications that drones have on operators also are not strong enough to completely overrule their use in warfare. AWS weapons, however; do present strong enough ethical objections that should prevent their use in warfare because they remove the human out of the kill change. On one final note, I end up returning to the same conclusion that I reached at the end of the first

chapter, the lack of a definition of the contemporary conflicts regarding the United States' fight against terrorist organizations makes it difficult to determine the ethical use of drone under JWT. In the next chapter I will be tackling this idea directly and attempting to develop a definition of transnational armed conflict to help address the challenges posed by contemporary views of JWT and international law.

Chapter Three: The Battle to Define Contemporary Armed Conflicts: The Need to Recognize Transnational Armed Conflict

Since the end of World War II, armed conflict has radically changed. Gone are the times of massive, conventional wars, in which states fight against one another. For the most of the second half of the 20th Century, IACs were relatively rare. They did still occur, such as the Falklands War, the Korean War, or the First Gulf War, but they were nowhere near the scale of World War I and II. Instead, the trend since World War II has seen the increased participation of a wide range of groups that had not historically participated in armed conflict (Bassiouni 2008, 715). This new involvement has caused NIACs to be more prevalent in today's world. These conflicts revolve around a state that is engaged in an armed conflict with a non-state actor and has been determined to be of such a level of intensity that it is no longer classified as an internal armed conflict. While this gave the world a better understanding, the conflict between the United States and Al-Qaeda has raised some serious questions as to whether a new classification of armed conflict is needed to accurately describe the conflicts experienced today.

After the attacks of 9/11, the United States under the Bush Administration considered itself to be in an armed conflict with Al-Qaeda and exercised the right to self-defense guaranteed by Article 51 of the UN Charter. While this conflict originally began in Afghanistan, it appears the conflict has expanded to Northwest Pakistan, Yemen, and Somalia. This conflict has exposed gaps in the current legal framework for armed conflict (Daskal 2013, 1175). Not only has the nature of this conflict exposed these gaps, but the introduction of new technology has as well. With the introduction of drone technology into hostilities by the United States, the idea of the conflict zone defined geographically has been severely challenged. As demonstrated in Chapter One of this work, it is of my opinion that drone strikes can indeed be considered legal under IHL

and the international law of self-defense. I do, however; acknowledge that there are significant difficulties in making this determination, such as limited data and unclear rules. I find it important to reiterate that for the purposes of the first chapter I assumed the existence of an armed conflict between the United States and Al-Qaeda, ISIS, and the Taliban and that this conflict had some aspects of both an international and non-international character. I made this assumption based on state practice, specifically the United States' view of the conflict. I believe that some of the difficulties that I experience in Chapter One are a result of the fact that there is no real definition of the contemporary conflict between non-state armed actors and states that spreads across different countries. These problems extend far beyond the use of drones in contemporary conflict environments and affect all military operations taken against groups such as Al-Qaeda. The use of drones to target individuals outside of the 'hot battlefield' in Afghanistan has only sped up the need for the international community to take a hard look at whether a new category of armed conflict should be considered.

I refer to this new category of armed conflict as transnational armed conflict, as called by Geoffrey Corn and Eric Jensen in the literature. I define transnational armed conflict to be a conflict not of an international character, in which the High Contracting Parties to the conflict consist of a state opposing a non-state armed actor and the conflict extends across state boundaries.¹⁴ This chapter is split into two sections. Section A presents my reasoning as to why the current categories of armed conflict are inadequate to address contemporary conflicts with non-state armed actors that cross international borders. Part B of this chapter will explain why

¹⁴ When I say that the conflict is not of an international character, I mean that the conflict is not between two states. The word international in international law always means between two states. Since the conflict is not between two states I prefer to use the word transnational to mean across national boundaries.

the adoption of transnational armed conflict as a new conflict classification under international law will help to address the current gaps in international law.

Part A: The Inadequacy of Common Article 2/3 Triggering Paradigm

Prior to 1949, the international community recognized two types of conflicts, war between two or more states and civil war (Crawford 2007, 443-444). The Geneva Conventions of 1949 redefined these two types of conflict to IAC and NIAC. The increased number of NIACs after the end of World War II demonstrated the weakness of the Geneva Conventions to handle such conflicts and resulted in the adoption of the Protocols Additional to the Geneva Conventions in 1977. Additional Protocol I changed the classification of wars of national liberation from NIAC to IAC and Additional Protocol II provided the first treaty based definition of NIAC (Crawford 2007, 446-448). Additional Protocol II defines NIAC as,

“all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting party between its armed forces and dissident forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement its Protocol (ICRC II 1977).”

This definition helped to clear up some of the debate in regards to what is to be defined as an NIAC, however; the conflict against Al-Qaeda has made this distinction difficult. Conflict classification is the essential first step in determining the rights and obligations of the parties involved in the hostilities (Corn 2009, 209). As stated before, there are only two recognized categories of armed conflict under international law and they are set forth in Common Article 2 and Common Article 3 of the Geneva Conventions. Common Article 2 is as follows:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is

not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof (ICRC 1949).”

Common Article 3 is as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict (ICRC 1949).”

These two articles form what is known as the Common Article 2/3 triggering paradigm. In the event of an armed conflict, the classification of the conflict is the first step taken by the High

Contracting Parties. If it is determined to be an IAC, Common Article 2 is triggered and both parties to the conflict abide by the restrictions presented in the Geneva Conventions, regardless if one is a party to the Conventions or not. If the conflict is determined to be a NIAC, then Common Article 3 is triggered and each party to the conflict will be bound by the requirements listed above. The either/or triggering paradigm has caused debate as to whether the current conflicts against transnational terrorist organizations can adequately fall within the two categories above. Many scholars point out that a plain reading of Common Article 2 does not apply to a conflict between a state and non-state actor. These scholars also push for a flexible interpretation of Common Article 3 and argue that transnational armed conflicts should be classified as NIACs. Their reasoning is that, currently, there is no other way to define the conflicts accurately because the authors of the Geneva Conventions did not anticipate transnational armed conflicts, but there is no way one of these conflicts can be IACs so by default they are NIACs (Shereshevsky 2016, 476-477). This reasoning is concerning, especially because of the lesser regulation in NIACs and the diminished ability to protect the victims of armed conflict (Shereshevsky 2016, 459).

Following the conflicts in the Former Yugoslavia, the International Criminal Tribunal on the Former Yugoslavia (ICTY) became the first international legal body to recognize the blurring between international and non-international armed conflicts (Crawford 2007, 451). The opinion given by the ICTY in *Prosecutor v Tadic* endorsed this view. The Tribunal acknowledged that there were compelling, humanitarian reasons for reducing, if not eliminating, the distinctions between the types of armed conflict. This decision has only made conflict classification more difficult since *Tadic* blurred the traditional legal differentiation between the types of armed conflict without providing clear guidelines (Crawford 2007, 441). The *Tadic* case did attempt to

define the geographic boundaries of both IACs and NIACs. It defined the geographic scope of an armed conflict of an international character as extending throughout the state in which hostilities were conducted. In the cases of conflicts not of an international character it defined the geographic scope as the area over which a party had territorial control in the cases in which the conflict did not extend throughout the entire state (*Prosecutor v. Tadic* 1997). This decision created a new approach to NIACs, if the fighting is sufficiently widespread throughout of the state, then the zone of active hostilities extends to the state's borders and if the fighting is only concentrated in certain regions within a state, then the zone should be geographically limited to those regions. This approach is incredibly fact-intensive and requires close monitoring to determine the appropriate zone of active hostilities (Daskal 2013, 1208). The decision in *Tadic* was a step in the right direction in addressing the problems associated with transnational armed conflict under the current legal framework, but the attacks of 9/11 and the United States' response strained even this new viewpoint toward NIACs.

Following the declaration of the "War on Terror" by the Bush Administration, the United States has decided to use a broad definition of who qualifies as part of the enemy forces and couples it with a lack of geographic boundaries (Daskal 2013, 1180). The legal decisions made by the Bush Administration in framing the conflict with Al-Qaeda were driven by perceived strategic ramifications of conflict categorization. While national security determinations related to the applicability of the laws of war are not immune from policy considerations, there is a danger in allowing policy decisions to drive legal application in the realm of armed conflict (Corn 2007, 311). The Bush Administration advanced the claim that the United States was in an IAC with Al-Qaeda and that empowered them to take military action wherever they were present. This model does not work for a conflict involving a state and a non-state armed actor

(Kreß 2010, 255). Common Article 2 specifically endorses the idea that in IACs the zone of armed conflict is in the territory of the states that are parties to the conflict. In most cases, non-state armed actors do not hold territory.¹⁵ The one benefit to classifying the conflict with Al-Qaeda as an IAC, at least from a humanitarian perspective, is international law has more rules in place for IACs (Crawford 2007, 442). Defining the conflict between the United States and Al-Qaeda, however; violates the spirit of Common Article 2 of the Geneva Conventions and cannot be accepted as the definition of the current conflict. The only characteristic that the conflict shares with an IAC is that it occurs on the territory of multiple states. This interpretation is in line with the majority of the literature base on conflict classification, with many authors concluding that Common Article 2 does not apply (Shereshevsky 2016, 477).

The Obama Administration took a different view of the conflict with Al-Qaeda, they considered an NIAC to exist with Al-Qaeda, but the geographic limits of the conflict were difficult to determine. While the classification of the conflict with Al-Qaeda as a NIAC appears to better describe the nature of the conflict, the lack of defined geographic boundaries limits the usefulness of this classification. The use of drones by the United States is a prime example of the geographic disjunction between hostilities and direct participation in them (Lubell & Derejko 2013, 85). Common Article 3 states at the very beginning that, "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions (ICRC 1949)." This sentence makes it clear that an NIAC is limited by some sort of geographic restriction and that the conflict must be occurring in the territory of one of the High Contracting

¹⁵ Even if they do, there are policy reasons for not recognizing non-state armed actors hold on territory. By doing so it gives a sense of legitimacy to the group, which is something that the state party to the conflict does not want. For example, countries have not recognized ISIS' claims to a caliphate in the Middle East because doing so would legitimize a key portion of their ideology and would likely allow for them to recruit potential fighters easier.

Parties. This implies that the conflict could be occurring in the territory controlled by the non-state armed actor. The *Tadic* decision reinforces this point by providing the new interpretation of the geographic boundaries for a NIAC. Some commentators have read this to mean that to be a recognized party to the conflict, a non-state armed actor must exercise control over territory (Sassòli 2006, 13). Very few non-state armed actors would meet this requirement. The question that remains is what happens to the groups that would not meet the threshold for controlling territory? The supporters of this view do not pose a solution to this question. This viewpoint is potentially dangerous, as it allows states to say that since the armed group they are in conflict with does not exercise control over territory, making them unlawful combatants and, therefore, are exempt from the protections laid forth in the Geneva Conventions.

In practice, there has been a recent consensus by many commentators and the U.S. government that some aspects of the conflict with Al-Qaeda can be adequately described as an NIAC and that the conflict cannot be described as an IAC. This has left the international community with two differing interpretations of the NIAC with Al-Qaeda. The first being the view ascribed to the U.S. government lawyers, which use a broad definition of who qualifies as part of the enemy force and couples this with the lack of geographic boundaries in the conflict (Daskal 2013, 1180). The alternative approach to the United States' position is the territorially restricted view, supported by several human rights groups and scholars. This view would impose territorially based limits on the use of law of war tools, such as drones (Daskal 2013, 1187). The supporters of this viewpoint also argue that even if a state outside of the zone of armed conflict were to consent to the use of armed force on its territory, that use of force is illegal because the armed conflict does not extend to that state (Daskal 2013, 1188). As I demonstrated in Chapter One, even under the existence of the assumption of the existence of an armed conflict, it is

incredibly difficult to determine the legality of drone strikes because of the differing levels of coverage that IACs and NIACs are given in international law. The norms governing NIACs and internal armed conflicts are underdeveloped because law, historically, has reacted to the past and not the future (Schmitt 2003, 3). Since NIACs were not the prevalent conflict experienced by the world's major powers in 1949, there was no perceived need to pay as much attention to them as there was for IACs. The adoption of the Additional Protocols to the Geneva Conventions in 1977 helped to clarify the rules in relation to NIACs, but even this does not far enough. Additional Protocol II, which governs NIACs, includes provisions that call for the humane treatment of combatants and protections for the civilian populations. Additional Protocol I is far more extensive in the rules governing IACs. Even though there has been a recent trend in concluding that customary law finds no difference between IACs and NIACs, the conflict following the 9/11 attacks challenge the regulatory mechanisms of international law.¹⁶

Part B: The Recognition of Transnational Armed Conflicts

The world faces an era of uncertainty. Globalization, the proliferation of advanced technology, violent transnational extremists, and rising powers have upset the world order established in the 1990s after the fall of the Soviet Union (Hoffman 2009, 34). The conflict between the United States and Al-Qaeda following the 9/11 has spanned across multiple nations and has been treated as an armed conflict. The deployment of lethal drone technology has raised numerous questions as to whether the use of drone strikes in these contemporary conflicts are

¹⁶ Customary law is one of the three sources of international law. The highest level is treaty law, things presented in treaties are acknowledged to be the most important source of international law since it is written down and accepted by multiple nations. Customary law refers to customary practices adhered to by nations. While these practices are not written down they are followed by nations for years and, therefore, are considered legitimate. The last level is general principles of international law. These include opinions issued by international courts and from national jurisprudence. Also accepted are the opinions of distinguished scholars and international organizations, such as the United Nations. The three levels are hierarchical and a higher level can supersede a lower level.

legal under international humanitarian law and the international law of self-defense. As I have stated in Chapter One I do conclude that drone strikes can be used legally. The issue of conflict classification has underlined this entire thesis. I assumed in Chapter One that an armed conflict that has some of the characteristics of an IAC and a NIAC exists between the United States and a various assortment of foreign terrorist organizations. I presented my analysis considering that assumption, but another commentator could easily argue in favor of these strikes being illegal, as many have already. I argue that the current debate regarding the legality of drone strikes has stagnated because of the flaws present by the either/or conflict triggering paradigm currently supported by the Geneva Conventions. Until something is done to address this issue, the issue of drones and, in my opinion, other advanced weapons technologies will likely to continue to go around in circles as states end up playing by their own rules.

I believe that the reason for the stalemated debates on weapons technologies are in part a symptom of the debate on conflict classification. The current debate as to how the conflict between the United States and Al-Qaeda should be classified has resulted in a stalemate (Daskal 2013, 1192). There are several proposed solutions as to how this should be done. Rosa Brooks endorses the view that IHRL may hold some of the answers to the problems and should be looked at rather than asserting that outdated paradigms should govern conflict (Brooks 2004, 686-687). Brooks, however; does acknowledge the difficulties with this view. There is no international tribunal that exists to determine whether IHRL has been violated by the United States, the primary state involved in contemporary conflicts and IHRL contains few norms as to when armed force is justified (Brooks 2004, 751-752). Others argue for the elimination of the distinctions between IACs and NIACs and while they argue that such a reality is achievable, their needs to instead be a focus on ensuring compliance with current laws (Crawford 2007,

465). I instead argue for a third solution, the adoption of a new type of conflict to ensure that no conflict falls outside of the scope of essential baseline regulation (Corn 2009, 185).

The current spread of technology ensures the prevalence of asymmetric warfare (Benvenisti 2010, 339). This trend presents the unique opportunity to the international community, the ability to regulate asymmetric conflicts proactively. Conflict classification is the essential first step in determining the rights and obligations of the parties involved in the hostilities (Corn 2009, 209). By adopting the new conflict classification of transnational armed conflict, the international community will be better poised to deal with the conflicts of the future. The move toward what is known as hybrid wars, conflicts which include the operational fusion of conventional and irregular capabilities will pose immense challenges because they combine the lethality of state conflict with the fanatical and protracted fervor of irregular warfare (Hoffman 2009, 36-37). The failure to recognize this new type of warfare will leave countries blind to the evolutions in contemporary warfare, especially because these conflicts can be carried out by non-state actors (Reeves & Barnsby 2013, 17). I do want to acknowledge that there are certainly those that disagree with this approach and argue that the addition of a third category may blur the distinction process between types of conflict even more. The second part of this argument is that states may then be incentivized to default to the new classification if it has less protections for the enemy (Sassòli 2006, 25). These are legitimate concerns, but I will demonstrate that a third category of conflict will in fact provide more protections for combatants and civilians and will make the distinction process easier.

As I state at the beginning of this chapter, I define transnational armed conflict to be a conflict not of an international character, in which the High Contracting Parties to the conflict consist of a state opposing a non-state armed actor and the conflict extends across state

boundaries. In terms of what qualifies as a non-state armed actor I go off Bassiouni's comprehensive definition in which:

“These groups take a variety of forms, including: (1) Regularly constituted groups of combatants with a military command structure and a political structure, (2) Non-regularly constituted groups of combatants with or without a command structure and with or without a political hierarchical structure; (3) Spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership; (4) Mercenaries acting as an autonomous group or as part of other groups of combatants; and (5) Expatriate volunteers who engage for a period of time in combat or in support of combat operations, either as separate units or as part of duly constituted or ad hoc units (Bassiouni 2008, 715-716).”

This definition helps to capture any type of non-state armed actor that may be involved in a conflict with a state. Setting forth this definition is important because there is no definition currently in international law as to what a non-state armed actor is.¹⁷ Conventional IHL provides us with many terms that are not defined, such as “zone of military operations,” “the zone of combat,” and “battlefield areas (Lubell & Derejko 2013, 73-74).” The adoption of the new classification of armed conflict requires that terms associated with it be defined to help conceptualize it.

Transnational armed conflict is a difficult concept to visualize because of the lack of attempts to do so in the current literature. Over the next couple of pages, I will be attempting to provide a visualization of what transnational armed conflict looks like, using the example of the conflict against Al-Qaeda following 9/11 and the current campaign against ISIS. The first and most important piece of determining whether any type of conflict exists is the existence of an armed attack or that of an imminent armed attack. In the case of transnational armed conflict, an

¹⁷ Even this definition may not be comprehensive enough, but it does serve as a good starting point for establishing what a non-state armed actor is. In the case of terrorist organization, certain members of those organizations essentially are civilians by day and then terrorists by night. They only act in service of those organizations for a limited period of time. Under transnational armed conflict, these temporary terrorists, as I refer to them, would still be legitimate targets because they are directly participating in hostilities.

armed attack would have to come from the non-state armed actor or the state.¹⁸ In the case of the conflict of Al-Qaeda, the 9/11 attacks satisfied this requirement. The world has now entered an age when non-state armed actors now have the capacity to launch attacks with the same destructive potential previously reserved only for states. The attacks of 9/11 cemented this view, demonstrating that states can suffer an armed attack from a non-state armed actor. This event led to the collapse of the previous consensus view on what armed conflict looked like prior to 9/11 (Barnidge Jr. 2012, 428-429). It is important to note, however; there is no definitive test for determining types of armed conflict. So, for transnational armed conflict the two basic criteria for the possibility of its existence are, the existence of an armed attack or an imminent armed attack significant enough to trigger the international law of self-defense from a non-state armed actor or state and the use of force by opposing forces in self-defense (Corn 2007, 302). In the case of a state, opposing forces would include any members of a nation's armed forces and as highlighted in Chapter One, potentially members of civilian intelligence agencies and other security services. Opposing forces for a non-state armed actor would be the members of that organization that fulfill the direct participation in hostilities requirement under IHL.

Using the example of Al-Qaeda, this meets these first two criteria. The attacks of 9/11 were significant enough to trigger self-defense and the United States responded with military force against Al-Qaeda in Afghanistan after it determined that the Taliban government in Kabul was unwilling and/or unable to deal with Al-Qaeda on their own. In the case of the Taliban it was because they were unwilling to deal with Al-Qaeda since they were effectively providing them sanctuary in Afghanistan. In the case of the conflict against ISIS, ISIS launched an armed attack significant enough to trigger self-defense against Iraq when it spilled over the border from

¹⁸ IHL is based on both sides have equal rights and as such, it could be possible that a state is the initiating entity in a transnational armed conflict.

Syria and proceeded to capture large swathes of territory in Iraq. Iraq responded in self-defense with assistance from its allies, primarily the United States. This case also meets the first two criteria for the existence of transnational armed conflict. The Al-Qaeda example presents another criterion for determining if a transnational armed conflict exists and that is if the state or states from which the group is operating out of is unwilling or unable to deal with the threat posed by that group to the international community. The principle of necessity under the international law of self-defense allows for a state to respond in self-defense in the case that the state from which the non-state armed actor is located is unwilling or unable to eliminate the threat (Schaller 2015, 202). This question must be asked prior to the use of armed force and, therefore, should be combined with the criterion regarding the use of force by the victim state's regular armed forces. If the state or states from which the non-state armed actor operates out of are unwilling or unable to eliminate the threat, then armed force by the victim state is justified. Once these two criteria are satisfied and the force used in response by the victim state is legal under the grounds of the international law of self -defense, armed conflict may then exist.

IHL is the governing body of international law for the regulation of armed conflict. As mentioned in the first chapter, the governing principles of IHL are the principle of distinction, the prohibition of attacks against those *hors de combat* (those who are sick and wounded or prisoners of war), the prohibition on the infliction of unnecessary suffering, the principle of proportionality, the notion of necessity, and the principle of humanity. Transnational armed conflict is no different than IAC or NIAC in the respect that it is governed by these principles. A transnational armed conflict though does go further than an NIAC in terms of the rules governing it. As noted above, NIACs are governed by Common Article 3 and Additional Protocol II. The mandate of Common Article 3 addresses only the treatment of detainees and other individuals

rendered *hors de combat* (Corn & Jensen 2009, 5). In the *Tadic* decision the ICTY expanded upon this and was only able to sustain many war crimes decisions by extending principles of armed conflict from treaty articles reserved for IACs to NIACs. By doing so the ICTY was the first international legal body to blend the two types of conflict together. As noted above, this makes the Common Article 2/3 triggering paradigm even cloudier. The adoption of transnational armed conflict helps to resolve this issue. In an NIAC, the conflict exists within the territory of one state, whereas in a transnational armed conflict, the conflict can exist in multiple different states and manifests itself in a different fashion than an IAC or NIAC. In an IAC, the conflict can manifest itself across different states, but there are drawn battle lines that can be identified. In an NIAC, the conflict is more fluid and battle lines are harder to identify, but the conflict stays within the territory of one state. Transnational armed conflict acts as a hybrid category of armed conflict that addresses what falls in between these two types of conflict. While this does not call for a radical overhaul of the principles of IHL, it calls for a more refined application of all the principles to these types of conflict because of their unique nature.

Figure 11: Basic Characteristics of Armed Conflict Classification Categories

	International Armed Conflict	Non-International Armed Conflict	Transnational Armed Conflict
Conflict is only between two or more state actors	X		
Conflict is between a state and non-state armed actor		X	X
Conflict crosses international borders	X		X

Transnational armed conflicts exist in battlespaces that are difficult to define because they are likely conducted against amorphous organizations. For this reason, the notion of necessity and the principle of humanity must be followed. Post-World War II international

tribunals have found that the notion of necessity cannot just be limited to IACs and instead extends to other conflicts. The confusion surrounding the conflict status with Al-Qaeda though allowed the Bush Administration to invoke the authority of necessity, while simultaneously abandoning the complementary principle of humanity. Corn and Jensen argue that this episode shows the importance of applying necessity to transnational armed conflicts. The notion of necessity serves a two-fold purpose under IHL, it provides the essential authority to employ the means necessary to bring the transnational non-state armed actor and it also serves as an essential constraint on military force when used in conjunction with the principle of humanity. It mandates the balancing principles of humane treatment and the prohibition of measures designed to cause unnecessary suffering, for example chemical weapons (Corn & Jensen 2009, 14-15). This balance between authority and obligation is at the core of IHL and the application of the notion of necessity when balanced by the prohibition on unnecessary suffering and the principle of humanity must be recognized in transnational armed conflict.

As noted in the discussion of the legality of drone strikes in first chapter, there has been a lot of (heated) debate surrounding whether drone strikes meet the principles of distinction and the principle of proportionality. In the conclusion of the first chapter I attribute some of the difficulties surrounding the analysis of these drone strikes due to the refusal to acknowledge the changing reality of conflict. Under transnational armed conflict the principle of distinction must be stringent because of the likelihood that the legitimate target may be operating close to civilians. Operators must take special care to distinguish between combatants and civilians. The principle of proportionality, however; needs to be refined for transnational armed conflicts because the conflict may take place in civilian centers against an enemy that does not wear a uniform. The limited notion of proportionality that I present in the first chapter is how

proportionality should be applied in transnational armed conflicts. The proportionality calculus should be formed of two things, the military advantage gained by using armed force and the absolute number of casualties as opposed to a ratio approach. By looking at the potential absolute number of casualties, military operators can draw up how many expected militant and civilian casualties would result from a use of armed force. A ratio approach is difficult to apply effectively because of the perceived military advantage. As the Mehsud hypothetical presented in the first chapter shows, the fixed ratio approach may disqualify uses of armed force that can be justified by the military advantage gained. By looking at the military advantage and the expected absolute numbers of casualties, this forces militaries to be more fact-intensive and avoid risky uses of armed force that may result in high numbers of civilian casualties. The addition of the question of whether the civilians present in the target area are complicit in armed conflict under my proposed limited principle of proportionality also promotes this fact-intensive approach.

Now that we have acknowledged that transnational armed conflict should be regulated by all the principles of IHL and not just the mandate of Common Article 3 and customary law generated by the ICTY, it is time to move onto the visualization of what transnational armed conflict looks like. The conflict between the United States and Al-Qaeda has been, from the very beginning, a transnational armed conflict, but the lack of this conflict classification in international law caused for the Bush Administration to assert that it was engage in an IAC with Al-Qaeda. Instead the conflict with Al-Qaeda was a component within an IAC between the United States and the Taliban regime in Afghanistan in 2001 and thereafter a component within a NIAC between the Afghan government and its allies the Taliban insurgency. This is where the theory of conflict bifurcation comes into play. This theory argues that the conflicts in Afghanistan, while contiguous, are separate conflicts (Corn 2009, 182). The conflict with the

Taliban began as an IAC and has now changed into an NIAC, but the conflict with Al-Qaeda has always been a transnational armed conflict. This distinction can be made because the relationship between Al-Qaeda and the Taliban shows that Al-Qaeda never truly operated on behalf of the Taliban, but rather formed a parasitic relationship to further its own strategic goals. This results in the link between the Taliban and Al-Qaeda becoming tenuous enough to the point where Al-Qaeda can be acknowledged as an individual actor (Corn 2009, 210). By separating the conflicts in Afghanistan into two separate, contiguous conflicts allow for us to look specifically at the case of Al-Qaeda in the context of transnational armed conflict.

Al-Qaeda is a fluid organization that operates in an increasingly diffuse network of affiliates that are linked back to Al-Qaeda Central in Pakistan (Cronin 2006, 32). While the core of the conflict has been focused on eliminating Al-Qaeda operatives in Afghanistan and Pakistan, operations have taken place in other countries, predominantly in Somalia and Yemen. Under the current definitions of armed conflict, it is difficult to say that an NIAC exists in Afghanistan, Pakistan, Yemen, and Somalia, unless one treats the conflicts with Al-Qaeda in these four countries as being separate. This, however; is not the case. Al-Qaeda Central exerts strategic influence over Al-Qaeda in the Arabian Peninsula (AQAP) and Al-Shabaab in Somalia through those groups pledged allegiance to the core group. Margulies and Sinnott argue that if a group outside of Afghanistan is part of the Al-Qaeda umbrella, then the United States has a right to target them wherever they are (Margulies & Sinnott 2013, 320). This is if Al-Qaeda Central has strategic influence over the group and they meet co-belligerency, which is the act of waging a war in cooperation against a common enemy without a formal alliance. They argue that the concept of co-belligerency should be extended to non-state actors in this case (Margulies & Sinnott 2013, 336-337). In transnational armed conflict the criteria of strategic influence and co-

belligerency help to guide what groups are legitimate targets and where IHL follows. The United States' conflict against Al-Qaeda across the world fits the definition of a transnational armed conflict, it is a conflict between a state actor and a foreign non-state armed actor that spans across international borders. As explained in the beginning of this chapter, this conflict cannot be truly described as an NIAC because an NIAC, per its definition refers to a conflict that does not cross international borders. It could be said that the conflicts against the groups associated with Al-Qaeda could be separate NIACs, but due to the close relationships between them it is difficult to truly separate the conflicts when AQAP and Al-Shabaab form part of the Al-Qaeda network.

Once the criteria for establishing the existence of an armed conflict with a group exists and the legitimate targets have been identified, the time comes to identify the scope of the zone of armed conflict. There are fears raised that the conflict against terrorism is a global war with no limits and for the most part, this view has been rejected by commentators (Thynne 2009, 166). I want to show that transnational armed conflict is not armed conflict without limits, but rather a form of armed conflict that relies on a fact-intensive approach to determining the geographic boundaries for the zone of armed of armed conflict. It is acknowledged that if a single organization engages in sustained and intense attacks against an opposing state, an armed conflict may exist, even if the attacks emanate from multiple locations (Daskal 2013, 1229). Once those locations are identified, that is when the boundaries can be drawn. This approach advocates for zones of armed conflict that are geographically limited to the regions within the state or states where this group is operating out. If the group is operating throughout the state, then the zone of armed conflict extends throughout the state, but if it does not, it is limited to the regions where the group is operating (Daskal 2013, 1210). In the case of Al-Qaeda, operations in Pakistan would be limited to the northwest region of the country where the majority of Al-

Qaeda's strongholds are located. In Yemen, operations would be limited only to the territory that is controlled by AQAP. This approach is heavily fact-intensive and relies on details gathered from on the ground to determine where the zone of armed conflict is in fact located.

Transnational armed conflict is difficult to visualize due to its complicated nature, but it is important that the international legal community realize its existence. As outlined over the last couple of pages there are several criteria for determining if transnational armed conflict exists and what are legitimate targets under it. By drawing on examples from the contemporary conflict with ISIS and the conflict over the last 16 years with Al-Qaeda, both of which I consider to be transnational armed conflicts, I have attempted to describe what these conflicts could look like. All transnational armed conflicts begin with the existence of an armed attack or an imminent armed attack by a foreign non-state armed actor, or state followed by the use of armed force in self-defense by the victim actor. The use of armed force by the victim state can only be used if the host state from which the foreign non-state armed actor operates out of allows for the victim state to intervene or the host state is unwilling or unable to eliminate the threat. Once this has been established, the zones of armed conflict are drawn based on where the fighting is actually occurring. Legitimate parties to the conflict are groups that are linked to the foreign non-state armed actor that committed the armed attack. These groups are linked to the hostile actor if the hostile actor exercises strategic influence over them and they are co-belligerents to the conflict. The final piece of transnational armed conflict, as I present it, is that all the principles of IHL must apply to the conflict and a limited notion of proportionality is needed to ensure civilian lives are protected. The final issue raised by transnational armed conflict is how it would affect the current armed conflict triggering paradigm.

The adoption of transnational armed conflict would not invalidate the triggering paradigm that is currently present under Common Article 2 and Common Article 3 of the Geneva Conventions, but rather would add onto it (Corn 2007, 331). I find my support for the proposal of a new conflict classification to stem from the Martens Clause. The Martens Clause was first adopted as part of The Hague Conventions of 1899 concerning laws and customs of war on land. The Martens Clause is present in the preamble of Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land and it states that:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience (ICRC 1899).”

The reoccurrence of the Martens Clause in the preambles of the Geneva Conventions and in the Additional Protocols to the Geneva Conventions show its continued importance and acceptance as a part of international law. The difficulty surrounding the Martens Clause, however; is that there is no accepted interpretation of the Clause by humanitarian lawyers (Ticehurst 1997). At its most restrictive interpretation, it is read to mean that customary international law applies even after the adoption of a treaty norm. One of the wider interpretations of the Clause is that provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted. In the context of this thesis, just because drones are not banned by treaty does not necessarily mean they are permitted. The widest interpretation is that armed conflicts are not only regulated by treaties and customary international law, but also by the principles of international law (Ticehurst 1997).

Corn argues that the Martens Clause supports the rationale for a new conflict classification category because it suggests a requirement to ensure humanitarian regulation of the de facto armed conflict and that this was historically considered preeminent to the technical interpretation of treaty obligation (Corn 2007, 338-339). I agree with Corn's argument because the rationale behind the adoption of transnational armed conflict is to ensure the better protection of civilians and combatants under IHL. The Clause seems to suggest that if another category of armed conflict was deemed appropriate by states, then it could be enforced as part of the principles of international law. This is important because the state practice by the United States regarding the description of the conflict with Al-Qaeda falls in line with the definition of transnational armed conflict. The United States under the Obama Administration viewed the conflict with Al-Qaeda as a NIAC that spanned across state borders. As I explained above, this seems to violate the spirit of the rules governing NIACs as laid out in Common Article 3 and Additional Protocol II. Instead under the Martens Clause, the view that is endorsed by the United States regarding the conflict with Al-Qaeda could be part of the principles of international law since the conflict does not fit into the categories described by the Geneva Conventions. Thus, the United States and other actors involved in the conflict are required to respect the rights of combatants and civilians.

While the Martens Clause does allow for an argument to be made to include transnational armed conflict to be considered as part of the principles of international law, I do not believe that it is the strongest argument possible. Instead I propose the following recommendations for the international community to consider. The first is a recommendation for the government of the United States that is endorsed by Corn. The United States should amend the Department of Defense Law of War Directive to specifically embrace the concept of transnational armed

conflict (Corn 2007, 349). This is the easiest way to advance the concept of transnational armed conflict since the United States is the one most actively engaged in this type of conflict already. This has the potential to cause a ripple effect among U.S. allies because the adoption of this new type of conflict by the United States will prompt major allies to start reviewing their own policies regarding conflict classification (Corn 2007, 349). Once more countries begin to model the changes made by the United States, transnational armed conflict will begin to be solidified as part of customary international law, increasing its legitimacy as a recognized category of armed conflict. My second recommendation is to the international community at large. I think that it is necessary for the international community to come together and adopt a new Additional Protocol to the Geneva Conventions that explicitly defines transnational armed conflict. This Additional Protocol would incorporate elements from both Additional Protocol I and Additional Protocol II to make sure that transnational armed conflict is governed by all the principles of IHL and this is clearly laid out in treaty law.

Transnational armed conflict is not going to go away, as conflict continues to shift from state on state violence to conflicts between states and non-state armed actors. By legally recognizing this new type of conflict states are given the tools to ensure their safety and can eliminate the threats posed by these groups, but more importantly, it allows for greater protections for civilians. Civilians must be protected during an armed conflict and targeting them willingly is illegal, but in cases of armed conflict casualties occur. IHL seeks to minimize these conflict, but in today's environment, where the conflict is not being fully defined, it is hard to protect civilians under the law. By acknowledging what the conflict actually is and how it is different than other conflicts is the first key step to protecting civilians in transnational armed conflicts, as well as allowing states to confront these international security threats within the

boundaries of the law. There is still much to be done on transnational armed conflict, and my hope is that the questions posed herein will prompt further research.

Conclusion

Drones are not going away and it is likely that their use by the United States will continue to increase. As I have argued in this work, drones are not some alien object that cannot be understood or regulated. Within the current framework of IHL and the international law of self-defense, drone strikes by the United States can be legal, but they also can be illegal. So long as the principles of the law are followed there is nothing that forbids their use, unless the international community decides through treaty that unmanned weaponry cannot be used in armed conflict. This work has found that drone strikes by the United States have, on average, succeeded in meeting principles of distinction and proportionality under IHL. This is not to say that all U.S. drone strikes have, but because of the discrepancies in the data that is available to the public it is difficult to fully determine which strikes are illegal and which are legal. I have also found that drone strikes can be legal under the international law of self-defense, but should be assessed under a case-by-case basis. As I mentioned in the first chapter of this study, I analyzed these drone strikes under the assumption that an armed conflict does exist between the United States and the groups that these strikes are conducted against. I used this assumption to look at these strikes within the world that the drone operators work in to see if these strikes can be considered legal even if they fall outside of traditional notion of a zone of armed conflict. Even with this assumption in place, the legal analysis of drone strikes is still a difficult undertaking. The discrepancies in publicly available data, the lack of clarity in the principles of IHL and the international law of self-defense, and the confusion surrounding the conflict classification have caused these difficulties to arise. As a result, I leave with the conclusion that drone strikes by the United States can be legal and must be assessed on a case-by-case basis by operators to determine their legality.

The second part of this work looked at some of the major ethical issues surrounding drone use. The most debated issue by far is the interaction between drone strikes and the principles of JWT. As I argued in the second chapter, the issues surrounding drone strikes in *jus in bello* and *jus ad bellum* are relatively the same to the issues that are raised in the debates about the legality of drone strikes under IHL and the international law of self-defense. I am drawn to the same conclusion as the first chapter, drone strikes can be ethical under JWT, but there must be case-by-case analysis. In the second chapter I raise the notion of the applicability of *jus ad vim*. While I conclude that *jus ad vim* is currently unrealistic, it does provide an interesting starting point for the discussion of transnational armed conflict. Further research is necessary to develop *jus ad vim* to determine if this is indeed a better framework for understanding the current uses of force by states and whether an international legal regime should be designed to accompany it. In addition to the discussion of JWT, I looked at three other ethical issues raised by drones. The first of those was whether the ethical questions accompanying drones are truly new. I argued that they are not and are simply an extension of questions regarding distance and killing that have existed since the introduction of the longbow by English archers in the 13th century. The next issue was how drones have affected military ethics. Sparrow presents the argument that drones have eroded military ethics through a series of blanket objections. These grand, sweeping objections to the use of drones made by Sparrow are incorrect. Drones do not present this great threat to military ethics and it is a disgrace to the military operators that do fly these craft to argue they have no regard for military ethics.

The final issue raised in my discussion regarding drones and ethics is the future of drone technology. Fully autonomous weapon systems are now being thought of as a possibility. The use of killer robots has unnerved many and I am one of those people. While I argue that drones

can indeed be ethical, I find it very difficult to justify the use of fully autonomous weapon systems and caution against their use if they are going to be directed to kill humans. The use of these weapon systems does raise new questions regarding the ethics of warfare, mainly the question of whether warfare can be ethical if there is no human in the loop, meaning there is no human control over the actions of the weapon systems. Currently, humans are still in the loop with drones, a human operator is flying the craft from a remote location and is inputting all the commands. With a robot, past its original programming, there is likely no further requirement to have a human in the loop. A robot will act based on its programming and it is difficult to program a robot to abide by laws that involve significant gray areas like IHL. I unequivocally reject the use of fully autonomous weapon systems as being unethical. I believe that they are dangerous enough that the international community should take steps to make fully autonomous weapon systems illegal under international law. The Campaign to Stop Killer Robots has already begun to make progress in this area and every effort should be made to prevent this unethical weapons system from being used.

I note throughout this study that there are difficulties surrounding the legal analysis and the ethical analysis under JWT of drone strikes. I attribute many of these difficulties to a refusal of international law to acknowledge that the conflicts between the United States and foreign terrorist organizations, such as Al-Qaeda, cannot be truly defined under the current definitions and rules of the two types of armed conflict outlined in the Geneva Conventions. It is necessary for the international community to acknowledge the existence of transnational armed conflict. It is likely that the fights between the United States and foreign non-state armed actors such as Al-Qaeda or ISIS are not unique, but rather represent the immediate future of armed conflict. This changing nature of conflict requires changing legal regimes to address them. As stated in the

third chapter, conflict classification is the essential first step in determining the rights and obligations of parties in armed conflict. The adoption of transnational armed conflict allows for these rights and duties to become clear. Currently, NIACs are subject to lesser regulation in treaty law and while customary law is starting to recognize that the regulations present in IACs and NIACs should be equal, treaty law supersedes. The addition of transnational armed conflict in the Geneva Conventions ensures that the victims of these types of armed conflicts are sufficiently protected. The lack of a conflict category that accurately defines these conflicts tempts states to consider non-state armed actors that do not hold territory to be unlawful combatants, further removing them from the protections of the Geneva Conventions. Such an outcome is unacceptable under international law and erodes the principles of IHL and the work that has been done in convincing states to adhere to them. Accepting transnational armed conflict as a conflict classification allows for states to have the tools to defeat non-state armed actors while still allowing for adequate protections for all combatants.

International law was designed to be malleable and as the Martens Clause suggests, IHL was designed with the thought that it should evolve to meet the challenges of the current era. In this study, I have presented, through the examples of the conflicts with Al-Qaeda and ISIS, one of the first attempts to truly visualize what transnational armed conflicts look like. This visualization is not perfect by any means and there is more research to do so the concept of transnational armed conflict is accepted by the world. As I have argued though, this new category does not endanger the current conflict triggering paradigm, IACs and NIACs will still exist, but the addition of transnational armed conflict is needed to better protect civilians caught in these conflicts, while still giving states the ability to eliminate groups that are threats to them legally. There is still much work to be done. The area of transnational armed conflict presents

multiple areas for where further research is necessary. The limits to the boundaries of the conflict, the possible application of principles of IHRL, and the continued look at visualization are examples of some of the areas that need more research done. It is my hope that this work has helped to contribute to the debate on transnational armed conflict through coupling the need for a new, hybrid category of armed conflict, with a visualization of what this type of conflict looks like. The acceptance of transnational armed conflict is needed to better determine the legality of drone strikes; especially as other countries begin to explore using drones as a means of targeted killing in these conflicts like the United States has. As a final note, I will reiterate what I said at the end of my third chapter. The United States has a large role to play in encouraging the adoption of transnational armed conflict. By amending the DOD Law of War Directive to embrace this concept, it is likely that other U.S. allies will consider following suit and I highly encourage the Trump Administration to consider doing so. The second part is the need for a new Additional Protocol to the Geneva Conventions. While this is unlikely, I believe that it is time for the international community to recognize transnational armed conflict as part of international law to address the challenges presented by contemporary conflicts.

“Everything in war is very simple. But the simplest thing is difficult.”

-Carl von Clausewitz

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