



## **Ethics or Efficacy?**

### **Examining Strategic Ethics and Counterinsurgency**

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## Introduction

In 2002, Michael Walzer wrote “in a war for “hearts and minds,” rather than for land and resources, justice turns out to be key to victory”.<sup>1</sup> Justice being ‘key’ to victory is a lesson which permeated the counterinsurgency (COIN) literature during the following decade. Even the Field Manuals for Iraq and Afghanistan emphasised a beneficial relationship between ethics and strategic effectiveness.<sup>2</sup> Soldiers are expected to be ethical when conducting COIN because it is seen as effective, and not just the morally ‘right thing to do’, it is also the strategically ‘right thing to do’.

This relationship, known in this thesis as strategic ethics, is present within the academic literature on counterinsurgency and ethics. Ethical COIN has become equated with effective COIN. Yet, these assumptions are being challenged within the literature. This relationship stands on somewhat shaky foundations. There is little detailed exploration into the role ethics has to play in the outcome of counterinsurgency operations. The purpose of this work is to provide further clarity on these issues. In doing so it will help to clarify whether the counterinsurgent has to choose between ethics or efficacy.

Further research is needed on this subject for a number of key reasons. First, it is to the benefit of strategic studies to develop the understanding of ethics and strategy. Ethics are one of the many dimensions of strategy.<sup>3</sup> All dimensions of strategy are always relevant to strategy, whether it is politics, organisation, military operations, or ethics.<sup>4</sup> All dimensions are distinctive, yet each one influences the other.<sup>5</sup> Ethics, for example, may limit what is

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<sup>1</sup> M. Walzer, *Arguing about War* (Connecticut: Yale University Press, 2004), 9.

<sup>2</sup> US Department of the Army and USMC, *FM 3-24/MCWP 3-33.5: Insurgencies and Countering Insurgencies*, (Washington DC: Department of the Army, 2014), 1-78.

<sup>3</sup> C.S. Gray, *Modern Strategy* (Oxford: Oxford University Press, 1999), 24.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

perceived as possible during a military operation. Gray notes that “questions of justice can be hugely relevant to strategic performance”.<sup>6</sup> However, “ethics is a formally neglected dimension of strategy”.<sup>7</sup> Further research into this dimension of strategy is therefore important, because a misunderstanding of the relationship between ethics and effectiveness may lead to misunderstandings of the importance of ethics in strategic studies. A misunderstanding of one of the dimensions of the strategy could potentially be disastrous for strategy.<sup>8</sup> For example, the current emphasis in the COIN literature may overexaggerate the importance of ethics in strategy. Although dimensions of strategy are always present, the relative significance must be variable from case to case. Therefore, more focused evaluation of the ethical dimension in strategic studies is vital.

The importance of examining strategic ethics coincides with a change in the counterinsurgency literature of the last decade, which has increasingly turned away from the notion that ethical COIN is effective COIN. The current literature highlights that counterinsurgency is in fact a brutal affair, and justice has not necessarily shown to be key to victory. Therefore, further research into strategic ethics and COIN is needed to help to develop and clarify the understanding of this relationship for the benefit of strategic studies.

This leads to a key point surrounding the importance of this thesis. As noted above, strategic ethics permeates current COIN doctrine. Importantly, not just American doctrine, but western doctrine in general.<sup>9</sup> If the underpinning assumption that ethical COIN is effective COIN is unsound, then this misunderstanding within the literature may ultimately be to the detriment

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<sup>6</sup> *ibid*, 31.

<sup>7</sup> *ibid*, 30.

<sup>8</sup> *ibid*, 25.

<sup>9</sup> For some examples of strategic ethics in COIN doctrine *see*: NATO, *Allied Joint Publication (AJP)-3.4.4(A): Allied Joint Doctrine for Counter-Insurgency (COIN)* (Brussels: NATO Standardisation Office, 2016) 1-4 & 1-5; UK Ministry of Defence, *British Army Field Manual Volume 1 Part 10: Countering Insurgency* (Swindon: Development, Concepts and Doctrine Centre: 2009) 2-07; Ministère de la Défense, *Doctrine for Counterinsurgency at the Tactical Level* (Paris: Centre de Doctrine D’emploi des Forces, 2010) 9, 18 & 24.



of future counterinsurgency campaigns in reality. Are we expecting too much from the counterinsurgent? We expect counterinsurgent forces to seek victory but achieving it in a manner that is seen to be morally acceptable. They operate with a global audience that makes ethical judgements on both the decision to go to war (*jus ad bellum*) and the conduct of the war (*jus in bello*). Yet, they also fight a foe who flaunts these ethical constraints. Clausewitz warned that if one side uses force without compunction “undeterred by the bloodshed it involves” and the other refrains, then the former side gains the upper hand.<sup>10</sup> Are these notions of right and wrong tying forcing the counterinsurgent to fight with one arm tied behind their back? One must remember that victory, understood as the attainment of political objectives, is the ultimate goal of strategy. If misunderstandings of strategic ethics hinder this, then is the protraction of a highly personalised conflict not the greatest cruelty? These questions remain unanswered.

Therefore, this thesis will further the understanding of strategic ethics, establishing whether or not justice has indeed been key to victory in counterinsurgency. Doing so, will further the understanding of the relationship between ethics and success in counterinsurgency.

### What is counterinsurgency?

Counterinsurgencies are asymmetric conflicts which involve the efforts of an actor, typically a nation state, to thwart an insurgency. An insurgency involves non-state actors who seek to challenge and replace the political control of an area through subversion and violence.

Starting from position of weakness, insurgents cannot match the government forces in open battle, so they challenge the government by chipping away at the government’s authority while trying to enhance their own. By increasing their authority, the insurgent can move from

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<sup>10</sup> C. Clausewitz, *On War* (London: Everyman’s Library, 1993), 84.

a position of weakness to strength, until it is strong enough to defeat the government.

Consequently, the counterinsurgent aims at preventing this from happening.

The government can prevent this from happening by reinforcing its authority over the region.<sup>11</sup> Authority can be established either with the agreement or submission of the population.<sup>12</sup> The approach taken in COIN mirrors the nature of counterinsurgent.<sup>13</sup> Because of this, there is no ‘one-size-fits-all’ approach to COIN. Authoritarian COIN may differ to COIN conducted by a liberal democracy, and COIN conducted domestically may differ to COIN conducted by an intervening force.<sup>14</sup>

In counterinsurgency operations, success is measured in the ability of the counterinsurgent to both neutralise insurgent forces *and* permanently isolate the insurgent from the population.<sup>15</sup> This support should be maintained by and with the population.<sup>16</sup> Consequently, success in counterinsurgency operations is often understood in the ability of the counterinsurgent to win the support of the population. Therefore, this work will examine success in COIN, in relationship to the ability of the counterinsurgent to win the support of the population.

Support is not always the same in each context. In liberal democratic countries for example, support is based upon legitimacy. In Western-liberal COIN literature, the counterinsurgent must enhance their legitimacy and delegitimise the insurgent.<sup>17</sup> Legitimacy can be seen as acceptance of the authority of an actor by the population through consent.<sup>18</sup> There is a

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<sup>11</sup> M. Kitzen, ‘‘Legitimacy is the Main Objective’’: Legitimation in Population-Centric Counterinsurgency,’ *Small Wars and Insurgencies*, 28, 41 (2017) 853-866: 856.

<sup>12</sup> D. Galula, *Counterinsurgency Warfare: Theory and Practice* (London: Praeger Security International, 2006), 4.

<sup>13</sup> D.J. Kilcullen, *Counterinsurgency* (London: Hurst & Company, 2010), 10.

<sup>14</sup> *ibid*, 11.

<sup>15</sup> Galula, *Counterinsurgency Warfare*, 54.

<sup>16</sup> *ibid*.

<sup>17</sup> See the Literature review, US and UK doctrine in particular on this.

<sup>18</sup> *ibid* and M.S. Weatherford, ‘Measuring Political Legitimacy’, *The American Political Science Review*, 86, 1 (1992), 149-166: 150-1.

difference between legitimacy, and authoritativeness. The latter does not necessarily mean that an actor is justified to impose rules on the population, and nor does it imply an obligation for the population to obey it.<sup>19</sup> Rather, opposition has been suppressed. legitimacy, then, can be viewed as the acceptance of authority via consent from the population. However, it is entirely possible that a counterinsurgent can obtain the support of the population through acquiescence rather than consent. Counterinsurgents may be able to mobilise a small group of supporters, even if they are not popular, through an assertion of power and suppression of opposition.<sup>20</sup> Therefore, success in counterinsurgency may not necessarily be based on legitimacy. Consequently, this work will measure success in terms of the ability to win the support of the population.

Who makes up ‘the population’? The population is the group whose support is key to success for the counterinsurgent. This group is the centre of gravity in counterinsurgency campaigns. Importantly the population is specific to each counterinsurgency case. Typically, the local population in the immediate area of operations is the main focus of COIN.<sup>21</sup> It is the local population where the insurgent finds immediate support, recruitment, and logistics. If the COIN forces can win the willing acceptance of authority over these people, the COIN forces will be rewarded with more stability, and possibly more intelligence. Support of the local population is seen as key to success in COIN.<sup>22</sup> However, in regional or international counterinsurgency campaigns the population may also extend to the home population of the counterinsurgent or the population of allies.<sup>23</sup>

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<sup>19</sup> A. Buchanan, ‘Political Legitimacy and Democracy’, *Ethics*, 112, 4 (2002), 689-719: 692.

<sup>20</sup> *ibid*, 71.

<sup>21</sup> A.J. Gawthorpe, ‘All Counterinsurgency is Local: Counterinsurgency and Rebel Legitimacy’, *Small Wars & Insurgencies*, 28, 4-5 (2017), 839-852: 842.

<sup>22</sup> See: Kitzen, ‘Legitimacy is the Main Objective’: Legitimation in Population-Centric Counterinsurgency’; Gawthorpe, ‘All Counterinsurgency is Local: Counterinsurgency and Rebel Legitimacy’, 848.

<sup>23</sup> D. Kilcullen, ‘Counter-insurgency *Redux*’, *Survival*, 48, 4 (2006), 111-130: 121.

## The Research Questions

As already established, this thesis examines the relationship between ethics and success in counterinsurgency. In particular, the thesis answers three key questions. All three questions concern the support of the counterinsurgent and adherence to different aspects of the Just War Tradition. The first question concerns *ad bellum* and the second focuses on *in bello*. The third question concentrates on the relationship between *ad bellum* and *in bello*. The following section will present, and discuss, the three research questions at the heart of this thesis.

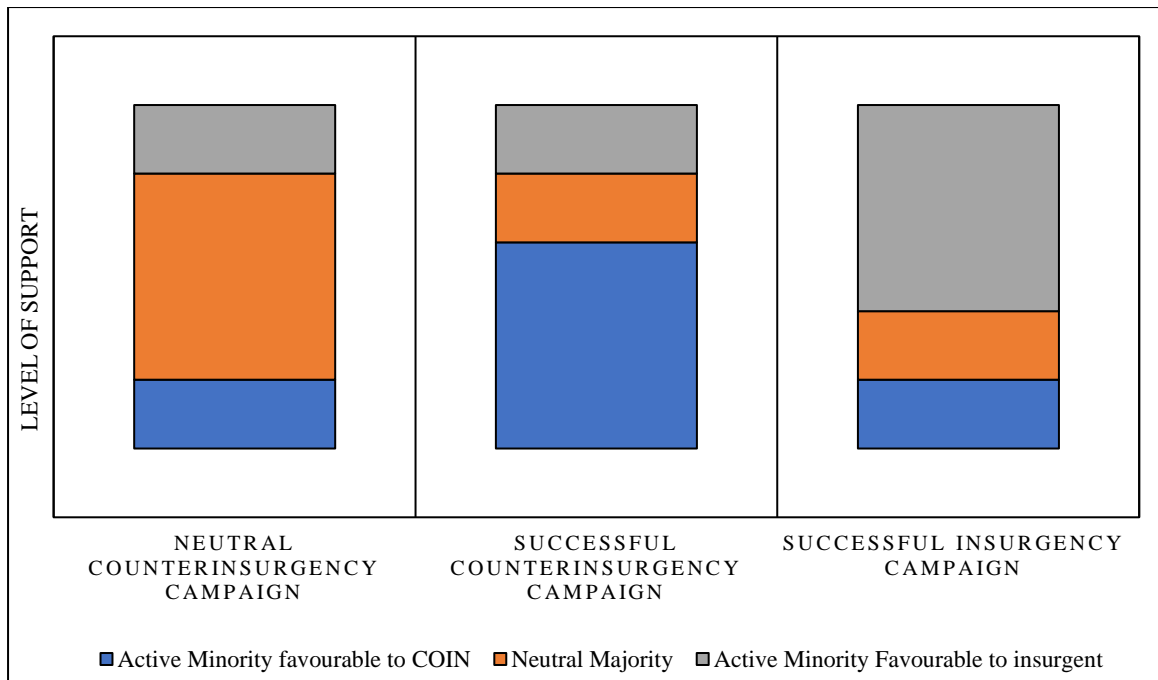
*RQ1: To what extent is a counterinsurgent who meets the principles of jus ad bellum more likely to win the support of the population compared to those who have not?*

Success in COIN is dependent on being able to win over the population to the counterinsurgent's side. In this regard, adherence to *jus ad bellum* concerns may have some strategic utility. In any given counterinsurgency campaign, the population can be categorised into three groups: an active minority who supports the insurgents, the neutral majority, and the active minority supporting the counterinsurgent.<sup>24</sup> In this type of conflict the insurgent and counterinsurgent will strive to increase their active minorities, until they can mobilise the neutral majority to their side.<sup>25</sup>

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<sup>24</sup> Galula, *Counterinsurgency Warfare*, 53.

<sup>25</sup> *ibid.*



(Fig. 1) Representation of support in COIN campaigns.

The literature indicates that a counterinsurgent, or insurgent, must have a clear cause in which the population can rally around. For insurgencies to grow, they must have an attractive cause to help increase their support base. “With a cause, the insurgent has a formidable, if intangible, asset that he can progressively transform into concrete strength”.<sup>26</sup> The counterinsurgent, then, must have a clear counter-cause to mobilise its own active minority into mobilising the general majority.<sup>27</sup> The cause will be contextual to the circumstances of each campaign,<sup>28</sup> and success depends on the ability of the counterinsurgent to demonstrate that they can fulfil their promises.<sup>29</sup>

Some of the literature indicates that the greater the justness of the cause, the more likely they are to mobilise the population to their side. Trinquier specifically argues that the cause must be just. He argues that if the population is going to be willing to fight by the

<sup>26</sup> Galula, *Counterinsurgency Warfare*, 12.

<sup>27</sup> *ibid*, 53, and Thompson, *Defeating Communist Insurgency*, 63.

<sup>28</sup> Thompson, *Defeating Communist Insurgency*, 63.

<sup>29</sup> Galula, *Counterinsurgency Warfare*, 73.

counterinsurgent's side, then the cause must be convincing. The population, therefore, must see their actions and support "in defence of a just cause".<sup>30</sup> Therefore, it seems plausible that the counterinsurgent with greater justness to their cause, may be more likely they are to mobilise the active minority.

Importantly, the just cause principle should not be examined alone. Although it is the lynchpin of JWT calculations, it does not stand independently. Having a just cause is not sufficient to meet the principles of *ad bellum*. An actor may have a just cause, but they may be defending an unjust actor. In such a case, the counterinsurgent may find a greater challenge in winning the support of the population. Likewise, the likelihood of the counterinsurgent to obtain the support of the population may come down to proportionality. Ultimately, the population must ask "is this cause worth suffering, fighting, or possibly dying for?" The perception of how good or bad the cause is affecting the answer to this question. In extreme cases, where the cause is either extraordinarily good or bad, this could potentially equate to unanimous support or opposition to the counterinsurgent.<sup>31</sup> To focus on one element, would be to ignore the wider picture. Reasons as to why one is fighting may fuel and legitimise the desire to win. Also, conflicts which cannot stand up to moral questioning can become undermined.<sup>32</sup> Therefore, this question moves beyond the scope of a cause and incorporates all elements of *jus ad bellum*.

*RQ2: To what degree have violations of the jus in bello principles of discrimination and proportionality shown to minimise the support of the counterinsurgent?*

Once the conflict commences, ethical concerns turn to its conduct. In this type of conflict, it is expected that just conduct will correlate with winning the support of the population. Within

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<sup>30</sup> Trinquier, *Modern Warfare*, 41.

<sup>31</sup> Galula, *Counterinsurgency Warfare*, 53.

<sup>32</sup> Gray, 'Moral Advantage, Strategic Advantage', 360-1.

the literature, it is emphasised that winning the support is contingent on the ability of the counterinsurgent to secure the population.<sup>33</sup> Often, the perception of the counterinsurgent's ability to provide security, and that they are acting in the best interests of the population, has significant strategic benefits.<sup>34</sup>

Ethically questionable conduct typically threatens the security of the population, and logically can be seen to be detrimental to the support of the counterinsurgent.<sup>35</sup> Therefore, unethical conduct can have serious strategic implications.

Moral advantage can be secured if the enemy is seduced into breaking his own rules, flouting his own standards... as a general rule terrorism and even some insurgencies can succeed only if they entice the government and its agents into defeating themselves morally, hence politically, and just possibly strategically.<sup>36</sup>

Therefore, to maintain the moral and strategic advantage the counterinsurgent should strive to fight morally. Failure to do so gives the moral advantage to the insurgent, who in turn can turn into strategic gains through propaganda.<sup>37</sup>

Therefore, ethical conduct is seen as strategically important. Kilcullen argues this point clearly within his work. He notes that even if a counterinsurgent is killing insurgents, if the use of force increases fear among the population or makes them unsafe then there is no chance of gaining their support. Therefore, any violence against non-combatants "is almost entirely counterproductive".<sup>38</sup> Kilcullen's work makes a clear argument that ethical conduct is not only the right thing to do, but key to being operationally successful.<sup>39</sup> For Kilcullen,

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<sup>33</sup> Galula, *Counterinsurgency Warfare*, 52-55.

<sup>34</sup> Kilcullen, *Counterinsurgency*, 30.

<sup>35</sup> Gray, 'Moral Advantage, Strategic Advantage?', 361.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> Kilcullen, *Counterinsurgency*, 4.

<sup>39</sup> *ibid.*

scrupulous ‘moral conduct’ and respect for the rule of law are “operational imperatives”. These factors “enable victory, and in their absence no amount of killing...can avert defeat”.<sup>40</sup> Therefore, when conducting counterinsurgency operations, the literature suggests there is a strategic benefit to conducting COIN operations discriminately.

Of course, the population is not some “undifferentiated mass”.<sup>41</sup> There will be segments of the population who may need to be *convinced* of the counterinsurgent’s cause more so than others, and therefore may need a ‘firmer smack of government’.<sup>42</sup> But any force must be fine-tuned in proportion to the task at hand. Although force may be tactically successful, “if the use of force is perceived as excessive or ill targeted the neutral segment of the population may be antagonised or alienated and it may leave a lasting feeling of resentment and bitterness”. Or, even worse, it could increase support for the insurgent.<sup>43</sup>

Therefore, examination of the COIN literature leads to an assumption that ethical conduct in COIN correlates with effective COIN. Thus, we arrive at the focus of the second research question of the thesis, which seeks to determine the relationship between ethical or unethical conduct and the ability of the counterinsurgent to enhance their support.

*RQ3: To what extent has support for counterinsurgents who satisfy the ad bellum principles been affected by in bello violations, compared to counterinsurgents who lack ad bellum justness?*

RQ1 and RQ2 have examined both the relationship between meeting *ad bellum* principles and *in bello* violations on the support of the counterinsurgent. The questions have not

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<sup>40</sup> *ibid*, 5.

<sup>41</sup> K.M. Greenhill & P. Staniland, ‘Ten Ways to Lose at Counterinsurgency’, *Civil Wars*, 9, 4 (2007), 402-419: 405.

<sup>42</sup> H. Strachan, ‘British Counter-Insurgency from Malaya to Iraq’, *Royal United Services Institute Journal*, 152, 6 (2007), 8-1: 8.

<sup>43</sup> UK Ministry of Defence, *British Army Field Manual Volume 1 Part 10: Countering Insurgency*, 3-28.



addressed the issues that a just war can be fought unjustly, and an unjust war can be fought justly.<sup>44</sup> If perceptions matter, and ethical judgements on why soldiers fight and how they fight influence the population's perception, then this leads to the question: would the population support a counterinsurgent fighting a just war, even if they fight unjustly? It also leads to the question, what happens to the support of the counterinsurgent who meets *ad bellum* but fails to conduct operations ethically? These questions are the focus of RQ3.

This question is at the heart of a key divide within the ethical literature. There is no agreement on the relationship between *ad bellum* and *in bello* judgements. The orthodox position is "in our judgements of the fighting, we abstract from all consideration of the justice of the cause".<sup>45</sup> Soldiers should not be judged on the war in which they find themselves in, and therefore have a moral equality with one another.<sup>46</sup>

However, contemporary ethical literature argues that the two sets of criteria are connected. For writers like McMahan, the principles of *jus in bello* cannot be independent of those of *jus ad bellum* because it is not morally permissible to fight in a war with an unjust cause.

Without justness to a cause, or reason for fighting, any action which aims to bring about that unjust cause is not justified.<sup>47</sup> Therefore, soldiers who fight for an aggressor, do not have a strict moral equality with the soldier fighting for a defender.<sup>48</sup> If there *is* a moral inequality of combatants, then how does this influence support in COIN? This question has not been addressed in the literature, yet in terms of strategic ethics it is vital. Particularly in conflicts

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<sup>44</sup> M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5<sup>th</sup> edition (New York: Basic Books, 2015), 21.

<sup>45</sup> *ibid*, 127.

<sup>46</sup> *ibid*, 36.

<sup>47</sup> J. McMahan, 'Morality, Law, and the Relation Between *Jus ad Bellum* and *Jus in Bello*', *Proceedings of the Annual Meeting (American Society of International Law)*, 100 (2006), 112-114: 113. See also: J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

<sup>48</sup> B. Orend, *The Morality of War*, 2<sup>nd</sup> Edition (Ontario: Broadview Press, 2013), 115.

where “popular perceptions and rumour are more influential than the facts and more powerful than a hundred tanks”.<sup>49</sup>

This observation is linked to the ‘sliding scale’ of morality,<sup>50</sup> which posits that “the greater the justice of one’s cause, the more rights one has in battle”.<sup>51</sup> Therefore, if the sliding scale is correct, then the more just one’s reasons for fighting is, then the less likely they are to be judged negatively on their actions. McMahan’s makes a similar point, “what is morally permissible to do in war depends crucially on whether one has a just cause”.<sup>52</sup> However, Walzer goes further to argue that in “supreme emergencies”, whereby the threat posed is of an “unusual and horrifying kind” and catastrophe is imminent, *in bello* restrictions may be temporarily lifted.<sup>53</sup> “Morally, a supreme emergency is a terrible tragedy. Prudentially, it is a struggle for survival”.<sup>54</sup> Ultimately, questions on the sliding scale revolve around *ad bellum*.<sup>55</sup>

Although supreme emergencies are rare, the sliding scale of morality indicates a possible relationship between the degree to which the counterinsurgent meets the *ad bellum* principles, and what may be permissible in counterinsurgent operations.

If the population can be convinced of the cause, and perceive it as just and necessary, then it is plausible that the population may accept harsher measures enacted by COIN forces against the insurgents. For example, “the level of destruction permitted in a war against a genocidal

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<sup>49</sup> Kilcullen, *Counterinsurgency*, 30.

<sup>50</sup> Walzer, *Just and Unjust Wars*, 245-46.

<sup>51</sup> *ibid.*

<sup>52</sup> McMahan, ‘Morality, Law, and the Relation Between Jus ad Bellum and Jus in Bello’, 113.

<sup>53</sup> Walzer, *Just and Unjust Wars*, 250-267. See also: Orend, *The Morality of War*, 153-171, and I. Primoratz, ‘Civilian Immunity, Supreme Emergence, and Moral Disaster’, *The Journal of Ethics*, 15, 2 (2011), 371-386, for a critique of Walzer.

<sup>54</sup> B. Orend, ‘Is There as Supreme Emergency Exemption?’ in M. Evans (ed) *Just War Theory a Reappraisal* (Edinburgh: Edinburgh University Press: Edinburgh, 2005) 134-154: 148.

<sup>55</sup> *ibid.*, 142.

enemy such as Nazi Germany is surely greater than in the Falklands War.”<sup>56</sup> It is perceivable that this would still be the case in counterinsurgency operations. A counterinsurgent fighting for a just cause, against an insurgent who poses a horrific threat to the population, such as an insurgent who has already committed massacres, may be forgiven for some *in bello* violations.

Of course, this is not to suggest that a counterinsurgent is immune from criticism if such violations are continuous and severe. Even counterinsurgents who meet the *ad bellum* principles are not necessarily allowed to do whatever is necessary to win. Their cause and legitimacy can still be damaged through their conduct. Bellamy wrote “it is incongruous to argue that one’s conduct can never undermine one’s reason for acting”.<sup>57</sup> Bellamy argues that the unjust conduct of a war can significantly undermine the *ad bellum* case for war.<sup>58</sup> If the conduct is indiscriminate and disproportionate it can affect the perception of *ad bellum* justifications.<sup>59</sup> In counterinsurgency operations, which can be described as a war of perceptions, the reasons why the counterinsurgent fights matter.<sup>60</sup> Therefore, the stronger the resort to force, may indicate stronger resilience against criticism by the population.

Thus, it is expected that the counterinsurgent who fulfils the *ad bellum* requirements, demonstrating a higher justification to resort to force, will be less affected by violations *in bello*, compared to states who failed to meet the *ad bellum* requirements. This leads the work to the third research question, which concerns the moral inequality of combatants, and support in counterinsurgency campaigns.

### Structure of the Thesis

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<sup>56</sup>Hurka, ‘Proportionality in the Morality of War’, 44.

<sup>57</sup> A.J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006), 129.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> McCready, ‘Ending the War Right: Jus Post Bellum and the Just War Tradition,’ 72.

With the research questions established, the opening chapter of the thesis will explain how the above research questions are to be addressed. The method chosen for this work is the analysis of in depth of four historical case studies of counterinsurgency campaigns. Case studies are examined using Walter Dorn's 'Just War Index'. Using this index, a relative score can be given to each case study to help demonstrate a 'degree of justness' for comparison.

The following chapter situates this thesis among the current literature on strategic ethics, the just war tradition, counterinsurgency literature and doctrine. Doing so will highlight key issues within the literature and demonstrate where this work fits in with the current work on strategic ethics.

The following four chapters are the case studies. The four case studies examined within this work are the Malayan Emergency, the Kenya Emergency, the Algerian War, and the Vietnam War. These chapters begin with an overview of the specific case study. Following this, the chapter then examines the degree to which the counterinsurgent met the principles of *jus ad bellum*. The case studies assess the principles of just cause, legitimate authority, public declaration of war, right intention, proportionality, and last resort. Next the chapter examines the degree that the counterinsurgent met the *in bello* principles of discrimination and proportionality. Beginning with an overview of the main phases of the conflict, the chapters then examine the key phases, strategies, operations and events during the conflict in terms of adherence to *in bello*. Examining the cases in such a manner allows the Just War Index scores to be presented, and therefore allows for comparative analysis.

The final chapter answers the three research questions established in the methodology. The chapter begins with a restating of the purpose of this work and the moves on to answer the questions. This chapter answers the three research questions through comparative analysis of the JWI scores and the support for the counterinsurgent. It begins by providing an answer to

research question one, which focuses on *ad bellum*, research question two which focuses on *in bello*, and then research question three, which asks questions about the moral equality of combatants and support for the counterinsurgent.

## **Chapter One: Methodology and Theoretical Framework**

The aim of this research is to examine the relationship between two variables: ethics and success for the counterinsurgent. The purpose of the research is to determine the impact the former has on the latter, expanding on the current knowledge of strategic ethics. It is not the intention of this to work to argue that ethics is the dominant factor that decides outcomes in counterinsurgency operations. Each of the dimensions of strategy, of which ethics is one, are not fixed in importance. In one instance, one dimension may be more important than another.<sup>61</sup> “Because the dimensions, factors, or elements are distinctive aspects of a whole entity, they cannot be rank-ordered for relative importance in a general theory of strategy”.<sup>62</sup> All of the dimensions of strategy are in play, to a greater or lesser extent, and to argue that there is one dominating dimension would be incorrect.<sup>63</sup> Nor is it the aim of this piece to develop counterinsurgency principles or amend the Just War Tradition. Rather, it is to examine whether ethical conduct, in terms of the Just War Tradition, has shown to correlate with strategic success, enhancing current strategic theory.

Therefore, by its nature, the research is inherently theoretical. Theory can be understood as a group of propositions that explain a phenomenon.<sup>64</sup> Theory is:

Used to analyze [sic] the constituent elements of war, to distinguish precisely what at first sight seems confused, to explain in full the properties of the means employed and to show their probable effects, to define clearly the nature of the ends in view, and to illuminate all phases of warfare in a thorough critical inquiry.<sup>65</sup>

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<sup>61</sup> Gray, *Modern Strategy*, 24-25.

<sup>62</sup> *ibid*, 25.

<sup>63</sup> *ibid*.

<sup>64</sup> M. Vego, ‘On Military Theory’, *Joint Force Quarterly*, 62, 3(2011), 59-67: 60.

<sup>65</sup> Clausewitz, *On War*, 163.

It is not a manual for success, but rather a guide that means that one does not need to start afresh.<sup>66</sup> Strategic, or military, theory is “a comprehensive analysis of all the aspects of warfare, its patterns and inner structure, and the mutual relationships of its various component/elements”.<sup>67</sup> Strategic theory research seeks for a “better understanding of how and why military activity may serve the political state”.<sup>68</sup> This work, which is an exploration into how ethics can influence strategic outcomes and the current understanding of strategic ethics, then is of a theoretical nature.

It is not the intention of this work to give a formula for success, as no work of theory can do this.<sup>69</sup> There will be no conclusion that will present a formula, like: if the JWT is adhered to by ‘degree X’, then the degree to which the legitimacy is improved is +/- Y. Instead, it is a theoretical exploration into strategic ethics, which will further the current understanding of ethics in strategic theory. Of course, the study of strategic ethics may have some practical application. If it was to overwhelmingly indicate that ethics have indicated a clear correlation to legitimacy, then this may convince the counterinsurgent to consider ethics to a greater degree within such conflicts. Of course, it is also true that “strategic theory must have a strong sense of the possible”.<sup>70</sup> However, as “long a theorist is contributing to our general understanding of military force as an instrument of policy, their work is valid”.<sup>71</sup> Therefore, the methods selected must be suitable for this theoretical undertaking.

### Case Studies at the Core

The preceding chapter has demonstrated that there are significant overlaps between the ethical and counterinsurgency literature, which indicates a relationship between the two.

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<sup>66</sup> *ibid.*

<sup>67</sup> Vego, ‘On Military Theory’, 60.

<sup>68</sup> C.S. Gray, *Theory of Strategy* (Oxford, Oxford University Press: 2018), 6.

<sup>69</sup> Lonsdale & Kane, *Understanding Contemporary*, 27.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*, 27-8.

RQ1, RQ2 and RQ3 present these overlaps, and provide the focus of this theoretical exploration. Vego's work explains that "theory is developed by deductively testing data".<sup>72</sup> Without testing these assumptions, or if a theory has received wide study, "theory can only make a rather weak claim to being the "best" explanation".<sup>73</sup> It is precisely for this reason, as discussed in the literature review, that Walzer's claim that morality is military necessity, is lacking in substance, and has helped to justify the need for this research.

Examination of case studies presents a suitable method for deductive testing<sup>74</sup> of the relationship between ethics and strategy. Examination of case studies allows for the exploration of causal mechanisms, which can be understood as "links between inputs (independent variables) and outcomes (dependent variables)", which serve to "open the black box of lawlike probably statements that simply state the concurrence or correlation of certain phenomena or events".<sup>75</sup> Through using case studies "we can look at a large number of intervening variables and inductively observe any unexpected aspects of the operation of a particular causal mechanism or help identify what conditions present in a case activate the causal mechanism."<sup>76</sup> As such, case studies allows for in depth explanations of events, stating how and why events occurred, rather than simply descriptions of what occurred.

This leads to another benefit of case studies that makes them suitable for this research, their ability to model and assess complex causal relations. Case studies "accommodate complex causal relations such as equifinality, complex interactions effects and path dependency".<sup>77</sup> Strategy and war are not sciences, they are an art form, that do not neatly fit into equations,

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<sup>72</sup> Vego, 'On Military Theory', 61.

<sup>73</sup> Bennett and George, 117.

<sup>74</sup> George and Bennett, 115-120.

<sup>75</sup> T.G. Falleti & J.F. Lynch (2009) 'Context and Causal Mechanisms in Political Analysis', *Comparative Political Studies*, 42, 9, 1143-1166: 1146.

<sup>76</sup> A.L. George & A. Bennett, *Case Studies and Theory Development in the Social Sciences* (London: MIT Press, 2005) 21.

<sup>77</sup> *ibid*, 22.



and nor will any situation be repeated exactly. In order to achieve success in these operations, there are numerous paths that one can take in order to achieve victory. Case studies allow that the end state may be the same even if the processes may be different, as they produce generalisations that are “narrower or more contingent”.<sup>78</sup> Thus making it a suitable method for this type of research.

Although one of the strengths of case studies is that they can identify whether or how a variable affects an outcome, it is a weaker method for assessing the degree to which this specific variable matters.<sup>79</sup> Case studies will not prove that B cannot exist without A, or that A is necessary for B. However, this is not vital for this work. Again, to make the point clear, the aim of this work is not to assume that ethics are the dominating reason for success in counterinsurgency operations. Rather, it is to assess the relationship between ethics and strategy, to further develop the current understanding of ethics as a strategic dimension. As discussed above, there are numerous dimensions of strategy and wars are so wrapped up in chance and friction<sup>80</sup> that absolute statements of necessity may be in doubt. As Bennett and George argue, there is a difference between whether a factor is necessary, and how much that factor has contributed to the outcome.<sup>81</sup> Therefore, although there are pitfalls with such a method, case studies are still suitable for this research.

Case studies are also a tried and tested method which dominates strategic theory. “The history of warfare is the very foundation of military theory”.<sup>82</sup> Without the use of historical examples and cases, theoretical discussion is “barren and lifeless”.<sup>83</sup> Clausewitz, for example, utilises historical cases to make his theoretical points clearer.<sup>84</sup> Also, it is a common practice

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<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*, 25.

<sup>80</sup> See Clausewitz, *On War*, 96, 138-139.

<sup>81</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 27.

<sup>82</sup> Vego, ‘On Military Theory’, 63.

<sup>83</sup> *ibid.*

<sup>84</sup> See: Clausewitz, *On War*.

in ethical pieces. Walzer, Orend and Coleman all utilise historical case studies to help make theoretical positions clearer.<sup>85</sup>

Not only is case study analysis an established method for strategic theory testing, but it also has other strengths, making it a suitable method for this research. Case study analysis allows for “conceptual validity”, because it allows for “contextualised comparison”.<sup>86</sup> Case studies allow for “conceptual refinements with a higher level of validity over a smaller number of cases”, minimising the risk of “conceptual stretching”.<sup>87</sup> This is important to consider, as counterinsurgency campaigns are heavily contextual. No two insurgencies are the same, and as such no two counterinsurgency campaigns are the same. Each one is contextual, and what may work in one campaign may not work in another. Even within the same campaign, a strategy used in one area of the country may not work in another area. “Insurgencies, like cancers, exist in thousands of forms, and there are dozens of techniques to treat them, hundreds of different populations in which they occur, and several major schools of thought on how to best deal with them”.<sup>88</sup> Therefore these conflicts present an inordinate number of potential variables.

However, a solution to this methodological problem is found through the examination of case studies. Case studies allow for the further, more tailored, aspects of each study, and can analyse the impact each variable had. One can begin to draw out explanatory variables. Why did *Action A* work in *Case B*, but not in *Case C*? What other factors were influencing these cases? Therefore, case studies are a suitable method for this type of research.

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<sup>85</sup> See: Walzer, *Just and Unjust Wars*, Orend, *Morality of War*, and S. Coleman, *Military Ethics: An Introduction with Case Studies* (Oxford: Oxford University Press, 2012).

<sup>86</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 19.

<sup>87</sup> *ibid.*

<sup>88</sup> Kilcullen, *Counterinsurgency*, 1.

### Case Study Selection: Case Study Bias

When selecting case studies, one must be aware of case selection bias. Selection bias is understood as “some form of selection process in either the design of the study or the real-world phenomena under investigation results in inferences that suffer from systematic error”.<sup>89</sup> For example, cases may be selected that “have extreme values on the dependent variable”, and this “sometimes occurs in the study of war”.<sup>90</sup> When cases are selected on these extreme values, they ignore the overall distribution of cases, and it is considered “truncation”.<sup>91</sup> Therefore it is important the cases are selected, understanding the risks of selection bias.<sup>92</sup>

### Case Study Selection: ‘Most likely and Least likely’ Cases

One manner of reducing selection bias would be to randomly choose case studies.<sup>93</sup> Choosing random counterinsurgency campaigns may have presented one option for this research. With counterinsurgency being one of the predominant forms of warfare in human history<sup>94</sup>, there is a substantial number of case studies available to the researcher.<sup>95</sup> However, although a selection of random case studies on a random basis may alleviate selection bias, to do so would swamp the research in contextual comparisons which may not allow for the proper testing of the theory. Such research could easily become merely a comparison of cases, rather than a testing of the theory.

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<sup>89</sup> D. Collier & J. Mahoney, ‘Insights and Pitfalls: Selection Bias in Qualitative Research’, *World Politics*, 49, 1 (1996), 56-91: 59.

<sup>90</sup> *ibid*, 60.

<sup>91</sup> *ibid*.

<sup>92</sup> It must also be considered when making conclusions, so not to overgeneralise from the cases, and instead make contingent, or contextual, generalisations from the selected cases. *See*: George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 83-84.

<sup>93</sup> K.N. Fritz & N.K. Lim, ‘Selection Bias’, B.B. Frey (ed) *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (London: SAGE, 2018) 1490-1491: 1491.

<sup>94</sup> C. Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies* (Washington: RAND, 2013) xi.

<sup>95</sup> *See*: C. Paul et. al., *Paths to Victory: Lessons from Modern Insurgencies* (Washington: RAND, 2013).

Thus, the selection of cases has been based on the relevance to the research objective; to examine the relationship between ethics and the legitimacy of the counterinsurgent. As such, the cases have been selected with controls on the variation, as required by this research question.<sup>96</sup> Controls of course require some prior knowledge, which could give rise to bias, but it can also be beneficial to research design. Prior knowledge allows for case selections based on whether they are ‘most-likely’ or ‘least-likely’ cases.<sup>97</sup> Therefore controls have been applied to the cases selected.

These controls are as follows: first, the counterinsurgent must be non-authoritarian. Non-authoritarian counterinsurgents are less likely to actively seek the support of the population.<sup>98</sup> The purpose of this work is to measure the ability of the counterinsurgent who aims to win the support of the population. Therefore, the counterinsurgent must aim to do this. Second, the case studies chosen are also to be resolved. Case studies must be resolved, as this allows for a full picture to be presented of the case study. Therefore, as a control, the counterinsurgency campaigns must have been resolved by 2010. Using historical cases will also help to establish whether or not strategic ethics is solely a post-Vietnam War phenomenon, as is highlighted within the literature.<sup>99</sup> Third, the case studies must be fought with a different degree of morality, in terms of adherence to the JWT, as this is the key variable in which the work is testing.

The third control leads to a selection based on “most-likely” and “least-likely” cases. George and Bennett explain “in a most-likely case, the independent variables posited by a theory are

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<sup>96</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 83.

<sup>97</sup> *ibid*, 24.

<sup>98</sup> See: Ucko, “‘The People are Revolting’: An Anatomy of Authoritarian Counterinsurgency”, 29-61, and Byman “‘Death solves all Problems’: The Authoritarian Model of Counterinsurgency”, 62-93.

<sup>99</sup> Walzer, *Arguing about War*, 9; and G. Lucas, *Ethics and Military Strategy in the 21<sup>st</sup> Century: Moving beyond Clausewitz* (Oxon: Routledge, 2020), 3-5.

at values that strongly posit an outcome or posit an extreme outcome.”<sup>100</sup> Whereas, in a “least-likely case, the independent variables are at values that only weakly predict an outcome or predict a low-magnitude outcome.”<sup>101</sup>

Through examining the least likely cases, one can begin to determine the strength of the theory. A least-likely case would be expected to not demonstrate the theory that the research intends to test and offer other alternatives. Therefore if the least-likely case turns out to prove that the theory is accurate, then this would strengthen the theory significantly.<sup>102</sup> This is known as the toughest test case.<sup>103</sup> George and Bennett note that “theories that survive such a difficult test may prove to be generally applicable to many types of cases, as they have already proven their robustness.”<sup>104</sup> Likewise, it would be expected that the most likely case would demonstrate that the theory is true. If, when testing the most-likely case, the theory fails, and the case does not show this, then this will weaken the validity, and suitability, of the theory.<sup>105</sup> Therefore, when selecting the case studies, one must decide on cases that are a mixture of most-likely and least-likely cases.

### Case Study Choices

The four in-depth case studies selected for this research are the Malayan Emergency (1948-1960), the Algerian War (1954-62), the Kenyan Emergency (1952-1960), and the American War in Vietnam (1965-1972).

The first two case studies are the ‘most-likely’ cases for this research. The Malayan Emergency was both a successful counterinsurgency campaign, which is twinned with the

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<sup>100</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 121.

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*, 121-122.

<sup>105</sup> *ibid.*

emphasis of the use of minimum and discriminate force within the conflict.<sup>106</sup> The Algerian conflict is another ‘most-likely’ case, because ultimately the French were unsuccessful in the conflict. The conflict is tainted by the abuses of the counterinsurgent,<sup>107</sup> and although the French were militarily successful, the legitimacy of the French was damaged. Therefore, between these two cases, they are most likely to highlight a beneficial relationship between ethics and success in counterinsurgency.

The least likely case within this work is the Kenyan Emergency. The British were ultimately successful in Kenya, but it was one the “most Hobbesian of counterinsurgency campaigns: one that was indeed nasty, brutish and relatively short.”<sup>108</sup> Therefore, this case presents the toughest test for strategic ethics; that having a moral advantage may have a strategic advantage.<sup>109</sup>

The final case study to be examined is the American War in Vietnam. This again shows a potential most likely case, as the Americans failed to secure South Vietnam from North Vietnam ultimately, and it utilised significant levels of force. Importantly, the Vietnam War has been included because it involves a foreign force, intervening in another, which based on

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<sup>106</sup> Mockaitis, *British Counterinsurgency, 1919-1960*, 52.

<sup>107</sup> J. Frémeaux, ‘The French Experience in Algeria: Doctrine, Violence and Lessons Learnt’, *Civil Wars*, 14, 1 (2012), 49-62: 54.

<sup>108</sup> A. Mumford, *The Counterinsurgency Myth: The British Experience of Irregular Warfare* (London: Routledge, 2012), 71.

<sup>109</sup> There is only one least-likely case study within this work, predominantly due to the suitability of case studies and the restraints placed on the thesis. Importantly, Kenya is not the only case study where a counterinsurgent has been both successful and unethical. However, these typically fall outside of the limits placed on this thesis. Russian COIN in Chechnya and the Indonesian COIN efforts against the ACEH insurgency demonstrate that brutality can be effective. However, the counterinsurgents did not focus on winning the support of the population and were not liberal countries. Another promising least-likely case was the Sri Lankan COIN operations against the Liberation Tigers of Tamil Eelam. However, due to the physical limits applied to the thesis, it was decided that a conflict which spanned decades could not be examined sufficiently within the confines of several thousand words. (The above is not an exhaustive list).

the last two decades is pertinent for study.<sup>110</sup> Therefore, these four case studies will be used to test the relationship between ethics and strategy, in order to answer the research questions.<sup>111</sup>

### A note on Sources

The four case studies in this thesis will be developed through a mix of both secondary and primary sources. Analysis of data from Academic books and journals are used to establish the case studies and the major events pertinent to this research. Doing so allows for wide range of data to be accessed efficiently. It also allows for a wide range of sources to be analysed where primary sources might be limited. For some cases primary sources might be limited due to the deliberate destruction of records, as was the case in post-colonial Kenya.<sup>112</sup> Consequently, secondary sources provide a suitable source for the development of case studies.

However, there are some methodological pitfalls with some of these sources. Notably, there are historiography concerns. There are issues of collective interpretations of historians which skew decisions. Assumptions that COIN is always about ‘hearts and minds’ and using ‘minimum force’ for example, can possibly skew the reality of these conflicts. For example, writers who ascribe to the ‘British way of COIN’ have been reluctant to show the true brutality of the conflict.<sup>113</sup> New evidence raises doubts on some claims made within the literature, and the authority of some of the claims.

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<sup>110</sup> However, as this work required conflicts that have ended, at the time of writing, Afghanistan and the Iraq War are not suitable cases to be selected, as these conflicts have not been sufficiently resolved. However, future research would do well to include these. Further to this, the findings from the Vietnam War could be assessed against cases such as these, to examine interventions and strategic ethics.

<sup>111</sup> Further case studies could have been included, as discussed above. However, due to the physical constraints of this thesis, it has been decided to keep to four detailed case studies. This will allow for thorough contextual comparisons to be made. Therefore, the generalisations from the work must not be overstated, but rather understood as ‘contingent generalisations’. See: George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 84.

<sup>112</sup> S. Sato, ‘Operation Legacy’: Britain’s Destruction and Concealment of Colonial Records Worldwide’, *The Journal of Imperial and Commonwealth History*, 45, 4 (2017), 697-719.

<sup>113</sup> T.R. Mockaitis, *British Counterinsurgency, 1919-60* (London: Macmillan, 1990), 185. T.R. Mockaitis, ‘The Minimum Force Debate: Contemporary Sensibilities Meet Imperial Practice,’ *Small*

Primary sources can address this issue, to some degree. Primary sources, such as government reports on the progress of counterinsurgency campaigns and memoirs can give insight into decisions taken at the time, without being skewed by issues of historiography. For the Vietnam war important documents like *A Program for the Pacification and Long-Term Development of Vietnam* (PROVN) provide important insights on counterinsurgency in Vietnam. Other sources, such as the government memorandums can provide vital insights on the intentions of actors which are useful in judging the right intention principle. There are other limitations with primary sources than those noted in the previous paragraph, including language barriers for French primary sources. However, important memoirs, such as Galula's *Pacification in Algeria* are written in English and provide insight into decisions made. Eye-witness reports are also used in the thesis to highlight important issues surrounding ethics and COIN. Eye-witness accounts help to highlight issues such as torture. Therefore, both primary and secondary sources will be used to develop the case studies for this thesis.

### The Just War Tradition – A Moral Framework

Having established the case studies chosen for this thesis, it is important to introduce the moral framework for analysis. The Just War Tradition provides a suitable ethical framework in which to assess the counterinsurgent. The JWT is an almost universally accepted set of rules and conditions, which dictate the morality of war.<sup>114</sup> Importantly, it is accepted as the moral compass for the counterinsurgents examined within this thesis. The rules have been established clearly over centuries, and it provides a means to analyse the morality of each case study.

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*Wars & Insurgencies*, 23, 4-5 (2012), 762-780: 774. See B.C. Reis, 'The Myth of British Minimum Force in Counterinsurgency Campaigns during Decolonisation (1945-197)' *Journal of Strategic Studies*, 34, 2, (2011), 245-279 for a critique of the historiography.

<sup>114</sup> Orend, *The Morality of War*, 9. Bellamy, *Just Wars: From Cicero to Iraq*, 5.



Each counterinsurgent in each case is assessed against whether they met the *ad bellum* principles of Just Cause, Public Declaration by a Legitimate Authority, Proportionality, Last Resort and Right Intention, and the *in bello* principles of Discrimination and Proportionality.

### Jus ad Bellum (1): Just Cause

The Just Cause principle is vital to the just war tradition, because it distinguishes between those actions that are just and those that are not; often understood in absolute terms.<sup>115</sup> The general idea of the just cause principle is to limit the resort to force, by deeming that the first use of military force is morally suspect, but the second use is not.<sup>116</sup> It is based upon the premise, in the contemporary sense, of positive law that actors both follow the principles of peace and the status quo, respecting the political sovereignty of nations, or violate it and face the punishment.<sup>117</sup> Traditionally understood, an actor may have a just cause to resort to force only in retaliation to aggression.<sup>118</sup>

Aggression threatens the sovereignty of the state, and the people within its borders, and therefore the state is justified to take action to defend its population. In fact, it has a moral obligation to do so. “The main purpose of the state, in our era, is to do its part in realising the human rights of its people.”<sup>119</sup> Human rights are understood to be “core entitlements we all have to those things we both vitally need as human beings and which we can reasonably demand from other people and social institutions”.<sup>120</sup> The failure to protect these, removes a state’s sovereignty, and its very reason for being. Therefore, when sovereignty, and the rights of those who exist within the state, are threatened, then there is a justified resort to force.

Therefore, a just cause can be understood as an act of self or other defence, to a wrong received. Thus, for the purposes of this work, the counterinsurgent must be acting in response

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<sup>115</sup> Bellamy, *Just Wars: From Cicero to Iraq*, 122.

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

<sup>118</sup> States have the right to both self and collective defence, in response to aggression.

<sup>119</sup> Orend, *The Morality of War*, 35.

<sup>120</sup> *ibid.*

to aggression, for them to have a just cause. If there is no evidence to suggest that they are acting in response to aggression, then they will be awarded a low score for this principle.

### Jus ad Bellum (2): Proportionality

*Ad bellum* Proportionality concerns the degree of retaliation. Brown explains that the idea behind *ad bellum* proportionality is to ensure the inevitable losses incurred on both sides of the conflict are justified by the importance of the cause.<sup>121</sup> A state considering a just war “must weigh the expected universal (not just selfish national) benefits of doing so against the expected universal costs”. A just war will only be proportional if the projected benefits of securing the just cause, outweigh the costs, usually understood in terms of destruction, brought about by conflict. It asks the actor to answer serious questions about the importance of the war.

Of course, it is not clear at the outset of the conflict the destruction that is to result from a conflict, or the damage that might result from not resisting aggression.<sup>122</sup> Orend argues that the calculations needed are “simply too complex and wide ranging” that it is “wildly improbable” that there could be simple cost-benefit formula to calculate proportionality.<sup>123</sup> Yet, “there is some truth in the proportionality maxim... an unrefined and imprecise truth, which can only point to obvious considerations of prudence and utility as limited conditions on the pursuit of rights-respecting justice in wartime”.<sup>124</sup> In the obvious cases, such as where the costs will be small and the benefits large, *ad bellum* proportionality considerations become relatively easier.<sup>125</sup> On the other end of the scale, where the costs will be large and the benefits small, it becomes more obvious that war may be a disproportionate response.<sup>126</sup> For

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<sup>121</sup> G. Brown, ‘Proportionality and Just War,’ *Journal of Military Ethics*, 2, 3 (2003), 171-185: 175.

<sup>122</sup> H. Frowe, *The Ethics of War and Peace: An Introduction* (New York: Routledge, 2011) 54.

<sup>123</sup> *ibid*, 62-3.

<sup>124</sup> *ibid*, 63.

<sup>125</sup> Coleman, *Military Ethics: An Introduction with Case Studies*, 82.

<sup>126</sup> *ibid*.

example, a wrong received such as the slander of State A's leader, by State B's press, it would not be proportionate for State A to invade and occupy State B, and the *ad bellum* principle would prohibit this.

Thus, there must be examination into two aspects, both the costs and benefits of the conflict. In each case, there must be a focus on the possible costs of inaction, against the benefits of action. If the latter outweighs the former, then they counterinsurgent will score a higher score for this principle. The degree of the aggression, or threat, must therefore also be considered.

### Jus ad Bellum (3): Right Intention

Right intention, like proportionality, is closely connected to the just cause principle. This principle is centred upon the aims of the belligerent, much like just cause, but in this sense it focuses on the subjective nature of the cause.<sup>127</sup> Orend explains that it is not enough to have an *objectively* just cause for going to war, you must also have a *subjective* intention, or state of mind, for the act to be considered moral.<sup>128</sup> This is the 'negative' interpretation of right intention, negative meaning constricting the actions of actors, as it does not condone actions based on bad attitude or bad intentions, such as; vengeance or hatred or the acquisition of territory.<sup>129</sup>

The positive interpretation, however, argues that right intention demands that the belligerent aims to right the wrongs that began the conflict, to remove the aggression, and restore peace and order.<sup>130</sup> Both the negative and positive interpretations present a great deal of difficulty in discerning an actor's true intentions, however, they can be judged.

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<sup>127</sup> Orend, *The Morality of War*, 46.

<sup>128</sup> *ibid.*

<sup>129</sup> Coleman, *Military Ethics: An Introduction with Case Studies*, 77.

<sup>130</sup> Orend, *The Morality of War*, 33.

Perhaps the clearest means of doing so comes from examining what happens next in the conflict. As a principle, right intention is both forwards and backwards looking. It is forward looking, because “our actions in war should cohere with our stated aims in going to war”. Because of this, it acts as a check upon war plans and tactics.<sup>131</sup> Right intention is backwards looking, because “we can see by a belligerent’s acts in war whether or not those acts are consonant with the stated intentions”.<sup>132</sup> Thus, as Orend writes “we know an agent’s intent through his conduct”.<sup>133</sup> He continues “intentions can be, and ought to be, discerned through a reasoned examination of publicly-accessible evidence, relying on behaviour, consideration of incentives, and explicit avowals”.<sup>134</sup> Intentions need not be mysterious, or impossible to discern. It may prove difficult, but one can discern between a state fighting for vindication following aggression, and grounds of ethnic conflict. “Dark motivations produce distinctive and noticeable results, such as torture, massacres, mass rapes, and large-scale displacements”.<sup>135</sup> Right intention then stands as another moral constraint to the initiation of a conflict and aims to limit the conflict by focusing attention to achieving the just cause. Therefore, examination of the conduct of the conflict can help to highlight intentions.

When assessing the case studies, then, the counterinsurgent’s stated aims will be assessed, and so too will their actions within the conflict. For example, if the counterinsurgent has promised to protect the population, but has conducted a murderous campaign against the population, then it will obviously show dark intentions, and will be scored negatively.

#### Jus ad Bellum (4): Public Declaration by a Legitimate Authority

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<sup>131</sup> D. Cole, ‘War and Intention’, *Journal of Military Ethics*, 10, 3(2011), 174-191: 188.

<sup>132</sup> *ibid.*

<sup>133</sup> Orend, *The Morality of War*, 49.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*, 50.

*Jus ad Bellum* requires that war can only a legitimate authority can initiate a war, and the authority must publicly declare the war. This principle requires us to make two judgements. First, we must ask whether there was a public declaration made. Second, we must assess whether the counterinsurgent is a legitimate authority.

Let us first tackle the issue of public declaration. There are several reasons as to why one must publicly declare war. By declaring that one is in a state of war, it makes this clear to the enemy that they now face a level of destruction and suffering. As a result, it presents a final chance ‘to cease aggression and begin a process of atonement.’<sup>136</sup> Frowe argues that this helps to satisfy the principle of last resort, which will be examined below.<sup>137</sup> She adds that if no peaceful solution is found at this stage, then public declaration enables and allows for the evacuation of civilians from cities and other targets.<sup>138</sup> Public declaration also alerts one’s own citizens to the intentions of their leaders;<sup>139</sup> which allows for debate which can make the conflict more credible, as the public can meaningfully consent to the conflict in which, if adhering to the just cause principle, is to enhance their rights. Therefore, it is important that the war is publicly declared by a legitimate authority. If there is not public declaration, or the refusal to call it a war, then the counterinsurgent will score negatively in the JWI for this, and vice versa for a counterinsurgent who did declare a war.

The principle of legitimate authority aims to constrict the type of actor who can justly go to war. Traditionally, it is accepted that only sovereign states and the United Nations Security Council have the right to go to war.<sup>140</sup> Sovereignty makes the state responsible for the security of the population from both external and internal threats. Therefore, a state dealing

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<sup>136</sup> *ibid*, 50.

<sup>137</sup> Frowe, *The Ethics of War and Peace: An Introduction*, 63.

<sup>138</sup> *ibid*.

<sup>139</sup> Orend, *the Morality of War*, 50.

<sup>140</sup> Bellamy, *Just Wars: From Cicero to Iraq*, 124.

with an internal insurgency will almost always be legally justified in engaging in counterinsurgency efforts.<sup>141</sup>

The traditional understanding of legitimate authority confers equal rights to all states to territorial integrity and political sovereignty “regardless of how unsavory [sic] some of these regimes might be”.<sup>142</sup> Here the ethical literature takes issue with the traditional accepting of legitimate authority and moves beyond the legal assumptions placed by international law. Orend importantly notes “if a state has rights in order to protect and realize [sic] the human rights of its own people, and that state uses its power instead to violate their human rights, why should we respect its “sovereignty” and the “integrity” of its territory? The very grounding of its state claims to be evaporated!” He continues “it doesn’t seem there’s a *moral* case to view these states as having rights”.<sup>143</sup>

In addition to this, there is a growing acceptance within the current literature that some insurgencies, and other non-state actors, may indeed be perceived as legitimate actors.<sup>144</sup> Therefore, this work has not accepted that it is sufficient to be merely declared a legally sovereign nation under international law to be perceived as a morally just actor. As Coleman wrote, although it “will almost always be legally justified, whether the state is ethically justified in engaging in counterinsurgency is quite a different matter”.<sup>145</sup> This is a particularly pertinent question for this thesis, as the cases focus on colonial powers. This work does not intend to argue that colonial governments, who often curtailed the human rights of their citizens, were automatically legitimate. Therefore, the traditional understanding of traditional authority is not suitable.

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<sup>141</sup> Coleman, *Military Ethics: An Introduction with Case Studies*, 106.

<sup>142</sup> Orend, *The Morality of War*, 37.

<sup>143</sup> *ibid.*

<sup>144</sup> Coleman, *Military Ethics: An Introduction with Case Studies*, 88-109 and Bellamy, *Just Wars: From Cicero to Iraq*, 138.

<sup>145</sup> *ibid.*

A solution to this problem can be found through Orend's argument that only a "morally fit" actor has the right to go war, and such an actor must fulfil the requirements of a "minimally just society".<sup>146</sup> A minimally just society meets three criteria. First, it must be recognised as legitimate by both their own people and the international community.<sup>147</sup> Internationally, actors are recognised by other just societies or by institutions like the United Nations. Domestic legitimacy can be measured in a number of ways, such as in free and fair elections, or the absence of unrest and civil war can indicate support for the government.<sup>148</sup> Second, a Minimally Just Society does not violate the rights of other countries.<sup>149</sup> States that violate the rights of others are aggressors, and aggressors lose the right not to be resisted.<sup>150</sup> As aggressor states lose their right not to be resisted, they lose their sovereignty and therefore cannot be just. Third, a Minimally Just Society is one that makes "every reasonable effort to satisfy the human rights of their own citizens".<sup>151</sup> Those states who do not wish to realise the rights of their people, do not meet the requirement of a rights-bearing state, with the authority to go to war, as it is the purpose of the state to protect the people within its borders, and therefore "there must be a baseline of physical security, and freedom from severe and systematic violence, if there is to be a political community at all".<sup>152</sup> And those states that do secure and promote the rights of their population "truly *do* have moral value and are worth enabling and protecting".<sup>153</sup> Therefore, for the purpose of this work, examining irregular

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<sup>146</sup> *ibid*, 37.

<sup>147</sup> *ibid*.

<sup>148</sup> However, this can also demonstrate high levels of coercion by the government, rather than acceptance by the people. Domestic legitimacy is not easy to measure. This is discussed in the methodology section).

<sup>149</sup> Orend, *The Morality of War*, 38.

<sup>150</sup> Orend's Core Principle on Aggression, states that "the commission of aggressor A, against any victim V, entitles V – and/or any third-party vindicator T, acting on behalf of V – to employ all necessary means to stop A, including lethal force, provided such means do not themselves violate human rights". Therefore, any state that violates the sovereignty of another, is liable to be attacked, and therefore has no sovereignty. Orend, *The Morality of War*, 39-40.

<sup>151</sup> *ibid*, 38.

<sup>152</sup> *ibid*, 67.

<sup>153</sup> *ibid*, 39.

conflicts, in a colonial setting, a legitimate authority is an actor which meets the criteria of a minimally just society.

#### Jus ad Bellum (5): Last Resort

It is preferable and more beneficial for the international community for there to be peace.<sup>154</sup>

Therefore the principle of last resort demands that every option available to the state below the use of force is exhausted before committing oneself to war. The principle only applies to conflicts that have not yet begun. As Frowe explains “it is supposed to prevent wars from taking place unnecessarily, and thus does not apply if the war is already under way”.<sup>155</sup>

Therefore, it is a restraint on those who are about to embark on war.

The main difficulty with this principle concerns the answer to the question: When have all options been exhausted? Walzer argues that if taken literally last resort is morally impossible.<sup>156</sup> The American scholar remarks “we can never reach lastness, or we can never know that we have reached it.”<sup>157</sup> Therefore, it is best to comprehend this principle as being met when methods short of war have been exhausted to a reasonable degree. Actors must show caution in their decision to go to war.<sup>158</sup> Thus, for the purposes of this work, to score positively on the JWI, the counterinsurgent must have demonstrably sought out peace by other means. However, if war has been declared already on the counterinsurgent or if sufficient violence is already happening, this principle may become moot.

#### Jus in bello, Discrimination

The first *in bello* principle demands that combatants discriminate between those who are liable to be attacked and those who are not. Ultimately the principle rests upon whether the

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<sup>154</sup> J.T. Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), 24.

<sup>155</sup> Frowe, *The Ethics of War and Peace: An Introduction*, 62.

<sup>156</sup> Walzer, *Arguing About War*, 88.

<sup>157</sup> *ibid.*

<sup>158</sup> Orend, *The Morality of War*, 58.



target is engaged in harm. Discrimination is understood in terms of combatant and non-combatant. The former may be deliberately targeted, and the latter may not. This is because the former has waived their right to be attacked, by becoming dangerous themselves. This known as the first “war right.”<sup>159</sup> The first war right is that “liability to attack in war is simply posing a threat”, and because “all combatants pose a threat to another, they are morally liable to attack.”<sup>160</sup> To make it clearer, let us say Soldier A is justified to kill enemy soldier B because soldier B is dangerous, but enemy soldier B is also justified to try to kill soldier A in defence because soldier A too is dangerous. One can demonstrate this point using the idea of a boxing match. Both fighters knowingly enter the ring. By entering the ring, they know that in order to land blows on the opponent, they must expect the same in return; in other words, by getting into the ring the fighters are waiving their right not to be hit.<sup>161</sup>

Civilians cannot be deliberately attacked<sup>162</sup>, because they have not ‘entered the ring’, so to speak. They have not waived their right not to be attacked, because they do not pose a threat. Civilians remain externally non-threatening.<sup>163</sup> Civilians, women and children for example, “do not bear arms effectively, nor have they been trained to kill, nor have they been deployed against the lives and vital interests of the opposing side” therefore, as they cause no harm, no intentional harm should fall upon them.<sup>164</sup>

Modern conflict poses a complex issue in terms of discrimination. Because modern conflicts are often conducted close to populated areas, particularly in COIN operations, combatants and non-combatants are often in close proximity with one another, and often civilians are

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<sup>159</sup> *ibid*, 36.

<sup>160</sup> McMahan, *Killing in War*, 11.

<sup>161</sup> *ibid*, 9.

<sup>162</sup> Deliberately is used here, because the Doctrine of Double Effect (DDE) allows for civilian casualties, as long as the force was intended to be used against legitimate targets. For further discussion on *see*: Orend, *The Morality of War*, 121-25.

<sup>163</sup> Orend, *The Morality of War*, 11.

<sup>164</sup> *ibid*.

killed. However, the ethical literature copes with this ethical conundrum with the Doctrine of Double Effect (DDE). DDE states that:

agent A may perform an action X, even though A foresees that X will result in *both* good (G) and bad (B) effects, *provided all* of the following criteria are met: 1) X is an otherwise morally permissible action; 2) A only intends G and not B; 3) B is not a means to G; and 4) the goodness of G is worth, or is proportionally greater than, the badness of B.<sup>165</sup>

Therefore, the death of non-combatants may not necessarily result in an operation being deemed unjust, or indiscriminate. Thus, when making judgements in this work in discrimination, we must consider the intentions of the counterinsurgent, and we must balance the good and bad effects against one another.

Soldiers only waive their right to not be killed temporarily when posing a direct threat to one another. To cease to be innocent in war “all that is necessary is the forfeiture of the right not to be attacked *for certain reasons*, by certain persons, in certain conditions...there is no loss of rights in general”.<sup>166</sup> The loss of rights is only temporary “the right against attack is instead forfeited only in relation to certain persons acting for certain reasons in a particular context”.<sup>167</sup> The enemy “alienates himself from me when he tries to kill me, and from our common humanity”.<sup>168</sup> Nonetheless “the alienation is temporary, the humanity imminent”.<sup>169</sup> Therefore, soldiers who are no longer engaged in harm become illegitimate targets.

This can apply to soldiers who are *hors de combat*, captured or surrendered. Once they have given up their ability to inflict harm upon the enemy, therefore the enemy does not have the

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<sup>165</sup> *ibid*, 121.

<sup>166</sup> McMahan, *Killing in War*, 10.

<sup>167</sup> *ibid*.

<sup>168</sup> Walzer, *Just and Unjust Wars*, 142.

<sup>169</sup> *ibid*.

right to attack them. Those who are captured should be placed under, what is known in legal terms as ‘benevolent quarantine.’<sup>170</sup> Benevolent quarantine demands that all captured combatants must be treated humanely. Frowe explains “this precludes the infliction of any injury, the use of torture, and the use of prisoners for medical or scientific experimentation”.<sup>171</sup> One cannot also parade the prisoner as a symbol of victory and humiliation.<sup>172</sup> Therefore, combatants who have surrendered themselves or are wounded transform into illegitimate targets, because they no longer are engaged in harm.

Therefore, in judgements of *in bello* discrimination, the counterinsurgent will be scored on the degree to which they actively sought out to protect the population. This can be measured in numerous ways. For example, there may be clear orders given from higher ranks on the protection of civilians, the use of rules of engagements and tactics can indicate this. Also, statistics on civilian deaths, and numbers of weapons captured can indicate a civilian to insurgent ratio. Reports on the treatment of captured insurgents, will also indicate the degree to which this principle was met.

### *In Bello* Proportionality

*In bello* proportionality is a calculation between the expected military gain and the foreseen collateral damage; in terms of the deaths of non-combatants and damage to civilian infrastructure.<sup>173</sup> *In bello* proportionality demands that if the foreseeable harm outweighs the military gain, then one should not carry out such an act, to do so would be unjust. This definition, in its current form, arguably makes this principle appear to be simplistic, but “proportionality in war cannot be made simply or mechanically”.<sup>174</sup> Proportionality

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<sup>170</sup> *ibid*, 46.

<sup>171</sup> Frowe, *The Ethics of War and Peace: An Introduction*, 114.

<sup>172</sup> *ibid*, 115.

<sup>173</sup> P. Gilbert, ‘Proportionality in the Conduct of War’, *Journal of Military Ethics*, 4, 2 (2008), 100-107: 100.

<sup>174</sup> Hurka, ‘Proportionality in the Morality of War’, 66.

calculations are inherently difficult as “there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured”.<sup>175</sup>

Decisions that determine proportionality, in terms of balancing harm and achieving goals, are made usually in the eye of the beholder.

However, we can still make judgements on proportionality. From the utilitarian position, any act that contributes significantly to the winning of the war is likely to be permissible.<sup>176</sup> This is the idea of military necessity, it is vital that all action is focused on winning the war and achieving the aim set out at the outset of the conflict. This implies that there is an inherent limit on what is permissible in a conflict, from those actions that are not. As Walzer’s work suggests, any action that is not aimed at moving the actor closer to victory, is nothing more than wanton violence equivalent to a massacre.<sup>177</sup> Therefore, proportionality can be assessed.

Such assessments are perhaps easier to determine when an action is disproportionate, rather than establishing when one is proportionate. In this sense, *in bello* proportionality is a *negative* condition, as it acts as a constraint on levels of force.<sup>178</sup> Therefore, if a counterinsurgent is to use force that excessive, such as the levelling of a village, to make it uninhabitable and therefore ‘secure’, this may be deemed as disproportionate, and a negative score would be awarded. In other cases, the counterinsurgent may have strict rules on the use of force. Restrictions on certain armaments or strict rules on where force can be used, to minimise destruction may indicate a good level of proportionality.

### Measuring ‘Justness’

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<sup>175</sup> Walzer, *Just and Unjust Wars*, 129.

<sup>176</sup> *ibid*, 129.

<sup>177</sup> *ibid*, 130.

<sup>178</sup> Orend, *The Morality of War*, 119.

Throughout the research questions, the key challenge is to first determine 'justness'. For example, to answer RQ1, one must begin by tackling the issue of measuring the degree to which cause of the counterinsurgent was just.

The idea of 'justness' is usually presented within the literature as a binary decision, that either a belligerent's cause is just or unjust. This is bolstered by the idea of positive law "which holds that actors either comply with the law or violate it".<sup>179</sup> However, moral decisions on war, especially the cause for which one fights, are rarely a simple decision between two labels: 'just' and 'unjust.' There is of course a difference between objective truth, and subjective truth. As Bellamy wrote "a war can certainly appear just on both sides and humans cannot break this veil of ignorance".<sup>180</sup> As a result, absolutist assessments on the 'justness' of a cause, can "tend to lack nuance or a sense of scale and collapse the scope of debate".<sup>181</sup> Therefore examination of conflicts through the scope of a just or unjust paradigm, in absolute terms, results in a diminished understanding of complex conflicts.<sup>182</sup>

Through judging the just cause criteria in relative terms, one may examine the justness of one's cause, in a way that considers the subjective nature of such decisions. By examining the just cause through a relative scope one asks the question 'is this cause more or less just?' rather than questions of 'just or unjust.' Relativity then allows for a more accurate moral examination of the cause of the belligerent as decisions to go to war; especially in more complex conflicts where some criteria are satisfied and others are not.<sup>183</sup> The reasons as to why one goes to war are made by humans, as such they are never entirely objective.

Therefore, one's cause is never simply just or unjust, but must have some degree of

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<sup>179</sup> Bellamy, *Just Wars: From Cicero to Iraq*, 122.

<sup>180</sup> *ibid.*

<sup>181</sup> W.A. Dorn, et.al., 'How Just Were America's Wars? A Survey of Experts Using a Just War Index,' *International Studies Perspectives*, 16, 3 (2015), 270-285: 273.

<sup>182</sup> *ibid.*

<sup>183</sup> A.W. Dorn, 'The Just War Index: Comparing Warfighting and Counterinsurgency in Afghanistan,' *Journal of Military Ethics*, 10, 3 (2011), 242-262: 243.

justness.<sup>184</sup> We should then view justness in relative terms. We should not expect an absolute justness, but what Bellamy calls a “sufficient” justness.<sup>185</sup> For RQ1, for example, each case study will be examined as to whether or not the counterinsurgent had a “sufficient cause”.<sup>186</sup>

This broadens the scope of the idea of justness, and automatically gives it a scalar property; whereby one can compare the ‘justness’ of one cause against another. In their work Dorn, Mandel and Cross advocate such an approach; a scaled approach to the just war criteria “encourages a nuanced analysis, while still allowing for overall pronouncements of a conflict as just or unjust to a specified degree”.<sup>187</sup> Therefore, this work must find a way to utilise a method of research to present a relative examination of the justness of the cause for each case study.

Again, the way the war is conducted is judged ethically. Therefore, to answer the question fully, there must be some way to determine the justness *in bello*. To do so in a binary manner would not be sufficient. Although this point may be obvious, it is still important to state that is a truth that some wars are fought more justly than others. Issues like collateral damage, where the combatant did not *deliberately* intend the deaths of non-combatants, is a different level of injustice to a genocidal campaign, or a campaign of torture. Yet, a binary “just or unjust” label would not be sufficient to explore such events. One has a greater degree of injustice than the other. Therefore, in order to answer the research questions, one must be able to demonstrate the relative justness of each case study.

### The Just War Index

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<sup>184</sup> Bellamy, *Just Wars: From Cicero to Iraq*, 122.

<sup>185</sup> *ibid*, 123.

<sup>186</sup> *ibid*.

<sup>187</sup> *ibid*.

The Just War Index (JWI) provides a suitable method to demonstrate relative justness. The Just War index is a seven point scale, with each point indicating a 'degree of justness'.<sup>188</sup> The seven points of the JWI are associated with meanings: +3 indicates an action that is strongly just, and -3 indicates one that is strongly unjust.<sup>189</sup> The intermediate levels are also given meanings, with  $\pm 2$  representing a moderately just or unjust, and  $\pm 1$  signifying slightly just or unjust.<sup>190</sup> 0 represents a neutral response to the question of Justness.<sup>191</sup> The benefit of this system is that it allows for a comparative discussion, demonstrating the differences between the causes of each case study. The JWI also benefits from being adaptable, and applicable to a range of conflicts.<sup>192</sup> Importantly, the JWI is used only to illustrate justness. It is not exact in the same manner a thermometer is with degrees of temperature. Instead, it is a tool used to illustrate degrees of justice following the in-depth explanation of the counterinsurgency case study.

The JWI will be utilised in the following manner. The events of a case study will be explained, in reference to a specific principle of the Just War Tradition. For example, the *ad bellum* principle of a legitimate authority. The counterinsurgent will be analysed in their ability to meet the principles of a minimally just actor. They will then be graded, using the seven-point scale, on the ability to meet the principle. For example, a counterinsurgent who strongly meets the principle, by being seen as internationally and domestically legitimate, respects and promotes the human rights of the population, and does not violate the rights of other states will score +3. If the counterinsurgent seriously fails to meet all of these principles, then the score will reflect this as -3. Cases which are mixed will fall in between

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<sup>188</sup> Dorn, 'The Just War Index: Comparing Warfighting and Counterinsurgency in Afghanistan', 243-4.

<sup>189</sup> Dorn, et.al., 'How Just Were America's Wars? A Survey of Experts Using a Just War Index', 275.

<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*, 284.

the range and are judged on their severity. For example, a counterinsurgent may be seen as internationally legitimate but domestically illegitimate and may actively and deliberately disregard the human rights of the population. In this case, their score would be either slightly or moderately unjust, and a score of -1 or -2 would be applied.

The averages of these scores will be used to demonstrate adherence of *ad bellum, in bello*, and the war as a whole. The first will be the *jus ad bellum index* (JaBI) which will be used to answer RQ1. Second will be the *jus in bello index* (JiBI) which will be used to answer RQ2 and RQ3. Third will be the JWI which will present an overall view of the justness of the case studies.

#### More than the JWI: Measuring Success

The above definitions of the JWT as a framework of analysis, allow for the measuring of the degree to which each counterinsurgent met each principle. However, analysing the JWI scores is only part of the solution to the research questions. The aim of this work is fundamentally to examine the relationship between the morality of the counterinsurgent and success for the counterinsurgent. As established in the introduction of this work, success in counterinsurgency operations is linked to the ability of the counterinsurgent to win the support of the population. It is not sufficient to merely destroy insurgent forces, but to isolate the insurgent permanently through the support of the population.<sup>193</sup>

Support is not finite and nor is it easily measurable. It does not fit into a neat equation.

However, there are factors that can indicate levels of support. For example, FM3-24 suggests examination of violence as one measure of effectiveness (MOE). A measure of effectiveness is “a criterion used to assess changes in system [behaviour], capability, or operational

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<sup>193</sup> Galula, *Counterinsurgency Warfare*, 54.



environment that is tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect”.<sup>194</sup> This is because without support of the population, the insurgent may struggle to conduct attacks as effectively or on a sufficient scale. As FM3-24 states “violence is likely to be more organized as the political support grows for an insurgency.”<sup>195</sup> Therefore, a general trend in the frequency and number of insurgent attacks, may potentially show support for the counterinsurgent. However, trends in the number of attacks may not only show support for the counterinsurgent. A counterinsurgent may have destroyed the fighting elements of an insurgency, but this does not necessarily mean that the counterinsurgent has won the support of the population. It must be remembered that success in COIN requires both the destruction of the insurgent forces *and* the support of the population.

One solution might be to examine the type of attacks that the insurgent carries out. Insurgencies start from a position of weakness and grow; traditionally until they can challenge the government conventionally. As FM 3-24 indicates “large-scale attacks require a level of operational sophistication that may imply an increased insurgent capability”.<sup>196</sup> Therefore, conventional attacks by insurgent forces can potentially show that the insurgency has a strong support base within the country, or an external supporter, which indicates that the insurgent has been able to expand their support base. Therefore, the examination of the historical cases will not only judge support in the number of insurgent attacks, but also the type of attacks carried out.

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<sup>194</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 12-20.

<sup>195</sup> *ibid*, 4-32.

<sup>196</sup> *ibid*, 12-24.

In addition to this, one can measure support by examining how the population<sup>197</sup> interacts with the counterinsurgent. When support is low, then one would expect the counterinsurgent to face greater opposition and hostility from the population. In FM3-24, which equates support to legitimacy, states that where legitimacy is low, the population “may require extensive prodding and incentives by the government to secure compliance of the population; high legitimacy generally invites compliance by the population and therefore requires less effort by the government to ensure compliance”.<sup>198</sup>

Therefore, we can determine the level of support towards a counterinsurgent by examining the relationship between the counterinsurgent and the population. For example, the more willingly and often the population provides intelligence on the insurgent, could potentially indicate that the population trusts the counterinsurgent, and they believe that the counterinsurgent has the ability to protect the population and possibly win.<sup>199</sup> Therefore, we can examine the level of support enjoyed by the counterinsurgent by “observing the population’s responses to their concrete actions”.<sup>200</sup> Such indicators may include, the number of insurgent attacks, opposition against the war or the counterinsurgent in the form of protest or riots, and human intelligence gathering from the population. Therefore, when examining the case studies these factors will be used as the indicators of whether or not support increased or decreased.<sup>201</sup>

### Answering the Questions

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<sup>197</sup> This may include the regional and international population as well as the local, depending on context.

<sup>198</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 1-29.

<sup>199</sup> *ibid*, 8-16.

<sup>200</sup> Gawthorpe, ‘All Counterinsurgency is Local: Counterinsurgency and Rebel Legitimacy’, 843.

<sup>201</sup> Again, it is important to note that these factors are contextual, and may not apply in every, or any, of the cases.

To answer the three research questions, the scores for the JaBI, JiBI and the JWI for each case study will be compared with the assessment of the counterinsurgent to succeed in their counterinsurgency campaigns; this will be presented within the final chapter of the thesis. Success will be measured in both the ability to defeat the insurgency and win the support of the population; two fundamental requirements of success in COIN. The cases will be examined individually and against the other cases. In doing so, a relationship between the success of the counterinsurgent, in terms of obtaining the support of the population, and ethics can be determined. For example, if a counterinsurgent with a high JWI has indicated a high level of support, and a counterinsurgent with a low JWI had little support, this may indicate a relationship between ethics and support in these operations. This process will allow for answers to the three research questions to be presented.

## **Chapter Two: Literature Review**

It is well established in the literature that ethics and strategy are connected. However, there is a lack of clarity about the role ethics plays in strategic outcomes. For some, it restricts the ability of the strategist to achieve victory. For others, ethical strategy is effective strategy. The argument that ethical strategy is effective strategy permeates much of the counterinsurgency literature. Assumptions that ethical COIN is effective COIN are increasingly being challenged within the literature. The main contribution of this work is to provide further clarity on the role strategic ethics has in counterinsurgency. As will be shown through the review of the literature, this is not only for the benefit of strategic studies, but for the practice of counterinsurgency.

This review examines four key clades of literature. First, it reviews the relationship of ethics to strategy in the literature. In doing so, it highlights the relationship between ethics and strategy, and the current understanding of strategic ethics. This section demonstrates that strategic ethics is an established position in strategic studies, but it is one that is currently underdeveloped. With a piece of work which examines the role of ethics on strategy, the next section of the review examines the Just War Tradition literature. It establishes a brief history of the Just War Tradition, to explain the suitability of this moral compass in general, and specifically to counterinsurgency campaigns. It is made clear that strategic ethics is present within the JWT literature, and that the JWT literature specifically refers to this relationship in COIN campaigns. However, again, the review of the literature shows that further work is needed. Walzer's work, which clearly states that the Just War Tradition has strategic utility, suffers from a lack of exploration. This thesis aims at testing the assumptions made by Walzer and developing the understanding of adherence to the JWT and success in COIN.

Having established that the relationship is present within COIN campaigns, according to the JWT literature, the review then moves to counterinsurgency literature. The counterinsurgency literature demonstrates confusion between the role ethics has and success in counterinsurgency. Reviewing the literature indicates that there is disagreement among the COIN writers. One camp argues that ethical COIN has shown to be effective COIN, and the other disagrees with this assumption.

Of course, if strategy was merely academic this difference may not matter, but strategy is not merely an academic subject. The influence of writers like Kilcullen on current US COIN doctrine, means that academic study has real world consequences. As shown in the review of COIN doctrine, strategic ethics is somewhat apparent in classical successful COIN doctrine, but it is more of a correlation, rather than the ethical assumptions made in current COIN doctrine. If the strategic community is not sure on whether ethical conduct is effective or not, then this divergence has real world consequences. Therefore, the importance of this thesis is found here. Its purpose is to provide further clarity and more understanding of the relationship between ethics and success in counterinsurgency. It will challenge and test the assumptions made within the literature, in order to provide more depth and coherence to the understanding of strategic ethics and COIN.

### Strategic Literature and Strategic Ethics

Ethics in strategic literature has grown in relevance over the last century. However, situating ethics in strategic literature is often fraught with difficulty. Ethics has often been dealt with as something ‘other’ to strategy. Ethics are something which should be left to philosophers, so the strategist can do their job. Carl von Clausewitz’s *On War*, which has been a beacon for strategists for centuries,<sup>202</sup> is a largely amoral text. For Clausewitz there is no logical limit to

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<sup>202</sup> M. van Creveld, ‘The Eternal Clausewitz’, in M.I. Handel (ed.) *Clausewitz and Modern Strategy* (Oxon: Frank Cass & Co., 1996) 35-51: 37.

the application of force. To restrain oneself for reasons such as ethics is to give the upper hand to the enemy and goes against the nature of war.<sup>203</sup> The fundamental aim of war is to achieve victory, measured in achieving political aims. The only limits on what one can do in war is in relation to the ends that one wishes to achieve.<sup>204</sup> Therefore, ‘strategy’ is often understood in terms of military means to achieve political ends.

Contemporary scholars, like Hew Strachan, have argued that to include ethics in strategic discussions is to dilute it beyond its original intention, rendering the term ‘strategy’ as so universal it becomes useless.<sup>205</sup> Strategy is not politics or policy, and nor is it ethics. Strategy is the attempt to “make war usable by the state, so that it can...use force to fulfil its political objective”.<sup>206</sup> This distinction is present within other key pieces of strategic literature. Hedley Bull noted that “pure” strategy excludes morality, focusing solely on means and ends.<sup>207</sup> Strategic judgements influenced by moral considerations are often to be rejected by the strategist.<sup>208</sup> Joseph Wylie Jr’s work *Military Strategy* notes that “strategy has no moral quality of its own”, and strategy by itself is neither good nor evil.<sup>209</sup> The morality of strategy is measured in the cultural judgements of the critics.<sup>210</sup>

However, Bull and Wylie argue that ethics have a role to play in strategic decisions. Bull argues that “while strategy is one thing and morals are another, the decisions that governments take in the field of military policy should not be based on considerations of strategy alone”.<sup>211</sup> Bull argues that strategists are not immoral beings, and moral judgements

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<sup>203</sup> C. Clausewitz, *On War* (London: Everyman’s Library, 1993), 84.

<sup>204</sup> *ibid*, 258.

<sup>205</sup> H. Strachan, *The Direction of War: Contemporary Strategy in Historical Perspective* (Cambridge: Cambridge University Press, 2013), 47.

<sup>206</sup> *ibid*, 49.

<sup>207</sup> H. Bull, ‘Strategic Studies and Its Critics’, *World Politics*, 20, 4 (1968), 593-605: 597.

<sup>208</sup> *ibid*.

<sup>209</sup> J. Wylie Jr., *Military Strategy: A General Theory of Power Control* (Maryland: United States Naval Institute, 2014), 15.

<sup>210</sup> *ibid*.

<sup>211</sup> Bull, ‘Strategic Studies and Its Critics’, 597.

are taken into consideration by strategists.<sup>212</sup> Wylie argues that ethics have an effective restraint on what the strategist will decide to do. He even argues that the morality of the method and purpose of strategy can have an effect on the validity of the entire strategy.<sup>213</sup> If the purpose of the strategy is of “dubious moral quality” it can be self-defeating.<sup>214</sup>

Justice has become increasingly significant in the literature since the turn of the century. As conflicts developed into ‘fourth generation warfare’, the moral and cognitive domains were where wars were decided.<sup>215</sup> Wars have come under greater moral, and legal, scrutiny, and therefore understanding ethics within strategy has become an important element of strategic studies. Perceptions of warfare have become strategically important. Ethics are no longer something the modern strategist can ignore.<sup>216</sup> David Lonsdale and Thomas Kane’s work on strategic necessity manages to balance ethics and strategy together under ‘strategic necessity.’<sup>217</sup> They argue that the strategist must take account of ethical considerations, but they should not be shackled by them.<sup>218</sup> Ethics should be respected as far as possible, but victory is still paramount.<sup>219</sup>

The literature on the dimensions of strategy can help to clarify the relationship between ethics and strategy. Michael Howard’s work established four dimensions of strategy: the social, the logistical, the operational, and the technical.<sup>220</sup> For Howard, not meeting any of these

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<sup>212</sup> *ibid.*

<sup>213</sup> Wylie, *Military Strategy*, 16

<sup>214</sup> *ibid.*

<sup>215</sup> L. Freedman, *Strategy: a History* (Oxford: Oxford University Press, 2013), 225-226.

<sup>216</sup> D.J. Lonsdale & T. Kane, *Understanding Contemporary Strategy*, 2<sup>nd</sup> edition, (Oxon: Routledge, 2019), 53.

<sup>217</sup> *ibid.*, 72.

<sup>218</sup> *ibid.*, 73.

<sup>219</sup> *ibid.*, 74. Lonsdale’s work is not merely driven by victory. Elsewhere, he examines the ‘common good’ as an ethical framework for strategy. In this understanding, strategy demands victory, but this victory it must be also guided not solely for self-interest, but for the good of all. It broadens the strategic understanding of realism and strategy but is not as prescriptive as the JWT. *See*: D. Lonsdale, ‘Beyond Just War: Military Strategy for the Common Good’, *Journal of Military Ethics*, 15, 2 (2016), 100-121.

<sup>220</sup> M. Howard, ‘The Forgotten Dimensions of Strategy’, *Foreign Affairs*, 57, 5 (1979), 975-986: 978.

principles would be strategically disastrous.<sup>221</sup> Howard notes that the social dimension had been forgotten during the Cold War due to the rise of technology. But to forget this dimension was to the detriment of strategic studies. In all forms of conflict, the societal base matters, in terms of the will to continue and sacrifice for a political objective.<sup>222</sup> The societal dimension of strategy became increasingly important post-1945, as the character of war turned to insurgencies.<sup>223</sup> The societal norms and values, in this sense, have some influence on strategic decisions. The societal dimension will inevitably involve ethics, as every political community has a moral compass to guide behaviour.<sup>224</sup> Therefore, ethics and strategy are not wholly distinct, the former influences the latter.

The dimensions are developed further by Gray, who notes that there are seventeen dimensions, under the categories of “People and Politics”, “Preparation for War”, and “War Proper”.<sup>225</sup> Ethics is situated within “People and Politics” alongside society, culture, politics, and people. All people have an ethical code to guide behaviour, and therefore all strategic behaviour at all times and by all people has ethical content to it.<sup>226</sup> The dimensions of strategy are distinctive elements of the whole of strategy. “Strategy is seriously incomplete if considered in the absence of any of them”.<sup>227</sup> Therefore, it must be made clear that ethics is but one of many dimensions. These dimensions cannot be ranked, and their importance is dependent on the context in which the strategist finds themselves.<sup>228</sup> This work will not argue that ethics is the most important dimension of strategy. However, incompetence in any of the dimensions could be disastrous for strategic endeavours.<sup>229</sup> Therefore the exploration of the

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<sup>221</sup> *ibid.*

<sup>222</sup> *ibid.*, 985.

<sup>223</sup> *ibid.*, 981

<sup>224</sup> Gray, *Perspectives on Strategy* (Oxford: Oxford University Press, 2013), 42.

<sup>225</sup> Gray, *Modern Strategy*, 24.

<sup>226</sup> Gray, *Perspectives on Strategy*, 43.

<sup>227</sup> Gray, *Modern Strategy*, 24.

<sup>228</sup> *ibid.*, 24-25.

<sup>229</sup> *ibid.*, 25.



role ethics plays in strategy to further the understanding of the ethical dimension is beneficial to the study of strategy.

Having established that there is a relationship between ethics and strategy, this review must move on to explore whether this relationship is a beneficial one. Gray explores this subject across a few pieces. Within *Perspectives on Strategy*, he argues that there is some strategic advantage in a “plausible morally framed argument, even though moral virtue has no discernible combat value in fighting”.<sup>230</sup> Gray argues that morality cannot directly benefit conflict as both belligerents are likely to believe that they are fighting for a just cause and may mean little to actual soldiers fighting.<sup>231</sup> Where the potential strategic value comes from, is from the people, and their support for the war. As Gray explains “For the pain and hardships of war to be bearable, societies need to believe that the costs incurred are for purposes that are morally worthy. The moral worthiness standard may not be high, but in most countries, popular democracies in particular though not uniquely, it does need to be met”.<sup>232</sup> Therefore, there may be a strategic benefit to having a moral advantage.

In ‘Moral Advantage, Strategic Advantage’ Gray makes a critical observation, that “it is the eternal and universal salience of the idea of right conduct that fuels the fires for possible net strategic advantage and disadvantage”.<sup>233</sup> He argues that there is often an obligation for parties to claim that they are fighting for justice or for the moral ‘good’.<sup>234</sup> This obligation is both moral and strategic. In *Modern Strategy* Gray notes “there is little doubt that an unmatched sense of the justice of one’s cause yield notable strategic advantage”.<sup>235</sup> But it is

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<sup>230</sup> Gray, *Perspectives on Strategy*, 72.

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*, 345.

<sup>234</sup> *ibid.*

<sup>235</sup> Gray, *Modern Strategy*, 31.

within his 2010 article that he begins a thorough examination of this relationship between ethics and strategy.

Gray's arguments revolve around the concept of the will. For Gray human will is "truly the centre of gravity for the strategist", and the will of an individual is suffused with moral criteria and judgments.<sup>236</sup> Therefore, his work puts forward the case that having a moral advantage can strengthen the will to succeed.<sup>237</sup> It is important to note that Gray does not suggest that a moral advantage is a cure-all in strategic affairs. As he wrote in *Modern Strategy* ethical considerations do not act as a break on "strategic (mis)behaviour".<sup>238</sup>

Therefore, ethics and strategy must be balanced. Having a "moral compass" will "yield little strategic advantage, if the vision, politics, and policy, that guide strategic performance, is judged fatally flawed by important stakeholders in the conflict, including by-standing observers".<sup>239</sup> But, it is also the case that "strategic expediency or tactical indiscipline can undermine the moral authority of the whole violent project".<sup>240</sup> Moral advantage is not a cure all to strategic woes, but rather it presents an important relationship and understanding in strategic theory. "Presented positively, moral argument is a weapon for grand strategy that can strike hard".<sup>241</sup> This work seeks out to further develop the understanding of strategic ethics. By doing so, it will continue to develop the work done by strategists like Gray, to the benefit of strategic studies.

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<sup>236</sup> Gray, 'Moral Advantage, Strategic Advantage?', 339.

<sup>237</sup> *ibid*, 360.

<sup>238</sup> Gray, *Modern Strategy*, 74.

<sup>239</sup> Gray, 'Moral Advantage, Strategic Advantage?', 352.

<sup>240</sup> *ibid*.

<sup>241</sup> *ibid*, 360.

## Strategic Ethics and the Just War Tradition Literature

The strategic ethics literature highlights a beneficial relationship between ethical conduct and effectiveness in COIN. Before developing this point further, we must first situate this work and determine what is meant by “ethical”. In western spheres the Just War Tradition is the moral compass used to guide moral judgements in war. There is a considerable history of literature which has developed the theory over centuries.

The Just War Tradition has developed over a two thousand year discussion into well established and accepted principles. Within *The Republic* Plato discusses how wars should be conducted. Within the text Socrates outlines certain rules and restrictions on the use of force.<sup>242</sup> The tradition’s rules which dictate when an actor can go to war, *jus ad bellum*, are found within late Roman literature. The principles of having a just cause and publicly declaring a war are proposed by the Roman Cicero.<sup>243</sup> Later, St Augustine introduced the requirement for having a right intention when declaring a war.<sup>244</sup> These early discussions on the justifications for war were explored and developed over the next thousand years or so. In the thirteenth century, St Thomas Aquinas’ *Summa Theologica* set out the established principles of the Just War Tradition. Aquinas’s work tried to limit the reasons for going to war, stipulating that to go to war, one must be a legitimate authority, do so for a just cause, and have a right intention.<sup>245</sup> Aquinas’ work developed the tradition further by introducing *in bello* criteria. He argued for discrimination when claiming that killing “innocents” is unjustified.<sup>246</sup> His work also introduced the Doctrine of Double-Effect, and linked this with

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<sup>242</sup> Plato, *The Republic*. Translated by R. Larson (Illinois: Crofts Classics, 1979) 134-136.

<sup>243</sup> M.T. Cicero, *On the Republic and On the Laws*. Translated by D. Fott (London: Cornell University Press, 2014) 24 z34 – 25-z35.

<sup>244</sup> Bellamy, *Just Wars*, 25-29

<sup>245</sup> T. Aquinas, *Summa Theologica, Part II-II (Secunda Secundae)*[ebook] (Project Gutenberg), Question 40, Article 1

<sup>246</sup> *ibid*, Question 64, article 6.

proportionality.<sup>247</sup> Therefore, by the time of Aquinas, key elements and values of the JWT had been agreed among scholars.<sup>248</sup> The principles were adapted over the following centuries and have become well established within the literature.<sup>249</sup> It is widely accepted that states have a right to go to war when a legitimate authority has publicly declared war, to achieve a just cause and with the right intention to achieve that cause. The decision to declare war must also be deemed proportional and declared as a last resort. Further to this, the war must be conducted discriminately and proportionately.<sup>250</sup>

There was a resurgence of JWT literature following the Vietnam War, with the most notable being Michael Walzer's *Just and Unjust Wars*. During the Vietnam War just war discussions moved from theological discussions to political discussions about the war. The Just War Tradition provided writers with a "common moral language" in which to judge the conflict. The theory was studied more and became a critical subject.<sup>251</sup>

In the twenty-first century, the tradition raised its head again in the literature as scholars attempted to apply the theory to contemporary issues such as cyber-warfare and the Global War on Terror.<sup>252</sup> The suitability of the JWT as a morel framework became a particularly important question for irregular conflicts where one side is not a nation state. Azari's work on the JWT in unconventional conflicts notes that in conflicts where the combatants have not been socialised in the Just War Tradition, there is nothing binding them to these rules.<sup>253</sup> This issue is also raised by Nicholas Fotion within *War & Ethics*. He argues that there is an

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<sup>247</sup> *ibid*, Question 64, Article 7.

<sup>248</sup> Orend, *Morality of War*, 15.

<sup>249</sup> See: Bellamy, *Just Wars*, 15-114 for a thorough history of the Just War Tradition and its development.

<sup>250</sup> Bellamy, *Just Wars*, 121-126. Frowe

<sup>251</sup> Walzer, *Arguing About War*, 7-9.

<sup>252</sup> See: F. Allhoff, A. Henschke, & B. J. Strawser (eds.) *Binary Bullets: The Ethics of Cyberwarfare* (Oxford: Oxford University Press, 2016).

<sup>253</sup> J. Azari, 'Just and Unjust Wars and just war doctrine in ideological warfare,' *Small Wars & Insurgencies*, 19, 2 (2008), 274-281: 279.

asymmetry in the application of the JWT to irregular conflicts. One side is held accountable to these standards, and yet the other is not.<sup>254</sup> *In bello* principles like discrimination and proportionality apply to the nation-state but not the non-state actor.<sup>255</sup> In insurgencies, the enemy plays to this asymmetry. Insurgents live and move among the population, blurring the lines between combatant and combatant. It may be tempting for the strategist to ignore the JWT in these conflicts. Adherence to the JWT could arguably be detrimental to the ability to achieve the just cause. As Clausewitz warned “If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand”.<sup>256</sup>

It is important to note that the Just War Tradition was not designed to be merely an abstract discussion of ethics. Instead, the tradition is a moral compass designed to help guide those in actual conflicts. Importantly then the JWT judgements must be tapered to the reality of conflicts. Even in Francisco de Vitoria’s *On the Laws of War* his just war criteria is developed in line with the realities of conflicts. For him rules such as the Doctrine of Double Effect<sup>257</sup> allow for reality of war. He argues that one should not be constrained to the point where “it would be impossible to wage war against the guilty”.<sup>258</sup> ‘War against the guilty’ is at the heart of a just war; it is to rectify wrong-doing. Victory in a just war is important.

Recent ethical scholarship recognises the importance of military victory to ethics. Eric Patterson’s work focuses on the war aims of a nation and the importance of victory. He asks, “If it is just to go to war in the first place (*jus ad bellum*), then is it not just to win?” To which

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<sup>254</sup> N. Fotion, *War & Ethics: A New Just War Theory* (London: Continuum, 2007), 97

<sup>255</sup> *ibid*, 90-91

<sup>256</sup> Clausewitz, *On War*, 84.

<sup>257</sup> The doctrine allows for the proportionate unintentional killing of civilians if legitimate aims or targets are the focus of an action.

<sup>258</sup> F. de Vitoria, ‘on the laws of war’, in J. Lawrence (ed.) *Vitoria: Political Writings* (Cambridge: Cambridge University Press, 1991) 293-327: 315

he answers that in wars of self-defence and to punish wrong-doers victory is important.<sup>259</sup> He argues that victory matters both prudentially and morally. Prudentially it ends long standing cycles of violence, and morally it can allow “good to triumph over evil”.<sup>260</sup> He argues that further work is needed to be done, but his work highlights an important issue within the ethical literature that victory matters; both strategically and ethically.

This raises the question “how far should states go for victory?” Walzer’s *Just and Unjust Wars* provides part of the answer “armies are entitled to try to win their wars”.<sup>261</sup> Yet, States are bound by the ‘war convention’ which limits what is acceptable within war on both moral and legal grounds.<sup>262</sup> Therefore, states are “not entitled to do anything that is or seems to them necessary to win”.<sup>263</sup> However, in “supreme emergencies”, whereby the threat posed is of an “unusual and horrifying kind” and catastrophe is imminent, *in bello* restrictions may be temporarily lifted.<sup>264</sup> “Morally, a supreme emergency is a terrible tragedy. Prudentially, it is a struggle for survival”.<sup>265</sup> Therefore, questions about victory and defeat are ethically important. How restrained should an actor be if they are fighting for a just cause?

Yet, some of the literature indicates that the opposite is true. Fotion acknowledges that at the tactical level, on the battlefield, the military are put at a disadvantage.<sup>266</sup> However, ignoring ethics when fighting these conflicts would be detrimental to the conflict at the operational and strategic level.

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<sup>259</sup> E. Patterson, ‘Victory and the Ending of Conflicts’, in A.R. Hom et.al. (eds) *Moral Victories: The Ethics of Winning Wars* (Oxford: Oxford University Press, 2017), 104-122: 111-117.

<sup>260</sup> *ibid*, 118.

<sup>261</sup> Walzer, *Just and Unjust Wars*, 131.

<sup>262</sup> *ibid*, 44.

<sup>263</sup> Walzer, *Just and Unjust Wars*, 131.

<sup>264</sup> Walzer, *Just and Unjust Wars*, 250-267. See also: Orend, *The Morality of War*, 153-171, and I. Primoratz, ‘Civilian Immunity, Supreme Emergence, and Moral Disaster’, *The Journal of Ethics*, 15, 2 (2011), 371-386, for a critique of Walzer.

<sup>265</sup> B. Orend, ‘Is There as Supreme Emergency Exemption?’ in M. Evans (ed) *Just War Theory a Reappraisal* (Edinburgh: Edinburgh University Press: Edinburgh, 2005) 134-154: 148.

<sup>266</sup> *Ibid*.

If any western army attacked non-combatants as a matter of policy, and did so on a regular basis, it would quickly be disgraced in the eyes of its own people. In losing the support of the people and the politicians behind them, it would inevitably lose the war. In short, fighting a ‘no holds barred’ war is not an option for western nations.<sup>267</sup>

This is a key finding within the literature. In counterinsurgency campaigns the counterinsurgent is judged in a different manner to the insurgent. Therefore, the insurgent has more freedom than the counterinsurgent. Yet, ethical restrictions are strategically important for western countries.

One solution to this in the literature has been to develop a new tradition for irregular conflicts. Fotion has attempted this,<sup>268</sup> but ultimately it is unconvincing. For example, Fotion argues that the insurgent cannot meet the legitimate authority principle and therefore only the counterinsurgent must meet this principle.<sup>269</sup> Yet, the legitimate authority principle does not necessarily need to be removed or a new JWT be developed to apply to COIN. Alex Bellamy in *Just Wars: From Cicero to Iraq* argues that all actors must meet certain criteria to meet the legitimate authority principle; and importantly, these apply to non-state actors and state actors.<sup>270</sup> Orend in *The Morality of War* provides criteria which are universal, for both state and non-state actor which are similar to Bellamy’s criteria. Orend argues only a “morally fit” actor has the right to go war, and such an actor must fulfil the requirements of a “minimally just society”.<sup>271</sup> To be a legitimate authority, an actor must be recognised by its own people and the international community. They must not violate the rights of other actors and must make every reasonable effort to satisfy the rights of their own citizens.<sup>272</sup> This is a universal

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<sup>267</sup> *ibid*, 134.

<sup>268</sup> Fotion, *War & Ethics*, 116-124.

<sup>269</sup> *ibid*, 121.

<sup>270</sup> Bellamy, *Just War*, 137-138

<sup>271</sup> *ibid*, 37.

<sup>272</sup> Orend, *The Morality of War*, 38-40

understanding of the legitimate authority principle. Coleman argues that the three principles are helpful to determine whether there is a justification to engage in an insurgency against the state, or whether the counterinsurgent has a right to defend themselves.<sup>273</sup> Therefore, the JWT remains a suitable moral compass to judge these conflicts.

Elsewhere in the literature on the Just War Tradition, there is some indication that ethical counterinsurgency is effective counterinsurgency. In his defence of the Tradition in *Arguing about War* Walzer claimed “there are now reasons for a state for fighting justly”, stating that “one might say that justice has become military necessity”.<sup>274</sup> Specifically, he emphasises that in “a war for “hearts and minds,” rather than for land and resources, justice turns out to be key to victory”.<sup>275</sup> Walzer opens an important discussion on the idea of ‘justice’ equating to ‘military necessity’. He calls this phenomenon the “usefulness of morality”.<sup>276</sup> Yet the ‘usefulness of morality’, known in this work as strategic ethics, is not explored in much depth by Walzer.

Walzer’s arguments are developed further elsewhere within the literature by writers like George Lucas. Lucas attempts to bridge the gap between ethics and strategy, arguing that military ethics plays an important role. His work contends that ethics now has a major role to play in strategy in modern conflicts. Lucas stipulates that the idea of military necessity now includes *in bello* considerations of discrimination and proportionality.<sup>277</sup> Importantly, Lucas situates Ethics at the heart of strategy, not at the periphery.<sup>278</sup> This is not because soldiers or populations have become more sensitive, but because strategic objectives have become more ethical in ‘postmodern warfare’.<sup>279</sup> Objectives have become more ethically focused in the last

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<sup>273</sup> Coleman, *Military Ethics*, 103.

<sup>274</sup> Walzer, *Arguing about War*, 9.

<sup>275</sup> *ibid*, 9

<sup>276</sup> *Ibid*, 10.

<sup>277</sup> Lucas, *Ethics and Military Strategy in the 21<sup>st</sup> Century*, 3

<sup>278</sup> *ibid*, 43.

<sup>279</sup> *ibid*, 4.



few decades, therefore ethics has a more important role to play. In contemporary and unconventional conflicts “*ethics is absolutely inseparable, indeed indistinguishable, from sound military and political strategy*”.<sup>280</sup> For Lucas, like Walzer, ethics as a dimension of strategy, now plays a major role in strategic outcome. Its importance has increased.

Yet, this raises the question of whether this only attributed to current conflicts? Lucas and Walzer seem to indicate that ethics are only strategically important in conflicts post-Vietnam. Walzer bases his assumption on the Vietnam war, claiming that it was the first war where *in bello* violations made a strategic difference. Walzer assumes that unethical conduct has been unproductive in other cases prior to Vietnam, but he does not spend time exploring this thought. If ethics are a dimension of strategy, then it is not impossible to imagine that ethics, well established over centuries, has not had a strategic role to play in pre-Vietnam conflicts. This has yet to be thoroughly explored in the literature.

Therefore, claims that justice is key to victory in counterinsurgency operations needs further exploration. It is the purpose of this work to determine whether morality has shown to be strategically ‘useful’. By doing so this work will test Walzer’s assumption *and* provide further clarity on the relationship between ethics and effectiveness in COIN.

### COIN Literature and Strategic Ethics

Walzer may claim that justice has become military necessity, and has ‘wide acknowledgement’ in military history, however there is no clear statement within the major works on COIN. The counterinsurgency literature presents a mixed picture on strategic ethics in counterinsurgency operations. A number of pieces of counterinsurgency literature indicates that restraint is strategically important. However, the importance placed on ethics differs considerably between classical and contemporary literature. Classical literature, written by

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<sup>280</sup> *ibid*, 5.

those who took part in campaigns in the twentieth century paid attention to ethics, but typically as a secondary concern. Restraint in these pieces were advocated when necessary. Comparatively, the literature from the first decade of the twenty-first century argued that restraint was necessary to be effective in COIN, and a major concern. This line of thinking in COIN has already been challenged within the literature. Therefore, the counterinsurgency literature casts doubt over the claim that justice is ‘military necessity’.

The strategic benefit of restraint has been present within the COIN literature for more than a century. For example, within *Small Wars*, first published in 1896, Callwell argues that there can be utility in restraint in fighting insurgents. He hints at the benefits of discrimination, as experienced in Burma, where “great care was taken not to exasperate the people of the newly acquired province, and to punish only the dacoits and marauders who invested the country and were reducing it to anarchy”.<sup>281</sup> We must not push this argument too far, as Callwell said that forces would hunt insurgents destroy villages that had supported the insurgents, and confiscate their crops and livestock.<sup>282</sup> However, even then, Callwell advocates some degree of proportionality. In dealing with the insurgents “the enemy must be chastised up to a point but should not be driven to desperation”.<sup>283</sup> The British Colonel explains that one of the most effective means of defeating insurgents is to cut them off from their supplies, however “wholesale destruction of the property of the enemy may sometimes do more harm than good”.<sup>284</sup> Therefore, even within a piece which is very much of its time, one can still draw out some strategic advantage to adhering to *in bello* principles. His work even hints at discrimination. In these operations, care was exercised not to punish villages who were victims of insurgents. Operations were not to directed at the people as a whole, only those

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<sup>281</sup> C.E. Callwell, *Small Wars: Their Principles and Practice*, 3<sup>rd</sup> edition (Lincoln: University of Nebraska Press, 1996), 147.

<sup>282</sup> *ibid*, 147.

<sup>283</sup> *ibid*.

<sup>284</sup> *ibid*, 149.

who supported the insurgent. He argued that this would help win the support for the population.<sup>285</sup> Therefore, the possible strategic benefit to adhering to ethical principles, such as discrimination and proportionality, has been noted within the COIN literature for more than a century.<sup>286</sup>

This relationship is apparent within the key twentieth century literature on counterinsurgency. In Sir Robert Thompson's *Defeating Communist Insurgency*, he equates restraint and proportionality in being key to success in COIN.<sup>287</sup> He argues that using proportional force in a discriminate way is strategically important. He acknowledges that there is a "very strong temptation" to use methods outside the law when dealing with the insurgent.<sup>288</sup> But "not only is this morally wrong, but over a period, it will create more practical difficulties for a government than it solves".<sup>289</sup> Thompson equates the use of disproportionate COIN measures enacted on the population as strategically detrimental, as it will damage the support for the counterinsurgent.<sup>290</sup> Simply understood, a counterinsurgent who is willing to kill or harm the population, is unlikely to regain their trust and legitimacy.<sup>291</sup> Thompson argued that a state which does act outside the law "forfeits the right to be called a government", and cannot expect the people to obey the law also.<sup>292</sup> Therefore, "functioning in accordance with the law is a very small price to pay in return of being the government".<sup>293</sup>

Of course, acting in the 'rule of law', does not equate instantly with ethical conduct. Harsh laws can be implemented in COIN operations. Often in Emergencies, for example, the human

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<sup>285</sup> *ibid*, 148.

<sup>286</sup> See: COIN Doctrine and Ethics section.

<sup>287</sup> R. Thompson, *Defeating Communist Insurgency: Experiences from Malaya and Vietnam* (London: Chatto & Windus, 1966), 52.

<sup>288</sup> *ibid*.

<sup>289</sup> *ibid*.

<sup>290</sup> French, *The British Way in Counter-insurgency*, 2.

<sup>291</sup> *ibid*.

<sup>292</sup> Thompson, *Defeating Communist Insurgency*, 52.

<sup>293</sup> *ibid*, 52-3.

rights of the population can be curtailed, and yet still be ‘legal’.<sup>294</sup> However, such measures must be proportionate. Thompson’s work demonstrated how notions about right and wrong were compatible with successful COIN.<sup>295</sup>

Thompson was not unique in this regard, however. David Galula’s *Counterinsurgency Warfare: Theory and Practice* too indicates that there is some relationship between ethics and success in COIN. For example, he argues the importance of restraint in the use of force in COIN. When discussing the adaptation of minds for these conflicts he notes “a soldier fired upon in conventional war who does not fire back with every available weapon would be guilty of a dereliction of his duty; the reverse would be the case in counterinsurgency warfare, where the rule is to apply the minimum of fire”.<sup>296</sup> Here Galula clearly equates notions of proportionality to success in COIN. Elsewhere Galula discusses the need to give fair treatment to surrendered insurgents and informants and the strategic benefits this can have, the importance of protecting the population, and conducting operations “with a minimum of errors and bitterness”.<sup>297</sup>

However, Galula argues that ethical considerations must be considered alongside the importance of victory. The French COIN practitioner saw the morality in terms of victory and the ending of the conflict as swiftly as possible. Hesitation to employ the means that are necessary to win the war are, for Galula, the greater injustice.<sup>298</sup> The counterinsurgent who refuses to conduct operations, or introduce new laws, will “drag the war out without getting closer to victory”.<sup>299</sup> Therefore, we can equate Galula’s focus on ethics in terms of victory and strategic necessity. He does not necessarily equate ethics in line with the strict principles

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<sup>294</sup> D. French, ‘Nasty not Nice: British Counter-insurgency doctrine and practice, 1945-1967’, *Small Wars & Insurgencies*, 23, 4-5 (2012), 744-761: 748.

<sup>295</sup> French, ‘Nasty Not Nice: British Counter-Insurgency Doctrine and Practice’, 745.

<sup>296</sup> Galula, *Counterinsurgency Warfare*, 66.

<sup>297</sup> *ibid*, 86-7.

<sup>298</sup> *ibid*, 53.

<sup>299</sup> *ibid*.

of the Just War Tradition. Instead, it is more in line with strategic necessity. When discussing the limits of COIN measures, he says that it is “a matter of ethics, and a very serious one, but no more than bombing the civilian population in a conventional war”.<sup>300</sup> The counterinsurgent must do what is necessary for victory, and therefore is not entirely bound to the JWT. Elsewhere he argues that support is dependent on “which side gives the best protection, which one threatens the most, which one is likely to win”.<sup>301</sup> It is for this reason, that often “kinetic equipment and tactics” will be employed in counterinsurgency operations, to demonstrate to the population that the counterinsurgent has the means to defeat the insurgency and is therefore fighting to secure the population.<sup>302</sup> However, he does acknowledge that the principles of discrimination and proportionality are important. Therefore, we find some relationship between ethical conduct and effectiveness in counterinsurgency in the counterinsurgency literature.

Roger Trinquier’s *Modern Warfare: A French View of Counterinsurgency*, an often overlooked classical piece of COIN literature, has a complicated lesson concerning the relationship between ethics and COIN. His work demonstrates little concern for restraint in some respects. For him, the role of the army is to win the war it is engaged with no logical constraint.<sup>303</sup> He argues that the defence of a nation is a just cause, and the army should not be questioned in its actions to achieve this.<sup>304</sup> He demands for the population to support the army in its actions. However, his work indicates that notions of justice are important in obtaining the support of the population. The population will only accept the sacrifices of war

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<sup>300</sup> *ibid*, 53.

<sup>301</sup> *ibid*.

<sup>302</sup> P. Cornish, ‘The United States and Counterinsurgency: ‘Political First, Political Last, Political Always’, *International Affairs (Royal Institute of International Affairs)*, 85, 1 (2009), International Order: Politics, Power and Persuasion, 61-79; 67.

<sup>303</sup>R. Trinquier, *Modern Warfare: A French View of Counterinsurgency*, 2<sup>nd</sup> edition (London: Praeger Security International, 2006), 90.

<sup>304</sup> *ibid*, 40.

if it is necessary.<sup>305</sup> Trinquier argues that the population can only be convinced to support the war “in defence of a just cause”.<sup>306</sup> Therefore, we can extrapolate from this piece that justice may indeed be key to victory.

This logic flows into the conduct of the war. Trinquier indicates that unethical conduct can be counterproductive. Harsh actions can easily pass as brutalities among the population, which will play into the hands of the insurgents and their propaganda.<sup>307</sup> He admits that sometimes brutality or fighting the population might be inevitable, but “rigorous discipline must always be enforced to prevent wanton acts”.<sup>308</sup> Wanton acts are detrimental to the counterinsurgency effort and can play into the hands of the insurgent. Therefore, in order to maintain the support of the population in defence of a just cause, there may indeed be some strategic necessity to demonstrate some degree of restraint.

However, we must put limits on this claim. Trinquier was far from a Just War advocate, particularly in terms of the conduct of the conflict. He argues that anyone who favours the objectives of enemy is to be treated as a traitor.<sup>309</sup> Trinquier also advocated the use of terror and torture to break the social elements of the insurgency.<sup>310</sup> He argues that suspects who are not forthcoming with information, must be interrogated by specialists to “force his secret from him” without the presence of a lawyer.<sup>311</sup> Once a confession was obtained, the suspect should “face the suffering” or even death as a punishment.<sup>312</sup> Trinquier’s work complicates the relationship between ethics and counterinsurgency.

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<sup>305</sup> *ibid*, 24.

<sup>306</sup> *ibid*, 41.

<sup>307</sup> *ibid*, 40.

<sup>308</sup> *ibid*.

<sup>309</sup> *ibid*, 23.

<sup>310</sup> I. Arreguin-Toft, ‘Contemporary Asymmetric Conflict Theory in Historical Perspective,’ *Terrorism and Political Violence*, 24, 4 (2012), 635-657: 640.

<sup>311</sup> Trinquier, *Modern Warfare*, 19.

<sup>312</sup> *ibid*.

During the War on Terror, a clear trend in the literature linked ethics to efficacy in COIN in a much more overt way than the classical pieces. Scores of academic literature highlighted the importance of adhering to the principles of *in bello*. Pieces written by US officers presented clear calls for restraint such as “use measured force” and “the more force you use, the less effective you are”.<sup>313</sup> Disproportionate force, which kills civilians, will play into the hands of the insurgent, and make the job of counterinsurgency much harder. Such lessons have permeated into current US COIN Doctrine. *Field Manual 3-24: Insurgencies and Countering Insurgencies* (FM 3-24), an updated version of *Field Manual 3-24: Counterinsurgency* originally published in 2006, clearly states that ethical coin is effective COIN. It argues that counterinsurgents win through increasing their legitimacy, and this is achieved through maintaining “the moral high ground”.<sup>314</sup> To maintain the moral high ground US Doctrine explicitly forbids the use of disproportionate and indiscriminate force, for both ethical *and* strategic reasons.<sup>315</sup> Adherence to *in bello* principles of discrimination, proportionality and non-combatant immunity is internalised within the war-planning and war-fighting doctrine of the US.<sup>316</sup>

The work of David Kilcullen, who helped to write US doctrine, clearly demonstrates a relationship between adherence to the JWT and effectiveness in COIN across a number of pieces. In *the Accidental Guerrilla*, he argues that security forces must conduct operations humanely, and in a manner that minimises non-combatant casualties.<sup>317</sup> However, it is within *Counterinsurgency*, where this relationship becomes most apparent. Within the opening pages Kilcullen establishes the “fundamentals” of counterinsurgency as local solutions and

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<sup>313</sup> Cohen, E. et.al., ‘Principles, Imperatives, and Paradoxes of Counterinsurgency,’ *Military Review*, 86, 2 (2006), 49-53: 51-52

<sup>314</sup> US Department of the Army and USMC, *FM 3-24/MCWP 3-33.5: Insurgencies and Countering Insurgencies*, (Washington DC: Department of the Army, 2014), 1-40

<sup>315</sup> *ibid*, 1-37.

<sup>316</sup> K. Paclischek, ‘The Ethics of Counterinsurgency’, *The New Atlantis*, 23 (2009), 13-24: 20.

<sup>317</sup> *ibid*, 112.

respect for non-combatants.<sup>318</sup> He notes that even if insurgents are being killed effectively, if the level of violence harms the local population then there is “next to no chance” that the counterinsurgent will win their support.<sup>319</sup> Violence against non-combatants, even if unintentional, is “almost entirely counterproductive”.<sup>320</sup> It is not only morally right, but operationally vital.<sup>321</sup> His work argues clearly that there is a relationship between ethical conduct and effectiveness in COIN. Discrimination between combatants and non-combatants is particularly important. Successful counterinsurgents “kill only those active, irreconcilable combatants who must be killed or captured, and where possible they avoid making more insurgents in the process.”<sup>322</sup> For Kilcullen, scrupulous moral conduct is an operational imperative which brings about victory.<sup>323</sup> Therefore, contemporary writers like Kilcullen, emphasise the importance of restraint, and espouse *in bello* principles of discrimination and proportionality in COIN.

Importantly, this position has become increasingly challenged within the literature, indicating a deep division within the COIN literature on strategic ethics. Edward Luttwak challenged this trend in COIN quite strongly, arguing that the emphasis on restraint in COIN has given the upper hand to the insurgents.<sup>324</sup> Luttwak argues that the “easy and reliable way of defeating all insurgencies everywhere” is to out terrorise the insurgents.<sup>325</sup> The US doctrine demonstrates an unwillingness to do what is necessary, and leaves the insurgent in control of the population. Luttwak harks back to Galula’s lesson that the winner in COIN is the one who

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<sup>318</sup> Kilcullen, *Counterinsurgency*, 3.

<sup>319</sup> *ibid.*

<sup>320</sup> *ibid.*

<sup>321</sup> *ibid.*

<sup>322</sup> *ibid.*, 5.

<sup>323</sup> *ibid.*

<sup>324</sup> E.N. Luttwak, ‘Modern War: Counter-Insurgency as Malpractice’, *Politique étrangère*, 4 (2006), 849-861: 861.

<sup>325</sup> *ibid.*, 859-860.



threatens the most.<sup>326</sup> The argument that the successful counterinsurgent must be one that is willing to “out-terrorise” the population is one that has grown in importance over the past decade within the literature, demonstrating a clear divide within the COIN literature on strategic ethics.

New literature has shed light on the reality of these conflicts, and the brutality often required to be successful in this type of conflict. This has particularly been attributed within the literature on British COIN. Typically COIN literature has championed British COIN, emphasising that principles like minimum force which show restraint have been effective in COIN operations.<sup>327</sup> However, there has been a growing rejection of such principles being applied in the reality of British COIN operations. David French’s article ‘Nasty not Nice’ examines British COIN doctrine and practice between 1945 and 1967 and argues that COIN operations were built upon exemplary force and coercion.<sup>328</sup> Bruno Reis’ work argues that the idea that British COIN has reflected minimum force, in reality, is a myth.<sup>329</sup> Instead, success in COIN has come from “a combination of coercion, attraction and control” rather than “minimum force winning hearts and minds”.<sup>330</sup>

British Army Colonel Rigden’s work demonstrates that the reality has been military necessity over any idea of moral restraint. Instead, the British have employed flexible rules of engagement which have allowed for considerably harsh measures to be employed.<sup>331</sup> Theo Farrell’s work on the British War in Afghanistan also indicates that in practice, the much championed ideal of ‘minimum force’ has not been the reality. For example, from 2007 the

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<sup>326</sup> Galula, *Counterinsurgency*, 53.

<sup>327</sup> R. Thornton, “Minimum Force’: a reply to Huw Bennett”, *Small Wars & insurgencies*, 20, 1 (2009), 215-226: 226.

<sup>328</sup> French, ‘Nasty not Nice’, 751.

<sup>329</sup> B.C. Reis, ‘The Myth of British Minimum Force in Counterinsurgency Campaigns during Decolonisation (1945-197)’ *Journal of Strategic Studies*, 34, 2, (2011), 245-279: 272.

<sup>330</sup> *ibid.*

<sup>331</sup> I.A. Rigden, ‘The British Approach to Counterinsurgency: Myths, Realities, and Strategic Challenges’, 222.

British Army and Royal Marines conducted eighteen months of ‘major combat operations’ that relied on significant levels of fire power, killing significant numbers of both insurgents and civilians, which produced strategic gains.<sup>332</sup> Therefore, perhaps there is actually little strategic advantage to having a moral advantage; particularly concerning notions of proportionality and minimum force in COIN operations?

Yet, others like Andrew Mumford have shown, through the examination of several COIN case studies, that there is a clear link between the appropriate use of force and the level of military *and* political strategic success.<sup>333</sup> He admits that the reality of these conflicts means that espoused principles of minimum force have often not been implemented. Nonetheless, his work shows that disproportionate levels of violence “perpetrated cycles of violence and reduce the counter-insurgency campaigns societal support base”.<sup>334</sup> So then, there is a considerable lack of clarity within the COIN literature on the importance of ethics to success in COIN.

Here we arrive at the importance of getting further clarity on the relationship between ethics and COIN. Reis warns that a mistaken belief in restraint in these conflicts creates a “dangerously optimistic” expectation for COIN today.<sup>335</sup> Current British COIN doctrine espouses these ‘lessons’ from previous COIN campaigns. British doctrine equates ethical COIN with effective COIN. It teaches that it is strategically significant how forces are perceived by the population. Collateral damage and unlawful acts have a negative effect on the perception of the population.<sup>336</sup> Therefore, COIN forces must use ‘properly applied

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<sup>332</sup> T. Farrell, *Unwinnable: Britain’s War in Afghanistan 2001-2004* (London: Vintage, 2017) 205.

<sup>333</sup> A. Mumford, *The Counter-Insurgency Myth*, 7.

<sup>334</sup> *ibid*, 60.

<sup>335</sup> *ibid*, 274.

<sup>336</sup> UK Ministry of Defence, *British Army Field Manual Volume 1 Part 10: Countering Insurgency* (Swindon: Development, Concepts and Doctrine Centre: 2009), 3-27.

force', in order to not only gain physical but "moral ascendancy over an adversary".<sup>337</sup>

Soldiers must use the minimum necessary force required, not only because it is morally right, but because it is seen as effective.<sup>338</sup> Without further clarification on the relationship between ethics and COIN, these misunderstood lessons are potentially lethal.

The argument that ethical COIN is effective COIN is challenged within Douglas Porch's *Counterinsurgency: Exposing the Myths of the New Way of War*. He argues that much of the current COIN doctrine is based on "mythologized [sic] history and selective memory".<sup>339</sup>

Often the brutality of these conflicts is ignored within the discussions. Porch's work sheds light on the significant levels of brutality which has often brought success in COIN. These campaigns have often "boiled down to campaigns of counter-terror that included internment without trial, torture, deportation, creating refugee tsunamis, or curfew and concentration camp lockdowns supplemented by calorie control".<sup>340</sup> Far from winning hearts and minds, these campaigns are "heartless and inhumane because they place the crosshairs on the people in a process of escalation inherent in war".<sup>341</sup> He continues, "war crimes have become a normal cost of doing small war business."<sup>342</sup> Current COIN doctrine and principles does not reflect the contemporary literature. Porch argues that doctrine currently does not reflect the reality of COIN operations in the past, and what has been required to succeed, and instead success has been presented in a self-serving and mythologised manner.<sup>343</sup> Therefore, there is a need for further research in COIN, which seeks out the reality of this type of conflict. False

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<sup>337</sup> UK Ministry of Defence, *Army Doctrine Publication: Land Operations* (Warminster: Land Warfare Development Centre, 2017), Chapter 3, Paragraph 6.

<sup>338</sup> R. Thornton, 'The British Army and the Origins of its Minimum Force Philosophy', *Small Wars & Insurgencies*, 15, 1 (2004), 83-106: 100.

<sup>339</sup> D. Porch, *Counterinsurgency: Exposing the Myths of the New Way of War* (Cambridge: Cambridge University Press, 2013), 344.

<sup>340</sup> *ibid*, 328.

<sup>341</sup> *ibid*, 327.

<sup>342</sup> *ibid*.

<sup>343</sup> *ibid*, 332-335.

assertions of COIN success, which can influence doctrine, and lead to strategic failure.<sup>344</sup>

Therefore, further examination into COIN strategy is required, to determine the reality of strategic ethics and success in COIN.

### COIN Doctrine and Strategic Ethics

The question concerning ethics and efficacy is not solely an academic endeavour. Strategic ethics is found within COIN doctrine. Doctrinal pieces are useful sources when examining how counterinsurgents approach COIN as they provide a vital link between theory and practice.<sup>345</sup> Doctrine provides guidelines which inform armed forces how to contribute to conflicts.<sup>346</sup> It aims at explaining clearly what means are required in strategy, and how those means should be employed.<sup>347</sup> The generalised and flexible rules within doctrine are built upon rigorous analysis and should hold true.<sup>348</sup> Good doctrine should not be “driven by changes in fashion”, in order to provide soundbites.<sup>349</sup> Therefore, doctrinal pieces are authoritative documents which guide changes and provide principles for action, and is an important primary source.<sup>350</sup>

Importantly, there is no universal doctrine on COIN. Culture shapes the process of strategy-making and its execution.<sup>351</sup> The politics, the history, the ethical tradition of an actor influences how it conducts strategy, and this culture permeates into how it approaches

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<sup>344</sup> *ibid*, 337.

<sup>345</sup> G. Sloan, ‘Military doctrine, command philosophy and the generation of fighting power: genesis and theory’, *International Affairs*, 88, 2 (2012), 243-263: 243-246.

<sup>346</sup> K.W. Eikenberry, ‘The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN’, *Foreign Affairs*, 92, 5 (2013), 59-62, 64-74: 60.

<sup>347</sup> B. Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* (London: Cornell University Press, 1984), 13.

<sup>348</sup> A. Alderson, ‘Revising the British Army’s Counter-Insurgency Doctrine’, *The RUSI Journal*, 152, 4 (2007), 6-11: 7.

<sup>349</sup> *ibid*.

<sup>350</sup> J. Nisser, ‘Implementing military doctrine: a theoretical model’, *Comparative Strategy*, 40, 3 (2021): 305-314: 306.

<sup>351</sup> Gray, *Modern Strategy*, 135.

counterinsurgency. For example, authoritarian COIN differs from western-liberal COIN. The approach between western forces differs also. Attention was given to the unsuitability of the 'British Way' for 'American' COIN in the literature in the early part of this century.<sup>352</sup> It is therefore important to focus the review on those pieces which are relevant to this work. Examining authoritarian COIN doctrine, for example, would shed little light into how a western liberal country conducted COIN. Similarly, it would not be suitable to examine current COIN doctrine in order to understand how classical COIN campaigns were conducted, because doctrine reflects the approaches adopted at a specific time for a specific conflict.<sup>353</sup> Therefore, this review will focus on British and American doctrine in Malaya, Kenya, and Vietnam.

French doctrine did not exist in a similar way to British and American Field Manuals which guided action,<sup>354</sup> and therefore has been omitted from this section. Galula commented on this when reflecting on his experience in Algeria. "In spite of all our past experience, we had no single, official doctrine for counterinsurgency warfare. Instead, there were various schools of thought, all unofficial, some highly vociferous".<sup>355</sup> Instead, French officers had the freedom to adapt the tactical and strategic level to their best practice. French theorists, such as Galula and Trinquier, developed theories based on their own experiences, and they are discussed elsewhere in this thesis. Galula's work is not necessarily French doctrine because it was

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<sup>352</sup> See: W. Chin, 'Examining the Application of British Counterinsurgency Doctrine by the American Army in Iraq', *Small Wars & Insurgencies*, 18, 1(2007), 1-26; J.K. Wither, 'Basra's not Belfast: the British Army, 'Small Wars' and Iraq', *Small Wars & Insurgencies*, 20, 3-4(2009), 611-635. For discussions on the history of the 'British way in COIN' see: D. French, *The British Way in Counter-Insurgency, 1945-1967* (Oxford: Oxford University Press, 2011), A. Mumford, *The Counter-Insurgency Myth: The British Experience of Irregular Warfare* (Oxon: Routledge, 2012), 14-37, I.A. Rigden, 'The British Approach to Counterinsurgency: Myths, Realities, and Strategic Challenges', in H.R. Yarger (ed.) *Short of General War: Perspectives on the Use of Military Power in the 21<sup>st</sup> Century* (Pennsylvania: Strategic Studies Institute, 2010) 207-230.

<sup>353</sup> J. Lider, 'Introduction to Military Theory', *Cooperation and Conflict*, 15, 3(1980), 151-168: 162.

<sup>354</sup> See: S. Taillat, 'National Traditions and International Context: French Adaptation to Counterinsurgency in the 21<sup>st</sup> Century', *Security Challenges*, 2010, 6 (2010), 85-96.

<sup>355</sup> D. Galula, *Pacification in Algeria: 1956-1958* (London: RAND, 2006).

largely ignored in France until it was published in French in the early 2000s. Therefore, the focus on this section of the review is on British and American doctrinal pieces.

Examination of COIN doctrine relating to the successful cases in this thesis shows that little attention was given to strategic ethics. Ethical considerations did occur within the literature, however there were no overt claims that ethical or unethical conduct was strategically important. *The Conduct of Anti-Terrorist Operations in Malaya* (ATOM) was the ‘soldier’s bible’ in Malaya, as it guided all security forces on how to handle the situation in Malaya. It was updated three times during the Emergency, and Templar credited it as one of the major reasons that the insurgency was defeated in Malaya.<sup>356</sup> ATOM was adapted into a manual for Kenya and published as *A Handbook on Anti-Mau Mau Operations* (AMMO).

Examination of both ATOM and AMMO demonstrates that minimal attention was given to the strategic utility from ethical conduct compared to current COIN doctrine. There is, for example, nothing akin to current doctrine which argues that having a moral high ground is a force multiplier.<sup>357</sup> However, there are limits which overlap with *in bello* principles, and demonstrate restraint.

ATOM clearly establishes a principle of discrimination; from minor operations to naval and aerial bombardment.<sup>358</sup> Emergency Regulation (ER) 28 establishes clearly that lethal weapons are to be used in self-defence against *armed* insurgents and as a last resort.<sup>359</sup> In both pieces, restrictions on air power and artillery are introduced to make sure that civilians are not in the vicinity of bombing. In AMMO, strict rules on the use of airpower were

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<sup>356</sup> J. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (London: University of Chicago Press, 2005), 98.

<sup>357</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 1-40.

<sup>358</sup> Director of Operations, Malaya, *The Conduct of Anti-Terrorist Operations in Malaya*, (3rd edition)(n.l.: n.p, 1958), Chapter 3, Section 7, Paragraph 5ci-iii.

<sup>359</sup> *ibid*, Chapter 4, Section 2, Paragraph 14.

introduced, such as the use of airpower only in special areas, and elsewhere under the ‘Mushroom Procedure’. Under this procedure there was to be no indiscriminate bombing, no foreseeable danger of injury to “innocent persons”, and the commander on the ground must only use a degree of force which is “necessary” to achieve the operation.<sup>360</sup> In Malaya, police clearance was required before undertaking an operation, to “ensure that no innocent person is killed or injured and no lawful habitation or property is destroyed or damaged” due to the COIN operation.<sup>361</sup> When clearance has been given, this means that the police have deemed that there are no civilians in that area “to the best of their knowledge”, but this “does not mean that [security forces] can shoot on sight any person found in an area which has been so cleared”.<sup>362</sup> Similarly, AMMO introduces different Operational Areas with different rules on opening fire, demonstrating discrimination.<sup>363</sup> Therefore, examination of British classic COIN doctrine demonstrates *some* degree of understanding of the importance of ethically conducting these operations.

It would be too far to argue that ATOM and AMMO overtly equates ethical conduct with effective COIN as found in current British COIN doctrine.<sup>364</sup> Notably, the doctrinal pieces do note the effectiveness of large amounts of fire power, in damaging insurgent moral and increasing the chances of killing the insurgents.<sup>365</sup> However, importantly, these handbooks do highlight a potential correlation between discrimination and proportionality in the conduct of these operations *and* defeating the insurgent. Both are aimed at effectively defeating an insurgency, based on experience, and both espouse the importance of restraint.

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<sup>360</sup> Commander in Chief, Kenya, *A Handbook on Anti-Mau Mau Operations* (Nairobi: Government Printer, 1954), Chapter 14, Section 2, Paragraph 13.

<sup>361</sup> Director of Operations, Malaya, *The Conduct of Anti-Terrorist Operations in Malaya*, Chapter 3, Section 7, Paragraph b.

<sup>362</sup> *ibid*, paragraph e.

<sup>363</sup> Commander in Chief, Kenya, *A Handbook on Anti-Mau Mau Operations*, Chapter 5, Section 3.

<sup>364</sup> UK Ministry of Defence, *Army Doctrine Publication: Operations*, Chapter 3, Paragraph 6.

<sup>365</sup> Director of Operations, Malaya, *The Conduct of Anti-Terrorist Operations in Malaya*, Chapter 18.

US attention on COIN increased significantly in the 1960s in response to the Vietnam War. In 1962, National Security Action Memorandum (NSAM) 182 was published which outlined US counterinsurgency doctrine.<sup>366</sup> NSAM 182 provided a framework for the US Army and Marine Corps to develop their doctrinal pieces. In 1962, Field Manual (FM) 100-5, *Field Service Regulations, Operations* was published. FM 100-5 was intended to act as a guide for all levels of command. Importantly, it indicated a correlation between restraint and effectiveness. It states that “excessive force” and “violation of the rules of warfare” alienates the population, making operations more difficult.<sup>367</sup> When FM 100-5 was updated in 1968, it stated that excessive force made operations “less effective” and “the attainment of U.S. objectives more difficult”.<sup>368</sup>

US COIN doctrine attributed success to winning the support of the population.<sup>369</sup> By the end of the 1960s, doctrine made a clear beneficial correlation between ethical conduct and the ability to maintain the support of the population. First published in 1963, the 1967 publication FM 31-16, *Counter guerrilla Operations*, clearly espoused strategic ethics in COIN.

Military operations must take into account protection of the civilian population...Bringing artillery or airpower to bear on a town from which sniper fire was received may neutralize the guerrilla action, but it will almost certainly alienate the civilian population as a result of casualties among noncombatants [sic].<sup>370</sup>

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<sup>366</sup> The White House, *National Security Action Memorandum No. 182, Counterinsurgency Doctrine*, August 24, 1962 (Washington D.C.: Department of State).

<sup>367</sup> US Department of the Army, *FM 100-5: Field Service Regulations, Operations* (Washington DC: Department of the Army, 1962), 129

<sup>368</sup> US Department of the Army, *FM 100-5: Operations of Army Forces in the field* (Washington DC: Department of the Army, 1968), 11-9

<sup>369</sup> US Department of the Army, *FM 100-5: Field Service Regulations, Operations, 1962*, 140

<sup>370</sup> US Department of the Army, *FM 31-16: Counter guerrilla Operations* (Washington DC: Department of the Army, 1967), 36



Elsewhere the 1967 publication argues that artillery must also be discriminate, so to avoid non-combatant casualties “which would alienate the population and intensify possible hostile attitudes toward U.S. units”.<sup>371</sup> These observations were not present in the 1963 publication of FM 31-16.<sup>372</sup> This indicates that the lessons learnt in Vietnam, reflected in the updated doctrine,<sup>373</sup> taught the US that effective COIN was ethical.

Therefore, examination of COIN doctrine pertinent to the cases within this work, demonstrates that ethics may have some strategic utility. However, the correlation between these elements is often not clear. They must be drawn out by looking through a lens. In the British COIN doctrine, these elements are not as overtly stated as in the US doctrine, and the relationship must be inferred. Importantly, doctrine can only provide some understanding of the approach to COIN by countries. US COIN doctrine from the early 1960s was largely ignored in Vietnam.<sup>374</sup> Doctrine was more closely followed in 1968, but it still faced some opposition.<sup>375</sup> Therefore, although this relationship is found within the doctrine, further examination of these cases is needed to determine whether the reality reflects the lessons of COIN doctrine; that ethical COIN is effective COIN.

### Conclusions of the Review

The three clades of literature reviewed demonstrates that there is a potential relationship between ethics and effectiveness in COIN. This position is established in the literature on the just war tradition and the strategic literature. However, strategic ethics remains an underexplored subject. Further development in the understanding of the relationship between

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<sup>371</sup> *ibid*, 71.

<sup>372</sup> US Department of the Army, *FM 31-16: Counter guerrilla Operations* (Washington DC: Department of the Army, 1963)

<sup>373</sup> A. Long, *Doctrine of Eternal Recurrence: The U.S. Military and Counterinsurgency Doctrine, 1960-1970 and 2003-3006* (RAND: California, 2008) 16-18

<sup>374</sup> *ibid*, 12.

<sup>375</sup> *ibid*, 17-19.

ethics and COIN is required to help clarify the relationship between ethics and effectiveness. This relationship, as shown above, is contested within the literature. The literature is divided into those that see ethical conduct as being strategically important in COIN, and those who do not. Instead, the latter argue that to be effective COIN is more brutal and push the limits of what is often perceived as being acceptable.

Therefore, this thesis will provide greater clarity on the complex relationship between strategic ethics and success in counterinsurgency operations, and the debate within the literature. This difference in the literature matters not only academically, but in practical matters. If the classical literature is wrong, and these lessons permeate COIN doctrine, then counterinsurgent forces will be sent ill-equipped to deal with the realities of this type of conflict. This makes a thesis examining the relationship between strategic ethics and counterinsurgency vital to strategic studies.

### **Chapter Three: The Malayan Emergency**

The Malayan Emergency began in 1948 and lasted until 1960. The 12-year conflict pitted British led security forces against a communist insurgency, ran by the Malayan Communist Party (MCP) and conducted by the Malayan National Liberation Army (MNLA). By 1955, the back of the insurgency had been broken by the British, and following elections held in 1955, violence had effectively stopped. From 1956, British security forces were withdrawn, and on 31 August 1957 independence was granted to Malaya. The State of Emergency was not fully withdrawn until 31 July 1960.<sup>376</sup> The war cost the lives of 6,711 insurgents, 2,473 civilians, and 1,865 security forces (police and military).<sup>377</sup> The Malayan Emergency is often held up as the golden example of counterinsurgency, which all others are compared to. Overall, it was judged to be a slightly just war. Examination of the literature on the Emergency indicates that Britain moderately met the requirements of both *jus ad bellum* and *in bello*. The following will first examine the justifications to go to war, and then the conduct of the war.

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<sup>376</sup> J. Newsinger, *British Counterinsurgency: From Palestine to Northern Ireland* (Hampshire: Palgrave, 2002), 58.

<sup>377</sup> R. Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 2<sup>nd</sup> edition (Singapore: Graham Brash (Pte) Ltd., 1984), 188.

## The Malayan Emergency: Jus ad Bellum index

### Just Cause

The British declared the emergency in response to growing unrest and violence, caused by communist aggression in Malaya, giving them a moderately just cause. From its creation in 1930, the MCP had stated its main aim was the creation of “a Soviet Republic of Malaya”.<sup>378</sup> From 1946, the MCP initiated a period of disruption and subversion. The communists tried to monopolise the trade unions in Malaya, and by the end of 1947, it controlled 200 of the 277 registered trade unions.<sup>379</sup> Widespread strikes, and labour unrest spread across the country. In 1947 the rubber and tin industries were affected by over three hundred strikes”.<sup>380</sup> This was particularly troubling for the British as these vital industries were beginning to recover after the war.<sup>381</sup> These strikes were part of the first phase of the MCP’s plan to remove the British from Malaya, beginning with industrial unrest.<sup>382</sup> By 1948, labour unrest had failed to remove the British from Malaya, and the MCP turned to violence.

By March 1948 the MCP Communists believed that they could not succeed “by peaceful means and they therefore sought to embarrass the Government by a more violent programme

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<sup>378</sup> D. Ucko, ‘The Malayan Emergency: The Legacy and Relevance of a Counter-Insurgency Success story’, *Defence Studies*, 10, 1-2 (2010), 13-39: 15.

<sup>379</sup> R. Jackson, *The Malayan Emergency: The Commonwealth’s Wars 1948-1966* (London: Routledge, 1991), 12.

<sup>380</sup> H. Miller, *Jungle War in Malaya: The Campaign Against Communism* (London: Arthur Baker Limited, 1972), 34.

<sup>381</sup> R. Stubbs, *Hearts and Minds in Guerrilla Warfare: The Malayan Emergency 1948-1960* (Oxford University Press: 1989) 21.

In May 1948 unrest had reached new heights, 179,539 man-days were lost due to strikes, whereas 12,773 man-days had been lost the previous month; see: I. Morrison, ‘The Communist Uprising in Malaya’, *Far Eastern Survey*, 17, 24 (1948), 281-285: 284.

<sup>382</sup> T.N. Harper, *The End of Empire and the Making of Malaya* (Cambridge: Cambridge University Press, 1999) 144.

of labour unrest and open terrorism”.<sup>383</sup> From April 1948 strikes became more violent, the population were intimidated, and numerous people murdered.<sup>384</sup>

In April 1948, MCP leaders compiled lists of Chinese-Malays who had fought against the Japanese during the Second World War, in readiness for a call up, and formed guerrilla groups; creating the Malayan People’s Anti-British Army, which would eventually evolve into the Malayan National Liberation Army (MNLA) in 1949. On 10 May 1948, the MCP held a committee meeting in Singapore, which confirmed that “without resolute action, concerted struggle and the use of violence when necessary” the British could not be repelled and victory would not be achieved.<sup>385</sup> By mid-1948, it became clear to the British authorities that the MCP had made efforts to transition from phase two, widespread terrorism, to phase three; armed revolution. Violence increased across Malaya.

Of the 298 murders and abductions that took place between 1 October 1945 and the beginning of the insurgency, one third took place in the first six months of 1948.<sup>386</sup> Hack’s work provides a higher figure, but a similar pattern, “murder incidents had fallen from 1946 to 1947 (from a yearly 421 to 220) but in 1948, they shot up to 470, almost entirely due to a surge in and after April”.<sup>387</sup> The communists had become a serious threat to the security of the Malayan population by 1948.

The increasing violence put the government under greater pressure to act. Miller remarks that in the first few months of 1948 “there was a rising tide of resentment against the apparent disinclination of Sir Edward Gent, then the High Commissioner, to take stern action against

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<sup>383</sup> F. Mellersh, ‘The Campaign against the Terrorists in Malaya’, *Royal United Services Institution Journal*, 96, 583 (1951), 401-415: 402.

<sup>384</sup> K. Hack, ‘The Origins of the Asian Cold War: Malaya 1948’, *Journal of Southeast Asian Studies*, 40, 3 (2009), 471-496: 471.

<sup>385</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 60-61.

<sup>386</sup> Thompson, *Defeating Communist Insurgency*, 26-27.

<sup>387</sup> Hack, ‘Origins of the Asian Cold War’, 471-472.

the party and its leaders”.<sup>388</sup> These calls to action became ever louder, as murders continued across the country; particularly in June. Following the murder of three European planters, in two separate attacks, and two Chinese labourers, on 16 June Gent took action to establish law and order in Malaya. An emergency declaration was made for certain areas of Perak and Johore, extending the emergency to the whole of these areas on 18 June. This declaration of the Emergency was made in response to insurgent aggression, and in order to protect the rights of the Malay people. Stubbs supports this, stating that “the increasing use of violence by a number of communist guerrilla groups resulted in mounting pressure on the Malayan Government to take decisive, *retaliatory* action”.<sup>389</sup> Therefore, the emergency was declared in response to communist aggression, and the violations of the rights of the Malay population; and therefore, a score of +3 is suitable.

### Right Intention

Right intention demands that a state can only go to war when it is aimed at preventing or correcting an injustice, and in the pursuit of a just cause.<sup>390</sup> Determining the interests of an actor is inherently difficult, but it can be determined by avowals of intent and their actions. The evidence indicates that the British showed a good degree of right intention when they declared the Emergency in Malaya as it sought to restore law and order, prior to granting Malaya independence.

Without law and order, the British government would not grant independence to Malaya.<sup>391</sup> Specifically, the British government had stated that independence could only be given to

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<sup>388</sup> H. Miller, *Menace in Malaya* (London: George C. Harrap & Co. Ltd., 1954), 77.

<sup>389</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 61.

<sup>390</sup> Frowe, *The Ethics of War and Peace*, 60.

<sup>391</sup> T.T. Yong, ‘The “Grand Design”: British Policy, Local Politics, and the Making of Malaysia, 1955-1961’ in M. Frey et.al. (eds) *The Transformation of Southeast Asia: International Perspectives on Decolonization* (London: M.E. Sharpe, 2003), 142-160: 146, and A. Benvenuti, *Cold War and Decolonisation* (Singapore: NUS Press, 2017), 32.

Malaya when the communists had been completely defeated.<sup>392</sup> In the House of Commons, in 1949, Attlee made the intentions of the emergency clear:

The purpose of our policy is simple. We are working, in co-operation with the citizens of the Federation of Malaya and Singapore, to guide them to responsible self-government within the Commonwealth. We have no intention of jeopardising the security, well-being and liberty of these peoples, for whom Britain has responsibilities, by premature withdrawal.<sup>393</sup>

The driving intention behind declaring the emergency was built upon securing Malaya, prior to granting of independence, which is in line with the just cause. The British viewed the insurgency as a question of restoring law and order, and the intention was based on this; in line with the historic function of Britain within the region.<sup>394</sup>

Britain also had other interests behind the decision to declare the emergency, to maintain security in Malaya to bolster the British economy. Malaya was integral to the economic security of post-war Britain. By 1947, Malayan rubber had become one of the Empire's greatest earners.<sup>395</sup> Britain had good reason to maintain security and stability within that region, as it was vital to the British economy.<sup>396</sup> This is particularly the case in the post-war period.<sup>397</sup> The loss of Malaya, or an interruption of trade from Malaya, would have seriously

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<sup>392</sup> J.P. Ongkili, *Nation Building in Malaysia 1946-1974* (Oxford: Oxford University Press, 1985), 81 and Newsinger, *British Counterinsurgency*, 41-2.

<sup>393</sup> *HC Deb 13 April 1949*, vol 463, col 2815. Available online: <https://hansard.parliament.uk/Commons/1949-04-13/debates/f1976ddd-f2f2-4cd0-8f13-5d0ea86a5513/BritishGovernmentPolicy> [Accessed: 06/03/2021].

<sup>394</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 66.

<sup>395</sup> Mumford, *The Counterinsurgency Myth*, 26.

<sup>396</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 18.

<sup>397</sup> *ibid.*

damaged the economy of the United Kingdom; particularly when Britain was facing a financial crisis.<sup>398</sup>

However, secondary interests do not negate the fact that Britain declared the emergency in line with the cause of rights vindication. In a report from Colonial Secretary Jones, which lays out the purpose and efforts established by the Emergency, the measures taken were to “restore law and order in the settled areas of the territory and to maintain the economic life of the country and restore morale”.<sup>399</sup> This desire to secure the country prior to independence was continually affirmed within government reports during the war.<sup>400</sup> The evidence then demonstrates that Britain’s intention was constant during the conflict, and therefore he that the was real and present<sup>401</sup> Therefore, Britain’s intention in Malaya was moderately just; a score of +2 is suitable.

### Public Declaration of War

In Malaya, like all the other cases in this work, war was never publicly declared against the insurgents. Instead, following the increase in violence in Malaya, the British declared a state of emergency. An Emergency denotes a legal regime, whereby public institutions are given ‘extraordinary powers’ to address threats to public order.<sup>402</sup> These threats can range from, but are not limited to, foreign military intervention and insurrection, political or civil unrest and

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<sup>398</sup> P. Deery, ‘Malaya, 1948, Britain’s Asian Cold War?’, *Journal of Cold War Studies*, 9, 1 (2007), 29-54: 37.

<sup>399</sup> A.C. Jones, *The Situation in Malaya, Memorandum by the Secretary of the Colonies, 1st July 1948*. CP (48) 171. Paragraph 17. Available online:

<https://discovery.nationalarchives.gov.uk/details/r/D7655447> [Accessed 24/03/2022].

<sup>400</sup> A. Lennox-Boyd, *Malaya: Review of the Situation, Memorandum by the Secretary of the Colonies, 6<sup>th</sup> April 1955*. C (55) 94. Available online:

<https://discovery.nationalarchives.gov.uk/details/r/D7657756> [Accessed 24/03/2022]; O. Lyttleton, *The Situation in Malaya, Memorandum by the Secretary of State for the Colonies, 20<sup>th</sup> November 1951*. C (51) 26. 100. Available online: <https://discovery.nationalarchives.gov.uk/details/r/D7656447> [Accessed 24/03/2022].

<sup>401</sup> Orend, *The Morality of War*, 49.

<sup>402</sup>E.J. Criddle & E. Fox-Decent, ‘Human Rights, Emergencies, and the Rule of Law’, *Human Rights Quarterly*, 34, 1 (2012), 39-87: 44-45.



terrorism.<sup>403</sup> They can be a justifiable response to a “serious, ongoing, internal armed struggle”.<sup>404</sup> Beginning on the 16 June 1948 in Perak and Johore, the emergency was extended, two days later, to the whole of Malaya.

The overriding decision to not declare the war a civil war, or a war, was both economic and strategic. Insurance rates covered losses of stocks and equipment in an emergency, but not in a civil war.<sup>405</sup> Any losses caused, if the emergency was classed as a war, would mean that the “cash-strapped” Attlee government would be forced to pay for damages.<sup>406</sup> Strategically, the use of the term ‘emergency’ was a “public relations concept”, even though in reality it was a colonial war. Furedi explains that “it had the advantage of allowing Britain to adopt wide-ranging coercive powers while maintaining the pretence of normal civil rule”.<sup>407</sup> Ultimately, then, the decision to not declare a war was done with the aim of maintaining the government’s legitimacy.

Mumford notes that Malaya presents an excellent case for analysing counterinsurgency language.<sup>408</sup> For instance, because the British were not fighting a ‘war’, the British could class the enemy as something other than combatants. MRLA insurgents were initially classed as ‘bandits’, “a politicised epithet implying lawlessness, illegitimacy and a lack of popular support”.<sup>409</sup> The insurgents also became known as ‘Communist Terrorists’(CT) to help contextualise the insurgency in the Cold War. Branding the insurgents as terrorists, meant

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<sup>403</sup> *ibid.*

<sup>404</sup> S. Miller, ‘Just War Theory and Counterterrorism’, in F. Allhoff, et.al (eds.) *Routledge Handbook of Ethics and War: Just War Theory and the Twenty-First Century* (London: Routledge, 2013) 226-235: 227.

<sup>405</sup> *ibid.*

<sup>406</sup> P. Deery, ‘The Terminology of Terrorism: Malaya. 1948-1952’, *Journal of Southeast Asian Studies*, 34, 2 (2003), 231-247: 237.

<sup>407</sup> F. Furedi, ‘Creating a Breathing Space: The Political Management of Colonial Emergencies’, *The Journal of Imperial and Commonwealth History*, 21, 3 (1993), 89-106: 94.

<sup>408</sup> Mumford, *The Counterinsurgency Myth*, 29.

<sup>409</sup> *ibid.*, 29: Eventually, ‘Bandits’ was replaced with CT or Communist Terrorists, which helped to contextualise the MCP in the wider Cold War.

that the insurgents were “not dignified with the status of belligerents: they were criminals, to be regarded as such by the general public and treated as such by the authorities”.<sup>410</sup> Howard warns, writing in the backdrop of the Global War on Terror, “to declare war on terrorists or, even more illiterately, on terrorism is at once to accord terrorists a status and dignity that they seek and that they do not deserve. It confers on them a kind of legitimacy.”<sup>411</sup> Therefore, there was a deliberate reason as to why an emergency was declared, and not a war; to try and help bolster the legitimacy of the counterinsurgent.<sup>412</sup>

Importantly, the government formally *declared* the emergency. The purpose of declaring a war, is several fold, but one of the major aspects is to alert one’s own population to the government’s intentions and plans.<sup>413</sup> A declaration of the Emergency powers, “ensures that the public has an opportunity to understand their legal rights and participate in shaping the state’s response to the crisis at hand”.<sup>414</sup> Importantly, the government must not be cryptic or deceitful in the language used.<sup>415</sup> The evidence indicates that the British were not cryptic in their declaration. On 17 June 1948, Gent made a public declaration, stating the rules of the emergency, including the death penalty for the unlawful possession of arms, the power of detention, the search of properties without warrants, and the power to occupy properties.<sup>416</sup> By formally declaring an Emergency, then one is making clear to the population that the pre-existing order has been disrupted.<sup>417</sup> Therefore, although the Malayan Emergency was not labelled a war, the evidence indicates that Britain sufficiently met the requirements of this principle, and a score of +2 is suitable.

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<sup>410</sup> M. Howard, ‘What’s in a Name? How to Fight Terrorism’, *Foreign Affairs*, 81, 1 (2002), 8-13: 8.

<sup>411</sup> *ibid.*

<sup>412</sup> Nagl, *Learning to Eat Soup with a Knife*, 63.

<sup>413</sup> Orend, *The Morality of War*, 52.

<sup>414</sup> Criddle & Fox-Decent, ‘Human Rights, Emergencies, and the Rule of Law’, 65.

<sup>415</sup> *ibid.*

<sup>416</sup> Nagl, *Learning to Eat Soup with a Knife*, 63.

<sup>417</sup> B. Anderson, ‘Emergency/Everyday’ in J. Burges and A.J. Elias (eds) *Time: A Vocabulary of the Past* (New York: NYU Press) 178-191: 179.

## Legitimate Authority

The evidence indicates that Britain was at least a slightly to moderately legitimate authority. Internationally, British rule in Malaya was accepted and not directly Challenged. The traditionally anti-colonial United States did not challenge the British claim to return to Malaya after the war.<sup>418</sup> In addition to this, there was no overt demonstration or challenge to the decision to declare the Emergency. There is little evidence to suggest that communist nations, including China, supported the MCP, or directly challenged the declaration.<sup>419</sup> Consequently then, it can be accepted that British rule in Malaya was accepted internationally as legitimate. Therefore, the following section will predominantly focus on two of Orend's principles of a minimally just state; first, being recognised as legitimate domestically and second, making every reasonable effort to satisfy the human rights of the population.<sup>420</sup> Both of which, Britain generally met.

## Legitimate Authority: Domestic Support

The degree to which Britain was legitimate in Malaya is complicated. Post-war policy in Malaya aimed at stabilising the country through the common practice of regional consolidation.<sup>421</sup> Regional consolidation was the "first step towards the independence of the nation as a whole".<sup>422</sup> In Malaya this took the form of the Malayan Union. Before the war Malaya was organised as nine separate states ruled by sultans. The Malayan Union would unite all of the nine Malay states with Malacca and Penang into one colony; excluding

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<sup>418</sup> R.J. McMahon, *The Limits of Empire* (New York: Columbia University Press: 1999), 27.

<sup>419</sup> Mumford, *The Counterinsurgency Myth*, 46.

<sup>420</sup> Orend, *The Morality of War*, 38.

<sup>421</sup> A.J. Stockwell, 'Insurgency and Decolonisation during the Malayan Emergency', *The Journal of Commonwealth & Comparative Politics*, 25,1 (1987), 71-81:73 and A.J. Christopher, 'Decolonisation without independence', *GeoJournal*, 56, 3 (2002), 213-224: 215.

<sup>422</sup> Jackson, *The Malayan Emergency*, 10.

Singapore as a separate entity.<sup>423</sup> Importantly, the new agreements meant that the British would possess and exercise full jurisdiction across Malaya.<sup>424</sup>

The Union policy caused resentment among the Malay population, resulting in the creation of the United Malays National Organisations (UMNO).<sup>425</sup> The UMNO became a relatively powerful movement and was supported by influential members of the Malayan Civil Service and became a major political player in Malaya.<sup>426</sup> Britain placated Malay opposition by introducing the Malayan Federation. The Federation still unified the Malay states under one commissioner, but it allowed the local sultans to retain their sovereignty.<sup>427</sup> Britain, however, would still control issues like trade, policy, and defence.<sup>428</sup> Britain was still the protector of Malaya, and “the traditional Malay elite still looked upon the British administration as their best guardian in an uncertain world”.<sup>429</sup> The Malayan Union policy may have tarnished the British legitimacy in the eyes of the Malay population, however, it would be too far to suggest that Britain was seen as illegitimate among the Malays. According to a report by the Colonial Secretary, Malay opposition was focused on the Union policy, and not British rule. Instead, the Malay population was largely satisfied and played little role in the violence.<sup>430</sup> Therefore, Britain was largely seen as legitimate among the Malay population.

Another key segment of Malayan society was the Chinese population. Making up a considerable proportion of the population, by 1948 they remained socially and politically

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<sup>423</sup> K. Hack, ‘Detention, Deportation and Resettlement: British Counterinsurgency and Malaya’s Rural Chinese, 1948-60’, *The Journal Imperial and Commonwealth History*, 43,4 (2015), 611-640: 612.

<sup>424</sup> C.B. Kheng, *Red Star over Malaya* (Singapore: NUS Press, 2012), 274.

<sup>425</sup> A.J. Stockwell, ‘The Formation and First Years of the United Malays National Organization (U.M.N.O.) 1946-1948’, *Modern Asian Studies*, 11, 4 (1977), 481-513: 488.

<sup>426</sup> M.R. Stenson, ‘The Malayan Union and Historians’, *Journal of Southeast Asian History*, 19, 2 (1969), 344-354: 345.

<sup>427</sup> K. Hack, ‘Detention, Deportation and Resettlement’, 612.

<sup>428</sup> Ucko, ‘Counterinsurgency as armed reform’, 450.

<sup>429</sup> Stockwell, ‘The Formation and First Years of the United Malays National Organisation’, 510.

<sup>430</sup> Jones, *The Situation in Malaya, 01 July 1948*, Paragraph 8.

ostracised.<sup>431</sup> The Malayan Union would have benefitted the Chinese population, by giving a considerable number citizenship and more stake in the country.<sup>432</sup> However, the Malayan Federation retracted this offer of citizenship. The reduction in the number of Chinese who would be eligible for citizenship, meant many were disenfranchised, which resulted in resentment; particularly as the Chinese paid more income tax than any other group.<sup>433</sup> The exclusion of around one million Chinese from the political process “immediately” provoked large-scale industrial unrest and subversion by the Malayan Communist Party, against British rule.<sup>434</sup>

Many Chinese inhabitants of Malaya saw little reason to support the government, and the British, and so turned to communism, as a “viable alternative that would better support Chinese interests.”<sup>435</sup> The mass of the Chinese and Indian populations, “although perhaps not in a very revolutionary mood by 1948, owed no positive loyalty to the British economic and administrative regime in the guise of the new Federation of Malaya.”<sup>436</sup> Therefore, the degree to which the British were seen as legitimate among the Chinese population is questionable, at best.

One important group within the Chinese community, to comment on in terms of legitimacy, is the Chinese squatters. The squatters were a group of 500,000 Chinese Malaysians who were forced off their lands by the Japanese and established settlements in the Jungles.<sup>437</sup> They held no title to the lands they farmed, and were not citizens, and therefore “they had little incentive

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<sup>431</sup> Mumford, *The Counter-Insurgency Myth: The British Experience of Irregular Warfare*, 26.

<sup>432</sup> Kheng, *Red Star over Malaya*, 286-287.

<sup>433</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 35.

<sup>434</sup> A. Edwards, *Defending the Realm? The Politics of Britain's Small Wars Since 1945* (Manchester: Manchester University Press, 2012), 62.

<sup>435</sup> C. Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 53.

<sup>436</sup> Stenson, 'The Malayan Union and Historians', 353.

<sup>437</sup> Ucko, 'Counterinsurgency as Armed Reform', 453.

to support the government.”<sup>438</sup> The rural Chinese in Malaya “constituted a state without a state”<sup>439</sup> and were the centre of gravity for the Communist insurgency.<sup>440</sup>

The squatters had developed close ties to the communists during the second world war. The Chinese squatters “felt extra-proud of being Chinese. They realised that freedom was a thing worth fighting for and for the first time they felt intimately close to their motherland and the cause of the Malayan People's Anti-Japanese Army”.<sup>441</sup> When the MCP turned to violence in 1948, to establish an independent and communist state in Malaya, it found little difficulty in obtaining the loyalty of the squatters. Any opposition, for which there was some, was dealt with “by appeal, threat of violence or violence.”<sup>442</sup> Once again the communists found their main support among the squatters, however this time in order to remove the British from power. Sandhu explains that “this difference was unimportant for the only Government they had known was the “Government” of the Malayan People's Anti-Japanese Army which had “defeated” the Japanese and was now about to “liberate them from their subsequent oppressors.””<sup>443</sup> Therefore, among much of the Chinese population the British were not seen as legitimate, particularly among the squatters; it was the Chinese communists who they saw as legitimate.

There is a contrast between the Malay population and the Chinese population, who make up most of the people in Malaya. The Former accepted British rule, to a degree, however, the latter, by 1948, did not see British rule as legitimate, particularly the Malayan Federation, and

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<sup>438</sup> Mockaitis, *British Counterinsurgency, 1919-60*, 8.

<sup>439</sup> A. Short, *The Communist Insurrection in Malaya 1948-60* (London: Frederick Muller Ltd, 1975), 173.

<sup>440</sup> K. Ramakrishna, ‘Making Malaya Safe for Decolonisation: the Rural Chinese Factor in the Counterinsurgency Campaign’ in M. Frey et.al. (eds) *The Transformation of Southeast Asia* (London: M.E. Sharpe: 2003), 161-179: 164.

<sup>441</sup> K.S. Sandhu, ‘The Saga of the "Squatter" in Malaya: A Preliminary Survey of the Causes, Characteristics and Consequences of the Resettlement of Rural Dwellers during the Emergency between 1948 and 1960’, *Journal of Southeast Asian History*, 5, 1 (1964), 143-177: 151.

<sup>442</sup> *ibid*, 153.

<sup>443</sup> *ibid*.

as such pushed for self-governance, and the implementation of a communist state. Therefore, the evidence indicates a relatively low score domestic legitimacy. At most the British were slightly to moderately legitimate in the eyes of the Malays, but to the Chinese they were illegitimate, or at best neutral-slightly legitimate.

#### Legitimate Authority: Respect for Human Rights?

Generally, the evidence indicates that Britain did try to satisfy the human rights of the population of Malaya. The Malayan Union policy can be seen as a genuine effort by the British to satisfy the rights of the population of Malaya. The Malayan Union would have resulted in the granting of citizenship to the Chinese, Indians and the Malays; with the intention of creating a “multiracial (and hopefully more cohesive) society”.<sup>444</sup> Malaya was an ethnically divided country. The population of just under 5 million, was 44 percent Malay, slightly over 38 percent Chinese, 10.5 percent Indian, 5.5 percent aborigine and 1.5 percent other, which included the European minority.<sup>445</sup> At the outbreak of the insurgency, with a population of nearly six million, these percentages remained similar.<sup>446</sup> Therefore, the Malayan Union can be seen as a genuine attempt to enhance the rights of the people of Malaya. However, Malay opposition resulted in the failure of the Union. The British were “ignorant” to the “ethnic-Malay animosity toward the ethnic-Chinese community”.<sup>447</sup> Although similar in size, Malays had a political monopoly and general citizenship threatened this. The Malays viewed themselves as “sons of the soil”, and the proposal to “confer upon the Chinese and other aliens equal rights was anathema to them”.<sup>448</sup> The Malays perceived the Union policy as “the most serious threat their survival as a

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<sup>444</sup> Benvenuti, *Cold war and Decolonisation*, 30.

<sup>445</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 12.

<sup>446</sup> K. Hack, ‘The Malayan Emergency as Counter-Insurgency Paradigm’, *Journal of Strategic Studies*, 32, 3 (2009), 383-414: 385.

<sup>447</sup> A.L. Mills, *British Malaya, 1824-67* (Kuala Lumpur: Oxford University Press, 1966), 24.

<sup>448</sup> G.P. Bhattacharjee, *Southeast Asian Politics: Malaysia & Indonesia* (Columbia: South Asia Books, 1977), 65.

dominant community had ever experienced from the British and they realized this quickly enough to react in an uncharacteristically aggressive manner.”<sup>449</sup> The Malays were also threatened because the Chinese population were economically dominant.<sup>450</sup> The Malay population was concerned that “without special privileges they would be placed under their political domination also.”<sup>451</sup> As a result the Malayan Union was met by widespread protest from all classes of Malays, with a unity that British did not foresee.<sup>452</sup>

This is different to a state that does not want to realise the rights of their citizens, which is unjust.<sup>453</sup> Therefore, it would be unfair to argue that Britain did not meet this requirement. Britain did not give up on citizenship, and the protection of rights that citizenship entails. During the Emergency, in September 1952, new rules on citizenship were introduced. Under the new rules anyone born within the Federation was granted citizenship, and this helped to undercut the insurgents politically, but also granted citizenship to 1,200,00 Chinese and 180,000 Indians.<sup>454</sup> Therefore, generally, Britain met this aspect of a minimally just society.

The available evidence demonstrates that when the declaration of an emergency was made in 1948, Britain was a legitimate authority in Malaya. Britain was seen internationally as legitimate, it made genuine efforts to enhance the rights of the population. Domestically the population was divided on how they perceived the legitimacy of the British, with a significant

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<sup>449</sup> Gangwu, ‘Malayan nationalism’, 320.

<sup>450</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 35. Figures are in Straits Dollars, which were \$8.57 to £1 in 1947.

<sup>451</sup> Bhattacharjee, *Southeast Asian Politics*, 65.

<sup>452</sup> Gangwu, ‘Malayan nationalism’, 319.

<sup>453</sup> Orend, *The Morality of War*, 38.

<sup>454</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 191.



proportion opposing British rule. Therefore, Britain met the requirements of a minimally just society, and a moderate score of +2 is suitable.

### Ad Bellum Proportionality

The decision to declare an emergency and conduct COIN operations in order to restore law and order should not be taken lightly. The costs associated with declaring an emergency are significant. Emergency regulations often curtail the rights of the population, in order restore security. Declaring an emergency brings about some ethical dilemmas. Often, the incentives to declare an emergency “also generate strong incentives for states to violate their human rights obligations during emergencies”.<sup>455</sup>

Orend raises this issue within his work, on how wars are conducted internally under emergency situations. He writes “In my view, most (but perhaps not all) emergency regime legislation is probably not morally justified, but rather constitutes an unjustified invasion of civil liberties and human rights” due to a panicked government.<sup>456</sup> The declaration of an Emergency in June 1948 typified a “surprised reaction” that the British had failed to foresee.<sup>457</sup> Even though the British showed right intention, and a just cause, the costs of declaring the emergency were significant. The declaration of the Emergency ushered in significant draconian laws. Porch wrote that the “White Terror” against the Chinese community unleashed by the State of Emergency outlawed the Chinese-dominated trade unions, many left-wing leaders were arrested, and essentially turned Malaya into a police state.<sup>458</sup> However, Orend does argue that the suspension of some freedoms, such as movement, may be defensible in wartime. He argues, the “heaviest burden rests with any government proposing any such restriction – it must have a clear and manifest connection to

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<sup>455</sup> Criddle & Fox-Decent, ‘Human Rights, Emergencies, and the Rule of Law’, 46.

<sup>456</sup> Orend, *The Morality of War*, 141.

<sup>457</sup> Mumford, *The Counterinsurgency Myth*, 27.

<sup>458</sup> Porch, *Counterinsurgency*, 253.

the legitimate operation of an otherwise justified war”.<sup>459</sup> Therefore, there are serious costs to action. However, in 1948 the British perceived the decision to declare an Emergency as being a proportional response. The costs of inaction, and the benefits of preventing a communist takeover, outweighed the costs of conducting COIN operations.

#### Ad bellum Proportionality: Humanitarian benefits?

The evidence suggests that the fall of Malaya to communism may have resulted in considerable human rights abuses. At the end of the Second World War, and Japanese surrender, it took several weeks for the British to return. Within this vacuum, the Malayan People’s Anti-Japanese Army (MPAJA) seized control of the Malay peninsula and established its own version of law and order. The MPAJA went forward and set up “People’s Committees” in towns and villages, “exercising intimidation through the ruthless use of ‘traitor killing squads’”.<sup>460</sup> Law and order dissipated across Malaya because the Malay Police force often the first victims of the communist ‘revenge’ carried out against collaborators.<sup>461</sup> Kheng explains that “if the policemen did not surrender, their police station would be attacked. If they gave themselves up without a fight, they would be disarmed, victimized, or killed” resulting in government security services being significantly weakened.<sup>462</sup> One writer commented in 1949 that “in the general state of lawlessness a veritable reign of terror began in many districts, which was a useful lesson to many in what a Communist administration might mean”.<sup>463</sup> This reign of terror resulted in the murder of a significant number of “collaborators”. A significant number of Malays and Indians had worked for the Japanese, and the majority had not opposed Japanese rule; therefore, when the MPAJA announced the

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<sup>459</sup> *ibid.* 142.

<sup>460</sup> R. Jackson, *The Malayan Emergency*, 9.

<sup>461</sup> Kheng, *Red Star over Malaya*, 178.

<sup>462</sup> *ibid.*

<sup>463</sup> B.N.R., ‘Communism in Malaya: Background to the Fighting’, *The World Today*, 5, 8 (1949), 346-354: 350.

objective of punishing and killing all who had assisted the Japanese, these people feared, and were subjected to, Chinese repression.<sup>464</sup> The repression was often indiscriminate. The communists set up “People's courts” whereby “commissars appeared as magistrates, dispensing a law foreign to all except the party and the jungle”.<sup>465</sup> Many of those found ‘guilty’ were summarily executed in a brutal manner.<sup>466</sup> Therefore, the events of 1945 indicated what a government under communist rule would have meant to the people of Malaya. It would be one whereby the communists would assert their governance by executing opposition and suppressing the population. This is something the British could not allow to happen; given its stated aim when it returned to develop Malaya into a secure and stable country. Therefore, the decision to declare the Emergency, in 1948, can be viewed as a proportionate response if it was to prevent this from happening again.

#### Ad bellum Proportionality: Wider Cold War Context

The decision to declare the Emergency in Malaya was seen as a proportionate response because of the perceived threat of communism within the context of the Cold War. The loss of Malaya would have given the communists one of the most strategic and economically important areas of Southeast Asia.<sup>467</sup> The British perceived “the Malayan Communist Party was a well-placed pawn which Russia could not fail to use, and if necessary sacrifice, in the cold-war period.”<sup>468</sup> The Atlee government was concerned that the Cold War focus on Europe, will result in pressure on South East Asia, and that the conditions within the region were favourable to the spread of communism, and could potentially come under Soviet control.<sup>469</sup> The spread of communism was of concern of the Foreign Office, who felt that the

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<sup>464</sup> L. Pye, *Guerrilla Communism in Malaya* (Princeton: Princeton University Press: 1956) 71.

<sup>465</sup> *ibid.*

<sup>466</sup> Kheng, *Red Star over Malaya*, 278.

<sup>467</sup> P. Deery, ‘Malaya, 1948’, 34.

<sup>468</sup> R. Thompson, *Defeating Communist Insurgency*, 28.

<sup>469</sup> Deery, ‘Malaya, 1948’, 31.

strengthening of communism in the region would have repercussions across South-East Asia.<sup>470</sup> Owendale wrote “If the impression prevailed in the area that the Western powers were unwilling and unable to resist Russian pressure, the psychological effect could be the weakening of local resistance”. He continues “With that, the governments in the region could be undermined to the extent that eventually the whole of South-east Asia would fall to the communist advance, and come under Russian domination without any military effort on the part of Moscow”, and therefore it was necessary that the European powers “stiffen” the “will to resist” among their colonies.<sup>471</sup> Therefore, the government perceived that decision to declare the emergency as proportionate.

The situation in 1948 gives some credence to the justification of the British declaration. By 1948 other states were beginning to secede, and communist uprisings were taking hold in South-East Asia. China, Indochina, Burma, the Philippines and Indonesia all saw forms of communist uprisings and struggles. As each colony fell, Malaya became increasingly important during the Cold War. As Stockwell wrote “the strategic importance of Malaya and Singapore increased rather than diminished after the transfer of power” of other colonies.<sup>472</sup> Also, because of the ambitions of the Great Powers, like the Soviet Union, “Malayan Policy became enmeshed with the big issues of *imperial defence* and the Cold War”.<sup>473</sup> Even the United States, who was focused on containing Soviet expansion in Europe under the Truman doctrine and ignored Southeast Asia in terms of the Cold War, began to see the importance of Malaya to stopping the spread of communism. By 1950, and the Korean War, Malaya became part of the US view of the Cold War, and domino theory. “Interestingly”, Mumford writes, “the Americans appear to have been concerned about Malaya not in the context of the

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<sup>470</sup> Owendale, ‘Britain, the United States, and the Cold War in South-East Asia, 1848-1950’, 448.

<sup>471</sup> *ibid*, 451-452 .

<sup>472</sup> Stockwell, *Insurgency and Decolonisation*, 72.

<sup>473</sup> *ibid* (emphasis added).

MRLA triumphing in its own right but specifically in relation to way in which the Soviet Union or China could use it as a regional foothold”.<sup>474</sup> The Americans, ultimately, saw Malaya as a small piece of the wider Cold War, and Washington ultimately supported the decision.<sup>475</sup> Therefore, the decision to declare the emergency to the population and the county, so that when the British left Malaya it was capable of remaining sovereign and not being overrun by communism, like in Burma, was perceived as a proportionate reason to resort to force.

Therefore, when the emergency was declared, it was done so within the context of the wider global context. As other communist groups rose, and rebellions began to manifest within the region, there was a serious concern that this would happen in the valuable state of Malaya. When the aggression from the communists increased, and the threat of revolution loomed, the British acted in self-defence from the direct attack in Malaya, and against the wider communist threat globally. Therefore, the decision to launch the Emergency in June 1948 was proportional to the threat. The significant threats of communism, both domestically to the people of Malaya, and internationally were deemed to be so severe, that the goods that would result from the conflict outweighed the perceived evils. Therefore, the score for *ad bellum* proportionality is +2; moderately just.

### Last resort

The principle of last resort becomes somewhat moot once aggression has taken place. Once an actor is the victim of aggression, even in cases where the peace is broken by a much smaller force, “a military, rather than diplomatic response, will generally be seen as appropriate”.<sup>476</sup> As made clear in the just cause section of this chapter, Britain had a just

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<sup>474</sup> Mumford, *The Counterinsurgency Myth*, 46.

<sup>475</sup> *ibid.*

<sup>476</sup> Coleman, *Military Ethics*, 78.

cause, because it acted in response to MCP aggression against the Malay population.

Therefore, it is given more allowance when being assessed for this principle.

When the emergency was declared in June 1948, the communist insurgency had commenced. The communist insurgency was based on a Maoist model; and this was known by the Malayan Security Services by June 1948. This armed revolution was to be completed in four stages. The First was a guerrilla warfare, to demoralise the country and force the Europeans, the police and government officials to the small towns and villages. Next, would be to set up guerrilla camps and communist regimes in the 'liberated areas'. The third stage would be of territorial expansion, where towns would be amalgamated into the other 'liberated areas', which also included pitched battles against the British in these areas.<sup>477</sup> It was expected that the earliest that the MCP could have launched the fourth stage, a full-scale revolt, would have been in September 1948. Nonetheless, by June 1948 communist violence, in order to overthrow the government, had commenced and increased. Therefore, it was not required to open diplomatic channels, as violence had begun.

Of significance to last resort, is the lack of action by the British government, in response to the communist violence. David Ucko notes that "armed campaign in Malaya caught the British authorities unaware" and "the lack of anticipation resulted in a lagging counter-insurgency effort".<sup>478</sup> The government was relatively slow in reacting; expecting that this was merely a criminal act, that would be short lived.<sup>479</sup> Following the increase in violence, increasing pressure was put on the government to act. According to Stubbs "Various vocal and influential individuals and groups became more and more insistent that the 'criminal elements' be suppressed and that the Government act to stem the rising tide of

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<sup>477</sup> E. O'Ballance, *Malaya: The Communist Insurgent War, 1948-60* (Connecticut: Archon, 1966), 78 .

<sup>478</sup> Ucko, 'The Malayan Emergency', 18.

<sup>479</sup> *ibid.*

lawlessness”.<sup>480</sup> Opposition to government’s inaction increased in May, and in June the Malay press began to criticise Gent’s failure to act.<sup>481</sup> By the point that the emergency was declared, Stubbs says it had become “mandatory”.<sup>482</sup> Thus, Britain met the *ad bellum* principle of last resort; based on two points, first, it was acting in response to aggression, and second, it acted slowly, and did not rush to violence. Therefore, a score of +2.5 is a suitable score for Last Resort.

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<sup>480</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 66.

<sup>481</sup> *ibid* 66-67.

<sup>482</sup> *ibid*, 67.

### **The Malayan Emergency: Jus in Bello Index**

Having examined the justness of Britain's resort to force, there must be an examination into the conduct of the conflict. The following will present the case as slightly just. Porch concludes his section on Malaya, stating "COIN tactics had served only to make the Emergency nastier and more costly in lives and resources than it need have been".<sup>483</sup> This is an unfair assessment of the conduct of the conflict as a whole. The war was not one continuation of the same approach, but one with varying operations and strategies to tackle the insurgency. Quite often within the literature, the emergency is split into three phases; 1948-50, is the counter terror period; 1950-1952, the Briggs Plan and 1952-60, Templer and optimisation.<sup>484</sup> This work has put the last two phases together under resettlement and hearts and minds. The former phase of the conflict was indeed indiscriminate and disproportionate, however, by 1950, the British approach to COIN had transformed, and had become both discriminate and proportionate. The work will demonstrate this below; focusing predominantly on the Briggs period, 1950-52, and the Templer period, 1952-54; as the use of force decreased significantly following 1955. The following section then will argue that the conduct of the Malayan Emergency was slightly just.

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<sup>483</sup> Porch, *Counterinsurgency*, 256.

<sup>484</sup> See: Short, *The Communist Insurrection in Malaya*, 160, and K. Hack, 'Everyone lived in fear: Malaya and the British Way of Counter-Insurgency', *Small Wars & Insurgencies*, 23, 4-5 (2012), 671-699, and K. Hack (2009) 'The Malayan Emergency as Counter-Insurgency Paradigm', 404.



## The Counter Terror Period, 1948-1950; Indiscriminate?

Between 1948 and 1949 the British conducted as the “counter-terror” phase of the Emergency.<sup>485</sup> This phase of the conflict was generally indiscriminate. Both the security forces and the British government blurred the lines between combatant and non-combatant; implementing a collective responsibility approach to the dealing with the insurgency, made permissible by the attitude of the government.

The British government knew that the centre of gravity for the MCP was the rural Chinese.<sup>486</sup> Most of the squatters supported the Malayan National Liberation Army, and provided a vital logistical role for the insurgents.<sup>487</sup> The government viewed the rural Chinese as likely to support whoever applied the most pressure.<sup>488</sup> Sir Henry Gurney, High Commissioner, told the colonial office that the squatters are “notoriously inclined to lean towards whichever side frightens them more”.<sup>489</sup> The initial approach to COIN in Malaya, therefore, was conducted with the focus of instilling the “fear of the government to ensure good behaviour”.<sup>490</sup>

British COIN forces indiscriminately terrorised the Chinese population during the counter-terror period.<sup>491</sup> Security forces, backed by emergency regulations, indiscriminately detained and deported significant numbers of Chinese people, and then “all huts, buildings and cultivations” were destroyed, in order to prevent bandits or neighbouring squatter areas

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<sup>485</sup> See: *ibid.*

<sup>486</sup> Hack, ‘Detention, Deportation and Resettlement’, 615.

<sup>487</sup> Newsinger, *British Counterinsurgency*, 47.

<sup>488</sup> Hack, ‘Everyone lived in fear’, 680.

<sup>489</sup> Gurney quoted in *ibid.*

<sup>490</sup> H. Bennett, ‘“A very salutary effect”: The Counter-Terror Strategy in the Early Malayan Emergency, June 1948 to December 1949’, *Journal of Strategic Studies*, 32, 3 (2009), 415-444: 427. R. Gregorian, ‘Jungle Bashing’ in Malaya: Towards a formal Tactical Doctrine’, *Small Wars & Insurgencies*, 5, 3 (1994), 338-359: 352. R. Gregorian, ‘Jungle Bashing’ in Malaya: Towards a formal Tactical Doctrine’, *Small Wars & Insurgencies*, 5, 3 (1994), 338-359: 352.

<sup>491</sup> L.C. Chin, ‘The Repatriation of the Chinese as a Counter-insurgency policy during the Malayan Emergency’, *Journal of Southeast Asian Studies*, 45, 3 (2014), 363-392: 376.

making use of them.<sup>492</sup> Being in the possession of “rice, cups, batteries, or simply because they had failed the “callus test”” meant that they could be detained or deported.<sup>493</sup> By 1950, 8,508 people were in detention camps.<sup>494</sup>

Those within the detention camps were not granted benevolent quarantine, and suspects were often beaten. Suspects were not granted benevolent quarantine during the early phase of the Emergency. Miller, a journalist “totally opposed to the Communists”,<sup>495</sup> recalled an incident in a police station:

I myself once saw a British sergeant encouraging a heavy-booted policeman to treat a suspect like a football. The young Chinese was kicked all round the room until a threat to report this treatment to headquarters brought the game to a stop.<sup>496</sup>

The police “gained a well-deserved reputation for brutality”.<sup>497</sup> There were frequent beatings of Chinese civilians, who often had little to no link with the insurgents.<sup>498</sup>

Suspects were also killed while ‘running away’. The most notorious example occurred in December 1948, in Batang Kali. On 11 December, A detachment of the Scots Guards entered the village and separated the men and women; holding them in huts to interrogate them. In the morning of 12 December, 24 suspects were shot dead by the soldiers. Initial reports claimed that the men were “executing a joint, pre-planned escape”.<sup>499</sup> Jackson comments that “the fact that all were killed and none wounded was in itself suspicious”.<sup>500</sup> Hack, adding to

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<sup>492</sup> Bennett, “‘A very salutary effect’: The Counter-Terror Strategy in the Early Malayan Emergency’, 423.

<sup>493</sup> Porch, *Counterinsurgency*, 253-4.

<sup>494</sup> Newsinger, *British Counterinsurgency*, 46.

<sup>495</sup> Newsinger, *British Counterinsurgency*, 48.

<sup>496</sup> Miller, *Menace in Malaya*, 89.

<sup>497</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 72.

<sup>498</sup> M. Moyar, *A Question of Command: Counterinsurgency from the Civil War to Iraq* (New Haven: Yale University Press, 2009), 114-115.

<sup>499</sup> Hack, ‘Everyone lived in fear’, 681.

<sup>500</sup> Jackson, *The Malayan Emergency*, 45.

this, commented that immediate investigations “failed to uncover the fact that initially wounded villagers were finished off”.<sup>501</sup> It still remains not entirely clear what took place on the morning of 12 December 1948; the official reports were destroyed.<sup>502</sup> Nonetheless, “Batang Kali remains the gravest, not least because it is the most exceptional, suspicion on the conduct of the British Army in Malaya”.<sup>503</sup> There is no evidence to suggest that, in the case of Batang Kali, the soldiers were certain that these 24 men were combatants; and at the time they were detained, therefore not actively engaged in harm.

It is important to highlight that the Batang Kali Massacre was not the only example whereby a suspect had been killed. The first case occurred on 20 July 1948, when a man police were questioning ‘tried to make off’.<sup>504</sup> Bennet’s work provides a number other examples, where people were shot ‘trying to escape’ however, “Here, as elsewhere, there can be no certainty about whether these people were truly shot trying to escape, or if it was a euphemism for murder, as Batang Kali suggests”.<sup>505</sup> Hack’s work indicates a suspiciousness regarding “more typical” cases whereby the numbers of those killed was low; “sympathetic coroners recorded verdicts of justifiable homicide after unarmed Chinese were shot in sweeps”, with there being little investigation into certain acts.<sup>506</sup> It is also worth highlighting the Army’s prevailing attitude of a shoot-to-kill approach to suspects ‘escaping’; promoted by General Boucher.<sup>507</sup> This is shown in the number of those killed when escaping. Between July 1948 and April 1949, out of a total 125 escapees, 77 people were killed, compared to 7 being wounded; 37

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<sup>501</sup> Hack, ‘Everyone lived in fear’, 681.

<sup>502</sup> C. Bayley & T. Harper, *Forgotten Wars: The End of Britain’s Asian Empire* (London: Allen Lane: London, 2007) 453.

<sup>503</sup> Short, *The Communist Insurrection in Malaya*, 169.

<sup>504</sup> Bennett, “‘A very salutary effect’: The Counter-Terror Strategy in the Early Malayan Emergency”, 433.

<sup>505</sup> *ibid*, 434.

<sup>506</sup> Hack, ‘Everyone lived in fear’, 681.

<sup>507</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 73.

were captured, including wounded.<sup>508</sup> These figures are “probably incomplete” as not all incidents were recorded, however “they provide a useful indication of the scale of violence applied towards civilians, and the relative efforts made to wound or capture suspects rather than kill them”.<sup>509</sup> Therefore, there were elements of the security forces that were indiscriminate and disproportional during counter-terror period of the emergency.

Importantly, the government had created an environment in which such abuses could be carried out. This is not to say the government made it policy that people were shot out of hand,<sup>510</sup> it is to say that the government passed legislation that meant these acts could go unpunished. On 22 January 1949 the government passed Emergency Regulation 27A, which legalised the use of ‘reasonable force’ to prevent the escape of suspects.<sup>511</sup> This included the use of lethal force; after warning the suspect that they may be fired upon. The regulation retrospectively covered acts that had occurred before; including Batang Kali.<sup>512</sup> In effect, the government had given the military a free space in which to act; and provided them cover for violations of the discrimination principle. Hack explains that, this meant that military action was loosely constrained, and “abuses became almost inevitable”.<sup>513</sup> Bennett supports Hack, arguing that the decision and attitude of the government, and the implementation of the retrospective regulation 27A, effectively absolved the security forces of their duty to act in accordance with the law, and any “unit bearing arms worked in a world with no clear rules

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<sup>508</sup> Bennett, ‘‘A very salutary effect’’: The Counter-Terror Strategy in the Early Malayan Emergency’, 436.

<sup>509</sup> *ibid*, 435.

<sup>510</sup> Short, *The Communist Insurrection in Malaya*, 160.

<sup>511</sup> Hack, ‘Everyone lived in fear’, 681.

<sup>512</sup> Bennett, ‘‘A very salutary effect’’: The Counter-Terror Strategy in the Early Malayan Emergency’ 431-432.

<sup>513</sup> Hack, ‘Everyone lived in fear’, 681.

about acceptable behaviour”, the decision of acceptable behaviour depended on the commanding officer, at the time and the place.<sup>514</sup>

Moyar criticises the emergency regulations for permitting indiscriminate acts. “Through the Emergency regulations, the British government denied the people the protections of civil liberties, an appropriate enough response to the Communist threat, but one that allowed abuses to flourish in the absence of good leadership”.<sup>515</sup> Therefore, the British were, generally, slight to moderately indiscriminate in the use of force during the counter-terror period.

#### The Counter Terror Period: Proportionate?

Important to proportionality concerns calculations about the degree of force used to achieve ends. The suffering caused must be suitable for the good that the ends achieved. The ‘ends’ that the counter terror period produced were mixed. The evidence indicates a correlation between the indiscriminate regulations implemented, and the inability to enhance the legitimacy of the counterinsurgency or damage the support of the MCP. In some cases, forcible detention, resettlement and deportation galvanised the resolve of the insurgents and their supporters.<sup>516</sup> Despite government efforts, Insurgent recruitment increased and by 1950, insurgent attacks more than tripled.<sup>517</sup> However, mass detention yielded some basic intelligence from detainees. Also, deportation and detention “broke up larger guerrilla groups and prevented the loss of whole districts”.<sup>518</sup> However, overall, the Counter-Terror phase of

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<sup>514</sup> Bennett, “‘A very salutary effect’: The Counter-Terror Strategy in the Early Malayan Emergency”, 432-433.

<sup>515</sup> Moyar, *A Question of Command*, 130.

<sup>516</sup> Mumford, *The Counterinsurgency Myth*, 42.

<sup>517</sup> Hack, “Iron Claws on Malaya”, 102.

<sup>518</sup> Hack, ‘The Malayan Emergency as Counter-Insurgency Paradigm’, 386.

the Emergency did not produce ends that could be termed as ‘good’ as it was largely unsuccessful at thwarting the insurgency.

During the counter-terror phase the military was “forced into an operational strategy consisting mostly of large-sweeps in the absence of good intelligence”, and the military resorted to jungle patrolling and ambushing; experiences learned in Burma when fighting the Japanese.<sup>519</sup> However, this conventional approach to tackling the insurgents failed. The aim of these sweeps was to liquidate the enemy forces in combat or push them further into the jungle.<sup>520</sup> However, the insurgents would not engage conventionally; and the dense jungle meant that their camps were “nearly impossible to find by either air or ground reconnaissance”.<sup>521</sup> The suffering it had caused, through mass deportations, detention and collective punishment, and large scale indiscriminate sweeps, were not proportional to the goods it achieved.

It is important to note, that the level of force used, generally in this period, was not abhorrent nor was it severe; limiting the degree to which it was disproportional. Obviously in specific cases like Batang Kali, the level of force was severely disproportionate, but as a whole the level of force used was somewhat limited. Short is correct, in comparing Malaya to campaigns like Vietnam or Kenya, that the atrocities carried out in Malaya seem to be exceptions, rather than common place.<sup>522</sup> However, this period of the conflict is deemed disproportionate because the goods it achieved was minimal as it the COIN strategy implemented failed to protect the population effectively.

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<sup>519</sup> Gregorian, ‘Jungle Bashing’ in Malaya: Towards a forma Tactical Doctrine’, 352.

<sup>520</sup> Bennett, ‘‘A very salutary effect’’: The Counter-Terror Strategy in the Early Malayan Emergency’, 428.

<sup>521</sup> C. Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 55.

<sup>522</sup> Short, *The Communist Insurrection in Malaya*, 160.

Gurney had justified harsh measures, believing that they “terrify the Chinese into supporting the government”.<sup>523</sup> However, the literature suggests that the inability to protect the Chinese population helped the insurgents, rather than the counterinsurgents. Moyar wrote “the Chinese might have been scared into cooperating if the government had been able to protect them from Communist retaliation, but because it was unable to do so, its cruelties only gained adherents for the Communists”.<sup>524</sup> The conventional strategy, implemented by the security forces, where they would conduct large sweeps, would not keep an area clear of insurgents. The jungle made some of the modern weapons redundant, and the large number of forces were heard long in advance by the guerrillas.<sup>525</sup> Once security forces swept through an area, frustratingly, the MNLA would either return, and once again live among the population, or move further into the jungle.

It is important to note, however, that British COIN was not wholly unsuccessful; the MNLA were unable to establish a liberated area, intelligence improved, and larger insurgent units were broken up.<sup>526</sup> However, the main failure of this conventional approach was that it failed to effectively cut off the insurgents from their support base; the Min Yeun. By 1950 more of the Chinese population, particularly the squatters, were “under the control of the Communists than they there were under that of the government”.<sup>527</sup>

In addition to large sweeps, the security forces would remove the population entirely from specific areas, and the remaining property and possessions would be destroyed. Security forces, in theory, were supposed to burn properties *after* possessions were removed, and the inhabitants had been screened.<sup>528</sup> According to Hack “the administration was keen to make

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<sup>523</sup> Moyar, *A Question of Command*, 115.

<sup>524</sup> *ibid.*

<sup>525</sup> Mumford, *The Counter-Insurgency Myth*, 31.

<sup>526</sup> Hack, ‘Everyone lived in fear’, 683.

<sup>527</sup> Newsinger, *British Counterinsurgency*, 47.

<sup>528</sup> Hack, ‘Everyone lived in fear’, 681.

the army follow proper procedure”.<sup>529</sup> However, Stubbs argues that a favourite tactic of the security forces to vent their frustration was not only to target suspects’ huts, but to “indiscriminately burn whole villages”.<sup>530</sup> In August 1948 the entire village of Pulai was destroyed in response to guerrillas having briefly occupied it.<sup>531</sup> Importantly, until 1949, much of the people evicted from areas, left homeless, were not re-housed, and expected to go to relatives.<sup>532</sup> For example, on 2 November 1948 another village, Kachau, was destroyed with one hour warning; leaving 400 people homeless.<sup>533</sup> The ‘heartache’ that this created, according to Hack, became the main communist recruiter.<sup>534</sup> With nothing to return to, and anger felt against the British, the MCP obtained more support and the MNLA increased its ranks. In addition to this, the number of attacks by the MNLA significantly increased. By the end of 1949 the number of MNLA offences rose to an average of 400 per month, compared to 100 in the Spring of 1949.<sup>535</sup> In June 1950 the “number of terrorist incidents at five times their 1949 level... with over 100 civilians (mainly Chinese) being murdered every month”.<sup>536</sup> Therefore, the indiscriminate actions of the British, in Malaya, failed to stem the insurgency during the counter-terror period, making it a slightly disproportional period of the emergency.

#### 1950-1960, Resettlement and ‘hearts and minds’

The major element of counterinsurgency efforts in Malaya in the post-counter-terror period concerned resettlement. The aim of resettlement was to physically cut off the insurgents from the Min Yeun. In doing so, one would be able to separate combatant from non-combatant, both physically and in terms of supplies and intelligence. On discrimination, Orend writes,

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<sup>529</sup> *ibid.*

<sup>530</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 73.

<sup>531</sup> *ibid.*

<sup>532</sup> Hack, ‘Everyone lived in fear’, 682.

<sup>533</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 73.

<sup>534</sup> Hack, ‘Everyone lived in fear’, 682.

<sup>535</sup> Mumford, *The Counterinsurgency Myth*, 32.

<sup>536</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 175.



“those clearly engaged in harming...may be directly targeted, as may their equipment, their supply routes, and even some of their civilian supporters”. However, “Civilians not engaged in the military effort...may not be targeted with lethal force”.<sup>537</sup> Resettlement targeted the insurgents, indirectly; and importantly did not involve the use of lethal force. It was carried out through legally sanctioned force, backed up by Emergency regulations. In January 1949 Emergency Regulation 17D was enacted, allowing for the removal of part of or all the inhabitants of the area, including deportation, and in May 1949 Emergency Regulation 17E was enacted, which gave the State’s authority to remove and resettle squatters.<sup>538</sup>

In April 1950, General Sir Harold Briggs was appointed as Director of Operations in Malaya and set out to implement a long term strategy to defeat the insurgents; known as the Briggs Plan. The Briggs plan consisted of the uprooting of thousands of squatters, to purpose built resettlement zones, known as New Villages. and between June 1950 and the end of 1951, eighty percent of squatters were resettled in over 400 resettlement areas.<sup>539</sup> 600,000 labourers were moved into more defensible living areas.<sup>540</sup> Thompson points out that the first, and most important, aim of the new villages was the protection of the population.<sup>541</sup> Clutterbuck points out, “protection was a vital element of resettlement”.<sup>542</sup>

Resettlement often did not happen freely, and “overwhelming force” was often used to prevent any escapes or resistance.<sup>543</sup> Villages were destroyed, and people were forced to move at gun point. Resettlement raises an important ethical consideration. Traditionally, the JWT does not allow for force to be used against the population intentionally, under the principle of discrimination. Even though the aim of resettlement was not to kill non-

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<sup>537</sup> Orend, *The Morality of War*, 113.

<sup>538</sup> Hack, ‘Everyone lived in fear’, 681-83.

<sup>539</sup> Hack, ‘Everyone lived in fear’, 684.

<sup>540</sup> *ibid.*

<sup>541</sup> Thompson, *Defeating Communist Insurgency*, 124.

<sup>542</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 176.

<sup>543</sup> Newsinger, *British Counterinsurgency*, 50.

combatants, they were coerced with military force as an element of strategy. But such is the nature of COIN operations, with the population as the centre of gravity, the Levine posits that COIN's "moral contours are likely to be different from those of conventional warfare".<sup>544</sup> In addition to this, the Briggs plan was done with the intention of separating and protecting the civilians from the insurgents; even if carried out with "little regard for the feelings of the Chinese".<sup>545</sup>

The Briggs plan had shown the desire of the British to separate the insurgent from their support base, and in doing so; it separated combatant from non-combatant. Unlike earlier operations, counterinsurgency efforts under Briggs were led by the Government in conjunction with the security forces, and therefore civilians were associated with success and failure in these operations.<sup>546</sup> Rather than intimidating the population into support, the government, and forces, strived to increase the confidence in the counterinsurgents in the eyes of the population.<sup>547</sup> By physically removing the insurgents from the area, and holding the area, the government forces were able to draw a physical line between combatant and non-combatant.

The MNLA retaliated to new villages by increasing the number of attacks, and by changing tactics. They moved away from terrorism committed by individuals and small gangs to large scale attacks with 20-30 insurgents. Short argues that the MNLA attacks against new villages show the "first sign of success for the Briggs plan".<sup>548</sup> Because the population was increasingly more protected from interference from the insurgents, then, "where in the past it was achieved voluntarily or with the threat of violence, violence had now to be increasingly

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<sup>544</sup> D.H. Levine, *Care and Counterinsurgency*, (Maryland: Center for International and Security Studies, 2009), 141.

<sup>545</sup> *ibid.*

<sup>546</sup> E.D. Smith, *Counter-Insurgency Operations 1: Malaya and Borneo* (London: Ian Allen Ltd.: London, 1985), 18.

<sup>547</sup> Hack, 'Everyone lived in fear', 683.

<sup>548</sup> Short, *The Communist Insurrection in Malaya*, 295.

overt and directed either against security forces or those who were reluctant to co-operate”.<sup>549</sup> For the insurgent the “tide was going out” and “he was now forced to go close inshore he not only gave away his position but ran the risk of being caught in the shallows”.<sup>550</sup> The British were able to draw out insurgents, in order to eliminate them effectively, while protecting the population. No new villages were lost.<sup>551</sup> The MCP, and MNLA, was unable to effectively disrupt or capture resettlement areas. By the end of 1951, the MNLA was facing problems maintaining popular support, diminishing supplies as the resettlement areas became better secured and policed.<sup>552</sup>

Templer improved on Brigg’s work, securing the population further. He improved the police force, transforming it from a para-military force to a more protective organisation. Police training establishments were set up, a police college was established, and all police went through intensive training.<sup>553</sup> Templer also put his faith in the Home Guard units, which were ineffective when he had arrived in Malaya. In 1953, the Home Guard had increased to 250,000; from 79,000 in 1951.<sup>554</sup> Templer took the decision to allow the predominantly Chinese Home Guard to be armed; as previously they had not been trusted to do so, for fears that weapons would fall into the hands to the insurgents. In reality, 103 weapons were lost up to November 1954, out of a total of 89,000 issued.<sup>555</sup> By 1953, the Home Guard was fully responsible for the defence of 72 New Villages, and by September 1954 it was responsible for the defence of 129 out of 323 New villages.<sup>556</sup>

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<sup>549</sup> *ibid.*

<sup>550</sup> *ibid.*

<sup>551</sup> Short, *The Communist Insurrection in Malaya*, 294.

<sup>552</sup> K. Hack, *Defence and Decolonisation in Southeast Asia: Britain, Malaya and Singapore 1941-1968* (Richmond: Curzon, 2001), 122.

<sup>553</sup> Jackson, *The Malayan Emergency*, 25.

<sup>554</sup> Nagl, *Learning to Eat Soup with a Knife*, 100.

<sup>555</sup> Short, *The Communist Insurrection in Malaya*, 414.

<sup>556</sup> *ibid.*

The home guard did not prevent every penetration by the insurgents, due to the miles of area to cover. However, the literature states that it was beneficial to the counterinsurgent efforts. First, it allowed for the release of thousands of police personal for other assignments.<sup>557</sup> Second, as French writes, the home guard's "real importance was that they helped sustain the morale of Malaya's population in the face of insurgent intimidation, and forced the Chinese, however reluctantly, to side with the security forces".<sup>558</sup> Adding to this, according to Stubbs' work, the Chinese were impressed that "Templer and his administration had, at long last, enough confidence in them to permit them to arm themselves for self-defence".<sup>559</sup> Therefore, the government was not merely punishing the population, but attempting to protect them, to establish security for the population within the new villages, and through police reforms and indigenous forces, establish effective and fair protection. The government had effectively drawn a physical line between combatant and non-combatant; separating the MNLA from the Min Yuen.

### New Villages and Coercion

Life within the New Villages was not a wholly pleasant experience. It is, as Mumford indicates, important to remember that resettlement was a tool of coercion, and as a means of war.<sup>560</sup> Some inhabitants of the new villages had been resettled at gun point with no prior warning.<sup>561</sup> Civil rights were curtailed within the walls, and those who left were searched, and movements outside of the camps were restricted.<sup>562</sup> Critics compared the New Villages to concentration camps, highlighting the harshness of resettlement.<sup>563</sup> The MCP built a

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<sup>557</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 158-159.

<sup>558</sup> French, *The British Way in Counter-Insurgency*, 187.

<sup>559</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 159.

<sup>560</sup> Mumford, *The Counterinsurgency Myth*, 32.

<sup>561</sup> Hack, 'Detention, Deportation and Resettlement', 633.

<sup>562</sup> Mumford, *The Counterinsurgency Myth*, 32, and Newsinger, *British Counterinsurgency*, 50.

<sup>563</sup> R. Tilman, 'The Non-Lessons of the Malayan Emergency', *Asian Survey*, 6, 8 (1966), 407-419: 411.

propaganda campaign around this image. The MCP compared New Villages to the concentration camps the Japanese had corralled the Chinese people in during the Second World War.<sup>564</sup>

One harshness of the New Villages was the use of collective punishments. Collective punishments were carried out in response to insurgent acts; particularly when the village was seen to be withholding information. As Cohen and Danziger wrote “While these settlements may have provided some of the first adequate lodging for the local population, they were maintained by force, and tough punishments were meted out to those who did not abide by British diktats”.<sup>565</sup> One example occurred in the town of Tanjongh Malim, where insurgents ambushed and killed the district officer, public works engineer and seven policemen. Templer went to the town, and after speaking with the community leaders, ‘with savage anger’, announced a 22-hour curfew for the town; whereby people would only be allowed to leave their homes between 12pm and 2pm.<sup>566</sup> No one could leave the town, the rice ration was halved.<sup>567</sup> The curfew was lifted, following outrage in Britain. However, Smith argues that it had been effective; as civilian contact with the MNLA halted.<sup>568</sup>

This last point is important to highlight; coercive measures were proportional, as they were not out of line with the good end being sought.<sup>569</sup> To be proportional, in the conduct of war, the act must not outweigh the good that comes of it. One must use force appropriate to the target.<sup>570</sup> Consider the above use of collective punishment, it was non-lethal and was not permanent. As the war went on, targeting of collective punishment became more specific. By

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<sup>564</sup> Hack, ‘Everyone lived in fear’, 691.

<sup>565</sup> M.A. Cohen & J. Danziger, ‘The Myth of a Kinder, Gentler War’, *World Policy Journal*, 27, 1 (2010), 75-86: 79.

<sup>566</sup> Smith, *Counter-Insurgency Operations 1: Malaya and Borneo*, 23.

<sup>567</sup> *ibid.*

<sup>568</sup> *ibid.*

<sup>569</sup> Coleman, *Military Ethics*, 161.

<sup>570</sup> Orend, *The Morality of War*, 125.

1952 New Villages were divided into specific sections, under a home guard division, so collective punishments were not as disproportionate and widespread.<sup>571</sup>

Coercion was also not wanton violence or abuse; it was conducted in order to persuade compliance with the government. As Mockaitis writes “No one has ever denied that the army and police forcibly relocated squatters and employed draconian emergency regulations to control population...Heavy-handed, non-lethal tactics, however, did not violate the minimum force doctrine as it was understood at the time”.<sup>572</sup> The use of resettlement was not done with the intention of punishment, but to allow the government to obtain spatial control and to allow that the government could effectively separate the fish from the sea.

### ‘Hearts and Minds’

New Villages were not entirely coercive or punitive however, and much effort was put into winning the ‘hearts and minds’ of the population. Mockaitis wrote “coercion played a significant role in the campaign, but it was intimately linked to the hearts-and-minds campaign”.<sup>573</sup> Coercion was not intended to be used alone, but there needed to be inducements. The Colonial Secretary, Creech Jones, is quoted to have said “it was not possible to treat the squatters as criminals and simply bundle them into concentration camps”,<sup>574</sup> one had to improve the wellbeing of the Chinese. As a result, Ucko wrote, “the New Villages were constructed not as concentration or labour camps, but as politically engaged and progressive communities, where the Chinese villagers could own land, work, engage in local politics and move freely”.<sup>575</sup> It is important that the use of New Villages in

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<sup>571</sup> Hack, ‘Everyone lived in fear’, 688.

<sup>572</sup> Mockaitis, ‘The minimum force debate’, 768. Minimum force, in Mockaitis’ work, is described as the requirement that ‘the civil power employs only the minimum amount of force necessary to ‘restore order and must never exceed it’, *ibid*, 763.

<sup>573</sup> Mockaitis, ‘The minimum force debate’, 769.

<sup>574</sup> Edwards, *Defending the Realm?*, 68.

<sup>575</sup> Ucko, ‘The Malayan Emergency’, 26.

Malaya was based heavily on a carrot and stick approach to counterinsurgency. Hack wrote “It is artificial to overemphasise one half of this equation, when both were intended to work together within the framework of population and spatial control”.<sup>576</sup> The government, by 1952 had moved on from protection from insurgents to the betterment of the lives of the Chinese population. Mockaitis states that without the incentives, the new villages would have been unsustainable. However, “as only 6 of 480 were abandoned after the emergency, the Chinese squatters must have seen some value in continuing to live in them”; indicating the degree to which Britain strived to improve the lives of the population.

A new village that had been “properly settled” was one that had access to a number of basic services, such as: a portion of agricultural land, land titles for the Chinese, adequate water supplies, a well-functioning village committee, village schools, medical facilities, adequate sanitation, places of worship, community groups like scouts and girl guides were even set up.<sup>577</sup> Improving the lives of the population within the New Villages intended to win over the hearts of the population; the mind was won by weighing up incentives against punishment. It is worth noting that not all New Villages were sufficiently developed,<sup>578</sup> however, the lives of the majority of the rural Chinese improved significantly. Hack’s work demonstrates that by 1953, the British were no longer just offering a choice between two terrors; they were attempting to offer “confidence...protection, and hope”.<sup>579</sup> Considering confidence, villages were allowed to elect their own Village councils, by adult suffrage. It is worth noting here that very few councillors were murdered, unlike in Vietnam, as they were seen as fairly elected and responsible only for local development.<sup>580</sup> Templar had given the people of new villages that had been deemed secure enough, a stake in their new community. As Miller

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<sup>576</sup> Hack, ‘Everyone lived in fear’, 688.

<sup>577</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 169.

<sup>578</sup> See *ibid*, 171-177.

<sup>579</sup> Hack, ‘Everyone lived in fear’, 688.

<sup>580</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 187.

wrote “the seeds of future democracy were sprinkled in the new villages”,<sup>581</sup> with one third of New Villages electing councils by March 1952.<sup>582</sup> In September 1952 Templer also introduced new rules on citizenship, and this granted citizenship to 1,200,00 Chinese and 180,000 Indians. Under the new rules anyone born within the Federation was granted citizenship, and this helped to undercut the insurgents politically.<sup>583</sup>

### Resettlement and Intelligence

Intelligence is key to conducting counterinsurgency operations effectively.<sup>584</sup> Because the insurgent operates among the population, actionable intelligence is required to target the insurgent and its support base.<sup>585</sup> Templar understood this and placed a premium on intelligence gathering.<sup>586</sup> The coercive controls of new villages allowed the British to obtain actionable intelligence, with which they could use to conduct more discriminatory operations against the insurgents. Therefore, the coercive nature of resettlement, was proportional as it allowed for the government forces to be more discriminatory outside of the barbed wire.

One prominent coercive measure taken in new villages concerned was food denial.<sup>587</sup> It was known by Special Branch that the Min Yuen provided the MNLA with food.<sup>588</sup> Without food, the MNLA would collapse and starve in the jungle. Each New Village had a limited number of gates, which were guarded, and villagers were only permitted to take out water and a minimum amount of food.<sup>589</sup> Shops had to account for all stock, and long lasting items, such

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<sup>581</sup> Miller, *Jungle War in Malaya*, 105.

<sup>582</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 190.

<sup>583</sup> *ibid*, 191.

<sup>584</sup> Mumford, *The Counterinsurgency Myth*, 21.

<sup>585</sup> Thompson, *Defeating Communist Insurgency*, 84.

<sup>586</sup> C. Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 60.

<sup>587</sup> Food denial operations took a significant amount of time and built upon three stages. The first would involve up to three months of intelligence gathering, followed by Phase Two, where there was an intensification of food control and security force pressure. This would be followed by phase three, which included Security Force ambushes, patrolling and attacks on located camps.

<sup>588</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 212.

<sup>589</sup> Hack, ‘Everyone lived in fear’, 686.



as tins, were punctured so they would spoil if stored for an extended period of time.<sup>590</sup> In some villages central rice cooking was introduced, which allowed the villagers to eat, but would result in the spoilage of cooked rice if stored or smuggled.<sup>591</sup> New villages allowed security forces to monitor the population<sup>592</sup> and identify those storing or passing food to the insurgents.

Those who were caught stockpiling, or smuggling food, could be persuaded to give ‘advance, precise information’, that would enable police and army patrols to be in ambush at, or on the route to, some specific insurgent pick-up point at the right moment.<sup>593</sup> This operational intelligence allowed counterinsurgent operations to act on live intelligence, and to be carried out discriminately; as one could ambush the insurgents at the point of meeting.<sup>594</sup> By 1955, resettlement and food denial had been effective at cutting supplies to the insurgents, and decreased their ability to continue fighting.<sup>595</sup> Therefore, non-lethal coercive measures like resettlement, and food denial, allowed security forces to obtain actionable intelligence, that allowed operations to become more discriminate, and effective.

### Removing of Restrictions

The government was willing to remove restrictive regulations when they were no longer in line with the good that they were meant to achieve. The government was proportional in its actions, making sure restrictions were removed as soon as feasible. For example, Emergency Regulation 17D, the regulation allowing for mass detention and deportation, was abolished in

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<sup>590</sup> *ibid.*

<sup>591</sup> *ibid.*

<sup>592</sup> Inhabitants of New Villages were known to security forces as identity cards were issued requiring every man, woman and child over the age of 12 in a new village to register and carry one. Those who were not carrying a card were presumed to be an insurgent, or part of the Min Yuen.

<sup>593</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 212.

<sup>594</sup> *ibid.*

<sup>595</sup> A.J. Joes, *Resisting Rebellion: The History and Politics of Counterinsurgency* (Kentucky: University Press of Kentucky, 2004), 110.

March 1953.<sup>596</sup> The Emergency Regulation that allowed for collective punishment was withdrawn in November 1953.<sup>597</sup> Templer even declared that “the government was keen to relax the Emergency Regulations whenever practicable”.<sup>598</sup>

The restrictive nature of New Villages was also not permanent. Detention was not an end in itself, but a means to an end; the eradication of insurgency in Malaya, and to restore law and order. As Short wrote “by imposing massive control...as was done in food denial operations, there was always the danger that it would create such bitterness and hostility to make it self-defeating”.<sup>599</sup> Once these operations had taken effect, and the guerrillas had been removed, there needed to be some “sort of prize that would both encourage co-operation with and lighten the burden of government”.<sup>600</sup> The answer to this was introduced in 1953, when Templer declared 221 miles of Malacca as a “white area”. White areas were those deemed to have been pacified to a point where restrictions could be lifted, without the infiltration of insurgents. Food controls were relaxed, no curfews were in place, and there was a free movement of people and goods.<sup>601</sup> It was made clear that the restrictions were lifted, so long as there was cooperation between the public and the authorities, however the literature suggests that the lifting of restrictions was such a relief, that any Min Yuen contact would result in being reported by fellow village members; no white area was ever converted back to black.<sup>602</sup> By the middle of 1954, 1,300,000 people lived in white areas,<sup>603</sup> and a year later one third of all the people in Malaya were living in White Areas.<sup>604</sup> Stubbs argues that “there can

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<sup>596</sup> K. Ramakrishna, “Transmogrifying’ Malaya’, 88.

<sup>597</sup> *ibid.*

<sup>598</sup> *ibid.*

<sup>599</sup> Short, *The Communist Insurrection in Malaya*, 378.

<sup>600</sup> *ibid.*

<sup>601</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 194.

<sup>602</sup> *ibid.*

<sup>603</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 180.

<sup>604</sup> R.D. Renick Jr, ‘The Emergency Regulations of Malaya Causes and Effect’, *Journal of Southeast Asian History*, 6. 2 (1965), 1-39: 32.

be no doubt that the steady spread of these deregulated areas across Malaya was a major incentive for the people to co-operate with the government”.<sup>605</sup> Therefore, as the restrictions were not indefinite, and were lifted when appropriate, when the government was certain of security, then it can be seen as proportional; as the ‘bad’ was in line with the ‘good’ ends, the security of the population.

The conduct of the British during the second phase of the conflict was proportionate.

Coercive measures were implemented, but not as punishment, but to allow the British to effectively conduct operations. The use of coercive measures, such as food denial, allowed for an increase in intelligence which led to more effective and discriminatory operations, which were proportionate. Restrictive regulations were maintained so long as they were needed and removed as soon as possible. On the other side of coercion lay the Templer’s ‘Hearts and Minds’ approach to counterinsurgency, which balanced the coercive measures, where suitable. Therefore, during the second phase of the conflict, the conduct of the British forces was moderate-strongly proportionate.

#### Operations Outside the New Villages: Discriminate?

Operations outside of the barbed wire of the New Villages became both more discriminate and effective following the increase in actionable human intelligence obtained through coercive measures like food denial.<sup>606</sup> Prior to 1950, the military had been “forced into an operational strategy consisting mostly of large-sweeps in the absence of good intelligence”.<sup>607</sup> By 1952, the increase in intelligence, partly a result from the protection that resettlement provided to the Chinese squatter,<sup>608</sup> allowed for smaller-scale more targeted operations to be

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<sup>605</sup> Stubbs, *Hearts and Minds in Guerrilla Warfare*, 180.

<sup>606</sup> See: Resettlement – Proportional (2) section.

<sup>607</sup> Gregorian, “Jungle Bashing’ in Malaya: Towards a forma Tactical Doctrine’, 352.

<sup>608</sup> K. Ramakrishna, “Transmogriying’ Malaya: The impact of Sir Gerald Templer (1952-54)’, *Journal of Southeast Asian Studies*, 32, 1 (2001), 79-92: 83.

conducted. “Locating and surprising the rebels was more important than outgunning them and operational success therefore depended on outsmarting and outmanoeuvring your adversary”.<sup>609</sup>

These smaller scale operations, secured higher surrenders than larger operations, or they forced insurgents to move into an area of the security forces choosing, where they were ambushed by security forces.<sup>610</sup> These operations were undertaken after obtaining police clearance, when being conducted near populated areas; and Surrendered Enemy Personnel (SEPs) and intelligence was handed to the police.<sup>611</sup> Therefore operations, thanks to an increase in intelligence, had become more focused under Templer. These operations also resulted in an increase in insurgents killed by security forces. In 1952 a total of 1,535 insurgents were eliminated; 1155 killed, 123 captured and 257 surrendered.<sup>612</sup> This was an increase from 942 eliminated in 1950, and 1,401 in 1951.<sup>613</sup> According to Jackson, “under the energetic leadership of General Templer, the Security forces were winning”.<sup>614</sup> Security forces became more effective in Malaya, under Templer, and more discriminate.

Airpower too was used somewhat discriminately by the British in Malaya. Airpower had two distinctive strategic remits, one kinetic and the other non-kinetic. Kinetic operations involved bombing raids of insurgent encampments, insurgent food sites, and strafing areas of insurgent activity ‘to flush enemy units into the path of a waiting ground troop ambush’.<sup>615</sup> Non-kinetic roles involved transporting troops, evacuating wounded personnel, inserting special forces into the jungle, and dropping supplies.<sup>616</sup> Smith commented, on the use of helicopters,

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<sup>609</sup> Ucko, ‘The Malayan Emergency’, 23.

<sup>610</sup> Gregorian, ‘Jungle Bashing’ in Malaya: Towards a forma Tactical Doctrine’, 376-77.

<sup>611</sup> Hack, ‘Everyone lived in fear’, 687.

<sup>612</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 188.

<sup>613</sup> *ibid.*

<sup>614</sup> Jackson, *The Malayan Emergency*, 47.

<sup>615</sup> A. Mumford, ‘Unnecessary or unsung? The utilisation of airpower in Britain's colonial counterinsurgencies’, *Small Wars & Insurgencies*, 20, 3-4 (2009), 636-655: 640.

<sup>616</sup> *ibid.*

“unlike the Americans in Vietnam, the helicopters were used not to strafe villages or populated areas, but to lift troops into the jungle”.<sup>617</sup> Concerning aerial bombardment, according to Smith, “special care was taken to keep all strikes well away from known areas of civilian population”.<sup>618</sup> Robert Jackson adds to this, explaining that before an air strike “a strict target clearance procedure had to be followed.”<sup>619</sup> Continuing, “the necessity for stringent safeguards to protect the civilian population and friendly ground forces was underlined by the very few unfortunate incidents that occurred during the campaign”.<sup>620</sup>

Even in the more remote jungle areas, care was taken to not inflict casualties on the Sakai aborigines who lived within the jungle, outside of government control. In certain cases, jungle villages were cleared, so that civilians would not be victims of aerial bombardment.<sup>621</sup> Strict controls were placed on larger bombs, due to their destructive power being disproportionate.<sup>622</sup> In 1953, following a policy change, offensive air support operations were directed against a small number of ‘pinpoint targets instead of bombing large areas of jungle’; even though, according to Jackson, area bombing had been effective at obtaining surrenders of insurgents.<sup>623</sup> Overall, following the counter-terror period, one can argue that the use of force was used discriminately.

### Benevolent Quarantine

Unlike the counter-terror period, captured insurgents or SEPs were afforded benevolent quarantine. SEPs and captured insurgents became a key intelligence source. Clutterbuck, who served in Malaya, said that SEPs were “almost invariably ready to give information, and

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<sup>617</sup> Smith, *Counter-Insurgency Operations 1: Malaya and Borneo*, 25.

<sup>618</sup> *ibid*, 41.

<sup>619</sup> Jackson, *The Malayan Emergency*, 82.

<sup>620</sup> *ibid*.

<sup>621</sup> *ibid*, 83.

<sup>622</sup> *ibid*, 84.

<sup>623</sup> *ibid*, 73.

would often lead out an army patrol at once”.<sup>624</sup> They were partly enticed by financial rewards, implemented by Templer; Chin Peng had the highest bounty at \$250,000, but other information led to enticing figures.<sup>625</sup> However, financial reward would not have been sufficient to obtain this intelligence without the ability to protect those who were surrendering. Ramakrishna wrote that “only if the Chinese squatter was confident in government's ability to protect him would he provide much-needed intelligence to the Police”.<sup>626</sup> The protection provided by the new villages allowed for intelligence sources to come forward.

So too did the government promise of benevolent quarantine. Good treatment of SEPs was advertised within New Villages and in the jungles. Leaflets were disseminated showing “healthy-looking SEP, apparently happy and reunited with their families.”<sup>627</sup> Under Gurney, in 1950, all SEP who surrendered, even those with ‘blood on their hands’ were “fairly and humanely treated”.<sup>628</sup> In 1953 Templer had “safe conduct passes” distributed throughout the jungle, “promising food and medical treatment for any MRLA cadres wishing to surrender”.<sup>629</sup>

Therefore, the treatment of those who surrendered to the British were safeguarded, meeting the principles of benevolent quarantine, and the discrimination principle. Ramakrishna describes humane treatment as a “pull pressure”, convincing the insurgent that it was safe to surrender, working in tandem with the “push pressure”; food denial and security force pressure.<sup>630</sup> In doing so, it suggests that respecting the rights of surrendered enemy personnel,

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<sup>624</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 181.

<sup>625</sup> Ucko, ‘The Malayan Emergency’, 26-27.

<sup>626</sup> Ramakrishna, ‘Transmogrifying’ Malaya: The impact of Sir Gerald Templer (1952-54)’, 83.

<sup>627</sup> K. Ramakrishna, ‘Bribing the Reds to Give Up’: Rewards Policy in the Malayan Emergency’, *War in History*, 9, 3 (2002), 332-353: 338.

<sup>628</sup> *ibid.*

<sup>629</sup> Ucko, ‘The Malayan Emergency’, 27.

<sup>630</sup> Ramakrishna, ‘Bribing the Reds to Give Up’, 338-339.

or non-combatants, is strategically sensible because it helps to secure further surrenders; which potentially leads to further intelligence. Short commented that information from SEPs led to actions that resulted in further surrenders, having a snowball effect.<sup>631</sup>

By 1957 “terrorist hearts and minds were being buffeted by powerfully reinforcing push and pull pressures”; as the military situation had become hopeless, and no prospect of external intervention.<sup>632</sup> In this context, even hardened insurgents turned towards the government, and the rewards policy.<sup>633</sup> By 1957, 52 percent of insurgents eliminated were by surrender, and in 1958, this figure had risen to 74 percent; 502 surrendered out of a total 677 eliminated.<sup>634</sup> Between October 1957 and July 1958, in South Perak and North Johore alone, 118 insurgents surrendered “which all but finished the MRLA”.<sup>635</sup> Importantly, Britain, in the post-counter-terror period met the principle on Benevolent quarantine; meeting the discrimination principle.

The conduct of the British during the Malayan Emergency was generally more just than it was unjust. In the counter terror phase of the conflict, security forces used force indiscriminately and disproportionately. However, by 1950 the COIN forces changed their approach to defeating the insurgency. Not only was the second phase of the emergency conducted effectively, generally it was conducted in line with the principles of *in bello*. The aim of resettlement was to protect the population from the insurgents, and physically separate combatant from non-combatant. Operations developed to small-scale intelligence driven operations, and benevolent quarantine was granted to non-combatants. Therefore, a slightly

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<sup>631</sup> A. Short, “The Malayan Emergency” in R. Haycock (ed) *Regular Armies and Insurgency* (London: Croom Helm, 1979) 53-69: 65.

<sup>632</sup> Ramakrishna, “Bribing the Reds to Give Up”, 349.

<sup>633</sup> *ibid*, 350.

<sup>634</sup> Clutterbuck, *Conflict and Violence in Singapore and Malaysia 1945-1983*, 188.

<sup>635</sup> Ramakrishna, “Bribing the Reds to Give Up”, 350.

just score of +1 for discrimination is suitable for the whole conflict, and a slightly to moderately just score of +1.5 for proportionality is suitable.



### The Malayan Emergency: Results

The British were justified in responding to aggression from the communists. The British showed a good degree of intent, focusing on protection and security of the population. The war was publicly declared, although not called a war, an Emergency was declared, and the exercise in powers were made clear to the public, and the enemy. Legitimate authority, based on Orend's principles of a minimally just state, was somewhat mixed. Domestically, in 1948, Britain was seen to be legitimate among the Malays, although second to the Sultans, and it had tarnished its authority during the war and with the Malayan Union period. The same cannot be said for the Chinese population, who mainly viewed China as their homeland, and did not see the British as legitimate; particularly following the introduction of the Malayan Federation. Internationally however, it was seen to be legitimate. Overall, the *JaBI* score shows a slight justness.

	Index Score
Just Cause	3
Right Intention	2
Public Declaration	2
Legitimate Authority	2
Proportionality	2
Last Resort	2.5
<i>Jus ad Bellum</i> Index (JaBI)	2.146

(Fig.2) Results of case study, indicating individual scores for *ad bellum* criteria, and overall *JaBI* score.

The *in bello* examination of the case study is more mixed than the *ad bellum* discussion. The Counter-Terror period was both indiscriminate and disproportional. It was more indiscriminate than it was disproportionate. However, from 1950, the British approach to COIN changed, and the operations became more discriminate and proportional. Therefore, the conduct of the conflict was just more than slightly just.

	Index Score
Discrimination	1
Proportionality	1.5
<i>Jus in Bello</i> Index (JiBI)	1.25

(Fig.3) Results of case study, indicating individual scores for *in bello* criteria, and overall *JiBI* score.

Having established the degree to which Britain met the principles of the JWT, the final chapter of this thesis will examine this case study against the others. Here the key theoretical findings of the thesis, and the answers to the three research questions, will be presented and discussed. The following chapters will continue to examine the justness of each case study in a similar manner to this one.

## **Chapter Four: Kenya Emergency**

Between 1952 and 1960, Britain undertook counterinsurgency efforts to put down the Mau Mau in Kenya. This conflict, the ‘sideshow among sideshows’, demonstrates a difficult counterinsurgency case for this work. During the main fighting years, 1952 and 1956, the counterinsurgency campaign was one of brutality, with little regard for the *in bello* principles of discrimination and proportionality. Yet, at least in the short term, the counterinsurgency was a success. Within 4 years the counterinsurgents had broken the back of the Mau Mau, and order had been restored to the point where troops were withdrawn. Official figures put the death toll of insurgents at 12,000, with 2,633 captured and 2,714 surrendered.<sup>636</sup> Mumford calls this a “disproportionate figure given that the Mau Mau was estimated to only have 12,000 members at its peak”.<sup>637</sup> British casualties were significantly fewer, with British Army and settler police fatalities numbering 63, and 1,920 Home Guard units killed.<sup>638</sup>

The literature presents a case study that goes against British counterinsurgency doctrine, particularly minimum force and winning of hearts and minds. As will be seen below, “the British counterinsurgency strategy also made little attempt to win the hearts and minds of the 1.4 million Kikuyus who made up roughly 28 percent of the Kenyan population”.<sup>639</sup> This can be seen during both phases of the conflict; the “early phase” which lasted from October 1952 to May 1953, and the “Erskine period and beyond”, which lasted from June 1953 to November 1956. Although repressive tactics and operations pushed some of the neutral majority in favour of the insurgents, it was “the repressive, indiscriminate, and overwhelming force employed by the COIN force that eventually broke the back of the insurgency”.<sup>640</sup>

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<sup>636</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 72.

<sup>637</sup> Mumford, *The Counterinsurgency Myth*, 69.

<sup>638</sup> *ibid*, 70.

<sup>639</sup> Porch, *Counterinsurgency*, 256.

<sup>640</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 64.

Throughout the emergency torture was used against insurgents, prisoners and civilians. Internment of civilians was the mainstay of British counterinsurgency in Kenya. These methods allowed for the British to overcome the insurgents. However, the success of the insurgency was double-edged. The repression of the counterinsurgency efforts would lead to the questioning of British rule in Kenya, and events such as those in the Hola Camp in 1959, would put Kenya on the road to independence. For this work, it is a difficult case, as it was fought unjustly, yet it was a conflict that had met the principles of *ad bellum*.

## The Kenya Emergency: *Jus ad Bellum* Index

### Just Cause?

The first major Kenyan political organisation focused on independence in Kenya, the Kenya African Union, was established in 1944. Although its membership had swelled, it had failed to achieve its aims by the early 1950s, and violent voices became louder. The militant nationalists, who became the Mau Mau, created a formidable organisation across the Central Province and into the Rift Valley.<sup>641</sup> A central committee was set up to organise all actions, across five major districts; Embu, Meru, Machakos, Nyeri and Fort Hall.<sup>642</sup> Militants became the dominant voice within the committee, weakening the influence of moderate politicians.<sup>643</sup> The Kiambu district, which had its own co-ordinating body and favoured non-violent action, gave in to the Central Committee's plan for violence.<sup>644</sup> However, the Mau Mau were preparing for violent action against the colonial government "in the long run" from 1948, as they began to collect weapons and plan murders.<sup>645</sup>

Mau Mau violence began in 1949 after leaders had called for the banishment and killing of Europeans.<sup>646</sup> Unprovoked attacks on Europeans became a "disturbing feature";<sup>647</sup> and in November 1951 a European man was murdered.<sup>648</sup> Arson attacks against European estates were frequently witnessed, and in February 1952 "fifty-eight unexplained grass fires

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<sup>641</sup> D. Hyde, 'The Nairobi General Strike [1950]: from Protest to Insurgency', *Azania: Archaeological Research in Africa*, 36-37, 1 (2001), 235-253: 238.

<sup>642</sup> A.G. Schutte, 'Mau-Mau: The Cognitive Restructuring of Socio-political action', *African Studies*, 32, 4 (1973), 215-228: 223.

<sup>643</sup> F. Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (Pennsylvania: University of Pennsylvania Press, 2013), 68.

<sup>644</sup> Schutte, 'Mau-Mau: The Cognitive Restructuring of Socio-political action', 223.

<sup>645</sup> R. Buijtenhuijs, *Essays on Mau Mau: Contributions to Mau Mau historiography* (Leiden: African Studies Centre, 1982), 37.

<sup>646</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 68.

<sup>647</sup> J.T. Kanogo, *Squatters and the Roots of Mau Mau, 1905-1963* (Athens: Ohio University Press, 1987), 136.

<sup>648</sup> *ibid.*

combusted on European estates”.<sup>649</sup> Fear and insecurity spread across the European community. “Out on their farms, they were surrounded by embittered Africans and were cut off from the security the colonial forces offered to their urban kinsmen”.<sup>650</sup>

Fear and insecurity also plagued by the Kikuyu population, who were often the main targets of Mau Mau attacks. “Far more casualties, indeed, occurred among the Kikuyu themselves, where reluctant tribesmen were terrorised to give support.”<sup>651</sup> In January 1952, for example, there were eleven cases of arson on homes of Kikuyu who were loyal to the government.<sup>652</sup> Worse, in 1952 loyalist Kikuyu were murdered at a rate of fifteen to twenty per week.<sup>653</sup> Between the 1 August and 20 October of that year thirty-four Kikuyu had been murdered. Ferudi comments that “in the eyes of the colonial government, the most notorious activity of the 40 Group was the political assassinations that it carried out”, particularly those elite Kikuyu who were loyal to the colonial government.

Militant Kikuyu targeted elite Kikuyu; those Kikuyu who held high positions on estates or those chiefs who were members of the Local Native Council.<sup>654</sup> It was viewed that these Kikuyu prospered, whilst the majority were suffering at the hands of the colonial government. These Chiefs were complicit in making the situation worse for the Kikuyu *en masse*.<sup>655</sup> Many of the Mau Mau saw themselves as “the *Irungu* generation, the straighteners, who would overthrow the corrupt generation of patrons and usurp European power”.<sup>656</sup>

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<sup>649</sup> B. Grob-Fitzgibbon, *Imperial Endgame: Britain's Dirty Wars and the End of Empire* (London: Palgrave MacMillan, 2011), 216.

<sup>650</sup> Kanogo, *Squatters and the Roots of Mau Mau*, 138.

<sup>651</sup> R. Douglas, *Word Crisis and British Decline, 1929-56* (London: MacMillan, 1986), 219.

<sup>652</sup> Grob-Fitzgibbon, *Imperial Endgame*, 216.

<sup>653</sup> M. Osborne, *Ethnicity and Empire in Kenya: Loyalty and Martial Race among the Kamba, C.1800 to the Present* (Cambridge: Cambridge University Press, 2014), 193.

<sup>654</sup> D. Branch, ‘The Enemy within: Loyalists and the War against Mau Mau in Kenya’, *The Journal of African History*, 48, 2 (2007), 291-315; 295-296.

<sup>655</sup> *ibid*, 296.

<sup>656</sup> *ibid*.

Mau Mau planned assassinations of Kikuyu leaders who were loyal to the government. The most notorious, and the final act before the declaration of the emergency, was the assassination of the loyalist Chief Waruhiu wa Kung'u.<sup>657</sup> Waruhiu was an outspoken loyalist who had been persuading Kikuyu to join the government and help stop the Mau Mau.<sup>658</sup> The British perceived this attack as a direct attack on the colonial government, and Mau Mau violence had become a serious threat to the minority of Europeans in country. Newsinger wrote that the death of Waruhiu “provided Baring with a dramatic demonstration of the threat the movement posed to British rule”.<sup>659</sup> It was in response to the growing unrest and Violence in Kenya that led to the declaration of an emergency and helped justify the British cause in Kenya.

Within a few days of entering Kenya, Baring had convinced the Secretary of State for the Colonies, Oliver Lyttleton, that “a State of Emergency was ‘drastic but necessary to prevent deterioration’ of the situation in Kenya”.<sup>660</sup> In the minds of the government the implementation of emergency regulations and the increase of security forces, including the military, was intended to restore law and order in Kenya. It was believed that it was “only a question of time before unauthorised European retaliation’ began, as a result of the ‘wanton’ Mau Mau attacks”.<sup>661</sup> Consequently, the government needed to get a hold of the situation in 1952 to prevent further unrest. The introduction of British troops was intended to have a psychological effect that might prevent riots and bloodshed; and if violence turned into a general uprising, the increase in troops was a military necessity.<sup>662</sup> Therefore, the British

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<sup>657</sup> Osborne, *Ethnicity and Empire in Kenya*, 193.

<sup>658</sup> Kanogo, *Squatters and the Roots of Mau Mau*, 137.

<sup>659</sup> Newsinger, *British Counterinsurgency*, 66-67.

<sup>660</sup> D.A. Percox, *Britain, Kenya and the Cold War: Imperial Defence, Colonial Security and Decolonisation* (London: Tauris Academic Studies, 2004), 62.

<sup>661</sup> *ibid.*

<sup>662</sup> *ibid.*

declared the emergency in response to Mau Mau aggression, to restore law and order, indicating a moderate degree of justness for the cause. Therefore, a score of +3 is suitable.

### Public Declaration of War

In a similar manner to Malaya, the British did not declare a war in Kenya. Instead on 20<sup>th</sup> October 1952, a formal declaration of the Emergency was made by Governor Baring, who had replaced Mitchell several weeks previously. The Emergency was proclaimed by Baring himself, and published in an *Official Gazette Extraordinary*, on 21 October 1952.<sup>663</sup> The declaration was built around the British Emergency Powers (Defence) Act of 1939; “a statute which had given the British government unrestricted power to detain individuals deemed dangerous to the state in a time of war”.<sup>664</sup> With a declaration of the Emergency “A kind of war had been declared – but only a kind”.<sup>665</sup> Although the Emergency had a different character to a conventional war, the Emergency ushered in a new period wherein two political entities used violence against one another to force the other to their will.<sup>666</sup> Regardless of its name, the Kenyan Emergency was a war.

As previously stated, the purpose of declaring a war is to make both the target or the enemy aware that they now face the hazards of war, and it allows for citizens of a country to be made aware of the government’s plans.<sup>667</sup> The British first published a notice which described the emergency regulations broadly. For example, it declared that Emergency powers included the provision for the detention of persons and deportation and exclusion of persons from the territory, the authorisation to seize any property; and the apprehension, trial

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<sup>663</sup> S. Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool: Liverpool University Press, 2013), 125.

<sup>664</sup> *ibid.*

<sup>665</sup> F. Majdalany, *State of Emergency: The Full Story of Mau Mau* (London: Longmans, 1962), 103.

<sup>666</sup> See: C.S. Gray, ‘Irregular Warfare: One Nature, Many Characters’, *Strategic Studies Quarterly*, 1, 2 (2007), 35-57: 39.

<sup>667</sup> Orend, *The Morality of War*, 50.



and punishment of suspects.<sup>668</sup> Importantly “they did not authorise ‘the making of provisions for the trial of persons by Military Courts’”.<sup>669</sup> In addition to this there was a separate Government publication, entitled *Emergency Regulations 1952*, “which defined in detail ‘Baring’s interpretation of these broad emergency powers as they appeared ‘necessary or expedient’ to him for maintaining political order in British Kenya’”.<sup>670</sup> Within this supplement, it was made clear why someone may be detained, or arrested; and the powers given to the police. It also outlined which acts had been outlawed, such as those which are “likely to cause ‘mutiny, sedition or disaffection’”<sup>671</sup> and the possession of firearms, explosive materials, and “sword, spear, cutlass, panga, simi, ace, hatchet, knife or other dangerous weapons”.<sup>672</sup> The publication by the British of the Emergency regulations both broadly and narrowly, set out what could be expected by the insurgents and also the civilian population. Therefore, the British met the principle of a public declaration in Kenya; a score of +2 is suitable.

### Legitimate Authority

In 1952 British colonial rule in Kenya was not openly challenged internationally. Even the United States, who had taken an anti-colonial position by the 1950s, had little interest in pressuring the UK to give up Kenya, as it saw decolonisation as detrimental to the anti-communist effort.<sup>673</sup> Elsewhere, for much of the outside world “the dominant picture was one of prosperity”.<sup>674</sup> Therefore, one can accept that British rule in Kenya was seen

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<sup>668</sup> Morton, *States of Emergency*, 126.

<sup>669</sup> *ibid.*

<sup>670</sup> *ibid.*

<sup>671</sup> *ibid.*

<sup>672</sup> *ibid.*

<sup>673</sup> J.H. Meriwether, *Proudly We Can Be Africans: Black Americans and Africa, 1935-1961* (North Carolina: North Carolina Press, 2002) 128-131.

<sup>674</sup> G. Bennett & A. Smith. ‘Kenya: from White Man’s country to Kenyatta’s State 1945- 1963.’ In D.A. Low and A. Smith (eds), *Oxford History of East Africa, vol III, 109-156* (Oxford: Clarendon Press, 1976), 109-156: 112.

internationally as legitimate. However, this view of ‘prosperity’ was far from the reality within the country. The reality was a country that was ruled by a racist minority, where much of the population suffered socially, politically and economically. Colonial Kenya was a state which continually demonstrated an unwillingness to promote and secure the human rights of the population. Nonetheless, domestically, there was little widespread opposition to British rule. The insurgency was limited to the Kikuyu tribe, and a notable number of Kikuyu were loyal to British rule.

### Legitimate Authority: Respect for Human rights

A legitimate authority is one that strives to satisfy the rights of their own citizens.<sup>675</sup> As has been discussed earlier within this work, some states may intend to achieve the human rights of the population, but lack the resources to do so; and other states may not want to realise them, since they do not care about human rights fulfilment.<sup>676</sup> It is the latter type of state which is an illegitimate state, and the British rule in Kenya fits into this category.<sup>677</sup>

States that do not seek to enhance the rights of the population are usually “governed by a malevolent minority which hordes power and wealth, and either discriminates against and/or cares not a whit for, the well-being of the majority”.<sup>678</sup> British rule in Kenya fits Orend’s description. In 1952 European settlers numbered at 29,000, whereas the largest African tribe, the Kikuyu, numbered at 1.4 million; out of a total population of 5 million.<sup>679</sup> However, it was the European minority of 29,000 who prospered; often at the detriment of the African majority. From entering the country in the 1920s, the European minority set out to strengthen their position in the country through the subjugation of the native population.<sup>680</sup> This “white

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<sup>675</sup> Orend, *The Morality of War*, 36.

<sup>676</sup> *ibid.*

<sup>677</sup> *ibid.*

<sup>678</sup> *ibid.*

<sup>679</sup> Porch, *Counterinsurgency*, 256.

<sup>680</sup> Klose, *Human Rights in the Shadow of Colonial*, 62.

man's country"<sup>681</sup> interpretation of Kenya permeated economic, social and political issues in the country.

The settlers, aware of being in a minority position, created an economic, social and political hierarchy based on race; with the native Africans at the bottom of the ladder.<sup>682</sup> The system, known as multiracialism,<sup>683</sup> guaranteed "white supremacy at the cost of the African majority population".<sup>684</sup> Africans were seen as people who needed to be civilised, or brought up to the European 'standard' before they could be entrusted with rights. Therefore, because the government did not perceive the Kikuyu as civilised enough to understand the importance of voting, they were not granted the right to vote.<sup>685</sup>

The political institutions were also established, and ran, in order to suppress African representation. This can be seen at the national level through examining the Legislative Council, which was the main representative institution for the state. The Council was heavily weighted in favour of the European minority.<sup>686</sup> In 1948 the Kenya Legislative council "was comprised of one Arab, five Indian and eleven European elected members, along with one Arab and four African members *appointed* by the Governor plus sixteen official members, also European".<sup>687</sup> In 1946 Mitchell wanted to appoint more Africans to the Legislative Council "as soon as possible".<sup>688</sup> However, in that year "he was doubtful whether six

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<sup>681</sup> C.G. Rosberg Jr & J. Nottingham, *The Myth of "Mau Mau": Nationalism in Kenya* (London: Pall Mall Press, 1966), 195.

<sup>682</sup> J. Darwin, *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (London: Macmillan press, 1988), 185.

<sup>683</sup> R.A. Frost, 'Sir Philip Mitchell, Governor of Kenya', *African Affairs*, 78, 313 (1979), 535-553: 538.

<sup>684</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 65.

<sup>685</sup> Frost, 'Sir Philip Mitchell, Governor of Kenya', 538.

<sup>686</sup> J. Lonsdale & B. Berman, 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914', *The Journal of African History*, 20, 4 (1979), 487-505: 499.

<sup>687</sup> D.L. Barnett & K. Njama, *Mau Mau from Within: Autobiography and Analysis of Kenya's Peasant Revolt* (London: Macgibbon & Kee Ltd., 1966), 24-25. (emphasis original).

<sup>688</sup> Frost, 'Sir Philip Mitchell, Governor of Kenya', 544.

Africans of adequate calibre could be found”.<sup>689</sup> Frost argues, that “there were, however, many whose social position and experience in the Districts made them accepted leaders among the peasantry and the growing white collar class”.<sup>690</sup> Yet these men were overlooked by the European dominated political system. Even in 1953, there were only six African representatives in a total of twenty-eight ‘unofficial’ members; 14 of whom were European.<sup>691</sup> Importantly; no African members were directly elected, all were chosen by the governor, from “preference-lists”.<sup>692</sup> The European minority had seen that the African Majority had no say in politics; and had not proper political representation. European political control even permeated the local level. Local Native Councils were filled with ‘safe’ African representatives, who would be trusted chiefs and headmen based on their attitude towards the colonial government.<sup>693</sup> The European minority held a virtual monopoly of all political institutions in Kenya.<sup>694</sup>

Without political rights, the social and economic situation for the Kikuyu population worsened. Europeans introduced rules which stripped the Kikuyu of their land. By 1953 the Kikuyu alone had “lost over five hundred thousand acres, for which they received not one penny compensation”.<sup>695</sup> Land played an important social role in Kikuyu society and culture.<sup>696</sup> Without land it became impossible for Kikuyu to reach respectable positions within society,<sup>697</sup> and without livestock many men could not marry as they could not pay a

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<sup>689</sup> *ibid.*

<sup>690</sup> *ibid.*

<sup>691</sup> J. Lonsdale, ‘KAU’s Cultures: Imaginations of Community and Constructions of Leadership in Kenya after the Second World War’, *Journal of African Cultural Studies*, 13, 1 (2000), 107-124: 113.

<sup>692</sup> *ibid.*

<sup>693</sup> R.M. Mambo, ‘Local Native Councils and Education in Kenya: The Case of the Coast Province, 1925 to 1950’, *Transafrican Journal of History*, 10, 1-2 (1981), 61-86: 61.

<sup>694</sup> D.L. Barnett & K. Njama, *Mau Mau from Within*, 24.

<sup>695</sup> G. Padmore, ‘Behind the Mau Mau’, *Phylon (1940-1956)*, 14, 4 (1953), 355-372: 357.

<sup>696</sup> M.L. Kilson Jr, ‘Land and the Kikuyu: A Study of the Relationship between Land and Kikuyu Political Movements,’ *The Journal of Negro History*, 40, 2 (1955), 103-153: 118.

<sup>697</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 66.

dowry.<sup>698</sup> The loss of land was perceived as an attack on the social fabric of the Kikuyu; as Kilson Jr wrote “to alienate land from the Kikuyu would be tantamount to setting their socio-cultural system on the road to total disintegration.”<sup>699</sup>

The loss of land also decimated the economic situation for the Kikuyu, whilst bolstering the settler economy. Many of the Kikuyu were moved to reserves; 50,000 square miles of “inferior waterless country”.<sup>700</sup> Those who could not afford to live in the reserves were absorbed as cheap labour by European estate owners. Backed by government legislation, the European landlords continually subordinated the interests of the Kikuyu farmers, known as squatters.<sup>701</sup> Squatters were given minimal support from the local government, and did not have access to basic services, because “as far as the administration was concerned the squatter community did not merit any medical, social or welfare services”.<sup>702</sup> They also were given no legal protection from violence at the hands of their landlords on the estates where “farms coercion and arbitrary force prevailed without the semblance of legality”.<sup>703</sup>

European settlers, backed by government legislation, could dominate the lives of the squatters. The 1937 Resident Native Labourers Ordinance (RNLO), for example, granted the Europeans the power to limit the acreage for squatter cultivation, eliminate squatter stock, and to increase the working days to 270 a year.<sup>704</sup> With the loss of land to cultivate for personal use, and livestock, and no wage increase, the squatters saw a drop in their real income of around 30 to 40 percent.<sup>705</sup> Yet, the European prospered. By 1953 the average

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<sup>698</sup> Porch, *Counterinsurgency*, 258.

<sup>699</sup> Kilson Jr., ‘Land and the Kikuyu’, 120.

<sup>700</sup> Padmore, ‘Behind the Mau Mau’, 358.

<sup>701</sup> F. Furedi, *The Mau Mau War in Perspective* (Oxford: James Currey, 1989), 58.

<sup>702</sup> *ibid*, 57.

<sup>703</sup> *ibid*, 59.

<sup>704</sup> Kanogo, *Squatters and the Roots of Mau Mau*, 97.

<sup>705</sup> F. Furedi, ‘The Social Composition of the Mau Mau movement in the White Highlands,’ *The Journal of Peasant Studies*, 1,4 (1974), 486-505: 492.

wage of a European agricultural worker was twenty-five shillings a month; squatters would earn between ten and eighteen shillings.<sup>706</sup>

Even those Kikuyu who left the rural areas, moving to urban areas following the loss of their lands, did not have their human rights protected. In Nairobi a 'colour bar' was implemented which segregated the capital.<sup>707</sup> The colour bar was partly social; banning access to hotels, restaurants, and it was also economic. Kikuyu were given unequal pay to their European counterparts.<sup>708</sup> By the 1950s there was a clear wage difference in the cities between the Europeans and the Africans. For example, Africans who were employed in government posts, as clerks and minor officials, were paid less than £24 per year, compared to the lowest grade European civil servant who would receive £600 per year.<sup>709</sup> The colonial government also tried to constrict the traders within the cities, and by the late 1940s, legal restrictions on the marketing of food and the movement of traders had resulted in most urban Africans to become "dependent on the underground economy".<sup>710</sup> Asians, Europeans and Africans lived in strictly defined residential areas; overcrowding became a major issue in these areas.<sup>711</sup>

By the 1950s militancy had been growing in these urban areas, and the discontent helped to propel these militants to the forefront of African politics. By 1952 the government had failed to protect the rights of the Majority, not because of a lack of resources; but from the European minority led government focusing more on their own economic, social and political

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<sup>706</sup> Padmore, 'Behind the Mau Mau', 360. Settlers also restricted the ability of the squatters to sell produce. Often, Landlords would, claim the right to purchase maize at a below market price, 14-15 shillings in 1950, and then sell it themselves, receiving 32 shillings a bag as a result of government subsidies, which would more than pay the squatter's wages, *see*: Furedi, 'The Social Composition of the Mau Mau movement in the White Highlands,' 493.

<sup>707</sup> F. Furedi, 'The African Crowd in Nairobi: Popular Movements and Élite Politics', *The Journal of African History*, 14, 2 (1973), 275-290: 276.

<sup>708</sup> *ibid.*

<sup>709</sup> Padmore, 'Behind the Mau Mau', 360.

<sup>710</sup> C. Robertson, 'Whose Crime? Arson, Class Warfare and Traders in Nairobi, 1940-2000', *Crime, History & societies*, 11, 2 (2007), 25-48: 30.

<sup>711</sup> *ibid.*

monopoly at the detriment of the rights of the Kikuyu population. Therefore, it failed to meet Orend's criteria of a minimally just state successfully, meaning that colonial government in Kenya was not legitimate.

#### Legitimate Authority: Domestic support

Orend's criteria for a minimally just state also demands that it is seen as legitimate both domestically and both internationally. As with the other cases, this is a difficult factor to measure, particularly with the top heavy political and societal structure in Kenya. Without universal suffrage, infrequent elections, it is not an easy task to obtain exact figures or opinions on the domestic acceptance of British colonial rule. However, we can be sure that the Mau Mau movement was predominantly limited to the Kikuyu tribe. This meant that violent opposition to British rule was limited to a minority within 28 percent of the population.<sup>712</sup> The Mau Mau insurgency did not “embody the hopes and frustrations of the African population in Kenya. Furthermore, it did not even embody the feelings and sentiments of the entire Kikuyu tribe from which the movement originated”.<sup>713</sup> Therefore, opposition to British rule in Kenya, was restricted to a minority within the country. Nonetheless, the events in the post-war period do demonstrate the perception of the British in the eyes of some of the Kikuyu population.

The worsening of the Kikuyu situation, and cutting off peaceful political participation for the majority, resulted in resentment against the British. It is within this atmosphere that the Kikuyu turned to oathing. Oathing was conducted by the Kikuyu to bind one another together, often during times of war or hardship. The oath developed into a “united effort to reclaim stolen land, self-rule, and restore respect” and colonial resistance.<sup>714</sup> The oath was

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<sup>712</sup> Porch, *Counterinsurgency*, 256.

<sup>713</sup> Mumford, *The Counterinsurgency Myth*, 66.

<sup>714</sup> M.M. Koster, *The Power of the Oath* (Rochester: Boydell and Brewer, University of Rochester Press, 2016), 46.

taken “to defeat colonial rule/ drive the white man away”, “to liberate”, “to ask for independence”, “to stop being ruled by the whites”, “to unite” and “to get back their land”.<sup>715</sup> Josiah Mwangi Kariuki, who took the oath, said that by doing so “we had rejected the authority of the Kenya Government. We had organized [sic.] in its place another Government, accepted by the large majority of our people”.<sup>716</sup> Kenyan intelligence estimated that more than 250,000 Kikuyu had taken the Mau Mau oath by mid-1952.<sup>717</sup> Many settlers believed that up to 80 per cent of Kikuyu had taken the oath,<sup>718</sup> pledging their lives “for Mau Mau and its demand for land and freedom”.<sup>719</sup>

Of course, it is also true that not all oaths were taken voluntarily. Some were coerced into taking the oath by militants.<sup>720</sup> Many of those who took the oath did so “in agreement with or out of fear of their fellows, nor from fear of whites”.<sup>721</sup> Nonetheless, these figures do show that, at the time of the Emergency, a great deal supported the Mau Mau, even if reluctantly, and in doing so the Mau Mau had a significant grassroots support network; known as the passive wing.

Also, to band all Kikuyu together in opposition to British rule would present a false representation of legitimacy in Kenya in 1952. Importantly, many Kikuyu did not support the Mau Mau. Educated and urban members of the tribe “although sharing anti-colonial sentiments, were repelled by the feral tactics and mystical oath-taking Mau Mau”.<sup>722</sup> Some Kikuyu, known as ‘loyalists’, had prospered under colonial rule. They had become wealthy,

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<sup>715</sup> *ibid*, 47.

<sup>716</sup> J.M. Kariuki, ‘Mau Mau’ Detainee: *The Account by a Kenya African of his Experiences in Detention Camps 1953-60* (London: Penguin Books, 1964), 59.

<sup>717</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 65.

<sup>718</sup> J. Lonsdale, ‘Mau Maus of the Mind: Making Mau Mau and Remaking Kenya’, *The Journal of African History*, 31, 3 (1990), 393-421: 396.

<sup>719</sup> C. Elkins, *Britain’s Gulag: The Brutal End of Empire in Kenya* (London: Pimlico, 2006), 26.

<sup>720</sup> Furedi, ‘The African Crowd’, 283.

<sup>721</sup> Lonsdale, ‘Mau Maus of the Mind’, 396.

<sup>722</sup> Mumford, *The Counterinsurgency Myth*, 66-67.



usually at the expense of other Kikuyu.<sup>723</sup> Some of these Kikuyu became senior chiefs, who oversaw Kikuyu reserves, and set out to enhance their own position.<sup>724</sup> The members of the LNC were often from this class of Kikuyu. It is often quoted within the literature that Christian parts of the Kikuyu were a fundamental part of the Loyalist group.<sup>725</sup> In August 1952, a large meeting of Loyalists, called the ‘Army of God’, was held to show public solidarity against the increase in Mau Mau violence.<sup>726</sup> Importantly, the term Loyalist, does not necessarily mean that these people whole-heartedly supported the government.<sup>727</sup> Rather, loyalists were Kikuyu who did not approve of the Mau Mau methods, rather than their aims and objectives.<sup>728</sup> Therefore, it is difficult to determine the strength of ‘loyalism’.<sup>729</sup> However, there appears to have been a considerable loyalist element in Kenya, indicating that to some Kikuyu, Britain was accepted as the legitimate authority.

The European population, perhaps obviously, did see the colonial government as legitimate. As the “settlers formed only a minute European island in tropical Africa”<sup>730</sup> they relied on the metropole to provide security and assistance. In the 1930s the government had to bail the farmers out of the depression; and in 1952 “The Mau Mau emergency of the 1950s attested to the Europeans' inability to maintain political and military dominance without expensive support from the metropole”.<sup>731</sup> In the eyes of the European settler, the colonial government and Britain were the legitimate authorities. However, the European settler was a small

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<sup>723</sup> Elkins, *Britain's Gulag*, 29.

<sup>724</sup> *ibid.*

<sup>725</sup> Branch, ‘The Enemy Within’, 297.

<sup>726</sup> D.M. Anderson, ‘Making the Loyalist Bargain: Surrender, Amnesty and Impunity in Kenya’s Decolonization, 1952-63’, *The International History Review*, 39, 1 (2017), 48-70: 50.

<sup>727</sup> L.S.B Leakey, *Defeating Mau Mau* (London: Methuen & Co. Ltd., 1954), 110.

<sup>728</sup> *ibid.*

<sup>729</sup> Bennett & Smith, ‘Kenya: from ‘White Man’s Country’ to Kenyatta’s State 1945-1963’, 135.

<sup>730</sup> G. Bennett, ‘Settlers and Politics in Kenya, up to 1945’ in V. Harlow & E.M Chilver (eds.) *History of East Africa, Volume II* (Oxford: Clarendon Press, 1965) 265-333: 332.

<sup>731</sup> G. Wasserman, ‘European Settlers and Kenya Colony Thoughts on a Conflicted Affair’, *African Studies Review*, 17, 2 (1974), 425-434: 427.

minority within a country of five million, therefore, they do not represent the general perception of colonial rule in Kenya.

British rule in Kenya was perceived internationally as legitimate. However, the available evidence demonstrates government failed to promote and protect the rights of the population. The government continually and deliberately suppressed the political and economic rights of the African population. However, it must be noted that the British did not curtail the right to physical security, as was the case in Algeria, and by the government in South Vietnam; minimising the degree to which this affects the score for this principle. The evidence also indicates that, while up to 80 percent of the Kikuyu population had taken the oath, much of the population did not oppose British rule in Kenya. Nonetheless, because the government refused to enhance the rights of the majority, in favour of a benevolent minority, a score of -1 is suitable.

#### *Ad bellum* Proportionality

By 1952, violence had spread across parts of Kenya, and the situation had worsened significantly, in part due to government inaction. The situation in Kenya had been downplayed by Governor Mitchell. Even in June 1952 he had sent “memo after memo to London inaccurately reporting the peace and progress of his country”.<sup>732</sup> However, once Baring entered the country, following a four-month interim, the reality of the situation was made clear. Mau Mau had been murdering loyal Kikuyu between September and October.<sup>733</sup> Upon arrival Baring received a report that the Mau Mau already had control over three Kikuyu districts and the movement was growing.<sup>734</sup> Although Baring perceived the violence in Kenya as ‘getting out of control’, he believed it was not irreparable if decisive action was

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<sup>732</sup> Elkins, *Britain's Gulag* 29-30.

<sup>733</sup> Edwards, *Defending the Realm?*, 92.

<sup>734</sup> Elkins, *Britain's Gulag*, 32.

taken.<sup>735</sup> By the time Baring had arrived in Kenya, he perceived the decision to declare an emergency as necessary.

Importantly, the government understood that further inaction would have resulted in a worsening of the situation in Kenya. Mau Mau attacks against loyalist Kikuyu and Europeans had risen significantly by 1952, and the growing impatience of the Settler community posed another threat to the security within Kenya. By 1952 the “volatile and often highly reactionary” European settlers had become concerned about government inaction, and the evidence indicates that further hesitation by the government may have led to the Europeans taking matters into their own hands.<sup>736</sup> Mau Mau violence had united the settler community, in “demanding its forcible suppression”.<sup>737</sup> Conservative voices in Kenya believed that “as for the squatters, so for Africans generally, firmness, even force, was the language they understood”.<sup>738</sup> Kanogo writes that it had become apparent the “the African was no longer a protégé in need of protection but a dangerous foe”.<sup>739</sup> European farmers, who were mainly ignored by the government in their calls to increase security measures, began to arm themselves.

The arming of Europeans put the colonial government under increased pressure to call an emergency in response to Mau Mau aggression; to allow them to control both violence from the Europeans and violence from the Mau Mau. In declaring the Emergency, Baring considered the potential for a deterioration of the situation. If they did not act it was feared that the Europeans would take the law into their own hands. This was a very real threat, as the European minority felt that the Mau Mau threatened their position and believed that “the

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<sup>735</sup> Long, *The Soul of Armies*, 154.

<sup>736</sup> D. Anderson, *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London: Phoenix, 2006), 62.

<sup>737</sup> J. Lonsdale, ‘Constructing Mau Mau’, *Transactions of the Royal Historical Society*, 40 (1990), 239-260: 248.

<sup>738</sup> *ibid*, 250.

<sup>739</sup> Kanogo, *Squatters and the Roots of Mau Mau*, 138.

nature of the organization they faced justified both personal and public violence.”<sup>740</sup>

Therefore, the evidence suggests that the decision to declare the emergency in order to get a hold of the situation in the face of further unrest was a proportionate decision.

Importantly, the Emergency was only meant to last a few weeks and therefore was seen as a proportional response, as it was meant to bring about a swift end to Mau Mau violence.<sup>741</sup>

According to Elkin’s work, the government were “convinced it would be over before it started – three months at best”.<sup>742</sup> In London, Baring’s position appeared “sincere enough”, and there was “plenty of evidence to back it up” following the unrest in Kenya, and therefore was seen as a proportionate response.<sup>743</sup> Almost immediately after the declaration the government undertook Operation Jock Scott,<sup>744</sup> which aimed at decapitating the movement. Thousands of arrests were made, including key Mau Mau leaders. The Emergency and Jock Scott were seen to be “a blessing”, because it would avoid significant bloodshed by getting rid of the Mau Mau leadership, “bringing peace to Kenya.”<sup>745</sup> Therefore, the evidence indicates a good level of proportionality to the decision to declare the emergency.

With the benefit of hindsight, the decision to declare the emergency worsened the situation. “As an antithesis to the interpretation of the Emergency as a *consequence* of Mau Mau violence, it can be seen that it was in fact a *cause* of escalated militancy”.<sup>746</sup> The British government perceived the majority of the population as supporting the Mau Mau, and therefore emergency powers allowed for a “draconian, catch-all detention policy”, which helped to alienate the population further.<sup>747</sup> Nonetheless, the decision at the time was still

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<sup>740</sup> Rosberg Jr. & Nottingham, *The Myth of “Mau Mau”*, 278.

<sup>741</sup> J. Newsinger, ‘Revolt and Repression in Kenya: The “Mau Mau” Rebellion, 1952-1960’, *Science & Society*, 45, 2 (1981), 159-185: 168.

<sup>742</sup> Elkins, *Britain’s Gulag*, 35.

<sup>743</sup> Anderson, *Histories of the Hanged*, 62 .

<sup>744</sup> See *In bello* section of this chapter, for a further discussion of this Operation.

<sup>745</sup> Elkins, *Britain’s Gulag* 35.

<sup>746</sup> Mumford, *The Counterinsurgency Myth*, 51, emphasis original.

<sup>747</sup> *ibid*, 51-2.

seen as a proportionate response due to the worsening of the situation. The government believed that it had to act, because the costs of doing nothing were significant.

In 1952, Baring told London that “we are facing a planned revolutionary movement”, and that action was necessary.<sup>748</sup> The degree to which the Mau Mau were capable of launching a strong insurgency in 1952 is in doubt, however, “it was certainly developing along these lines.”<sup>749</sup> Violence had been undertaken by its members before the Emergency was declared; and with the aim to upset and unsettle the colonial government. The government was reacting to “a rising tide of militancy and violence which was leading towards a breakdown in law and order”.<sup>750</sup> By 1952 there is evidence that the Mau Mau had gone through a significant degree of active preparation; through mass oath-taking recruitment campaigns, and the stockpiling of weapons to create a situation whereby their intention had become a positive danger.

Therefore, the declaration of the Emergency, in order to enhance security, was a proportionate response to the growing unrest in Kenya, as it was seen as necessary help to control law and order; and not give the European free reign. Therefore, the initial declaration of the Emergency in 1952 was done so with respect to the principle of *ad bellum* proportionality; and it was indeed moderately proportional. A score of +2 is suitable for this principle.

### Right Intention

The available literature and evidence suggest that the British declared a state of emergency in Kenya with a degree of good intent, in order to restore security to Kenya. Of course, as with

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<sup>748</sup> Newsinger, ‘revolt and repression’, 167.

<sup>749</sup> M. Tamarkin, ‘Mau Mau in Nakuru’, *The Journal of African History*, 17, 1 (1976), 119-134: 126 & 134

<sup>750</sup> *ibid*, 132.

the other case studies, there were numerous interests at play in Kenya, influenced by the different sectors of the Kenyan society at the time.<sup>751</sup> As Ferudi wrote, “The motives behind the declaration of the emergency...in Kenya in October 1952...are complex and not to be reduced to one common cause”.<sup>752</sup> Nonetheless, in line with the JWT,<sup>753</sup> the available evidence demonstrates that there was a genuine intent to reduce the threat to the population from the Mau Mau, and the restoration of law, order and security.

According to Percox’s work, Baring did not arrive in Kenya with the intention of declaring an emergency, and instead it was called in response to the situation on the ground at the time.<sup>754</sup> The intention behind the declaration was to “curb the mounting levels of rural violence and urban disquiet”.<sup>755</sup> As already stated, Baring hoped the emergency would be a short affair, and the extra powers, he hoped, would “permit a quick return to normality.”<sup>756</sup> By hoping for a ‘quick return to normality’, or the restoration of peace, this indicates a good degree of right intent; even though the declaration possibly worsened the situation in reality.

Importantly, although the colonial government at the time suppressed the rights of the population, there is little evidence to suggest that the emergency was declared with the main intention of silencing the nationalist movement in Kenya. If we examine Baring’s comments, he said that the Emergency was taken to “stop the spread of Violence”, and it was not “not against men who hold any particular political views, but against those who have had recourse to violent measures”.<sup>757</sup>

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<sup>751</sup> Mumford, *The Counterinsurgency Myth*, 52.

<sup>752</sup> F. Furedi, ‘Britain’s Colonial Wars: Playing the Ethnic Card’, *Journal of Commonwealth & Comparative Politics*, 28, 1(1990), 70-89: 71.

<sup>753</sup> Orend, *Morality of War*, 49.

<sup>754</sup> Percox, *Britain, Kenya and the Cold War*, 49.

<sup>755</sup> Mumford, *The Counterinsurgency Myth*, 51.

<sup>756</sup> Newsinger, *British Counterinsurgency*, 67.

<sup>757</sup> Edwards, *Defending the Realm?*, 92.

There is little evidence to indicate that the government was exercising its power to silence nationalism entirely. Percox argues that if this was the case, it would have been obvious from the outset and “concerns to end it as quickly as possible would be absent from the documentary record; this is not the case.”<sup>758</sup> Importantly then, it was not declared with the intention of solely neutralising nationalistic goals and self-rule, but it was to neutralise the *radical* wings of anti-colonial movements.<sup>759</sup> Instead, it can be seen that the Kenya Government was “obsessed with the question of security”, and that the government focused on quelling unrest, in all forms.<sup>760</sup> This is particularly apparent when one, again, considers the decision to take action in the face of European settlers beginning to take matters into their own hands.

Therefore, the intention behind the declaration of the Emergency was to enhance security within Kenya and the protection of the population. Therefore, it moderately met the principle of right intention and a score of +2 is awarded.

### Last Resort

As already established elsewhere, when an actor is responding to aggression, the discussions on the last resort become somewhat moot.<sup>761</sup> When the emergency was declared on 20 October 1952, it was done in response to Mau Mau aggression, aimed at the eventual removal of the colonial government; and therefore, the decision to meet the principle of last resort was largely met. However, some of the literature argues that the government perhaps acted too swiftly, cutting off means of mediation.

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<sup>758</sup> Percox, *Britain, Kenya and the Cold War*, 51.

<sup>759</sup> Furedi, ‘Britain's colonial wars’, 71.

<sup>760</sup> D.A. Percox, ‘British Counter-Insurgency in Kenya, 1952-56: Extension of Internal Security Policy or the Prelude to Decolonisation?’ *Small Wars and Insurgency*, 9, 3 (1998), 46-101, 54.

<sup>761</sup> Fotion, *War & Ethics*, 15.

The Emergency declaration was accompanied by the mass arrests of a number of high profile Kikuyu, under Operation Jock Scott. The result of this was the arrest of key moderate nationalists, which has been perceived as the government robbing themselves of negotiation partners.<sup>762</sup> In addition to this, the Emergency did not nip nationalism in the bud, instead it led to further radicalisation.<sup>763</sup> Long explains that these arrests aided mobilisation for the insurgents as moderates were removed, and the arrests themselves provided a “major symbol of colonial oppression”.<sup>764</sup>

However, this is to ignore the fact that the Mau Mau had been killing loyalists and Europeans for more than two years by the time the emergency was declared. Elkins wrote “it was now clear to those on the spot that Mau Mau was preparing to launch an anticolonial and civil rebellion, though few at the time foresaw the level of destruction that lay over the horizon”<sup>765</sup>. Percox is right in stating that Operation was conducted “as late in the day as a pre-emptive strike could get”.<sup>766</sup>

In addition to this, the evidence indicates that if the government had not declared the Emergency when it did, the situation may have worsened and become more complex. Settlers had begun to arm themselves, and there was growing concern that, without government intervention, the European population may have taken the law into their own hands.<sup>767</sup> Baring, in justifying the emergency to London argued that “swift action would put a break on settler excess”.<sup>768</sup> Therefore, the evidence suggests that the British met the principle of last resort when declaring the Emergency in Kenya, it was in response to Mau Mau aggression

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<sup>762</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 67.

<sup>763</sup> *ibid*, 71.

<sup>764</sup> Long, *The Soul of Armies*, 155.

<sup>765</sup> Elkins, *Britain's Gulag*, 30.

<sup>766</sup> Percox, ‘British Counter-Insurgency in Kenya, 1952-56’, 62.

<sup>767</sup> See *ad bellum* proportionality section for a discussion on this.

<sup>768</sup> Anderson, *Histories of the Hanged*, 62.



and if they had waited much longer the evidence indicates that the situation would have worsened. Therefore, a score of +2 is suitable for this principle.

## The Kenya Emergency: *Jus in Bello* Index

The conflict can be split into at least two phases, the first running from October 1952 to May 1953 is known as the Early Emergency; whereby military forces took a back seat to police, and other security forces in COIN operations. During this period, the counterinsurgency operations were indiscriminate, disproportionate, and ultimately failed to stem the growth of the insurgency. Indiscriminate methods, such as collective punishment, detention, torture and murder did little to enhance the support base for the counterinsurgents. The second phase of the Emergency began with the arrival of Lieutenant-General George Erskine in June 1953. Erskine entered Kenya with the intention of reducing the abuses conducted by security forces. However, abuses continued, and Operation Anvil and villagisation were both indiscriminate and disproportionate as thousands of Kikuyu suffered. However, these operations broke the back of the insurgency. Overall, the conduct of the emergency was moderately to strongly unjust; however, the counterinsurgent in this case was successful at defeating the insurgency.

### The Early Emergency (October 1952 to May 1953)

#### Who Coerces Wins?

The early counterinsurgency efforts during the Kenyan Emergency failed to meet the *in bello* principles. The government focused its attention on defeating the Mau Mau as swiftly as possible, stamping its authority on the country, and signalling resolve to the other tribes in Kenya.<sup>769</sup> It was decided that fear was the “strategic lever” in combating the insurgency.<sup>770</sup>

Both the government and security forces believed that the most effective means of defeating

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<sup>769</sup> H. Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge: Cambridge University Press, 2013), 161.

<sup>770</sup> H. Bennett, ‘The Other Side of the COIN: Minimum and Exemplary Force in British Army Counterinsurgency in Kenya’, *Small Wars & Insurgencies*, 18, 4 (2007), 638-664: 647.

the Mau Mau was to coerce the Kikuyu population to support the government, rather than the Mau Mau,<sup>771</sup> and both systematically “allowed brutality” in order to crush the revolt.<sup>772</sup> Some scholars have gone so far to argue that the violence of the early phase, and the emergency as a whole, can be perceived as a genocidal campaign. Elkins argues that the emergency was a “murderous campaign to eliminate Kikuyu people”.<sup>773</sup> However, there is no evidence indicating that the government sought to destroy the entire Kikuyu population.<sup>774</sup>

However, it is evident that security forces believed that 90 percent of the Kikuyu population had taken the oath, and therefore discrimination was predominantly employed on an ethnic basis, rather than in terms of combatant and non-combatant.<sup>775</sup> The Kikuyu population suffered abuses, such as murder, rape, torture and beatings; and these were often conducted deliberately in order to intimidate the Kikuyu population into supporting the government.<sup>776</sup> However, the main objective for the military during this phase was to protect the white-settler population.<sup>777</sup> Therefore, the evidence indicates that the government paid little attention to *in bello* during this phase of the Emergency.

The Kenya Police and Kenya Police Reserve (KPR) were initially responsible for operations against the Mau Mau.<sup>778</sup> Both were heavily European dominated forces, and as such they showed little discipline and restraint in dealing with the population.<sup>779</sup> Klose comments that many white settlers had interpreted the declaration of the state of emergency “to be like the “opening of the hunting season” on all Kikuyu, Embu, and Meru, who were universally

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<sup>771</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 140.

<sup>772</sup> Bennett, *Fighting the Mau Mau*, 267.

<sup>773</sup> Elkins, *Britain's Gulag*, xiv.

<sup>774</sup> Bennett, *Fighting the Mau Mau*, 108.

<sup>775</sup> Mumford, *The Counterinsurgency Myth*, 52.

<sup>776</sup> H. Bennett, ‘The Mau Mau Emergency as Part of the British Army's Post-War Counter-Insurgency Experience,’ *Defense & Security Analysis*, 23, 2 (2007), 143-163: 152-153.

<sup>777</sup> Bennett, *Fighting the Mau Mau*, 161.

<sup>778</sup> Long, *The Soul of Armies*, 155.

<sup>779</sup> *ibid.*

suspected of conspiracy with the Mau Mau”.<sup>780</sup> During the first eight months of the Emergency widespread shootings, torture and beatings took place.<sup>781</sup> In November 1952, for example, in a village called Kiruara, police officers fired into a crowd and nearly one hundred people were murdered.<sup>782</sup> The evidence indicates that security forces murdered the civilian population. In April 1953, Governor Baring informed that 430 Mau Mau suspects had been shot while “attempting to escape”; which appears to have been a euphemism for “unnecessary, and indiscriminate shooting”.<sup>783</sup> Elkins’ work explains that secret documents shared between Lyttelton and Baring “described the security force’s “trigger happy” attitude, and allegations of misconduct, which included kill competitions”.<sup>784</sup> The conduct of the early phase of the emergency, by COIN forces, significantly failed to meet the principles of *in bello*.

One of the starkest failures of adhering to the principles of *in bello* came at the end of March 1953, with the Lari Massacre. On 26 March, Mau Mau insurgents attacked the predominantly loyalist area of Lari, within the Kiambu district.<sup>785</sup> The insurgents stormed the village, burning families alive in their homes and hacked to death those that escaped.<sup>786</sup> In total, 97 men, women and children were killed; including the Chief and his family, and 29 were wounded.<sup>787</sup> For the British, Lari demonstrated the savagery and evilness of the Mau Mau.<sup>788</sup> However, what is often omitted from the literature is the brutality of the security forces’ reprisal.

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<sup>780</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 71.

<sup>781</sup> Bennett, ‘The Mau Mau Emergency as Part of the British Army’s Post-War Counter-Insurgency Experience’, 152.

<sup>782</sup> Elkins, *Britain’s Gulag* 51-2.

<sup>783</sup> Bennett, ‘The Other Side of the COIN’, 649-650.

<sup>784</sup> Elkins, *Britain’s Gulag* 51.

<sup>785</sup> Newsinger, *Revolt and Repression*, 170.

<sup>786</sup> See Anderson, *Histories of the Hanged*, 119-132 for a description of events.

<sup>787</sup> Percox, *Britain, Kenya and the Cold War*, 57.

<sup>788</sup> Anderson, *Histories of the Hanged*, 177.

Security forces took revenge for these killings over the following twenty-four hours in both an indiscriminate and disproportional manner. Hundreds were killed out of hand by security forces. Up to 400 people, with little or no clear connection to the Mau Mau, were murdered overnight by security forces.<sup>789</sup> There was no differentiation between combatant and non-combatant, and the actions of the security forces were covered up by the government and were not publicised. There was no official enquiry into the events that followed the attack at Lari.<sup>790</sup> Lari demonstrates the starkest example of failing to meet the discrimination principle in the early phase of the conflict.

Indiscriminate policies, such as collective punishments, were introduced against the Kikuyu.<sup>791</sup> Livestock and crops could be confiscated, in response to minor infractions such as holding oath ceremonies in the region.<sup>792</sup> Swathes of the population were forcibly evicted from their lands. Often this force would involve murder, torture and beatings.<sup>793</sup> Villages and homes of Kikuyu were destroyed by COIN forces during the resettlement process, leaving families destitute.<sup>794</sup> There are claims that some security forces, the Home Guard and Kings African Rifle's in particular, raped underage girls while families were being cleared from areas.<sup>795</sup>

These indiscriminate measures were implemented *deliberately*, in an attempt to rally the loyalist Kikuyu behind the government against the insurgents, in a divide-and-rule strategy. By the end of 1952, the security forces argued that their methods were effective, as they believed the Kikuyu to be splitting into two camps; one which sought to avoid further

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<sup>789</sup> Elkins, *Britain's Gulag*, 51 and Newsinger, 'Revolt and Repression', 170.

<sup>790</sup> Anderson, *Histories of the Hanged*, 130.

<sup>791</sup> Bennett, 'The Mau Mau Emergency as Part of the British Army's Post-War Counter-Insurgency Experience', 156.

<sup>792</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 140.

<sup>793</sup> *ibid.* 153.

<sup>794</sup> A. Duffy, 'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure', *Law and History Review*, 33, 3 (2015), 489-542: 508.

<sup>795</sup> *ibid.*

punishment, and the other wanting to support violent resistance.<sup>796</sup> Growing economic strife had led to many Kikuyu lose faith in the Mau Mau.<sup>797</sup> However, although the British may have solidified their support base among the loyalist population, the evidence still indicates that by 1953 the indiscriminate and disproportionate force used by the security forces helped to increase the support for the Mau Mau.<sup>798</sup> Therefore, not only was the early phase demonstrably indiscriminate and disproportionate, but the evidence indicates that it did little to improve the support of the counterinsurgent.

### Screening

Counterinsurgency is inherently difficult, and one of the most challenging aspects of its character concerns identifying the insurgent from the population.<sup>799</sup> To find the insurgent among the population, Britain introduced a process known as screening. When the Kikuyu were resettled or detained, all would go through this process. Tens of thousands of Kikuyu would go through the process.<sup>800</sup> According to Elkins, “no one escaped it”.<sup>801</sup> She continues “no Kikuyu – man, woman, or child – was safe from the screening teams. Every Kikuyu was a suspect.”<sup>802</sup> Suspects were interrogated to persuade them to confess their Mau Mau affiliations. They would then be sorted, and sent through the “pipeline”, where they would be classed a ‘white-grey-black’, depending on allegiance.

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<sup>796</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 140.

<sup>797</sup> *ibid.*

<sup>798</sup> Bennett, ‘The Mau Mau Emergency as Part of the British Army's Post-War Counter-Insurgency Experience’, 153 & Mumford, *The Counterinsurgency Myth*, 60.

<sup>799</sup> M. Kress & R. Szechtman, ‘Why defeating Insurgencies is Hard: The Effect of Intelligence in Counterinsurgency Operations – A Best-Case Scenario’, *Operations Research*, 57, 3 (2009), 578-585: 578.

<sup>800</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 66.

<sup>801</sup> Elkins, *Britain's Gulag*, 63.

<sup>802</sup> *ibid.*

All Kikuyu who were screened went through the “pipeline”; which was based on a ‘white-grey-black’ classification system.<sup>803</sup> ‘Blacks’, or those deemed most committed, were sent up the pipeline for “softening” in special detention camps.<sup>804</sup>

Screening was often accompanied by violence, and suspected were tortured to force a confession.<sup>805</sup> Screening for the African detainee, often meant hours, if not days, of torture, in order to extract intelligence.<sup>806</sup> Suspects were often beaten to extract “confessions” and information.<sup>807</sup> According to Elkin’s work, even in government-approved screening centres, “where presumably there was closer scrutiny of interrogation tactics”, the “third degree” was “the method of choice”.<sup>808</sup> Based on interviews of Mau Mau adherents, Elkin’s explains that teams made up of “settlers, British district officers, members of the Kenya police force, African loyalists, and even soldiers from the British military forces demanded confessions and intelligence, and used torture to get them”.<sup>809</sup> If the team was not satisfied with a suspects response, then “torture was a legitimate last resort”.<sup>810</sup> Many loyalists had a considerable role to play in the torture of fellow Kikuyu. For example, following the assault at Lari, Chief Makimei was “selecting suspects and then carrying out his own investigations”, where “many were beaten by the Home Guard in the Uplands camp”.<sup>811</sup>

Detainees were often also subjected to sexual violence. “Bottles (often broken), gun barrels, knives, snakes, vermin, and hot eggs were thrust up men’s rectums and women’s vaginas”.<sup>812</sup>

Kariuki, who had been detained, wrote that he had heard stories that women were sexually

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<sup>803</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 69.

<sup>804</sup> Elkins, *Britain’s Gulag*, 136.

<sup>805</sup> D.M. Anderson, ‘British Abuse and Torture in Kenya’s Counter-Insurgency, 1952-1960’, *Small Wars & Insurgencies*, 23, No.4 (2012), 700-71: 702.

<sup>806</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 174.

<sup>807</sup> Porch, *Counterinsurgency*, 260.

<sup>808</sup> Elkins, *Britain’s Gulag*, 63.

<sup>809</sup> *ibid*, 66.

<sup>810</sup> *ibid*.

<sup>811</sup> Anderson, *Histories of the Hanged*, 160.

<sup>812</sup> Elkins, *Britain’s Gulag*, 66.

assaulted with bottles to make them confess.<sup>813</sup> In some cases, detainees would die from the torture, or they would be killed outright.<sup>814</sup> The torture of detainees clearly goes against the principles of *in bello*.

Importantly, the government was aware of these abuses. When General Erskine entered Kenya, he wrote to the Secretary of State for War, acknowledging that widespread beatings and torture had taken place at police posts, and that “administration-run screening teams also used torture to obtain information”.<sup>815</sup> Notably, it was the police units who were in charge of screening, and often the Army did not torture the detainees. There is also “firm evidence” that soldiers “acted appreciably better than did those in non-British Army units”.<sup>816</sup> There is also evidence that some British soldiers were reluctant to hand over prisoners, because they believed the police would torture them.<sup>817</sup> Bennett however, argues that there was close collaboration between both the army and other COIN forces, and the archives are “replete with countless cases of combined operations between all elements of the security forces, in the opening phase and afterwards”.<sup>818</sup> Therefore, although perhaps not actively involved in the screening process, in comparison to the KPR, KAR and the Home Guard, the army knew the use of force that was being carried out against suspects, and it continued to happen during the early phase of the conflict.

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<sup>813</sup> J. M. Kariuki, “Mau Mau”*Detainee: The Account by a Kenya African of his Experiences in Detention Camps, 1953-60* (Harmondsworth: Penguin, 1964), 68.

<sup>814</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 175.

<sup>815</sup> H. Bennett, ‘Soldiers in the Court Room: The British Army’s Part in the Kenya Emergency under the Legal Spotlight’, *The Journal of Imperial and Commonwealth History*, 39, 5 (2011), 717-730: 723.

<sup>816</sup> R. Thornton, “‘minimum force’: A Reply to Huw Bennett”, *Small Wars and Insurgencies*, 20, 1 (2009), 215-226: 220.

<sup>817</sup> Anderson, *Histories of the Hanged*, 260.

<sup>818</sup> H. Bennett, ‘Minimum force in British counterinsurgency’, *Small Wars & Insurgencies*, 21, 3 (2010), 459-475: 463.



Importantly, even though the government and military were aware of the nature of screening, its use continued even under Erskine.<sup>819</sup> The method was perceived as a successful method of obtaining confessions and intelligence; and the fear from the early methods of screening were effective at extracting information.<sup>820</sup> Some detainees would break, and would provide information to their interrogators, to stop the abuse and torture.<sup>821</sup> However, the validity of the information provided is in doubt within the literature. Klose's work indicates that detainees would tell the screeners what they wanted to hear, in order to stop the abuse.<sup>822</sup> In other cases, some detainees, known as the 'hard core', were not broken by the abuses.<sup>823</sup> The abuse, and the threat of abuse, in some cases resulted in Kikuyu supporting the Mau Mau. As Lonsdale wrote "if one were treated as Mau Mau by the police, it looks as if it seemed prudent to become one".<sup>824</sup> Therefore, the effectiveness of screening is questionable; bringing into doubt arguments that it was a necessary campaign.<sup>825</sup>

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<sup>819</sup> Anderson, 'British Abuse and Torture in Kenya's Counter-Insurgency, 1952-1960', 703.

<sup>820</sup> *ibid*, 706.

<sup>821</sup> D.R. Peterson, 'The intellectual Lives of Mau Mau Detainees,' *The Journal of African History*, 49, 1 (2008), 73-91: 75.

<sup>822</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 175.

<sup>823</sup> Peterson, 'The intellectual Lives of Mau Mau Detainees,' 75.

<sup>824</sup> Lonsdale, 'Constructing Mau Mau', 241.

<sup>825</sup> Particularly when compared to the treatment of surrendered insurgents under Erskine which provided significant intelligence gains.

## The Erskine Phase, and Beyond: 1953-1960: Offensive Operations and Prohibited Zones

Hinde was replaced in June 1953 by General George Erskine. Erskine has a ‘Templar effect’ whereby he is credited with turning the tide against the insurgency, introducing a number of significant changes to the counterinsurgency campaign in Kenya. Under Erskine the army took the lead in operations, taking the mantle from the police and home guard. Troop numbers increased to 20,000<sup>826</sup> and RAF heavy bombers were sent to Kenya.<sup>827</sup> The army took offensive operations, akin to clear and hold operations. Infantry units would probe into the forest, clearing the area, backed by armoured cars, and air power would be used to make the area “unwholesome”.<sup>828</sup> Once the area was cleared, home guard and police units would re-enter to hold the area, preventing Mau Mau re-infiltration.<sup>829</sup> Alongside these operations, the military would continually hunt the insurgents.<sup>830</sup> Initially these operations involved large sweeps with big unit patrols, and yielded little returns. However, the large scale sweeps were quickly replaced with small unit operations, which were more effective at killing insurgents.<sup>831</sup> Erskine introduced established and effective COIN to the Kenyan emergency.

Pertinent to this work, alongside the effective COIN strategy, Erskine emphasised discrimination and proportionality in these operations. Firepower was limited in the operations, when hunting the insurgents.<sup>832</sup> For example, artillery was used in a limited manner, with only one artillery battery being sent to Kenya; firing only twenty-four thousand rounds over the course of the entire emergency.<sup>833</sup>

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<sup>826</sup> Newsinger, *Revolt and Repression*, 171.

<sup>827</sup> Percox, *Britain, Kenya and the Cold War*, 58.

<sup>828</sup> Edwards, *Defending the Realm?*, 99.

<sup>829</sup> *ibid.*

<sup>830</sup> Long, *The Soul of Armies*, 159.

<sup>831</sup> *ibid.*

<sup>832</sup> *ibid.*

<sup>833</sup> *ibid.* If compared to the Algerian or Vietnam Wars, the use of Artillery in Kenya was minimal.

In a speech given in 1956, after leaving Kenya, Erskine said, “In operations of this kind it is important to be clear about the legal position of the security forces”, and “in Kenya, the rules were straightforward and simple”.<sup>834</sup> In Kenya different areas were designated “Prohibited” and “special” areas. Within prohibited areas, regions seen as a threat to public order, the population were forbidden from entering these areas.<sup>835</sup> Anyone found in the area was deemed to be Mau Mau, and liable to be attacked. The surrounding areas, the special areas, were areas where security forces could fire upon anyone who did not halt when asked.<sup>836</sup> In the prohibited areas, the military were given a free hand in the use of force, but in the special areas Erskine emphasised restraint. In the special zones, “security forces must prevent a felony and bring to justice those who have committed one, bearing in mind the general rule that no more force than is necessary to achieve the object should be used”.<sup>837</sup> Erskine argued that this gave the security forces “sufficient scope to use force in a sensible, reasonable, and controlled manner”.<sup>838</sup> The designation of the two zones, Erskine believed, made it easier for troops to use force in a more discriminatory manner.<sup>839</sup>

However, in practice, the military continued to use force indiscriminately. The shooting order, that soldiers could fire if ‘suspects’ did not halt when ordered to do so, became a “free pass for the arbitrary killing of Africans” and numerous shootings occurred based on the slightest reasons.<sup>840</sup> Bennett, explains that many were shot due to panic or misunderstanding. “It was one thing for Regulations to require people to stand still when ordered, but when many Kikuyu rightly feared rough treatment or prolonged detention (potentially without

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<sup>834</sup> G. Erskine, ‘Kenya – Mau Mau’, *Royal United Services Institution. Journal*, 101, 601 (1956), 11-22: 13.

<sup>835</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 141.

<sup>836</sup> *ibid*, 141-2.

<sup>837</sup> Erskine, 13.

<sup>838</sup> *ibid*.

<sup>839</sup> Edwards, *Defending the Realm?*, 102.

<sup>840</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 142.

trial), it is not surprising that some ran away”.<sup>841</sup> In one instance, a man was shot in the forest, who was working for the Forestry department.<sup>842</sup> “The assumption that running away always implied guilt was flawed”.<sup>843</sup> In another case, security forces called on Kikuyu to leave their huts, and as they did they were shot.<sup>844</sup> Importantly, these practices were not punished, because “a soldier, in his own judgement, acted within reason, in good faith, and in performance of his duties”.<sup>845</sup> Therefore, abuses did happen.

Although abuses still occurred, the designation of specific zones demonstrates a significant measure implemented in Kenya, with the intention of minimising harm to the general population and allowing for selective force to be employed.<sup>846</sup> The local population were informed of the rules concerning the areas, and commanders were obliged to know the exact coordinates of the zones.<sup>847</sup> The use of air power highlights in particular the desire to reduce the risk of civilian casualties.

The role of the RAF in Kenya was to force the rebels out of their camps, into the oncoming ground troops, to inflict as many insurgent casualties as possible.<sup>848</sup> According to Edwards limiting the effects of military operations on the wider Kenyan population was one of “Erskine’s major preoccupations”, and he “continually raised the issue of proportionality in the use of force amongst his senior commanders”.<sup>849</sup> Accordingly, “the archival evidence reveals that senior RAF officers and members of the Cabinet were fully attuned to the need to avoid civilian casualties from air action.”<sup>850</sup> As such, “offensive air operations were only

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<sup>841</sup> Bennett, ‘The Other Side of the COIN’, 650-651.

<sup>842</sup> *ibid*, 651.

<sup>843</sup> *ibid*.

<sup>844</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 142.

<sup>845</sup> *ibid*.

<sup>846</sup> Bennett, *Fighting the Mau Mau*, 129.

<sup>847</sup> *ibid*, 130.

<sup>848</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 142.

<sup>849</sup> Edwards, *Defending the Realm?*, 97.

<sup>850</sup> S. Chappell, ‘Air Power in the Mau Mau Conflict’, *The RUSI Journal*, 156, 1 (2011), 64-70: 66.

authorised in those areas prohibited to civilians where the Mau Mau were known to operate”.<sup>851</sup>

Some of the literature criticises the use of air power, or free reign of force, in these areas as indiscriminate and banded by international law.<sup>852</sup> Areas would be carpet bombed by aircraft; due to poor visibility caused by the dense forests.<sup>853</sup> However, the Secretary for the Colonies justified the use of airpower, saying that the prohibited areas were “known to everyone, and there is no risk to law-abiding persons”, and that “no bombing or armed action by aircraft is permitted outside the prohibited areas”.<sup>854</sup> To operate elsewhere would result in possible civilian casualties, which would potentially turn the civilian population into potential enemies.<sup>855</sup>

Only in exceptional circumstances would operations be allowed to be conducted outside the prohibited zones, under the name of Operation Mushroom. These actions would be continually assessed and would only happen temporarily. Chappell argues that this indicates a high level of discrimination and proportionality:

The most senior members of the RAF and the government understood that the contest for the support of the population in counter-insurgencies is based on moulding the population's perceptions...clearly something on which civilian casualties would have had a detrimental effect.<sup>856</sup>

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<sup>851</sup> *ibid.*

<sup>852</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 142.

<sup>853</sup> *ibid.*

<sup>854</sup> *HC Deb 18 November 1953*, Vol 520, CC1722-30. Available online: [https://hansard.parliament.uk/commons/1953-11-18/debates/e7469f59-8b4e-4144-a9a1-47d29234b1b5/ProhibitedAreasKenya\(Bombing\)](https://hansard.parliament.uk/commons/1953-11-18/debates/e7469f59-8b4e-4144-a9a1-47d29234b1b5/ProhibitedAreasKenya(Bombing)) [Accessed: 20/03/2021].

<sup>855</sup> Edwards, *Defending the Realm?*, 98.

<sup>856</sup> *ibid.*, 68.

Under Mushroom, air support could be called to support troops who came into close contact with large gangs of insurgents; but the firepower was still restricted to twenty-pound bombs, which could be “delivered accurately with little risk of collateral damage”.<sup>857</sup> Therefore, the evidence indicates that under Erskine, there was a genuine attempt to meet the principles of *in bello*.

### Erskine: Reigning in abuse

When Erskine had arrived in Kenya, news of abuses carried out by security forces against the Kikuyu were becoming known across Kenya, and back in Britain. Anderson comments that Erskine was “deeply shocked” by the “culture of intimidation and gratuitous physical abuse of Kikuyu suspects” that had been carried out since the beginning of the emergency.<sup>858</sup> To Erskine, these were deep rooted issues, that had not been kept in check. “Among the KPR and Kenya regiment, the bully-boys, thugs and racists were having a field day, unconstrained and ill-disciplined”, and became “brash and proud in their excess, disregarding possible consequences”.<sup>859</sup> Erskine, within a month of arriving, issued an order making it clear that abuses, including the ‘mistreatment’ of detainees were not acceptable and would not go unchecked.<sup>860</sup> Within his order he states:

I most strongly disapprove of ‘beating up’ the inhabitants of this country just because they are the inhabitants...Any indiscipline of this kind would do great damage to the reputation of security forces and make our task in settling Mau Mau much more difficult.<sup>861</sup>

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<sup>857</sup> Long, *The Soul of Armies*, 159. This procedure was only used nine times between June 1954 and July 1955.

<sup>858</sup> Anderson, *Histories of the Hanged*, 258.

<sup>859</sup> *ibid.*

<sup>860</sup> Edwards, *Defending the Realm?*, 100.

<sup>861</sup> Erskine, quoted in Anderson, *Histories of the Hanged*, 259.

Erskine also stated that he would ‘personally’ investigate allegations of abuses, and empirically he did. Brigadier Donald Cornah, the commander of the 70 East African Brigade, was relieved of his command in August 1952 because of a his ‘scorched earth’ policy against the Mau Mau.<sup>862</sup> In another case, Captain Gerald Griffiths was court martialled for the murder of two Kikuyu men; after he had subjected the men to torture and mutilation.<sup>863</sup> The arrival of Erskine demonstrates the first major focus in the conflict on discipline of security forces; and an obvious stance against abuses.

Nonetheless, abuses still continued, despite Erskine’s orders and clamping down on abuses. Although given official instruction to take prisoners, soldiers were given “unofficial instructions to shoot-to-kill” and summary executions continued.<sup>864</sup> Direct orders to not mistreat suspects and the population were ignored, and “rough treatment continued to be meted out”.<sup>865</sup> Abuses at the hands of the police still continued; and screening teams were would still employ violence against detainees.<sup>866</sup>

One notorious example of abuse concerns Brian Hayward, who was sent to Tanganyika by Baring, to screen potential Mau Mau. In less than a week, the governor of that region received reports that the screening team had been “very rough” with the Kikuyu.<sup>867</sup> An official investigation was carried out and Hayward was found guilty of torture, along with ten others.<sup>868</sup> They were guilty of ten counts of assault and causing actual bodily harm.<sup>869</sup> Hayward was fined £100, and sentenced to 3 months hard labour, which was spent doing clerical work in a hotel. The other men were fined one hundred shillings and served one day

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<sup>862</sup> Edwards, *Defending the Realm?*, 100-101.

<sup>863</sup> Edwards, *Defending the Realm?*, 101, and Anderson, *Histories of the Hanged*, 259.

<sup>864</sup> *ibid.*

<sup>865</sup> Edwards, *Defending the Realm?*, 100.

<sup>866</sup> See *Operation Anvil* Section.

<sup>867</sup> Elkins, *Britain’s Gulag*, 82.

<sup>868</sup> Anderson, ‘British Abuse and Torture in Kenya’s Counter-Insurgency, 1952-1960’, 702.

<sup>869</sup> Elkins, *Britain’s Gulag*, 83.

in prison.<sup>870</sup> The evidence suggests that although Erskine ordered for abuses to stop, they continued. Reports indicate that security forces raped or sexually assaulted detainees. Papers now available record fifty-six separate sexual crimes between 1954 and 1959; “all were perpetrated by employees of the colonial administration or members of the security forces”.<sup>871</sup>

Therefore, under Erskine there was a genuine attempt to reign in abuses by security forces, which demonstrates a change in attitude from the early phase of the Emergency. Erskine sought to hold accountable those who had conducted abuses against the population. He had clearly given orders that security forces must not condone or take part in abuses. Nonetheless, Erskine was unable to impose tight discipline on all the security forces and abuses still continued. The pattern for violence was deeply engrained in the COIN forces in Kenya, and gradually Erskine accepted this, “because his strategy for defeating the Mau Mau left him no other option”, and all but the most severe abuses went unpunished.<sup>872</sup>

### Benevolent Quarantine?

One important aspect to Erskine’s war, is his emphasis on benevolent quarantine, and the effort made to allow for the surrender of insurgents. The idea of negotiating with the insurgents was widely unpopular among the settler population.<sup>873</sup> However, Erskine saw the strategic sense in obtaining surrenders in Kenya, based on the success of surrenders in Malaya, which had helped to reduce the number of insurgents and benefitted intelligence gathering.

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<sup>870</sup> *ibid.*

<sup>871</sup> D.M. Anderson & J. Weis, ‘The Prosecution of Rape in Wartime: Evidence from the Mau Mau Rebellion, Kenya 1952-60’, *Law and History Review*, 36, 2 (2018), 267-294: 274.

<sup>872</sup> Bennett, *Fighting the Mau Mau*, 194.

<sup>873</sup> J. Lonsdale, ‘Constructing Mau Mau’, 256.



By August 1953, only 29 incidents of voluntary surrender had been recorded. The lack of clear instruction on how to deal with surrenders, and rumours of mistreatment by security forces, discourages surrenders from the Mau Mau.<sup>874</sup> For Erskine, the fair treatment of surrendered insurgents made strategic sense; there is little incentive to lay down arms, if the result is to be hanged for murder once in the hands of the security forces.

The first offer to relinquish the death penalty for any Mau Mau who surrenders was given in August 1953; but this had limited success with only 66 surrenders.<sup>875</sup> However, in January 1955, a surrender policy was introduced which offered “double amnesty” to both insurgents and security forces. Insurgents would not be prosecuted for murder and security forces could no longer face trial for any accusations of “murder, torture, beatings and other abuses” prior to 18 January 1955.<sup>876</sup> Without fear of execution or death, the number of surrenders obtained was significant. During the Amnesty, which ended on 10 July, 979 insurgents surrendered, and “after the double amnesty, the end of the military conflict came quickly”.<sup>877</sup> However, one must put this statement into context. Bennett’s work indicates that, although surrender policies were successful, most Mau Mau who surrendered did so because of other government offensives, and the peak in surrenders came following Anvil and villagisation.<sup>878</sup> Nonetheless, the promise of fair treatment helped to increase the number of insurgents who surrendered. Approximately 10 to 12 percent of all fighters ultimately surrendered, and Erskine attributes surrenders to the defeat of the Mau Mau, and “undoubtedly helped to win the war”.<sup>879</sup>

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<sup>874</sup> Anderson, ‘Making the Loyalist Bargain’, 54.

<sup>875</sup> Mumford, *The Counterinsurgency Myth*, 63.

<sup>876</sup> Anderson, ‘Making the Loyalist Bargain’, 59.

<sup>877</sup> *ibid.*, 63.

<sup>878</sup> Bennett, *Fighting the Mau Mau*, 146.

<sup>879</sup> *ibid.*

Those who surrendered also offered a “potential intelligence goldmine in terms of revealing the size, movement and operation intentions of their former units”.<sup>880</sup> Surrendered insurgents, who turned against their former comrades, were used in pseudo gangs. These small units, led by security forces, but comprised of former insurgents, were sent out gather actionable intelligence from insurgents.<sup>881</sup> The Pseudo gang method was effective, and led to an increase of actionable intelligence. Erskine’s successor, Lt General Gerald Lathbury, believed that they were the most effective weapon against the insurgents.<sup>882</sup> The surrender of enemy personnel, allowed for intelligence led missions to be conducted, and by early 1956, these low-intensity and targeted operations had resulted in the capture or death of most Mau Mau leaders.<sup>883</sup> Therefore, the emphasis on surrender, and the promise that the insurgents would not be killed, indicates not only a good degree of understanding of the *in bello* principles; but also indicates a possible link between strategic success and ethics. Therefore, offering insurgents the chance to surrender and guaranteeing benevolent quarantine may result in significant surrenders.

#### ‘The turning point’ – Anvil

In April 1954, Mau Mau still held a strong presence in Nairobi; and it was in the city where the passive wing was mainly found. Weapons, supplies, funds, and recruits came from the city and kept the insurgency maintained. “Without access to this source, the Land and Freedom Armies would soon have withered and died”.<sup>884</sup> At the beginning of 1954 Erskine set out to remove Mau Mau’s grip on the city, and in April Operation Anvil was launched. Anvil is often viewed as the ‘turning point’ in the conflict; where the counterinsurgents

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<sup>880</sup> Mumford, *The Counterinsurgency Myth*, 63.

<sup>881</sup> Long, *The Soul of Armies*, 162.

<sup>882</sup> Mumford, *The Counterinsurgency Myth*, 59.

<sup>883</sup> Anderson, *Histories of the Hanged*, 286.

<sup>884</sup> Newsinger, ‘Revolt and Repression’, 173.

significantly disrupted the Mau Mau; cutting it off from its support base. The operation is criticised within the literature as indiscriminate.

On the 24 April, 25,000 troops and police cordoned off the city of around 95,000. The city had been organised into sections by the security forces, and all the African population had been systematically rounded up. Those who were lacking documentation, a place of residence, or identified by informers as Mau Mau were detained.<sup>885</sup> Security forces “detained 27,000 mainly Kikuyu men and women, some as young as twelve, and deported a further 20,000 back to the reserves”.<sup>886</sup> The operation was indiscriminate and any distinction between Mau Mau and non-Mau Mau was ‘crude’.<sup>887</sup> Men, women and children, some as young as twelve, were collected and detained by the screening teams.<sup>888</sup> Mumford wrote, “the British had demonstrably failed to distinguish Mau Mau from the wider population, and consequentially displayed an arrogance that could have endangered that widespread apathy towards Mau Mau by mounting such a forceful catchall operation.”<sup>889</sup> The operation was moderately indiscriminate. According to Anderson’s work, there were ‘many, many cases of mistaken identity’ and once labelled, it was ‘exceedingly difficult’ to prove otherwise.<sup>890</sup> He also writes:

In the morass of Operation Anvil, bureaucratic procedure had taken over from common sense: with these numbers, what did it matter if one more Kikuyu was detained? And if in any doubt, it was surely better to detain him than let him go? Anvil epitomised an attitude of mind that pervaded the security forces.<sup>891</sup>

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<sup>885</sup> Long, *The Soul of Armies*, 163.

<sup>886</sup> Porch, *Counterinsurgency*, 261.

<sup>887</sup> Anderson, *Histories of the Hanged*, 202.

<sup>888</sup> Porch, *Counterinsurgency*, 261.

<sup>889</sup> Mumford, *The Counterinsurgency Myth*, 57.

<sup>890</sup> Anderson, *Histories of the Hanged*, 204.

<sup>891</sup> *ibid.*

Porch's work highlights that internment violated the European Convention on Human Rights, however "lawyers claimed that the Convention did not apply to Africans" and Article 15 allowed for detention without trial during a public emergency.<sup>892</sup> Operation Anvil was not discriminatory, as all Kikuyu were swept up in the security net. Therefore, it failed to meet the requirement.

Although Operation Anvil was indiscriminate, the evidence indicates that the operation was proportionate. It must be made clear here that the arrests of the population were often conducted with some degree of force. If the suspects moved too slowly, often they were beaten with rifle butts or clubs.<sup>893</sup> Some suspects, who complained about abuses, were shipped off in "special police vehicles", and disappeared.<sup>894</sup> Therefore, this must be considered in line with the benefits of the operation, but the evidence indicates that these benefits outweighed the costs. Operation Anvil was ultimately successful, and it "marked the turning point in the British Campaign against the rebels",<sup>895</sup> and the evidence indicates that the operation was proportionate.

The aim of the operation was to dismantle the Mau Mau hold on the capital and to cut it off from the passive wing. Nairobi was seen as fundamental to the Emergency, and Erskine was determined to control the city. The operation achieved these aims. Mumford's work explained that the operation crippled Mau Mau's "organisational capabilities in Nairobi, their only urban base, and severed the ability of the urban Mau Mau to supply or influence the rural campaign".<sup>896</sup> The Operation "sealed the fate" for the forest fighters in the rural areas.<sup>897</sup> Supplies and recruitment halted, and gradually the insurgents began to suffer. Importantly,

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<sup>892</sup> Porch, *Counterinsurgency*, 261.

<sup>893</sup> Elkins, *Britain's Gulag Britain's Gulag*, 123.

<sup>894</sup> *ibid.*

<sup>895</sup> Anderson, *Histories of the Hanged*, 214.

<sup>896</sup> Mumford, *The Counterinsurgency Myth*, 57.

<sup>897</sup> Anderson, *Histories of the Hanged*, 268.

with Nairobi secured, the military could focus their efforts on hunting down the insurgent forces in the forests. In the months after Anvil, security forces hunted the insurgents, and by October, they were losing more than 600 fighters each month. By May 1955, the forest war had effectively been won, with Mau Mau insurgent numbers dwindling.<sup>898</sup> Therefore the benefits of Operation Anvil were longer term, than in the immediate suppression of Nairobi. It allowed for further military operations to be conducted. As Mumford wrote “the strategic dividend of the operation was sizable”.<sup>899</sup> Therefore, the evidence indicates that, although the operation was indiscriminate, the operation was proportionate to the benefits it achieved.

However, the operation had mixed results on winning the support of the population. Anvil had effectively cleared the capital of all Kikuyu, except those who were ‘clean’, or seen to be loyal to the government.<sup>900</sup> Therefore, the operation meant that the loyalists were able to oppose the Mau Mau more openly, without fear of retribution.<sup>901</sup> The success of the operation, also weakened the position of the Mau Mau, and from mid-1954 loyalism appeared to be the more-likely path to “land, freedom and self-mastery than Mau Mau”.<sup>902</sup>

However, the indiscriminate nature of the operations alienated swathes of the originally anti-Mau Mau population.<sup>903</sup> Church leaders, who had often been prominent loyalists and opposed the Mau Mau before the Emergency, criticised the government, on the grounds that the African Christians had been subjected to intimidation and violence; even church members who had openly and publicly condemned the Mau Mau were detained and screened.<sup>904</sup> Anderson comments that “Church leaders had been mildly critical of the government

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<sup>898</sup> *ibid*, 268.

<sup>899</sup> Mumford, *The Counterinsurgency Myth*, 57.

<sup>900</sup> Elkins, *Britain's Gulag Britain's Gulag*, 124.

<sup>901</sup> Branch, ‘The Enemy Within’, 302.

<sup>902</sup> *ibid*.

<sup>903</sup> Mumford, *The Counterinsurgency Myth*, 57.

<sup>904</sup> Anderson, *Histories of the Hanged*, 206-7.

throughout the emergency; Anvil turned this into a unified chorus of dissent”.<sup>905</sup> The operation also economically damaged the Kikuyu position as entire work forces were detained. In doing so, the operation alienated an important sector of the Kikuyu community, who often were loyalist.

Anvil broke the back of Mau Mau’s organization [sic.] in Nairobi, but at what cost? For the respectable Kikuyu middle class, many of whom lived in fear and dread of Mau Mau intimidation, Anvil had been nothing less than a betrayal. Already threatened by Mau Mau, they had now been the victims of a state sponsored raid. They had lost their livelihoods and their property.<sup>906</sup>

Therefore, although the operation was significantly important to the outcome of the Kenyan Emergency, it is important to understand that the indiscriminate nature of the operation damaged the perception of the government. Mumford’s work indicates that the much of the criticism of the British COIN efforts in Kenya stem from the indiscriminate nature of the conflict, including operations such as Anvil.<sup>907</sup> Therefore, although the operation was proportionate, the overall proportionality score must be tempered against the indiscriminate nature of the operation.

### Villagization and Rehabilitation

Much like in other cases, such as Malaya and Algeria, anti-Mau Mau counterinsurgency utilised strategic villages in order to separate the insurgent from its support base.

‘Villagization’ began in June 1954, whereby thousands of Kikuyu were forcibly removed from their homes in the countryside, into defensible villages. This was carried out to an enormous scale. Within 18 months, over 1 million Kikuyu were relocated, into 854 villages,

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<sup>905</sup> *ibid*, 208.

<sup>906</sup> Anderson, *Histories of the Hanged*, 212.

<sup>907</sup> Mumford, *The Counterinsurgency Myth*, 60.

consisted of 230,000 huts.<sup>908</sup> The villages were surrounded by barbed wire, ditches filled with spikes to keep the rebels out, watch towers, and were patrolled by armed guards.<sup>909</sup> The Home Guard, which had a strength of 25,600 in 1954, oversaw security within the villages.<sup>910</sup> Like in Malaya, villagisation is given much credence in the literature, in its role in defeating the Mau Mau in Kenya. Anvil had stripped the hold of the Mau Mau over the capital, but villagization had effectively separated the Mau Mau from the passive wing in the countryside. In 1953, the Mau Mau held the upper hand in the reserves, and were able to operate freely, until the close administration afforded to the government by villagisation halted the freedom of movement for the insurgents.<sup>911</sup> According to Anderson “no one was any longer able to openly support Mau Mau” and “loyalists felt more secure than they had done for two years past”.<sup>912</sup> Indicating the benefit of the operation, Sorrenson credits villagization with winning the war, as it allowed for the government to gain control again over the population; and that “there is no doubt that this policy was successful”, and by 1955 the majority of the population had had a “change of heart”.<sup>913</sup>

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<sup>908</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 71.

<sup>909</sup> Porch, *Counterinsurgency*, 262 and Anderson, *Histories of the Hanged*, 268.

<sup>910</sup> The Home Guard had increased significantly under Erskine, as there were 7,600 Home Guard members in 1952. However, this does not indicate that these members saw the government as legitimate, or that loyalty was a popular cause. There were numerous reasons why one may join the home guard. Some were forced into joining. Often those who refused, were seen as Mau Mau sympathisers, so they joined in order to not be detained. In other cases, they were opportunists who wanted to benefit from the position of a loyalist, who were given preferential treatment by the government, and also there were those who joined for vengeance against Mau Mau violence. Therefore, the increase in Home Guard units does not clearly indicate legitimacy, but perhaps, as Anderson notes, “had little to do with conscience but everything to do with circumstance”. Anderson, *Histories of the Hanged*, 240-243, and Anderson, ‘Making the Loyalist Bargain’, and Branch, ‘The Enemy Within’, 291-315.

<sup>911</sup> D. Throup, ‘Crime, Politics and the Police in Kenya’ in D.M Anderson and D. Killingray (eds) *Policing and Decolonisation: Politics, Nationalism and the Police, 1917-65* (Manchester: Manchester University Press, 1992), 127-157: 148.

<sup>912</sup> Anderson, *Histories of the Hanged*, 268.

<sup>913</sup> M.P.K. Sorrenson, *Land Reform in the Kikuyu Country* (London: Oxford University Press, 1967) 110-111.

However, the evidence indicates that it was less a ‘change of heart’ of the Kikuyu, and instead indicates that the success of the operation came from stronger government control, which came from a significant level of brutality. In Kenya “‘winning hearts and minds’ was in many ways a euphemism. What mattered most was *winning* – not ‘hearts and minds’”.<sup>914</sup> The government paid little attention to winning the hearts of the population, and often the welfare of the population worsened. Resettled villages were plagued by hunger and poverty, as thousands were herded into the camps “without work, without land, without hope”.<sup>915</sup> In Malaya, the government gave land rights and farming opportunities to the inhabitants of the new villages, in Kenya, the government did not give the inhabitants the same luxuries.<sup>916</sup> Overcrowding led to a lack of food, and by 1955 reports were coming from districts that starvation and malnutrition was widespread.<sup>917</sup> These reports were ignored, and Baring refused to accept that there was any scarcity of food, therefore nothing was done to alleviate the hunger.<sup>918</sup> The villages became “a bleak, brutal place for the inhabitants”.<sup>919</sup> Alongside the poor conditions of the villages, the population were also victims of indiscriminate violence. Home Guard units ruled “with an iron fist, smashing down upon their opponents”.<sup>920</sup> Although the programme was implemented to “protect loyal Kikuyu” by reducing the risk to the population,<sup>921</sup> there is little evidence to suggest that there was significant adherence to the discrimination principle as the population fell victim to violence

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<sup>914</sup> Percox, ‘British Counter-insurgency in Kenya, 1952-56’, 83. Mumford, *The Counterinsurgency Myth*, 55.

<sup>915</sup> Newsinger, *British Counterinsurgency*, 74.

<sup>916</sup> Mumford, *The Counterinsurgency Myth*, 54.

<sup>917</sup> Elkins, *Britain’s Gulag*, 259-260.

<sup>918</sup> *ibid.*

<sup>919</sup> Anderson, *Histories of the Hanged*, 268.

<sup>920</sup> *ibid.*

<sup>921</sup> R.W. Heather, ‘Intelligence and Counter-insurgency in Kenya, 1952-60’, *Intelligence and National Security*, 5, 3 (1990), 57-83; 60. The evidence does allude to villagisation securing the loyalists, who were the main targets of insurgent attacks, and after 1956, the number of loyalists killed were minimised. See: Branch, ‘The Enemy Within’, 303. However, the decrease in attacks can also be attributed to the bulk of the Mau Mau being defeated by this point.



from security forces within the camps. Most camps were “little more than concentration camps to punish Mau Mau sympathizers”.<sup>922</sup>

The government focused on winning the ‘minds’ of the population through a programme of forced rehabilitation.<sup>923</sup> It was believed that civilians who had been ‘diseased or infected’ by Mau Mau, could be ‘cured’<sup>924</sup> through a process which required first a confession, and second to go through the cleansing process.<sup>925</sup> Between 1952 and 1959, 80,000 Kikuyu were passed through the process.<sup>926</sup> According to Elkins this was not “envisaged as a punitive measure”, but it was cast in the rubric of reform; “ultimately, a detainee was to be transformed into a progressive citizen through an integrated program of cleansing, manual labor [sic.], and systematic re-education”.<sup>927</sup> However, in practice this liberal ideal gave way to a violent and brutal regime, against the civilian population behind the wire.<sup>928</sup> Rehabilitation involved “a regime of starvation and forced labour while sleeping rough and unsheltered, punctuated by regular beatings by club- and whip-wielding Home Guards designed to break the spirit of Kikuyu men”.<sup>929</sup> The atmosphere within the camps, was one of “brutality” and “Viboko or rhino whips, rifle-butts, hoe handles, and clubs were all weapons of choice” against the population. In order to extract a confession from the population, security forces often turned to torture.<sup>930</sup>

Sexual assaults against women within the camps were also common and widespread. There were numerous cases “opportunistic rape” of civilians, by those who were put in power, and

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<sup>922</sup> Anderson, *Histories of the Hanged*, 294.

<sup>923</sup> Mumford, *The Counterinsurgency Myth*, 55.

<sup>924</sup> R.L. Doty, *Imperial Encounters: The Politics of Representation in North-South Relations* (Minneapolis: University of Minnesota Press, 1996), 117.

<sup>925</sup> *ibid.*

<sup>926</sup> *ibid.*, 118.

<sup>927</sup> C. Elkins, ‘The Struggle for Mau Mau Rehabilitation in Late Colonial Kenya’, *The International Journal of African Historical Studies*, 33, 1 (2000), 25-57: 26.

<sup>928</sup> *ibid.*, 46.

<sup>929</sup> Porch, *Counterinsurgency*, 262.

<sup>930</sup> Anderson, *Histories of the Hanged*, 295.

“torture-related” rape, where they were punishing women for Mau Mau sympathy.<sup>931</sup> In many of the camps, there was a gender imbalance, with the number of women drastically outnumbering the number of men detainees. For example, in Kabare, of the 1,360 inhabitants only 176 were adult males, and in many camps the women were “especially vulnerable” to sexual violence.<sup>932</sup> Elkin’s highlights that “it did not matter whether they were young or old, all women in the villages lived in fear of sexual assault”.<sup>933</sup> In one camp, the Home Guard, were ‘regularly’ accused of the abduction and sexual assault of women.<sup>934</sup> In some camps, women were held to gun point and were given the “choice between death and rape”.<sup>935</sup> Sexual assaults would be carried out randomly, either within the village or whilst undergoing forced labour within the camp.<sup>936</sup> The evidence then shows that the security forces did not give much attention to *in bello* in terms of villagisation.

On 3 March 1959, eleven unarmed internees were beaten to death by guards, at the Hola Camp. The camp contained ‘hard-core’ Mau Mau, and a decision was taken to “step up the level of force to be used against ‘recalcitrant’ prisoners” and camp officers were instructed to compel the prisoners to work.<sup>937</sup> This written instruction was known as the Cowan Plan.<sup>938</sup> The government tried to cover the deaths, but following three enquiries it became clear what had happened; they had been whipped, and clubbed to death by their African guards, whilst European warders observed.<sup>939</sup> The abuses at Hola Camp demonstrated the brutality of British rule in Kenya, and the methods used within the Emergency.<sup>940</sup> So much so, the

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<sup>931</sup> Anderson & Weis, ‘The Prosecution of Rape in Wartime’, 293.

<sup>932</sup> *ibid*, 281.

<sup>933</sup> Elkins, *Britain’s Gulag*, 247.

<sup>934</sup> *ibid*.

<sup>935</sup> *ibid*.

<sup>936</sup> *ibid*.

<sup>937</sup> Anderson, *Histories of the Hanged*, 326.

<sup>938</sup> Elkins, *Britain’s Gulag*, 346.

<sup>939</sup> *ibid*, 347 and Anderson, *Histories of the Hanged*, 327.

<sup>940</sup> Newsinger, *British Counterinsurgency*, 83.

evidence indicates that it discredited the rule of the British in the country.<sup>941</sup> Therefore, even after Erskine's influence on the security forces, the conduct of the conflict continued to be indiscriminate and disproportionate.

Thus, although Erskine did try to introduce some changes in Kenya, the war continued to be a brutal conflict. As Bennett's work addresses, Erskine gradually "came to believe, as many others did, in the strategic effectiveness of repression".<sup>942</sup> The campaign continued to be indiscriminate, and the use of torture was disproportionate. However, as it can be shown above, the physical resettlement of the population following Operation Anvil was successful at cutting the insurgents from their support base. Therefore, perhaps there is some credence to the argument of military necessity. However, there is little evidence to suggest that 'screening' and torture was justified in order to win the support of the population.

Nonetheless, the introduction of special areas and the restrictions on bombing demonstrated the intention to adhere to principles of discrimination. In addition to this, the importance placed on the granting of benevolent quarantine to surrendered insurgents again indicates greater adherence to the principles of *in bello* than in the opening months of the conflict. Therefore, this period of the conflict, overall, was not just, however the degree to which it was unjust was lesser than the opening phase of the conflict. Therefore, a score of -2 for *JiBI* is appropriate for the Kenya Emergency.

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<sup>941</sup> Porch, *Counterinsurgency*, 263 and Anderson, *Histories of the Hanged*, 327.

<sup>942</sup> Bennett, *Fighting the Mau Mau*, 267.

### The Kenya Emergency: Results

From the literature it is evident that the British met most of the *ad bellum* principles. They had a just cause, as the Emergency was declared in response to increasing aggression from the Mau Mau, following a long period of protest and terrorism. Clearly, the principle the British met the most was public declaration, it was made apparent to the people of Kenya, and at home, what the Emergency would mean, and what rules were to be introduced. As is the case with other counterinsurgency operations, such as Algeria and Malaya, based on Orend's criteria for a minimally just state; Britain did not meet these criteria. It is not evident that the government was seen as legitimate domestically, and the rights of most of the population were not respected, protected or promoted. Importantly, the literature indicates that issues of *ad bellum* proportionality were taken into serious consideration before declaring the emergency, and a moderately just score is suitable. Thus, a JaBI score of 1.25, as can be seen in *fig.4*, was awarded. Therefore, Britain had a slightly-moderate just resort to force in Kenya.

<i>Jus ad Bellum</i> Principles:	Score:
Just Cause	3
Right Intention	2
Public Declaration	2
Legitimate Authority	-1
Proportionality	2
Last Resort	2
<i>Jus ad bellum</i> Index	1.67

(Fig.4) Results of case study, indicating individual scores for ad bellum criteria, and overall JaBI score.

Unlike the resort to force, the conduct of the conflict was more than moderately unjust. The early phase of the conflict lacked political direction, and the security forces were given a free hand, backed up by indiscriminate and disproportional policies. Collective punishments like forced resettlement were introduced, which went against the *in bello* principles. Screening, which was a euphemism for torture, was conducted throughout the conflict by security forces on detainees, civilians and insurgents. The arrival of Erskine did introduce a new emphasis on restraint, and changes in COIN strategy that were in line with discrimination a proportionality. But, as noted above, abuses at the hands of the security forces continued. Therefore, a score of -2 is suitable for the conduct of the conflict.

<i>Jus in Bello</i> Principles:	Score:
Discrimination	-2
Proportionality	-2
<i>Jus in Bello</i> Index	-2

(Fig.5) Results of case study, indicating individual scores for in bello criteria, and overall JiBI score.

## **Chapter Five: The Algerian War**

The French-Algerian war, fought between 1954 to 1962, has been described as the “last, the greatest and most dramatic of colonial wars”.<sup>943</sup> The Algerian war is a case study wherein the counterinsurgent had some *ad bellum* justness, but the conflict was conducted with little concern for *in bello* restraints. For instance, France was responding to armed aggression, and therefore had a just cause. However, it is difficult to argue that France was a legitimate authority because it had little regard for the rights of the Algerian population. The COIN campaign mirrored French Algeria in this regard, and it was conducted with considerable brutality. Collective punishments and torture were used to coerce the population into siding with the French. Importantly for this work, the evidence indicates that tactically and operationally, the French were militarily successful in Algeria. By the end of the 1950s, the insurgent operational capability was crushed. However, the tactical and operational successes could not be converted into success at the strategic level. The brutality of the campaign resulted in greater international and domestic pressure to give Algeria independence.

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<sup>943</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 75.

## The Algerian War: Jus ad Bellum Index

### Just Cause?

Nationalism had grown in Algeria for decades, becoming a political movement in the 1940s, but by 1950s a small group of militant nationalists believed violence was the best route to independence.<sup>944</sup> On 1 November 1954, All Saints Day, the Front de Liberation National (FLN) broke the peace in Algeria and declared war on France with the aim of securing Algerian independence. At 1am attacks were launched across Algeria by small armed groups, beginning in the Aures Mountains.<sup>945</sup> Although the attacks resulted in minimal damage, the attacks were accompanied by a declaration, which signalled that the FLN were launching an armed rebellion, not merely conducting wanton violence.

Their proclamation established that the aim of the FLN was national independence, and this was to be achieved through a revolution. “The moment has arrived to move the National Movement out of the impasse into which it was backed by personal struggles and fights over influence, in order to launch it...into the true revolutionary struggle”.<sup>946</sup> By declaring a ‘revolutionary struggle’ the FLN clearly sets out that it intends to overthrow the government; and in doing so, bolsters the French cause to defend itself. The FLN declared it would “Struggle by *every means* until our goal is attained. Exertion at home and abroad through political and *direct action*, with a view to making the Algerian problem a reality for the entire world. The struggle will be long, but the outcome is certain.”<sup>947</sup> This declaration, and the

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<sup>944</sup> E. Behr, *The Algerian Problem* (London: Penguin Books, 1961), 59 & A. Horne, *A Savage War of Peace: Algeria 1954-1962* (New York: New York Review Books, 2006) 79.

<sup>945</sup> Behr, *The Algerian Problem*, 67.

<sup>946</sup> *Proclamation of Algerian National Liberation Front (FLN), November 1, 1954*. Available online: <https://www.marxists.org/history/algeria/1954/proclamation.htm> [Accessed 15/4/2021] (Emphasis added).

<sup>947</sup> *ibid.*

actions that were carried out on 1 November 1954, clearly demonstrate a direct threat to French rule in Algeria.

The French responded to Algerian nationalist violence and the war can be perceived as meeting the criteria of a just cause. Algeria, unlike other colonies, was not merely a protectorate, but it was deemed to be part of France itself. Conquered between 1830 and 1871, in 1871 it came under civil administration, and became a legal part of France. It was legally a department, much like other French regions such as Burgundy or Normandy. The Minister for the Interior, Francois Mitterrand spoke at the Assembly on 5 November, arguing “Algeria is France. And who among you...would hesitate to employ every means to preserve France?”<sup>948</sup> The attacks of 1 November were deemed to be a direct attack at the sovereignty of France, not just the colony,<sup>949</sup> bolstering the French cause.

The Mendes-France government collapsed in February 1955, following a vote of no confidence. Although replaced by Edgar Faure’s government, the cause to continue, and escalate the conflict, was still somewhat justified, in terms of the just cause principle. Soustelle, who had been brought in as Governor-General by Mendes-France, and kept on by Faure, visited Algeria. During the visit he noted that the rebellion had grown more than expected and had become a serious threat. He reported in 1956, that “the rebellion was then tending to become an endemic evil, that of permanent and diffuse guerrilla warfare with ambushes, isolated attacks and individual attacks”.<sup>950</sup> He noted that the attacks had become more “atrocious”, and the general population were “frightened and noncommittal.”<sup>951</sup> Reports by Soustelle would help result in the declaration of a State of Emergency by the French National Assembly on 3 April 1955. Effective for an initial six months, the declaration

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<sup>948</sup> Mitterrand, quoted in Horne, *A Savage War of Peace*, 99.

<sup>949</sup> *ibid.*

<sup>950</sup> Soustelle, quoted in Behr, *The Algerian Problem*, 73-74.

<sup>951</sup> *ibid.*



granted extra powers to the government to deal with the insurgency. It allowed the right to restrict the movement of persons and vehicles, the establishment of special security zones, and to send suspects to enforced residence. Pacification was the first aim of the emergency.<sup>952</sup> The aim was to defeat the insurgency, and defend Algeria from the FLN, maintaining French sovereignty; a just cause.

Not only was the decision to fight against the FLN undertaken in order to maintain the state, and keep Algeria a part of France, but also to protect the people of Algeria. Attacks against the population, by the FLN, had increased. In November 1954, there were 178 attacks, rising to 201 in December. In April 1955 there were 196 incidents, 455 in May, 501 in June, and 441 in July.<sup>953</sup> This increase in violence led to, according to Evans, “fear throughout the country”. It is of course, the state’s fundamental role to promote, or at least protect, the human rights of its citizens.<sup>954</sup> One aspect of this includes physical security. Humans have the right to be protected from physical attack, and the threat of physical harm.<sup>955</sup> A just cause can be in response to the attack against the human rights of a population; rights vindication. Soustelle illustrates this. In 1956, Soustelle made a speech which avowed to the protection of human rights:

The population has a right to security; this right is everyone's right. ... Think of these French Algerians...who live on isolated farms, with the fear of attack, of assassination, and of arson. ... The fate of the French Muslims is no less frightening. These men have the right to be defended, and it is our duty to defend them.<sup>956</sup>

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<sup>952</sup>Behr, *The Algerian Problem*, 74.

<sup>953</sup> Evans, *Algeria: France's Undeclared War*, 125.

<sup>954</sup> Orend, *The Morality of War*, 33.

<sup>955</sup> *ibid*, 33-34.

<sup>956</sup>Soustelle quoted in H. Murphrey, ‘Colonial Propaganda: Jacques Soustelle in Defense of French Algeria, 1955-1962’, *Proceedings of the Meeting of the French Colonial Historical Society*, 6/7 (1982), 76-85: 78.

This respect of rights, at least in word, indicates that the decision to combat the insurgency in Algeria, was done so with a good degree of adherence to the *ad bellum* principle of Just Cause.

Overall, France's cause regarding self-defence is justifiable. Clearly, by 1954 the growing nationalist movement had become violent, and the FLN attack on 1 November 1954 was a direct attack against French sovereignty in Algeria. Not only did France act in response to aggression there is some indication of rights vindication, at least in word, for the population. The aim of the French, in Algeria, was to suppress the insurgency, pacify the country and minimise the threat and instability to the population. Therefore, a score of +3 can be applied to the French in Algeria.

#### Right intention

The French government did intend to respond to aggression and restore peace and security in Algeria, indicating right intention. As stated previously, we can judge intentions partly by examining the avowals of intentions. The French government continually restated that its intention in Algeria was to defend itself. There were no avowals of hatred, revenge or self-aggrandisement.<sup>957</sup> Instead, the Mendes-France government's reaction was to call for a stop to the rebellion, and to restore law and order. In a speech made to the French Parliament, Mendes-France stated that the government was "defending the internal peace of the nation and the integrity of the Republic".<sup>958</sup> The French government continually discussed their intent in terms of defence. In a speech made by Soustelle, in 1956, he discusses France's "inflexible determination to preserve Algeria from the terrible destiny that some are seeking

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<sup>957</sup> Bellamy, *Just Wars*, 122.

<sup>958</sup> Mendes France, quoted in B. Stora, 'Algeria: The war without a name', *The Journal of Imperial and Commonwealth History*, 21, 3 (1993), 208-216: 211.

to prepare for it”.<sup>959</sup> France’s official intention was to retain Algeria, and to suppress the rebellion. In his first speech to the Algerian Assembly, Soustelle reassured the *Pied Noirs* that pacification was his first aim in Algeria.<sup>960</sup> Therefore, from examining the avowals of intent in Algeria, we can perceive right intentions in Algeria.

However, there were other competing intentions in Algeria. For example, Klose’s work indicates that the “the iron will to defend French Algeria may well have been strengthened by the discovery of oil in the Sahara Desert and the desire to hold onto the testing grounds for the French atomic weapons program in the Algerian desert.”<sup>961</sup> However, having competing intentions does not mean that the right intention principle has not been met.<sup>962</sup> Perhaps, as Orend’s work shows, the right intention principle merely needs to be present among the principles.<sup>963</sup> The dominating intention was to secure, and maintain, a sovereign part of France. Algeria was perceived as being at the heart and centre of the French republic, and therefore it would be “defended at all costs”.<sup>964</sup> This became the mantra for the French governments during the war.<sup>965</sup> Therefore, the evidence indicates that the French showed good intention when it defended itself against FLN aggression.

The French government demonstrated right intention, at least initially, as it sought out to not only repress, but to reform. Under Mendes-France, the French strived for a two-pronged approach, that would first provide security, and second bring in reforms; to ‘find a third way between conservative settlers and extremist nationalists and construct a Franco-Muslim

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<sup>959</sup> Soustelle, quoted in Behr, *The Algerian Problem*, 74.

<sup>960</sup> Horne, *A Savage War of Peace*, 108.

<sup>961</sup> *ibid.*

<sup>962</sup> Orend, *The Morality of War*, 49.

<sup>963</sup> *ibid.*

<sup>964</sup> C. Ageron, *Modern Algeria: A History from 1830 to Present*, 9<sup>th</sup> Edition (London: Hurst & Company, 1990), 108.

<sup>965</sup> Horne, *A Savage War of Peace*, 99.

community based on equality”.<sup>966</sup> The evidence suggests that Mendes-France was intent on suppressing the insurgency and doing so alongside enhancing the lives of *all* the Algerian population. In January 1955, he proposed ambitious plans for more educational and employment opportunities for Muslims. He announced more infrastructure development, and the increase in public works. He was preparing to implement the 1947 Statute; granting voting rights to Algerian women.<sup>967</sup> Mendes-France’s government, however, lost a vote of no confidence; Mendes France was replaced by Faure, Soustelle remained. Soustelle maintained a somewhat liberal approach to the solution.

Soustelle reintroduced the policy of Assimilation, but under a new phrase ‘integration’. Integration was based upon the equality of all Algerians.<sup>968</sup> Unlike assimilation, integration recognised linguistic, cultural and religious differences amongst the communities; however, would introduce a French administrative framework.<sup>969</sup> For example, the discrepancies in the electoral colleges were to be dealt with; enhancing political representation. Another example is that Arabic became an official language in Muslim schools; previously banned.<sup>970</sup>

Therefore, it seems that in the decision to commit itself against the FLN and its military wing the *Armée de libération nationale* (ALN), France’s intentions were not punitive, but were in response to violence, and showed a good level of intent. The rebellion was not merely going to be suppressed by brute force but was to be conducted with some degree of reform.

The degree to which France fulfilled the requirement of right intention is mixed. Its aims were not for aggrandisement, but to maintain the status quo, and to bring stability back to

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<sup>966</sup> Evans, *Algeria: France’s Undeclared War*, 130.

<sup>967</sup> *ibid*, 131.

<sup>968</sup> Horne, *A Savage War of Peace*, 108.

<sup>969</sup> Evans, *Algeria: France’s Undeclared War*, 133.

<sup>970</sup> Horne, *A Savage War of Peace*, 108.

Algeria. Also, it was acting to provide stability and security to the population. Therefore, a slight to moderate just score of +2 is suitable for right intention.

### Public Declaration of War?

Like the British in Malaya and Kenya, France never declared a *war* in Algeria. In a speech made in November 1954, Mitterand stated “We will avoid anything which might appear to be a state of war; we do not want this”.<sup>971</sup> The conflict was referred to as “police operations” aimed at maintaining order within French territory.<sup>972</sup> The first time the conflict was recognised by the French as a war was in 1999, decades after the war had ended.<sup>973</sup> However, France did declare the *état d’urgence*, or state of emergency, in March 1955. The emergency declaration granted the French authorities greater powers in dealing with the worsening situation. A Special decree made on the 1 July 1955, set out the rules of engagement, making it clear to the population what hardships they might face, and that the status quo has changed;<sup>974</sup> the purpose of the *ad bellum* declaration principle. The declaration led to the army replacing the police in numerous areas.<sup>975</sup> With the situation worsening by the middle of 1956, the French made another decree which gave the French military full control of the COIN operations. The military were given “carte blanche to arrest, imprison, torture and kill without reference to the normal rule of law”.<sup>976</sup> Even with the increase in the militarisation of the ‘police action’, the government framed the conflict as an emergency “in order to preserve the semblance of peace within the French imperial order”.<sup>977</sup>

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<sup>971</sup> Mitterand quoted in Stora, ‘Algeria: The war without a name’, 210.

<sup>972</sup> S. Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool: Liverpool University Press, 2013), 149.

<sup>973</sup> M. Alexander & J. F. V. Keiger, ‘France and the Algerian War: strategy, operations and diplomacy,’ *Journal of Strategic Studies*, 25, 2 (2002), 1-32: 3.

<sup>974</sup> Evans, *Algeria: France’s Undeclared War*, 138.

<sup>975</sup> Porch, *Counterinsurgency*, 191.

<sup>976</sup> *ibid*, 152.

<sup>977</sup> Morton, *States of Emergency*, 149.

The decision not to call it a war was deliberate. By not declaring war against the FLN, the French assumed this would benefit their campaign in Algeria. First, it was believed that to declare a war in Algeria would have resulted in “a considerable upheaval” and the breakup of the “Franco-Algerian 'family’”.<sup>978</sup> It was feared that by calling it a war, it would have been tantamount to accepting a possible separation between Algeria and France.<sup>979</sup> By not declaring a war, the French government believed they could discredit the nationalist movements by declaring them “outlaws”.<sup>980</sup> Second, the government believed that it could strengthen its own support base. Part of the reasoning behind this JWT principle is to make the population aware of the hardships that they will have to endure in a state of war. The government believed that the French people would not accept another war following the loss of Indochina. Another explanation for the reluctance to declare a war against the FLN was that “the majority of the French people, satisfied that peace in Indochina had ended at last the drain on French resources, hated to contemplate the prospect of another long, drawn out war, in Algeria”.<sup>981</sup> The idea of colonies were beginning to be seen as “more a liability than an asset”.<sup>982</sup> The government, therefore, did not want to call the conflict what it was; a war.

Nonetheless, as already established in this work, the declaration of an emergency fulfils the purpose of this *ad bellum* principle. Following the declaration of the Emergency, the population and the insurgents were made aware that the status quo had changed. New rules and regulations were established, from which the Europeans were tacitly exempt, were implemented and these were publicly declared.<sup>983</sup> Therefore, although a *war* was not declared, the French declared a state of emergency, which signalled a change in the situation

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<sup>978</sup> Stora, ‘Algeria: The war without a name’, 209.

<sup>979</sup> *ibid.*, 210.

<sup>980</sup> H. Chapman, *France’s Long Reconstruction: In Search of the Modern Republic* (Massachusetts: Harvard University Press: 2018), 260.

<sup>981</sup> Galula, *Pacification in Algeria: 1956-1958*, 10.

<sup>982</sup> *ibid.*

<sup>983</sup> Horne, *A Savage War of Peace*, 116.

in the country. Therefore, like the British in Kenya and Malaya, France sufficiently met this *ad bellum* principle and a score of +2 is suitable.

#### Legitimate Authority: Human Rights Violations

In 1871 Algeria became a part of France. It was not merely a colony, it was under the control of the Minister of the Interior, and it was to be legally equal to mainland France. However, in reality the structure of Algeria meant that it was not equal to the metropole. Behr wrote that the idea that Algeria was a part of mainland France, in 1954, “could hardly be taken seriously...the political, judicial, financial and administrative fields, its statute was entirely different.”<sup>984</sup> The system in Algeria was designed to suppress the rights of the Algerian population, which was 8,450,000 in 1954, while strengthening the position of the European Settler population of 984,000.<sup>985</sup> Therefore, the evidence indicates that Algeria was ruled by a benevolent minority of Europeans, while the majority of the Algerians had their rights suppressed.

French rule in Algeria was conducted with the intention of enhancing the rights of the minority European population, and the suppression of anything that may challenge this. There are examples of the French authorities stamping down the Algerian population with little regard for their human rights. If we consider the human right to security, which requires the state to protect “life, liberty, property, and other human rights by means of criminal and civil law and its enforcement against those who violate these rights”<sup>986</sup>, then the French demonstrated a significant failure to secure the human rights of the population in Setif and Guelma in 1945.

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<sup>984</sup> Behr, *The Algerian Problem*, 36.

<sup>985</sup> Ageron, *Modern Algeria: A History from 1830 to Present*, 82-86.

<sup>986</sup> M. Nowak, *Human Rights of Global Capitalism* (Pennsylvania: University of Pennsylvania Press, 2017), 138-139.

In Setif, on 8 May 1945, VE Day, protesters carrying banners that read “Down with Colonialism”<sup>987</sup> clashed with the police who tried to remove the banners. Shots were fired, and protestors began to attack Europeans; killing twenty-one, including the mayor.<sup>988</sup> Anti-settler violence spread across the country, and 102 Europeans were killed, in a brutal manner.<sup>989</sup> The violence was perceived to be a real uprising.<sup>990</sup> Fear spread across the settler community, and *colons* vigilante groups took matters into their own hands. What followed was “pitiless repression that fully reflected the fear and hatred on the part of the *colons*.”<sup>991</sup> These vigilante groups killed without discrimination; prisoners were lynched and hundreds of muslims were shot out of hand.<sup>992</sup>

The French government sent troops to Algeria in response to the Muslim aggression, not to protect the Muslim population from European retaliation. Government forces, which had been given carte blanche to repress the rebellion,<sup>993</sup> used force against the Algerian Muslim population. In Setif any Muslim not wearing an armband was summarily shot.<sup>994</sup> Houses were burnt down by the army and villages bombed by the Navy and Air Force.<sup>995</sup> The official reports stated that the French military had deliberately killed 500 to 600 people; although it assumed that indiscriminate bombing killed more.<sup>996</sup> These figures are heavily questioned within the literature.

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<sup>987</sup> Behr, *The Algerian Problem*, 49.

<sup>988</sup> Evans, *Algeria: France's Undeclared War*. 86.

<sup>989</sup> *ibid*, 86.

<sup>990</sup> M. Halpern, ‘The Algerian Uprising of 1945’, *Middle East Journal*, 2, 2 (1948), 191-202; 193.

<sup>991</sup> Ageron, *Modern Algeria: A History from 1830 to Present*, 102.

<sup>992</sup> Behr, *The Algerian Problem*, 50 & Horne, *A Savage War of Peace*, 26.

<sup>993</sup> M. Evans & J. Phillips, *Algeria: Anger of the Dispossessed* (London: Yale University Press, 2007), 52.

<sup>994</sup> Behr, *The Algerian Problem*, 50.

<sup>995</sup> Horne, *A Savage War of Peace, A Savage War of Peace*, 26.

<sup>996</sup> *ibid*.



The official figure of the total dead during the reprisals, declared by the government of Algeria, was 1,340 Muslims killed.<sup>997</sup> Clayton argues this figure was too low, and it is more likely that just under 3,000 were killed.<sup>998</sup> However, “the exact number of the dead is...less crucial than the spirit of terrible vengeance exhibited during the events.”<sup>999</sup> Setif and Guelma demonstrate that the French cared about the rights and security of the benevolent minority in Algeria, and not the majority of the population. Horne wrote that even if the lowest figures were accepted “it still represents a ten to one “over-kill” in relation to the numbers of Europeans massacred.<sup>1000</sup>

Smith explains that the events of May 1945 demonstrated one of the key themes of French rule in Algeria, that “liberality should extend only so far as it enhanced the French presence; and any hesitation was a sign of weakness sure to feed disorder”.<sup>1001</sup> Therefore, it is clear that France was determined to suppress the majority, even disproportionately and indiscriminately, to protect the minority; putting into doubt its legitimacy. Therefore, French authority in Algeria was not established through the enhancement of rights, but through a focus on authority and submissiveness of the Algerian Population.

We can also see this by examining the continual subjugation of the political rights of the Algerian Muslim population, in order to maintain the European control of Algeria. One of the main issues concerned citizenship. Legally, Algeria was part of France, but most of the population were not classed as citizens. A Muslim could only become a citizen if they

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<sup>997</sup> Clayton, ‘The Sétif Uprising of May 1945’, 12.

<sup>998</sup> *ibid.*

<sup>999</sup> D.C. Gordon, *The Passing of French Algeria* (London: Oxford University Press, 1966), 54.

<sup>1000</sup> Horne, *A Savage War of Peace*, 27.

<sup>1001</sup> T. Smith, *The French Stake in Algeria, 1945-1962* (London: Cornell University Press, 1978), 114.

denounced Islam; whereas “a Spaniard, an Italian, or a Maltese could become a Frenchman in Algeria with the minimum of formality.”<sup>1002</sup>

Until 1946 the population came under different laws. The French *colon* came under French common and domestic law; however, the natives of Algeria were subjugated to the *code de l'indigénat*, or native code. Passed in 1874, lasting until 1946, this set out a list of ‘treasonable’ acts that the native could be punished; separate to the *colon*.<sup>1003</sup> The code became a rallying cry for the Nationalists in Algeria. *L'indigénat* was, amongst other aspects of Algerian life, a clear demonisation of the Native Algerian Muslims.<sup>1004</sup> The government, claiming Algeria was France, continued to treat its people unequally. The rights of the native Algerian were not protected as much as the European settlers. Behr wrote “the only hindrance to equality...was the colonial system, which had created a juridical caste difference between European and Moslem [sic]”.<sup>1005</sup> Therefore, the evidence indicates that the French failed to equally enhance the rights of the Algerian population.

Even with the establishment of the French Union and the the passing of the Lamine Guèye law, all residents of French overseas territories were granted the same title as French nationals in France.<sup>1006</sup> Under the French Union, which changed the relationship of the Empire and the metropole, Algeria became a “exterior province”, granting it more representation in Parliament and a federal assembly. Yet, even with the establishing of an Algerian Assembly in 1947, France continued to fail in satisfying the rights of the people in

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<sup>1002</sup> Behr, *The Algerian Problem*, 45.

<sup>1003</sup> Gordon, *The Passing of French Algeria*, 17-18.

<sup>1004</sup> J. McDougall, ‘Savage wars? Codes of violence in Algeria, 1830s – 1990s’, *Third World Quarterly*, 26, 1 (2005), 117-131: 122.

<sup>1005</sup> Behr, *The Algerian Problem*, 45.

<sup>1006</sup> J. E. Genova, ‘Constructing Identity in Post-War France: Citizenship, Nationality, and the Lamine Guèye Law, 1946-1953’ *The International History Review*, 26, 1 (2004), 56-79: 58.

terms of ‘political justice’ and liberty because the system had been designed to maintain the dominance of the European settlers.

To ensure European dominance, there was systematic rigging and control of election outcomes in Algeria. Following local election victories by nationalist parties in 1947, Governor General, Marcel-Edmond Naegelen, determined to break threats to French sovereignty, ordered his administration to “make sure of a ‘good election’”.<sup>1007</sup> There was widespread evidence of “stuffing” election boxes by local officials and loyal Muslims, registration cards were never issued, in some areas heavily armed police, some with tanks, formed a presence at polling stations to intimidate the voters, and in some cases, where some refused to vote, the police opened fire killing several.<sup>1008</sup> Nationalist election meetings were broken up, and numerous nationalists were arrested.<sup>1009</sup> Results in some areas were never announced; and in some areas where the results were announced, there were major discrepancies.<sup>1010</sup> The Europeans dominated the Assembly, and Horne comments that “it was a result which a Communist bloc regime could have been proud”.<sup>1011</sup> Election fraud continued and in 1951, in Djelfa, nationalist parties did not receive a single vote; whilst the government candidate achieved 800 votes, from a possible 500 voters.<sup>1012</sup> Therefore, the systematic rigging of elections in Algeria, is another indication of the suppression of political rights. Therefore, France continued to demonstrate indifference to enhancing the rights of the Algerian population, yet it showed a significant interest in maintaining European dominance.

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<sup>1007</sup> Ageron, *Modern Algeria: A History from 1830 to Present*, 105.

<sup>1008</sup> Horne, *A Savage War of Peace*, 71.

<sup>1009</sup> *ibid.*

<sup>1010</sup> *ibid.*

<sup>1011</sup> Horne, *A Savage War of Peace*, 71.

<sup>1012</sup> *ibid.*, 72.

## Legitimate Authority: Domestic Legitimacy

Algeria contained an “extremely diverse and notoriously fissiparous population”, and therefore it is difficult to find a general consensus on domestic legitimacy.<sup>1013</sup> However, if we examine the attitudes and the actions of different groups within the population, then we can present some degree of domestic perception of French legitimacy in Algeria.<sup>1014</sup>

The evidence indicates that following the Second World War, the attitude of the Algerian population was one that did not see the French as legitimate. Between 1945 and 1954, 85 to 90 per cent of the population harboured “an unwillingness to be permanently subordinated to the minority and its way of life.”<sup>1015</sup> Nationalism spread across the Algerian population, and the political parties had turned away from assimilation to independence.<sup>1016</sup> The Algerian independence parties became increasingly popular among the Algerian population. For example, local elections in 1947 had resulted in considerable wins for Messali’s party; the Mouvement pour le Triomphe des Libertés Démocratiques (MTLD). The MTLD achieved 31% of the vote, and Abbas’ Union Démocratique du Manifeste Algérien (UDMA) obtained 27% among the Muslim voters.<sup>1017</sup> Alongside the tens of thousands of MTLD supporters in Algeria, the party enjoyed the support of 60,000 people in Paris.<sup>1018</sup> Therefore, there appears to have been large support for nationalism in Algeria.

French actions to suppress Algerian nationalism appears to have made calls for nationalism stronger. In 1951, election fraud resulted in neither the MTLD nor the UDMA winning a seat

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<sup>1013</sup> Porch, *Counterinsurgency*, 172.

<sup>1014</sup> Weatherford, ‘Measuring Political Legitimacy’, 149.

<sup>1015</sup> B. Rivlin, ‘Context and Sources of Political Tensions in French North Africa’, *The Annals of the American Academy of Political and Social Science*, 298 (1955), 109-116: 112.

<sup>1016</sup> M. Fois, ‘Algerian Nationalism’, *Oriente Moderno*, 97, 1 (2017), 89-110: 99.

<sup>1017</sup> P. Krause, *Rebel Power: Why National Movements Compete, Fight, and Win* (Ithaca: Cornell University Press, 2017), 106.

<sup>1018</sup> *ibid*, 110.

in the national elections.<sup>1019</sup> Horne remarked that this resulted in the “crystalising of Muslim rage”, and led to the distrust of the French government, noting that after 1954 when French leaders offered elections, “no Muslim would believe him”.<sup>1020</sup>

This mistrust, and frustration, with the system in Algeria in part resulted in the militancy of nationalism. By 1954, nationalist groups had seen every legal route to reform closed off, and Abbas declared in 1953 that “there is no other solution but the machine gun”.<sup>1021</sup> In 1948 some nationalists had given up on political channels and began calling for more direct action. Nationalists began to shout ‘give us arms’ in response to repression and fraud, and by April 1948 a new generation had joined Ben Bella and the OS.<sup>1022</sup> Even some politicians, officially with the MTLD, had now joined the OS, who recognised Messali’s popularity with the population, but had become impatient with the party’s political direction.<sup>1023</sup> French failure to provide free elections, had resulted in a decrease in domestic legitimacy from the majority, as they had lost faith in the political system. So much so, during the first ten months of 1954, there was one terrorist attack per week.<sup>1024</sup> Rural Algeria was ‘overwhelmingly hostile’ to French Algeria, demonstrated by bouts of violence in rural areas.<sup>1025</sup> Clearly, by 1954, France had failed to sufficiently respect and protect the political rights of all of the population. Rather, it continued to subjugate the rights of the majority of the population, in favour of the minority, significantly hindering the degree to which France was seen to be legitimate by the majority of the domestic Algerian population.

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<sup>1019</sup> *Evans, Algeria: France’s Undeclared War*, 108.

<sup>1020</sup> *Horne, A Savage War of Peace*, 72.

<sup>1021</sup> *Ageron, Modern Algeria: A History from 1830 to Present*, 106.

<sup>1022</sup> *Evans, Algeria: France’s Undeclared War*, 106.

<sup>1023</sup> *Behr, The Algerian Problem*, 56.

<sup>1024</sup> *Evans, Algeria: France’s Undeclared War*, 112.

<sup>1025</sup> *ibid.*

However, this is not to suggest that all Algerians called for the violent removal of the French. Some of the nationalist movements in Algeria were frustrated by the NLF taking action against the French. Abbas and the UDMA did not support the decision to turn to violence, believing that violence would not result in independence.<sup>1026</sup> The Centralists, a group which had split from the MTLD, had tried to prevent the uprising and warned potential participants away.<sup>1027</sup> Messali was angered by the decision and set up a rival militant anti-colonial group, known as the Mouvement National Algérien (MNA); eventually the FLN and MNA would fight against each other in a ‘fratricidal’ war.<sup>1028</sup> Although, much of this opposition came in part because each of the other groups were frustrated that they did not take the initiative and launch the campaign in their name,<sup>1029</sup> some of the opposition came from the belief that the FLN’s strategy was political suicide, it would be defeated, and did not present the best way to achieve independence.<sup>1030</sup>

Although nationalism was a common feeling among the population in Algeria, the evidence indicates that the population were not convinced of violent means to achieve this. Even following the FLN’s call to Arms in November 1954, the local Muslim population remained, largely, apathetic.<sup>1031</sup> William H. Lewis explains “the bulk of the indigenous population reacted with reserve to the emergence of the FLN, unhappy with nationalist exactions, fearful of retaliation for non-compliance, but equally anxiety ridden lest compliance engender French reprisals”.<sup>1032</sup> The FLN, then, was not a popular movement with a strong base of

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<sup>1026</sup> Krause, *Rebel Power*, 110.

<sup>1027</sup> *ibid.*, 109.

<sup>1028</sup> See: R. Aissaoui, ‘Fratricidal War: The Conflict between the Mouvement National Algérien (MNA) and the Front de liberation national (FLN) in France during the Algerian War (1954-1962)’, *British Journal of Middle Eastern Studies*, 29, 2 (2012), 227-240.

<sup>1029</sup> *Evans, Algeria: France’s Undeclared War*, 124.

<sup>1030</sup> *ibid.*

<sup>1031</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 78.

<sup>1032</sup> Lewis, ‘The Decline of Algeria’s FLN’, 164.

public support.<sup>1033</sup> Therefore, although the evidence indicates that France was not perceived as legitimate among the population, it would be too far to say that violent nationalists, or the insurgents, were legitimate.

Another important aspect of Algerian society, although a minority, was the *piéd noirs*. They held a disproportionate level of social and political clout in Algeria, and with the metropole. Barclay, Chopin and Evans argue that the European was not a ‘static body’ nor a ‘bloc’, rather “It was shot through with differences of class, gender, national origin and regional background.”<sup>1034</sup> As such “there was no single overarching settler narrative but rather a series of intersecting, often paradoxical, narratives that shifted according to the socio-historical moment.”<sup>1035</sup> The *piéd noirs* and the colonial system, did not mesh entirely into that of the metropole. Often the Algerian settler was worse off than their counterpart in mainland France. Also, there was a resentment among settlers of imperial interference from the metropole; as it was the *piéd noirs*’ intention to assert their own sovereignty in Algeria.<sup>1036</sup> Hassett’s work indicates a desire among particularly right-wing settlers, to create a settler utopia.

Between 1908 and 1946, the *colons* population remained the same, yet the Muslim population increased. Coinciding with this, international pressure, such as the signing of the Atlantic Charter and the creation of the United Nations, began to champion the idea of self-determination. “Settlers felt outnumbered and consequently fearful about the future of French Algeria”.<sup>1037</sup> As such the *colons*, even those on the extreme, could not reject French interference. Being the minority, fearful of the greater number of Muslim Algerians, and the increasing number of politicised Algerians, the *colons* had to balance a rejection of metropole

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<sup>1033</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 89.

<sup>1034</sup> F. Barclay, et.al., ‘Introduction: Settler Colonialism and French Algeria’, *Settler Colonial Studies*, 8, 2 (2018), 115-130: 117.

<sup>1035</sup> *ibid.*

<sup>1036</sup> D. Hassett, ‘Proud *colons*, proud Frenchmen: settler colonialism and the extreme right in interwar Algeria,’ *Settler Colonial Studies*, 8, 2 (2018), 195-212: 196.

<sup>1037</sup> F. Barclay, et.al., ‘Introduction: Settler Colonialism and French Algeria’, 122.

interference but would demand intervention from the metropole when their interests were at stake.<sup>1038</sup> The *colons* understood that they were reliant on France to guarantee the security that underpinned the settler hegemony.<sup>1039</sup> Hassett explained that “Although the settlers may well have aspired to total control over all affairs in the colony, they grudgingly accepted that their reliance on metropolitan power and the encroachment on their sovereignty that this implied.”<sup>1040</sup> This was demonstrated following the attacks in November 1954, when the settlers demanded French intervention, to restore French rule; and to suppress the nationalist insurgency.<sup>1041</sup> Therefore, to a minority of the population, France was indeed the legitimate authority. The colons were reliant on the French state to provide security, granting them sovereignty and legitimacy.

#### Legitimate Authority: International Legitimacy

There is little doubt that France was seen as legitimate authority in Algeria by the international community. One manner in which this can be judged is the recognition by other states, and the inclusion in international organisations.<sup>1042</sup> When the North Atlantic Treaty was signed, this helped to solidify France’s claim to legitimacy in Algeria. Article five of the treaty states that any member of the treaty has the right to individual and collective self-defence, and will be aided by another party of the treaty; with action that is deemed necessary.<sup>1043</sup> Importantly, article five applies to an armed attack “on the Algerian Departments of France”.<sup>1044</sup> French Algeria had been internationally codified, so much so,

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<sup>1038</sup> Hassett, ‘Proud *colons*, proud Frenchmen’, 196.

<sup>1039</sup> *ibid.*

<sup>1040</sup> *ibid.*, 208.

<sup>1041</sup> F. Barclay, et.al., ‘Introduction: Settler Colonialism and French Algeria’, 123.

<sup>1042</sup> Orend, *The Morality of War*, 37-8.

<sup>1043</sup> NATO, *The North Atlantic Treaty*, 4 April 1949. Available online: [https://www.nato.int/cps/en/natohq/official\\_texts\\_17120.htm](https://www.nato.int/cps/en/natohq/official_texts_17120.htm) (accessed 15/4/2021).

<sup>1044</sup> *ibid.*



that if it was to be attacked, it would be equivalent to an attack on the metropole; or another NATO state.

French allies perceived the conflict as an internal affair, and French authority came up against little opposition. Even the United States, which had an anti-le stance did not question French control in Algeria.<sup>1045</sup> British officials regarded Algeria as a “French preserve” and did not challenge French authority.<sup>1046</sup> Even following Setif, France “drew little comment, let alone any informed criticism, from Washington, Moscow or London”.<sup>1047</sup>

Even states, expected to be somewhat favourable to Algerian nationalists, did not go so far to challenge French sovereignty. The Arab league, committed to Arab unity and established in 1945 by Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan and Yemen; was in 1954 “unwilling to challenge French claims that Algeria was juridically an internal affair.”<sup>1048</sup>

Even Egypt, who gave refuge to leaders like Ben Bella and Ait Ahmed, refused to fully back the FLN against the French. Horne argued the Egyptian line, under Nasser, was “start the revolution first...then aid will follow”.<sup>1049</sup> Gordon attributes this to the fact that Egypt, in 1954, had good relations with France and Britain and did not wish to alter this; thereby, perhaps inadvertently giving recognition to France.<sup>1050</sup> Even in 1955, the Algerian Question was brought to the United Nations General Assembly; however it was squashed by France,

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<sup>1045</sup> I.M. Wall, *France, the United States, and the Algerian War* (California: University of California Press, 2001) 17. See: M. Thomas, ‘Defending a Lost Cause? France and the United States Vision of Imperial Rule in French North Africa’, *Diplomatic History*, 26, 2 (2002), 215-247: 222, M. Barkauoi, ‘Managing the colonial status quo: Eisenhower’s Cold War and the Algerian war of independence’, *The Journal of North African Studies*, 17, 1 (2012), 125-141: 128.

<sup>1046</sup> J. Abadi, ‘Great Britain and the Maghreb in the Epoch of Pan Arabism and Cold War’, *Cold War History*, 2, 2 (2002), 125-160: 141, and M. Thomas, ‘The British Government and the end of French Algeria, 1958-62’, *Journal of Strategic Studies*, 25, 2 (2002), 172-198: 172.

<sup>1047</sup> M. Thomas, ‘France’s North African Crisis, 1945-1955: Cold War and Colonials Imperatives,’ *History*, 92, 2 (2007), 207-234: 220.

<sup>1048</sup> M. Connelly, ‘Rethinking the Cold War and Decolonization: The Grand Strategy of the Algerian War for Independence’, *International Journal of Middle East Studies*, 33, 2 (2001), 221-245: 224.

<sup>1049</sup> Horne, *A Savage War of Peace*, 85.

<sup>1050</sup> Gordon, *The Passing of French Algeria*, 65.

referring to Article 2, paragraph seven, which did not allow other members to debate internal affairs of other members.<sup>1051</sup> The fact that this stood, within the UN, and the question was dropped, demonstrates that France was seen, internationally, as the legitimate authority, who still retained sovereignty.

The question of whether France was a legitimate authority, does not allow for a simple binary answer of yes or no, when examined in terms of minimal justness. Clearly, there were serious human rights abuses, that diminish the degree to which a state can be deemed to be just; particularly following the massacres of 1945. In addition to this, a large number of the Algerian domestic population opposed French rule. This would indicate a strongly or moderately negative score for France. However, the entire population was not opposed to French rule. Significantly, France was recognised internationally as the legitimate authority. It was recognised by other states, including some which were sympathetic to the nationalist cause. It was recognised by the United Nations, and within NATO. This international recognition gives a level of sway in terms of legitimacy, at the outset of the conflict, and therefore helps to counteract, to a degree, the more negative aspects of France's claim to legitimacy. Regardless, the continual subjugation of the rights of the population, often in extreme cases such as in Guelma and Setif, significantly diminished the legitimacy of France in Algeria, and it is not clear that the French were seen legitimate domestically among the Algerian population. Therefore, French Algeria did not meet the requirements of a minimally just society, even though it was seen internationally as legitimate. Therefore, a moderately unjust score of -2 is suitable for legitimate authority.

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<sup>1051</sup> M. Thomas, *The French North African Crisis: Colonial Breakdown and Anglo-French Relations, 1945-62* (Basingstoke: Macmillan Press Ltd, 2000), 140.

### Ad Bellum Proportionality

From the available knowledge at the time, the decision to go to war with the FLN seems to be proportional. To understand this, one must consider the position that France found itself in 1954. In 1954 France was a falling power. It had been humiliated in the Second World War and had also been defeated in Indochina. Unrest in Tunisia and Morocco had also weakened its position in North Africa. For the French, “keeping Algeria was seen by France's political elite as proof of French greatness; loss of the North African colony, it was believed, would spell the end of France as a world power.”<sup>1052</sup> If France was to lose Algeria, as it had lost other colonies, it was believed that it would drop to a ‘third rank power’.<sup>1053</sup> Therefore, the costs of inaction would have been significant.

Algeria was one of France’s most valuable possessions, as it held significant strategic importance.<sup>1054</sup> It was the gateway to France’s African Empire. North Africa was a ‘geopolitical axis’ that connected the Central African Colonies and held the headquarters for the French Mediterranean fleet.<sup>1055</sup> It was the springboard for control of the Maghreb and the eastern Mediterranean, therefore “its preservation was considered crucial to French greatness.”<sup>1056</sup> Soustelle presented this case, arguing that if France was to abandon Algeria it would lose its access to Africa “and in losing Africa, France would lose at the same time her future.”<sup>1057</sup> As such, the official stance at the time viewed the use of force to retain French sovereignty in Algeria as proportionate.

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<sup>1052</sup> W.B. Cohen, ‘The Algerian War, the French State and Official Memory’, *Historical Reflections / Réflexions Historiques*, 28, 2 (2002), 219-239: 221.

<sup>1053</sup> Smith, *The French Stake in Algeria, 1945-1962*, 162.

<sup>1054</sup> W.B. Cohen, ‘Algerian War and the Revision of France’s Overseas Mission’, *French Colonial History*, 4 (2003), 227-239: 227.

<sup>1055</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 85.

<sup>1056</sup> *ibid.*

<sup>1057</sup> Soustelle quoted in Smith, *The French Stake in Algeria, 1945-1962*, 174.

Faure reiterated the need for the use of all measures to defend itself in a speech made in 1955; “the entire honor [sic] of France as well as her human mission oblige us absolutely, without equivocation and without reticence, to keep Algeria for France and in France”.<sup>1058</sup> Another example comes from Soustelle, when making a speech made on 9 March 1956, said:

Algeria lost! If these words were to become a reality, they would define a national disaster equal to the most frightening in our history - to the Sedan and to June, 1940. France would cease to be a power... This misfortune is knocking on our door. Nothing will be too much to ask to solve it.<sup>1059</sup>

The loss of Algeria, it was argued, would be so detrimental to France, so unthinkable, that the use of force would be justified, and proportional as ‘nothing’ would be too much to solve it.

Importantly, the initial response to the events in November were seen to be proportional. The government believed that it would prevent a long and drawn-out war by acting quickly.<sup>1060</sup> First, the security forces would crush the rebellion quickly, and then reforms would be enacted to tackle the underlying issues.<sup>1061</sup> The initial response was repression mixed with reform. The repressive measures were supported by the Algerian Assembly. On 2 November the Consil-General for the department of Algiers voted unanimously that “order be firmly and rapidly restored”, that “the guilty...be exemplarily punished” and “no weakness be tolerated”.<sup>1062</sup> However, Mitterand, the Minister of the Interior, had put two immediate and important restraints on to the use of force. First, there was to be no indiscriminate bombings of suspected rebel villages with napalm or high explosives, and secondly the police forces were to be fused with the police of metropolitan France, to reduce the influence of the more

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<sup>1058</sup> Faure, quoted in Smith, *The French Stake in Algeria, 1945-1962*, 162.

<sup>1059</sup> Soustelle, quoted in Murphrey, ‘Colonial Propaganda’, 78.

<sup>1060</sup> Horne, *A Savage War of Peace*, 96.

<sup>1061</sup> *Evans, Algeria: France’s Undeclared War*, 130.

<sup>1062</sup> *ibid*, 97.

racist and brutal elements of the Algerian Police.<sup>1063</sup> Indicating that the government was concerned with the costs of their actions.

It must be noted, however, that the repressive measures implemented by the security forces did not completely thwart the insurgency. In fact, the indiscriminate arrests conducted by security forces, resulted in many innocent people being “converted into ardent militants by the fact of their imprisonment”.<sup>1064</sup> Therefore the benefits were negligible. Also, the reforms never manifested. Mendes France was outvoted, as members on all sides did not see a liberal solution to Algeria. They believed liberal policies would ultimately liquidate French power.<sup>1065</sup> Therefore, the double-pronged strategy quickly became a single-pronged approach based on repression, rather than reform, which would go on to define the conflict.

Nonetheless, overall, one can perceive the decision to fight the insurgency as proportionate in the context 1954. Even the French public, who “hated to contemplate the prospect of another long, drawn out war in Algeria”, after Indochina, recognised that they could not abandon the people of Algeria to be “left at the mercy of the terrorists”.<sup>1066</sup> Therefore, one could argue that the French perceived that the use of force was proportional to the ‘evils’ that would have occurred had they not engaged with the FLN. As such, a score of +2 is suitable for the proportionality principle.

### Last Resort

In November 1954, the FLN had launched a violent struggle against the French with the aim of independence. The FLN had broken the peace, and therefore the principle of last resort

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<sup>1063</sup> Horne, *A Savage War of Peace*, 100.

<sup>1064</sup> *ibid*, 96.

<sup>1065</sup> Evans, *Algeria: France's Undeclared War*, 132.

<sup>1066</sup> Galula, *Pacification in Algeria*, 10-11.

becomes somewhat moot.<sup>1067</sup> Therefore, France met this principle. However, there is still some discussion to be had.

The last resort principle asks that we determine that all reasonable options be exhausted. Mendes France had tried to fast track reforms, which would have given the Algerian population greater stake in the country; potentially delegitimising the cause of the militant nationalists. However, these had been blocked and resulted in the collapse of Mendes France's government. Therefore, the options for reform were not realistic.

Negotiations were perhaps unrealistic also. Many moderates had been swept up in the initial arrests. Others were blocked from making speeches. Abbas, one of the moderate nationalists who did not call for violence, and opposed the FLN until 1955, tried to speak at the Algerian Assembly in November 1954 to argue that reforms would help to bring peace. However, he was denied the chance to speak.<sup>1068</sup> The continual suppression of Algerian politics meant that there were no *interlocuteurs valables* with whom the government could negotiate with. Horne argued that the Mendes France and subsequent governments found themselves in an "iron maiden" whereby the only choice was to continue to fight.<sup>1069</sup> Therefore, although much of this position was their own doing, there were not many other avenues the French could realistically take in 1954, than respond to the violence. Therefore, France generally met the principle of last resort, and +2 is a suitable score for this principle.

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<sup>1067</sup> A.J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 2016), 210.

<sup>1068</sup> Behr, *The Algerian Problem*, 70.

<sup>1069</sup> Horne, *A Savage War of Peace*, 97.

### The Algerian War: *Jus in Bello* Index

The French reacted quickly to the events of All Saints Day, but it did not nip the insurgency in the bud. Violent attacks by the FLN increased, until they averaged 450 per month in early 1955.<sup>1070</sup> The government declared an emergency on 3 April 1955. By this point, Stora said the French were at war, because from then it “was up to the military authorities to directly suppress any crimes and misdemeanours”.<sup>1071</sup> Therefore, the French approach to COIN in Algeria was predominantly led by the military. The military, which had an aim of restoring “military greatness”,<sup>1072</sup> conducted operations COIN operations in Algeria with little regard for *in bello* principles. Indiscriminate policies, such as collective responsibility, were implemented across Algeria. Torture became synonymous with the conflict. Resettlement was conducted with little regard for the safety of the population, and instead was conducted with the intention of punishing the population into submission. By the late 1950s the French security forces had destroyed much of the FLN’s fighting capability and structure. However, it failed to convert these successes into strategic success. French abuses played into the hands of the insurgents, who managed to manipulate abuses, enhancing their cause and delegitimising France.<sup>1073</sup> Therefore, the following sections will demonstrate that the French war in Algeria was fought unjustly, and a moderate to strongly unjust score of -2.5 is suitable for both *in bello* principles.

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<sup>1070</sup> Evans, *Algeria: France’s Undeclared War*, 125.

<sup>1071</sup> Stora, ‘Algeria: The war without a name’, 210.

<sup>1072</sup> Evans, *Algeria: France’s Undeclared War*, 134.

<sup>1073</sup> Paul, et.al, *Paths to Victory: Detailed Insurgency Case Studies*, 90.

## Policy of Collective Responsibility

At the outset of the conflict Mitterand forbid indiscriminate actions, and so too did Soustelle, who had replaced Mendes France. Soustelle wrote to military commanders claiming that indiscriminate violence would drive the support of the population to the insurgents, and that “it is our mission to restore peace and order, not against the Muslim population, but for them and with them”.<sup>1074</sup> However, as FLN violence increased, the army began to regard every Muslim as a “potential killer”.<sup>1075</sup> Following the state of emergency, the military employed indiscriminate operations, and followed a policy of collective responsibility.

On 14 May 1955, the Commander in Chief in Algeria, Paul Charrière, ordered that “Collective responsibility [was] to be vigorously applied”.<sup>1076</sup> This command undercut any previous emphasis on restraint, and the conflict became increasingly indiscriminate. Every insurgent attack was met with a retaliatory strike, which usually mean the nearest village was attacked.<sup>1077</sup> Klose’s work indicates that “ten Arabs were killed for every dead Frenchman in...retaliatory raids carried out by the Army and the settler militias”.<sup>1078</sup>

Initially, Villages would be evacuated, then destroyed, and the males rounded up in internment camps.<sup>1079</sup> However, as the war continued, bombing would commence prior to the evacuation of civilians.<sup>1080</sup> According to Klose’s work, a corporal of the 1er Régiment de d’infanterie de l’Air claimed, in private, that “the Arab population feared his unit deeply because they knew that anytime a shelling occurred from a village, it meant that – fifteen

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<sup>1074</sup> Soustelle, quoted in Klose, *Human Rights in the Shadow of Colonial Violence*, 145-146, and Horne, *A Savage War of Peace, A Savage War of Peace*, 113.

<sup>1075</sup> Horne, *A Savage War of Peace*, 115.

<sup>1076</sup> Charrière quoted in *ibid*, 114.

<sup>1077</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 146.

<sup>1078</sup> *ibid*, 99.

<sup>1079</sup> Horne, *A Savage War of Peace*, 114.

<sup>1080</sup> *ibid*.



minutes and a warning later – the village would be razed by French troops”.<sup>1081</sup> In another unit a lieutenant claimed that:

should one of my men be killed some day in an ambush, then I will go into the nearest village, gather up all the inhabitants and shoot every second one on the spot...the reason: they did not warn the French that they were about to be ambushed.<sup>1082</sup>

Collective responsibly goes against the rules of *in bello* and demonstrates a clear disregard for the principle of discrimination.

### Summary Executions of Prisoners

On 1 July 1955, the Faure Government declared that “every rebel using weapons or seen carrying weapons or in the middle of carrying out an exaction [sic] must be immediately shot...every suspect who tries to escape must be fired upon”.<sup>1083</sup> As evident within the other cases of this work, the issue of suspects ‘escaping’ led to the murder of non-combatants. The number of people who had been shot while ‘trying to escape’ were significant and happening on a daily basis. In March 1960, the Parisian lawyers reported to the ICRC that several thousand people had been executed whilst ‘escaping’, and that they believed that the evidence indicated that they were executed outright.<sup>1084</sup> Frequently, these ‘escapes’ were staged in events called *corvée de bois*; wood gathering.<sup>1085</sup> Prisoners would be sent out with the order to ‘gather wood’ and then shot by the military for trying to escape.<sup>1086</sup> Klose’s work explains that of those who disappeared whilst being taken prisoner, half were sent out to ‘gather wood’; the other half were killed during torture.<sup>1087</sup> The killing of suspects or prisoners

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<sup>1081</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 146.

<sup>1082</sup> Unnamed French Lieutenant quoted in *ibid*, 146.

<sup>1083</sup> *Evans, Algeria: France’s Undeclared War*, 138.

<sup>1084</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 148.

<sup>1085</sup> Frémeaux, ‘The French Experience in Algeria: Doctrine, Violence and Lessons Learnt’, 55.

<sup>1086</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 148.

<sup>1087</sup> *ibid*.

clearly goes against the principle of discrimination, as prisoners should be granted benevolent quarantine. Klose noted that in light of the murder of prisoners, it is “not at all astonishing to learn...that ALN soldiers preferred to die fighting in a hopeless situation than to be taken prisoner”.<sup>1088</sup>

The French also failed to discriminate effectively between combatant and non-combatant when searching for insurgents. During French searches, known as *ratissages*, French forces would use force indiscriminately amongst the population. Fleeing civilians were seen to be ‘suspicious’ and therefore legitimate targets.<sup>1089</sup> Horne’s work provides an example of a searching within a *piéd noir* farm. Horne explains that the French believed that insurgents were hiding in a barn. Two men were found and interrogated with the use of rifle butts. The Algerian men appeared not to speak French and no intelligence was obtained, which angered the French officer, who then charged nine farm hands with complicity. The two suspected men and nine farm hands were lined up against a wall and shot; in front of their wives and children.<sup>1090</sup> Summary executions, such as this one, became “a characteristic phenomenon of the war”.<sup>1091</sup> Therefore, the evidence indicates that the French failed to adhere to the principles of discrimination between combatant and non-combatant. Military forces, backed up by government orders, resulted in significant breaches of *in bello*.

### Philippeville Massacre

The strongest example of the French disregard to the principle of discrimination, during the early phase of the war, was the Philippeville massacre. The ALN had struggled over the 1954-55 winter, and by the summer of 1955 still had not mobilised the population. The ALN in response to this turned to the tactic of ‘blind terrorism’ in order to provoke a repressive

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<sup>1088</sup> *ibid.*

<sup>1089</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 147.

<sup>1090</sup> Horne, *A Savage War of Peace*, 115.

<sup>1091</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 148.

response from the government and security forces; to drive the uncommitted majority towards their cause.

The ALN orchestrated a military action against the Europeans within the Constantine area; with the primary target being the harbour city of Philippeville and the surrounding areas. In Philippeville, uniformed insurgents marched through the streets, killing indiscriminately.<sup>1092</sup> In total, on the 20 August 1955, 123 people were killed, seventy-one Europeans, thirty-one soldiers and police officers, and twenty-one Algerians.<sup>1093</sup>

The French security forces met the insurgent's brutality with its own kind. The army rounded up Muslims and executed 700.<sup>1094</sup> A member of the 18er Régiment de Chasseurs Parachutistes described the actions taken when they came across a group of 'rebels' and civilians:

We opened fire into the thick of them, *at random*. Then as we moved on and found more bodies, our company commanders finally gave us the order to shoot down *every Arab we met*...For two hours all we heard was automatic rifles spitting fire into the crowd.<sup>1095</sup>

Soldiers did not take prisoners, as this "complicated everything".<sup>1096</sup> Instead, soldiers fired machine guns into the crowd, and once it was over "There were so many of them that they had to be buried with bulldozers".<sup>1097</sup>

Official reports stated that 1,273 guerrillas and Algerian villagers were killed in retaliation.<sup>1098</sup> The FLN put forward a figure of those dead at 12,000. This figure was never

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<sup>1092</sup> Behr, *The Algerian Problem*, 80.

<sup>1093</sup> Evans, *Algeria: France's Undeclared War*, 141.

<sup>1094</sup> Stora, 'Algeria: The war without a name', 210.

<sup>1095</sup> Unnamed soldier quoted in Horne, *A Savage War of Peace*, 121 (emphasis added).

<sup>1096</sup> *ibid.*

<sup>1097</sup> *ibid.*

<sup>1098</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 79.

refuted<sup>1099</sup> and they were able to back this up with names and addresses.<sup>1100</sup> It is worth mentioning that scores of people were killed by  *pied noirs*  vigilante groups; however, the military still took a central role in the killing of the Algerians following Philippeville. Importantly, “most of those killed by the French were innocent of wrongdoing”.<sup>1101</sup>

Philippeville significantly damaged the support of the French in Algeria. French overreaction had played into the hands of the insurgents. Other nationalist movements joined the FLN, and it became the largest nationalist group, dominating Messali’s MNA.<sup>1102</sup> Importantly, Philippeville had converted the moderate nationalists to the NLF’s cause. Abbas, who had initially opposed the violence, joined the NLF following the massacre in August 1955.<sup>1103</sup> In Metropolitan France, prominent voices, such as Jean Paul Sartre, became outspoken against the war, in part due to its brutality.<sup>1104</sup> The event also damaged the international legitimacy of France, with the US sympathising with the nationalists.<sup>1105</sup>

### Sakiet Crisis

In the later phase of the war another major breach of the principle of discrimination took place in the Tunisian border village of Sakiet in February 1958. French aircraft bombed the village intending to knock out an ALN support base.<sup>1106</sup> The attack resulted in at least seventy-five dead, and over a hundred more wounded; these figures include women and children.<sup>1107</sup> Importantly, these civilians were not only non-combatants, but were members of another sovereign state. As a result, this attack not only violated the principle of

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<sup>1099</sup> Stora, ‘Algeria: The war without a name’, 210.

<sup>1100</sup> Horne, *A Savage War of Peace*, 122.

<sup>1101</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 79.

<sup>1102</sup> Evans, *Algeria: France’s Undeclared War*, 141.

<sup>1103</sup> Horne, *A Savage War of Peace*, 140-141.

<sup>1104</sup> *ibid*, 143.

<sup>1105</sup> Wall, *France, the United States, and the Algerian War*, 14.

<sup>1106</sup> Thomas, *The French North African Crisis*, 147.

<sup>1107</sup> J.S. Ambler, *The French Army in Politics, 1945-1965* (Ohio: Ohio State University Press, 1966) 229.

discrimination, but also violated Tunisian sovereignty.<sup>1108</sup> In doing so the conflict became internationalised, and France was put under significant pressure. The US secretary of State, Dulles, took this event as proof that “French policy in North Africa was morally and politically bankrupt and inadequately controlled in Paris”.<sup>1109</sup> This event was to provoke the “harshest exchange of words” between France and her most important ally, the United States.<sup>1110</sup> Wall wrote “France had used American equipment against innocent civilians and involved the United States in the conflict. This could not be allowed to continue”.<sup>1111</sup> The event weakened French Authority. States like Norway and Sweden expressed resentment at the United Nations.<sup>1112</sup> Internally, the fallout from the indiscriminate bombing of Sakiel was to result in the collapse of another government on 15 April 1958, leading to the May Crisis of 1958. France lost authority and its cause came into question with this indiscriminate act of violence. Therefore, one cannot argue that France was discriminate in its action during the Algerian War.

### Systematic Torture

The legacy of the Algerian war is intrinsically linked to the use of torture. From the beginning of the conflict, critics of the conflict compared actions of the French security forces, both the police and military, to the Gestapo.<sup>1113</sup> Torture was systematically used in Algeria, that by 1957 it became a routine part of interrogation.<sup>1114</sup>

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<sup>1108</sup> M. Thomas, ‘France Accused: French North Africa before the United Nations, 1952-1962’, *Contemporary European History*, 10, 1 (2001), 91-121: 109.

<sup>1109</sup> Thomas, *The French North African Crisis*, 147.

<sup>1110</sup> Wall, *France, the United States, and the Algerian War*, 109.

<sup>1111</sup> *ibid.*

<sup>1112</sup> Evans, *Algeria: France’s Undeclared War*, 231.

<sup>1113</sup> Cohen, ‘The Algerian War and the Revision of France’s Overseas Mission’, 228.

<sup>1114</sup> A.J. Bellamy, ‘No Pain, No Gain? Torture and Ethics in the War on Terror,’ *International Affairs*, 82, 1 (2006), 121-148: 144.

Reports of torture surfaced early in the conflict, and the most notorious was written by Civil Inspector-General Roger Wullaume. Wullaume's report, developed through interviews with police officers and prisoners, concluded that physical violence had taken place, in various forms. For example. Prisoners had been beaten with fists, sticks or whips.<sup>1115</sup> Others subjected to the "water method", whereby a prisoner's "eyes are bandaged, his nose stopped up, the tube is thrust into his mouth, and water passed through it until he is practically suffocated or loses consciousness".<sup>1116</sup> Another method used was the "electrical method"; where two leads connected to mains would be applied to the most sensitive parts of the body, such as "armpits, neck, nostrils, anus, penis or feet".<sup>1117</sup> Importantly, the report continues to explain that "all parts of the police" including the gendarmerie, the criminal police and general information service made use of these methods to interrogate prisoners; with the water method being the most popular.<sup>1118</sup>

The government were aware of the abuses being conducted.<sup>1119</sup> Wullaume's report was made available to Mitterand, Faure, and Soustelle, and several other officials.<sup>1120</sup> They also had access to other reports and publications made at the time.<sup>1121</sup> However, no legal action was taken against suspected police officers.<sup>1122</sup> Torture became normalised and accepted as part of dealing with the Algerian insurgency.<sup>1123</sup>

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<sup>1115</sup> R. Wullaume (1955) 'Text of the Wullaume Report' in P. Vidal-Naquet, *Torture: Cancer of Democracy: France and Algeria 1954-1962* (Harmondsworth: Penguin, 1963), 172.

<sup>1116</sup> *ibid.*

<sup>1117</sup> *ibid.*

<sup>1118</sup> *ibid.*, 173.

<sup>1119</sup> E. Kanstroom, 'Justifying Torture: Explaining Democratic States' Noncompliance with International Humanitarian Law', *Frontiers: The Interdisciplinary Journal of Study Abroad*, 14 (2007), 51-95: 66.

<sup>1120</sup> P. Agee, "Review: Torture as an Instrument of National Policy: France 1954-1962", *Social Justice*, 17, 4 (1990), 131-138: 133.

<sup>1121</sup> Kanstroom, 'Justifying Torture: Explaining Democratic States' Noncompliance with International Humanitarian Law', 66.

<sup>1122</sup> Vidal-Naquet, *Torture: Cancer of Democracy*, 32-33.

<sup>1123</sup> Bellamy, 'No Pain, No Gain? Torture and Ethics in the War on Terror,' 143.

The use of torture increased following the decision in March 1956 to give the Army Police powers by the Guy Mollet Government.<sup>1124</sup> “The civil authority transferred the ungrateful task of maintaining order to the shoulders of the military”.<sup>1125</sup> Unfortunately, as Porch warns “soldiers make lousy cops”.<sup>1126</sup> The lack of experience solving crimes, and their aim of collecting actionable intelligence, led to the an increasing reliance on torture, until it became common practice.<sup>1127</sup> According to Galula, “as we were in a hurry to get exploitable information, the interrogation techniques were crude”.<sup>1128</sup> In some areas the policy was “talk or else”.<sup>1129</sup> Galula goes on to explain that “our most important improvement in our counterinsurgent operations in Algeria” was the introduction of specialist teams who would extract confessions and information from the population, “far from civilian eyes”.<sup>1130</sup> Trinquier lead the Dispotif de Protection Urbaine (DPU), who were tasked with acting on suspect lists. Trinquier explained that when interrogating suspects “no lawyer is present...if the prisoner gives the information requested, the examining is quickly terminated; if not, specialist must force his secret from him”.<sup>1131</sup> For Trinquier, the use of torture was justifiable, as a method of war:

we must not trifle with our responsibilities. It is deceitful to permit artillery or aviation to bomb villages and slaughter women and children...and to refuse interrogation specialists the right to seize the truly guilty terrorist and spare the innocent.<sup>1132</sup>

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<sup>1124</sup> On 24 January 1956 Guy Mollet, of the Socialist Party, took over as Prime Minister from Faure. Soustelle was replaced by General Catroux, who was quickly replaced by Robert Lacoste.

<sup>1125</sup> J. Domenach, ‘The French Army in Politics’, *Foreign Affairs*, 39, 2 (1961), 185-195: 189.

<sup>1126</sup> Porch, *Counterinsurgency*, 192.

<sup>1127</sup> *ibid.*

<sup>1128</sup> Galula, *Pacification in Algeria*, 183.

<sup>1129</sup> *ibid.*

<sup>1130</sup> *ibid.*, 184.

<sup>1131</sup> Trinquier, *Modern Warfare*, 19.

<sup>1132</sup> *ibid.*

Therefore, the French army perceived the systematic use of torture as a justifiable means to achieved tactical and operational ends. However, the use of torture during the Battle of Algiers, that demonstrates success at the tactical and operational levels, came at a strategic price.

### Torture and the Battle for Algiers

Torture was a prevalent method used during the Battle for Algiers. Between 1956 and 1957 the FLN had turned towards a new campaign of urban terrorism.<sup>1133</sup> Between the Autumn of 1956 and the spring of 1957 the FLN carried out an average of 800 shootings and bombings per month.<sup>1134</sup> Lacoste responded by granting General Massu and the 10<sup>th</sup> Parachute Division all police and security power.

*Quadrillage* was employed across Algiers, whereby the city was separated into sectors, sub-sectors, blocks, and buildings. Massu demanded that all police files on suspected terrorists were given to him, and the DPU was ordered to make these arrests.<sup>1135</sup> Thirty to forty percent of the active male population of Algiers was arrested for questioning;<sup>1136</sup> 24,000 arrests were made over nine months.<sup>1137</sup> Torture became the “basic instrument” of questioning subjects. The ‘electric method’ was the preferred method of torture in Algiers. Massu declared that “a *sine qua non* of our action in Algeria is that we should accept these methods as heart and soul as necessary and morally justifiable”.<sup>1138</sup> However, torture was not limited to this method. There were a number of water methods, whereby heads were held under water until the suspect was ‘half-drowned’; “bellies and lungs filled with cold water from a hose placed in

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<sup>1133</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 81.

<sup>1134</sup> *ibid.*

<sup>1135</sup> A.J. Joes, *Urban Guerrilla Warfare* (Kentucky: University Press of Kentucky, 2007), 58.

<sup>1136</sup> Behr, *The Algerian Problem*, 114.

<sup>1137</sup> ‘No Pain, No Gain? Torture and Ethics in the War on Terror, 144.

<sup>1138</sup> Vidal-Naquet, *Torture: Cancer of Democracy*, 51.



the mouth, with the nose stopped up”.<sup>1139</sup> There were also other degrading acts, such as “bottles thrust into the vaginas of young Muslim women; high pressure hoses inserted in the rectum; sometimes causing permanent damage”.<sup>1140</sup> A number of people died during interrogation, either through death caused by the torture itself or from being executed for not divulging evidence. Teitgen stated that the number of those who disappeared was 3,024 due to torture or execution, between 28 January and 2 April 1957.<sup>1141</sup>

This figure is the one most often quoted, and taken as official, but arguably does not “give the full picture”.<sup>1142</sup> The military did not disclose all of the arrests that were made, and in June 1957 the Army obtained the census documents, and wiped out “all trace, other than in the memory of the family concerned, of anyone who had been arrested and killed”.<sup>1143</sup> The army took part in disposing of the “inconvenient”; those who did not provide information.<sup>1144</sup> Horne’s work indicates that mass graves were dug and there is suggestion that bodies were dropped into the sea by helicopter.<sup>1145</sup> *Corvée de bois* was also used. By the end of 1957, torture had become routine and carried out heavily by the military.

In terms of proportionality, it is important to note that the French were tactically successful in Algiers. By March the number of bombings dropped to almost zero, and the killing of civilians was halted. Massu claimed that the ends justified the means.<sup>1146</sup> Chalk wrote that there “is no doubt” that the tactics used by the French “were effective in crushing the FLN’s operation capacity”.<sup>1147</sup> Some of the literature attributes part of this success to the use of

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<sup>1139</sup> Horne, *A Savage War of Peace*, 200.

<sup>1140</sup> *ibid.*

<sup>1141</sup> Evans, *Algeria: France’s Undeclared War*, 212.

<sup>1142</sup> Vidal-Naquet, *Torture: Cancer of Democracy*, 52.

<sup>1143</sup> *ibid.*

<sup>1144</sup> Horne, *A Savage War of Peace*, 201.

<sup>1145</sup> *ibid.*

<sup>1146</sup> *ibid.*, 204.

<sup>1147</sup> P. Chalk, *Money in the Bank – Lessons Learned from Past Counterinsurgency (COIN) Operations* (California: RAND, 2007), 24.

torture. Behr explains that “the FLN’s entire terrorist network was out of action, its politico-administrative sections badly mauled, its fund-raising network destroyed, and the entire Moslem [sic] population of Algiers cowed beyond belief”.<sup>1148</sup> Behr, who did not condone the use of torture wrote that “it is certain that without torture the FLNs terrorist network would never have been overcome”.<sup>1149</sup> Horne wrote of the tactical utility of torture in a similar manner “the Battle of Algiers could probably only have been won with resort to institutionalised torture – freely admitted by Massu – on a large scale.”<sup>1150</sup> Therefore, it was argued that because it had been effective in suppressing the FLN in Algeria, it was therefore justified as a means to an end, and therefore proportional.

There are a few issues regarding this utilitarian justification. First, issues arise around the successfulness of torture. Proportionality means that we must measure the costs of any action against the expected good. In terms of torture, the expected good, concerns whether they can obtain the desired information from that person.<sup>1151</sup> Therefore, in order for torture to be proportional, one must be certain that the target of their torture will have the information required, because if this is not guaranteed then there cannot be a justifiable reason to subject that person to torture.<sup>1152</sup> In Algeria, torture was not used solely for intelligence gathering, but also in response to ALN actions, and as a means of terrorising the insurgents, and to convince the population against the insurgency.<sup>1153</sup> Therefore, often the intentions behind the use of torture were not ‘good’. In addition to this, when torture was used to obtain actionable intelligence, it is doubtful that torture was indeed necessary.

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<sup>1148</sup> Behr, *The Algerian Problem*, 115.

<sup>1149</sup> *ibid*, 114.

<sup>1150</sup> A. Horne, ‘The French Army and the Algerian War, 1954-62’ in R. Haycock (ed.) *Regular Armies and Insurgency* (London: Croom Helm, 1979), 69-83: 79.

<sup>1151</sup> D. Cole, ‘Torture and Just War,’ *The Journal of Religious Ethics*, 40, 1 (2012), 26-51: 39.

<sup>1152</sup> *ibid*, 40.

<sup>1153</sup> P. Paret, *French Revolutionary Warfare from Indochina to Algeria* (London: Pall Mall Press, 1964), 73.

In Algeria, torture was used indiscriminately, therefore they could not be certain of the information that they would obtain. Within Galula's work, he notes that when he and his men set out to purge a village, he would arrest four to five villagers who he had "a shadow of information, or who had simply committed some minor offense" and then interrogate them.<sup>1154</sup> The widespread use of torture, on speculative grounds, is not proportional. We must also consider the utility of such an approach. Horne noted that "More often than not the collating services are overwhelmed by a mountain of false information extorted from victims desperate to save themselves further agony."<sup>1155</sup> Paret's work leads to a similar conclusion:

a prisoner's admission that he supported the rebels or sympathised with their cause could only rarely possess operational significance; torturing a prisoner to obtain such a confession could not be explained by the need to prevent an ambush or terrorist attack.<sup>1156</sup>

His work indicates that the information about the insurgent structure and forces could be obtained elsewhere, through more reliable sources. Torture provided French forces with little useful information "beyond what was obtained from the more usual and incomparably more acceptable means of informants, surveillance, bribery, and public cooperation."<sup>1157</sup> Therefore, there is little support to the argument that the goods were so overwhelming to justify the use of torture.

Perhaps most prominent is that any "good" obtained through the use of torture remained at the tactical level. At the strategic level the use of unacceptable forms of violence, like torture, caused national disgust and international condemnation. "Opposition to the war was based on

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<sup>1154</sup> Galula, *Pacification in Algeria*, 120.

<sup>1155</sup> Horne, *A Savage War of Peace*, 205.

<sup>1156</sup> *ibid.*

<sup>1157</sup> Joes, *Urban Guerrilla Warfare*, 65.

the way it was conducted, in particular the use of torture, rather than on its goals.”<sup>1158</sup> As shown above, the war was arguably justified, as the French were reacting in response to aggression. However, the use of torture had damaged the French cause in Algeria, and this indication permeates the literature on the conflict. Ambler wrote that, based on the reaction of the free press and of the political opposition in France, “it is quite likely that the cause of French Algeria was damaged, rather than strengthened, as a result of the battle of Algiers”.<sup>1159</sup> The battle for Algeria was won, but at the wider cost of losing the war. The conduct of the battle had succeeded in “removing any semblance of moral legitimacy from Paris”.<sup>1160</sup> Much of the Algerian population became alienated by the tactics used in the battle, and the FLN gained more sympathy.<sup>1161</sup> The methods used also raised international concerns about French legitimacy in Algeria.<sup>1162</sup> Ultimately, the French had minimised the operational ability of the insurgency, but it had failed to increase its active minority, or enhance its legitimacy.

### Regroupement

On 1 June 1958 De Gaulle was voted back into power. With the intention of bringing peace to Algeria, De Gaulle ordered General Challe to defeat the insurgency. Challe set out to deliver the final blow to the ALN through a number of offensive manoeuvres, which would become known the Challe offensive. The offensive began on 5 February 1959; starting in the areas around Oran. The Challe offensive devastated the fighting capability of the insurgency

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<sup>1158</sup> Cohen ‘The Algerian War and the Revision of France’s Overseas Mission’, 229.

<sup>1159</sup> Ambler, *The French Army in Politics*, 175.

<sup>1160</sup> Chalk, *Money in the Bank*, 25.

<sup>1161</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 82.

<sup>1162</sup> *ibid.*

and was a major military success for the French.<sup>1163</sup> The Challe offensive resulted in the destruction of 40 to 50 percent of the ALN, and its logistical capability had decreased by 20 percent.<sup>1164</sup>

Coinciding with the military operations, the Challe offensive included an extensive resettlement programme; known as *regroupement*. The aim of *regroupement* was to isolate and destroy the ALN, by physically removing its support base into fortified villages and towns that could be controlled; whilst offensive forces destroyed the ALN militarily.<sup>1165</sup> Paret explains that “resettlement not only hurt the enemy but also brought the population under more stringent control, and at least in theory, afforded the opportunity of restructuring and re-educating”.<sup>1166</sup> In 1961, 2,380 centres were established, and 2.3 million Algerians were resettled; twenty-five percent of the total Algerian population.<sup>1167</sup>

However, resettlement was achieved through indiscriminate force. Efforts to minimise the harm done to non-combatants were minimal. The population was forcibly removed from their lands, which were then razed and napalmed.<sup>1168</sup> Those who refused to leave their homes and villages were executed or died in French bombings.<sup>1169</sup> As Klose said, “it is impossible to speak of a voluntary and peaceful resettlement of the population for the people’s own benefit” in Algeria.<sup>1170</sup>

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<sup>1163</sup> F.M. Gougeon, ‘The Challe Plan: Vain Yet Indispensable Victory’, *Small Wars & Insurgencies*, 16, 3 (2005), 293-316: 303; C. Griffin, ‘Major Combat Operations and Counterinsurgency Warfare: Plan Challe in Algeria, 1959-1960’, *Security Studies*, 19, 3 (2010), 555-589: 557.

<sup>1164</sup> Gougeon, ‘The Challe Plan: Vain Yet Indispensable Victory’, 303; Horne, *A Savage War of Peace*, 337.

<sup>1165</sup> Griffin, ‘Major Combat Operations and Counterinsurgency Warfare’, 582.

<sup>1166</sup> Paret, *French Revolutionary Warfare from Indochina to Algeria*, 44.

<sup>1167</sup> B.C. Brower, ‘Partisans and Populations: The Place of Civilians in War, Algeria’, *History and Theory*, 56, 3 (2017), 389-397: 395.

<sup>1168</sup> J. McDougall, ‘Savage Wars? Codes of Violence in Algeria, 1830s-1990s’, *Third World Quarterly*, 26, 1 (2005), 117-131: 126.

<sup>1169</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 170.

<sup>1170</sup> *ibid.*

The areas left empty following regroupement were classed as *zones interdites*. Within these areas, the *in bello* requirement of discrimination was ignored. These zones provided an area in which the military could conduct unrestrained and indiscriminate violence.<sup>1171</sup> Anyone within the zones was liable to be targeted by artillery and airpower.<sup>1172</sup> Entire villages were destroyed, fields and crops were destroyed; and napalm was used freely.<sup>1173</sup> One case reported by the Algerian Red Crescent occurred in March 1959, where 112 people, predominantly women and children, were gassed in a cave, which they had been using for protection.<sup>1174</sup> Outside of the barbed wire, there was scant attention paid to discrimination, all Algerians were fair game.

Those within the barbed wire also suffered considerably, leading to a conclusion that *regroupement* was both indiscriminate *and* disproportionate. Inhabitants were tortured<sup>1175</sup> and Klose's work argues that the French military would deliberately stop delivery of food supplied in order to 'coerce loyalty to France'.<sup>1176</sup> The suffering of the Algerian population caused by *Regroupement* was not proportional to the goods that were achieved. Even Massu had raised concerns about the conditions in a camp twenty-five miles from Algiers; "the level of life, and in particular the situation of the children, was inferior to the most miserably I have known in Black Africa".<sup>1177</sup> It is hard to justify these camps as proportional to the goods that they achieved.

The camps had been set up too hastily, and the French could not afford to set the camps up properly. Essentials "like water and shelter were an afterthought in many camps".<sup>1178</sup> Access

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<sup>1171</sup> Brower, 'Partisans and Populations: The Place of Civilians in War, Algeria', 395.

<sup>1172</sup> K. Sutton, 'Army Administration Tensions over Algeria's *Centres de regroupement*, 1954-1962', *British Journal of Middle Eastern Studies*, 26, 2 (1999), 243-270: 250.

<sup>1173</sup> Wall, *France, the United States, and the Algerian War*, 161.

<sup>1174</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, , 151.

<sup>1175</sup> Horne, *A Savage War of Peace*, 339.

<sup>1176</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 171.

<sup>1177</sup> Massu quoted in Horne, *A Savage War of Peace*, 339.

<sup>1178</sup> Brower, 'Partisans and Populations: The Place of Civilians in War, Algeria', 395.

to food, water and medicine was irregular, leading to high mortality rates from hunger and disease.<sup>1179</sup> Comparisons between some camps and concentration camps were made.<sup>1180</sup> Child mortality was so high that a child died every second day.<sup>1181</sup> Diseases became rife; in the Merdji camp, for example, 30 percent of the inhabitants were infected with tuberculosis, and 250 people died within a month.<sup>1182</sup>

Challe, however, argued that they were of a military necessity.<sup>1183</sup> At the tactical and operational levels, Challe was correct. *Regroupement* effectively cut the insurgents off from their support base. By 1960, Algerian officers in the northeast praised the camps, stating that they had completely cut off their contact with civilians in one case “and that loyalists could only smuggle a little semolina flour and symbolic amounts of coffee and sugar from another camp”.<sup>1184</sup> *Regroupement* was so successful that over the winter of 1959, insurgents were “dying as often from hunger as from enemy bullets”.<sup>1185</sup> Therefore, at the operational level *Regroupement* was successful. It had cut off the ALN from its support. However, as Heilbrunn wrote in 1966, “The Army could wipe out the rebels but not subdue the spirit of rebellion”.<sup>1186</sup>

*Regroupement* had little impact on the ability of France to win the support of the population. The violent nature of pacification alienated huge sections of the population, deepened nationalist and pro-FLN feelings. “People resented being forced to leave their homes, and they resented the poor living conditions of the camps.”<sup>1187</sup> *Regroupement* may have tactically

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<sup>1179</sup> *ibid.*

<sup>1180</sup> Horne, *A Savage War of Peace*, 338.

<sup>1181</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 170.

<sup>1182</sup> *ibid.*

<sup>1183</sup> Horne, *A Savage War of Peace*, 339.

<sup>1184</sup> Brower, ‘Partisans and Populations: The Place of Civilians in War, Algeria’, 396.

<sup>1185</sup> Horne, *A Savage War of Peace*, 336.

<sup>1186</sup> O. Heilbrunn, ‘The Algerian Emergency, 1954-1962’, *Royal United Services Institution. Journal*, 111, 643 (1966), 230-234; 233.

<sup>1187</sup> *Evans, Algeria: France’s Undeclared War*, 254.

destroyed the ALN, which did see a considerable decrease in numbers and ability to fight, but these successes could not be transformed into strategic ones.

Tactical success from Regroupement had come at “enormous cost both in human suffering and to France’s reputation in the world”.<sup>1188</sup> Once reports of the circumstances in the camps were made public, in July 1959, there was a “major uproar, on the Left and Right”, and the government came under scrutiny for its actions.<sup>1189</sup> Challe was pushed to close them, but “pleaded for their retention on grounds of military necessity”.<sup>1190</sup> Militarily, *Regroupement* was successful, but politically it was devastating for the French. Therefore, this cannot be deemed strategically necessary in an ethical sense.

By 1959 there was a significant amount of war weariness across the metropole and calls began for an ‘honourable exit’ withdrawal from Algeria. Militarily, the French had defeated the ALN by 1958, but the evidence suggests that the conduct of the conflict had tarnished its legitimacy, and politically it lost the war. It had failed to win over the Algerian population, and no longer could it afford to maintain control over Algeria. On 19 March 1962, following referendums in the metropole, and negotiations with FLN, and an increase in FLN violence, France handed over independence to Algeria. Overall, the conduct of the conflict was moderately to strongly unjustified. The widespread and systematic use of torture, and the suffering caused to the public was severe. Therefore, a score of -2.5 is suitable for both *in bello* principles.

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<sup>1188</sup> Wall, *France, the United States, and the Algerian War*, 161.

<sup>1189</sup> Horne, *A Savage War of Peace*, 339.

<sup>1190</sup> *ibid.*



### The Algerian War: Results

The degree to which France met the *ad bellum* criteria, as discussed above, is somewhat mixed. The French cause, responding to aggression from Algerian nationalists, presents a moderately just cause. The French also demonstrated a moderate level of right intent and fulfilled the principle of last resort. The most difficult aspects of *ad bellum* justice concerned legitimate authority. Using Orend's three criteria for a minimally just state, it is at best only slightly just. Although it did not sufficiently meet to requirement of protecting and promoting human rights of *all* of the population, it was still regarded as legitimate internationally, and to some degree domestically.

	Index Score
Just Cause	3
Right Intention	2
Public Declaration	2
Legitimate Authority	-2
Proportionality	2
Last Resort	2
<i>Jus ad Bellum</i> Index (JaBI)	1.5

(Fig.6) Results of case study, indicating individual scores for *ad bellum* criteria, and overall JaBI score.

In contrast to the resort to force, which was slightly to moderately just, the conduct of the Algerian war was moderately to strongly unjust. The conflict was conducted with severe levels of brutality. Torture was used both systematically and indiscriminately in by the security forces. Detainees and suspects were often executed out of hand. The security forces failed to discriminate effectively, and collective punishments were used against the Algerian Muslim population. *Regroupement* was a disproportionate COIN method employed by

security forces in Algeria. The severe suffering *regroupement* caused outweighed the benefits of the plan; even though it was tactically successful. Therefore, the French failed to meet both principles of *in bello* and a moderately to strongly unjust score is suitable for both *in bello* principles.

	Index Score
Discrimination	-2.5
Proportionality	-2.5
<i>Jus in Bello</i> Index (JiBI)	-2.5

(Fig.7) Results of case study, indicating individual scores for *in bello* criteria, and overall *JiBI* score.

## **Chapter Six: The Vietnam War**

The United States began its advisory role in South Vietnam following the withdrawal of the French after the First Indochina War in 1954 and the splitting of the country at the 17<sup>th</sup> Parallel. In March 1965, the United States sent troops to Vietnam to defend US air bases. What ensued was thirteen years of conflict, wherein the United States and the government of South Vietnam (GVN) forces fought against a North Vietnamese inspired communist insurgency, conducted by the National Liberation Front (NLF). By 1968 the United States had failed to defeat the insurgency, and it began to seek an exit from Vietnam. Gradually forces were withdrawn, with the Army of the Republic of Vietnam (ARVN) taking the brunt of security operations between 1968 and 1975. The United States left Vietnam in 1973, following the Paris Peace Agreements; and two years later South Vietnam was overrun by North Vietnamese Army (NVA) units, and Vietnam became unified under communism. The War was immensely costly, swathes of the countryside was decimated by bombing and left uninhabitable. A conservative figure puts the civilian toll in the south at 415,000 deaths.<sup>1191</sup> The War cost the lives of 58,000 Americans, and 115,000 ARVN; with considerably more wounded.<sup>1192</sup> In the last four years of the conflict alone, US officials reported that half a million NLF were killed.<sup>1193</sup> Although the United States delayed the communist victory, ultimately it failed in its main aim of keeping an independent South Vietnamese State. Importantly, the war was both unjust in terms of *ad bellum* and *in bello*.

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<sup>1191</sup> M.K. Hall, *The Vietnam War*, 3<sup>rd</sup> edition (New York: Routledge, 2018), 85.

<sup>1192</sup> *ibid.*

<sup>1193</sup> G.C. Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 3<sup>rd</sup> edition (London: McGraw-Hill, 1996), 282.

## The Vietnam War: *Jus ad Bellum* Index

### Just Cause for intervention: In response to a rights violation?

In the previous case studies, the counterinsurgents have conducted operations domestically in response to internal aggression. However, the Vietnam War presents a case where a counterinsurgent is intervening within the borders of another state. This alters the questions that must be asked regarding the justness of the United States' cause: we must ask whether the United States had a just cause to intervene.

To have a just cause to intervene, one must fulfil several criteria. First, there must be a request for help in response by the state who needs outside help.<sup>1194</sup> In 1961 Diem wrote to Kennedy requesting help from the United States, to help deal with the growing insurgency in South Vietnam. Kennedy responded, citing the Geneva agreements, promising greater support against the insurgency, which threatened South Vietnam.<sup>1195</sup>

Second, there must be severe enough rights violations being conducted in order to justify intervention. In the normal workings of international relations, sovereignty prohibits actors interfering in the internal affairs of another state. Interventions then, are generally prohibited, and viewed as “reprehensible violations of national sovereignty”.<sup>1196</sup> Yet, there are exceptions to the rule, and the literature does indicate an allowance for intervention in exceptional circumstances. Such circumstances include the *significant* violation of the rights of, or some of, the population. Violations must be significant, because of the risks involved with interventions. Intervention on anything short of a serious violation of rights, will often

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<sup>1194</sup> Orend, *The Morality of War*, 90.

<sup>1195</sup> R.B. Smith, *An International History of the Vietnam War Volume II: The Struggle for South-East Asia, 1961-65* (Hampshire: Macmillan Press Ltd, 1985), 25.

<sup>1196</sup> D.P. Lackey, *The Ethics of War and Peace* (New Jersey: Prentice Hall, 1989), 37.

cause more harm than good, and therefore are not justified.<sup>1197</sup> A significant violation of rights should include violations of the right to life and liberty.<sup>1198</sup>

By the time the United States had intervened in 1965, the NLF had conducted significant rights violations. Under their control the insurgents launched a campaign of assassinations and violence against village officials. By 1962, up to 10,000 village chiefs had been killed out of 16,000 villages.<sup>1199</sup> With government appointed officials removed “the NLF held the monopoly of force once the government left a void”.<sup>1200</sup> Within this void, the communists began a programme of indoctrination against the population. Indoctrination, which included persuasion and coercion, aimed at transforming villages into areas of revolutionary activity.<sup>1201</sup>

The Saigon government had failed to nip the insurgency in the bud. Therefore, the Americans, as protectors of South Vietnam following the withdrawal of the French, intervened in Vietnam in response to the growing violence and instability in South Vietnam. This gives some justness to the American cause in Vietnam, as it was in response to growing insurgent violence.

It would be fair to argue, the United States had some degree of justness to their cause, as they were responding to communist aggression by a North Vietnamese backed indigenous communist insurgency. Regan, argues, that the US may have been justified in intervening in Vietnam on humanitarian grounds: “assuming that the rebels, if victorious, would establish a radically unjust regime, and that the humanitarian goal of preventing the establishment of

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<sup>1197</sup> N. Fotion & G. Elstrom, *Military Ethics: Guidelines for Peace and War* (Massachusetts: Routledge & Kegan Paul, 1986), 115.

<sup>1198</sup> Walzer, *Just and Unjust Wars*, 101.

<sup>1199</sup> R. Millen, *The political Context Behind Successful Revolutionary Movements, Three Case Studies: Vietnam (1955-63), Algeria (1945-62), and Nicaragua (1967-79)* (Pennsylvania: US Army War College, 2008), 15.

<sup>1200</sup> *ibid*, 9.

<sup>1201</sup> C.E. Neu, *America's Lost War, Vietnam: 1945-1975* (Illinois: Harlan Davidson, Inc., 2005), 45.

such a regime was a cause that might justify intervention.”<sup>1202</sup> Empirically, communist governments have shown to be complicit in massive human rights violations. The North Vietnamese government, for example, implemented a land reform programme which resulted in a significant number of deaths. Literature published in the 50s and 70s indicated a “bloodbath” of up to 500,000 executed; Richard Nixon claimed another 500,000 died in slave labour camps.<sup>1203</sup> However, these figures appear to be significantly inflated as propaganda,<sup>1204</sup> and more moderate estimates put the number of those executed between 3,000 and 15,000.<sup>1205</sup> Regardless of the figure, protection of South Vietnam from such abuses of human rights were used as some of the justification to intervene in South Vietnam. Orend asks “what could be more just than trying to save the South Vietnamese from that?”<sup>1206</sup> Therefore, it could be argued that the United States did have a just cause to intervene in Vietnam.

### Collective Defence?

The decision for the US to intervene in South Vietnam cannot be understood without reference to its Cold War context. By the mid-1960s the fear that once Vietnam fell to communism other countries would fall like ‘dominoes’ and quickly succumb to communism; and all the human rights issues that would entail. The US was concerned that “the loss of South Vietnam would endanger neighbouring governments in the region, rendering them vulnerable to overt aggression, externally sponsored revolution, or neutralization”.<sup>1207</sup> The

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<sup>1202</sup> R.J. Regan, *Just War: Principles and Cases*, 2<sup>nd</sup> edition (Washington: Catholic University of America Press, 2013), 71.

<sup>1203</sup> E.E. Moise, ‘Land Reform and Land Reform Errors in North Vietnam’, *Pacific Affairs*, 49, 1 (1976), 70-92: 73.

<sup>1204</sup> See: A.D. Vo, ‘Nguyễn Thị Năm and the Land Reform in North Vietnam, 1953’, *Journal of Vietnamese Studies*, 10, 1 (2015), 1-62.

<sup>1205</sup> Moise, ‘Land Reform and Land Reform Errors in North Vietnam’, 78.

<sup>1206</sup> Orend, *The Morality of War*, 93.

<sup>1207</sup> J.M. Schuessler, *Deceit on the Road to War: Presidents, Politics, and American Democracy* (London: Cornell University Press, 2015), 63.

National Security Action Memorandum (NSAM) 288, which defined the Johnson administration's position and strategy in Vietnam, emphasised the costs of inaction: "all of Southeast Asia will probably fall under Communist dominance... [and the] threat to India, to the west, Australia and New Zealand to the south, and Taiwan, Korea, and Japan to the north and east would be greatly increased".<sup>1208</sup> By the mid-1960s South Vietnam was viewed by the United States as the "cornerstone of the free world in Southeast Asia",<sup>1209</sup> and its defence was vital for collective security. In the context of the Cold War, and the aim of collective security, then we can find some justice to the cause of the United States to intervene in South Vietnam.<sup>1210</sup>

### Intervening on behalf of the Just

The third requirement to a just cause for intervention concerns picking sides.<sup>1211</sup> The intervening actor must intervene on behalf of the side that is 'just'. Orend stipulates that intervening in a civil war or an insurgency is "justifiable only when there is an obvious injustice on one side of the civil war, and you are intervening on the side of justice".<sup>1212</sup>

Intervention on behalf of an unjust actor is "aggressive intervention in a civil war, and thus unjust".<sup>1213</sup> Therefore, we must determine the degree to which the United States was intervening on behalf of the just actor.

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<sup>1208</sup> N. Sheehan, *Pentagon Papers* (London: Routledge & Kegan Paul Ltd., 1971), 292.

<sup>1209</sup> Herring, *America's Longest War*, 83.

<sup>1210</sup> Domino Theory, and collective self-defence, is discussed further in the proportionality section.

<sup>1211</sup> Another contentious issue with this subject is what the intervening force is allowed to do. Walzer argues that only counter-interventions are justified, and the intervening force may only balance a side against another. However, Orend argues that this is not operational. Orend is more convincing, and realistic, as belligerents must be entitled to win their war. If an actor intervenes on the side of justice, against a clearly unjust actor, then surely it is best to bring about justice? As Orend wrote "what matters most in political life is justice, not washing one's hands of what is going on next door". Orend, *the Morality of War*, 90. See also: Walzer, 95-101.

<sup>1212</sup> B. Orend, *The Morality of War*, 1<sup>st</sup> edition (Ontario: Broadview Press, 2006), 86.

<sup>1213</sup> B. Orend, 'Michael Walzer on Resorting to Force', *Canadian Journal of Political Science / Revue Canadienne de science politique*, 33, 3 (2000), 523-547: 541.

As already stated in this work, the justness of an actor is assessed by the degree to which the actor meets the requirements of a minimally just society.<sup>1214</sup> As will be discussed below, it is not clear that either North or South Vietnam were minimally just societies. Both sides conducted human rights abuses, and it is difficult to determine which side was legitimate. As will be shown below, when the United States intervened in South Vietnam, it did so on behalf of a country which did not meet requirements of a minimally just society. Therefore, the degree to which it met the criteria just cause for intervention is in doubt.<sup>1215</sup>

### South Vietnam, a Minimally Just State?

Critics of the American War in Vietnam and of the South Vietnamese government argue that the GVN was illegitimate due to the failure to adhere to the Geneva agreement. Under Article 7 of the Geneva agreement, in July 1956 a referendum was meant to be held, to determine whether Vietnam was to become unified or remain as two separate states. “Diem never wanted to measure his popularity against Ho’s” and the elections never manifested.<sup>1216</sup>

Walzer wrote “when the South Vietnamese government refused to permit these elections, it clearly lost whatever legitimacy was conferred by the agreements”.<sup>1217</sup> The Geneva agreements, importantly, only granted authority to the North and the South, ‘pending the general elections’ which would bring about the unification of Vietnam; therefore the agreements carried the implication that South Vietnam, and North Vietnam, “was an interim

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<sup>1214</sup> Orend, *The Morality of War*, 83. As noted elsewhere, a minimally just society is one that is recognised by its own people as legitimate, does not fringe upon the rights of other states, and it promotes and protects the human rights of its own people.

<sup>1215</sup> The concept of a just cause to intervene entangles the legitimate authority principle with the just cause principle. A legitimate authority would be one that intervenes on the side of the just; if not, the intervener is illegitimate. Therefore, without an assessment of legitimate authority, it is hard to establish whether there is a just cause to intervene. Therefore, unlike the other sections in this work, both legitimate authority and just cause will be examined in the same section. See: Walzer, *Just and Unjust Wars*, and Orend, *The Morality of War*, for discussions on this principle.

<sup>1216</sup> R.D. Schulzinger, *A Time for War: The United States and Vietnam, 1941-1975* (Oxford: Oxford University Press, 1998), 88.

<sup>1217</sup> Walzer, *Just and Unjust Wars*, 98.



authority, an arrangement and a government therefore that was liable to terminate in two years' time, and that Diem might be no more than the head of a caretaker administration".<sup>1218</sup>

As such, commentators like De Groot argue that the state was somewhat illegitimate. He writes "The Republic of Vietnam...should not have existed in the first place and like a fledgling which has fallen from the nest should not have survived long".<sup>1219</sup> He continues, "had the Geneva terms been observed, the south would have been quickly absorbed into one, communist Vietnam. Instead...this synthetic nation was artificially sustained".<sup>1220</sup> Therefore, critics of the war argue that South Vietnam had little legitimacy and was not a just society.

Thompson opposed these arguments in 1969, when he wrote: "To suggest...as some have that South Vietnam has no moral or legal existence as a separate state... is plainly nonsense".<sup>1221</sup> However, he did argue that referendums would have been "very helpful"; and would have helped bolster the legitimacy of South Vietnam. "An explicit vote against reunification...would have established the South's cause and would certainly have 'discouraged any who might wish to impose a foreign ideology on your free people'".<sup>1222</sup> However, we of course do not know whether such elections would have been free and fair if they had taken place. The evidence, from examining other elections in South Vietnam, and the reality of the communist North Vietnam, would suggest that even if the referendum had taken place, perhaps the results would have been in doubt. For example, in an election held in October 1955 Ngo Dinh Diem won 98.2 percent of the vote by "ballot stuffing, voter intimidation, and campaign restrictions".<sup>1223</sup> In Saigon, for example, he won 605,000 votes

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<sup>1218</sup> A. Short, *The Origins of the Vietnam War* (London: Longman Group UK Ltd., 1989), 188.

<sup>1219</sup> G.J. De Groot, *A Noble Cause? America and the Vietnam War* (Essex: Pearson Education Ltd, 2000), 84.

<sup>1220</sup> *ibid.*

<sup>1221</sup> R.G.K. Thompson, *No Exit from Vietnam* (London: Chatto & Windus, 1969), 117.

<sup>1222</sup> *ibid.*, 115.

<sup>1223</sup> Hall, *The Vietnam War*, 40.

from 405,000 registered voters<sup>1224</sup> and this level of fraud was similar across South Vietnam.<sup>1225</sup> Therefore, although it is important, one cannot judge the legitimacy of the GVN solely on the lack of a referendum.

South Vietnam was recognised internationally, and many states gave the young country “as good a standing as a state in international law as many other states, both past and present including the United States”.<sup>1226</sup> South Vietnam was recognised internationally by sixty Nations, which helps to bolster the legitimacy of the country, and it means it met an important aspect of a minimally just society.<sup>1227</sup>

### Promote Human Rights?

However, the suppression of elections, leads us to examine another key feature of a minimally just society; the requirement to satisfy the rights of the population. Satisfying the rights of the population is fundamental to being a minimally just society. Those actors who choose not to realise the rights of all the population are not just. “Such countries are government by a malevolent minority, which hordes power and wealth, and discriminates against and/or cares not a whit for the well-being of the majority”.<sup>1228</sup> South Vietnam falls within this description. Diem’s government, and subsequent governments, failed to satisfy the rights of the population, and in doing so damaged the domestic legitimacy of the GVN; further weakening its position as a minimally just society.

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<sup>1224</sup> Herring, *America’s Longest War*, 59.

<sup>1225</sup> G.J. De Groot, *A Noble Cause?*, 62.

<sup>1226</sup> *ibid.*

<sup>1227</sup> J.N. Moore, ‘International Law and the United States Role in Viet Nam: A Reply’, *Yale Law Journal*, 76, 6 (1967), 1051-1094; 1056, and D. Little, ‘Is the War in Vietnam Just?’ in P.T. Menzel (ed) *Moral Argument and the War in Vietnam* (London: Aurora Publishers Incorporated, 1971), 7-14: 9.

<sup>1228</sup> Orend, *The Morality of War*, 38.

For example, during Diem's Denunciation of Communists Campaign in 1955, tens of thousands of South Vietnamese were arrested, and sent to re-education camps. Suspects, who could be "innocent civilians who had simply voiced dissatisfaction with Diem's so-called land reform programme",<sup>1229</sup> were held indefinitely without bringing formal charges and without trial. Reports of the torturing of suspects "were common"<sup>1230</sup>. In Ben Tre, seventeen thousand inhabitants were imprisoned, and many were subjected to torture, such as having their tongues cut out and their "eyes plucked" and their teeth extracted.<sup>1231</sup> Torturing of civilians, even if suspects, does not satisfy the human rights of the population.

Importantly, the failure of the Diem regime to satisfy the human rights of the population damaged the legitimacy of the GVN. By 1958, discontent had grown significantly. "In the cities of South Vietnam, many feared and resented the president's repressive measures".<sup>1232</sup> In the rural areas, in response to his brutality, the former Viet Minh members "stunned by the severity of Diem's Anti-Communist campaign, began to organize [sic] the peasantry, assassinate local officials, and even ambush patrolling ARVN units".<sup>1233</sup>

Diem also violently suppressed religious freedoms in South Vietnam, leading to the Buddhist Crisis in May 1963. Protests, which included hunger strikes, against the government increased spread across Vietnam. The crisis reached its crescendo on 11 June 1963 when a Buddhist monk, Thich Quang Duc, in front of a large crowd and reporters from international news corporations, self-immolated himself, gaining international attention.<sup>1234</sup> Diem's response was heavy handed. Two thousand pagodas were raided, more than one thousand

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<sup>1229</sup> N.V. Long, 'South Vietnam', in P. Lowe (ed.) *The Vietnam War* (London: MacMillan Press Ltd, 1998), 62-94: 67.

<sup>1230</sup> R.K. Brigham, 'Why the South Won the American War in Vietnam' in M.C. Gilbert (ed.) *Why the North Won the Vietnam War* (Hampshire: Palgrave, 2002), 97-116: 100.

<sup>1231</sup> Long, 'South Vietnam', 67.

<sup>1232</sup> Neu, *America's Lost War*, 38.

<sup>1233</sup> *ibid*, 38.

<sup>1234</sup> Z.J. Toong, 'Overthrown by the Press: The US Media's Role in the Fall of Diem', *Australasian Journal of American Studies*, 27, 1 (2008), 56-72: 59.

Buddhists were arrested, and several hundred were killed.<sup>1235</sup> A shoot to kill policy was introduced to anyone who did not adhere to a curfew, and a complete press censorship was introduced.<sup>1236</sup> Diem successfully alienated much of the Buddhist population, who made up eighty per cent of the population, and damaged how the country was perceived internationally.<sup>1237</sup> Diem lost the support of the Vietnamese population, and importantly, the support of the United States government. When a coup took place on 1 November 1963, ultimately resulting in the death of Diem and his brother, the United States refused to help.<sup>1238</sup> By 1963, the GVN was perceived as illegitimate by much of the population and failed to satisfy the rights of the population.

Even the removal of Diem did little to bolster the legitimacy of the South Vietnamese government, and a period of political instability and repression followed. Between the death of Diem in November 1963, and June 1965, there were nine changes of government,<sup>1239</sup> seven in 1964 alone.<sup>1240</sup> Major General Khanh headed one of these governments, following a successful coup on 30 January 1964, and his government presided over “an era of instability that plagued the RVN for more than a year as he and his political opponents struggled bitterly for control of South Vietnam”.<sup>1241</sup> Writing in 1968, Lederer commented that “Every government we have helped into power in Vietnam has been inadequate; and all of them have been rejected by the Vietnamese people”.<sup>1242</sup> Under Major General Thieu and Brigadier General Ky; who seized power in June 1965, and would continue to rule during the war, civil

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<sup>1235</sup> *ibid.*

<sup>1236</sup> Shulzinger, *A Time for War*, 146.

<sup>1237</sup> D.L. Anderson, *The Columbia Guide to the Vietnam War* (New York: Columbia University Press, 2002), 40.

<sup>1238</sup> J.G. Morgan, *The Vietnam Lobby: The American Friends of Vietnam, 1955-1975* (Carolina: University of Carolina Press, 1997), 98. See: M. Kalb, *The Road to War: Presidential Commitments Honored and Betrayed* (Washington: Brookings Institution Press, 2013) 74, for the conversation between Diem and Lodge.

<sup>1239</sup> Regan, *Just War*, 145.

<sup>1240</sup> Hall, *The Vietnam War*, 46.

<sup>1241</sup> Morgan, *The Vietnam Lobby*, 105.

<sup>1242</sup> W.J. Lederer, *Our Own Worst Enemy* (New York: W.W. Norton & Company, Inc., 1968) 93.

liberties continued to be suppressed. Ky and Thieu were corrupt, keeping American Aid for themselves, which led to opposition and disillusionment among the South Vietnamese population.<sup>1243</sup> By 1965, the United States was propping up an illegitimate government, which did not support the rights of its own people and had little support base in the country.

Therefore, if we accept that one can only intervene on behalf of the just actor, and the measure to which that actor is just depends on whether it meets the principle of a minimally just state; then the evidence indicates that the US did not have a clear just cause to intervene in South Vietnam. The evidence indicates that South Vietnam from its conception was a corrupt government, who gradually lost legitimacy and failed to satisfy the human rights of its own people. Therefore, because the United States intervened on behalf of an unjust actor, it did not meet the requirements of a just cause to intervene.

#### Did the US Pick the Right Side?

The above is not intended to suggest that North Vietnam was a legitimate state. Such a statement would be false and misleading. It is not clear that North Vietnam met the requirements of a minimally just society. For example, in 1956 a group of intellectuals called the Nhân-Van, revolted against the government opposing “the complete absence of freedom, the lack of civic rights, of a constitution, and of any code of laws, and against the high-handed and dictatorial behaviour of senior officials”.<sup>1244</sup> Orend argues that “the Diem government might have been bad, but communism was a terrible form of government, which we all know now was complicit in human rights violations”. He then asks, “what could be more just than trying to save the South Vietnamese from that?”<sup>1245</sup> The *jus ad bellum*

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<sup>1243</sup> J., Marciano, *The American War in Vietnam: Crime or Commemoration?* (New York: Monthly Review Press: 2016), 91.

<sup>1244</sup> P.J.H., ‘Revolt of the Intellectuals in North Vietnam’, *The World Today*, 13,6 (1957), 250-260;253.

<sup>1245</sup> Orend, *The Morality of War*, 92.

questions surrounding the Vietnam War are as complex as they are numerous. If intervening, a state should do so on behalf of the just actor, yet picking a just side in Vietnam is difficult, and as Orend noted, with no clear sides of justness, the war is questionable on both fronts.<sup>1246</sup>

Therefore, coming to a conclusive answer to the justness of the US cause in Vietnam is difficult, and contentious. There appears to be *prima facie* just cause for the US to intervene. The NLF had already launched an armed struggle in Vietnam and thousands had been murdered by NLF cadres. The United States intervened in order to secure both South Vietnam and the wider region. Therefore, there was indeed some justness to the cause of the United States: as self-defence of others is an acceptable just cause. However, intervening in a civil war requires there to be a just side and an unjust side, and the intervening actor must do so on the side of justice. In Vietnam there is no overwhelmingly just side. As noted above, North Vietnam does not respect the human rights of the population. However, South Vietnam had a poor human rights record, failed to satisfy the rights of the population, and importantly this resulted in a lack of legitimacy. Therefore, South Vietnam is not clearly a minimally just society. Therefore, because it is unjust to intervene on behalf of an unjust actor, or where there is no clear just side, then there is no cause to intervene. Therefore, a slightly to moderately unjust score of -1.5 is suitable for just cause.

### Legitimate Authority

As per the minimally just society criteria, the United States was seen as a legitimate state abroad and at home. It largely satisfied the rights of its population, although it did have important civil rights issues. Importantly, the manner in which the US government approached the intervention in South Vietnam was conducted through legitimate channels, via the passing of the Gulf of Tonkin resolution. On 2 August 1964 the *USS Maddox*,

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<sup>1246</sup> *ibid.*, emphasis original.

conducting patrols off Hon Me Island, was attacked by torpedoes launched by three North Vietnamese patrol vessels. On 4 August, the destroyer *USS Turner Joy* accompanied the *Maddox* on patrol and were reportedly attacked. Johnson sought approval from Congress after the Gulf of Tonkin incidents to allow for him to escalate if required.

On 7 August, Congress passed the Gulf of Tonkin resolution unanimously, after a forty-minute debate<sup>1247</sup>, and the senate passed it; with only two objections. The Gulf of Tonkin Resolution approved and supported the “determination of the President” to prevent future attacks.<sup>1248</sup> It also declared that the United States “as the president determines” can take all necessary measures “including the use of force” to assist any member of the Southeast Asia Treaty Organisation who required assistance in securing their freedom.<sup>1249</sup> Again, the South Vietnamese government had requested support from the US. Therefore, with the passing of the resolution, Johnson was given legitimate authority from congress to deal with the situation in Vietnam, and the support to continue to oppose “by all necessary means” efforts by the communists to “subvert and conquer” South Vietnam.<sup>1250</sup> The resolution was also accepted by the US public, for whom the decision to retaliate to the Tonkin attacks was clear.<sup>1251</sup> Overnight the opinion polls on Johnson rose by 30 percent following the passing of the resolution.<sup>1252</sup> The resolution granted the President a blank cheque to deal with Vietnam, and this was achieved through a legitimate process.. The resolution was open-ended and did not have restrictions placed upon it. It would be in place, and would be acted upon, until “the president shall determine that the peace and security of the area is reasonably secure”.<sup>1253</sup>

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<sup>1247</sup> De Groot, *A Noble Cause?*, 128.

<sup>1248</sup> D. Kaiser, *American Tragedy: Kennedy, Johnson and the Origins of the Vietnam War* (London: Harvard University Press, 200), 336.

<sup>1249</sup> *Ibid.*

<sup>1250</sup> Sheehan, *Pentagon Papers*, 277.

<sup>1251</sup> F. Logevall, *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam* (London: University of California Press), 205.

<sup>1252</sup> *ibid.*

<sup>1253</sup> De Groot, *A Noble Cause?*, 128.

Congress had in effect abandoned its constitutional authority to declare war and granted the President the power to escalate in Vietnam.<sup>1254</sup> Therefore, one could argue that the US was indeed a legitimate authority in Vietnam.

However, the main concern in assessing whether the US was a legitimate authority in Vietnam is whether it violated the sovereignty of Vietnam. Again, this is a difficult issue to answer, and it is linked heavily with the discussion on the just cause to intervene. Above it was argued that the US did not have a sufficient just cause to intervene in Vietnam, because it was an intervention to help an unjust actor. Again, Armed intervention on behalf of an illegitimate government is not just.<sup>1255</sup> The literature indicates that such an intervention would be an aggressive intervention, which indicates that it would violate the sovereignty of the people that it was intervening in.<sup>1256</sup> Therefore, as America was arguably an aggressive intervener, then the degree to which it was legitimate comes into doubt. Therefore, because the United States did not meet the principle of a just cause to intervene, as it intervened on the side of an unjust actor, the ethical literature indicates that the US did not meet the principles of a legitimate authority.

Dorn's work gave the conflict a score of -0.33 a neutral-slightly unjust score, and the second lowest score out of 18 conflicts.<sup>1257</sup> Dorn suggests that Legitimate authority was often the higher scores for a conflict in his results because "Perhaps the participants viewed US military forces as always acting under presidential authority if not with Congressional or UN Security Council authorization".<sup>1258</sup> As such, Dorn's score is slightly high. Therefore, taking into account the previous section, and the fact that the United States intervened in Vietnam

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<sup>1254</sup> Young, *The Vietnam Wars*, 120-121.

<sup>1255</sup> De Groot, *A Noble Cause?*, 92.

<sup>1256</sup> *ibid*, 90.

<sup>1257</sup> W. Dorn, et.al., 'How Just Were America's Wars? A Survey of Experts Using a Just War Index', 276.

<sup>1258</sup> *ibid*.



behalf of an unjust state, a moderately unjust score for legitimate authority is suitable.

Therefore, for the legitimate authority principle, a score of -1 is suitable.

### Public Declaration

Regarding the public declaration of war there was never a formal declaration made. One of the remarkable features of the Vietnam War is that because a declaration was never made “no one can say precisely when it began”.<sup>1259</sup>

The Gulf of Tonkin resolution was perhaps as close to declaring a war as the United States came in Vietnam. The resolution was communicated to Hanoi as an ultimatum. On 10 August 1964, the Canadian diplomat Blair Seaborn, was sent to Hanoi with a clear message, which outlined that the resolution had been passed, established the American position. This made clear to Hanoi, the US intention of maintaining South Vietnam and it stated that the US will “by all necessary means” defend south Vietnam in response to further North influence”.<sup>1260</sup>

The US had successfully made North Vietnam aware of possible escalation, and it had simultaneously made the American public prepared for possible escalation.<sup>1261</sup> However, when Marines were issued to South Vietnam in March 1965, several months after the passing of the resolution, there was no subsequent declaration of war.

“Even as he took that monumental step”, Hess writes, “Johnson downplayed its significance. In a low-keyed announcement, the president spoke to his countrymen about the necessity to wage “a different kind of war,” but he declined to share the costs and sacrifice that were in the offing”. There was “No Oval Office speech to the nation, no address to Congress – just a terse statement marked the moment when the country was unmistakably at war”.<sup>1262</sup>

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<sup>1259</sup> R.B. Smith, *An International History of The Vietnam War Volume I: Revolution versus Containment, 1955-61* (London: The Macmillan Press Ltd., 1983), 3.

<sup>1260</sup> Sheehan, *Pentagon Papers*, 277.

<sup>1261</sup> *ibid.*

<sup>1262</sup> *ibid.*

Wars of course can be declared through a vote in the elected assembly and doing so in this manner may meet the *ad bellum* requirement.<sup>1263</sup> However, the evidence indicates that there was considerable confusion within Congress about what the resolution meant the next steps the President could take. The central position of congress was affirmation of the US determination to oppose further aggression.<sup>1264</sup> “However, beyond that theme, there was a considerable variety of opinion...Several spokesmen stressed that the resolution did not constitute a declaration of war...and did not give the President carte blanche to involve the nation in a major Asian war”.<sup>1265</sup> It is also true that the legislators did not ask the “hard questions” about the resolution and its “capacious language”.<sup>1266</sup> As Logevall noted “it is no doubt true that most never expected the resolution to become the functional declaration of war that it did, but all knew that its language could allow the landing of large American armies in Vietnam”.<sup>1267</sup> Nonetheless, to meet the principle of a public declaration of war, an actor must be clear, and not cryptic, about what the next military steps will be.<sup>1268</sup> Congress perhaps should have known better, but the public were not clear on what the resolution meant, and few understood the implications of the passing of the resolution; although they supported retaliatory strikes.<sup>1269</sup> Therefore, there was never a clear declaration of war in South Vietnam against the NLF, instead the government intervened several months after a resolution. The US failed to meet this *ad bellum* requirement. Therefore, a score of -3 is suitable for this principle.

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<sup>1263</sup> Orend, *The Morality of War*, 52.

<sup>1264</sup> Kaiser, *American Tragedy*, 337.

<sup>1265</sup> Sheehan, *Pentagon Papers*, 276.

<sup>1266</sup> Logevall, *Choosing War*, 204.

<sup>1267</sup> *ibid.*

<sup>1268</sup> Orend, *The Morality of war*, 52.

<sup>1269</sup> Logevall, *Choosing War*, 205.

### Right intention in Vietnam?

The intentions behind the decision to intervene were numerous and complex. It is perhaps unsurprising then that Dorn's work presents a neutral score of -0.02 for right intention in Vietnam.<sup>1270</sup> However, the evidence indicates that the US in South Vietnam did indeed seek to achieve a just cause, of securing South Vietnam, and preventing the spread of communism.

If we can infer the intentions of a state through its actions, then we can argue that the United States did indeed want to keep South Vietnam a free and independent state. By 1965 the United States had committed itself to preventing South Vietnam from falling to communism. By the early 1960s the United States had already made a considerable commitment to South Vietnam, and was pumping over \$250 million a year in military and economic support into South Vietnam.<sup>1271</sup> The United States had also undertaken the significant task of rebuilding the demoralised and ill-equipped ARVN.<sup>1272</sup> The United States fitted out the ARVN with military hardware, including helicopters, tactical aircraft, and armoured personnel carriers.<sup>1273</sup> President Kennedy, emphasising counterinsurgency in South Vietnam, increased the number of 'advisors' in South Vietnam from 2,000 in 1961 to more than 11,000 in 1962.<sup>1274</sup> By 1965 the United States had shown a great commitment to South Vietnam.

However, US money and materiel could not prevent the deterioration of the situation in South Vietnam. The American-equipped ARVN was not suited for the task in South Vietnam,<sup>1275</sup> and in 1963 suffered a humiliating defeat at the Battle of Ap Bac against the NLF, who they outnumbered 10 to 1.<sup>1276</sup> Rural defence forces such as the Civil Defence

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<sup>1270</sup> W. Dorn, et.al., 'How Just Were America's Wars? A Survey of Experts Using a Just War Index', 277.

<sup>1271</sup> Smith, *An International History of the Vietnam War Volume I*, 187.

<sup>1272</sup> Brigham, 'Why the South Won the American War in Vietnam', 111.

<sup>1273</sup> Anderson, *The Columbia Guide to the Vietnam War*, 39.

<sup>1274</sup> Neu, *America's Lost War*, 53.

<sup>1275</sup> Nagl, *Learning to Eat Soup With a Knife*, 120.

<sup>1276</sup> Herring, *America's Longest War*, 98.

Corps and the Civil Guard units, were overlooked by the military advisors. They were poorly trained, failed to secure the population, could not cope with the insurgents, their brutality led to recruitment for the NLF, and they also became a source of weapons for the insurgents.<sup>1277</sup> By 1965 South Vietnam was ‘on the verge of a decisive defeat’.<sup>1278</sup> If Vietnam was to collapse in 1965, the United States feared that it would appear weaker on the world stage and to its allies.<sup>1279</sup>

However, the US did fail to enhance the freedom of the population of South Vietnam.

According to the *Pentagon Papers*, The McNaughton Draft for McNamara on the “Proposed Course of Action” stated that 10% of the US aim in Vietnam was to permit the people of SVN to enjoy a better, freer way of life”.<sup>1280</sup> Yet, if we consider the aim of permitting the South Vietnamese people to enjoy a ‘freer’ life, the US appears to have paid little attention to improving the political circumstances for the people of South Vietnam. On this Thompson wrote “the underlying intention would have been sound if it had implied that practical measures would be promoted within the country which might have led to, and established a foundation for, a democratic form of government”.<sup>1281</sup> However, the United States “devoted very little attention to political matters and, despite its massive foreign aid program, exerted very little influence”.<sup>1282</sup> Instead, some Americans assumed that Diem shared the same US values and that “it was enough for Diem to be “competent, anti-Communist and vigorous”” and that representative government was a long-term objective.<sup>1283</sup> Political reform was an

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<sup>1277</sup> *ibid.*, 121.

<sup>1278</sup> G.A. Daddis, *No Sure Victory: Measuring U.S. Army Effectiveness and Progress in the Vietnam War* (Oxford: Oxford University Press, 2011), 63.

<sup>1279</sup> See *ad bellum* proportionality section of this chapter.

<sup>1280</sup> Sheehan, *Pentagon Papers*, 442.

<sup>1281</sup> Thompson, *No Exit from Vietnam*, 115.

<sup>1282</sup> *De Groot, A Noble Cause?*, 68.

<sup>1283</sup> *ibid.*, 68-69.

attractive aim for the Americans, and it accorded well with their traditions.<sup>1284</sup> However, the US in reality showed little attention to developing the domestic politics of South Vietnam. Failure to reign in on political corruption damaged other aims of the US in Vietnam. For example, Diem's corruption would play a large role in the undoing of the Strategic Hamlet Programme, one of the early promising counterinsurgency campaigns fostered by the US. The aim of the program was to sever the link between the insurgents and the Vietnamese population, and enhance the credibility of the government of south Vietnam.<sup>1285</sup> The Strategic Hamlet Program, based on the experiences of the British in Malaya, involved the resettlement of the population into new defensible villages.<sup>1286</sup> ARVN forces would clear areas of insurgent activity, then the areas would be held while civil defence forces would be trained to hold and secure the area, and the police would root the insurgents out from the area; and then the next area would be selected and process continues; in line with the oil spot principle of COIN.<sup>1287</sup>

However, the program failed due to several factors.<sup>1288</sup> Diem and Nhu had constructed too many villages, too hastily, and in many hamlets, there was often no security. "Anxious to give the regime positive news", province chiefs "would declare a hamlet complete when its defence amounted to no more than a few strings of barbed wire and its social and economic amenities were nil".<sup>1289</sup> In addition to this, the population resented, and often resisted, being moved from their ancestral homes, which added to the discontent of the rural population.<sup>1290</sup>

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<sup>1284</sup> Thompson, *No Exit from Vietnam*, 114.

<sup>1285</sup> G.R. Hess, 'South Vietnam under Siege, 1961-1965: Kennedy Johnson, and the Question of Escalation or Disengagement', in D. Anderson (ed.) *The Columbia History of the Vietnam War* (New York: Columbia University Press, 2011), 143-167: 144.

<sup>1286</sup> A.F. Krepinevich, *The Army and Vietnam* (London: John Hopkins University Press, 1988), 66.

<sup>1287</sup> *ibid*, 67.

<sup>1288</sup> See: P.E. Catton, 'Counter-Insurgency and Nation Building: The Strategic Hamlet Programme in South Vietnam; 1961-1963', *The International History Review*, 21, 4 (1999), 918-940.

<sup>1289</sup> P. Cheeseright, 'Involvement without engagement: The British Advisory Mission in South Vietnam, 16 September 1961-31 March 1965', *Asian Affairs*, 42, 2 (2011), 261-275: 270.

<sup>1290</sup> Herring, *America's Longest War*, 98.

The levels of corruption and autocratic nature of the government of South Vietnam under-cut the humanitarian premise of U.S. intervention.<sup>1291</sup> Once Diem was overthrown the program was eventually stopped. However, had the US pushed for political reforms, and kept Diem in check, it may have been able to keep these operations in check. Therefore, even when operations were promoted by the US, which could have bolstered the security in the South, failure to address political issues hindered such projects.

This commitment made by the United States leads us to another of the main intentions of the United States in Vietnam, which contains credibility. The dominating intention in the decision to go to war in Vietnam was to do with securing the US reputation within the context of the Cold War. Credibility was the explanation “advanced by officials” when they addressed other officials in off the record meetings.<sup>1292</sup> Logevall notes that “one finds scant references to “moral obligations” or “defending world freedom” in the records of their interaction with congressional committees, with foreign government leaders, with journalists in private sessions”. Within these sessions the emphasis was almost always on “prestige, reputation and credibility and how these were on the line in Vietnam”.<sup>1293</sup>

According to the *Pentagon Papers*, the reputation of the US dominated American policy in Vietnam. The McNaughton Draft for McNamara on the “Proposed Course of Action” states that US aims in Vietnam were “70% - to avoid a humiliating US defeat (to our reputation as guarantor)”, “20% - to keep the people of SVN (and the adjacent) territory from Chinese hands”.<sup>1294</sup> It is of note, that the draft indicates that the US aim was “NOT – to “help a friend”.<sup>1295</sup> The dominating intention behind intervening in South Vietnam had little to do

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<sup>1291</sup> P. Busch, ‘Killing the ‘Vietcong’: The British Advisory Mission and the Strategic Hamlet Programme’, *Journal of Strategic Studies*, 25, 1 (2002), 135-162; 153.

<sup>1292</sup> Logevall, *Choosing War*, 388.

<sup>1293</sup> *ibid.*

<sup>1294</sup> Sheehan, *Pentagon Papers*, 442.

<sup>1295</sup> *ibid.*

with actually achieving the just cause, but rather to protect the credibility of the United States. When the pentagon papers were published, in 1971, “the documents confirmed what critics had been arguing, among other things that Kennedy and Johnson had consistently misled the public about their intentions in Vietnam”.<sup>1296</sup> The Pentagon papers show that the US had little intention of resisting aggression, and critics argued that the US failed to show right intention.<sup>1297</sup>

However, it must be remembered that issues of reputation and credibility related to the ability of the US to defend its allies and others from falling to communism. Reputation and credibility do matter in international relations, particularly in terms of coercion and deterrence. Failure to commit itself to South Vietnam was seen a potentially disastrous to the United States, and Southeast Asia, in the context of the Cold War. In addition, it may have hindered the ability of the US to prevent the expansion of Communism, which is indeed a just cause.<sup>1298</sup> Therefore, this intention may have been justified.

Therefore, coming to a decision on whether or not the United States met the right intention principle in South Vietnam is not clear-cut, and it is complex. Nonetheless, the evidence does indicate that there was some degree of right intention in South Vietnam. The prevention of South Vietnam from falling to communism, and to protect the population, was indeed in the stated intentions and aims in South Vietnam, although credibility was the main aim.

Therefore, a neutral to slightly just score of 0.5 is suitable.

#### Ad Bellum Proportionality

As presented earlier in this chapter, the justness of the American cause in Vietnam was moderately unjust. With questionable cause to intervene in Vietnam, the proportionality of

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<sup>1296</sup> Herring, *America's Longest War*, 267.

<sup>1297</sup> See: Walzer, *Just and Unjust Wars*, 97-100, 299-303. Orend, *Morality of War*, 92.

<sup>1298</sup> Orend, *Morality of War*, 92.

the conflict is also questionable because the benefit is not clear. Without a clear benefit, then the costs of going to war are more likely to outweigh any potential benefit. However, we can still determine the degree to which the US decision to intervene in South Vietnam was disproportionate.

### *Ad Bellum* Proportionality: The Cost of Inaction

*Ad bellum* proportionality asks that an actor examines the universal costs and benefits of a campaign, and the evidence indicates that the United States did assess the costs and benefits of committing itself further to Vietnam by intervening.

By 1965 South Vietnam was on the verge of collapse. The Saigon government, following NLF attacks in December 1964, was “close to panic” and it was prepared to evacuate its five northern promises.<sup>1299</sup> Without intervention, South Vietnam was likely to collapse. The overriding strategic factor why an actor would intervene, depends upon the national interest.<sup>1300</sup> “In this respect, it should have been greatly to the United States political advantage that she had no direct or military interest in the area”.<sup>1301</sup> Militarily, American strength relied upon a network of offshore military bases, and the Asian mainland was not as important to US grand Strategy.<sup>1302</sup> Bases along the chain of islands from the Philippines to Japan allowed the US to have influence in the area and mainland bases would always be more of a liability than an asset.<sup>1303</sup> Economically, Vietnam was an agricultural country, which did not contribute to the American economy, in the same way Malaya had to the British.

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<sup>1299</sup> Neu, *America's Lost War*, 82.

<sup>1300</sup> Thompson, *No Exit from Vietnam*, 110.

<sup>1301</sup> *ibid.*

<sup>1302</sup> J. Rovner, *Fixing the Facts: National Security and the Politics of Intelligence* (London: Cornell university Press: 2011), 56.

<sup>1303</sup> *ibid.*, and Thompson, *No Exit from Vietnam*, 110.



Instead, the survival of South Vietnam became the national interest within the wider context of the Cold War. As already discussed in the Just Cause section of this chapter domino theory, wherein other countries would fall to communism following the loss of Vietnam, had become engrained in American foreign policy. Acting on a warning from Maxwell Taylor on the consequences of a retreat from Vietnam, McNamara said to the House Armed Services Committee that:

the survival of an independent government in South Vietnam is so important to the security of all of Southeast Asia and to the Free World that I can conceive of no alternative other than to take all necessary measures within our capability to prevent a Communist victory.<sup>1304</sup>

One can comprehend the justification of South Vietnam in this context and why the US believed intervention to be proportionate.

However, even by 1965, there were doubts about the reality the domino effect following a loss of South Vietnam. Many states questioned the direct impact the loss of South Vietnam would have on the region and whether it mattered to Western Security.<sup>1305</sup> “None questioned the need to contain possible Chinese communist expansion in Asia, only whether it was necessary or wise to fight in Vietnam to do so”.<sup>1306</sup> Thompson’s work explains that the aim of containing China and Asian communism above the 17<sup>th</sup> Parallel, was a tenable concept in the 1950s, it did not seem valid in the later 1960s, “In China itself communism was making an excellent job of self-containment”.<sup>1307</sup>

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<sup>1304</sup> *ibid.*

<sup>1305</sup> F. Logevall, ‘America Isolated: The Western Powers and the Escalation of the War’, in A.W. Daum et.al. (eds.) *America, The Vietnam War, and the World: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2003) 175-196: 176.

<sup>1306</sup> *ibid.*

<sup>1307</sup> Thompson, *No Exit from Vietnam*, 113.

Even prior to the escalation of the war, “allied and nonaligned governments questioned not America’s will but its judgement”.<sup>1308</sup> In 1964, Johnson launched the ‘Many flags’ campaign which sought allies for the US cause in Vietnam. The campaign yielded limited returns, and the War continued to be an American war.<sup>1309</sup> Significantly, the US failed to convince those nations who would have been the next dominoes to fall if South Vietnam collapsed.<sup>1310</sup>

Although they did not support a communist Vietnam, they did not view the outcome “in the dire terms that underlay US policy”.<sup>1311</sup> Instead, they were convinced that whether the ‘dominoes fell’ depended on the individual country, “not on what happened in Vietnam”.<sup>1312</sup> Key allies like West Germany, Britain, the Netherlands, Denmark and Italy, had all ruled out even a token military presence,<sup>1313</sup> as they downplayed the importance of Vietnam to western security.<sup>1314</sup>

US intelligence reports from 1964 shed some doubt on the threat, or reality, of domino theory. CIA Director John McCone tasked the Board of National Estimates (BNE) to examine National Security Action Memorandum (NSAM) 288. The BNE report questioned the severity of the concerns of the NSAM; stating that “it is likely that no nation in the area would quickly succumb to communism as a result of the fall of Laos and South Vietnam” and that if there was spread of communism, it would be slow and could succumb to numerous factors.<sup>1315</sup> Therefore, the costs of inaction, or the benefits of intervening in South Vietnam, appear not to be universally significant.

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<sup>1308</sup> Logevall, *Choosing War*, 380.

<sup>1309</sup> J. Colman & J.J. Widen, ‘The Johnson Administration and the Recruitment of Allies in Vietnam, 1964-1968’, *History*, 94, 4 (2009), 483-504: 484.

<sup>1310</sup> Logevall, *Choosing War*, 181.

<sup>1311</sup> *ibid.*

<sup>1312</sup> *ibid.*

<sup>1313</sup> *ibid.*, 179.

<sup>1314</sup> *ibid.*

<sup>1315</sup> Rovner, *Fixing the Facts*, 56.

The main cost of losing South Vietnam, concerned the credibility of the United States. By 1965 “Vietnam had assumed a symbolic importance which outweighed its actual strategic importance”.<sup>1316</sup> South Vietnam had become a credibility test for the United States, and Johnson was concerned with ‘Psychological domino theory’,<sup>1317</sup> whereby if South Vietnam fell to the communists, it would unsettle allies, embolden adversaries, “mortally damaging US credibility internationally”.<sup>1318</sup> In terms of Cold War politics of the era, a loss of credibility could have played into the hands of the communist countries. Smith noted that “doubtless” the Soviet Union saw an opportunity to challenge the American ability to protect its allies, and it could manipulate this fact.<sup>1319</sup> However, Thompson wrote that credibility concerns, about maintaining an independent South Vietnam, were “not so overriding that it should be accomplished irrespective of cost.”<sup>1320</sup> In fact, he argues that the United States could have maintained its credibility, had it taken a more limited role in South Vietnam. Had limited support been given to the GVN, then the loser would have been the GVN not the United States.

The original United States commitment would have been honoured and, although there would have been a failure of policy, it would not have been unduly damaging to United States prestige and grand strategy. The cost, in all sense, would have been limited.<sup>1321</sup>

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<sup>1316</sup> *De Groot, A Noble Cause*, 125.

<sup>1317</sup> J.M. Schuessler, *Deceit on the Road to War*, 64.

<sup>1318</sup> J.H. Lebovic, *Planning to Fail: The US Wars in Vietnam, Iraq and Afghanistan* (Oxford: Oxford University Press, 2019), 23.

<sup>1319</sup> R.B. Smith, *An International History of the Vietnam War, Volume III: The Making of a Limited War, 1965-66* (London, The MacMillan Press Ltd., 1991), 56.

<sup>1320</sup> Thompson, *No Exit from Vietnam*, 110.

<sup>1321</sup> *ibid*, 120-121.

Importantly, prior to the escalation of the war, there were doubts among key US allies, like the UK, of the ability of the US to succeed in Vietnam.<sup>1322</sup> Critics of escalation in South Vietnam argued that further involvement in South Vietnam would actually be detrimental to the credibility of the US. Morgenthau, for example, argued that the US had become so “obsessed with the fear of the permanent loss of prestige”, that the US became oblivious to the risk to their prestige and credibility if it continued to commit itself to Vietnam.<sup>1323</sup> “Everywhere people question...the wisdom and the morality of the government of the United States”. He continues, “And what will our prestige be like if hundreds of thousands of American troops become bogged down in Vietnam unable to win and unable to retreat?”<sup>1324</sup> Morgenthau’s work argues that the war was both unwinnable and unnecessary for the US to become involved in, arguing that it was a Vietnamese war. He also argues that the war is immoral. “War...can only be justified by a transcendent end; that makes a war just. There is no such end and there is no justice here”.<sup>1325</sup> Therefore, even in 1965, there were outspoken commentators who questioned, and criticised, the proportionality and justness of the conflict. Even within the government there were some, albeit a limited few, who queried the proportionality of escalation. Undersecretary of State, George Ball, who had been counsel to the French embassy, and watched as Indochina fell, saw escalation of the US efforts in South Vietnam as disproportionate. He was not convinced that bombing the north would stop Hanoi supporting the NLF. “In Ball’s view, the risks of escalation outweighed the possible gains”.<sup>1326</sup> Ball was concerned that the US would end up in a drawn out bloody war, which involved an “open ended commitment of US forces, mounting US casualties, no assurances

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<sup>1322</sup> F. Logevall, ‘Lyndon Johnson and Vietnam’, *Presidential Studies Quarterly*, 34, 1 (2004), 100-112: 103.

<sup>1323</sup> H.J. Morgenthau, *Vietnam and the United States* (Washington: Public Affairs Press, 1965), 12.

<sup>1324</sup> *ibid.*

<sup>1325</sup> *ibid.*, 20.

<sup>1326</sup> Herring, *America’s Longest War*, 139.

of a satisfactory solution” and a danger of escalation.<sup>1327</sup> Ball, and Senator Mike Mansfield who also opposed escalation, argued that US credibility in medium and long term would suffer less from an American withdrawal, than from getting drawn into a “deep and deadly morass”.<sup>1328</sup> Nonetheless, even in the Spring of 1965, the majority of US policy makers saw victory in South Vietnam as “essential to the credibility, power, and might of the United States”.<sup>1329</sup>

Johnson did weigh up the cost of going to war, and the repercussions of action. He was concerned of the political repercussions of force and the continuous political and social instability in South Vietnam.<sup>1330</sup> He sought to try to solve the problem in South Vietnam through a limited and gradual response, to minimise the costs of the war. Rolling Thunder, a bombing campaign in the North, began, with the intention of bringing Hanoi to the negotiation table, was conducted with strict constraints. Bombing was restricted near the Chinese border and Haiphong Harbour, so to minimise to potential escalation or widening of the conflict. The President “lived in mortal terror, by some accounts, that an American pilot... would drop a bomb down the smokestack of a soviet freighter, thus starting World War III”.<sup>1331</sup> Therefore, at the beginning of the US war in Vietnam, the US seemed to approach the war in terms of minimising costs.

However, the United States was trying to win a limited war against an enemy that “was totally dedicated to revolutionary war”.<sup>1332</sup> Rolling Thunder failed to bring Hanoi to the negotiation table, and Johnson authorised the sending of Marines in March 1965 to defend air bases. Unlike in the North, “there was not debate on the appropriate level of force to be used

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<sup>1327</sup> Hall, *The Vietnam War*, 36.

<sup>1328</sup> Logevall, *Choosing War*, 381.

<sup>1329</sup> Young, *The Vietnam Wars*, 143.

<sup>1330</sup> Herring, *America's Longest War*, 138.

<sup>1331</sup> G.C. Herring, ‘The Cold War and Vietnam’, *OAH Magazine of History*, 18, 5 (2004), 18-21: 19.

<sup>1332</sup> Neu, *America's Lost War*, 85.

south of the 17<sup>th</sup> Parallel”.<sup>1333</sup> Pandora’s box had been opened, and the United States could not put the lid back on. Gradually the number of troops sent to Vietnam increased significantly. The US was trying to win a limited war against the NLF, who was an enemy that “was totally dedicated to revolutionary war”.<sup>1334</sup> Even by April Johnson recognised that US objectives would require “a sustained and costly commitment”.<sup>1335</sup> Thompson noted, retrospectively, that “not one of the four American Presidents concerned would have become involved in Vietnam if they could have foreseen what the eventual commitment would be”.<sup>1336</sup>

It is of course with the benefit of hindsight that we can argue clearly that the decision to send ground troops was disproportionate. However, to argue that the war was strongly disproportionate would be too far. In 1965 the general consensus of the US administration was that the costs of action were outweighed by the benefits of intervening in Vietnam. The government believed that the failure to prevent communist expansion, or inaction against communist expansion, had considerable regional and global implications in the Cold War. The evidence also indicates that President Johnson did initially strive to limit the costs and escalation of the conflict, to minimise the potential costs of the conflict. Therefore, at the outset of the conflict, it was perceived as a proportionate response, and a slightly to moderately unjust score of -1.5 is suitable for proportionality.

### Last Resort

The last resort principle asks us to examine whether other options short of war had been reasonably explored. The evidence suggests that the United States had shown restraint in deciding to go to war. Even once the Gulf of Tonkin resolution was passed in August 1964,

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<sup>1333</sup> Young, *The Vietnam Wars*, 131.

<sup>1334</sup> Neu, *America’s Lost War*, 85.

<sup>1335</sup> Herring, *America’s Longest War*, 147.

<sup>1336</sup> Thompson, *No Exit from Vietnam*, 110-111.

and it had developed a plan for escalation, the US still did not use significant force until several months later.<sup>1337</sup> Even at the end of 1964, “like Kennedy and Eisenhower before him, [Johnson] had no enthusiasm for a massive engagement of American forces on the Asian mainland”.<sup>1338</sup> The first major use of forces occurred in retaliation to an NLF attack on a military base at Pleiku on 7 February 1965. The attack killed nine soldiers, wounding over 100 and damaging 22 aircraft. Johnson ordered retaliatory strikes against military targets in North Vietnam; known as Operation Flaming dart. Hall wrote that the incident was used as an “excuse to implement previously agreed-upon decisions.”<sup>1339</sup> Herring agrees with Hall, arguing that although the operations were presented as retaliatory, “It is abundantly clear that Pleiku was the pretext for rather than the cause of the February decision.”<sup>1340</sup> The United States had already been advocating more force, and therefore it was “simply a matter of finding the right opportunity to justify measures to which the administration was already committed”.<sup>1341</sup> However, it had still held off from using force before then. This indicates a degree of ‘lastness’ in the resort to force, particularly as the insurgency had already begun.

If we examine the situation on the ground in 1965, if the US wanted to maintain an independent South Vietnam, then that was potentially the last year it would be able to. Since 1960, South Vietnam had faced an armed and united movement to overthrow the government.<sup>1342</sup> Even before then, in 1959, insurgents launched an attack at Bien Hoa, killing one American soldier and wounding two.<sup>1343</sup> As already noted, by 1965 the NLF had made significant progress, and controlled a large portion of the population. The US had sought other means of securing the country, such as aid and supporting early COIN operations like

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<sup>1337</sup> Schulzinger, *A Time for War*, 197.

<sup>1338</sup> Herring, *America’s Longest War*, 130.

<sup>1339</sup> Hall, *The Vietnam War*, 58.

<sup>1340</sup> Herring, *America’s Longest War*, 143.

<sup>1341</sup> *ibid.*, 143-4.

<sup>1342</sup> Neu, *America’s Lost War*, 43.

<sup>1343</sup> *ibid.*, 46.

the strategic hamlet programme. However, US aid and training had failed to improve the situation in South Vietnam, and there was a fear that United States inaction may lead to the government in Saigon seeking independent negotiations or simply collapse.<sup>1344</sup> It had become clear that “without massive American intervention in 1965, the Republic of Vietnam would never have lived to see 1966”.<sup>1345</sup> It is unsurprising, then, that when he inherited the war from Kennedy, Johnson “had a certain restlessness and impatience that shaped his approach to the Vietnam crisis”.<sup>1346</sup> Therefore, the United States had shown a decent record of seeking to achieve its aims through other means, but these had ultimately failed, and by 1965 the options short of War were becoming limited.

Perhaps the US could have sought more negotiations. For example, United Nations ambassador Stevenson urged President Johnson to make a statement welcoming negotiation, but this was rejected by the administration.<sup>1347</sup> The bombing campaign had just started, and it was seen as too early to offer negotiations.<sup>1348</sup> The first instance of the United States approaching the idea of negotiations occurred on 7 April 1965; over a month after bombing had commenced, and after the Marines had landed on the beaches of Vietnam. By this point both sides had hardened. “The ante now having been upped, there was something ridiculous about folding”.<sup>1349</sup>

Both the US and North Vietnam were not likely to concede to one another via negotiations. Seaborn, of the Canadian government, was sent to Hanoi with the aim of mediating the differences of North Vietnam and the United States.<sup>1350</sup> During the Seaborn mission Hanoi

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<sup>1344</sup> L.C. Gardner, ‘Lyndon Johnson and the Bombing of Vietnam: Politics and Military Choices’, in D.L. Anderson (ed.) *The Columbia History of the Vietnam War* (New York: Columbia University Press, 2011), 168-190: 172.

<sup>1345</sup> Neu, *America’s Lost War*, 82.

<sup>1346</sup> Hess, ‘South Vietnam Under Siege’, 155.

<sup>1347</sup> Gardner, ‘Lyndon Johnson and the Bombing of Vietnam’, 174.

<sup>1348</sup> *ibid.*

<sup>1349</sup> *ibid.*

<sup>1350</sup> Hess, ‘South Vietnam Under Siege’, 157.



was uncompromising, arguing that it would not enter negotiations to end the war unless the US withdrew all military from South Vietnam<sup>1351</sup> and South Vietnam accepted the program of the NLF.<sup>1352</sup> In 1965, the United States would not realistically have left Vietnam, doing so would have compromising its fundamental objective of an independent South Vietnam.<sup>1353</sup> It is also unlikely that North Vietnam, who was backing an insurgency to help reunify the country, would give up on an aim it had focused on for more than a decade.<sup>1354</sup> In 1965, the North showed “an abundance of stoicism” and “no signs of war-weariness”.<sup>1355</sup> Both Hanoi and the United States had become inflexible on the position they found themselves in 1965.<sup>1356</sup> Therefore, because it is unlikely that both Hanoi and the US would have changed their stance on South Vietnam, it is unlikely that negotiations would have been fruitful. Therefore, the evidence suggests that the US may have exhausted *reasonable* options short of war, a slightly just score of +1 is suitable for last resort.

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<sup>1351</sup> A. Preston, ‘Balancing War and Peace: Canadian Foreign Policy and the Vietnam War, 1961-1965’, *Diplomatic History*, 27, 1 (2003), 73-111: 98.

<sup>1352</sup> Schulzinger, *A Time for War*, 206.

<sup>1353</sup> Herring, *America’s Longest War*, 149.

<sup>1354</sup> Neu, *America’s Lost War*, 41-44.

<sup>1355</sup> Preston, ‘Balancing War and Peace’, 98.

<sup>1356</sup> *ibid*, 101.

## The Vietnam War: *Jus in Bello* Index

The war in Vietnam began gradually. The air war began in February 1965 with Operation Rolling Thunder, but the Ground War did not begin until the introduction of United States Marines on the beaches of Da Nang on 8 March 1965. US troops would remain in Vietnam until 1973, following the Paris Peace Agreement. The Vietnam War can be examined in two phases, the War under Westmoreland, and the War under Abrams. This work will examine the years of 1965 to 1968, and then 1968-1972. Both periods demonstrate a continuous disregard for *in bello* principles, and the conflict was fought unjustly and unsuccessfully.

### Westmoreland's War: 1965-1968

#### A War of attrition: Chasing the "Crossover Point"

The US COIN strategy in Vietnam under General William Westmoreland was both indiscriminate and disproportionate. In September 1965, Westmoreland established his objective in Vietnam, and the strategy by which he was to achieve it. The objective in Vietnam was "ending the war in the Republic of Vietnam by convincing the Viet Cong and the DRV...that military victory is impossible, thereby forcing an agreement favorable [sic.] to the RVN and the United States".<sup>1357</sup> The United States would convince the North through a three-phased strategy. First, was to halt the NLF offensive; second, to resume the offensive, in order to destroy the insurgent forces and pacify selected areas; and third, to restore the country back to the government of Vietnam progressively.<sup>1358</sup>

Events in 1965, such as the battle of Ia Drang, convinced the US that a counterinsurgency strategy of attrition was the way to win in Vietnam. Success under Westmoreland depended heavily on seeking a 'crossover point' whereby the US were killing more enemy troops and

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<sup>1357</sup> Westmorland, quoted in R. McNamara, *In Retrospect: The Tragedy and Lessons of Vietnam* (New York: Random House, 1995), 209.

<sup>1358</sup> Smith, *An International History of the Vietnam War Volume III*, 223.

insurgents, than the North could replace. In order to measure success, in terms of reaching this point, the US Army used body counts as an indicator. Progress reports included the absolute numbers killed and the kill ratio comparing American deaths to National Liberation Front and North Vietnamese deaths.<sup>1359</sup> The higher the kill ratio, the more successful an operation had been. Measuring the body count was fraught with difficulties; for example, the NLF and NVA tried to recover and bring back their dead when retreating from the battlefield.<sup>1360</sup>

Distinguishing between insurgent and civilian is of course a difficult task in counterinsurgency campaigns. But in Vietnam counterinsurgent forces used crude methods to distinguish between insurgent and civilians. One Marine commented that “if it’s dead and Vietnamese, it’s VC, was a rule of thumb in the bush”; this became known as the ‘Mere Gook Rule’.<sup>1361</sup> Under increased pressure to meet a crossover point, discrimination was not significantly followed in Vietnam.<sup>1362</sup> Operations were often accompanied by massive amounts of indiscriminate firepower.<sup>1363</sup> Villages were often destroyed through firepower in response to any form of provocation.<sup>1364</sup> General Johnson said that quite often, “too much firepower was applied “on a relatively random basis””.<sup>1365</sup> Artillery doctrine advocated the use of harassment and interdiction (H&I); where artillery was fired into areas randomly and

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<sup>1359</sup> M.B. Young, ‘Counting the Bodies in Vietnam’ in E.S. Rosenberg and S. Fitzpatrick (eds.) *Body and Nation: The Global Realm of U.S. Body Politics in the Twentieth Century* (London: Duke University, 2014) 230-340: 232.

<sup>1360</sup> J. Prados, ‘American Strategy in the Vietnam War’ in D.L. Anderson (ed) *The Columbia History of the Vietnam War* (New York: Columbia University Press, 2011) 247-261: 256-7.

<sup>1361</sup> P. Caputo, quote in Herring, *America’s Longest War*, 171.

<sup>1362</sup> S.S. Gartner & M.E. Myers, ‘Body Counts and “Success in the Vietnam and Korean Wars”’, *The Journal of Interdisciplinary History*, Winter, 25, 3 (1995), 377-395: 380.

<sup>1363</sup> Krepevinich, *The Army and Vietnam*, 197.

<sup>1364</sup> J. Schell, *The Military Half: An Account of destruction in Quang Ngai and Quang Tin*, (New York: Alfred A Knopf, 1968), 14-15.

<sup>1365</sup> *ibid*, 199.

unobserved.<sup>1366</sup> H&I, also known as ‘spray and slay’<sup>1367</sup> was so common, that between 1966 and 1967 it accounted for up to 85 per cent of artillery fire.<sup>1368</sup> H&I killed scores of civilians, was applied with little regard for civilian safety, and was detrimental to the US war effort.<sup>1369</sup>

According to Long, the Army considered civilians “at a minimum an almost irrelevant nuisance to operations” and in other “civilians were ruled a legitimate target, as they provided active or passive support to insurgents”.<sup>1370</sup> Pacification officials complained about the use of heavy weapons by the 25<sup>th</sup> Infantry Division, to which a division spokesman stated “if the population wanted to avoid such destruction, they should come forward and warn the Army of the VC presence in their hamlets”.<sup>1371</sup> However, officers on the ground objected to the tactic, on the basis that it had a “negative impact on pacification”.<sup>1372</sup> Notably, this relationship was noted within US doctrine. US Army artillery doctrine from 1970 notes that indiscriminate use of artillery in populated areas could result in losing the support of the population.<sup>1373</sup> Yet, it also continued to advocate the importance of indiscriminate practices like H&I.<sup>1374</sup>

Officially the Army maintained that it observed strict Rules of Engagement, but in reality the army’s focus on body counts resulted in commanders to “shoot first and worry about the hearts and minds later”.<sup>1375</sup> As doctrine noted, while fire support must not be indiscriminate,

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<sup>1366</sup> US Department of the Army, *FM 6-20-1: Field Army Tactics* (Washington DC: Department of the Army, 1965), 33-34; and Prados, ‘American Strategy in the Vietnam War’, 256.

<sup>1367</sup> N. Turse, *Kill Anything That Moves: The Real American War in Vietnam* (New York: Picador, 2013), 213.

<sup>1368</sup> Prados, ‘American Strategy in the Vietnam War’, 256.

<sup>1369</sup> Long, *The Soul of Armies*, 147; J.M. Hawkins, ‘The Cost of Artillery: Eliminating Harassment and Interdiction Fire During the Vietnam War’, *The Journal of Military History*, 70, 1 (2006), 91-122: 92.

<sup>1370</sup> *ibid*, 150.

<sup>1371</sup> Krepevinich, *The Army and Vietnam*, 199.

<sup>1372</sup> Prados, ‘American Strategy in the Vietnam War’, 256.

<sup>1373</sup> US Department of the Army, *FM 6-20-2: Field Artillery Techniques* (Washington DC: Department of the Army, 1970), 7-24.

<sup>1374</sup> *ibid*, 5-9.

<sup>1375</sup> Krepevinich, *The Army and Vietnam*, 198-9.

“the mission must not be jeopardized [sic] by excessive economy and caution”.<sup>1376</sup> Doctrine advocated that the use of fire support used should fit between the two extremes of too much caution and indiscriminate violence.<sup>1377</sup> This resulted in rudimentary attempts at discrimination in Vietnam. Running from helicopters or looking up at helicopters flying overhead was enough to lead troops to designate someone an insurgent, and therefore a legitimate target.<sup>1378</sup> Rules of engagement were bent in order to meet kill-ratios.<sup>1379</sup> For example, in October 1967 an unarmed boy was executed by members of Company B, 1<sup>st</sup> Battalion, 35<sup>th</sup> Infantry, and was reported as an enemy KIA.<sup>1380</sup> Clearly, in Vietnam, there were numerous cases of indiscriminate and disproportionate acts of violence.

### A Bad Deed Goes Unpunished

In addition to chasing the kill count, US troops operated in a permissive environment where indiscriminate and disproportionate acts were not effectively punished or condemned. Rather, the evidence suggests that a focus on body counts, resulted in US troops being allowed, or persuaded, to use indiscriminate force in order to rack up body counts. Turse, for example, provides a typical scenario of a US Army officer in Vietnam. A young US Army lieutenant’s troops have been fired upon, and now has a choice to make, he could let the guerrillas go and explain to his superior why he has no body count to report, or he could lead his troops into a possible ambush. His third option; “disregarding or bending the ROE, he could ring up a rear base and call in artillery, jets or helicopter gunships, perhaps saving the lives and limbs of his troopers and getting some bodies to count, which would please command and get them off his back.”<sup>1381</sup> Turse argues “the third choice, of course, was usually the easiest to justify”

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<sup>1376</sup> US Department of the Army, *FM 6-20-2*, 6-1.

<sup>1377</sup> *ibid.*

<sup>1378</sup> Schell, *The Military Half*, 114-5.

<sup>1379</sup> *ibid.*, 202.

<sup>1380</sup> Turse, *Kill Anything That Moves*, 123.

<sup>1381</sup> *ibid.*, 57.

continuing that “hard choices became progressively easier with repetition, in part because it was soon apparent to many young officers that few headquarters knew or cared much about the details in the field – beyond the stats that is”.<sup>1382</sup> This led to, on occasion, situations where soldiers could take revenge on the local population, with a degree of impunity.

Daddis writes that “body counts could satisfy on a deeply personal level while also meeting organisational requirements for reaching a casualty crossover point”.<sup>1383</sup> This led to excesses in violence against the population. On this, Hammer wrote, because the insurgents are not obviously near the troops, “when a casualty is taken, there is usually no one around at whom to unleash the mounting fury. Frustration grows at the inability to find anyone on whom to vent one’s anger and leads to the insensate desire to hit out at something, to get a measure of revenge”.<sup>1384</sup> The United States in Vietnam created an atmosphere in which issues of discrimination came second to killing the ‘enemy’.

#### Destroying the Village to Save it: Attrition and Pacification

Westmoreland believed that a strategy of attrition would eventually result in securing the population.<sup>1385</sup> For Westmoreland, killing the enemy first would result in winning ‘the other war’; pacification. It is a simple conventional logic, if the enemy is dead, they no longer pose a threat to the population, and therefore the population is secure. The dominating operational strategy under Westmoreland was ‘search and destroy’ operations. The aim of which was for US troops to find the insurgents and eliminate them. “US ground patrols, protected by heavily fortified bases, would issue forth to locate the enemy and then call in artillery and airpower to eliminate him”.<sup>1386</sup> Once the enemy was eliminated the troops would withdraw from an area.

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<sup>1382</sup> *ibid.*

<sup>1383</sup> Daddis, *No Sure Victory*, 98.

<sup>1384</sup> R. Hammer, *One Morning in the War: The Tragedy at Son My (Pinkville)* (London: Rupert Hart-Davis, 1970), 102.

<sup>1385</sup> Daddis, *No Sure Victory*, 91.

<sup>1386</sup> Young, *The Vietnam Wars*, 163.

The strategy in Vietnam, under Westmoreland, was “search, destroy, count the bodies, move on”.<sup>1387</sup> For example, following Operation Cedar Falls, which used immense amounts of firepower to ‘pacify’ an NLF stronghold known as the Iron Triangle in January 1967, these areas were quickly infiltrated again by insurgents once the forces had left.<sup>1388</sup>

ARVN and South Vietnamese security forces were meant to secure the area once the US had driven the insurgent main forces from the area. However, ARVN officers were reluctant to commit soldiers to this role, as they saw it as demeaning.<sup>1389</sup> Westmoreland’s attrition strategy “did little to provide real security to the population”.<sup>1390</sup> Even if pacification efforts were undertaken any gains were often nullified by the amount of force utilised.<sup>1391</sup> “US forces...too often levelled villages, blackened the countryside with artillery, napalm, and defoliants, and on occasion pacified the population by killing those who failed to flee on time”.<sup>1392</sup> The destruction of the countryside did little to win over the population of South Vietnam, a predominantly agricultural society.<sup>1393</sup>

### Pacification Through Refugees

The United States saw the destruction of areas to be beneficial to their strategy in Vietnam. The Americans believed that by laying waste to most of the countryside, they would force the population to resettle. The idea was to resettle the population into areas that were meant to be protected by the ARVN.<sup>1394</sup> In doing so, the US believed that it could win the ‘other war’ of

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<sup>1387</sup> *ibid.*

<sup>1388</sup> Young, *The Vietnam Wars*, 175.

<sup>1389</sup> Herring, *America’s Longest War*, 172.

<sup>1390</sup> M.A. Hennessy, *Strategy in Vietnam: The Marines and Revolutionary Warfare in I Corps, 1965-1972* (London: Praeger, 1997), 123.

<sup>1391</sup> Herring, *America’s Longest War*, 176.

<sup>1392</sup> Porch, *Counterinsurgency*, 218.

<sup>1393</sup> Herring, *America’s Longest War*, 172.

<sup>1394</sup> Schulzinger, *A Time for War*, 228.

pacification, by depriving the insurgents of sanctuary and support from the local population. Therefore, the destruction of the countryside was seen a military necessity.

However, the evidence indicates that the benefits from this strategy was negligible, and evidence suggests that it damaged the legitimacy of the United States, making it disproportionate. For the US, a large refugee population was viewed as an indicator in its success in the ‘other war’.<sup>1395</sup> By 1968, out of a population of 17 million, 5 million people were officially classed as refugees.<sup>1396</sup> At any given time, roughly four million people, one quarter of the population of South Vietnam, were refugees.<sup>1397</sup>

However, forcible resettlement of the population did little to actually pacify South Vietnam. First, it did little to gain control of the population, nor win their support. Following Cedar Falls, the civilian refugees became “more hostile to Saigon than ever before”.<sup>1398</sup> Refugees often fled to urban centres, causing social and economic problems for the government of South Vietnam. Many of those who fled US bombing, ended up living in squalid slums, where diseases like tuberculosis and dysentery were common.<sup>1399</sup> Those who did not flee into cities, often were “shuttled into overwhelmed, underfunded, understaffed, under provisioned, and underequipped” refugee camps.<sup>1400</sup> The majority of these refugees blamed the US and GVN for this new suffering.<sup>1401</sup> Herring wrote that “a large portion of South Vietnam’s population was left rootless and hostile, and the refugee camps became fertile breeding grounds for insurgent fifth columns”.<sup>1402</sup>

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<sup>1395</sup> Krepevinich, *The Army and Vietnam*, 225.

<sup>1396</sup> *ibid*, 177.

<sup>1397</sup> *ibid*, 229.

<sup>1398</sup> Hall, *The Vietnam War*, 43.

<sup>1399</sup> Schulzinger, *A Time for War*, 229.

<sup>1400</sup> Turse, *Kill Anything That Moves*, 65.

<sup>1401</sup> Krepevinich, *The Army and Vietnam*, 227.

<sup>1402</sup> Herring, *America’s Longest War*, 178.



In addition to this, among the camps and the slums quite often the NLF were able to indoctrinate and infiltrate the population “extremely successfully”.<sup>1403</sup> US forces, once clearing an area, did not hold the area and quickly left, meaning that even if a population was resettled, they were not much more secure. For example, following search and destroy operations by the 1<sup>st</sup> Cavalry Division, some refugee camps were unsafe for government officials, and others were considered to be under the control of the NLF.<sup>1404</sup> The government of South Vietnam “appeared incapable, in the eyes of its people, of providing their protection, further undermining its legitimacy”.<sup>1405</sup> Destroying the countryside, in order to move the population into slums, was not proportionate to the ends it achieved; as quite often the population was not secure, and the NLF did not suffer. Therefore, because there was little ‘good’ that came out of the destruction, ‘the other war’ under Westmoreland was disproportionate. As Daddis wrote, “Body counts might be crucial in assessing enemy attrition, but tempering the use of force in the political-military environment of South Vietnam was equally important”.<sup>1406</sup>

#### Airpower and Free Fire Zones

The use of airpower in south Vietnam, alongside these operations, was also indiscriminate. Once an area had been cleared, it became a ‘free fire zone’. A free fire zone allowed for unrestrained bombing because the population had been removed and anyone left was classified as an insurgent. “Within such a zone anything that moved, anything at all, was a fair target”.<sup>1407</sup> The designation ‘free-fire’ was not an unlimited licence to kill, as the laws of

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<sup>1403</sup> Krepevinich, *The Army and Vietnam*, 226.

<sup>1404</sup> *ibid.*

<sup>1405</sup> *ibid.*, 227.

<sup>1406</sup> *ibid.*

<sup>1407</sup> Young, *The Vietnam Wars*, 129.

war still applied. However, a US Senate study acknowledged that by 1968 “an estimated 300,000 civilians had been killed or wounded in free-fire zones”.<sup>1408</sup>

Importantly, the ordinance used within the free fire zones by the United States was often both indiscriminate and disproportionate. B-52s for example, would devastate swathes of the countryside. B-52s were used across south Vietnam to pulverise the villages, when an area had been encircled by US troops.<sup>1409</sup> These operations were significantly indiscriminate.<sup>1410</sup> B-52s, flying in sorties of six, could destroy everything in a strike zone two miles long and five eighths of a mile wide.<sup>1411</sup> Often, the bombers were loaded with indiscriminate cluster munitions, saturating an area with millions of indiscriminate steel pellets.<sup>1412</sup>

B-52s, and other aircraft, would also drop the incendiary chemical weapon, Napalm.

According to Mody “Of all the weapons in the US arsenal, the most feared is napalm. Its horror lies not in its capacity to inflict death, but in the agony of those who survive the initial bombing”.<sup>1413</sup> One report claimed that anyone who survives an attack is dreadfully burnt, and without medical care, is ‘condemned to a lingering, painful death or, at best, permanent disfigurement’.<sup>1414</sup> Napalm was used on a massive scale in Vietnam. In 1966 alone, 54,670 tons of napalm were dropped in Vietnam.<sup>1415</sup>

The military claimed that the B-52s only bombed uninhabited areas; but this was not the reality.<sup>1416</sup> In the summer of 1965, US planes devastated the province of Quang Ngai, with

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<sup>1408</sup> Turse, *Kill Anything That Moves*, 60.

<sup>1409</sup> Herring, *America’s Longest War*, 168.

<sup>1410</sup> *ibid.*

<sup>1411</sup> Turse, *Kill Anything That Moves*, 82.

<sup>1412</sup> *ibid.*, 85.

<sup>1413</sup> N. Mody, ‘Chemical Warfare in Vietnam’ *Economic and Political Weekly*, 5, 24 (1970), 948-9; 948.

<sup>1414</sup> R.M. Neer, *Napalm* (Massachusetts: Harvard University Press, 2013), 111.

<sup>1415</sup> B. Neilands, ‘Vietnam: Progress of the Chemical War’, *Asian Survey*, 10, 3 (1970), 209-229: 213. For comparison, 32,215 tons were dropped during the entire Korean War.

<sup>1416</sup> *ibid.*

estimates of up to 500 Vietnamese being killed.<sup>1417</sup> In some cases, it appears that although civilians were not *deliberately* targeted, efforts to make sure they were protected were not taken. In Operation Thayer II, undertaken in February 1967, in an area that was characterised by the army as “densely populated”, 171 B-52 sorties were flown, as well as 2,622 fighter-bomber missions; dropping over 500,000 pounds of napalm.<sup>1418</sup> In some cases, Napalm was used indiscriminately on civilian areas, in order to destroy villages. One report stated that US pilots were given a ‘square mile on a map’ and told to hit every hamlet in the area with napalm.<sup>1419</sup> If the intention of the war in the South was to secure the population, weapons like Napalm did not help to link tactics to strategy. As Hammer wrote “one does not use napalm on villages and hamlets sheltering civilians caught between the government and the enemy if one is attempting to persuade those people of the rightness of one’s cause”.<sup>1420</sup> The use of napalm, and other destructive weapons, damaged the perception of the United States and the War itself. Napalm resulted in “moral indignation”.<sup>1421</sup>

The evidence suggests that the American use of force damaged the support of the US and South Vietnam, rather than securing the population or winning them over. The use of force, the refugee crisis, the destruction of the countryside “undermined the social fabric of an already fragile nation and alienated the people from a government that never had a firm base of popular support”.<sup>1422</sup> The legitimacy of the US and the GVN in the eyes of the Vietnamese population was damaged, in part, due to the indiscriminate and disproportionate use of force.

By the end of 1967, the NLF had grown to be a major force in South Vietnam. “In the face of the American war machine operating at full tilt, the NLF had been able to recruit new

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<sup>1417</sup> Young, *The Vietnam Wars*, 96.

<sup>1418</sup> Krepevinich, *The Army and Vietnam*, 224.

<sup>1419</sup> *ibid.*

<sup>1420</sup> Hammer, *One Morning in the War: The Tragedy at Son My (Pinkville)*, 203.

<sup>1421</sup> Hess, *Vietnam: Explaining America’s Lost War*, 5.

<sup>1422</sup> Herring, *America’s Longest War*, 172.

members”, and the majority of those recruited had come from the south, indicating that the GVN did not have the support of the population.<sup>1423</sup> Optimistic about their position in South Vietnam, NVA and NLF forces launched the Tet Offensive, to try and bring the war to a decisive end on 30 January 1968.<sup>1424</sup> Communist forces were pushed back, and militarily defeated. Importantly, the NLF was decimated by the US and ARVN counter offensive, with up to 40,000 NLF forces were killed.<sup>1425</sup>

However, the offensive became a turning point in the war. Tet had been a psychological and a political victory for the NLF and the North. The ability of the NLF to launch such a major attack across South Vietnam, showed to the American people that they had not been succeeding in Vietnam, despite what the government had been telling them.<sup>1426</sup> The War became unpopular among the American public, and the brutality of the counter offensive made them question what they were doing in the country.<sup>1427</sup>“The fact that the US was inflicting such widespread destruction on a largely defenseless [sic] peasant society, inevitably killing and maiming thousands of civilians, removed – from the view of many Americans and foreign critics of the war – any claim to America’s moral authority”.<sup>1428</sup> Therefore, the war under Westmoreland was moderately to strongly unjust in its conduct. It was both indiscriminate and disproportionate. Therefore, a score of -2.5 is suitable for both *in bello* principles, for this phase of the war.

#### Atrocities: The My Lai Massacre

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<sup>1423</sup> Young, *The Vietnam Wars*, 214.

<sup>1424</sup> Neu, *America’s Lost War*, 130.

<sup>1425</sup> Herring, *America’s Longest War*, 208-9.

<sup>1426</sup> H.Y. Schandler, *Lyndon Johnson and Vietnam: The Unmaking of a President* (New Jersey: Princeton University Press, 1977), 81.

<sup>1427</sup> Young, *The Vietnam Wars*, 225-225.

<sup>1428</sup> D.D.P. Johnson & D. Tierney, *Failing to Win: Perceptions of Victory and Defeat in International Politics* (Massachusetts: Harvard University Press, 2006), 132.

Body-counts and kill ratios in a permissive environment, mixed with revenge and poor leadership, resulted in one of the darkest failures of discrimination in the Vietnam War; the My Lai Massacre. On 16 March 1968, men of Charlie Company, First Battalion, Twentieth Infantry Brigade, Americal Division assaulted the village of My Lai. That morning they conducted one of the most notorious atrocities during the war. The troops entered My Lai with the belief that they had a licence to kill,<sup>1429</sup> and began to systematically kill the inhabitants of the village.

Officers prior to the massacre, and during, did not, either intentionally or unintentionally, make “any clear distinctions between combatants and non-combatants in their orders and instructions”.<sup>1430</sup> Soldiers reported that Captain Medina, on the eve of the battle, gave an order to “kill everything that breathed”.<sup>1431</sup> The first platoon leader, Lieutenant Calley, ordered his men to kill the huddled villagers, and when some refused “Calley set his rifle on automatic and executed many of the villagers himself”.<sup>1432</sup> Villagers were killed in groups of five and ten at a time.<sup>1433</sup> Soldiers threw grenades into the bunkers, killing those who remained inside. According to Cookson “they set houses afire and shot the residents as they tried to escape... They raped women and teen-age girls and then killed them”.<sup>1434</sup> Soldiers systematically and indiscriminately killed every person in sight and “by noon every living thing in My Lai that the troops could find – men, women, children, and livestock – was dead”.<sup>1435</sup>

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<sup>1429</sup> K. Baier, ‘Guilt and Responsibility’ in P.A. French (ed) *Individual and Collective Responsibility: Massacre at My Lai* (Massachusetts, Schenkman Publishing Company, 1972), 35-62: 40.

<sup>1430</sup> Peers, 193.

<sup>1431</sup> Turse, *Kill Anything That Moves*, 2.

<sup>1432</sup> *ibid.*

<sup>1433</sup> W.R. Peers, et.al., *The My Lai Massacre and its Cover-up: Beyond the Reach of Law? The Peers Report with a Supplement and Introductory Essay on the Limits of Law* (New York: The Free Press, 1976), 134.

<sup>1434</sup> *ibid.*

<sup>1435</sup> D.L. Anderson, ‘Introduction: What Really Happened?’ in D.L. Anderson (ed) *Facing My Lai: Moving beyond the Massacre* (Kansas: University Press Kansas, 1998) 1-19: 3.

An official investigation claimed that between 175 and 400 civilians were murdered that morning; and accounts of individual and group acts of rape, sodomy, maiming and general assaults on non-combatants were reported.<sup>1436</sup> Both North and South Vietnamese sources, which include names of those who were murdered, number the total dead at 504;<sup>1437</sup> including 182 women, 17 of which were pregnant, 173 children, of whom 56 were of infant age, and sixty of the men killed were over 60.<sup>1438</sup> Not one American was fired upon by the NLF; the only American casualty was due to a soldier shooting himself in the foot, to escape the massacre. My Lai is the starkest example of a failure of American Troops to apply the principles of *in bello* in Vietnam.

The government's response to My Lai indicates a relationship between failing to adhere to the *in bello* principles, and the impact this can have on support for the counterinsurgent. The government knew that disillusionment with the war was growing and "the news that US soldiers might be murders seemed additional evidence of the liability that the war had become".<sup>1439</sup> Therefore, like it had with other atrocities, the US government initially tried to cover up the events of My Lai.<sup>1440</sup> The military portrayed it as a legitimate battle, where US forces achieved a victory against a 'formidable' enemy force,<sup>1441</sup> stating that 128 insurgents were killed in action, and three weapons captured.<sup>1442</sup> However, in November 1969 the events were reported to the American public. When the events of My Lai came to light, it damaged the legitimacy of the United States, its military, and the already unpopular War.<sup>1443</sup>

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<sup>1436</sup> L.P. Rockwood, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility* (Massachusetts: University of Massachusetts Press, 2007), 116.

<sup>1437</sup> Anderson, 'What Really Happened?', 4.

<sup>1438</sup> C. Cookman, 'An American Atrocity: The My Lai Massacre Concretized in a Victim's Face', *The Journal of American History*, 94, 1 (2007), 154-162: 157.

<sup>1439</sup> Anderson, *What Really Happened?* 1.

<sup>1440</sup> Turse, *Kill Anything That Moves*, 228-231.

<sup>1441</sup> *ibid*, 3.

<sup>1442</sup> Anderson, *What Really Happened?* 4.

<sup>1443</sup> K. Oliver, 'Atrocity, Authenticity and American Exceptionalism: (Ir)rationalising the Massacre at My Lai', *Journal of American Studies*, 37, 2 (2003), 247-268: 258.

According to Neu, “for many Americans, the atrocities at My Lai only confirmed their contention that the war must end – and soon”.<sup>1444</sup>

Therefore, My Lai indicates a possible link between ethics and strategy. The gross violations of *in bello* principles, such as the murder of civilians, damaged the perception of the US war in Vietnam, and further led to opposition growing against the war. The United States justified its war to “prevent bloodbaths, not to commit them” and then subsequently cover them up.<sup>1445</sup>

Regan argues that single atrocities may not damage the justness of the war as a whole, however, “if unjust war conduct is systematic and pervasive, the very justice of the cause for which a belligerent is purportedly waging war will be tainted”.<sup>1446</sup> It must be stated here that My Lai was not an aberration, but a culmination of the US war to that date. My Lai, and other atrocities, “flowed from what could be called the American War in Vietnam...the culprit is the body count or kill ratio”.<sup>1447</sup> Following My Lai, veterans began to testify that massacres were commonplace in the conduct of the war.<sup>1448</sup> Media reports of other atrocities flooded in, as the media began to communicate the events on the ground more openly to the American public.<sup>1449</sup> My Lai revealed to the American public, the “growing ugliness of the war”.<sup>1450</sup> Therefore, My Lai was not only wholly indiscriminate and disproportionate, it damaged the US domestic support for the war in Vietnam.

### Another War? Combined Action Plan

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<sup>1444</sup> Neu, *America's Lost War*, 164.

<sup>1445</sup> Young, *The Vietnam Wars*, 243.

<sup>1446</sup> Regan, 99-100.

<sup>1447</sup> Anderson, ‘What Really Happened?’, 7, See also United States Army, *The My Lai Massacre and its cover-up: Beyond the Reach of Law? The Peers Report* (New York, The Free Press, 1976) for a discussion on the reasons behind the massacre.

<sup>1447</sup> Neu, *America's Lost War*, 164.

<sup>1448</sup> Young, *The Vietnam Wars*, 243-244.

<sup>1449</sup> Oliver, ‘Atrocity, Authenticity and American Exceptionalism: (Ir)rationalising the Massacre at My Lai’, 256.

<sup>1450</sup> Neu, *America's Lost War*, 164.

There was some deviation from the search and destroy operations conducted by the army, in Vietnam. Westmoreland was in charge of the ground war in Vietnam, but he only had nominal command over the Marines. The Marines, based on their experience of COIN, sought a different strategy in I Corps Tactical Zone. General Lewis Walt, commander of III Marine Amphibious Force, believed that it was not the enemy forces that were the centre of gravity in this conflict, but rather the villages and the population who lived in them.<sup>1451</sup> Marines sought to increase the security for the population, establishing the Combined Action Program (CAP).

The CAP involved Marines living in selected villages, to establish a lasting security presence. The Marines also set out to train and improve the village militias known as Popular Forces (PF). CAP met the principles of clear-hold-build in counterinsurgency operations, and pertinent for the purposes of this work, were more in line with the *in bello* principles than search and destroy operations. For example, artillery and air support was only used ‘when needed’ and the Marines interacted heavily with the people of the village.<sup>1452</sup> With marines living in the villages, undertaking night patrols within the villages, there was little need for massive amounts of firepower within the villages; when firepower was needed, it could be directed out of the villages, from within. The evidence indicates that this low intensity approach to counterinsurgency that focused on securing the population was relatively successful. According to Hennessy, “hamlets within CAP villages demonstrated nearly twice the advance in security ratings experienced by other hamlets in I Corps”.<sup>1453</sup> However, there is some variation in the success in each hamlet, due to the PF and those recruited within it.<sup>1454</sup>

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<sup>1451</sup> Y. Gortzak, ‘The Prospects of Combined Action: Lessons from Vietnam’, *Small Wars & Insurgencies*, 25, 1 (2014), 137-160: 139.

<sup>1452</sup> J. Southard, *Defend and Befriend: The Combined Action Program and U.S. Military Strategy in Vietnam* (Kentucky: University Press of Kentucky, 2014), 124.

<sup>1453</sup> Hennessy, *Strategy in Vietnam*, 131.

<sup>1454</sup> See: Gortzak, ‘The Prospects of Combined Action: Lessons from Vietnam’, 141-151.



However, in many of the villages where CAP was employed, they were able to secure the population. Only one CAP was ever overrun.<sup>1455</sup>

Securing the population led to an increase in intelligence gathered from the population within the village,<sup>1456</sup> and it allowed for long range, small unit patrols by the Marines, who could gain intelligence on enemy movements.<sup>1457</sup> In addition to this, the marines actively worked to keep the population separate from the insurgents outside of the village. The population was protected when working in farming areas, under a program called Golden Fleece, which prevented the insurgents from obtaining food and supplies from the locals. When the NLF attacked the fields, they were pushed back by the marine and PF forces.<sup>1458</sup> CAP, then, not only demonstrates an aspect of the ground war that met the principles of *in bello*, but it was strategically sound.

Regardless of the success of the program, CAP was only employed in a limited manner in Vietnam, and therefore its impact on the conflict was limited. From 1965 to 1967, Walt employed a multifaceted strategy in I Corps. Marines focused on pacification in the rural areas, small-unit counterinsurgency operations in the countryside, and large-unit operations against enemy main force units.<sup>1459</sup> Conventional operations did take place. On any given day, CAP employed 1800 out of the 70,000 marines sent to Vietnam.<sup>1460</sup> Even though there were successes in CAP, Westmoreland did not push for an increase in this type of operation. On this, Porch wrote “even as officers on the ground reported that conventional search and destroy operations were not working, the US Army lacked a mindset and institutional structure to “learn” and adjust its doctrine and tactics to achieve success”.<sup>1461</sup> Westmoreland

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<sup>1455</sup> Krepevinich, *The Army and Vietnam*, 175.

<sup>1456</sup> Neu, *America's Lost War*, 114.

<sup>1457</sup> Krepevinich, *The Army and Vietnam*, 175.

<sup>1458</sup> *ibid*, 174.

<sup>1459</sup> Southard, *Defend and Befriend*, 130.

<sup>1460</sup> Gortzak, ‘The Prospects of Combined Action: Lessons from Vietnam’, 139.

<sup>1461</sup> Porch, *Counterinsurgency*, 207.

argued that CAP, if widened, would require too much of the available manpower, and there was not enough in Vietnam to implement this effectively.<sup>1462</sup> However, this is reflective of the Army's "impatience for quick results in a conflict environment that would not produce them".<sup>1463</sup> An oil-spot strategy, as dictated in doctrine, and implemented in CAPs, would not be as manpower intensive as Westmoreland believed.<sup>1464</sup> Regardless, CAP indicates both a success in COIN, and an approach that met the principles of *in bello*; albeit on a limited scale. However, the ground war in Vietnam was dominated by an indiscriminate and disproportionate attrition strategy.

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<sup>1462</sup> Southard, *Defend and Befriend*, 137.

<sup>1463</sup> Krepevinich, *The Army and Vietnam*, 175-6.

<sup>1464</sup> *ibid.*

## 1968-1972: Abram's War

### Changes at the Top: Abram's 'One War'

On 1 July 1968, Westmoreland was replaced by General Creighton Abrams. Abrams adapted the strategy in Vietnam, emphasising the importance of securing the population prior to the inevitable US withdrawal. Rather than viewing pacification as 'the other war', Abrams wanted to balance pacification and offensive operations.<sup>1465</sup> The strategy, known as the 'one war' plan, would focus on eliminating not only the enemy, including insurgent and regular forces, but also the insurgent infrastructure.<sup>1466</sup> In November 1968, the 'one war' concept was implemented during the three-month long Acceleration Pacification Campaign (APC). The objective of the APC was to establish the South Vietnamese government's control of the countryside. The APC was a clear and hold operation where contiguous areas, under insurgent control, would be cleared by counterinsurgent forces, and then the population would be pacified and secured by regional and local forces; developed and established by the United States.

### Abram's war: Clearing an Area

Pacification can only be achieved once an area has been cleared of insurgents and then held. Under Abrams, some parts of the army, whilst undertaking clear operations did demonstrate respect for the *in bello* principles. Some Army officers understood that in this 'one war', the protection of the population was vital, and that force needed to be discriminate and proportional. Abrams introduced more restrictive rules of engagement, and "was quick to praise units that emphasized small unit, intelligence-led operations".<sup>1467</sup> Abrams also reduced

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<sup>1465</sup> Hawkins, 'The Cost of Artillery', 109.

<sup>1466</sup> Krepevinich, *The Army and Vietnam*, 253.

<sup>1467</sup> D. Fitzgerald, *Learning to Forget: US Army Counterinsurgency Doctrine and Practice from Vietnam to Iraq* (California: Stanford University Press, 2013), 28.

available artillery ammunition expenditure, which effectively banned H&I.<sup>1468</sup> The justification for this reduction was more economic, rather than any ethical or effectiveness concerns.<sup>1469</sup> Nonetheless, the evidence suggests that the proportionate and discriminate operations under Abrams were effective.

For example, the 101<sup>st</sup> Airborne in Thua Thien were able to destroy the insurgent infrastructure and pacify the area by November 1968. The 101<sup>st</sup> importantly remained in the area and provided a continuous security presence, separating the insurgent from the population. Living among the population, the forces relied on intelligence obtained by local security forces rather than the “indiscriminate use of airpower and artillery”.<sup>1470</sup> In the area of My Thuy Phuong, where 80 to 85 percent of the population had supported the NLF, the 101<sup>st</sup> Airborne succeeded in reducing NLF support by 50 percent.<sup>1471</sup> “Government supporters, both passive and active, increased from 5 to 10 or even 15 percent”.<sup>1472</sup> This indicates that the United States did implement some restrictions on the conduct of the conflict; which led to counterinsurgency success at the operational level as areas were pacified.

However, the deviation from large scale sweeps was generally limited. Abrams struggled to convince the army to change tact from conventional operations. According to Nagl, “the army culture was too strong” and that the MACV pattern was set in concrete.<sup>1473</sup> “While there were cases of units breaking down into smaller elements and providing population security over a period of time, they were the exception, with most main-force units continuing to operate as they had been”.<sup>1474</sup> Attrition remained a key goal under Abrams, in order to keep

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<sup>1468</sup> *ibid*, 28.

<sup>1469</sup> Prados, ‘American Strategy in the Vietnam War’, 256.

<sup>1470</sup> Nagl, *Learning to Eat Soup with a Knife*, 169.

<sup>1471</sup> Young, *The Vietnam Wars*, 224.

<sup>1472</sup> *ibid*.

<sup>1473</sup> Nagl, *Learning to Eat Soup with a Knife*, 169.

<sup>1474</sup> Krepevinich, *The Army and Vietnam*, 257.

the insurgents on the run and away from the population.<sup>1475</sup> In the Quang Ngai province, for example, the Americal Division was successful at rooting out elements of the NLF, but achieved this by liberally applying indiscriminate firepower; 648,000 pounds of bombs and 2,000 rounds of artillery were used to kill 47 insurgents.<sup>1476</sup> Krepinevich wrote that “while the operation was a military success, it was a political disaster: over 300 civilians were killed, nearly 400 were wounded, and over 3,000 homes were severely damaged”.<sup>1477</sup> This operation was wholly disproportionate as once the area was cleared, the division remained in the area for seven weeks, and withdrew without increasing security in the area; which was subsequently overran. The destruction and death caused in securing the territory did not effectively pacify the area. Discrimination in Vietnam was flexible and came second to military success.

This is most evident by examining the operations of the 9<sup>th</sup> Infantry Division in the Mekong Delta, South Vietnam’s most populated region. Under Major General Ewell, nick-named the ‘butcher of the delta’, the 9<sup>th</sup> Division continued to measure success in terms of the body count.<sup>1478</sup> Ewell was focused on doing “everything possible to achieve high enemy-to-friendly kill ratios”.<sup>1479</sup> Ewell’s men undertook Operation Speedy Express to pacify the Mekong Delta. The tactics employed used helicopters for reconnaissance before piling on troops and utilising massive firepower.<sup>1480</sup>

Speedy Express also saw the introduction of night-hunter and night-search operations. These operations involved helicopters, using primitive night vision, to identify targets, fire upon them with tracer fire, and then accompanying helicopters would fire upon the area

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<sup>1475</sup> D. Andrade, ‘Westmoreland was right: learning the wrong lessons from the Vietnam War’, *Small Wars & Insurgencies*, 19, 2 (2008), 145-181: 165.

<sup>1476</sup> Krepevinich, *The Army and Vietnam*, 256.

<sup>1477</sup> *ibid.*

<sup>1478</sup> Krepevinich, *The Army and Vietnam*, 203.

<sup>1479</sup> *ibid.*

<sup>1480</sup> D. Fitzgerald, *Learning to Forget*, 27.

indiscriminately.<sup>1481</sup> During these missions “No attempt was made... to determine whether the people or structures were civilian, and large numbers of innocents were killed and wounded as a result”.<sup>1482</sup> In one instance, three young boys, tending to a Water Buffalo, were all strafed by US forces. All three boys and the buffalo were added to the official account of insurgents killed.<sup>1483</sup> After the operation 11,000 insurgent forces were reported as killed, even though on 748 weapons were captured.<sup>1484</sup> Although this figure leads to the conclusion that many non-combatants were killed by US firepower,<sup>1485</sup> the Army praised the 9<sup>th</sup> Division for securing an area. Ira Hunt Jr., a Major General in Vietnam, commented that these operations were proportionate.<sup>1486</sup> A memo on the 9<sup>th</sup> Division highlights that an area was cleared of insurgents and the “separation of fish and water was achieved”, but “at a tragic cost in civilian lives and property”.<sup>1487</sup> Therefore, the evidence suggests that under Abrams, the indiscriminate and disproportionate use of force was still abundant in operations in Vietnam during the clear phase.

#### Abram’s War: Holding an area

The APC operations did have some positive impact on the pacification of South Vietnam. Once areas had been cleared, where areas were held, the army and civil groups under the Civilian Operations and Revolutionary Development Support (CORDS) did undertake pacification operations. Regional forces were increased in number and their equipment and training were improved. The primary responsibility of providing lasting security at the rural

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<sup>1481</sup> Turse, *Kill Anything That Moves*, 210.

<sup>1482</sup> *ibid.*

<sup>1483</sup> Young, *The Vietnam Wars*, 234.

<sup>1484</sup> *ibid.*, 222-223.

<sup>1485</sup> R. Hunt, *Pacification: The American Struggle for Vietnam’s Hearts and Minds* (Colorado: Westview, 1995), 189.

<sup>1486</sup> I. A. Hunt, *The 9<sup>th</sup> Infantry Division in Vietnam: Unparalleled and Unequaled* (Kentucky: University Press of Kentucky, 2010), 143.

<sup>1487</sup> 9<sup>th</sup> Division Memo, quoted in M. Elliot, *RAND in Southeast Asia: A History of the Vietnam War Era* (California: RAND Corporation, 2010), 406.

and local level became regional forces; as part of ‘Vietnamisation’ and represented part of the ‘soft’ approach to counterinsurgency.<sup>1488</sup> Regional and People Forces expanded from 100,000 men in 1968 to over 500,000 in 1971; and the People’s Self-Defence Forces were expanded to over three million and equipped with 500,000 weapons.<sup>1489</sup> The increase in regional security forces, it seems, helped to reduce the ability for the NLF to act. Guerrilla attacks and terrorism decreased significantly from 1968 to 1970 under this ‘one war’ period.<sup>1490</sup> By the end of 1968, the APC had managed “to double the “secured” population in Hau Nghia, while the portion under VC control dropped by half”.<sup>1491</sup> The government had reduced the grip of the communists on the South Vietnamese population; and the following hold and build operations, termed ‘Vietnamisation’, resulted in counterinsurgency successes.<sup>1492</sup> According to Warner, by 1970, at least 90 percent of the population of South Vietnam had been pacified.<sup>1493</sup> Within these secured areas local elections were held and the US sought economic development.<sup>1494</sup> However, these pacification gains were somewhat minimal, and outran the resources that could be allocated to it.<sup>1495</sup> Hall wrote “real progress demanded time, and there was no time”; in June 1969 US ground troops were being withdrawn from South Vietnam.<sup>1496</sup> As the US gradually withdrew from Vietnam, pacification operations

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<sup>1488</sup> J. Dumbrell, *Rethinking the Vietnam War* (Basingstoke: Palgrave MacMillan, 2012), 188.

<sup>1489</sup> R.W. Komer, ‘The Impact of Pacification on Insurgency in South Vietnam’, *Journal of International Affairs*, 25, 1 (1971), 48-69: 62.

<sup>1490</sup> *ibid.*, 63; note: It is important for the reader that Abram’s ‘one war’ is not the sole reason for the decrease in the number of NLF attacks. The NLF had been decimated by the Tet Offensive, and had gone back from battalion sized operations to lower-level terrorist attacks. In addition to this, the United States had increased the Phoenix programme, which targeted the insurgent infrastructure, and numerous insurgent targets and supporters were ‘eliminated’ or assassinated. Therefore, pacification operations are only one part of this trend post 1968: but an important part nonetheless.

<sup>1491</sup> T.L. Ahern, *Vietnam Declassified: The 1968 Tet Offensive and Accelerated Pacification* (Kentucky: University Press of Kentucky, 2010), 302.

<sup>1492</sup> E. Bergerud, ‘The Village War in Vietnam, 1965-1973’, in D.L. Anderson (Ed) *The Columbia History of the Vietnam War* (New York: Columbia University Press, 2011) 262-296: 293.

<sup>1493</sup> L.A. Warner, ‘Vietnam (1959-1972)’ in A. Rabasa et.al. (eds) *Money in the Bank – Lessons Learned from Past Counterinsurgency Operations: Rand Counterinsurgency Study – Paper 4* (California: RAND, 2007) 27-38: 36.

<sup>1494</sup> Elliot, *RAND in Southeast Asia*, 389.

<sup>1495</sup> Porch, *Counterinsurgency*, 219.

<sup>1496</sup> Hall, *The Vietnam War*, 75.

were shown to be too little too late. When left to themselves, without US ground support and once US military aid was cut, the ARVN and regional forces were not sufficient to halt the conventional attack by the North in August 1975.

### The Phoenix Program

In addition to developing an area that had been cleared, the United States implemented a ‘hard’ approach to pacification the Phoenix Program. The US-led Phoenix Program began in 1968 and consisted of CIA agents, special forces and South Vietnamese units, with the aim of destroying the insurgent infrastructure (VCI). Provincial Reconnaissance Units (PRUs) would ‘neutralise’ the VCI by detaining, killing or routing suspected communist supporters. Official figures put the number of those neutralised by the end of 1969 was 20,000,<sup>1497</sup> with nearly 5,000 being killed.<sup>1498</sup> Young’s work posits that from 1968 to mid-1971, 28,000 VCI were captured, 20,000 assassinated and 17,000 were persuaded to defect.<sup>1499</sup> The Phoenix program demonstrates a serious violation of the *in bello* principle of discrimination.

First, it is doubtful that all of those who were killed were VCI, or actively involved in the conflict. Otterman suggests that up to 80 percent of those detained were innocent of any crime.<sup>1500</sup> Neutralisation rates, a cousin of the body count measure, was used to measure success in the program.<sup>1501</sup> By August 1968 the head of CORDS, Robert Komer, had established, as a ‘management tool’, a quota that 1,800 VCI had to be neutralised per

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<sup>1497</sup> Herring, *America’s Longest War*, 255.

<sup>1498</sup> Turse, *Kill Anything That Moves*, 190.

<sup>1499</sup> Young, *The Vietnam Wars*, 213.

<sup>1500</sup> M. Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (Melbourne: Melbourne University Press, 2007), 71.

<sup>1501</sup> D. Valentine, *The Phoenix Program: America’s Use of Terror in Vietnam* (New York: Open Road Media, 2014), 314.



month;<sup>1502</sup> and this figure remained until 1970, when it was reduced to 1,200 per month.<sup>1503</sup> Quotas, and the cash rewards for meeting them, influenced the *modus operandi* of the program, and resulted in a wildly indiscriminate campaign; where thousands of innocent people were detained. It is, obviously, against the discrimination principle to deliberately target suspects, who have not relinquished their right to be free from harm. Therefore, the phoenix programme did not meet the *in bello* principle of discrimination.

In addition to the killing of civilians, the program quickly became synonymous with torture. When PRUs would capture suspects, they would be sent to regional interrogation centres. Under the JWT, detainees should be granted benevolent quarantine, and free from abuse and harm. However, in Vietnam torture was “a common Vietnamese interrogation method”.<sup>1504</sup> Torture became the “standard procedure during the interrogation of all VC suspects”.<sup>1505</sup> In some cases, psychological and discomfort methods of torture were used, and physical torture including beatings were also common.<sup>1506</sup> One military intelligence officer, Kenneth Barton Osborn, testifying in front of a House Operations Subcommittee, provided the example of a detainee being killed by having a dowel driven into his ear with a mallet.<sup>1507</sup> He also testified that not one VC suspect survived interrogation under his supervision during his 18 months in the program.<sup>1508</sup>

Under the supervision of American advisers, interrogators often combined electrical torture and sexual abuse, “one woman, Ms Nguyen Thi Nhan, was given electric shocks under the super vision of three CIA officers. One of the men directed a Vietnamese interrogator to ram

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<sup>1502</sup> *ibid.*, 397.

<sup>1503</sup> Otterman, *American Torture*, 71.

<sup>1504</sup> T.L. Ahern, *Vietnam Declassified: The CIA and Counterinsurgency* (Kentucky: University Press of Kentucky, 2010), 260.

<sup>1505</sup> *ibid.*, 72.

<sup>1506</sup> Otterman, *American Torture*, 67.

<sup>1507</sup> Turse, *Kill Anything That Moves*, 191.

<sup>1508</sup> Otterman, *American Torture*, 72.

needles under her fingernails. Another ordered the insertion of an iron rod into her vagina to exacerbate the damage caused by the electricity”.<sup>1509</sup> Welch’s work states that many of the thousands killed “were victims of a “pump-and-dump” apparatus that would brutalize Vietcong suspects during interrogations and when the subjects died, their remains were simply disposed of”.<sup>1510</sup> Therefore, because of the failure to meet the principles of discrimination, as it deliberately targeted non-combatants, and the suspects were murdered and, or, tortured, then the phoenix program was strongly unjust.

At the time, the director of Phoenix CIA officer William Colby, argued that the ‘collateral damage’ was justified, and that the programme was “an essential part of the war effort” and was “designed to protect the Vietnamese people from terrorism”.<sup>1511</sup> For Colby, it was military necessity and justified. However, the degree to which the program was ‘essential’ and whether it was necessary to kill thousands of non-combatants is difficult to assess. On one hand, the program did effectively weaken the NLF in certain areas.<sup>1512</sup> On this, Young wrote “corrupt and brutal, despite being frequently mistaken in its targets, over time Phoenix took a heavy toll on local NLF cadres”.<sup>1513</sup> However, it did not destroy the NLF, and its tactics often stimulated new support for the insurgents.<sup>1514</sup> There are also questions about whether or not these deaths actually were intended to drive the campaign forward. Vincent Okamoto, who worked in the program, called it “uncontrollable violence”, and that in some cases it “degenerated into nothing more than “wholesale killing””.<sup>1515</sup>

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<sup>1509</sup> *ibid.*, 70.

<sup>1510</sup> M. Welch, *Crimes of Power & States of Impunity: The U.S. Response to Terror* (New York: Rutgers University Press, 2009), 85.

<sup>1511</sup> W. Colby, quoted in Otterman, *American Torture*, 71.

<sup>1512</sup> Hall, *The Vietnam War*, 74.

<sup>1513</sup> Young, *The Vietnam Wars*, 213.

<sup>1514</sup> Hall, *The Vietnam War*, 74.

<sup>1515</sup> Okamatao quoted in Turse, *Kill Anything That Moves*, 190.

In a report by Rosenau and Long, they take a ‘middle of the road’ stance on this issue, arguing that “Phoenix was neither the devastatingly effective program its supporters have sometimes claimed nor the merciless assassination campaign that its detractors have alleged”.<sup>1516</sup> Their work indicates that the program did make a contribution to the pacification campaign in Rural Vietnam, and did help the US succeed in this period of the Vietnam conflict, however, it did so at a political cost.<sup>1517</sup> Tactical successes at neutralising the VCI, resulted in failings at the strategic levels of operation, as it damaged the reputation of the campaign. Phoenix quickly became viewed as an assassination campaign and “its detractors charge that Phoenix violated the part of the Geneva Conventions guaranteeing protection to civilians in time of war”.<sup>1518</sup> Adding to this, Long and Rosenau wrote “neither Phoenix nor its action arms were assassination programs, as critics charged, but negative publicity helped shape public perceptions that the United States was at war with the Vietnamese people...The secretive and ruthless reputation enjoyed by the PRUs had an effect on their adversaries, to be sure, but that effect extended beyond Vietnam and reached broader audiences in ways that worked against U.S. policy objectives.”<sup>1519</sup> Therefore, Phoenix “contributed to a lasting legacy of suspicion about U.S. power and global ambitions”.<sup>1520</sup> In fact, the CIA began to withdraw direct support for the program, partly because of the image of the program.<sup>1521</sup> Therefore, the degree to which the murder of civilians during the phoenix programme was necessary is in doubt.

Overall, the period of 1968 to 1972, indicates a slight trend towards more discrimination in the conduct of the war, however, Abrams was unable to completely remove the attrition

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<sup>1516</sup> W. Rosenau & A. Long, *The Phoenix Program and Contemporary Counterinsurgency* (Santa Monica: RAND, 2009), 1.

<sup>1517</sup> *ibid.*

<sup>1518</sup> Valentine, *The Phoenix Program*, 25.

<sup>1519</sup> Rosenau & Long, *The Phoenix Program and Contemporary Counterinsurgency*, 14.

<sup>1520</sup> *ibid.*, 1.

<sup>1521</sup> Otterman, *American Torture*, 70.

strategy from Vietnam, which led to disproportionate and indiscriminate operations. The Phoenix Program was incredibly indiscriminate, and the use of torture was wholly disproportionate. Overall, for the whole conflict, a *JiBI* score can be given of -2.125 for discrimination, and -2.5 for proportionality. Therefore, the conflict was fought unjustly.

### The Vietnam War: Results

Overall, the American war in Vietnam failed to meet the principles of the JWT. The United State did not have a just cause to intervene. Although there had been significant rights violations, the United States had chosen to intervene on behalf of an unjust actor. This is linked to whether or not the United States was a legitimate authority in Vietnam, and because South Vietnam was not a minimally just society, the United States was not legitimate when it intervened in Vietnam. The US clearly failed to publicly declare the war. The United States did however fulfil the principle of Last resort, as South Vietnam was facing aggression from the insurgency by the time it was intervening, and inaction may have led to the collapse of South Vietnam. However, it is not clear that the war was proportionate. The preservation of US prestige is not a proportionate reason to go to war in South Vietnam; and nor does it show right intent. Therefore, the JaBI indicates that the war was moderately unjust.

	Index Score
Just Cause	-1.5
Right Intention	0.5
Public Declaration	-3
Legitimate Authority	-1
Proportionality	-1.5
Last Resort	1
<i>Jus ad Bellum</i> Index (JaBI)	-1

(Fig.8) Results of case study, indicating individual scores for ad bellum criteria, and overall JaBI score.

The evidence indicates that the conduct of the COIN operations in South Vietnam were significantly unjust. A focus on body counts, and a direct approach based on an attrition strategy resulted in the application of indiscriminate methods. The use of airpower in the

south, and the use of weapons like napalm among the population clearly indicate the indiscriminate nature of the conflict. Although this slightly improved under Abrams, it continued to be the case. In addition to this, pacification operations were also indiscriminate and disproportionate, in particular forced resettlement and the creation of refugees and the phoenix program.

	Index Score
Discrimination	-2.125
Proportionality	-2.5
<i>Jus in Bello</i> Index (JiBI)	-2.313

(Fig.9) Results of case study, indicating individual scores for in bello criteria, and overall JiBI score.

## Conclusion

### An exploration in Strategic Ethics

“The relationship between strategy and ethics is complex, at times complementary, but sometimes in a state of tension”.<sup>1522</sup> The purpose of this work is to explore the complex relationship between ethics and strategy. Specifically, it aims at providing further insight into the assumption that ethics are a military necessity.

As established within the review of the ethical literature, the counterinsurgency literature, and counterinsurgency doctrine, there is a common assumption that ethical conduct equates to effective counterinsurgency. This relationship, known as strategic ethics, has been developed in strategic theory by writers like Gray.<sup>1523</sup> However, there is disparity between the counterinsurgent and the insurgent in terms of ethics. The counterinsurgent is often bound by established legal and moral restrictions and fights an enemy who is not. It is not impossible to comprehend why counterinsurgents may push against such restrictions. Should we not allow the counterinsurgent to do all they can to achieve victory? Should they be bound by the same ethical constraints? One must not forget that victory has an ethical element to it also. Failure in war can be catastrophic, failing to achieve one’s objective means that lives are lost for no actual gain, and defeat can be considerably worse.<sup>1524</sup> These questions have been at the heart of this thesis.

The following sections will answer the three questions established earlier in the thesis. The first question concerns having a just resort to force and the support for the counterinsurgent.

The second examines the effect *in bello* violations have had on the support for the

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<sup>1522</sup> Lonsdale & Kane, *Understanding Contemporary Strategy*, 77.

<sup>1523</sup> Gray, ‘Moral Advantage, Strategic Advantage?’, 361.

<sup>1524</sup> Lonsdale & Kane, *Understanding Contemporary Strategy*, 72.

counterinsurgent. The third question asks about the relationship between *ad bellum* and *in bello*. The focus of this question is to determine whether the counterinsurgent who fights for a just war is less likely to have their support damaged by *in bello* violations, compared to the counterinsurgent who does not fight a just war. As will be explained, the four case studies examined in this thesis demonstrate that there generally has been positive correlation between adherence to the principles of the JWT and support for a counterinsurgency.



## Answering the Questions

RQ1: To what extent has the counterinsurgent who meets the principles of ad bellum been more likely to win the support of the population compared to those who have not?

RQ1 assumes that the counterinsurgent with a greater justification in their resort to force, is more likely to succeed in counterinsurgency campaigns. Success in counterinsurgency is measured by the ability of the counterinsurgent to both neutralise the insurgent forces and infrastructure, *and* the permanent isolation of the insurgent from the population through obtaining their support.<sup>1525</sup> Generally, the four case studies present a correlation between having a just resort to force and the ability of the counterinsurgent to increase their support. In particular, meeting the *ad bellum* principles of just cause, legitimate authority and a public declaration of war, appears to correlate with an increase in support.

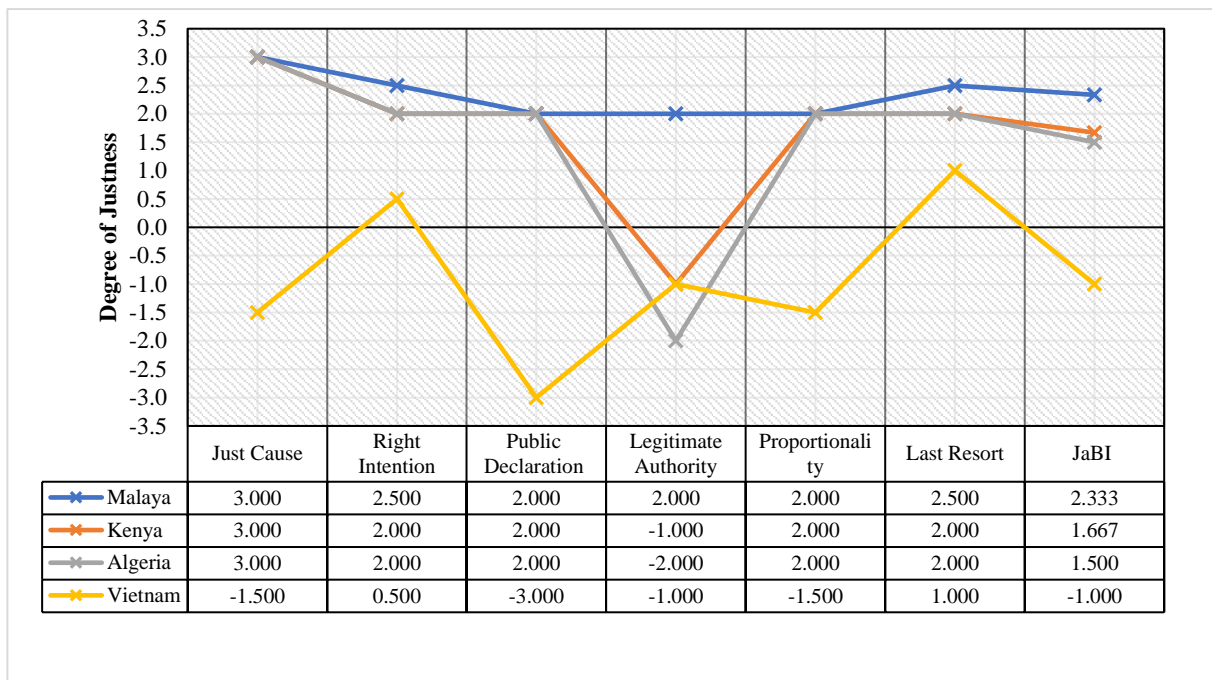
### Jus ad Bellum and Support

The *Jus ad Bellum* Index scores in *fig.10* demonstrate the overall degree to which the principles of jus ad bellum were met by each of the counterinsurgents.<sup>1526</sup> Three of the counterinsurgents generally satisfied the *ad bellum* criteria. The British in Malaya met all *ad bellum* principles moderately. The scores for the British in Kenya and the French in Algeria were both slightly just, although the former's resort to force was marginally more just than the latter. The only counterinsurgent to fail in satisfying the *ad bellum* principles was the United States in Vietnam.

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<sup>1525</sup> Galula, *Counterinsurgency Warfare*, 54.

<sup>1526</sup> Index scores are used to illustrate adherence to specific Just War principles. They are demonstrative, rather than an exact measurement of justice.



(Fig 10. The individual scores for the ad bellum principles and the JaBI score for each case study)

There is some correlation with the JaBI scores and the ability of the counterinsurgent to succeed in COIN operations. For example, the British in Malaya were both justified in their resort to force and successful in their campaign. The British in Malaya were able to both defeat the insurgent forces but achieved a permanent isolation of the insurgency through increasing the support of the Chinese population. The Malayan Emergency conforms to the assumption that having a just resort to force positively correlates with the ability of the counterinsurgent to enhance their support.

In contrast, the United States failed to both meet the principles of *ad bellum* and succeed in Vietnam. Even with the decimation of NLF forces following Tet, the US was unable to permanently isolate the insurgent from the population. Gradually, the United States withdrew from South Vietnam, and in 1975 Saigon fell to communist forces. These two conflicts, at the extremes of the JaBI scores, indicate that there may be some correlation between having the justness of a counterinsurgent's resort to force and support.

A similar correlation is present with the Kenyan Emergency. Britain was given a JaBI of 1.667, indicating that the resort to force for the British was slight to moderately justified. Not only was Britain justified in resorting to force in Kenya, but they were also successful in their counterinsurgency efforts. By 1954 the insurgent forces had been weakened and cut off the population. By 1956, the rebellion was over, and with law and order established, Britain then set out to grant Kenyan independence, which was completed in December 1963. The evidence also indicates that Britain was able to both secure and increase its support in Kenya. For example, locally raised security forces were expanded significantly. By 1954, home guard units stood at 25,600, outnumbering the Mau Mau insurgents in the forests and the British troops in Kenya.<sup>1527</sup> Therefore, like Malaya and the United States, the Kenyan Emergency demonstrates a possible correlation between having a just resort to force and the ability to enhance your support base and succeed in COIN.

Importantly, although there may be a correlation between *ad bellum* and the support for the counterinsurgent, the evidence does not indicate that meeting the principles of *ad bellum* will *cause* an increase in support for the counterinsurgent. Support is not contingent on having a just resort to force. Even with a just resort to force, Britain did not extinguish the Kikuyu desire for independence, and many of those who turned away from the Mau Mau in 1954 did so because they believed that loyalism was the more likely route to independence.<sup>1528</sup> As will be discussed later in this chapter, success in Kenya came through considerable coercive measures, and the suppression of the population; more so than meeting *ad bellum* principles. Therefore, although there may be a correlation between *ad bellum* and support in COIN, meeting the principles of *ad bellum* may not *cause* an increase in support for the counterinsurgent.

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<sup>1527</sup> French, *The British Way in Counter-Insurgency*, 186.

<sup>1528</sup> Branch, 'The Enemy within', 302.

The Algerian War, however, casts doubt on the correlation between meeting the *ad bellum* principles and increasing the support for the counterinsurgent. Although the JaBI score for Algeria is similar to the Kenyan Emergency, the outcome of the conflict differs considerably. The French were ultimately unsuccessful in Algeria. France sought to maintain its colony, but growing opposition to the war resulted in the granting of independence in 1961. Much like the British in Kenya, French COIN forces were successful at defeating the insurgent forces and infrastructure. French failure came from the inability to enhance, even maintain, support for its cause in Algeria. Even though the ALN were decimated through French COIN operations, this success had been double-edged as France had made its position in Algeria untenable. The nationalist spirit continued, and support for the war and French rule was minimal.<sup>1529</sup> The Algerian War is a case where the counterinsurgent had a just resort to force but failed to enhance their support.

Of the four case studies examined within this work, the Algerian case study is an outlier. It is the only case which did not demonstrate a positive correlation between *ad bellum* and support for the counterinsurgent. So far, each case has been examined by its JaBI score which gives an overview of the justness of the resort to force. As can be seen in *Fig.10*, there is a variation in the degree to which certain principles were met. Therefore, the work must now move on to examine specific *ad bellum* principles to examine the relationship between ethics and support in COIN further to allow us to explore variables.

### More than having a Just Cause

When we compare the Algerian conflict to the cases that met the *jus ad bellum* principles, we uncover an important finding. Merely having a just resort to force is not sufficient to correlate with strategic success. The population must believe that the counterinsurgent is able to

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<sup>1529</sup> Horne, *A Savage War of Peace*, 339.

achieve the just cause. As Trinquier noted, the population must be *convinced* that they are fighting in defence of a just cause.<sup>1530</sup>

Part of the ability to convince the population that the just cause is worth fighting, and possibly dying for, concerns success. Even a just cause by itself is not sufficient to mobilise the population. The counterinsurgent must demonstrate an ability and will to achieve the cause.<sup>1531</sup> The four case studies in this work support Thompson's claim that at the height of an insurgency, the cause becomes less important, and the key question becomes 'who is going to win?'<sup>1532</sup>

In Algeria, even with the destruction of FLN forces, by 1958 French COIN forces had shown that they did not have the ability to win in Algeria. In January 1959 the FLN was still conducting numerous assassinations and about fifty terrorist attacks per week.<sup>1533</sup> These attacks were conducted both in Algeria and in Mainland France.<sup>1534</sup> Without an end to the war in sight, France failed to maintain the will of the French people. De Gaulle and his government, once declaring a right to self-determination in Algeria, had effectively demonstrated that it did not have the will to continue in Algeria. Regardless of the justness of the French Cause, without the will to continue the war was lost.

In Malaya, the increase in support coincided with the ability of the counterinsurgent to demonstrate that it could achieve its aims. By 1955, Britain had not succeeded in winning the support of the Chinese population.<sup>1535</sup> The Chinese had been reluctant to support the counterinsurgent, and the task at hand was "not so much a matter of winning their hearts as a

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<sup>1530</sup> Trinquier, *Modern Warfare*, 41.

<sup>1531</sup> Thompson, *Defeating Communist Insurgency*, 69.

<sup>1532</sup> *ibid.*

<sup>1533</sup> Horne, *A Savage War of Peace*, 318.

<sup>1534</sup> *ibid.*

<sup>1535</sup> A. Lennox-Boyd, *Malaya: Review of the Situation, 6<sup>th</sup> April 1955*. C (55) 94. Page 23. Available online: <https://discovery.nationalarchives.gov.uk/details/r/D7657756> [Accessed 24/03/2022].

question of convincing them which side is going to win the struggle".<sup>1536</sup> Even if the Chinese population supported the British cause in Malaya, by the end of 1954 they were not convinced that the cause could be achieved. However, by effectively providing security to the population, through operations like the Briggs Plan, the support for the counterinsurgent increased significantly.<sup>1537</sup> Therefore, in strategic terms, having a just resort to force may not be strategically significant if the counterinsurgent cannot demonstrate to their audience an ability to achieve it. The population typically does not want to back a loser, even if their cause is just.

In Kenya, we find a similar trend. Branch's work indicates that trends in attitudes towards the COIN forces and the Mau Mau depended on the balance of power in localities.<sup>1538</sup> As the counterinsurgent forces were able to demonstrate successes, from operation Anvil, the support for the counterinsurgent increased from late 1954 onwards.<sup>1539</sup> These case studies, demonstrate that there may be a correlation between having a just resort to force, however, this correlation is strengthened by the ability of the counterinsurgent to demonstrate their ability to achieve their cause. Ultimately then, to paraphrase Galula, when a man's life is at stake, it takes more than ethics to budge him.<sup>1540</sup>

#### Ad Bellum Legitimacy and Support for the Counterinsurgent

The evidence also indicates that the degree to which the counterinsurgent meets the requirements of a legitimate authority may correlate with the likelihood that they will increase their support base. An illegitimate counterinsurgent may have a just cause, but the evidence indicates that an illegitimate authority will find it more difficult to increase their

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<sup>1536</sup> *ibid*, 22.

<sup>1537</sup> See the Malayan Emergency Chapter.

<sup>1538</sup> Branch, 'The Enemy Within', 292-3.

<sup>1539</sup> *ibid*, 293.

<sup>1540</sup> Galula, *Counterinsurgency Warfare*, 55.

support base. This work finds that the greater the legitimacy of the counterinsurgent at the outset of an insurgency, the greater its support base will be, and the less effort is required for the government to reintroduce law and order, and vice versa.

This work has viewed a legitimate authority as an actor who meets the principles of a minimally just government.<sup>1541</sup> Assessing legitimate authority in this manner moves beyond the state-centric attitude of traditional approaches to legitimacy. This is important when dealing with colonial cases of counterinsurgency, where the colonial state will traditionally be perceived as the legitimate authority. Overall, the case studies within this work indicate that the counterinsurgents who scored lower for the legitimate authority principle faced greater difficulty in being able to win the support of the population.

Of the four case studies examined in this work, the French scored the lowest for the Legitimate Authority principle. French rule was recognised internationally and was legally legitimate. However, external legitimacy does not automatically translate into domestic legitimacy.<sup>1542</sup> French rule in Algeria was built upon deliberate and continuous failure to satisfy the rights of the majority Muslim Algerian population. The starkest example of this occurred during the Setif Massacre. Setif became a rallying point for nationalism, and the suppression of political rights cut off legitimate and peaceful avenues for reform. The suppression of the majority in order to maintain the minority's position in Algeria required the deliberate suppression of rights, which ultimately resulted in widespread resentment. It is important to note that militant nationalism and the insurgency began from a position of considerable strength, because that was not the reality in Algeria. The major parties, the UDMA and MTLD opposed the violence. But the dearth of domestic support at the outset of

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<sup>1541</sup> Orend, *Morality of War*, 37-39.

<sup>1542</sup> S. Podder, 'Understanding the Legitimacy of Armed Groups: A Relational Perspective', *Small Wars & Insurgencies*, 28, 4-5 (2017), 686-708: 699.

the war demonstrates that the French were in a weakened position, and this has strategic implications in terms of winning support.

Current doctrine notes that counterinsurgents with low legitimacy may “breed contempt” and the population may require “extensive prodding and incentives” to win their support.<sup>1543</sup>

Illegitimate governments only method of obtaining control of the population comes from coercion, which is resource intensive.<sup>1544</sup> In Algeria, without a support base from which to build their campaign, the French conducted a predominantly coercive campaign against the population of Algeria. The FLN utilised the media and publicity in their efforts and used French brutality against them.<sup>1545</sup> French coercive measures, resulted in international condemnation, and gradually they damaged their international legitimacy. This is perhaps a lesson to learn for modern campaigns, which often involve a “scripted enemy” who plays to the global audience and seeks victory in the court of global public opinion.<sup>1546</sup> Therefore, the Algerian Case study shows that a counterinsurgent who fails to meet the principle of legitimate authority, even if it met other principles like just cause, may begin its campaign from a position of weakness.

This is not to suggest that an illegitimate authority may not be able to succeed in counterinsurgency. It is perfectly reasonable that “even if a population does not see an insurgency or a government as legitimate, control can be established effectively by coercion”.<sup>1547</sup> The Kenyan Emergency, for example, demonstrates that an illegitimate authority can enhance its support base even though it failed to meet the requirements of a legitimate authority. However, we must put this conflict into context. Britain faced an

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<sup>1543</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 1-29.

<sup>1544</sup> *ibid.*

<sup>1545</sup> Paul et.al., *Paths to Victory: Detailed Insurgency Case Studies*, 92.

<sup>1546</sup> Kilcullen, *Counterinsurgency*, 40.

<sup>1547</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 1-33.



insurgency “with no coherent strategic plan, a fractured leadership, limited resources, a narrow domestic appeal and no external support”.<sup>1548</sup> The insurgency Britain faced in Kenya differed considerably to the insurgency faced by the French in Algeria, who were a “more effective revolutionary-warfare machine than the Mau Mau”,<sup>1549</sup> and the insurgency the Americans faced in South Vietnam, who had a wide base of support and external support. Mumford notes “it could be argued that Mau Mau was doomed from the start”.<sup>1550</sup> Therefore, the comparative weakness or failings of the Mau Maus perhaps explains why the British were successful, even though they were not legitimate in Kenya.

The Vietnam War, like the Algerian War, demonstrates a correlation between failing to meet the legitimate authority principle and failing to win the support of the population. The United States failed to meet the criteria for a just cause to intervene in South Vietnam which is intertwined with legitimate authority concerns. An actor may only intervene in defence of a minimally just society. It is only minimally just societies who “truly *do* have moral value and are worth enabling and protecting”.<sup>1551</sup> The United States was not justified in intervening in Vietnam because it was doing so on behalf of an actor who failed to meet the principles of a minimally just society. The South Vietnamese government failed to promote the rights of the people of South Vietnam, and it was not generally accepted as legitimate by the South Vietnamese population. When the United States intervened in South Vietnam it faced considerable opposition.

By 1965 vast swathes of the population were under the control of the NLF, and when US forces entered Vietnam, they entered a country where the insurgents had been successful at getting their message of “liberating Vietnam from the American imperialists and corrupt

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<sup>1548</sup> Mumford, *The Counterinsurgency Myth*, 70.

<sup>1549</sup> J. ‘Bayo Adekson, ‘The Algerian and Mau Mau revolts: A comparative study in revolutionary warfare’, *Comparative Study*, 3, 1 (1981), 69-92: 90.

<sup>1550</sup> Mumford, *The Counterinsurgency Myth*, 70.

<sup>1551</sup> Orend, *The Morality of War*, 39.

government officials” across to the population.<sup>1552</sup> The United States was perceived by the Vietnamese population as colonialists, who threatened the long-standing desire for Vietnamese independence, and they faced a considerable challenge in obtaining the support of the population, and ultimately failed. The Vietnam War leads to a conclusion that intervening on behalf of an unjust actor is not only unethical,<sup>1553</sup> it may correlate with difficulty in winning the support of the local population.

This inability to make progress in South Vietnam, in part due to the perception of the United States by the Vietnamese population, had a considerable impact on the ability of the United States to maintain the support of the US population for the war. A counterinsurgent’s support base is not only limited to the local population, but it may also be regional and global, and the mobilisation of these bases may influence success.<sup>1554</sup> At the outset of the conflict, the United States had a relatively strong domestic support base. Evidence indicates that in 1965 the US public generally supported their government’s policies in South Vietnam.<sup>1555</sup> However, by 1968, following the Tet Offensive, support for the war had waned. In a *Harris* poll taken in 1969, over fifty percent of respondents believed that the war was morally indefensible, and it was a mistake that the US were there.<sup>1556</sup> By this point the American population had been made aware that the US were not winning the war. The inability to win the war and the rising number of US casualties, led to the perception that the costs of the war outweighed the benefits of an independent Vietnam, and the support for the war waned.<sup>1557</sup> This leads to a key finding for conflicts which involve intervening forces. If a counterinsurgent is less likely

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<sup>1552</sup> Young, *The Vietnam Wars*, 147.

<sup>1553</sup> Orend, *The Morality of War*, 90.

<sup>1554</sup> Killcullen, ‘Counterinsurgency Redux’, 121.

<sup>1555</sup> Logevall, *Choosing War*, 242.

<sup>1556</sup> H. Erskine, ‘The Polls: Is War a Mistake’, *The Public Opinion Quarterly*, 34, 1 (1970), 134-150: 150.

<sup>1557</sup> E.M. Schreiber, ‘Anti-War Demonstrations and American Public Opinion on the War in Vietnam’, *The British Journal of Sociology*, 27, 2 (1976), 225-236: 232.

to win the support of the local population when intervening on behalf of an unjust actor, then this may ultimately impede the ability of the counterinsurgent to succeed in the campaign. Without support of the domestic population, the counterinsurgency campaign may be stalled or hindered. As a war drags on, and the costs of war increase, it may be more difficult to maintain support for the war and the will to succeed.

In contrast to these cases, the British in Malaya scored the highest for the Legitimate Authority principle. When Gent declared the Emergency in June 1948, Britain maintained a good level of support in Malaya. Although Britain had alienated much of the Chinese population through the implementation of the Malayan Federation, it still enjoyed support from the Majority of the Malay people. At the outset of the conflict the British already had a relatively large base of support. Coinciding with this the British were able to obtain the support of the population without resorting to the same levels of coercion as experienced in Algeria and Kenya. Importantly, this support was lasting and when emergency restrictions were lifted, the insurgency was permanently cleared from an area through the support of the population.

Examination of the four case studies indicates that there may be some strategic advantage in having an *ad bellum* moral advantage if the counterinsurgent meets the principle of legitimate authority. Failing to meet the requirements of a minimally just actor, particularly the domestic legitimacy and the protection of human rights, appears to influence the support of the population. The counterinsurgent may have a just cause, in terms of defence, but perhaps the important strategic-ethical question in COIN is “what kind of state are we defending?” This question may have strategic ramifications.

## A strategic benefit of Publicly Declaring a War?

Ethically, a war must be publicly declared to inform both the enemy, and the people, that they now face war and its inherent hardships.<sup>1558</sup> In all of the conflicts, there was a reluctance to call them what they were; wars. Often this was done to delegitimise the insurgency. In addition to this, states often act as though a declaration of *war* binds them to *in bello* principles.<sup>1559</sup> These wars are often called “police actions” or “incidents”, because actors wish to avoid the legal ramifications of “war”.<sup>1560</sup>

Some of the literature alludes to a strategic benefit between meeting the principle of public declaration, and effectiveness in COIN. In Vietnam, the United States did not declare war in South Vietnam. Months after the Gulf of Tonkin resolution, which was not a declaration of war, US troops were sent to Vietnam and the figures swelled. Some of the literature has indicated that not declaring a war in South Vietnam had a detrimental strategic effect on US COIN. Summers’ work is most damning concerning this point, when he writes “Rather than go back to the Congress and ask for a declaration of war “efforts were made to make the change as imperceptible as possible to the American public...” In retrospect this was a key strategic error”.<sup>1561</sup> Although Summers argues that a declaration of war is not “magic talisman” that would have solved all of the difficulties faced by the United States, he also argues that it is not “a worthless anachronism”.<sup>1562</sup> Instead, the declaration of a war has a significant strategic influence. A declaration of war not only indicates that a country is at war, for ethical reasons, but it also focuses the nation’s attention on the enemy. “It was the lack of

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<sup>1558</sup> Orend, *Morality of War*, 52.

<sup>1559</sup> T.M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (New York: Cornell University Press, 2018), 82.

<sup>1560</sup> *ibid.*

<sup>1561</sup> H.G. Summers Jr., *On Strategy: A Critical Analysis of the Vietnam War*, 2<sup>nd</sup> edition (New York: Random House Publishing, 1995), 25.

<sup>1562</sup> *ibid.*, 21.

such focus on the enemy and on the political objectives to be obtained by the use of military force that was the crux of our strategic failure”, Summers contends.<sup>1563</sup>

In addition to this, a declaration helps to bridge the gap between the government and the people by making the conflict a shared responsibility. The military was ordered into battle by the President, but a lack of a public declaration of war resulted in “many vocal and influential members of the American public questioned (and continue to question) the legality and propriety of its actions”.<sup>1564</sup> The failure of the United States to declare a War in Vietnam meant that it came under intense scrutiny from the American people.

Failure to declare a war, or at least make the war clear to the American people, constrained what Johnson could do. When he escalated the conflict by increasing ground troops, he did so in a manner that was palatable for the US public. He only publicly announced that 50,000 troops were being sent to Vietnam, rather than the actual 100,000, and an additional 100,000 the following year, and tried to make it “as painless as possible” by refusing to call up the reserves or increase taxes.<sup>1565</sup> This is a stark contrast to the State of the Union address made by President Roosevelt in January 1942 during the Second World War, which set out the objectives of the conflict, the hardships the US people would face, and what was required to win.<sup>1566</sup> Public declarations focus the mind of the population, which can be strategically significant.

This is important to counterinsurgency campaigns because they are often long conflicts, which require a large concentration of efforts, supplies and personnel.<sup>1567</sup> Publicly declaring a war makes the population aware of the objectives and hardships they will face. Without being

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<sup>1563</sup> *ibid.*

<sup>1564</sup> *ibid.*, 22.

<sup>1565</sup> Herring, *America's Longest War*, 138

<sup>1566</sup> The American Presidency Project, *Franklin D. Roosevelt, State of the Union Address, January 6, 1942*. Available online: <https://www.presidency.ucsb.edu/node/210559> [Accessed 01/08/2021].

<sup>1567</sup> Galula, *Counterinsurgency Warfare*, 55.

made aware of such hardships the public may be less likely to support the war, as shown with Vietnam. This is strategically important, as insurgents can be strengthened by the possibility that their adversary may abandon the war as the war drags on.<sup>1568</sup> Therefore, a public declaration of war may not only be ethical, but strategically significant in counterinsurgency.

Although the conflicts were deliberately not called wars, in Kenya, Algeria and Malaya Emergencies were declared publicly. These declarations established a change in the status quo, the public were made aware of the emergency regulations. For example, in Kenya special areas were set up, so the public were aware of areas that they were permitted to enter. In addition to this, it reasserted the commitment of the government to defeat the insurgency. Counterinsurgent supporters will not be able to rally the population if they are not convinced that the counterinsurgent has the ability and commitment to win.<sup>1569</sup> Declaring Emergencies in Kenya and Malaya helped to quell the growing unrest and frustrations of those who were loyal to the counterinsurgents. In Kenya, European settlers had started to arm themselves, and by declaring the Emergency this helped quell some of the settler fears. Emergency powers were made clear to the population, and the government was legally allowed to reassert its authority through means which would be unacceptable in peace time. It allows the government to reassert its authority. Therefore, a declaration of a war or an emergency may be an early sign to signal this commitment and may indicate some strategic-ethical correlation.<sup>1570</sup>

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<sup>1568</sup> Cohen, 'Principles, Imperatives, and Paradoxes of Counterinsurgency', 51.

<sup>1569</sup> Galula, *Counterinsurgency Warfare*, 55.

<sup>1570</sup> It must be made clear that although there may be some strategic benefit to declaring a war, this variable appears to not stand alone. If an unjust war is declared or it is declared by an unjust actor, then there may be little significance to whether the war is declared or not. If the counterinsurgent is perceived as unjust, then perhaps there is little to suggest that its support base will be increased. In the same manner that the insurgent may declare war, but the international community does not support their cause. For example, in Malaya, the MCP received little support, and so too in Kenya. The counterinsurgents in both cases were fighting relatively small insurgencies, isolated from the outside world. However, a declaration of war allows for the government to control what the outside world sees, in terms of media control.

Reluctance, or hesitation, to declare an emergency or a war, when the insurgent has already openly declared war, may be detrimental to ability of the counterinsurgent to prevent the insurgent from increasing their support base. Unlike in Malaya and Kenya, the FLN publicly declared war on the French government in Algeria. For insurgents, a declaration of war acts as a “calling card” and alerts potential supporters of their existence.<sup>1571</sup> It can also signal their intentions to the international community and be beneficial to them logistically and politically.<sup>1572</sup> The French initially treated the insurgency as a criminal action, not declaring a war to legitimise the insurgents. Reluctance to respond to the FLN declaration, according to Porch, was detrimental to the COIN efforts. “Treating the insurgency as a criminal tribe may provide psychological and moral certainty to the counterinsurgent. However, it denies the political character of unrest and allowed the FLN to define the political narrative”.<sup>1573</sup> Therefore, efforts to delegitimise the insurgent by not declaring a war, when the insurgent has publicly declared a war is perhaps to fight with a handicap.

Declaring a war sets out clear aims for the counterinsurgent. It focuses the attention of the people, the government, and the military to the task at hand. If we refer to Thompson’s principles of counterinsurgency, the first principle states that “the government must have a clear aim”, and all efforts must be geared towards that aim.<sup>1574</sup> Without a long-term aim, often counterinsurgent will apply *ad hoc* means to destroy the insurgency which will be ineffective.<sup>1575</sup> Alexander and Keiger’s work indicates that a failure to declare the war meant that clear aims were never established by the French, and this hindered their campaign. The FLN, on the other hand, did declare a war and treated it as such. By doing so, the FLN had a “clarity of purpose” which contrasted against “years of obfuscation by the French

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<sup>1571</sup> Fazal, *Wars of Law*, 190.

<sup>1572</sup> *ibid.*

<sup>1573</sup> Porch, *Counterinsurgency*, 192-3.

<sup>1574</sup> Thompson, *Defeating Communist Insurgency*, 51.

<sup>1575</sup> *ibid.*, 52.

authorities.”<sup>1576</sup> Therefore, there may be some strategic disadvantage if a counterinsurgent does not *clearly* declare a war or an emergency.<sup>1577</sup>

### *Ad Bellum* and Support for the Counterinsurgent

Examination of the four case studies in this work draws out some key findings between meeting *ad bellum* and the ability of the counterinsurgent to win the support of the population. The evidence indicates that merely having a just cause is not sufficient to winning the support of the population. The counterinsurgent must be able to demonstrate an ability to achieve the just cause. Declaring the emergency or war may demonstrate a commitment and focus the efforts of the counterinsurgent to achieve this aim, indicating a possible relationship between ethics and COIN. In addition to this, there appears to be some correlation between failing to meet the requirements of a minimally just government and difficulty in winning the support of the population. This is not to suggest that it is impossible for a counterinsurgent to succeed or win the support of the population, however, the government may find themselves beginning from a position of weakness in terms of domestic support. Consequently, the counterinsurgent who fails to meet the requirements of a minimally just actor may face a greater challenge in obtaining the support of the population compared to the counterinsurgent who meets these principles.

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<sup>1576</sup> Alexander & Keiger, ‘France and the Algerian War: strategy, operations and diplomacy’, 3.

<sup>1577</sup> This point is aware that bad strategy may be bad strategy, however, there appears to be a correlation to making the population aware that they are at war. Particularly in conflicts where the aim is to win the support of the population.



RQ2: To what degree have violations of the jus in bello principles of discrimination and proportionality shown to minimise the support of the counterinsurgent?

Winning the support of the population is the centre of gravity of counterinsurgency. Support from the population allows the counterinsurgent to isolate the insurgent from their support base, leaving it to die on the vine.<sup>1578</sup> To win the support of the population, much of the literature emphasises the need to secure the population,<sup>1579</sup> and because of this, restraint becomes strategically important. Even if a counterinsurgent is successful at killing insurgents, if it does so in a manner that kills a disproportionate number of non-combatants, and the people feel threatened, then the chances of winning the population's support are minimised.<sup>1580</sup> Excessive destruction or violence may even bolster the cause for the insurgent, and it may diminish any gains made by the counterinsurgent.<sup>1581</sup> Strategists understand this relationship and it is prevalent within current COIN doctrine and literature.<sup>1582</sup> Yet, as shown in this work, the reality of COIN is often brutal and harsh. RQ2 seeks to determine whether ethical COIN has been effective COIN, in terms of support for the counterinsurgent. Examination of the four case studies shows disproportionate and indiscriminate use of force have both shown to correlate with a decrease in the support for the counterinsurgent. There is also evidence that restraint has shown to be strategically beneficial for the counterinsurgent. Importantly, the case studies show that it is not impossible for the counterinsurgent to increase their support, even if their conduct is unjust. The following section will explore these points further and answer RQ2.

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<sup>1578</sup> Thompson, *Defeating Communist Insurgency*, 55-57.

<sup>1579</sup> Galula, *Counterinsurgency Warfare*, 8.

<sup>1580</sup> Cohen, E. et.al., 'Principles, Imperatives, and Paradoxes of Counterinsurgency', 49.

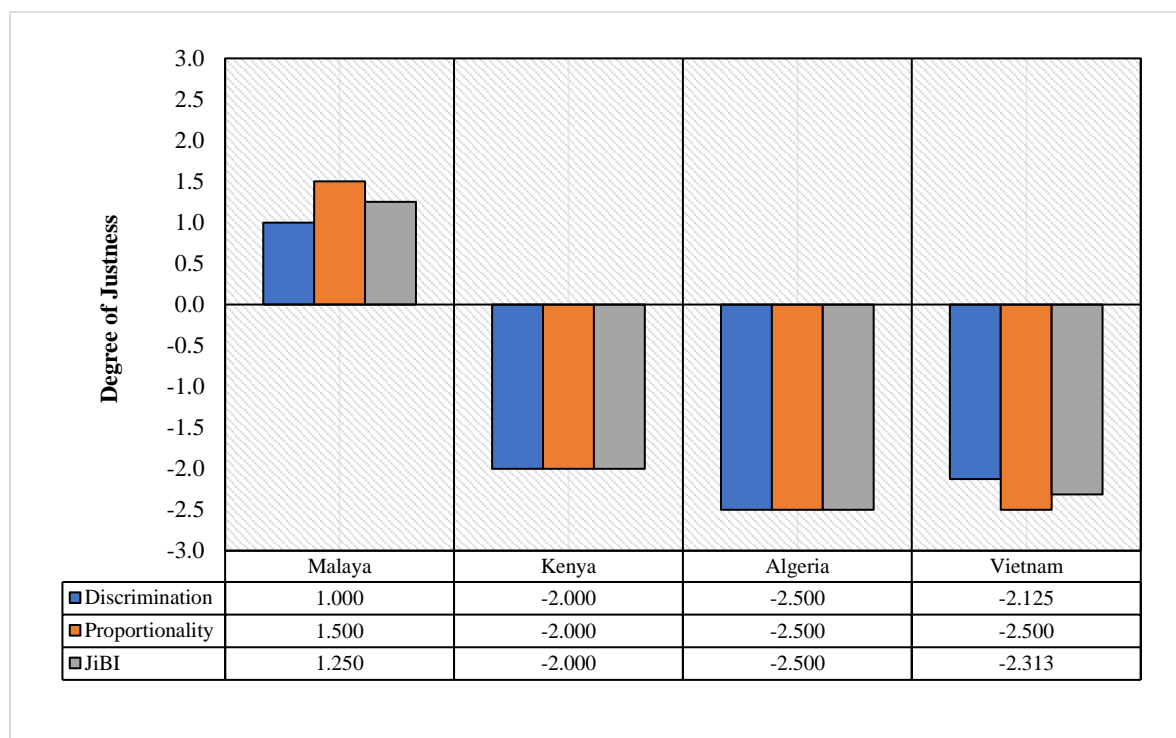
<sup>1581</sup> *ibid.*

<sup>1582</sup> See the literature review chapter.

## Unethical Conduct and Support for the Counterinsurgent

As stated in the methodology section, support for the counterinsurgent can be measured by observing the relationship between the population and the counterinsurgent. For example, an increase in intelligence provided by the population wilfully will indicate a good level of support. We can also examine the tactics and operations conducted by the insurgents.

Insurgents capable of mounting large scale or conventional attacks, may indicate that the insurgent has high levels of support among the population or externally. Therefore, we can determine a level of support through examining these factors of each case study.



(Fig.11: the discrimination, proportionality, and JiBI scores for each case study)

As can be determined in from Fig.11, the degree to which in the *in bello* principles were adhered to varies across each case study. The Malayan Emergency was the only case study where the principles of *in bello* were sufficiently met. This case scored the highest for both *in bello* principles, scoring +1.5 for proportionality and +1 for discrimination. Overall, the conduct of the conflict was slightly just, with the conduct being more proportionate than it

was discriminate. The counterinsurgents in the three other cases did not conduct their campaigns justly. The British were moderately unjust in their conduct in Kenya, with a JiBI score of -2, with the operations generally being more indiscriminate than they were disproportionate. The conduct of both Algerian War and the Vietnam War was moderately to strongly unjust. The Algerian War was the conducted with the lowest degree of justness, with a JiBI score of -2.500.

There is a general trend across all four cases that unethical conduct damaged the support for the counterinsurgent. Often the local population is the main group who holds the support that is necessary for success in counterinsurgency operations.<sup>1583</sup> However, in some cases the population may spread beyond borders, and may include regional, allied or the home populations.<sup>1584</sup> In both the Algerian War and the Vietnam War, the evidence suggests that *in bello* violations not only failed to enhance local support, but support for the counterinsurgent was damaged at home and internationally.

The Vietnam war was conducted both indiscriminately and disproportionately.

Westmoreland's war of attrition, based on kill ratios and body counts, utilised firepower across South Vietnam to reach the crossover point. Artillery was fired indiscriminately into villages, with little attention to the safety of the population.<sup>1585</sup> Civilians were strafed from helicopters to boost body counts. Villages were destroyed to prevent the insurgent from reaching the population, using indiscriminate weapons such as napalm. Napalm and defoliants devastated swathes of the largely agricultural country.

Examination of key evidence such as reports, and eyewitness accounts demonstrate that unethical conduct in Vietnam negatively affected support for the counterinsurgent. By 1966

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<sup>1583</sup> See: Gawthorpe, 'All Counterinsurgency is Local: Counterinsurgency and Rebel Legitimacy'.

<sup>1584</sup> D. Kilcullen, 'Counter-insurgency *Redux*', 121.

<sup>1585</sup> Long, *The Soul of Armies*, 147.

operations in South Vietnam had already involved considerable levels of brutality and violence. The Journalist William Tuohy reported for the *New York Times Magazine* that the ARVN had used torture, US bombing was killing civilians and artillery was being used at random.<sup>1586</sup> Bernard Fall commended in 1965 that the defining characteristic of the Vietnam war was to “wage unlimited aerial warfare...at the price of literally pounding the place to bits”.<sup>1587</sup> It appears that ‘pounding the place to bits’ was ineffective at winning the support of the population. Published in 1966, the *A Program for the Pacification and Long-Term Development of Vietnam* study by the US Army demonstrated that the war was not being won. The study argued that the situation by 1966 had deteriorated rather than improved.<sup>1588</sup> According to the study, the GVN only controlled ten percent of the countryside, and twenty-five percent of the population in total.<sup>1589</sup> In a memo to Johnson, McNamara admitted that in 1966 the US controlled little of the population, the insurgents thrived in most of the countryside, giving them a major intelligence advantage.<sup>1590</sup> On the ability to win the support of the population, or pacify south Vietnam, McNamara admitted that “we have failed consistently since 1961 to make a dent in the problem”.<sup>1591</sup> Part of the failure was attributed to the conduct of the military in south Vietnam. PROVN ordered that to win the support of the population “selective warfare” must be employed.<sup>1592</sup> The report stated that “counterproductive troop behavior [sic] and operational practices which alienate the Vietnamese people must be terminated”.<sup>1593</sup> Such behaviour included brutality, rape, theft,

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<sup>1586</sup> W. Tuohy, ‘A Big “Dirty Little War”’, in Library of America (eds) *Reporting Vietnam: American Journalism* (New York: Library of America, 1998), 187-197: 189.

<sup>1587</sup> B.B. Fall, ‘Vietnam Blitz: A Report on the Impersonal War’, in Library of America (eds) *Reporting Vietnam: American Journalism* (New York: Library of America, 1998), 175-186: 179.

<sup>1588</sup> Department of the Army, Office of the Deputy Chief of Staff for Military Operations, *A Program for the Pacification and Long-Term Development of Vietnam: Volume 1* (Washington: Department of the Army, 1966), 1. (Hereafter known as PROVN).

<sup>1589</sup> *ibid*, 31.

<sup>1590</sup> Sheehan, *Pentagon Papers*, 555.

<sup>1591</sup> *ibid*, 561.

<sup>1592</sup> Department of the Army, *PROVN*, 71

<sup>1593</sup> *ibid*.

unobserved artillery fire in populated areas and air strikes in populated areas where there was no active contact with the insurgents.<sup>1594</sup>

Even as early as October 1965, there were hundreds of well-substantiated stories about thousands of innocent bystanders being hurt by bombing.<sup>1595</sup> The evidence indicates that these events correlated with a decrease in support for the counterinsurgent. A RAND study, published in 1967 for the department of defence, based on a wide sample of interviews, argues that operations which hit villages naturally affected the attitudes of villagers.<sup>1596</sup> There is no question that a significant number of noncombatants [sic] have been killed and maimed; their houses, livestock and crops have been destroyed... The population is bound to be alienated".<sup>1597</sup> Therefore, some of the evidence indicates that the use of indiscriminate force was detrimental to the support for the counterinsurgent. Jonathan Schell's first-hand account of Vietnam explains that the indiscriminate use of force counterbalanced the incentives intended to win the support of the population. For villagers, because American military operations destroyed villages and brought so much death, no American civil-affairs works could "balance" the suffering caused by military firepower "which was often absolute and irreversible".<sup>1598</sup>

However, this relationship needs to be developed further. Support in Vietnam was not solely won or lost on the justice of conduct. A report by RAND in 1965, based on interviews of captured insurgents, indicates that civilian damage was not an immediate motive for joining the insurgency. Several insurgents denied civilian damage having any impact at all.<sup>1599</sup>

Another report, from 1967, which asked this question in more detail, however, provides

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<sup>1594</sup> *ibid.*

<sup>1595</sup> Fall, "Vietnam Blitz: A Report on the Impersonal War", 179.

<sup>1596</sup> J.C. Donnell, *Viet Cong Recruitment: Why and How Men Join*, (Santa Monica: RAND, 1967), 51.

<sup>1597</sup> Department of the Army, *PROVN*, 5-19.

<sup>1598</sup> Schell, *The Military Half*, 197-8.

<sup>1599</sup> L. Goure, *Some Impressions Of The Effects of Military Operations on Viet Cong Behavior* (Santa Monica: RAND, 1965), 16.

further insight into the relationship between excessive firepower and support for the US. Support changes in response to indiscriminate force were reported to be contingent on: the degree of commitment to insurgent cause, which side of the war controlled the village in question, and whether or not insurgents had been in the area.<sup>1600</sup> The ability to both provide lasting security to the population and demonstrate an ability to win also influenced support for either side.<sup>1601</sup> One insurgent said that when both sides of the conflict act badly “the villagers think it is wise to take sides with the winning party.”<sup>1602</sup>

However, unethical conduct does give the insurgent propaganda in which to help develop their support base. The manipulation of attacks by the US by the insurgents were reported to have influenced those who supported the insurgency.<sup>1603</sup> Severe or continuous attacks on the population gave the insurgents significant amounts of convincing propaganda. According to Donnell, unethical conduct does play into the hands of the insurgent, and their propaganda can be more convincing because of this. The NLF, for example, were able to give specific figures and examples of attacks on villages which killed civilians.<sup>1604</sup> NLF propaganda was useful in sowing hatred among the population and helped to alienate the population from the GVN. This leads to the conclusion that, whilst unethical conduct may not *directly* cause a change in support for the counterinsurgent, it gives the insurgent fuel for its propaganda machine which can affect support. Furthermore, restraint in counterinsurgency may provide an effective foil against propaganda. Donnell’s report notes that “The very stereotype of the invariably malevolent American that Viet Cong propagandists try to convey makes them vulnerable, for U.S. personnel can derive considerable political benefit from disproving the allegation that American and GVN forces mistreat, torture, and kill VC captives and

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<sup>1600</sup> Donnell, *Viet Cong Recruitment*, 52-57.

<sup>1601</sup> Goure, *Some Impressions Of The Effects of Military Operations on Viet Cong Behavior*, 18.

<sup>1602</sup> Unknown insurgent quoted in *ibid*.

<sup>1603</sup> Donnell, *Viet Cong Recruitment*, 53.

<sup>1604</sup> *ibid*, 54.

defectors”.<sup>1605</sup> Therefore, examination of the Vietnam War demonstrates two findings. First, that unethical conduct can be detrimental to the support of the counterinsurgent. Second, this decrease in support may be dependent on insurgent propaganda. Consequently, restraint may be an effective foil for the counterinsurgent against insurgent propaganda.<sup>1606</sup>

The Algerian case study provides a similar conclusion to the Vietnam War. The brutality of the war resulted in the growth of support for the insurgency. The Philippeville Massacre, for example, helped to convert moderates to join the FLN opposition against the French.<sup>1607</sup> The systematic use of torture, in particular, played into the hands of the insurgents. Victims were electrocuted, drowned, sexually assaulted, and degraded.<sup>1608</sup> Although the intelligence provided through torture helped during the battle of Algiers to devastate the FLN’s operational capacity,<sup>1609</sup> victory in Algiers came at the cost of alienating Muslim hearts and minds.<sup>1610</sup> Opposition to the war also increased in the metropole following reports of torture.<sup>1611</sup> Reports of torture were printed in news papers in France and around the world.<sup>1612</sup> International condemnation grew in response to the reports. In an article for *The New York Times*, Robert Doty remarked that the repression of the Algerian War, including the use of torture, sapped the “moral position” of France in the world.<sup>1613</sup> The Algerian insurgents received international sympathy in response to the reports, ultimately damaging the support for French Algeria.<sup>1614</sup> The Algerian question became a major topic at the United Nations and

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<sup>1605</sup> *ibid.*, 131.

<sup>1606</sup> Further research into the propaganda, COIN and ethics would help to develop this discussion further, but the scope of such research is beyond the limits of this thesis.

<sup>1607</sup> Evans, *Algeria: France’s Undeclared War*, 141.

<sup>1608</sup> Horne, *A Savage War of Peace*, 200.

<sup>1609</sup> Behr, *The Algerian Problem*, 115.

<sup>1610</sup> Evans, *Algeria: France’s Undeclared War*, 225.

<sup>1611</sup> Wall, *France, the United States and the Algerian War*, 68, and; Horne, *A Savage War of Peace*, 232-234.

<sup>1612</sup> W.B. Cohen, ‘The Sudden Memory of Torture: The Algerian War in French Discourse, 2000-2001’, *French Politics, Culture & Society*, 19, 3 (2001), 82-94: 82-83.

<sup>1613</sup> R. C. Doty, What Price Algeria? A balance Sheet, *The New York Times*, 7 February 1960, 67-68.

<sup>1614</sup> Chalk, *Money in the Bank*, 25.

support for the war gradually decreased internationally. Support for maintaining Algeria as a part of France decreased in the metropole, and by 1958 De Gaulle realised that it was not possible to hold on to Algeria; the primary aim of the war.<sup>1615</sup> Thus, the Algerian War indicates that *in bello* violations, even if tactically effective, may damage the support for the counterinsurgent, indicating a strategic-ethical relationship in counterinsurgency campaigns.

In Kenya, the British experience indicates a complex relationship between ethics and support from the population. As can be seen in *Fig. 11*, the conduct of the conflict did not meet the principles of *in bello*. Forced resettlement, indiscriminate violence, and torture plagued the conflict. In the early phase of the Emergency, these methods appear to have helped increase the support for the Mau Mau.<sup>1616</sup> Collective punishments, and the view that all Kikuyu were Mau Mau, increased support for the Mau Mau cause.<sup>1617</sup> However, gradually the British did expand their support base in Kenya. As discussed earlier in this chapter, loyalism increased in Kenya from 1954, and anti-Mau Mau action became more popular.<sup>1618</sup> The government was able to transfer support from the Mau Mau to the counterinsurgency, despite little deviation in terms of adherence to *in bello*. Restraint was evident, the introduction of special areas<sup>1619</sup> and the offering of benevolent quarantine to surrendered insurgents for example,<sup>1620</sup> however generally the conflict continued to be brutal.

The Kenyan Emergency, therefore, shows that support is not necessarily contingent on ethics. Instead, it shows that even a brutal counterinsurgent can win by relying on a small and active core of supporters.<sup>1621</sup> Opposition to these core supporters can be stamped out through

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<sup>1615</sup> *ibid*, 24.

<sup>1616</sup> Bennett, 'The Mau Mau Emergency as Part of the British Army's Post-War Counter-Insurgency Experience', 153.

<sup>1617</sup> Branch, 'The Enemy Within', 300.

<sup>1618</sup> *ibid*, 302.

<sup>1619</sup> Bennett, *Fighting the Mau Mau*, 264.

<sup>1620</sup> *ibid*, and Mumford, *The Counterinsurgency Myth*, 63.

<sup>1621</sup> Galula, *Counterinsurgency Warfare*, 71.



considerable levels of disproportionate and indiscriminate violence. The Kenyan emergency puts into doubt the idea that a ‘soft’ approach to counterinsurgency can bring success.<sup>1622</sup>

However, we must put this success into context. As already noted, the British faced a limited and isolated insurgency in Kenya. Porch’s work indicates that in conflicts where “insurgents may be too isolated politically, ethnically, religiously, or geographically, their message too unpopular or methods too brutal to swell and sustain support for a particular political, social, economic, or religious agenda”, such as in Kenya, “the counterinsurgent can simply pick a side in a civil war, or roll up an insurgency’s infrastructure, incarcerate its support base, decapitate its leadership, and destroy its economy to prevail”.<sup>1623</sup> The British did not face an insurgency like the Americans faced in Vietnam, where the NLF controlled swathes of the countryside with a logistical bloodline through the Ho Chi Minh Trail, or the French in Algeria, where the FLN obtained international political and logistical support. As Mumford wrote, in Kenya “it was an annihilation waiting to happen. At worst, it reveals a disproportionate and indiscriminate level of violence undertaken by the counter-insurgent forces who wantonly eliminated and inferior combatant with little adherence to notions of minimum force”.<sup>1624</sup> Therefore, perhaps in such limited conflicts, there may be little correlation between maintaining support and ethical conduct.

This leads to an important finding for contemporary conflicts. Kenya was an isolated counterinsurgency campaign. In contrast, Algerian and Vietnam were significantly internationalised. Algeria, for example, was debated numerous times at the United Nations and the Vietnam War was permeated by media coverage and reports. In Kenya, Britain was able to minimise the international coverage and response to the Emergency, and its conduct.

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<sup>1622</sup> Bennett, *Fighting to Mau Mau*, 268.

<sup>1623</sup> Porch, *Counterinsurgency*, 320.

<sup>1624</sup> Mumford, *The Counterinsurgency Myth*, 70.

Images of barbarism and communism kept countries like the United States at a distance.<sup>1625</sup>

There was a refusal to internationalise the emergency with discussions at the United Nations.<sup>1626</sup> In modern conflicts, where the ‘population’ extends beyond borders or counterinsurgents may intervene in other countries, the role of the ethical dimension may be significantly more important.<sup>1627</sup> If the counterinsurgent can exclude the outside world from actions conducted by counterinsurgents, then perhaps unethical conduct may be less likely to influence support. However, in an ever connected world and the rise of social media, is this a likely proposition for a Western counterinsurgent? During the Arab Spring in 2011, social media played a key role in communicating abuses and facilitating uprisings internationally.<sup>1628</sup> Therefore, while the Kenyan Emergency demonstrates that unethical force *can* bring about success, this lesson must be understood in context. It may not be as easy for the counterinsurgent of the twenty-first century to conduct such an isolated campaign.

There are also doubts about the longevity of ‘success’ brought about by coercive COIN. The case study appears to correlate with Galula’s argument that a policy of pure force brings about a ‘precarious’ return to the status quo, rather than a lasting peace.<sup>1629</sup> Harsh and brutal measures carried out by the British were effective at enforcing isolation between the insurgents and the population. However, the French Army had not crushed the desire of independence. Loyalism grew because many saw supporting the British as the best means to independence.<sup>1630</sup> By the end of the 1950s, the apparent peace enforced through coercion was

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<sup>1625</sup> A.S. Cleary, ‘The Myth of Mau Mau in its International Context’, *African Affairs*, 89, 355 (1990), 227-245: 244.

<sup>1626</sup> *ibid*, 245.

<sup>1627</sup> Further research into contemporary conflicts is required to answer this hypothesis, and currently lies outside the scope of this thesis.

<sup>1628</sup> N. AlSayyad & M. Guvenc, ‘Virtual Uprisings: On the Interaction of New Social Media, Traditional Media Coverage and Urban Space during the ‘Arab Spring’’, *Urban Studies*, 52, 11 (2015), 2018-2034: 2024-2025.

<sup>1629</sup> Galula, *Counterinsurgency Warfare*, 72.

<sup>1630</sup> Branch, ‘The Enemy Within’, 302.

beginning to succumb to an increase in violence. A memorandum from the Secretary of State for the Colonies in March 1959 explains that for several months the security situation was deteriorating to a point when “serious violence might occur at any time”.<sup>1631</sup> The report explains that there had been an increase in incidents which were part of an organised threat to law and order, which were similar to those faced before the insurgency.<sup>1632</sup> By 1960, Britain was concerned that it would eventually face “Mau Mau round two”.<sup>1633</sup> The Kenyan Emergency had already cost the British £55 million and potential further unrest in the country made Kenya more of a liability than an asset.<sup>1634</sup> Therefore, although the Kenyan Emergency may challenge the correlation between ethics and counterinsurgency support and success, we must question what success such methods may bring. As Porch commented, “Even when they are achieved, military victories in small wars seldom come at an acceptable political, diplomatic, legal, moral, and financial cost”.<sup>1635</sup>

Like the Vietnam War and the Algerian war, unethical conduct in Malaya coincided with an inability of the counterinsurgent to enhance their support base. At the outset of the conflict, the British enjoyed support from the Malay population. By the end of the counter-terror period the British continued to receive support from the Malay population.<sup>1636</sup> However, it had failed to win the support of the Chinese population, the true centre of gravity. A report indicates that there was some support for the British, but the lack of security meant that the Chinese supporters could not emerge.<sup>1637</sup> However, this support base was minimal. The younger Chinese population was more likely to be swayed by the communist appeal, and the

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<sup>1631</sup> A. Lennox-Boyd, *Security Measures in Kenya, Memorandum by the Secretary of State for the Colonies, 4 March 1959*. C (59) 42. Available online:

<https://discovery.nationalarchives.gov.uk/details/r/D7658866> [Accessed 02/03/2022].

<sup>1632</sup> *ibid.*

<sup>1633</sup> Porch, *Counterinsurgency*, 264.

<sup>1634</sup> Anderson, *Histories of the Hanged*, 329.

<sup>1635</sup> Porch, *Counterinsurgency*, 327.

<sup>1636</sup> A. Lennox-Boyd, *Malaya: Review of the Situation, 6<sup>th</sup> April 1955*, 19.

<sup>1637</sup> *ibid.*, 21.

government were concerned about this becoming stronger.<sup>1638</sup> The evidence indicates, however, that the “great mass” of the Chinese population were sitting on the fence and were not supportive of either side.<sup>1639</sup>

The British failure to win the support of the population correlated with the use of indiscriminate and disproportionate force. During the ‘Counter-Terror period’ Britain sought to obtain the support of the population through control and intimidation, but these efforts had failed.<sup>1640</sup> Punitive measures, including the destruction of villages, were challenged on humanitarian grounds and did little to win the support of the population.<sup>1641</sup> The ‘heartache’ caused by the disproportionate application of force, such as the destruction of entire villages, resulted in many of the Chinese population flocking to the MCP.<sup>1642</sup> A report from 1951 on the situation in Malaya notes that the insurgents hold on Malaya was stronger than it ever had been.<sup>1643</sup> The report notes that after three years of war, the insurgency was far from broken due to the inability to win the support of the Chinese population.<sup>1644</sup> The report suggests that efforts need to be tailored so that the Chinese population are not “alienated by unnecessary harshness”.<sup>1645</sup> Indicating that even in 1951, the government was aware of the strategic importance of proportionality. However, even by the end of 1954 the British had not won the support of the population, and most of the Chinese were playing both sides.<sup>1646</sup> By 1955, the British had not convinced the Chinese population in both their cause and their ability to achieve it.<sup>1647</sup> An inability to win the support of the population correlates with the ethical

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<sup>1638</sup> *ibid.*

<sup>1639</sup> *ibid.*

<sup>1640</sup> Dixon, ‘Hearts and Minds’? British Counter-Insurgency from Malaya to Iraq’, 369.

<sup>1641</sup> Porch, *Counterinsurgency*, 253; Stubbs, *Hearts and Minds in Guerrilla Warfare*, 73;

<sup>1642</sup> Hack, ‘Everyone lived in fear’, 682.

<sup>1643</sup> Lyttleton, *The Situation in Malaya, 20<sup>th</sup> November 1951*, 106.

<sup>1644</sup> *ibid.*, 108.

<sup>1645</sup> *ibid.*, 109.

<sup>1646</sup> Lennox-Boyd, *Malaya: Review of the Situation*, 23.

<sup>1647</sup> *ibid.*, 22.

conduct in Malaya, as it did with Algeria and Vietnam. Indicating that unethical conduct may correlate with an inability to win the support of the population.

### Does Fighting Ethically improve Support for the Counterinsurgent?

Generally, the evidence indicates that ethical COIN is effective COIN, in terms of increasing support for the counterinsurgent. In all case studies, when ethical principles were met, this correlated with an increase in the support for the counterinsurgent. This correlation is most significant when examining pacification efforts, such as resettlement.

Resettlement programmes are conducted when it is not possible to secure the selected area, with the aim of permanently dislocating the insurgency from their support base. For example, in rural campaigns it may not be physically possible to secure several small villages or numerous huts where they stand, and therefore to control the population the counterinsurgent may need to concentrate the population into defensible areas, where they can be held. Forced resettlement has ethical issues, as it often requires the use of coercion or force against non-combatants, testing the discrimination principle. This approach to counterinsurgency raises important ethical questions about how they are treating the population.<sup>1648</sup>

These ethical questions matter strategically too. There appears to be a correlation between proportionality in resettlement and the ability to win and maintain the support of the population. In particular, the four case studies in this work indicate that the level of force used when moving the population and the degree of suffering caused by resettlement, correlate with the level of support for the counterinsurgent. The Briggs plan, for example, was conducted with a good degree of proportionality. Although the population was forcibly moved at gunpoint, and villages were destroyed,<sup>1649</sup> the suffering of the population in the

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<sup>1648</sup> Levine, *Care and Counterinsurgency*, 141.

<sup>1649</sup> Newsinger, *British Counterinsurgency*, 50.

‘new villages’ was minimal compared to the other campaigns. Of course, these villages were tools of government control and coercion. However, coercive methods were applied proportionately in terms of the situation at hand. The ‘stick’ of coercion was balanced by the ‘carrot’ of incentives. Indicating that conducting resettlement in counterinsurgency campaigns proportionally may be likely to secure the population.

If we contrast forced resettlement in Malaya against forced resettlement in Algeria, then this line of argument is made clear. In Algeria forced resettlement was a predominantly punitive measure. The population were moved with much greater force than in Malaya. Their homes were napalmed, and those who did not leave were executed or died in bombings.<sup>1650</sup> Those that did move did not see much benefit. The suffering in the *centres de Regroupement* was severe. Thousands of Algerians died due to disease, and malnutrition plagued the camps; because the French military *deliberately* stopped the delivery of food to coerce the population into supporting the French.<sup>1651</sup> In addition to this, security forces also tortured and assaulted many inhabitants. Tactically and operationally *Regroupement* was effective, it physically cut off the insurgents from the population, and this hindered the FLN’s ability to continue the insurgency. However, the French argued that *Regroupement* was intended to also win over the support of the Algerian people.<sup>1652</sup> The evidence suggests that the French failed to achieve this aim. The suffering in the camps, at the hands of the French, resulted in the further alienation of the Algerian population. The government in France came under greater scrutiny in mainland France and internationally. Support for the war in France was diminished, in part, because of the disproportionate methods it had employed in Algeria. Its

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<sup>1650</sup> Klose, *Human Rights in the Shadow of Colonial Violence*, 170.

<sup>1651</sup> Brower, ‘Partisans and Populations: The Place of Civilians in War, Algeria’, 395, and Klose, *Human Rights in the Shadow of Colonial Violence*, 171.

<sup>1652</sup> Paret, *French Revolutionary Warfare from Indochina to Algeria*, 44.

reputation was tarnished.<sup>1653</sup> Thus, we find that forced resettlement may be more effective at winning the support of the population if it is conducted proportionally.

The Vietnam war provides a similar lesson to Algeria. The destruction of the Vietnamese countryside, and the failure to effectively protect and enhance the lives of those who had been made homeless, damaged the support for the US and increased support for the insurgents.<sup>1654</sup> It appears in this case that it is not sufficient to merely round up or remove the population from the area by force. This force must be accompanied by some benefit or improvement to lives of the population to win over their support. Where improvements were implemented, such as during the Combined Action Program, where force was limited and security for the population increased, support for the counterinsurgents increased.<sup>1655</sup> Support in this case can be shown by the increase in actionable human intelligence provided to the marines by the population, allowing for further restrained actions against the insurgents.<sup>1656</sup> Although CAP was implemented in a limited manner, and therefore may not reflect the war as a whole, it does demonstrate a possible correlation between meeting *in bello* and support for the counterinsurgent.

Therefore, in answer to RQ2, the counterinsurgent cases in this thesis have shown that *in bello* violations have generally damaged the support for the counterinsurgent. The degree to which the support is affected, depends predominantly on the degree to which they are violated. This is both in terms of how long they are violated for, and how seriously they are violated. Importantly, as shown with Kenya, the increase in support is not dependent on ethical conduct. A counterinsurgent may be able to increase their support base through coercion, however, this was not achieved in Algeria or Vietnam, and questions arise about the

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<sup>1653</sup> Wall, *France, the United States, and the Algerian War*, 161.

<sup>1654</sup> Hall, *The Vietnam War*, 43.

<sup>1655</sup> Southard, *Defend and Befriend*, 124.

<sup>1656</sup> *ibid.*

longevity of the peace. In addition to this, restraint has generally shown to be beneficial to the counterinsurgent, and when restraint has not been used, such as when massacres have taken place, this has played into the hands of the insurgents. Therefore, the evidence indicates there is a positive correlation between ethical conduct and effectiveness in COIN.



RQ3: To what extent has support for counterinsurgents who satisfy the *ad bellum* principles been affected by *in bello* violations, compared to counterinsurgents who lack *ad bellum* justness?

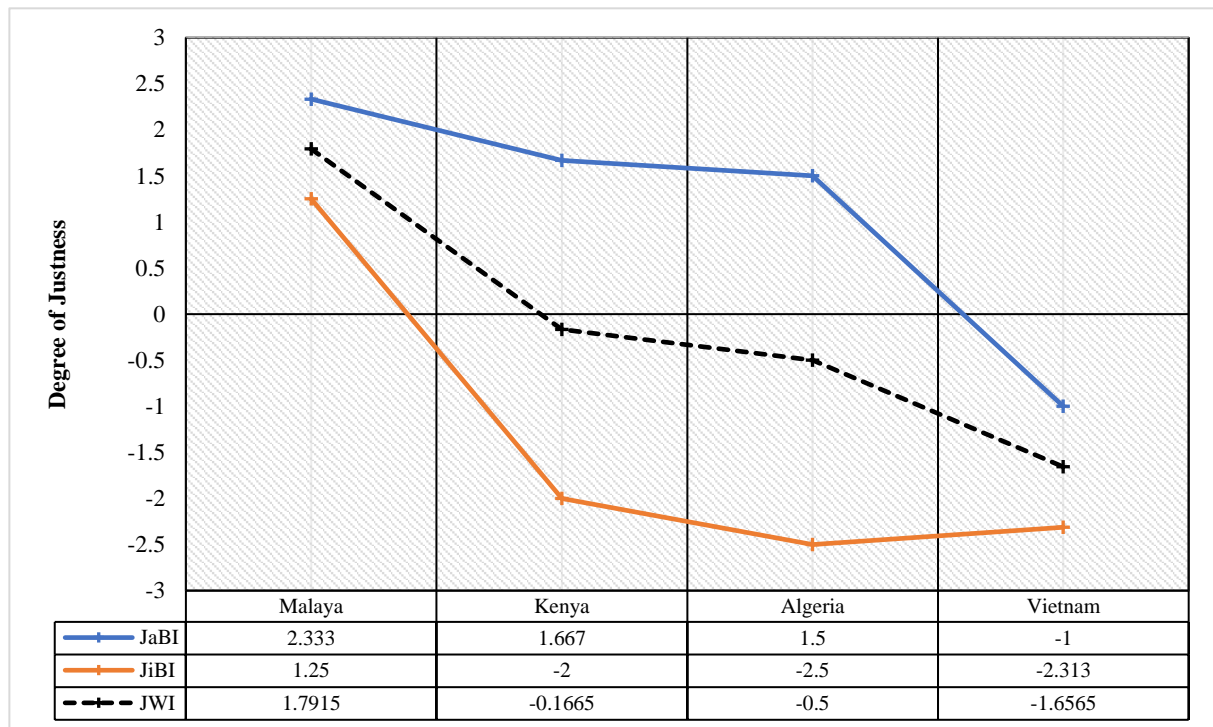
This work has so far demonstrated that meeting the *ad bellum* principles of Just Cause, Legitimate Authority and Public Declaration may correlate with winning support for the counterinsurgent. In addition to this, RQ2 demonstrated that *in bello* violations have shown generally to turn the population against the counterinsurgent. In some cases, the evidence indicates a positive relationship between ethical conduct and the ability to increase support. However, these two categories of the Just War tradition have been examined independently. Current ethical literature argues that *in bello* judgements are made in line with *ad bellum* judgements, and they are not separate from one another.<sup>1657</sup> If this is the case, then it is expected that the strategic-ethical relationship presented in answer to RQ1 and RQ2 may be linked with one another. Therefore, RQ3 asks whether there is a difference in the degree to which *in bello* violations affect the support of the counterinsurgent who meets the *ad bellum* principles compared to the counterinsurgent who does not.

Examination of the four case studies demonstrates that regardless of *ad bellum* score, all the counterinsurgents examined in this work were affected by *in bello* violations. Therefore, there is little correlation between the impact *in bello* violations have based on the degree to which the counterinsurgent met the *ad bellum* principles. Instead, it is the severity of the *in bello* violations which affects the support of the counterinsurgent the most. One of the key findings of this work is that severe or continuous *in bello* violations can affect judgements of the conflict as a whole. The use of torture or the destruction of swathes of a country may lead the population to question the righteousness of one's cause. Therefore, *in bello* violations appear

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<sup>1657</sup> McMahan, 'Morality, Law, and the Relation Between *Jus ad Bellum* and *Jus in Bello*', 113, and Orend, *The Morality of War*, 115.

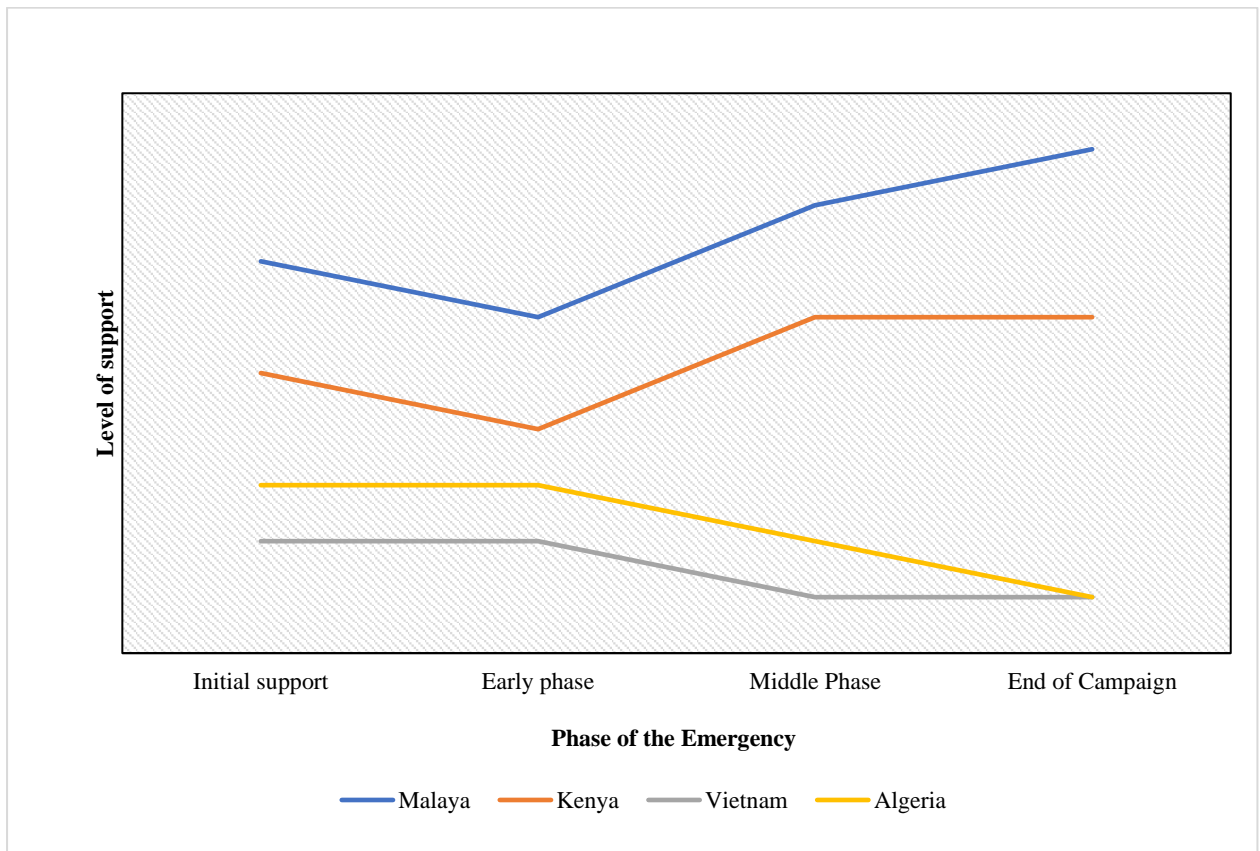
to affect *ad bellum* judgements on the war, which may have strategic consequence. Another key finding of this work is that *ad bellum* principles, particularly legitimate authority, may affect the conduct of the conflict and there may increase the likelihood of *in bello* violations. The following section will examine these key points further.



(Fig.12: The Jus ad Bellum Index, Jus in Bello Index, and the Just War Index scores for each case study.)

Fig. 12 shows the degree to which the JaBI differs to the JiBI scores. The conduct of the conflict was more unjust than the resort to force in all of the cases. The counterinsurgents in the Malayan Emergency and the Vietnam War had a small range between the two just war categories. Overall, the British fought a just war in a just manner and the Americans fought an unjust war, unjustly. Comparatively, the Kenya Emergency and the Algerian War both have a considerable range between the JaBI and the JiBI scores. The counterinsurgents in both conflicts were justified to resort to force, but they conducted their just conflicts unjustly. If we compare the findings of Fig.12 to the overall trend in support for the counterinsurgent,

presented in *Fig.13*, then we can begin to examine this relationship between the moral equality of combatants and the ability to win the support of the population.



(*Fig. 13: The General trend in support for the counterinsurgent in each COIN campaign, across the different phases of the conflict.*)

The assumption made by RQ3 is that the counterinsurgent who meets the *ad bellum* principles may be less affected by *in bello* violations than the counterinsurgent who does not have a just resort to force. If there was such a relationship it would be expected that the support of the counterinsurgent with a higher JaBI score would be less affected by *in bello* violations than the counterinsurgent with a lower JaBI score. For instance, the support for the

French in Algeria would be affected to a lesser degree than the United States in Vietnam.<sup>1658</sup>

However, this is not the case.

As shown in *Fig.13*, all counterinsurgents at some point damaged their support level during the conflict. Often, the decrease in support coincided with periods where the counterinsurgent conducted *in bello* violations, regardless of their *ad bellum* score. We can even see this trend during the Malayan Emergency, where the conflict was generally fought justly and the resort to force was justified. However, during the early phase of the Malayan Emergency the use of indiscriminate methods such as collective punishments and disproportionate methods such as torture of prisoners, bolstered support for the MCP. Therefore, although there may be some strategic advantage in having a moral advantage to one's resort to force,<sup>1659</sup> this will not prevent the counterinsurgent from being affected by *in bello* violations.<sup>1660</sup>

Although the French largely met the principles of *ad bellum*, the evidence indicates that serious *in bello* violations damaged support for the counterinsurgent, alienated the population, and bolstered support for the insurgency. Following the Philippeville massacre, moderate Algerian nationalists who had openly been opposed to the conflict turned to militancy. Even the *in bello* violations conducted during Militarily successful operations, like the Challe Offensive and *Regroupement*, damaged the support for the French in Algeria, which ultimately led to the French losing the war.<sup>1661</sup> As reports of violence against the population and the systematic use of torture at the hands of French security forces reached the metropole and internationally, the international support for French Algeria was also considerably damaged. Even though the ALN was defeated, the French failed to maintain

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<sup>1658</sup> As already noted, and can be seen in *Fig.12*, the Kenya Emergency and the Malayan Emergency are both cases where a counterinsurgent had a just resort to force and failed to meet *in bello* and the Vietnam War is a case where the counterinsurgent failed to meet both *ad bellum* and *in bello*.

<sup>1659</sup> See: answer to RQ1.

<sup>1660</sup> See: answer to RQ2.

<sup>1661</sup> Wall, *France, The United States, and the Algerian War*, 68.

enough support, in Algeria, France and internationally, to hold on to French Algeria.

Therefore, the French in Algeria suffered *in bello* violations to a similar manner to the Americans during the Vietnam War.

As shown in *Fig. 13*, we see a similar pattern in the support of the United States in Vietnam as the French in Algeria. Other than in small scale operations like the Combined Action Programme, the United States generally failed to maintain any support in South Vietnam. In part this inability to maintain or increase their support correlated with the use of indiscriminate and disproportionate firepower. A focus on body counts and the creation of a major refugee crisis did little to win the support of the population. By 1968 the NLF believed that it had enough strength to launch the Tet Offensive. As established earlier in this work, one measure of support for the insurgency is the nature of the insurgent violence. By 1968 the NLF had shown that it had enough support and logistics to launch a considerable offensive; even if ill-fated. Even though the NLF was predominantly crushed by the US and ARVN counter offensive, the United States still failed to adequately win the support of the population, and importantly the war became unpopular at home as the war dragged on and stories of atrocities permeated the US media. We therefore see a similar pattern in the support for the counterinsurgent in both the Vietnam War and the Algerian War. This leads to the belief that there is little correlation between meeting *ad bellum* principles and the impact *in bello* violations have on the support of the counterinsurgent.

The Kenyan Emergency on the other hand does differ from the findings of the Vietnam War and the Algerian War. As already established within this chapter, the British in Kenya were able to enhance their support in Kenya. The British in Kenya largely met the principles of *jus ad bellum*, yet they moderately failed to meet the principles of *jus in bello*. It could be argued then, that the Kenyan Emergency indicates that the assumptions made in RQ3 are sound.

However, these arguments would be on shaky foundations. We have already established that the increase in support in Kenya was not necessarily ‘popular’ support, but rather it was the acquiescence of a segment of the Kenya population, who had been subjected to a considerable ‘smack of government’ from the British. Also, the Kenyan insurgency was on a much smaller scale than the French faced in Algeria and the Americans in Vietnam.

Likewise, there was a much smaller media presence in the country, which helped to keep the conflict isolated. There was little international attention to this colonial conflict. Therefore, the counterinsurgents almost had a comparative free hand in Kenya compared to the French and the Americans.<sup>1662</sup> The increase in support in Kenya can be seen as a pragmatic choice by a population threatened by a government. By 1954, with the Mau Mau all but destroyed, loyalism seemed to be the obvious choice for many of the Kikuyu.

Nonetheless, *in bello* violations did affect the support of key loyalist supporters, who arguably did believe in the British cause in Kenya. Notably, the indiscriminate violence of Operation Anvil, caused many of the loyal Christian Kikuyu community to become critical of the counterinsurgents. Thus, in answer the RQ3, it cannot be claimed with significant certainty that there is indeed a difference in the impact *in bello* violations has on the support of the population for the counterinsurgent who meets the *ad bellum* principles, compared to the counterinsurgent who does not.

Rather than *ad bellum* decisions influencing the affect *in bello* violations, the evidence indicates that significant *in bello* violations can alter the judgements we make on the war as a whole and this may indicate a strategic-ethical relationship. At the outset of the conflict, the French perceived the war in Algeria to be vital to the success of France, and its loss would be

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<sup>1662</sup> This is particularly pertinent to modern campaigns, where the rise of media, including social media, permeates most conflicts, allowing for reports of *in bello* abuses to be made public and used as insurgent propaganda.

a national disaster.<sup>1663</sup> However, by 1958 the French government, under De Gaulle, sought to give Algeria the option of peace, to end the conflict, even if this meant giving independence to Algeria.<sup>1664</sup> Although France was far from a minimally just actor in Algeria at the outset of the conflict, it did initially have international recognition as the legitimate authority. However, as the war dragged on, the French faced increased opposition to its authority in Algeria. By 1958 “French public opinion had long since sickened of the war; France’s intellectuals had rallied under the banner of dissidence, and it was clear that the torture and other abuses routinely tolerated in order to vanquish the terror in Algeria were unacceptable at home”.<sup>1665</sup>

Again, we see a similar pattern happening in Kenya. Although the British were able to militarily defeat the Mau Mau, their methods in doing so had tarnished the British reputation. Following Operation Anvil, the Mau Mau became unable to maintain its contact with the passive wing and withered. However, the manner in which this was conducted damaged the reputation of the British, their war and their rule in Kenya. Porch argues that operational successes in Kenya led to “strategic defeat, because the “brutality of its COIN tactics carried out with a deliberate disregard, even flaunting, of legal constraints, mocked the legitimacy of Britain’s claim to rule in Kenya”.<sup>1666</sup> In Vietnam, the disproportionate use of firepower on a rural and poor population did little to bolster the cause of the war; to save the people of South Vietnam from the horrors of communism. Using napalm on villages, for example, does little to persuade the people that one’s cause is righteous.<sup>1667</sup> Gradually the increase in American opposition to the war grew, coinciding with both the inability to win the conflict and the

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<sup>1663</sup> See *Ad Bellum* Proportionality section of the Algerian War chapter.

<sup>1664</sup> Evans, *Algeria: France’s Undeclared War*, 261-267.

<sup>1665</sup> Wall, *France, The United States and the Algerian War*, 265.

<sup>1666</sup> Porch, *Counterinsurgency*, 264.

<sup>1667</sup> Hess, *Vietnam: Explaining America’s Lost War*, 5.

brutality of the US conduct.<sup>1668</sup> Therefore, the evidence suggests that *in bello* violations can affect *ad bellum* judgements such as proportionality, or the justness of one's cause, which may affect support for the counterinsurgent both locally and internationally.

This may be a crucial finding on strategic ethics for modern campaigns as the counterinsurgent must be able to mobilise and maintain the support of the home population, the host country, the regional and global audiences, other actors, and the populations of allied and neutral countries.<sup>1669</sup>

#### A note on relationship between *in bello* and *ad bellum*

The above section raises a key insight into the relationship between *in bello* and *ad bellum* judgements, which must be made clear. Earlier in this work, it was noted that there is disagreement in the literature on the judgements made in war. Walzer separates the two sets of rules established by the Just War Tradition, arguing that soldiers should be judged not on the nature of the war in which they fight, but instead *only* on their conduct.<sup>1670</sup> All soldiers, according to Walzer, have moral equality with one another. Others move away from strict moral equality, and instead argue that we reserve the moral right to criticise soldiers for taking part in an unjust war.<sup>1671</sup> In coming to an answer of RQ3, the case studies in this work indicate that judgements of *in bello* are not made independently of *ad bellum* considerations.

Importantly, the relationship between *ad bellum* and *in bello* should not be considered in a linear fashion. It is not the case that once a conflict has commenced, then *ad bellum* judgements are no longer to be made. Instead, questions about the justification for the war as a whole do not stop once the actual fighting of the war has commenced. Instead, such judgements should be made throughout. As shown earlier in this chapter, *in bello* violations

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<sup>1668</sup> Johnson & Tierney, *Failing to Win*, 132.

<sup>1669</sup> Kilcullen, 'Counter-insurgency *Redux*', 121.

<sup>1670</sup> Walzer, *Just and Unjust Wars*, 34-40.

<sup>1671</sup> Orend, *Morality of War*, 115.



can damage and affect *ad bellum* judgements. For example, destroying swathes of countryside, even if the intention is to save the rural population, can cast doubt on the war as a whole. Importantly, *ad bellum* concerns do not end when the war begins. *Ad bellum* provides an end goal, the just cause. Actions during the conflict must move towards that aim, and therefore *ad bellum* must be referred to throughout.

However, *ad bellum* concerns can change. For example, at the outset of the Algerian War France was seen internationally as legitimate in Algeria. But, through the conduct of the conflict, France damaged its legitimacy and questions around the justice of the war as a whole arose. By the end the 1950s, France had little claim that it was defending its ‘own’ country, as it was clear that international opinion had declared that no longer Algeria was France. Debates at the UN and the turning away of key allies, such as the US, had shown that the brutality of the conduct cast doubt on the legitimacy of France. A state that becomes illegitimate will ultimately degrade the nature of its cause. Questions of proportionality, and the importance of the cause, in such a case would shift towards the costs outweighing the benefits. By the 1950s, maintaining Algeria became too costly, therefore indicating that *in bello* issues can affect *ad bellum* decision. Therefore, when examining strategic ethics, it must be understood that there is no clear line drawn when a conflict begins. The justifications for the war must continue to be present.

This lesson is beginning to get traction in the literature. Lucas’ work, for example, highlights that in contemporary conflicts *in bello* affects *ad bellum*. Issues in the former can affect judgements of the war as a whole. For Lucas the distinction between the two categories have become increasingly more “hideously blurred” to a point where they are now inextricably linked.<sup>1672</sup> The conduct of a conflict constitutes a “*direct and immediate reflection of the*

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<sup>1672</sup> Lucas, *Ethics and Military Strategy in the 21<sup>st</sup> Century*, 39.

*justification of the nation's cause, and a reflection of the nation's own legitimacy and honour*".<sup>1673</sup> This work demonstrates that significant and continuous violations of *in bello* affect *ad bellum* concerns throughout the conflict. This is a key finding of the work, which is at the forefront of ethical-strategic literature. If *Ad bellum* concerns affect strategy, as shown in answer to RQ1, then it needs to be understood that *ad bellum* concerns do not end when the fighting begins. Understanding the relationship between *in bello* and *ad bellum* in this way is strategically important. This relationship must be understood by current and future strategic thinkers and practitioners. If one wishes to understand the relationship between the ethical dimension of strategy and success in COIN, then understanding the relationship between *ad bellum* and *in bello* is important.

Academically, the above point is important. The JWI has shown to be a useful tool to demonstrate the level of justice of conflicts. However, this thesis examines *ad bellum* at the outset of hostilities. The above discussion allows for further development of the JWI and its methodological uses. Future pieces which conduct similar research will benefit from making *ad bellum* judgements at different phases of the conflict. An index of *Jus ad Bellum* principles presented at the outset, middle, and end of the conflict, for example, would be useful to track whether or not the cause has remained just throughout. Future research into strategic ethics, utilising such a method, will provide greater insight into the findings of this thesis.

#### *Ad bellum* affecting *in bello* violations

The degree to which one is likely to violate *in bello* principles, may depend on the war in which they are fighting. COIN doctrine states that illegitimate counterinsurgents may require

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<sup>1673</sup> *ibid.* Emphasis original.

more force to convince the population to their cause.<sup>1674</sup> Of the four case studies examined in this work, only the Malayan Emergency met the principle of legitimate authority, and it was also the only one to meet the principles of *in bello*. The British were supported at the outset of the conflict by the majority of the Malayan population, who made up almost half of the population. With a greater degree of support at the outset the British began their operations with a benefit not afforded to the other counterinsurgents.

The counterinsurgents Algeria and Vietnam began their COIN efforts from a position of comparative weakness to the British in Malaya. In these campaigns the counterinsurgents had to try to win the support of the whole population, whereas in Malaya the British already enjoyed the support of the majority. With the population in Malaya being more supportive of the government, the British methods did not need to be as severe, as it faced a relatively limited insurgency. This observation coincides with Galula's work, which argues that the likelihood that an insurgency can increase depends on the strengths and weaknesses of the political regime.<sup>1675</sup> Factors like the national consensus, can have an influence on the ability of the insurgency to grow. The greater the counterinsurgent is supported at the outset may mean that the counterinsurgent is less likely to require coercive measures across a wide area, which may result in *in bello* violations and damage the support of the counterinsurgent. In Malaya, for example, COIN operations were limited to operations against the Chinese population, a significant difference than in the other case studies where most of the population were caught up in the counterinsurgent operations. This leads to the assumption that there may be some strategic advantage to having an *ad bellum* moral advantage. The evidence from this work suggests that the counterinsurgent who meets the *ad bellum* of

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<sup>1674</sup> Department of the Army and USMC, *FM 3-24/MCWP 3-33.5, Insurgencies and Countering Insurgency*, 1-29.

<sup>1675</sup> Galula, *Counterinsurgency Warfare*, 17.

legitimate authority may require less force, and therefore may be less likely to violate *in bello* principles, which benefits their support.<sup>1676</sup>

There is an important caveat to this observation, however. This principle is not self-fulfilling, the counterinsurgent must deliberately decide upon the nature of war in which they fight. This can be determined often by their culture. For example, the American war in Vietnam was fought with a preference for firepower, because that was part of the American strategic culture.<sup>1677</sup> In addition to this, often the COIN approaches were haphazardly implemented, and with kneejerk reactions. For example, even though the British were seen as legitimate at the outset of the Malayan Emergency, the British failed to win the support of the Chinese population, until significant measures were implemented under the Briggs plan. Therefore, *ad bellum* adherence is not a sufficient defence against strategic misbehaviour.<sup>1678</sup> Strategy is difficult and often counterinsurgents will not succeed. It is unlikely that *ad bellum* can protect the counterinsurgent from poor strategy regardless of the degree of justice.

However, the evidence indicates that a counterinsurgent's strategy may be influenced by the degree to which it meets the requirements of a minimally just actor. Counterinsurgency, of course, mirrors the state.<sup>1679</sup> For example, the British ruled Kenya for decades with little regard for the rights of the Kikuyu majority and maintained its authority through "subjugation and belittlement".<sup>1680</sup> The Emergency was seen as a civilising process, in which the native Kenyans were to be taught a lesson by their European masters. The history of failing to satisfy the rights of the population, helps to explain why the British COIN efforts in Kenya was conducted "with an iron fist".<sup>1681</sup> Again, we find this pattern in Algeria. With a history of

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<sup>1676</sup> If we are to take the answer to RQ2 as correct.

<sup>1677</sup> See: Nagl, *Learning to Eat Soup with a Knife*, and Krepevinich, *The Army and Vietnam*.

<sup>1678</sup> Gray, *Modern Strategy*, 74.

<sup>1679</sup> Kilcullen, *Counterinsurgency*, 10.

<sup>1680</sup> Mumford, *The Counterinsurgency Myth*, 55.

<sup>1681</sup> *Ibid.*

failing to respect the rights of the Algerian population, scant attention was paid to the Algerian population when conducting operations. Therefore, the evidence suggests that a counterinsurgent who fails to fulfil the requirements of a minimally just actor, may be more likely to conduct their operations with a greater level of brutality. *If* the findings of RQ2 are correct, then this could have considerable strategic implications.

Thus, the answer to RQ3 is that support for a counterinsurgent can be affected by *in bello* violations regardless of their resort to force. All the counterinsurgents in this work were affected by *in bello* violations. However, the degree to which support is affected by *in bello* violations does appear to relate to severity of the *in bello* violations. If these violations are severe enough, then the evidence indicates that this may correlate with a lack of support for the war as a whole and affect *ad bellum* judgements. For instance, it is hard to argue a counterinsurgent is trying to protect the population from an unjust insurgent, when it napalms the places where the population lives. Further to this, there is a correlation between the likelihood that a counterinsurgent will resort to unethical conduct during a campaign and the degree to which they met the principles of *ad bellum*. Therefore, there does appear to be some strategic-ethical relationship between the two criteria of the just war tradition and the support for the counterinsurgent. The examination of further case studies, which have similar JaBI and JiBI scores, would allow for further insight into this relationship. However, this work laid the foundation for this further research into strategic ethics.

### **Concluding remarks**

This work set out to close some of the current gaps in the knowledge on strategic ethics and counterinsurgency. It examined the correlation between meeting the principles of the Just War Tradition and the ability of the counterinsurgent to succeed in counterinsurgency campaigns; understood as the ability to not only destroy the insurgent forces and their infrastructure, but to maintain the permanent isolation of the insurgent from the population through their support. Because of this, the work has focused predominantly on the ability of the counterinsurgent to win the support of the population.

Through examination of the four case studies in this work, there does appear to be a correlation between ethics and the support in favour of the counterinsurgent. A key finding is that it is not sufficient to merely meet the principle of a just cause. Although this may give something for the population to support and cling on to, the counterinsurgent must demonstrate the ability to achieve the just cause. Ultimately, the population is unlikely to support a losing cause regardless of the justice of the cause. In addition to this, there appears to be a positive correlation between the degree to which a counterinsurgent meets the criteria of a minimally just government and the difficulty they face in obtaining the support of the population.

Moreover, the four case studies present a relationship between ethical conduct and the impact this has on support for the counterinsurgent. Generally, in all case studies unethical conduct coincided with the decrease in support for the counterinsurgent. The continuous and systematic abuse of the population and use of indiscriminate firepower in Algeria and Vietnam correlated with a continual decrease in support for the population. However, as shown by the Kenya case study, the counterinsurgent does not need to be ethical in order to

win the support of the population. The counterinsurgent can use unethical means to obtain the support of the population, albeit this may not be popular support. Nevertheless, the Kenya Emergency was more isolated than the Algerian and Vietnam cases, where international and support in the home countries played a larger role. Therefore, in a world with mass and social media, which permeates every level of society, it is likely that modern COIN campaigns may be affected in a similar manner to the US in Vietnam and the French in Algeria.

This work has also examined the relationship between the concept of moral equality and support for the counterinsurgent. It has sought to answer the question “is the support for the counterinsurgent who fights for an unjust war more likely to suffer from *in bello* violations?” The four case studies in this work do not indicate that the counterinsurgent who meets *ad bellum* is no more or less likely to suffer from *in bello* violations. Instead, what matters most is the degree to which the counterinsurgent violates the principles of discrimination and proportionality. However, the degree to which *in bello* violations may relate to the reasons one is fighting. For example, an illegitimate government rules through coercion, and may be more likely to use unethical means to win the support of the population which can adversely affect the support for the population. This thesis therefore shows that the often ignored dimension of ethics may have some strategic utility.

In coming to this conclusion this work bolsters the current literature on strategic ethics. It indicates that Gray’s work indicates that there is a strategic advantage to having a moral advantage,<sup>1682</sup> and it also indicates that it is often pragmatic, or strategic necessity<sup>1683</sup>, for counterinsurgents to approach counterinsurgency ethically. Further to this, it has also opened other avenues for further research.

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<sup>1682</sup> Gray, ‘Moral Advantage, Strategic Advantage?’.

<sup>1683</sup> Lonsdale & Kane, *Understanding Contemporary Strategy*, 71-74.

Importantly, this work has not argued that ethics are a cure-all for bad strategy, nor does it argue that ethics are the dominating dimension of strategy. No matter the amount of justice one has on their sides, there is no substitute for good strategy. One does not wish to go as far as Walzer in claiming that “justice turns out to be key to victory” in counterinsurgencies.<sup>1684</sup> However, this work has shown that there is an important relationship between strategic ethics and counterinsurgency. Examination of the four case studies has shown that ethics has *correlated* with the support for the counterinsurgent. In conflicts where the aim is to win the support of the population, then the way in which one fights, and the war that one fights, appears to have some strategic consequences. Further research may build upon the foundation laid by this work and convince the future counterinsurgent that they do not need to destroy the village to save it.

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<sup>1684</sup> Walzer, *Arguing about War*, 9.



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