

IN THE WAR ON TERROR, CAN THE USE OF DRONES BE CONSISTENT WITH JUST
WAR THEORY?

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ABSTRACT

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WAR THEORY?

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This paper will explore the use of drones in the war on terror and the extent to which this usage either does or does not meet the requirements set forth by Just War Theory (JWT). Initially, this paper will review the existing literature on JWT and terrorism within the just war tradition, providing an overview of the theory and the varying definitions of terrorism. The analytical section of the paper will deal with instances where the use of drones and definitions of terrorism both fit with and contradict the framework in question. The paper will achieve this analysis by first examining the usage of drones in specific instances with JWT and then by examining these same circumstances according to the treatment of terrorism within the theory. Finally, the paper will turn to the policy implications following from the research; what (if anything) needs to be amended about either JWT, or the use of drones in acts of international aggression, and the definitions of terrorism and its treatment in order to gain a cohesive and constant ethical framework for the practical use of drones, clarifying both how and on whom they should be used.

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“We judge the assassin by his victim, and when his victim is Hitler-like in character, we are likely to praise the assassin’s work, though we still do not call him a soldier.”¹

-Michael Walzer, *Just and Unjust Wars*

“Laws are silent when arms are raised.”²

-Cicero

Introduction

The attacks of September 11, 2001 forced a change in our society in ways that could not have been foreseen at the time. Over a decade later we are still coming to grips with the fundamental changes that have taken place in the way we interpret and respond to threats and moreover, the way that we apply heretofore unchanged guidelines regarding how wars are viewed and fought. The War on Terror is a product of this new era in which enemies are defined as those who not only commit terrorist acts but also those who provide both essential and non-essential support to them, those who harbor them (willingly or not), and those who share a name or home with them. The 2003 Iraq war was said to be a battle for the ‘hearts and minds’ of the people – a war of ideas, and the War on Terror is in much the same vein; the western world is engaged in a battle of ideologies wherein our very way of life is thought to be threatened. The challenges that the international community faces in fighting terrorism are not unlike challenges that they have faced before, rather what has changed is the landscape in which they are fought and the methods by which they are defeated.

American President, Barack Obama, has presided over a remarkable escalation in the use of Armed UAVs (Unmanned Aerial Vehicles) in the war on terror;³ indeed, “in the four years from 2004 to 2007, there were a total of 9 *Predator* strikes in Pakistan. In 2010 alone there were

¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), 199.

² Helen Frowe, *The Ethics of War and Peace: An Introduction* (New York: Routledge, 2011), 95.

³ Michael Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight,” *Rolling Stone*, April 16, 2012, accessed March 16, 2013, <http://www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416>

118 strikes.”⁴ The Obama administration has identified the major tactical advantages of a drone war, as opposed to a traditional war, and has used these to its benefit; drones enable a state to, “launch military strikes or order assassinations without putting a single boot on the ground – and without worrying about a public backlash over U.S. soldiers coming home in body bags.”⁵ Prior to the Obama administration, drones were used sparingly and in very specific circumstances. However, today two drone programs exist; one is led by the Department of Defense and is operated in a semi-public manner in states that the U.S. or NATO are currently involved in, meanwhile, the other is led by the CIA and primarily concerns the drone activities that occur within states with whom the U.S. is not currently at war.⁶ The latter program will be evaluated in this analysis largely owing the need that exists for a measure of accountability in the CIA’s drone war. The Drone program that is in use by the Department of Defense (DoD) is regulated by their obligation to follow the Laws of International Armed Conflict (LOIAC), the International Humanitarian Laws (IHL), and the Standard Operating Procedures (SOPs) specific to the DoD. The CIA is not governed by the same international protocols on the conduct of war and as such, this investigation will center on assessing the CIA’s drone war in terms of Just War Theory (JWT).

The current state of drone warfare in the War on Terror can be characterized as fairly regular strikes within the Federally Administered Tribal Areas (FATA) in Pakistan and on the Arabian Peninsula in Yemen. On an average day one can find a headline or two regarding the killing of several militants in the Arabian Peninsula. The bodies of such articles will not give

⁴ Chris Cole, “Drone Wars Briefing,” *Drone Wars UK* January 2012, accessed March 2, 2013, <http://dronewarsuk.wordpress.com/>, 14.

⁵ Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

⁶ Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

much information other than that the strike was successful and the number of dead as a result of the strike. Occasionally, as in an article from the Huffington Post on October 18, 2012, the alleged reason behind the strike will be specified in relative detail; “officials say the attacks followed tips of an imminent al-Qaida attack on the town...security officials said they believe the movement has a hit list of officials, and wants to paralyze the new government that came to power this year as a result of 2011’s popular uprising.”⁷ However, in other reports of strikes the reason for the attack is only vaguely alluded to; in a short write-up following a drone strike in the Arabian Peninsula on October 21, 2012, the Huffington Post reported that at least four militants were killed and that, “the U.S. considers the local al-Qaida branch the world’s most active.”⁸ However, the vague and sometimes speculative reporting that is available on the strikes in otherwise closed-off areas of the world does little to fill the knowledge gap; knowing that something happened is a far cry from knowing what happened. In short, the secrecy that the CIA’s drone and, moreover, targeted strike programs are shrouded in, has led to a great deal of confusion and speculation. Recent strikes have led the U.N. to publicly question the use of drones in such circumstances as well as calling for a legal framework to avoid such ambiguities in the future. The U.N. added that they were not the only body calling for clarification on the legality of drone usage but in fact, “the investigation emerged as a result of a request last June from China, Pakistan, and Russia.”⁹ U.N. Lawyer, Ben Emmerson, added that in his estimation the need for a legal framework was pressing because, “this form of warfare is here to stay, and it

⁷ Ahmed Al-Haj, “Yemen: Suspected Drone Strikes Kill 7 Militants, Officials Say,” *Huffington Post*, October 18, 2012, accessed March 12, 2013, http://www.huffingtonpost.com/2012/10/18/yemen-suspected-us-drone_n_1977511.html?utm_hp_ref=email_share

⁸ Ahmed Al-Haj, “Yemen Drone Strike: Officials Say U.S. Drone Airstrike Kills At Least 4 Suspected Militants,” *Huffington Post*, October 21, 2012, accessed March 12, 2013, http://www.huffingtonpost.com/2012/10/21/yemen-drone-strike-kills-suspected-militants_n_1998130.html?utm_hp_ref=email_share

⁹ Colum Lynch, “UN Launches Drone Investigation,” *Foreign Policy*, January 24, 2013, accessed January 30, 2013, http://turtlebay.foreignpolicy.com/posts/2013/01/24/un_launches_drone_investigation

is completely unacceptable to allow the world to drift blindly toward the precipice without any agreement between states as to the circumstances in which drone strike targeted killings are lawful, and on the safeguards necessary to protect civilians.”¹⁰

This paper will explore the use of armed UAVs (drones) in the War on Terror and the extent to which their use is capable of fitting with the ethical prescriptions set forth by JWT. I hope to put forth an explanation of the theory that the use of drones in the War on Terror is indeed capable of meeting the ethical prescriptions contained in JWT. The discussion will further address the reasoning behind this thesis, with the following caveats: The limited information available, the highly variable nature and credibility of information on the drone war in Pakistan, Yemen, and to a lesser extent, Somalia, and finally, the shortcomings of JWT in a modern context. The paper will begin by examining the basic tenets of JWT, both *Jus ad Bellum* and *Jus in Bello*; the rules regarding just causes for war and the rules surrounding the conduct of armies engaged in war, respectively. The paper will then examine the various definitions of terrorists and terrorism so as to highlight the discrepancies that exist within the literature and the problems that the lack of agreement on a classification has led to. Next, the analysis will examine the use of drones in the war on terror in various instances and will provide an overview of targeted killings to offer the reader a short history and background. After providing a basic literature review of the relevant materials, the paper will then move to the methods by which a sound analysis can be reached; I will attempt to establish a classification system for both the use of drones and for the use of the classifications terrorist and terrorism, noncombatant and innocent, and their treatment as such. In doing so, I hope to come to assessments regarding whether or not

¹⁰ John F. Burns, “U.N. Panel to Investigate Rise in Drone Strikes,” *New York Times*, January 24, 2013, accessed January 29, 2013, <http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html>

the use of drones in the war on terror can be consistent with the prescriptions of JWT. In my final analysis, I hope to reach a measure of understanding regarding the likely implications of moving forward with these practices unchanged. Lastly, I will reach a set of policy prescriptions that will address suggestions moving forward; what should be amended about the use of drones to comply with JWT? And additionally, what should be changed about JWT to formulate a more complete and realistic framework that will address the realities of modern war?

History and Context

A Short History of Unmanned Aerial Vehicles

The use of armed and unarmed UAVs has been preceded by numerous manned and unmanned aerial inventions that date back as far as the American Civil War when both sides used hot air balloons to conduct surveillance and monitor troop movements. More recently, the American military used a vehicle referred to as the ISR (Intelligence, surveillance, and reconnaissance) in the Vietnam War to conduct intelligence gathering.¹¹ Indeed, the advent of drones as a tool of war is not a recent development; in the 1980's the Israeli military used drones in their war against Syria and later, NATO used them in their mission in Kosovo.¹² The armed drones that are used in today's War on Terror are the product of a secretive Lockheed Martin project known as *Dark Star*.¹³ Perhaps the most popular products of this project were the *Predator* and *Reaper* drones, used as early as 2001 in Afghanistan.¹⁴

¹¹ Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

¹² Cole, "Drone Wars Briefing," 25.

¹³ Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

¹⁴ Cole, "Drone Wars Briefing," 14

The price tag associated with drones is surprisingly low with the estimate for a drone being between \$6 and \$13 million. Furthermore, “the global market for unmanned aerial vehicles is now \$6 billion a year, with more than 50 countries moving to acquire drones.”¹⁵ The global market for drones and the price tag associated with the technology is noteworthy for two reasons: the low price to acquire drone technology alludes to the ease with which a state or an individual can obtain a drone and the global market points to the prevalence of these events. Further evidence of the prevalence of drones is available in a UN report on targeted killing practices, which reported that, “Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France either have or are seeking drones that also have the capability to shoot laser-guided missiles ranging in weight from 35 pounds to more than 100 pounds.”¹⁶

Context: The War on Terror, Drones, and Terrorism Today

The first publicly successful drone strike on an alleged terrorist occurred in 2002, when a senior Al-Qaeda leader and his convoy were targeted in Yemen.¹⁷ In more recent years, drone strikes in both Pakistan and Yemen have drastically increased in number and in scope; a reasonable estimate for casualties in Pakistan alone (from 2004 to present) is around 2,300.¹⁸ The main concerns surrounding the use of drones have to do with both their nature as weapons and the lack of international guidelines surrounding their use. Due to their capabilities as a weapon that can be remotely controlled, some worry that they are changing the nature of modern warfare; not only do they exempt forces from harm on the battlefield and the general horrors of war but

¹⁵ Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

¹⁶ U.N. General Assembly Human Rights Council, 14th Session. Agenda Item 3, Report of the Special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. 8 May 2010 (A/HRC/14/24/Add.6). Official Record. 28 May 2010.

¹⁷ Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

¹⁸ Cole, “Drone Wars Briefing,” 16

they also remove a lot of heretofore pressing concerns of nations considering a war, such as public backlash. Additionally, many have expressed concern about the clandestine nature of the CIA program; it offers few assurances that there are any existing judicial review or accountability standards surrounding the process of targeted killings, it exists surrounded in a veil of secrecy and as such accurate information is very difficult to obtain, and finally, the example that is being set by the CIA program abroad is likely to be repeated by states acquiring the technology.

The drone operators are usually based out of Nevada, at Creech Air Force Base. A two-man team typically operates drones and their actions are said to be analyzed and monitored by intelligence personnel.¹⁹ The process surrounding the authorization of the use of lethal force is also shrouded in secrecy, though varying reports have surfaced indicating that higher-level targets may require White House authorization.²⁰ In a report from the *Rolling Stone* in April 2012, an unnamed source with knowledge of the program reported that, “agency lawyers are required to sign off on drone strikes but the process remains classified, and oversight is far less restrictive than that provided on the military side.”²¹ Additionally, the same report cites former Chief Counsel at the CIA, John Rizzo, as claiming that, “when the agency wants to launch a drone strike...it asks a lawyer to provide the legal cover for the assassination by signing off on a five-page dossier laying out the justification for the attack.”²² There are obvious qualms with both the operation of the drones and the authorization for said operation; many have claimed that

¹⁹ Cole, “Drone Wars Briefing,” 14

²⁰ Cole, “Drone Wars Briefing,” 17.

²¹ Michael Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

²² Michael Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

the distant nature of the drone operation has led to a more desensitized environment for war.²³ Furthermore, the lack of transparency in the process for identifying targets has led many to worry that the U.S. is engaged in assassination campaigns against perceived foreign enemies, in clear violation of international law.

The initial concerns expressed by the international community and domestic opponents were only the first of many; indeed, in recent years the Obama administration has experienced a growing degree of public backlash, in addition to a worsening of relations with Pakistan and several other ‘allies’ in the War on Terror, over the clandestine drone program. Aside from the questions surrounding the legal justifications for using lethal force in sovereign states on people for whom due process has not been afforded, ample questions of war ethics abound; when is it acceptable for one state to ignore the sovereignty of another? Who is an acceptable target for the lethal use of force and under what circumstances? When is a threat imminent rather than likely? The various questions of the usage of drones and their ethical assessments will be addressed below. Perhaps the most worrying aspect however, from a tactical standpoint, is the tendency of American military standards to be adopted by other states. While the tendencies of the CIA are not likely to be replicated by armies, they are likely to be assumed an acceptable example for other covert intelligence agencies. If this were to happen in the realm of drone usage, we may be facing a future where Iranian drones are able to target Americans with lethal force with little or no obligation to provide just cause.

In large measure the Obama Administration has avoided conversations relating to the lawfulness of the CIA’s drone war by being vague, refusing to give specific information, and by

²³ David Cortright, Benjamin Wittes, Daniel Goure, and Tom Barry, “Cato Unbound: How Drones are Changing Warfare,” *Cato Institute*, January 2012, accessed January 20, 2013, <http://www.cato-unbound.org/january-2012-how-drones-are-changing-warfare/>

continuously towing the same line; the administration claims that the CIA's drone war meets legal guidelines and offers a dual-war explanation. The administration has specified that the drone war meets the guidelines of the LOIAC and other international norms of war primarily because the U.S. is fighting two concurrent wars; "the first, a transnational non-international armed conflict, is one in which there are no geographic limitations on the scope of the conflict. The second is a traditional non-international armed conflict in which a U.S. ally is fighting an insurgent group within its borders, and the U.S. is a participant in that non-international armed conflict."²⁴ This re-characterization of the War on Terror as two distinct but concurrent conflicts provides a satisfactory answer to two very valid critiques of the CIA's drone war, namely that the U.S. is targeting groups outside of states against whom it is currently engaged in open hostilities, and secondly, that the U.S. is targeting individuals that are not engaged in terrorist activities against the U.S. Furthermore, the U.S. government claims that the principle of self-defense entitles the U.S. to fight its enemies wherever they may be; "the United States is at war with al Qaeda and its allies and can legally defend itself by striking its enemies wherever they are found."²⁵ The validity of such claims can only be evaluated in part and is largely outside the purview of this investigation. Having provided the reader with a short introduction to the War on Terror and the use of drones in this fight, the discussion will now turn to a review of the pertinent literature.

²⁴ Gregory S. McNeal, "Kill-Lists and Accountability," *Georgetown Law Journal* (2013): 1-127, accessed April 1, 2013 <http://ssrn.com/abstract=1819583> or <http://dx.doi.org/10.2139/ssrn.1819583>

²⁵ Scott Shane, "Election Spurred a Move to Codify U.S. Drone Policy," *New York Times*, November 24, 2012, accessed January 29, 2013, <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>

Literature Review

Just War Theory: An Overview

JWT was developed by Christian theologians but has been used by governments and peoples of all religions in an attempt to, “reconcile three things: taking human life is seriously wrong, states have a duty to defend their citizens, and defend justice, [and that] protecting innocent human life and defending important moral values sometimes requires willingness to use force and violence.”²⁶ JWT can be understood as an attempt to codify the norms of war in an otherwise chaotic environment. While JWT prescribes a set of conditions that war will meet and then abide by, it still abides to the maxim that war is always a negative development; it nevertheless attempts to control the conditions that it creates.²⁷ In short, JWT, as a principle can be seen as an attempt to, “provide a guide to the right way for states to act in potential conflict situations.”²⁸

JWT concerns both the justness of causes for war and the justness of the conduct of armed forces while fighting a war; these separate aspects are referred to as *Jus ad Bellum* and *Jus in Bello*, respectively. The beginnings of JWT can be traced to early Catholic philosophers; St. Augustine is credited as being amongst the earliest of Just War theorists.²⁹ A notable aspect of JWT that is derived directly from Catholic philosophy is the Doctrine of Double Effect (DDE). The DDE notes a difference between the intended consequences of an act and the foreseeable implications of the same act.³⁰ The importance of this distinction for JWT lies in the moral

²⁶ “Ethics - War: Just War – Introduction,” BBC, accessed April 5, 2013, <http://www.bbc.co.uk/ethics/war/just/introduction.shtml>

²⁷ “Ethics - War: Just War – Introduction,”

²⁸ “Ethics - War: Just War – Introduction,”

²⁹ Frowe, *The Ethics of War and Peace*, 3.

³⁰ Frowe, *The Ethics of War and Peace*, 20.

acceptability of a certain measure of civilian casualties, commonly referred to as collateral damage, during the waging of a war.³¹

As stated above, JWT can be broken down into two main subcategories: *Jus ad Bellum* and *Jus in Bello*; the former referring to whether or not a nation has just cause for going to war³², and the latter referring to, “the rules of war as they pertain to combatants, legitimate targets, legitimate tactics, and prisoners of war.”³³ One important distinction that should be made at the outset concerns the necessity for complete adherence to *Jus ad Bellum* conditions. The lack of this necessity in JWT as a whole is referred to as the independence of *Jus in Bello*. In *Jus ad Bellum*, a state can have a just cause for war and still lack an overall just case for war.³⁴ In other words, a state may meet one, or even several of the clauses of *Jus ad Bellum*, but as long as the state does not satisfy every condition, it will ultimately lack a just case for war. Conversely, a state may meet all of the conditions for *Jus ad Bellum* thus signifying that they have a just cause and just case for war and, in the midst of fighting, if that state does not satisfy the conditions of *Jus in Bello* then they are characterized as having fought an unjust war. This principle applies inversely as well; a state may not have a just case for war and still fight the war in a just manner.³⁵

Jus ad Bellum

Jus ad Bellum is comprised of seven components; just cause, proportionality, reasonable chance of success, legitimate authority, right intention, last resort, and public declaration.³⁶ The

³¹ Frowe, *The Ethics of War and Peace*, 24

³² Frowe, *The Ethics of War and Peace*, 50.

³³ Frowe, *The Ethics of War and Peace*, 95.

³⁴ Frowe, *The Ethics of War and Peace*, 51.

³⁵ Frowe, *The Ethics of War and Peace*, 99.

³⁶ Frowe, *The Ethics of War and Peace*, 50.

first condition, just cause, refers to the reason a nation goes to war; “the foundation of a case for war – the trigger that begins the debate about whether war could be morally permissible.”³⁷ The most common just causes for war are self-defense and other defense. Both self-defense and other defense cover a wide range of violations including preemptive wars, retaliatory wars, strict wars of self-defense, and wars aiming to avert humanitarian crises.³⁸ The next condition of *Jus ad Bellum* is proportionality; “in order for a war to be just, it must be a proportionate response to the suffered wrong.”³⁹ An important note that Frowe points out regarding proportionality concerns the ongoing nature of the assessment; “the *ad bellum* requirement is to be understood not as a one-off assessment but as an ongoing evaluation of the war’s justness.”⁴⁰ Frowe makes further note of the problematic nature of the proportionality requirement given the difficulty in judging abstract values such as good and bad, harmful and helpful.⁴¹ Additionally, Reinold asserts that the contents of the requirement of proportionality have remained obscure; on proportionality Reinold claims that, “its exact content remains elusive and its specific requirements have been somewhat neglected...in the *Jus ad Bellum*, proportionality circumscribes the scope of legitimate responses to a grievance, whereas in the *Jus in Bello* proportionality refers to the weighing of the anticipated benefits of a military operation against the costs of human lives that this operation might cause.”⁴² Indeed, the notion that proportionality is the weakest of the 7 components of *Jus ad Bellum* is repeated throughout the literature; Anthony Burke maintains that, “the proportionality rule is the Achilles heel of just war theory.”⁴³

³⁷ Frowe, *The Ethics of War and Peace*, 51.

³⁸ Frowe, *The Ethics of War and Peace*, 53.

³⁹ Frowe, *The Ethics of War and Peace*, 54.

⁴⁰ Frowe, *The Ethics of War and Peace*, 54.

⁴¹ Frowe, *The Ethics of War and Peace*, 55.

⁴² Theresa Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” *American Journal of International Law* 105 (2011): 8.

⁴³ Anthony Burke, “Just War or Ethical Peace? Moral Discourses of Strategic Violence after 9/11,” *International Affairs* 80 (2004), 342.

The third condition of *Jus ad Bellum* is that the state waging the war must have a reasonable chance of success. This requirement is very self-explanatory and refers to the imperative against sending soldiers to their certain deaths. Frowe asserts that the likely sentiment behind this clause has to do with the fact that those who declare war are not the same individuals who must then fight the war.⁴⁴ Legitimate authority is the next condition that must be met in order to qualify as having a just cause for war. The legitimate authority clause refers to the requirement that the head of the state must sanction or authorize the war; “a legitimate authority is the person or group who has the authority to speak for the state and who represents the state on the international stage.”⁴⁵ Frowe notes the problems that the requirement of legitimate authority has faced in the past and in more modern warfare; in civil wars and revolutions, when the populace is attempting to replace their head of state, legitimate authority becomes less clear. She further identifies the need to revisit the clause entirely due to the advent of wars between non-state actors; “the very notion of a ‘war on terror’ implies that it is possible to be at war not only with other states, but also with non-state organizations. If this is indeed possible, we must re-assess the traditional definition and role of legitimate authority.”⁴⁶

The fifth condition of *Jus ad Bellum* is that of right intention. The right intention condition specifies, “that having the right reason for launching a war is not enough: the actual motivation behind the resort to war must also be morally appropriate.”⁴⁷ Frowe notes that this clause is viewed as perhaps the least important of the seven conditions due to its lack of consequence for both the broader situation and for the outcome of events. The answer that Frowe offers for the question of why intention matters lies in the larger context of just cause; given a

⁴⁴ Frowe, *The Ethics of War and Peace*, 57.

⁴⁵ Frowe, *The Ethics of War and Peace*, 59.

⁴⁶ Frowe, *The Ethics of War and Peace*, 59.

⁴⁷ Frowe, *The Ethics of War and Peace*, 60.

situation like the 2003 Iraq War, one might claim that the war is being fought to protect the Iraqi civilians from their despotic government when in reality the intention was to overthrow Saddam Hussein to satisfy a need for revenge or to gain a foothold in a resource-rich region. However, an important caveat to the discussion of right intention is that a war can be fought for multiple reasons and still be considered to satisfy the condition of right intention.⁴⁸ The sixth condition that Frowe mentions is that of last resort and it represents the impetus of a government waging a war to have attempted all other available means of averting armed conflict before declaring war. However, this is a requirement that only applies to nations that have not already been attacked; “the last resort condition is meant to restrain nations that are considering initiating hostilities – it is not relevant to nations that have already been attacked...the condition of last resort applies only to the starting of a war.”⁴⁹

The final condition that needs to be met for a war to be considered as having just cause is that of a public declaration of war. This requirement is taken directly from the Hague Convention of 1907 which states that war, “must not commence without previous or explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.”⁵⁰ Presumably, this clause is meant to be a final safeguard against war or against large numbers of civilian casualties by either giving the states in question one last chance to negotiate or by giving civilians the opportunity to flee the area that is being targeted.

Jus in Bello

Frowe then turns to the requirements of *Jus in Bello*; the rules relating to the conduct of a just war; specifically they concern the, “the rules...as they pertain to combatants, legitimate

⁴⁸ Frowe, *The Ethics of War and Peace*, 61.

⁴⁹ Frowe, *The Ethics of War and Peace*, 62.

⁵⁰ Frowe, *The Ethics of War and Peace*, 63.

targets, legitimate tactics, and prisoners of war.”⁵¹ The rules of combatants concern the guidelines that one must meet to be considered a combatant and are a product of the 1949 Geneva Convention. The Convention states that in order to be considered a combatant and treated as such, one must meet several guidelines, including; being part of a hierarchical group, wearing a uniform or insignia that establishes them as such, carrying their weapons openly, and abiding by the rules of *Jus in Bello*.⁵² The purposes of such conditions are several and primarily concern the fair treatment of prisoners of war (POWs), the protection of non-combatants, and a level playing field. Frowe notes the inherent difficulty for some groups in attaining these standards; for instance, fighters in guerilla warfare. In an environment where wars are no longer fought on an open battlefield between more or less equal powers, some of the requirements of combatants are simply not realistic.⁵³

The second condition of *Jus in Bello* concerns the requirement of discrimination and legitimate targets. According to JWT, only combatants and military targets are legitimate targets. This is not to say that the destruction of a hospital or the death of a civilian can never be just. The importance of non-military targets and non-combatants as illegitimate targets has to do with intention; as long as noncombatant deaths occur as the result of an intended military advantage, within reason, then allowances are made.⁵⁴ The next stipulation of *Jus in Bello* concerns the use of legitimate tactics. The requirements of using legitimate tactics in a just war are commonly referred to as the military necessity or proportionality clause; “all legitimate attacks in war must meet the conditions of military necessity and proportionality. Military necessity requires that an

⁵¹ Frowe, *The Ethics of War and Peace*, 95.

⁵² Frowe, *The Ethics of War and Peace*, 101.

⁵³ Frowe, *The Ethics of War and Peace*, 102.

⁵⁴ Frowe, *The Ethics of War and Peace*, 105.

offensive be intended to confer some sort of military advantage.”⁵⁵ Proportionality is also an integral part of this clause; indeed, the proportionality aspect of just tactics demands that the damage that is inflicted in the waging of the war must be proportional to the good that is being protected by resorting to war.⁵⁶ The final clause of *Jus ad Bellum* is treatment of POWs. While this final clause of *Jus in Bello* is indeed an important aspect, it is largely irrelevant to this discussion given that the treatment of POWs by drones is nonexistent. Nonetheless, the general stipulations of this clause call for the protection (legal and physical), fair treatment, and immediate repatriation upon the ceasing of hostilities of POWs.⁵⁷

Just Cause and Imminence: An Impossible Test

Michael Walzer characterizes aggression, in the form of war, as the most egregious breach of rights because, “the wrong the aggressor commits is to force men and women to risk their lives for the sake of their rights. It is to confront them with the choice: your rights or (some of) your lives.”⁵⁸ Walzer further notes that it is the right of most states to protect their territorial integrity (sovereignty) only to the extent that they provide a common good for their people; indeed, Walzer notes that states’ rights are an extension of individual rights transferred through a social contract.⁵⁹ In this way, states are only acting on behalf of their members to the degree that they have lived up to their end of the contract; “the moral standing of any particular state depends upon the reality of common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile.”⁶⁰ This is important to

⁵⁵ Frowe, *The Ethics of War and Peace*, 106.

⁵⁶ Frowe, *The Ethics of War and Peace*, 107.

⁵⁷ Frowe, *The Ethics of War and Peace*, 114.

⁵⁸ Walzer, *Just and Unjust Wars*, 51.

⁵⁹ Walzer, *Just and Unjust Wars*, 54.

⁶⁰ Walzer, *Just and Unjust Wars*, 54.

note due to the ramifications that it holds for both just cause (self-defense) and for legitimate authority; in a region like the FATA in Pakistan where militant groups are largely operating with impunity, the protection being afforded to law abiding citizens is difficult to judge against the value of Pakistan's territorial sovereignty. Indeed, some would argue that Pakistan's inability, or unwillingness, to control or eradicate these groups equates to a forfeiting of their sovereignty. The notion of conditional sovereignty will be discussed in greater detail below.

Additionally, Walzer notes the problems with imminence as a condition for the waging of a preemptive war. He states that in our current reality, waiting for a threat to meet the current definition of imminent (instant, overwhelming, leaving no choice of means, and no moment for deliberation)⁶¹ would leave no room for effective reaction. Instead, Walzer puts forward three conditions for meeting the requirement of imminence in the modern age; in order for a threat to qualify as imminent, Walzer states that one needs to establish, "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."⁶² In the same vein, Anthony Burke notes the need for a, "moral and analytical framework which can better deal with historical and geopolitical complexity."⁶³ It is with these aforementioned clauses that Walzer is able to make the case for an abandoning of imminence as the standard for preemptive wars and the adoption of the current global reality as the new one.

Self-Defense and Sovereignty: Conditional Standards

Theresa Reinold's article, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11," explores the difficulties that occur at the intersection of a state's right to

⁶¹ Walzer, *Just and Unjust Wars*, 74.

⁶² Walzer, *Just and Unjust Wars*, 81.

⁶³ Burke, "Just War or Ethical Peace?" 333.

territorial integrity and the right to self-defense. In light of the global war on terror, a war characterized by state campaigns against the terrorist activities of non-state actors, the problem of competing rights has become all the more magnified. On the one hand, a state has the right to have its sovereignty and territorial integrity respected, however, on the other a state has the right to self-defense. It is this conundrum in particular that has raised the notion that a state is responsible to control the activities that occur within its borders (whether state-sanctioned or not) or forego its right to territorial integrity; “the global fight against terrorism...has strengthened the notion that sovereignty entails responsibility for the effective control of one’s territory, and that failure to discharge this obligation legitimates a military response.”⁶⁴ Following in the trend of Frowe and Walzer, Reinold makes the claim that the current definition of self-defense does not address the realities of modern warfare and as such she notes the need for change.⁶⁵

Another important point that Reinold makes on the issue of sovereignty is its conditional nature and the impact that the state in question has on the ultimate value judgment of its own territorial integrity; “sovereignty is conditional, not an absolute value...the nature of the regime harboring the militants is an important factor to be taken into account by the defending state. Put differently, the enjoyment of sovereign privileges is made dependent upon whether or not the harboring state lives up to certain standards of good (responsible) governance.”⁶⁶ In short, the less competent a regime, the less sovereignty they should enjoy; the more mal-intent a regime has, the more sovereignty they can expect to have taken from them. This point is evidenced in *Foreign Policy’s Failed State Index*⁶⁷ each year; in 2012, Pakistan ranked number 13, Somalia

⁶⁴ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 2.

⁶⁵ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 4.

⁶⁶ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 6.

⁶⁷ An index ranking all states with the least viable states at the top
http://www.foreignpolicy.com/failed_states_index_2012_interactive

number 1, Yemen number 8, and Afghanistan number 6.⁶⁸ It can't be a coincidence that the top four states where the U.S. is engaged in fighting terrorism, sometimes with the aid of the government and sometimes without, have also ranked in the top 20 of the Failed State Index numerous years in a row. Reinold describes this phenomenon as state collapse that occurs when, "the basic functions of a state are no longer preformed...state failure signifies a return to the conditions of the state of nature in which the security dilemma arises anew."⁶⁹ This tendency to hold a host government responsible for state and non-state actors operating from within the state has been codified in recent years by successive U.S. administrations. Indeed, what has been referred to as the Harboring Doctrine states that, "states which become the victims of terrorist attacks have the right to act in legitimate self-defense, including, if necessary, the use of appropriate force. The non-consensual use of force...is justified only if the host country is unable or unwilling to take effective action."⁷⁰

Drones and Just War Theory: Where Do They Meet?

The intersections of JWT and the use of drones have primarily to do with the proportionality, last resort, and to a lesser degree, reasonable chance of success conditions listed in *Jus ad Bellum*. The other area of JWT that needs to be examined in the context of the use of drones is that of sovereignty and territorial integrity. These areas of JWT have raised serious questions concerning the nature and use of drones and as such will be addressed below. The conditions left out of the assessment concerning the meeting points of drones and JWT are just cause, right intention, public declaration, and legitimate intention. These conditions have been

⁶⁸ "Failed States: An Eighth Annual Collaboration Between Foreign Policy and the Fund for Peace," *Foreign Policy*, accessed March 18, 2013, http://www.foreignpolicy.com/failed_states_index_2012_interactive

⁶⁹ Reinold, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11," 9.

⁷⁰ Reinold, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11," 12.

left out this assessment for several reasons including their irrelevance for the above-stated context and the importance of their consideration elsewhere in the analysis.

The discussion surrounding drones and proportionality can be broken into two obvious blocs, those who consider drones to be a humanitarian weapon capable of achieving precision warfare, and those who believe that drones represent an escalation of warfare due to the remote nature of armed UAVs. Those who believe that drones represent the natural progression of weapons evolution claim that there is nothing inherently different about a drone that makes it worth its own moral and legal arguments; “drones are a weapon like any other weapon. Their evolution is the latest step in a very long chain of the development of lethal technologies virtually all of which involve the attempt to augment one’s own offensive capability while at the same time minimizing ones exposure to risk during attack.”⁷¹ They furthermore point to the success of drones in minimizing collateral casualties and damage, “drone warfare permits a highly calibrated military response to situations in which the alternative may involve not lesser but far greater uses of military violence.”⁷² On the other hand, some see drones as representing a new and morally questionable tool of modern warfare; “any development that makes war appear to be easier and cheaper is deeply troubling. It reduces the political inhibitions against the use of deadly violence. It threatens to weaken the moral presumption against the use of force that is at the heart of the Just War doctrine.”⁷³

Proportionality necessitates that the harm that is done by going to war must not outweigh the good that is maintained by fighting. In this sense, the use of drones against terrorism suspects is debated due to the perceived ability of drone warfare not only to kill an incommensurate number of civilians along with alleged terrorists, but also their ability to act as a recruitment tool

⁷¹ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷² Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷³ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

for precisely the groups that are being targeted. The Bureau of Investigative Journalism has reported that, “civilian casualties occur in approximately one fifth of U.S. drone attacks in Pakistan,”⁷⁴ not to mention the attacks that take place elsewhere. Furthermore, the CATO Institute suggests that, “drone strikes are fomenting greater anti-American hatred and creating support for the very militant movements their proponents claim to be suppressing.”⁷⁵ While some may argue that a drone strike targeted on a small group of people away from highly populated areas is indeed proportional to either the terrorist attacks already committed or those in the making, the real test, in terms of satisfying JWT, lies with the number of noncombatants killed and the number of new combatants recruited.

The condition of last resort relates to drones in two ways; the difficulty in proving that all other means available have been tried when the target is merely an alleged terrorist and the claim that drones make other options not only less likely, but flat-out unconsidered. Indeed, some argue that the problem of terrorism is not a military but a political ill and that it should be dealt with as such. Drones as a weapon of war, some claim, “reinforce the illusion that military force is the solution to complex political challenges.”⁷⁶

Related to the issue of last resort is that of a reasonable chance of success. Just as the opponents of drones claim: Those who have contention with drones over a reasonable chance of success assert that drones and other military options are not the correct tools to fight the enemies in question. While there is little question as to whether or not drones are successful on a case-by-case basis, the query remains as to their efficacy in the big picture; while drones are obviously effective at killing alleged terrorists, can they combat terrorism as a whole? The CATO Institute argues that, “terrorism is more a political and law enforcement challenge than a threat that can be

⁷⁴ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷⁵ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷⁶ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

addressed by military means.”⁷⁷ Furthermore, a study by the Rand Corporation in 2008 shows that, “the primary factors accounting for the demise of 268 terrorist organizations over a nearly 40 year period were participation in the political processes (43 percent) and effective policing (40 percent). Military force accounted for the end of terrorist groups in only 7 percent of the cases examined.”⁷⁸

Sovereignty and territorial integrity need to be addressed in the use of drones due to the nature of drone warfare; the drone program conducted by the CIA involves the usage of drones in areas where the U.S. is not at war and where the U.S. has no authorization (that is publicly acknowledged) by the governments in question to do so. On the other hand, there are various reports, for instance, that the Pakistani government is working with the U.S. government to single out targets.⁷⁹ If this is indeed the case, the question of sovereignty is no longer an issue. However, if these reports are unsubstantiated then the use of drones is either unlawful, or one needs to adopt a less strict interpretation of state sovereignty in which it is viewed as conditional (as discussed above).

Terrorism: Definitions and Classifications

Terrorism has as many definitions as it does instances and it is this indefinite value that has led to many of the problems associated with fighting it. A useful, broad, and widely accepted definition of terrorism defines it as, “intentionally targeting noncombatants with lethal or severe violence for political purposes.”⁸⁰ As such we can break down the most identifiable

⁷⁷ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷⁸ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

⁷⁹ C. Christine Fair, “Drone Wars: The Obama administration won’t tell the truth about America’s new favorite weapon – but that doesn’t mean its critics are right,” *Foreign Policy*, May 28, 2010, accessed January 29, 2013, http://www.foreignpolicy.com/articles/2010/05/28/drone_wars

⁸⁰ Saul Smilansky, “Symposium on Terrorism, Justification, and Illusion,” *Ethics* 4 (2004): 790.

characteristics of terrorism as being directed at noncombatants, involving violence, and having political aims. An important point that should be made early on concerning the political nature of terrorism is that political aims in this sense need not exclude religious or ideological motivations; “reference to political motivation is not meant to be so narrow as to include only secular or pragmatic outlooks.”⁸¹ C. A. J. Coady offers a definition that is inclusive of these three basic tenets and describes terrorism as, “the organized use of violence to attack noncombatants or their property for political purposes.”⁸²

Moving from the definition of terrorism to its practical purposes, the most obvious reason behind such acts is to induce change. While there are as many motivations for terrorism as there are definitions, if not more, the more important literature regarding motivations concerns that which attempts to justify it for certain purposes; Saul Smilansky does just this in his article, “Terrorism, Justification, and Illusion.” He puts forth three sets of circumstances in which he states that terrorism could possibly be justified: situations where there is clear danger to a group’s existence, situations where the purpose is to draw the world’s attention to the developing world and their suffering, and finally, instances where the purpose is to oust a tyrannical regime.⁸³ The reasoning given behind the choice of these three circumstances as instances where terrorism may be justified has to do with their meeting specific criteria. The criteria given are as follows: “that the existence of real needs and just aims be established, that severe violence should be used only as a last resort, that reasonable proportionality be maintained, and that standards of universalization can be applied to the would-be justification.”⁸⁴ Furthermore, the International Committee of the Red Cross (ICRC) claims that characterizations of terrorism do

⁸¹ C. A. J. Coady, “Terrorism and Innocence,” *The Journal of Ethics* 8 (2004): 41.

⁸² Coady, “Terrorism and Innocence,” 39.

⁸³ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 797-8.

⁸⁴ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 800.

not rest on whether or not an act is lawful, but rather, “whether the conduct constitutes an integral part of armed confrontations occurring between belligerents.”⁸⁵

Terrorists and Unlawful Combatants: Characterizing the Enemy

Terrorists perpetrate terrorism; this seems like an obvious statement but the implications are far from obvious. Terrorism has often been categorized as an activity that can only be committed by an “other”; “governments characteristically define terrorism as something only their opponents can commit...the U.S. State Department...includes the claim that it is carried out by sub national groups or clandestine agents.”⁸⁶ Certainly, the U.S. engages in activities in other states that are carried out by clandestine agents however, the term terrorist has never been applied to it domestically. However, this is not to say that these other states have not labeled these acts (and these actors) as such. State sponsored terrorism is routinely left out of the assessment of U.S. actions abroad by domestic politicians however, when one considers the actions of the U.S. government in the 1980’s in support of the Contras in Nicaragua, a group known to intimidate political adversaries and their supporters with violence. Furthermore, the overt support by the U.S. government for the state of Israel belies its attitude to state sponsored terrorism in the form of harassment and violence directed at Palestinians.⁸⁷ Indeed, the attitude associated with the relegating of terrorist acts to others and the definition of the acts of the U.S. and its allies as the legitimate acts of states can largely be seen as a codification of a definition of terrorism as having to do primarily with those who commit it; “that states can terrorize and can use soldiers, airplanes, and tanks to do so...terror should not be reduced to the difference

⁸⁵ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

⁸⁶ Virginia Held, “Terrorism and War,” *The Journal of Ethics* 8 (2004): 62.

⁸⁷ Held, “Terrorism and War,” 63.

between nonstate and state action.”⁸⁸ Additionally, when a state or nonstate actor commits an act of self-defense, it is sometimes labeled as terrorism largely owing to the “us-them” distinction; “what *they* do is terrorism and is unjustified, whereas what *we* and our friends do is not terrorism but is a justified response to, or is justified self-defense.”⁸⁹

The line between a terrorist and those that are aiding and abetting terrorists is a difficult one to draw. Traditionally, theorists have thought that only those who provide support that is essential to the act of terrorism should be considered complicit in the crime. What is not so clear is: what is considered essential? Surely the man who constructs a suicide vest for detonation in a crowded city center would be considered complicit, but what about the family that houses him, or the farmer that feeds him? This question has been answered largely by, “alleging a morally relevant distinction between the sorts of contributions made by non-combatants...a distinction between the things that a state [or non-state actor] needs specifically to wage war, for example weapons, and things that it needs in peacetime, such as food.”⁹⁰

Unlawful combatants, on the other hand, can be another name for terrorists or it can be a characterization of those who are not meeting some requirement of *Jus in Bello*. It certainly does not follow that all people who are unlawful combatants are terrorists. The importance in these distinctions lies in the applicability of the Geneva Conventions on the treatment of POWs and combatants in war.⁹¹ However, as Frowe asserts, the very nature of terrorism runs opposite to JWT and *Jus in Bello* in particular. Without delving into a discussion of the morality of terrorism itself one can still recognize that there are several activities which seem to be made impossible in the face of the rules put forth in *Just in Bello*. For example, Guerilla warfare; when a group of

⁸⁸ Held, “Terrorism and War,” 63.

⁸⁹ Held, “Terrorism and War,” 65.

⁹⁰ Frowe, *The Ethics of War and Peace*, 155.

⁹¹ Frowe, *The Ethics of War and Peace*, 192.

guerillas or partisans mounts an offensive against a government, their very reason for acting against the *Just in Bello* has to do with the nature of their circumstances; they face disadvantages in both numbers and force and attempt to bridge this gap by falsifying their true identity.

Assuming that all guerilla activity in the past has been unjust because the fighters do not wear uniforms does not seem to fit with the sentiment of JWT.⁹²

Noncombatants and Innocents: Where to Draw the Line?

In a traditional sense, noncombatants and innocents are usually converged into one category; however this may not necessarily be correct. The term noncombatant implies that a person is not actively fighting or bearing arms, whereas innocent implies a level of moral blamelessness that cannot be deduced from whether or not someone is engaged in fighting. As Held identifies, the distinction between innocent and culpable is not as easy as that between combatant and noncombatant, especially in instances where civilians have a say in the actions of their governments. Perhaps, in a less-than-democratic society where the government leaves only violent avenues for change, it would be clearer that civilians and innocents were one in the same. However, in democratic societies, “it is voting publics that often put in power the governmental leaders, and support the policies, that terrorists oppose. If other means have failed and if violence against members of a state’s armed services is justified, it is unclear why those who bring about that state’s policies... should be exempt.”⁹³ Furthermore, it is even less clear why the government of targeted state should be considered innocent or exempt, “it is plausible to hold the high political leadership of the enemy state (those who plotted and instigated the war) to be agents of harm, as are the scientists and technologists employed in devising and producing new lethal

⁹² Frowe, *The Ethics of War and Peace*, 194.

⁹³ Held, “Terrorism and War,” 60.

weapons.”⁹⁴ Indeed, the danger in this manner of thinking is that no one could be considered innocent and thus everyone will be subject to the horrors of war.

The reverse of the above way of deeming innocence is to determine that all those who are not responsible for the harm being fought ought to be considered immune from attack. This is what is known as the Principle of Noncombatant Immunity (PNI); “it is never permissible to aim to kill (or severely harm) noncombatants; PNI forbids the terrorist as well as counter-terrorist activities aimed at killing (or severely harming) noncombatants.”⁹⁵ However, as Smilansky notes in his article on the subject, “PNI might be socially useful even though philosophically it is unpersuasively strict...it has a civilizing influence.”⁹⁶

Just War Theory and Terrorism: Can they Coexist?

Terrorism in JWT is a non-starter. Terrorism as a concept goes against much of *Jus ad Bellum* and most of *Jus in Bello*. Looking at each condition separately we can see why terrorism is treated as such in JWT; for Just Cause, most terrorist activities are aimed at avenging perceived wrongs or historical injustices, neither of which qualify as a just cause for hostilities. Next, the proportionality of a terrorist act is a difficult judgment to make in clear-cut circumstances and even more so when a non-state group is attempting to get even for numerous or unclear wrongs. The third condition of *Jus ad Bellum*, reasonable chance of success, can be assessed both positively and negatively, depending on how the measure of success is defined; if success is killing civilians, then most instances of terrorism are successful. However, if success is defined as incorporation into the political process or effecting lasting change, then the rate of success is considerably low. Certainly the legitimate authority claim would need to be judged on

⁹⁴ Coady, “Terrorism and Innocence,” 46.

⁹⁵ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 791.

⁹⁶ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 800-1.

a case-by-case basis but more often than not, terrorist groups are fringe collectives that do not represent the majority of people.

Next, if we accept a standard definition of terrorism, such as the targeting of noncombatants with violence for a political purpose, then by that definition it cannot meet the right intention condition. However, if one defines the intent of a terrorist group as achieving change and perhaps lasting peace then this would indeed qualify as a right intention. Last resort may be the only condition of *Jus ad Bellum* that terrorism meets more often than not; most groups that commit terrorism do so because of a lack of alternatives; “in many countries there is no likely possibility of improvement unless the present rulers are toppled.”⁹⁷ The final clause of *Jus ad Bellum*, public declaration of war, is not met in modern terrorism; indeed the element of surprise is one of the major advantages that terrorist groups possess. *Jus in Bello* is so opposite to the practices of terrorist groups, it seems as though the rules were written to make the practice illegal, and indeed they may have been. Terrorism, when defined as the purposive targeting of civilians by violent means to achieve a political end, violates the principles of discrimination of combatants, targets, and tactics. The final premise of *Jus in Bello* is that of just treatment of POWs and as such one cannot make a blanket judgment of whether or not terrorism falls in line with it as each group follows its own rules.

However, as terrorism becomes a larger issue on the international stage, the attention paid to it has left some room for rethinking how JWT treats non-state actors and the violence they undertake. For instance, in the past, noncooperation with *Jus in Bello* has led to the classification as an illegal combatant for many terrorists, or those thought to be terrorists, and as such the Geneva Conventions have not been applied. More recently however, the idea has presented itself that although terrorist groups do not follow the internationally recognized rules of war, this does

⁹⁷ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 798.

not mean that, “Some terrorists or their leaders are beyond moral and conversational reach, and hence everything may be done – including targeting noncombatants – in order to suppress them.”⁹⁸ However, this is a recent claim made in the literature and has not, as evidenced in recent history, been the case in practice. Additionally, the tendency of Just War theorists to allow for some measure of civilian casualties in the waging of war has been seen as a loophole through which one, if so inclined, could write off the casualties of a terrorist attack that was needed to achieve some change or measure of good;⁹⁹ the distinction that has been made in the past is that which exists between unintended casualties and foreseen casualties (i.e. DDE). So, while terrorism intends to target noncombatants, and just violence does not intend to but does, is there a substantive distinction for the people being harmed? The principle of right intention would contend that there is in fact an important distinction.

Drones and the War on Terror: A Weapon of Necessity in a Changing Environment

The literature available on the use of Drones in the War on Terror is limited and, to a large degree, speculative. The drone program operated by the CIA in Pakistan, Yemen, and Somalia is secretive at best and as such, reliable information on targets and casualties can be hard to come by. The primary issues that have been evaluated for the purpose of this literature review are that of the use of drones on suspected terrorists in Pakistan and Yemen, the debate over targeted killings, and the casualty rates associated with these strikes.

The CIA drone program operating in Pakistan, Yemen, and Somalia, and less frequently in Afghanistan, scored its first victory in 2001 when Mohammed Atef, an associate of Osama

⁹⁸ Smilansky, “Symposium on Terrorism, Justification, and Illusion,” 802.

⁹⁹ Coady, “Terrorism and Innocence,” 57.

Bin Laden, was killed in Kabul, Afghanistan.¹⁰⁰ Since this initial strike, the Bush and Obama administrations have launched hundreds more strikes, primarily in Pakistan and Yemen.¹⁰¹ Many of the aforementioned strikes have taken place in the FATA in Pakistan. The U.S. Department of State has categorized the FATA as, “the most ungoverned, combustible region in the world.”¹⁰² Furthermore, the State Department issued a warning in 2009 that stated, “Al Qaeda terrorists, foreign insurgents, and Pakistani militants have strengthened their safe havens in portions of Pakistan’s FATA...Al Qaeda and others use the FATA to launch their attacks in Afghanistan, plan operations worldwide, train, recruit, and provide propaganda.”¹⁰³ If nothing else, the concentration of insurgent activity in the FATA may explain the reason for the recently inflated number of drone strikes in the region.

The New America Foundation, a Washington-based think tank, has assembled reports on the CIA’s drone programs in both Pakistan and Yemen. The report on Pakistan details drone strikes by date specifying the number and type of person killed, sometimes being as specific as to list the name of the militant(s), and when available, the perceived target of the attack. Additionally, for strikes occurring after November 19, 2010, an indicator can be found on Google maps for the exact location. The obvious benefit of such reporting is to counter the claims of wildly inflated civilian casualties as a result of the strikes which no doubt are used as recruiting tactics for the very groups being targeted. The New America Foundation report on Pakistan contains data from 2004- January 15, 2013. The report finds that of the years 2004-2013, 2010 was the year with the highest number of strikes occurring in Pakistan, with 122 of the

¹⁰⁰ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 51.

¹⁰¹ David Rhode, “The Obama Doctrine: How the president’s drone war is backfiring,” *Foreign Policy*, March/April 2012, accessed January 29, 2013, http://www.foreignpolicy.com/articles/2012/02/27/the_obama_doctrine

¹⁰² Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 50.

¹⁰³ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 50.

total 349 strikes occurring in that year alone. The report also notes a shift from 2006- 2007 wherein militants became the main casualties of the strikes instead of civilians as in the previous years.¹⁰⁴ The report claims that during 2004-2013 in Pakistan, between 1,977 and 3,302 people were killed in drone strikes with an approximately 10.9% civilian death rate.¹⁰⁵ In contrast to the data offered by the New America Foundation, Pakistan Body Count, a website claiming to offer information on all reported drone strikes in Pakistan beginning in 2004, reports virtually only civilian casualties, a very small number of Taliban casualties, and no reported al Qaeda casualties.¹⁰⁶ The disparities evident in the widely varying reports of deaths attributed to drone strikes point to an even larger issue of accountability; in a situation where governments and their adversaries cannot be trusted to report factual information on life and death circumstances, who will be the final arbiter of the truth? An important side note to be taken into account when considering the civilian casualty rate is that there is also an “unknown” death rate that is separate from both the civilian and the militant casualty figures; that is to say, there may be either lower or greater numbers of civilian casualties depending on the actual identity of these “unknowns.” Furthermore, the high and low estimates of casualties highlight the ever-present problem of tremendous factual disparities in reporting.

The New America Foundation’s report on Yemen begins with data on a 2002 strike on Qaed Salim Sunian al Harithi and Ahmed Hijazi and going forward, does not contain data on strikes until December 17, 2009. The information contained in the Yemen report is similar to that outlined in the Pakistan report with minor differences; listed in the Yemen report is the date of each recorded strike, the supposed target, the leaders targeted (if any), a high and low estimate of

¹⁰⁴ “Counterterrorism Strategy Initiative. 2013: Year of the Drone,” *New America Foundation*, accessed March 15, 2013, <http://counterterrorism.newamerica.net/drones/2013>

¹⁰⁵ “Counterterrorism Strategy Initiative. 2013: Year of the Drone.”

¹⁰⁶ “Pakistan Body Count,” accessed March 12, 2013, http://pakistanbodycount.org/drone_attack

the number killed, the village and location where the strike took place, and, surprisingly, the nation responsible for the strike.¹⁰⁷ In contrast to the situation in Pakistan, there is no doubt, officially or otherwise, of the complicity of the Yemeni government in the CIA's drone program. The New America Foundation reports 116 total strikes in Yemen resulting in anywhere from 1080 to 765 people killed in total, and of the total, the report claims that 1006 and 743 of the reported dead were militants.¹⁰⁸ The immensely lower percentage of reported civilian casualties in Yemen, a state which has given permission and cooperated in the drone strikes on its territory, leads the reader to question exactly which reporting bias is at play here: Does Yemen wish to report lower civilian casualties because they are publicly involved in the strikes, or does the more public and overt nature of the drone strikes in Yemen allow for more accurate reporting?

In an interview with the former Chief Counsel for the CIA, John Rizzo, he explained the process of drafting and approving drone strike proposals; "when the agency wants to launch a drone strike...it asks a lawyer to provide legal cover for the assassination by signing off on a five-page dossier laying out the justification for the attack. The cable usually contains a list of 30 people targeted for death."¹⁰⁹ The CIA categorizes the use of drones on suspected terrorists in Pakistan and Yemen as falling into one of two categories: signature strikes and personality strikes. Signature strikes are described as involving, "attacks on groups of alleged militants who are behaving in ways that seem suspicious...the decision to launch a drone assault is essentially an odds game: If the agency thinks it's likely that the group of individuals are insurgents, it will take the shot."¹¹⁰ Personality strikes, on the other hand, are strikes targeted at big-name terrorists

¹⁰⁷ "Obama's Covert War in Yemen," *New America Foundation*, accessed March 15, 2013, <http://yemendrones.newamerica.net/>

¹⁰⁸ "Obama's Covert War in Yemen."

¹⁰⁹ Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

¹¹⁰ Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

and they “usually require approval from a lawyer...the CIA Chief, and sometimes the president himself.”¹¹¹ Personality strikes are further characterized as having been the most utilized type of drone strike by the previous administration and there is evidence that this category of strike has involved international cooperation; “established by the Bush administration and Musharraf in 2004, the covert CIA drone program initially carried out only ‘personality’ strikes against a preapproved list of senior al Qaeda members.”¹¹²

If the extent of official Pakistani government sanctioning of the CIA’s drone program is questionable, there certainly exists at least a level of implicit approval by factions of the government, “despite Islamabad’s public saber-rattling, media reports have surfaced time and again that the Pakistani government tacitly approves of US military operations on its territory, and even cooperates with Washington in the selection of targets: ‘a lot of the targets are nominated by the Pakistanis – it’s part of a bargain getting Pakistani cooperation’.”¹¹³ More dubious logic on the topic suggests that the Americans have taken Pakistani silence on the matter to imply Pakistani approval; “the U.S. government believes that because Pakistan has not said ‘no’ to U.S. strikes, the strikes are permissible.”¹¹⁴ Indeed, concrete evidence of tacit approval exists in the form of designated areas inside the FATA where drone strikes are permitted.¹¹⁵ The circumstances surrounding the cooperation of the Yemeni government are far more straightforward; the Yemeni government offers full, public support of the drone program and the strikes within their territory.¹¹⁶ Speculation as to the reasons for the extent of Yemeni cooperation with the drone strikes primarily focus on the new regime’s desire for stability and

¹¹¹ Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

¹¹² Rhode, “The Obama Doctrine: How the president’s drone war is backfiring.”

¹¹³ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 55.

¹¹⁴ McNeal, “Kill-Lists and Accountability,” 18.

¹¹⁵ McNeal, “Kill-Lists and Accountability,” 17.

¹¹⁶ McNeal, “Kill-Lists and Accountability,” 19.

the desire of the government to secure assistance in fighting the insurgence and al Qaeda in the Arabian Peninsula.

Aside from the probable cooperation between Pakistan and the U.S. on drone targets, there nonetheless exists a measure of discord between the two nations on matters of implementation. BBC News reported on the drone strike that killed a senior Pakistani militant, Mullah Nazir, and the dissonance that it caused in the Pakistani- American relationship; Mullah Nazir was the leader of one of the largest Pakistani militant groups in the FATA and was the cause of much infighting in these groups due to his insistence on fighting American soldiers in Afghanistan rather than Pakistani government forces. As such, the targeted killing of Nazir caused a rift between the Pakistanis and the Americans; Nazir kept the peace for the Pakistani government.¹¹⁷ This instance highlights the difficulty of vague cooperation and alliances between nations in war on terror; the political naiveté, or plain disregard, in targeting practices.

The Obama administration defended the actions of the CIA in their targeted killing program in a speech by Harold Koh, legal advisor to the State Department, which stated, “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”¹¹⁸ Koh lays out several reasons why the U.S. program of targeted killings are lawful; first, it is not unlawful to target leaders of an enemy force because they are combatants and as such, legal targets. The second reason given for the lawfulness of the targeted killing program concerns the nature of drones as a weapon of war; some have expressed concern over drones as a weapon but the administration states that these types of weapons are not prohibited. Third in the list of reasons for legality, Koh

¹¹⁷ Aleem Maqbool, “Pakistan militant Mullah Nazir killed ‘in drone attack’,” *BBC*, January 3, 2013, accessed March 12, 2013, <http://www.bbc.co.uk/news/world-asia-20896755>

¹¹⁸ U.S. Department of State. Office of the Legal Advisor. *The Obama Administration and International Law* by Harold Hongju Koh. Washington DC: GPO, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm>

states, is that the lack of due process afforded to those being targeted is not illegal because a state involved in war is not required to give its enemies legal process.¹¹⁹ Finally, Koh states that the program does not violate the domestic ban on assassinations because the program does not meet the definition of an assassination campaign, but is instead, “precision targeting of specific high-level belligerent leaders.”¹²⁰

However, the U.N.’s special rapporteur Philip Alston’s report categorizes the targeted killing program as illegal and deeply troubling. Alston offers this definition of targeting killing as, “the intentional, premeditated, and deliberate use of lethal force by States or their agents acting under color of law, or by an armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator,”¹²¹ and he asserts that the CIA’s drone program qualifies as such. Alston further claims that, “although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.”¹²² Alston notes the Israeli example of targeted killings and cites the guidelines formulated by the Israelis as an example of how the U.S. can codify a legal procedure for its own program: The Israeli guidelines were as follows: the burden of proof to identify a target is placed on those doing the targeting, if less-than-lethal methods can be effective then they must be used in place of lethal methods, each killing needs to be reviewed by a judicial panel, and finally, any collateral harm to noncombatants must meet standards of proportionality.¹²³ A final question that

¹¹⁹ U.S. Department of State. Office of the Legal Advisor. The Obama Administration and International Law by Harold Hongju Koh.

¹²⁰ U.S. Department of State. Office of the Legal Advisor. The Obama Administration and International Law by Harold Hongju Koh.

¹²¹ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

¹²² Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

¹²³ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

Alston raises concerns the imputation of non-state actors to states where drone strikes take place; Alston claims that the burden of proof should again rest on those doing the targeting.¹²⁴

Putting the debate over legality of targeted killings aside, the questions over causalities of drone strikes remains; the main problem concerning obtaining accurate information on civilian casualties as a result of drone strikes has to do with the reliability of the information available and the lack of information on suspected targets. The main sources reporting any information on the clandestine drone strikes are the groups that are being targeted and the ones doing the targeting and as such a serious bias exists. Additionally, both groups (suspected terrorist organizations and the CIA) have a lot to gain from either inflating or conflating the number of casualties they report. Aside from obvious propaganda-related reasons for manipulating casualty figures, information is hard to come by due to the locals' fear of reprisals¹²⁵; indeed, the Taliban is known for punishing those who collude with enemy forces or even journalists. *Foreign Policy* reports that under the Obama administration, between 1,332 and 2,326 combatants have been killed, underscoring the enormous gap in accepted figures.¹²⁶ The lack of reliable information regarding casualties of drone strikes is highlighted in an article by the *New York Times* that mentions comments made by a Taliban spokesman regarding a recent strike and his inability to discern the identities or numbers of militants killed¹²⁷; indeed the problem of a lack of reliable information plagues both sides. The *New York Times* reported that between 2002 and 2004, “drones had killed just 14 terrorist leaders at the price of some 700 civilian lives. This is 50

¹²⁴ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

¹²⁵ Ahmed Al-Haj, “Yemen Drone Strikes: Suspected U.S. Attack Kills at Least 8,” *Huffington Post*, January 19, 2013, accessed March 12, 2013, http://www.huffingtonpost.com/2013/01/19/yemen-drone-strikes_n_2512871.html?utm_hp_ref=email_share

¹²⁶ Meg Braun, “The Obama Doctrine: Drones and Just Wars,” *Foreign Policy*, September 25, 2012, accessed January 29, 2013, http://afpak.foreignpolicy.com/posts/2012/09/25/obama_doctrine_drones

¹²⁷ Ismail Khan and Declan Walsh, “Attack, Said to Be Drone Strike by U.S., Kills 2 in Pakistan,” *New York Times*, March 10, 2013, accessed March 12, 2013, http://www.nytimes.com/2013/03/11/world/asia/drone-strike-reported-in-pakistan.html?_r=1&

civilians for every militant killed... a hit rate of 2 percent.”¹²⁸ Concluding, the problem of unreliable casualty estimates is not only one of perception; the recent UN inquiries into the CIA’s drone program have largely been spurred by outrage over this lack of accountability. Philip Alston, the investigator appointed by the United Nations Human Rights Council, commented on the drone program, stating that, “the Central Intelligence Agency is running a program that is killing significant numbers of people and there is absolutely no accountability in terms of the relevant international laws.”¹²⁹

Literature Review Conclusions

Frowe’s work on JWT presents a modern, updated summary in *The Ethics of War and Peace*. Her book outlines for the reader the various conditions contained within *Jus ad Bellum* and *Jus in Bello*, as well as the common debates surrounding each condition. Frowe’s work is very easily applied to new subject matter as her text is not history specific; Frowe uses abstract examples and as such the reader is able to imagine the required stretch or aptness of each clause in varying circumstances. Michael Walzer, on the other hand, offers a slightly more rigid interpretation of JWT in *Just and Unjust Wars*. Walzer’s analysis is achieved by using historical examples to illustrate the various clauses of JWT and so the information he relays is not as easily translatable to varying circumstances as it is in Frowe’s work. While Walzer’s analysis of JWT may be too strict for the purposes of this investigation, he nonetheless provides some useful discussion on the principle of Just Cause (primarily that of self-defense), which is outlined

¹²⁸ Fair, “Drone Wars: The Obama administration won’t tell the truth about America’s new favorite weapon – but that doesn’t mean its critics are right.”

¹²⁹ Reuters, “U.S. Use of Drones Queried by U.N.,” *New York Times*, October 27, 2009, accessed January 29, 2013, <http://www.nytimes.com/2009/10/28/world/28nations.html>

below. Walzer also puts forth a beneficial analysis of the imminence precondition of waging preemptive wars, which is too, outlined below.

With a view to the available literature on the subject of JWT, drones in the War on Terror, and terrorism, there exists a gap between theory and practice. Anthony Burke notes the disconnect between war theory and practice and suggests the adoption of a more realistic framework going forward where war is treated as an ongoing condition rather than a set of special circumstances. Burke asserts that, “if war is seen as policy, we must do what so many just war thinkers fail to do: treat war as a part of a historical continuum, rather than an isolated event limited to the conduct of high-intensity military operations whose impact can somehow be limited in time, scope, and spatial reach.”¹³⁰ In short, Burke notes the need to imagine a framework that would support a non-negotiable, ethical peace; “ethical peace imagines a universal moral community in which no ethical obligation can be traded away in times of emergency, and no humans can be put in mortal danger so that others may be safe.”¹³¹

The holes in the literature and, in large part, theory, surrounding terrorism have largely to do with the absence of motive in the discussion. Indeed, the morality of an action is judged, at least in part, by the motive behind the act. Indeed, the means engaged to achieve an end are part of the moral calculation but one must also take into account the necessity of an act to determine its morality. Virginia Held notes the important point that for some groups, violence is the only path available to change; on the plight of those disenfranchised by their own government, Held notes that, “it can become the choice of those so disempowered by a political order (or a political disorder) that they have no other options.”¹³² Furthermore, she notes the failure of the literature to address the changing international political realities; states are no longer the only actors that

¹³⁰ Burke, “Just War or Ethical Peace?” 333.

¹³¹ Burke, “Just War or Ethical Peace?” 333.

¹³² Held, “Terrorism and War,” 69.

carry weight; indeed, non-state actors such as terrorist groups, NGOs, IGOs, and multinational corporations play a greater role in global politics every day and the literature and theory on the subject has yet to make up for this deficiency. For instance, the US and the UN both ascribe to ideals of legitimate violence as the right of the state only¹³³; is this to say that the so-called “Arab Spring” revolutions are not legitimate forms of violence? That those fighting for their lives in Syria are on the wrong side of history? The literature on JWT, terrorism, and the use of modern weapons, need to be amended to address the reality on the ground instead of anachronistic notions of war, the role of states, and battles as being fought by equal armies.

Analysis

After having given the reader an introduction to JWT, the debate over classifications and definitions of Terrorism and Terrorists, and a short overview of the use of drones in the War on Terror, the paper will now turn to the analysis of the question at hand: in the war on terror, can the use of drones be consistent with the prescriptions of JWT? The following sections will attempt to prove the authors thesis; that the use of drones, as a tool of war, in the War on Terror both can be, and currently is, compliant with the prescriptions of JWT. In large measure, given that this analysis will rely only on available information, some of the judgments made reflect the lack of concrete evidence. Unfortunately, the information that is available regarding the CIA’s drone war is incomplete, however the analysis is drawn from what is currently available. Furthermore, it has been this author’s preference to, where possible; give credence to the claims put forth regarding the drone war by the U.S. government over those of al Qaeda and its associated forces. The reason for this preference lies in the ability of a state, operating as a single entity to provide constant information, as more favorable than the claims put forth by a loosely

¹³³ Held, “Terrorism and War,” 70.

associated network of terrorist elements. In short, this analysis will not only address the question posed regarding JWT and drones in the War on Terror, but will offer an assessment of JWT in terms of modern war; how JWT falls short in its capability to address the realities of modern war and its insistence in clinging to a realist model of global politics.

In this analysis the discussion will examine both how the classification of “terrorism” has influenced the way that the War on Terror is fought and, how the treatment of terrorism and terrorists has either complied with, or run contrary to, JWT. Next, the analysis will address when the use of drones in the War on Terror has fallen in line with, or in opposition to, JWT. Finally, by reaching conclusions about each of these pieces separately, and then examining the circumstances as a whole, the paper will be able to make assessments as to the compliance with JWT of drones in the War on Terror, as well as the specific areas of JWT and drone application that need to be assessed and modified in order to reach a more complete level of compliance with either JWT or the realities of modern war. The analysis will reach conclusions on the justness of the War on Terror in its entirety by examining each condition separately. An important fact to remember is that in order for a cause for war to be considered just, all the components of *Jus ad Bellum* must be met. Conversely, *Jus ad Bellum* and *Jus in Bello* should be viewed separately of one another (see Appendix A).

Terrorism, Terrorists, and the Importance of Distinction

The treatment of terrorism and terrorists, and the characterization of actions and people as such, is an important aspect of the War on Terror given the differing methods and morality that are employed in the fight against them. When determining the level of compliance with JWT of the War on Terror and the use of drones in the fight, we must first determine if those we are

fighting are being treated according to the principles of JWT and, furthermore, if the labels that are assigned them fit with this framework.

The treatment of those defined as terrorists has often been vaguely codified; however, there remains the need for a more structured set of guidelines regarding those defined as terrorists, irregular forces, and unlawful combatants, if for no other reason than to address the creeping reality of irregular warfare as the modern norm. Indeed, one could argue that the rules regarding POWs and enemy forces in general are outdated; we no longer live in a world where wars take place on a battlefield, nor are our wars characterized by two, somewhat equal, armies meeting at a predetermined location. The need to redefine the terms of *Jus in Bello* is especially evident in terms of the CIA's covert war on militants in Pakistan and the Arabian Peninsula. Irregular warfare is usually not the product of a desire or personal preference by a group, but rather it reflects the necessity, either imagined or real, of such tactics for a group to persevere. While moral justifications of acts of terrorism are beyond the purview of this paper, the question regarding treatment of the enemy needs to be addressed: are those who engage in terrorist acts beyond the pale in terms of fair and humane treatment? Smilansky lays out four moral justifications for any action, which are particularly useful in determining the morality of both means and ends. Smilansky asserts, "the general project of moral justification makes certain demands: for instance that the existence of real needs and a just aim be established, that severe violence should be used only as a last resort, that reasonable proportionality be maintained, and that standards of universalization can be applied to the would-be justification."¹³⁴ In the event that these conditions are met, but the conditions of *Jus in Bello* are not met (largely owing to the nature of terrorism itself), then should the treatment of unlawful combatants, or 'terrorists' be any different than the treatment prescribed for POWs or regular enemy forces?

¹³⁴ Smilansky, "Symposium on Terrorism, War, and Justice," 800.

The labels ‘terrorist’ and ‘terrorism,’ as discussed above, have as many different definitions as they do instances and, as such, the ambiguity of these terms has led to their widely differing application. Perhaps the most important reason for requiring a strict definition of what a state considers terrorism and whom they consider a terrorist has to do with the desire to avoid the use of the terms as a political maneuver to eradicate dissident groups or others who may cause problems for a given regime. In the area of JWT, the moral obligation to discern between terrorists and noncombatants, or innocents, is referred to as the principle of distinction. The very nature of terrorism and the groups that commit it make distinction very difficult, if not impossible. The circumstances of the War on Terror provide just such difficulties for coalition forces attempting to differentiate between enemies and civilians; “this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians.”¹³⁵ Additionally, distinction is made all the more difficult by the failure to identify what constitutes a terrorist or a fair target. It may be obvious that engaging in terrorism would classify one as a terrorist, but does supplying money to a “terrorist” organization constitute terrorism? If the answer to that question is in the affirmative, then does a non-violent group who supplies money to a terrorist group, such as a gathering of Afghani drug-lords, earn the classification of a terrorist group?¹³⁶ Indeed, it has not been the practice of International Humanitarian Law (IHL)¹³⁷ in the past to assume that civilians who fight enemy forces in a time of foreign intervention were in fact enemy combatants or terrorists; “IHL has never recognized

¹³⁵ Koh, “The Obama Administration and International Law.”

¹³⁶ Charlie Savage, “U.N. Report Highly Critical of U.S. Drone Attacks,” *New York Times*, June 2, 2010, accessed January 29, 2013, http://www.nytimes.com/2010/06/03/world/03drones.html?pagewanted=all&_r=0

¹³⁷ Cole, “Drone Wars Briefing,” 20.

civilians who take up arms in a non-international conflict as combatants.”¹³⁸ IHL refers to, “the Laws of Armed Conflict, known formally as the Laws of International Humanitarian Law (IHL), are made up of a number of internationally agreed treaties such as the Universal Declaration of Human Rights; the Charter of the United Nations; the Geneva Conventions, the Genocide Convention and what are called the ‘customs of war’, codified as the Nuremburg Principles.”¹³⁹ Indeed, the UN’s Philip Alston notes the need for a rigid definition of who can be characterized as a terrorist in order to protect civilians in the most generous way possible; “the key...is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat.”¹⁴⁰

While the CIA maintains that they have methods whereby they are able to determine the true identity of a terrorist in situations where others would be unable to, they fail to provide concrete examples of what these characteristics are. The CIA claims that by deducing information about the social networks that a ‘terrorist’ maintains, they are able to discern their true identity; “social ties that appear inactive or weak to a casual observer such as an NGO, human rights worker, journalist, or even a target’s family members may in fact be strong ties within the network.”¹⁴¹ However, as stated above, in order to maintain a high standard of prejudice in the intentional killing of civilians, we should only consider those actively involved in hostilities as either combatants or terrorists, depending on the circumstances.

¹³⁸ Cole, “Drone Wars Briefing,” 20.

¹³⁹ Cole, “Drone Wars Briefing,” 20.

¹⁴⁰ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

¹⁴¹ Gregory S. McNeal, “Kill-Lists and Accountability,” 39.

Imputation: Whose Responsibility?

In addition to the need to comply with the principles of distinction, a further issue, imputation, needs to be discussed. Imputation is the practice of assigning ownership or responsibility to a state based on the nationality, operating position, or current location of a group in question. In the context of the War on Terror, this concerns the imputation of al Qaeda and associated forces to Pakistan, Yemen, and more recently, Somalia. Safe-havens, furthermore, have been a concept at the heart of America's initial claim of self-defense in the War on Terror; former President Bush invoked the right to self-defense in 2001 when he asked congress for an AUMF and asserted that those who harbor terrorists are to be considered enemies of the U.S. as well. As discussed above, the notion of conditional sovereignty is highly relevant to the circumstances in Pakistan whereby the CIA believes that the government of Pakistan is either allowing militants to operate, is unable to stop them from operating, or, most worrisome, is encouraging and protecting militants that are operating in the FATA. Whatever the circumstances, the question remains: How can groups operating within the borders of a state be attributed to that state? In order to answer that question, the concept of safe-havens needs to be discussed. Safe-havens, according to Reinold, are, "ungoverned, under-governed, or ill-governed areas of a country where terrorists...are able to organize, plan, raise funds, communicate, recruit, train, and operate in relative security because of inadequate governance capacity, political will, or both."¹⁴²The ability of militant groups to operate in these areas means that the states in which they operate forego a measure of their sovereignty; as mentioned above, sovereignty is a conditional right that can be lost or amended depending on the severity and duration of the ill-governance. As Reinold states, irregular warfare (terrorist activity, guerilla warfare, etc.) occurs as a result of poor governance; "irregular warfare does not occur in a

¹⁴² Reinold, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11," 1.

vacuum. It flourishes because states direct, support, or simply tolerate irregular activities on their territory. Terrorists and other non-state actors need a sanctuary where they can train and plot without interference.”¹⁴³ With a fuller understanding of non-state actor imputation to their state sponsors and safe-havens, we can move to the case for Pakistani militant imputation to Pakistan.

U.N. special rapporteur, Philip Alston, claims that the burden of proof for determining imputation lies with those claiming self-defense.¹⁴⁴ In practice however, the state claiming self-defense would likely attack the non-state actor wherever they were located therefore relegating questions of imputation to a secondary position. In the case of Pakistan, the question of imputation is complicated by differing accounts of complicity,

The events of 9/11 transformed Pakistan into a staunch US ally in the war on terror, yet on the other hand its efforts have failed to eliminate the extensive terrorist network operating on its soil. Moreover, the fractured nature of the Pakistani leadership and the apparent complicity of the elements in the Pakistani intelligence community in terrorist activities have fuelled suspicions that Islamabad’s civilian government does not fully control the army, that the army does not fully control the intelligence agencies, and that these intelligence agencies have lost their ability to rein in the very militant groups they helped to create.¹⁴⁵

In the case of Yemen, the invitation and public cooperation by the Yemeni authorities makes the question of imputation virtually nonexistent. Indeed, when a state is invited by another to assist in self-defense, the question of just cause has already been address and thus needs no self-defense clarification.

Jus ad Bellum and Terrorism: Just Cause, Proportionality, and Last Resort

In light of the above discussion, can the targeting of enemy forces, defined as terrorists, be consistent with JWT? The various concepts enshrined in JWT that have terrorism-specific

¹⁴³ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11,” 8.

¹⁴⁴ Alston, “Report of the Special rapporteur on extrajudicial, summary or arbitrary executions.”

¹⁴⁵ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11,” 58.

implications are contained in both *Jus ad Bellum* and *Jus in Bello*; in *Jus ad Bellum*, they concern just cause, proportionality, and last resort and for *Jus in Bello* they pertain to combatants and the requirement of discrimination. I would like to turn first to the conditions of *Jus ad Bellum* as they concern terrorism and terrorists.

Just cause, as a precept of *Jus ad Bellum*, pertains to the fighting of terrorism, especially in the War on Terror, in that the cause given for the War on Terror was self-defense. Self-defense is recognized as among the first, and most just causes, of the causes listed for going to war. The question is not whether or not self-defense is a just cause for war but whether a fight against non-state actor can be considered self-defense. Again, questions of this nature remind the reader of the great need for an updated framework to address the changing reality of modern war; we are no longer faced with the realist¹⁴⁶ conception of war and as such, frameworks that do not take into account the changing influence of non-state actors are becoming less and less practical. Furthermore, the question relates to whether or not a war against a non-state actor who has not already attacked a state can be considered a just case of preemptive self-defense.

Reinold describes the conditions that would need to be met to claim self-defense against a terrorist group; “the threat emanating from the terrorist hiding in a failed state would have to be imminent, and arresting them would not be a viable option.”¹⁴⁷ However, the usefulness of this claim is dubious given that the condition given is ‘imminence’ and that is the very concept in question; there is little doubt as to the threat that terrorist groups pose the U.S. and Western society in general, mostly attributable to their public statements to the former, however the

¹⁴⁶ The Realist conception of war, as referenced above, can be understood as war between two more or less equal armies on a battlefield. Furthermore, realism views war through a state-centered lens wherein nonstate actors, and their contributions, are largely ignored. Therefore, in this case we can interpret the realist view of war as one in which wars of the 20th century are described and the nuances of modern war (nonstate actors, “unlawful combatants,” and modern technology are ignored.

¹⁴⁷ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11,” 54.

uncertainty revolves around the level and imminence of the threat. The literature review provided the reader with a discussion on imminence as a standard for preemptive war and the problematic nature of imminence as a maxim. Imminence as a standard for preemptive war is problematic in this setting for two reasons: the definition of imminence is vague at best and so is left open to debate and, the most commonly accepted definition of imminence leaves little or no room for meaningful action. Instead, it is the opinion of this author that, given the continuous nature of the threat, the public declaration of the intent to harm the U.S. and its allies, and the proven track record of following through on threats, the threat is then enough to constitute imminent harm. If the standards for imminence were restricted any further, the usefulness of preemptive wars of self-defense would be doubtful at best.

Given that these standards of imminence are met in the War on Terror, the only other standards that need to be met are those of self-defense. The U.S. government has characterized the War on Terror, and the drone strikes employed, as “the purest form of self-defense”¹⁴⁸. Indeed, given the circumstances of the 9/11 terrorist attacks, the targeting of civilians, the lack of a declaration of war, and the lack of any concrete grievance other than historical narratives, it would be difficult for anyone to deny the U.S. self-defense as a just cause for war against al Qaeda and its associated forces.

The next condition of *Jus ad Bellum* to be discussed is proportionality. Proportionality relates to the fighting of terrorism when comparing the damage inflicted in the interest of stopping or curbing terrorism as compared with that which would be inflicted in the absence of action. Given the nature of terrorism, as discussed above, as violence aimed at noncombatants in the pursuit of political aims, it can certainly be considered proportional to target and kill terrorist group leaders in the effort to protect civilians. While the question of proportionality in aims may

¹⁴⁸ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11,” 54.

be an easy one to answer, the question of the same proportionality in the actual fighting of the war may be more difficult, not least of all because authentic figures of casualties are hard to come by. As discussed above, the parties doing the reporting of casualties (civilian and militant) are both intensely biased and as such the figures given can hardly be trusted. Furthermore, the enormous disparities in reported casualties lend credence to the fact that neither side can be trusted in data gathering. Disparities and suspicions aside, what is the calculation that one would use when comparing the lives of militants and civilians? That is to say, should the lives of those willingly entering hostilities and those merely caught in the crossfire or worse, targeted because of their vulnerabilities, be counted equally? It is the contention of this author that they should not. Furthermore, the claim that because both terrorism and counterterrorism ignore the identities of their targets is not only factually flawed but it overlooks the important distinction between aggressor and defender. Held claims that, “terrorism that kills civilians to oppose a government’s policies does not distinguish between those who support and those who oppose that government. But neither does counter-terrorism that kills civilians distinguish between those who support and those who do not support terrorist groups.”¹⁴⁹ It is the responsibility of the armed forces of each state, regular or irregular, terrorist or freedom fighter, to protect civilians. Given the nature of the terrorist organizations and their track records of targeting civilians, I would contend that the allied forces in the War on Terror have indeed met the proportionality imperative.

The final condition of *Jus ad Bellum* that relates to the fighting of terrorism concerns the imperative of last resort. Of the three conditions discussed as related to terrorism, the clause of last resort is most problematic case for those fighting the war on terror and has, as such, been categorized as meeting the requirements of JWT *with conditions*. Last resort is not problematic because methods of diplomacy have not been tried or because ultimatums have not been given,

¹⁴⁹ Held, “Terrorism and War,” 67.

rather the problematic portion is the lack of less-than-lethal methods employed in drone strikes on terrorists or militants. In a meeting of forces on the ground, troops and militants have the opportunity to surrender, be hurt, taken captive or taken as POWs. In a targeted drone strike, none of these possibilities exists. McNeal uses the targeting of the high-level al Qaeda operative, al Aulqi, as an example, stating, “if al Aulqi chose to surrender, then he would automatically be rendered *hors de combat* and could not be targeted – though whether an individual could surrender to an aircraft remains an open question.”¹⁵⁰ However, regardless of the obvious nature of this question, it simply cannot be answered; the fact that the CIA’s drone program operates in secrecy prohibits judgments of this sort from being made. An additional concern regarding the last resort clause however is the claim that there exists a lack of attempts by coalition forces to arrest or detain suspected militants in Yemen, Pakistan, and Somalia. The conclusion that no attempts are made to detain militants is not such a cut and dry conclusion to reach given the circumstances; to assume that from the fact that some militants are killed, it follows that all militants are killed, is faulty logic. With the unlikelihood of an answer as to whether or not a suspected militant can surrender to a drone and the existence of detained militants as proof of the existence of less-than-lethal methods, one must conclude that the principle of last resort is indeed met satisfactorily. The operative phrase in this assessment is satisfactorily; in no way is this discussion contending that there are not unanswered questions or that no changes exist which could ensure the process one hundred percent compliance with JWT. Instead, the judgment being made is a reflection of a responsible assessment given the information available.

¹⁵⁰ McNeal, “Kill-Lists and Accountability,” 60-1.

Jus in Bello: Discrimination

The discussion will now turn to the final clause of JWT that concerns terrorism in this context; the *Jus in Bello* principle of the Legitimate Targets, or distinction, (for the purposes of this discussion: combatants and non-combatants). The above discussion surrounding the difficulties of defining what constitutes a terrorist, a combatant, a civilian, and an 'innocent,' all make the case for distinction very difficult. However, determining whether or not coalition forces have met the standard of attempting to discern between enemy forces and civilians may be an easier judgment to make; while uncertainty exists over the way that forces are judged as terrorist, there is certainly a degree of discernment that takes place in the decision surrounding the a targeted strike. Furthermore, little doubt remains over whether or not a distinction is made between civilians and those bearing arms against the U.S. and the west in general. It then becomes a moot point as to whether or not the forces targeted are in fact terrorists, militants, freedom fighters or any other category of fighter; the fact remains that those engaged in hostilities to one degree or another, against the U.S. and its allies in the War on Terror, are targeted with a supposedly low number of civilian casualties. Additionally, the standard of Legitimate Targets is to be understood in the context of unavoidable, or a level of acceptable, collateral damage; to meet this condition the targeted strikes must prove that they have only intended to kill combatants which the targeting process (as far as one is capable of knowing) meets.

The only remaining issue is determining that these reported casualties are in fact accurate. As stated above, the issues faced in determinations of this sort are numerous and, perhaps, insurmountable. The only information that one has to go on is statements by the administration regarding the issue, however as referenced earlier, there is a large degree of bias involved in this

reporting. Obama administration officials have in the past (June 2011) denied any measure of civilian casualties owing largely to the technology employed in drone strikes; “in June, John Brennan...alleged that for the past year there had not been a single collateral death in Pakistan caused by the US’s counter operations...because of the exceptional proficiency, precision of the capabilities that we’ve been able to develop.”¹⁵¹ Although this comment was mocked by many in the international community and domestically, there remains a bit of truth in the former Counter-terrorism advisor’s sentiment regarding the drone program capabilities. Indeed, the literature suggests that decisions to launch a drone strike go through myriad tests, including tests assuring the identity of a target.

Once such assurance mechanism is known as the Pattern of Life Analysis (POLA) and is reported to have a high degree of success in differentiating between militants and civilians. The POLA is comprised of, “connecting relationships between places and people by tracking their patterns of life. This analysis draws on the interrelationships among groups to determine the degree and points of their interdependence.” In other words, a target’s identity is assessed based on their friends, contacts, hangouts, and habits, in addition to their place within the organization in question. A further method of analysis, ensuring the lowest possible degree of collateral damage and civilian casualties in a strike aimed at a positively identified target is the Collateral Damage Methodology (CDM), is employed when planning a drone strike. CDM is a method used by the armed forces of the U.S., however the intelligence community uses a method that is, in essence, very similar however the specifics of the methodology are classified and as such I will refer to the CDM as an example of a like-method.¹⁵² For all intents and purposes, the CDM is a method by which the CIA analyzes information about a target including its location, nearby

¹⁵¹ Cole, “Drone Wars Briefing,” 16.

¹⁵² McNeal, “Kill-Lists and Accountability,” 64.

objects, the likely number of civilians in the area, traffic patterns, and other information intended to inform the decision about whether or not a strike would cause an acceptable number of civilian casualties.¹⁵³

In light of the above information, two major conclusions can be drawn: the question regarding whether or not the U.S. and associated forces have met the *Jus in Bello* requirement of distinction, (Legitimate Tactics) between combatants and civilians essentially disregards the debate on what constitutes a terrorist. The second conclusion to be drawn is that the U.S. and their allies in the War on Terror have indeed made the requisite effort to determine the accurate identity of those being targeted. This conclusion is all the easier to reach when one considers the nature of the enemy being targeted and their practice of doing just the opposite by purposively targeting civilians. While this claim regarding the relativity of conditions met for *Jus in Bello* is not meant to suggest that the meeting of standards is dependent on the degree to which an enemy does so, it does imply a measure of the reciprocity expected in JWT as well as the LOIAC.

Drones and Just War Theory: An Analysis

The investigation will now turn to the analysis of the use of drones in the War on Terror and the extent to which they do or do not fit with the ethical prescriptions of JWT. The analysis will attempt to reach conclusions about the degree to which each standard is met by analyzing each condition independent of the others. The previous section discussed the *Jus ad Bellum* conditions of just cause, proportionality, and last resort, and the *Jus in Bello* condition of discrimination as pertaining to terrorism and terrorists as targets, respectively, and therefore the following sections will only mention just cause in more depth with regard to the extent that it needs to be expounded upon. Next, the paper will attempt to make a case for each of the two

¹⁵³ McNeal, "Kill-Lists and Accountability," 65.

distinct JWT sections and then to make a judgment regarding the possibility of drone compliance with JWT. This section will begin by addressing the components of *Jus ad Bellum* (just cause, reasonable chance of success, legitimate authority, right intention, and public declaration) and then turn to *Jus in Bello* (combatants, tactics, and, to the extent that there is any relevance for this investigation, POWs).

Drones and Pre-War Judgments: Can the Use of Drones Comply with Jus ad Bellum?

Just cause was discussed in the analysis of terrorism and its implications for JWT however, in this section the analysis will focus on self-defense as the product of the dual-war that the U.S. is fighting. Just cause as a principle of *Jus ad Bellum* concerns the justness of the reason behind a state choosing to go to war. In the case of the War on Terror, both the Bush and Obama administrations have maintained that they are fighting a war of self-defense. The previous discussion of self-defense pertaining to its applicability in war against non-state actors and the extent to which imminence can be proven remains relevant for the discussion here as well. However, in the context of drones, regardless of their targets, self-defense needs to be understood as a response to the dual conflicts that successive administrations have identified; a transnational non-international armed conflict and a traditional non-international armed conflict. The significance behind characterizing the War on Terror as two separate but related wars is that the U.S. government can both claim that it is fighting a transnational enemy, such as a terrorist group, and that they are assisting a U.S. ally in fighting a group that is attributable to their state.¹⁵⁴ In other words, regardless of who, or where, the U.S. chooses to target an enemy, their classification of the war will cover the targeting as either a function of the transnational or traditional conflict. The Department of Justice (DOJ) White Paper that was leaked to the press in

¹⁵⁴ McNeal, "Kill Lists and Accountability," 19.

February of 2013 outlined the Obama administration's legal justification for engaging in hostiles outside of 'hot spots'; "The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan."¹⁵⁵

Furthermore, both of the types of war that the administration has identified fit within the definition of self-defense; the U.S. is seen as either engaging in its own self-defense or engaging in other-defense by coming to the aid of an ally.¹⁵⁶ Finally, as to whether or not the self-defense justification can apply to future, or anticipated events, Philip Alston states that,

a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defense against a non-state actor... As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defense – necessity that is instant, overwhelming, and leaving no choice of means, and no moment of deliberation – would be met.¹⁵⁷

Alston is implying here that the rules surrounding anticipatory self-defense were either formulated for just such a situation or that the characterization of the War on Terror as the aforementioned dual-conflicts was formulated to meet these conditions, the latter obviously being the more worrisome and more likely version of events. However, when one puts aside the question regarding the classification of the conflict, the fact remains that there was a terrorist attack on American soil for which the American Congress authorized the use of military force. In light of this it would be hard to argue that the U.S. did not have just cause, indeed a textbook case of self-defense, to go to war against al Qaeda and associated forces. The remaining questions regarding who should be included in the 'associated forces' category is beyond the

¹⁵⁵ U.S. Department of Justice. *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force*. Washington, D.C. GPO 2013. http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans#.URxAfe2v8kk.mailto accessed February 13, 2013.

¹⁵⁶ Cole, "Drone Wars Briefing," 20.

¹⁵⁷ Alston, "Report of the Special rapporteur on extrajudicial, summary or arbitrary executions."

scope of this paper and therefore, for the purposes of this investigation it is the author's estimation that the U.S. does indeed have just cause for engaging in hostilities and employing the use of drones to do so.

There are indeed some aspects of U.S.'s right to engage in hostilities with al Qaeda and associated forces that have varying degrees of both legality and morality. However, the question in the assessment regarding the compliance with JWT does not concern how long an AUMF lasts or when it should be renewed; the question is whether or not the U.S. has a just cause to go to war. In the case of just cause, self-defense is indeed a just cause and furthermore, one could argue that the U.S. is in a state of ongoing war thus negating the idea that the AUMF is no longer valid after more than a decade. Indeed, the U.S. Congress has not been forced, in the past, to continuously renew authorizations of force in other ongoing wars, so why should the nature of this war (against a non-state actor rather than a state) change the requirements? The initial AUMF given by Congress to the President stipulated that the targets of such force would be those that the President, "determines planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001."¹⁵⁸ Additionally, as Paulen asserts regarding the discretion of the President to wage war against terrorists; "he chooses the ends and when they have been attained, he decides when there are no longer any relevant persons, groups, or nations that fit the described authorization. There is no prescribed time limitation...it is, potentially, a war of unlimited duration."¹⁵⁹

The next condition to be examined is that of a reasonable chance of success. The condition of reasonable chance of success can be understood in multiple ways however the spirit of the guideline is thought to be related to the fact that the men who declare war are not the same

¹⁵⁸ Michael Stokes Paulen, "Declaration of War: Ten Years Later," The Witherspoon Institute: Public Discourse (2011), accessed April 14, 2013, <http://www.thepublicdiscourse.com/2011/09/4004/>

¹⁵⁹ Paulen, "Declaration of War: Ten Years Later."

men who must then fight it; in other words, leaders, according to JWT, are prohibited from sending soldiers to die in a fight that they have no (or very slim) chances of winning. This is clearly not the case in the instance of the use of drones in the War on Terror. However, if the question is to be understood differently, as whether or not the use of drones is helping to win the war against extremism rather than to win battles against militants, then the question may be harder to answer. In the most accepted definition of the JWT condition of a reasonable chance of success however, the CIA's campaign against militants in Pakistan and Yemen has been a clear operational success; "facts on the ground indicate that the drone program has been an operational success. Under Obama's watch drone strikes in Pakistan have killed 1,322 to 2,326 combatants and the number of monthly terrorist attacks in Pakistan has fallen by over 50% since the high in 2008."¹⁶⁰ However, to reiterate the earlier point about whether this is a measure of winning a battle or winning a war, the analysis will now turn to a discussion regarding whether or not drones are effective in the War on Terror as a method to eradicate terrorism rather than as a method to kill militants.

The effectiveness of drones in the War on Terror is less a measure of the ability to kill militants and more a measure of the ability to win the war against them. In other words, have drones contributed to a successful campaign to eradicate terrorism? The answer, unfortunately, is no, and for this reason, the condition of reasonable chance of success is yet another instance of where a JWT clause is met with conditions. Regardless, drones have been a very effective method of killing militants as well as preventing overflow into neighboring regions.¹⁶¹ One of the ways that terrorist groups have been kept at bay through the use of targeted drone strikes concerns the targeting of high-level leaders within the targeted organizations;

¹⁶⁰ Meg Braun, "The Obama Doctrine: Drones and Just Wars," *Foreign Policy*, September 25, 2012, accessed January 29, 2013, http://afpak.foreignpolicy.com/posts/2012/09/25/obama_doctrine_drones

¹⁶¹ Braun, "The Obama Doctrine: Drones and Just Wars."

The constant removal of leadership impedes consistent guidance and coherent strategic communication, which weakens and delegitimizes leadership. Replacement leaders may be found quickly, but often lack the skills, experience and relationships of their predecessors. Meanwhile, the network's capacity to plan, supply, and stage attacks is diminished due to an increased impetus for defensive measures and due to poor guidance from leaders to operatives... This diverts time and resources from offensive operations to precautionary measures.¹⁶²

The process of keeping the militants on the defensive rather than allowing them to continue planning and plotting can thus be characterized as a war of attrition and while this is not ideal, “a war of militant attrition is not without advantages. Drone attacks based on patterns of activity rather than individual identity have decimated the ranks of low-level combatants, forcing would-be terrorists to look to their own survival rather than plotting their next attack.”¹⁶³

The ability of drones to target both high and low level operatives has appeared successful when presented as a numbers game however, the ability of terrorist networks to bounce back from losses at the highest level suggests that the setbacks are minor and temporary at best; “networks are notably resistant to the loss of any one node.”¹⁶⁴ As previously stated, terrorism has very rarely been effectively targeted and eliminated through military force¹⁶⁵, instead, inclusion in the political process, a bridging of the gap between the haves and the have-nots, and development in the states that spawn it are more likely to lead to positive, lasting outcomes. Indeed, “killing militants will not cure the world of terrorism, it can only help to restrain it. The solution lies in committing the diplomatic and financial resources to address the political and economic instability upon which Islamic extremism feeds.”¹⁶⁶

The next condition of *Jus ad Bellum* to be analyzed is that of legitimate authority.

Legitimate authority is an additional clause in this assessment which has been deemed as

¹⁶² McNeal, “Kill Lists and Accountability,” 31.

¹⁶³ Braun, “The Obama Doctrine: Drones and Just Wars.”

¹⁶⁴ McNeal, “Kill Lists and Accountability,” 39.

¹⁶⁵ Cortright, Wittes, Goure, and Barry, “Cato Unbound: How Drones are Changing Warfare.”

¹⁶⁶ Braun, “The Obama Doctrine: Drones and Just Wars.”

satisfactorily met or met with conditions. When legitimate authority is understood as the necessity for the rightful leader of a state be the one declaring and waging a war, then in this instance the answer is clear; the president asked congress for an authorization of war, which was granted shortly after the 9/11 attacks. The AUMF granted by the U.S. Congress is the legal justification for the use of force currently being employed in the War on Terror. This is a very straightforward case of legitimate authority; a group of civilians in a non-military target were attacked by a non-state actor on sovereign territory without a prior warning or ultimatum of any kind, then a democratically elected government issued an AUMF at the request of the president. There is little question remaining as to whether or not the government of the U.S. has the legitimate authority to wage war against al-Qaeda and associated forces.

As stated earlier, there is no language in the AUMF given to then President Bush that stipulates a time at which the authorization expires. The worrisome aspect of the AUMF is not that it has been used past its allotted timeframe, but that it has been used at all. The AUMF given by Congress is seen as a very far-reaching authorization and as such, one that is very subject to interpretation and even abuse. Indeed, one may even remark that the very reason that the U.S. is law-abiding in this aspect is because it was the U.S. who wrote the law. However, in terms of this investigation, the question is not directed at whether or not the U.S. has the appropriate legal framework in place to wage a war against al Qaeda and associated forces but, whether or not the U.S. has met the condition of legitimate authority; as discussed previously, the critic would be hard pressed to prove that it has not.

Right intention is the next condition of *Jus ad Bellum* to be evaluated and the next clause to be categorized as having met the prescriptions of JWT with conditions. The obvious justification is that the U.S. and its allies are fighting a war against al-Qaeda and associated

forces in self-defense. There are however a few alternatives offered, most notably that drone strikes on militants in Pakistan are an appeasement tool for the U.S. - Pakistani relationship; “there is also evidence to suggest that many of the attacks were designed to appease Pakistan in that drones have pursued Taliban leaders who were more threatening to Pakistan than to the United States.”¹⁶⁷ Less convincingly, some have asserted that the war between the U.S. and al Qaeda is a war to maintain the status quo, a war to maintain the balance of power; “the violence used to suppress terrorism is the price paid to maintain the status quo, as the violence used by the dissatisfied group is the price paid to pursue its goal.”¹⁶⁸ However, as mentioned above, one needs to make a distinction between the right intention and many intentions. Furthermore, given the very strong case for a just war of self-defense it is difficult to conclude anything other than that the U.S. has a right intention for war in addition to many other intentions. The U.S. government, while it has its share of faults, has a fairly high degree of credibility and as such, it would be difficult to believe that the U.S. was engaged in the War on Terror to maintain its fractured relationship with Pakistan or to maintain its current realist perspective of the international community

A further point regarding the distinction between right intentions and many intentions concerns the relationship between just cause and right intention; a state may wage a war for both self-defense and revenge or for revenge and personal gain, however, only the war fought for a just cause can be considered to be fought with right intentions. Looking deeper into the issue of right intention provides a clearer picture of the exact intention that we are aiming to discover: Are we fighting a war to end terrorism or to kill terrorists, and, is there a difference? I maintain that there is indeed a sizeable difference between the intent to defend one’s self and the intent to

¹⁶⁷ Braun, “The Obama Doctrine: Drones and Just Wars.”

¹⁶⁸ Held, “Terrorism and War,” 68

kill members of another group. Some might argue that when the members of the other group are militants intending to do us harm, that killing them is justified. The question, in my estimation, comes down to the principle of universalization; what is good for one state must be good for another. In other words, many have defined terrorism as the act of ‘others’ but when one’s own state commits like-acts they are defined as self-defense; “what a lot of discussions of terrorism try of course to do is to come up with a definition such that what *they* do is terrorism and *unjustified*, whereas what *we* and our friends do is not terrorism but a justified response to it, or is justified self-defense.”¹⁶⁹ If this is indeed the case, then the use of drones in a war against a group of people no more morally culpable than their attackers cannot be considered to be waged with right intention. However, the evidence does not point to this conclusion. What it does point to, troublingly, is that the use of drones in the War on Terror is the codification of a policy of killing rather than a policy of capturing, as is custom in war.¹⁷⁰ In this author’s approximation, right intention is not certain in the context of using drones in the war on terror, but the evidence to the contrary is not either. In a situation such as this one, one can only rely on the facts that are known; the U.S. and its allies are engaged in a war of self-defense with al-Qaeda and its associates thus its consideration as having met the principle of right intention.

The final clause of *Jus ad Bellum* to be evaluated for this analysis is that of the requirement to publicly declare war. As stated earlier, the requirement to make a public declaration of war is only incumbent upon the aggressor, usually in the form of an ultimatum, and does not apply to wars fought in self-defense.¹⁷¹ As such the condition of making a public declaration of war does not apply to these circumstances. However, although the requirement to make a public declaration of war on al-Qaeda did not apply to the U.S. when the war began, a

¹⁶⁹ Held, “Terrorism and War,” 65.

¹⁷⁰ Rhode, “The Obama Doctrine: How the president’s drone war is backfiring.”

¹⁷¹ Frowe, “*The Ethics of War and Peace*,” 62.

statement nonetheless was issued. On September 18, 2001, former President, George W. Bush, signed the AUMF, “against those nations, organizations, or persons he determined planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”¹⁷² The AUMF that declared the legality of hostilities against al-Qaeda and its associated forces is considered to be one of the most far-reaching documents of its kind. While few could argue that the Bush administration failed to meet the requirement of a public declaration, least of all because it didn’t apply as a requirement for the U.S. given the circumstances, one could argue that the actors named in the AUMF were vague and far reaching.

Given the above circumstances, it would be a fair assessment to make that not only does the possibility exist for drones to operate within the confines of *Jus ad Bellum*, but that in the War on Terror these conditions have been met. The just cause for waging a drone war on militants in the FATA and the Arabian Peninsula is self-defense, a readily agreed upon just cause for war. The drone war has furthermore proved itself to be an operational success in areas such as the FATA thus erasing any doubt that ever existed regarding a reasonable chance of success. As stated earlier however, if we view a reasonable chance of success as pertaining to the war and not the battle, the estimation may look less certain. Additionally, the conditions of legitimate authority and a public declaration have very clearly been met given that the U.S has a democratically elected government that voted on the AUMF. Finally, the principle of right intention is the least clear, however in this case the argument for meeting the requirement is considerably stronger than the argument against it and as such a reasonable person would likely

¹⁷² Paulen, “Declaration of War: Ten Years Later.”

choose to believe that the U.S. engaged wage a war against al-Qaeda and its associated forces for self-defense.

Drones and Wartime Conduct: Jus in Bello

The analysis of the conditions of *Jus in Bello* will contain a short review of the problematic nature of the definitions of combatants, a review of the tactics associated with drones, and a small discussion on the rules surrounding POWs and the reasons why it is not applicable for this investigation. The principle of discrimination (legitimate tactics) was fully explored earlier in the analysis regarding terrorism and drones and as such will not be reiterated here.

The rules surrounding the classification of a militant as a combatant are very specific and seem to have been formulated in the realist model; they are meant to accommodate more or less equal armies meeting on a field for battle. Given that this is no longer the constant reality of war, the conditions that are laid out provide serious problems for forces that, according to many other principles of *Jus in Bello*, would be considered to be waging a just war. This is not to say that those who commit terrorism are in the right save for their failure to carry arms openly or to wear a visible insignia, but it does suggest that guerilla forces fighting against a despotic ruler should not be deemed unjust because the situation that they face necessitates their operating in secrecy. This need to reevaluate the terms of qualifying as a combatant apply to more than just guerilla forces, indeed, some of our forces fighting in the War on Terror do not meet these guidelines of combatants.

Aside from the obvious problems with necessary conditions for combatant status, the use of drones does not seem to operate contrary to these guidelines. The obvious problem with these

conditions is that it is difficult to evaluate drones according to the conditions set forth for evaluating human forces. There are some conditions that drones can meet as easily as human forces: drones are identifiable and do not pretend to be civilians, they are visible from a distance, at times, and they (or those who operate them) are subject to the other rules of *Jus in Bello*. The inherent difficulty in evaluating drones in terms of *Jus in Bello* relates to the separation between weapon and combatant; the combatants operating the drones can be based thousands of miles away in undisclosed locations. The drones, in this instance, are representatives of the combatants in their absence; however they do not meet some terms of qualification as a combatant. Indeed, a drone is a weapon and regardless of their remote capabilities, they are still controlled by human operators; to assert that a drone must meet the same conditions as human combatants is nonsensical. The ability of modern weapons to act as stand-ins for human combatants further underscores the need to redefine the terms of qualifying as a combatant within JWT. Given the measure of applicability of *Jus in Bello* to the circumstances specific to drone warfare, it seems that drones can indeed qualify as combatants according to JWT.

Legitimate tactics, also referred to as proportionality in *Jus in Bello*, are the next facet of drone usage in JWT that will be evaluated and are perhaps the most important to the investigation into the ability of drone warfare to be consistent with *Jus in Bello*; given their classification as a weapon (i.e. tactic) this clause can be seen as the most pertinent to the discussion. Much has been said and written about targeted drone strikes on individuals and while the debate over whether or not these strikes constitute assassination is still raging, that is more an issue for international and domestic law than it is one of JWT. Nonetheless, a short discussion of the current administration's stated legal justification for drone strikes are in order. The Obama administration has stated, publicly, that its policy of targeted killings of high-level militants does

not qualify as assassination because they are party to the groups that America is waging war against and as such qualify as targets. Harold Koh, legal advisor to the State Department described the legality of targeted killings as such, “some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law.”¹⁷³

A counter argument to the administrations legal justification is that the targeted killing of a leader of a group qualifies as an assassination and as such violates domestic law. However, the sticking point for this counter argument lies in the both the classification of the enemy being targeted and in the classification of the situation in which the targeting is taking place. Given that the administration has an AUMF under which it is operating in the War on Terror and, given that the AUMF has specified which groups are being operated against, it follows that the instances of targeting are taking place in an environment of warfare therefore, assassination would not be the correct terminology. Indeed, the definition of ‘assassination’ reads, “to murder (a usually prominent person) by sudden or secret attack often for political reasons.”¹⁷⁴ War, however, is neither secret nor sudden. Furthermore, drone strikes target both high and low level individuals who are either members or suspected members of terrorist organizations. Additionally, although the targets of drone strikes meet the ‘political’ aspect of the definition of assassination (terrorism is, by nature, a political act), not every death of a terrorist can be considered assassination.

The argument behind the morality of the tactics used in drone strikes centers around the remote capabilities associated with this type of warfare. Critics argue that, “unlike other forms of warfare, virtual war has an unsurpassed power to commute death, to keep it out of sight, out of

¹⁷³ Koh, “The Obama Administration and International Law.”

¹⁷⁴ “Assassinate,” Merriam- Webster, An Encyclopedia Britannica Company, accessed May 1, 2013. <http://www.merriam-webster.com/dictionary/assassination>

mind. Herein lies the morally dubious danger. In simulated preparations and virtual executions of war, there is a high risk that one learns how to kill but not to take responsibility for it.”¹⁷⁵ Indeed, the remote nature of drone war has led many to worry about the lack of accountability, both legal and otherwise; remote war sanitizes war to an even greater degree than the American public is accustomed to, effectively removing even the notion from our consciousness making it that much easier to enter into hostilities. Finally, the nature of drones as a remote and technologically advanced weapon makes risk taking more feasible by making it less dangerous; losing a drone means losing a few million dollars, not a troop with a family to answer to. Finally, the advanced technology employed in drones leads to various capacities, such as the ability of drones to loiter over an area for prolonged periods of time, that are new to our intelligence agencies and our armed forces, underscoring the need for the codification of best practices with such technology. Some suggest that these new capabilities, in the absence of restrictions specific to them, create various opportunities for abuse. In regard to the capability to loiter over a given area, Cole points out that, “evidence is beginning to emerge that it is the persistent presence of UAVs sitting over remote villages and towns simply looking for ‘targets of opportunity’ that may be leading to civilian casualties.”¹⁷⁶

On the other hand, the argument for the use of drones as a more humane tactic is slightly more convincing. Certainly the essence of the moral argument behind using just tactics in war is to ensure that horrific, unnecessarily cruel methods are not used against soldiers and civilians. What then, could be more moral and humanitarian than employing methods that are proven to be effective thus shortening the war for all parties concerned? As Burke notes regarding the tactics that a state uses in war, “whatever contributes to his overall victory usually diminishes overall

¹⁷⁵ Burke, “Just War or Ethical Peace?” 331.

¹⁷⁶ Cole, “Drone Wars Briefing,” 27.

casualties, especially his own. It is therefore self-evident to him that any device or tactic that hastens victory represents the highest morality.”¹⁷⁷ As a secondary point of the importance of using the most effective methods, which in turn also means using the most humane methods, Coady refers to the importance of evaluating an act by its military importance first and foremost. Indeed, by using the example of the strategic bombing of bridges in Kosovo, Coady illustrates that means should be judged by military necessity first to ensure that whatever the outcome, the aim was justified; “the question about whether the bridges should have been bombed at all should turn on their military significance and not on the answers to fantastic questions about whether Serbians deserved their government.”¹⁷⁸ Given the above discussion, it seems as though the argument leans in favor of determining the tactics employed by drone warfare as indeed meeting with *Jus in Bello*.

Finally, the restrictions on the treatment of POWs is not relevant to the discussion of drones in the War on Terror given that drones do not take prisoners, nor do they affect the treatment of those injured or captured. As stated earlier, the fact that the ability of a person to surrender to a drone, or any aerial weapon, is unknown is certainly cause for concern given that this could mean that militants that are *hors de combat* or who have surrendered are being killed in clear violation of *Jus in Bello*. However, this issue is not unique to drone warfare; a person or persons are unable to surrender to F16’s and their usage is not seen as employing a weapon or class of weapon considered beyond the pale of war. Due to the above circumstances, I am inclined to believe that drones shouldn’t be judged according to this standard.

¹⁷⁷ Burke, “Just War or Ethical Peace,” 329.

¹⁷⁸ Coady, “Terrorism and Innocence,” 54.

Policy Prescriptions

In light of the above analysis, I would like to turn now to the facets of JWT, which require attention or updating, and of the aspects of the usage of drones in war, which are in danger of causing violations of JWT. To begin the discussion of policy recommendations, I would like to begin by identifying the likely implications of continuing on in perpetuity with the regulations that we currently have, unchanged. In order to gain a clearer picture of the aspects that need revision of both JWT and drones as a weapon of war, I feel that it will be helpful to identify the most worrisome future implications of our current framework. The lack of a legal international framework for the use drones will likely lead to a chaotic environment in which many states, including rogue ones, both possess and use drones as they see fit.¹⁷⁹ Additionally, drones are likely to become more commonplace in war as all nations experience the advantages of remote warfare; the lack of rules regarding the use of drones in war combined with their increased prevalence will likely mean more abuse of power. Indeed, the failure of the West to codify a so-called drone playbook will leave us with no leg to stand on when our enemies turn our technology against us. Turning to the outdated rules of JWT, the conditions that we currently have in place criminalize the acts of weaker states, creating a landscape in which only wealthy, powerful states can wage just wars.¹⁸⁰ Indeed, if a state or a group has no chance of complying with LOIAC or JWT, will they further disregard the rules they are capable of meeting? Furthermore, JWT was formulated to address a world envisioned by realists and largely ignores the growing role of non-state actors which then hinders the ability of the international community to effectively counter said groups when they pose a threat. As such, the policy prescriptions that I would like to put forth are as follows: JWT should be amended to fit a more

¹⁷⁹ Savage, "U.N. Report Highly Critical of U.S. Drone Attacks."

¹⁸⁰ Burke, "Just War or Ethical Peace," 348.

reality-based, modern war environment, a “drone playbook” should be formulated that codifies the laws of war concerning the use of drones for all states, and finally, the U.S. should implement more accountability measures within its current CIA drone war in the FATA, the Arabian Peninsula, and more recently in Somalia. I will now address each prescription individually below.

Modernizing Just War Theory

The need for a modification of JWT to meet the realities of modern war and conflict is made overwhelmingly obvious when attempting to assess circumstances surrounding technological developments, non-state actors, and changing political realities against the principles of the framework. The essence of JWT is not being called into question however; the ability to reconcile the more specific aspects of certain conditions with the reality of modern war has grown weak. Indeed, Burke notes that in our radically changed landscape, the laws of war are ineffective in that the rules only apply to half of the players, “it is arguable that the law of war is flawed and extremely difficult to enforce – which throws the focus back on to its voluntary observance by governments and militaries, who nonetheless remain largely unaccountable for violations.”¹⁸¹ The need to revisit JWT and attempt to modernize it is evident in almost every one of the conditions of both *Jus ad Bellum* and *Jus in Bello*. Just cause, for instance, ignores the role of non-state actors as both perpetrators and victims of violence; in a world where the U.S. and the majority of its allies are engaged in a years-long conflict with non-state actors, the role of these groups can’t be exaggerated. Additionally, the terms of qualifying as a combatant are outdated and don’t reflect the necessity of some armies to act in secret in order to remain competitive with larger, better-equipped armies. JWT needs to account for non-

¹⁸¹ Burke, “Just War or Ethical Peace,” 330.

state actors, revolutionaries, guerillas, terrorism, technology, and remote warfare if it wants to remain relevant in our modern war landscape.

Creating a Drone Playbook

The technology behind drones will not stay in the wealthiest, western countries for long, if indeed it has up until now. The prevalence and spread of drones was noted at the beginning of this discussion and if anything should signify the urgency with which the present administration needs to address the issue of a “drone playbook.” The need to codify the use of drones in war is made especially evident when one imagines the use of drones by our enemies against us. As Hastings notes, “can you imagine what the reaction would be if the Pakistani ambassador in Washington was overseeing a campaign of targeted killing in America?”¹⁸² While this is somewhat alarmist, it nonetheless forces one to imagine what the world could possibly be like in the event that drones are never internationally legislated. The need to regulate drones is made more evident by the apparent unwillingness of the current administration to provide legal justification its actions abroad, “the covert nature of the drone program lends further credence to the assumption that states including the US do not want to set precedents for other states but rather prefer to keep the rules on the use of force as indeterminate as possible in order to retain some flexibility for future action.”¹⁸³ While it may appear as though the U.S. wishes to keep its options open in the way of drone operations, President Obama has noted the danger of keeping the current rules by which the CIA operates a secret; in the run up to the 2012 American Presidential election, the Obama Administration feverishly attempted to codify its drone policies

¹⁸² Hastings, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight.”

¹⁸³ Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” 56.

so that in the event the opposing candidate won, the rules would already be in place.¹⁸⁴ It is difficult to imagine a politician admitting the need to be controlled but on the topic of drones Obama noted, “one of the things we’ve got to do is put a legal architecture in place, and we need Congressional help in order to do that, to make sure than not only am I reined in but any president’s reined in terms of some of the decisions that we’re making.”¹⁸⁵

To the above points, Alston, the UN Special Rapporteur on Extrajudicial Killings, has put forth four prescriptions that he believes should be included in any such codification on drone strikes:

States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the basis for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law and the measures taken after a killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a state commits a targeted killing in the territory of another state, the second state should publicly indicate whether they have consent, and on what basis.

The suggestions that Alston provides are a bit vague and center on the issue of targeted killings however, they would likely be useful in the context of the international use of drones generally as well.

From Covert to Overt: Taking the CIA’s War Semi-Public

The final suggestion for policy makers that I propose is an end to some of the secrecy that is the hallmark of the CIA’s drone wars. One can easily understand the need for keeping information classified and for intelligence gathering to be done in secret, however one can also identify the obvious reasons why the high degree of secrecy surrounding this war is working

¹⁸⁴ Shane, “Election Spurred a Move to Codify U.S. Drone Policy.”

¹⁸⁵ Shane, “Election Spurred a Move to Codify U.S. Drone Policy.”

against the overall aims. Misinformation, exaggerations, and flat-out lies have created an atmosphere in which even those citizens supposedly being protected by this drone war are in fear of the outcome. Not only has the drone war produced an atmosphere of fear and distrust at home but also abroad, in states where strikes are taking place, the war has served the propaganda interests of the very groups it set out to counter.¹⁸⁶ Rather than being a tool for recruitment, drones have the ability to be effective tools for keeping terrorist groups at bay. Additionally, the steady flow of misinformation has served to stoke the public outrage over American drone strikes in their villages. Initiating a policy of claiming a drone strike and offering reliable coverage on the strike would serve to alleviate some of this casualty exaggeration and the like.¹⁸⁷ The covert nature of the drone war has also led to distrust on the part of both allies and former allies of the U.S. in the War on Terror, allies that the U.S. will continue to depend on in the future fight. For example, the U.S. use of drones in the FATA, shrouded in secrecy and operating with debatable permission by Pakistani authorities, has served to alienate some groups inside Pakistan who were otherwise much needed allies of the U.S. in the War on Terror.¹⁸⁸ Indeed, the U.S. government's use of drones in the FATA has caused even pro-Western Pakistanis to rethink their positions; "from the perspective of Pakistani law, we probably committed a murder... we commit espionage every day, breaking the laws of other countries."¹⁸⁹ Additionally, some envision a role for our allies in drone operations of the future, thus highlighting the need to maintain relations with states such as Pakistan; "eventually, they hope to make drone strikes joint efforts carried out openly with local governments."¹⁹⁰

¹⁸⁶ Shane, "Election Spurred a Move to Codify U.S. Drone Policy."

¹⁸⁷ Rhode, "The Obama Doctrine: How the president's drone war is backfiring."

¹⁸⁸ Michael Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

¹⁸⁹ Michael Hastings, "The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight."

¹⁹⁰ Rhode, "The Obama Doctrine: How the president's drone war is backfiring."

Conclusions

In summation, the use of drones in the War on terror is, and has been, satisfactorily compatible with JWT. Examining each condition separately, the discussion has been able to determine the level of compliance with the framework as a whole: the separate clauses and the specific conditions. *Jus ad Bellum* and *Jus in Bello* have both shown to be satisfied by the conduct of drone operations in the War on Terror, however, the analysis makes clear that the extent to which each condition was met varied greatly and, to a large degree, was highly reliant on both the limited information available and the limitations presented by JWT. Indeed, perhaps in a decade, with more declassified information, this assessment will look very different. Furthermore, the lack of modernization that JWT has undergone, especially in light of technological advances in warfare, means that the ability of JWT to address some of the nuances of drone warfare was certainly lacking. For example JWT, as it stands currently, doesn't have provisions within the reasonable chance of success clause that are suited to accurately assess the difference between winning a battle and winning a war; as stated earlier, little doubt exists as to whether or not drones are an effective tool when used to target and kill suspected militants; indeed they are. However, it has been widely claimed that terrorism is a law enforcement issue and one that cannot be effectively met with drones, so while drones are effective in eradicating specific militants they are not effective at eradicating terrorism, thus establishing a contradictory assessment for the same question.

Jus ad Bellum and *Jus in Bello* conditions were shown to have been met satisfactorily by the conduct of drone warfare in the War on Terror. The American Congress granted then President, G.W. Bush, an AUMF in response to the attacks of 9/11. This AUMF acted to allow the U.S. armed forces to act in self-defense against its enemies, thus establishing just cause.

Following this narrative, the U.S. government has acted in accordance with JWT in its conduct in the war on terror; proportionality, reasonable chance of success, legitimate authority, right intention, last resort, and public declaration were all met when one considers the waging of a war against a non-state actor an act of self-defense. Subsequently, in the active waging of the war, the U.S. government has shown that: they do not consider terrorists lawful combatants, and secondly, that much of their conduct has rested and relied on the above classification. Labeling al Qaeda and associated forces as unlawful combatants has allowed the U.S. government to wage a new war; a war characterized by a non-state enemy who is not entitled to the rights of the enemy that has been met in the past. The nature of the War on Terror as a new war has allowed the U.S. government to make up some rules as it goes. The necessity to develop rules grounded in reality and experience, rather than notions of war from the 20th century is highlighted in the fighting of this new war; if we allow states to break ground regarding drone warfare with no rules in place, their actions will become law and this may mean some very unsavory things for the future of warfare. In an Orwellian future, where drones circle the sky, Pakistani bureaucrats determine your fate, and legal proceedings no longer decide guilt or innocence – we may wish that we had codified the practices of drone war and that we had held up a more realistic and modern moral compass as our guide.

Appendix A

Jus ad Bellum

Condition	Met	Met w/ Conditions
Just Cause	X	
Proportionality	X	
Reasonable Chance of Success		X
Legitimate Authority		X
Right Intention		X
Last Resort	X	
Public Declaration	X	

Jus in Bello

Condition	Met	Met w/ Conditions
Combatants		X
Legitimate Targets		X
Legitimate Tactics	X	
Prisoners of War	N/A	N/A

Bibliography

- Al-Haj, Ahmed, "Yemen Drone Strike: Officials Say U.S. Drone Airstrike Kills At Least 4 Suspected Militants," *Huffington Post*, October 21, 2012, accessed March 12, 2013, http://www.huffingtonpost.com/2012/10/21/yemen-drone-strike-kills-suspected-militants_n_1998130.html?utm_hp_ref=email_share
- Al-Ha, Ahmed, "Yemen Drone Strikes: Suspected U.S. Attack Kills at Least 8," *Huffington Post*, January 19, 2013, accessed March 12, 2013, http://www.huffingtonpost.com/2013/01/19/yemen-drone-strikes_n_2512871.html?utm_hp_ref=email_share
- Al-Haj, Ahmed, "Yemen: Suspected Drone Strikes Kill 7 Militants, Officials Say," *Huffington Post*, October 18, 2012, accessed March 12, 2013, http://www.huffingtonpost.com/2012/10/18/yemen-suspected-us-drone_n_1977511.html?utm_hp_ref=email_share
- Assassinate," Merriam- Webster, An Encyclopedia Britannica Company, accessed May 1, 2013. <http://www.merriam-webster.com/dictionary/assassination>
- Braun, Meg, "The Obama Doctrine: Drones and Just Wars," *Foreign Policy*, September 25, 2012, accessed January 29, 2013, http://afpak.foreignpolicy.com/posts/2012/09/25/obama_doctrine_drones
- Burke, Anthony, "Just War or Ethical Peace? Moral Discourses of Strategic Violence after 9/11," *International Affairs* 80 (2004): 329-353.
- Burns, John F., "U.N. Panel to Investigate Rise in Drone Strikes," *New York Times*, January 24, 2013, accessed January 29, 2013, <http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html>
- Coady, C. A. J., "Terrorism and Innocence," *The Journal of Ethics* 8 (2004): 37-58.
- Cole, Chris, "Drone Wars Briefing," *Drone Wars UK* January 2012, accessed March 2, 2013, <http://dronewarsuk.wordpress.com/>
- Cortright, David, Benjamin Wittes, Daniel Goure, and Tom Barry, "Cato Unbound: How Drones are Changing Warfare," *Cato Institute*, January 2012, accessed January 20, 2013, <http://www.cato-unbound.org/january-2012-how-drones-are-changing-warfare/>
- "Counterterrorism Strategy Initiative. 2013: Year of the Drone," *New America Foundation*, accessed March 15, 2013, <http://counterterrorism.newamerica.net/drones/2013>
- "Ethics - War: Just War – Introduction," *BBC*, accessed April 5, 2013, <http://www.bbc.co.uk/ethics/war/just/introduction.shtml>

“Failed States: An Eighth Annual Collaboration Between Foreign Policy and the Fund for Peace,” Foreign Policy, accessed March 18, 2013,
http://www.foreignpolicy.com/failed_states_index_2012_interactive

Fair, C. Christine, “Drone Wars: The Obama administration won’t tell the truth about America’s new favorite weapon – but that doesn’t mean its critics are right,” Foreign Policy, May 28, 2010, accessed January 29, 2013,
http://www.foreignpolicy.com/articles/2010/05/28/drone_wars

Frowe, Helen, *The Ethics of War and Peace: An Introduction* (New York: Routledge, 2011).

Hastings, Michael, “The Rise of Killer Drones: How America Goes to War in Secret, An inside look at how killing by remote control has changed the way we fight,” Rolling Stone, April 16, 2012, accessed March 16, 2013, <http://www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416>

Held, Virginia, “Terrorism and War,” *The Journal of Ethics* 8 (2004): 59-75.

Khan, Ismail and Walsh, Declan “Attack, Said to Be Drone Strike by U.S., Kills 2 in Pakistan,” *New York Times*, March 10, 2013, accessed March 12, 2013,
http://www.nytimes.com/2013/03/11/world/asia/drone-strike-reported-in-pakistan.html?_r=1&

Lynch, Colum, “UN Launches Drone Investigation,” Foreign Policy, January 24, 2013, accessed January 30, 2013,
http://turtlebay.foreignpolicy.com/posts/2013/01/24/un_launches_drone_investigation

Maqbool, Aleem, “Pakistan militant Mullah Nazir killed ‘in drone attack’,” BBC, January 3, 2013, accessed March 12, 2013, <http://www.bbc.co.uk/news/world-asia-20896755>

McNeal, Gregory S., “Kill-Lists and Accountability,” *Georgetown Law Journal* (2013): 1-127, accessed April 1, 2013 <http://ssrn.com/abstract=1819583> or <http://dx.doi.org/10.2139/ssrn.1819583>

“Obama’s Covert War in Yemen,” New America Foundation, accessed March 15, 2013,
<http://yemendrones.newamerica.net/>

“Pakistan Body Count,” accessed March 12, 2013, http://pakistanbodycount.org/drone_attack

Paulen, Michael Stokes, “Declaration of War: Ten Years Later,” *The Witherspoon Institute: Public Discourse* (2011), accessed April 14, 2013,
<http://www.thepublicdiscourse.com/2011/09/4004/>

Reinold, Theresa, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,” *American Journal of International Law* 105 (2011): 1-65.

- Reuters, "U.S. Use of Drones Queried by U.N.," *New York Times*, October 27, 2009, accessed January 29, 2013, <http://www.nytimes.com/2009/10/28/world/28nations.html>
- Rhode, David, "The Obama Doctrine: How the president's drone war is backfiring," *Foreign Policy*, March/April 2012, accessed January 29, 2013, http://www.foreignpolicy.com/articles/2012/02/27/the_obama_doctrine
- Savage, Charlie, "U.N. Report Highly Critical of U.S. Drone Attacks," *New York Times*, June 2, 2010, accessed January 29, 2013, http://www.nytimes.com/2010/06/03/world/03drones.html?pagewanted=all&_r=0
- Shane, Scott, "Election Spurred a Move to Codify U.S. Drone Policy," *New York Times*, November 24, 2012, accessed January 29, 2013, <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>
- Smilansky, Saul, "Symposium on Terrorism, Justification, and Illusion," *Ethics* 4 (2004): 790-805.
- U.N. General Assembly Human Rights Council, 14th Session. Agenda Item 3, Report of the Special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. 8 May 2010 (A/HRC/14/24/Add.6). Official Record. 28 May 2010.
- U.S. Department of Justice. Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force. Washington, D.C. GPO 2013. http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans#.URxAfe2v8kk.mailto accessed February 13, 2013.
- U.S. Department of State. Office of the Legal Advisor. *The Obama Administration and International Law* by Harold Hongju Koh. Washington DC: GPO, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm>
- Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006).