The Morality of Force in Asymmetric Warfare

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Preface and Acknowledgements

The pastoral scene of long-horned cows dotting the rolling hills represented a stark contrast from the constellation of red tail lights snaking through Constitution Avenue in Washington, DC. Sitting in the shadow of history, in the stone cottage of former fellow Christ Church member John Locke, I felt the inexorable pull of the past all around me. These verdant hills were once stained deep with crimson blood; the ancient sycamore trees still whisper of battles fought during two conventional wars that engulfed the world. Europe largely had known peace since then, but it was an uneasy peace, punctuated by a steady stream of violence inflicted in military interventions abroad.

The peace was not to last. In February 2022, Russia launched a full-scale invasion of Ukraine, raising the spectre of great power competition and the return of conventional warfare that was supposed to be relegated to the annals of history. The prohibition on the use of force, the cornerstone of international law, failed to hold back the age-old forces of nationalism and conquest. It was a shock, but not a surprise. For more than two decades, the practices and precedents set in a very different kind of war, the global "war on terror," had been eroding respect for the rule of law and the foundations of the international order. Like waves crashing against the dam, every lethal strike outside of clearly defined conflict zones chipped away at the legal guardrails, blurring the line between war and peace.

Perpetual war stalks the world we have inherited, the world we have created. For my part in it, I can only hope this thesis makes some small contribution in rectifying the past and illuminating a path back to peace. The first time I set foot in the White House, I was confident the Obama administration would forge this path, adopting a morally-directed approach to national security. But when I left, standing on the steps of the Eisenhower

Executive Office Building and watching the sun set on that symbol of American power, I was less sanguine. For all the policy restrictions in the world could not alter the fact that the next US president would have near limitless authority to preside over an expansive targeted killing infrastructure of global reach. This was the world we built. And it was not good enough.

In search of answers, I turned to moral philosophy. I found the first glimmer of hope at Oxford University, where a well-worn copy of *Cosmopolitan War* was waiting for me on the dusty shelves of the Bodleian. Beneath the vaulted ceiling of Duke Humfrey's Library, I poured through the pages of Cécile Fabre's book, the inspiration behind much of this project. Little did I know then that we would cross paths later at a dinner at the Vice Chancellor's house, a serendipitous meeting that forever altered my path.

When I arrived in Oxford, I had no formal training in just war theory. I am deeply grateful to my supervisors, Tom Simpson and Cécile Fabre, for their wisdom and patience in rectifying this gap. My thanks especially to Tom for rekindling the spark of the philosopher that was buried in me and resides in each of us. I will always appreciate his forbearance with my early drafts, particularly those that I was reluctant to show to anyone else. And it has been a privilege to learn from Cécile, a gifted philosopher who has worked tirelessly to promote individual rights in war. This thesis will have accomplished its aim if I have built upon their work in some small way, and contributed to its application in the real world.

As I sought to apply this knowledge to US counterterrorism operations, I incurred a great many debts. For their incisive comments on various iterations of the policy paper, I am forever grateful to a number of former US government officials and colleagues,

namely National Security Council (NSC) Senior Director for Counterterrorism Luke Hartig, NSC and State Department Legal Advisor Brian Egan, and especially Ryan Goodman and Tess Bridgeman, who served, respectively, as Special Counsel to the General Counsel of the Department of Defense and White House Special Assistant to the President, Associate Counsel to the President, and Deputy Legal Adviser to the NSC. Ryan and Tess are as brilliant as they are kind, and it has been an honour to work alongside them.

The Oxford Institute for Ethics, Law and Armed Conflict has been a significant source of support for my research. Dapo Akande served as my examiner for both Transfer and Confirmation of Status, providing invaluable guidance on the direction and arc of the thesis. Federica D'Alessandra, Janina Dill, Cheyney Ryan, and Hugo Slim pushed me to sharpen and refine my arguments. Janina, in particular, lent moral support while parenting through a pandemic—from discussing lethal action at the swings to our Taittinger pram walks through Christ Church meadows.

For reading parts of the thesis and providing helpful comments, I would also like to thank Daniel Brunstetter, Agnès Callamard, Joseph Chapa, Pepper Culpepper, Tom Dannenbaum, Anthony Dworkin, Linda Eggert, Christopher Finlay, Lawrence Freedman, Vafa Ghazavi, Jessica Gliserman, Miles Jackson, Nikolas Kirby, Larry Lewis, Samuel Moyn, Samuel Murray, Rhiannon Neilson, Barry Pavel, Neil Renic, Paul Schulte, Thomas Sinclair, Nicholas Wheeler, Jonathan Wolff, Micah Zenko, and several reviewers who wish to remain anonymous.

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For his unfailing support, I owe the deepest debt, more than words can express, to Nima Gerami. Nima left everything behind to follow my dreams, no matter the cost or consequence. He believed in me more than I believed in myself, read every page I wrote, and supported me unreservedly. This thesis exists only because of his sacrifices.

Every year of this journey has been marked by life and death, in war and on a personal level. My mother-in-law lost her two-decade battle to cancer at the beginning of the thesis and, in her typical spirit of selflessness, her primary concern was whether I had *ash-e reshteh* to eat to recover from freshers' flu. She was the bravest and most beautiful soldier I have ever known. On the anniversary of her death, I lost the first life I ever created. My best work of all was born on the cusp of a global pandemic, as the war against coronavirus ravaged the world. Those dark nights seemed never-ending. And now, as the light shines at the end of the tunnel, new life is kicking away once again, eager to come out into the sun. The world I seek to build is for them.

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Abstract

This doctoral thesis addresses crucial theoretical and policy questions concerning the morality of force in asymmetric warfare. I argue that asymmetric warfare exposes fundamental flaws with the internal logic of traditionalism, posing a challenge to the theory that arises independently from the revisionist critique. Traditionalists, by their own account, propose different moral paradigms for conventional and asymmetric conflicts, yet they offer no compelling account of what triggers these paradigms. Applying the logic of traditionalism consistently in both types of conflicts leads to conclusions that many traditionalists would reject, such as the suggestion that not all combatants are in fact morally equal. Moving from the realm of analytic philosophy to applied ethics, the asymmetric case further undermines pragmatic morally-directed arguments in support of traditionalism.

Every aspect of this study, which encompasses four independent but interrelated papers and an introduction, reinforces these themes. Following a survey of the literature in the introduction, I present three theoretical papers that illuminate, respectively, problems with the traditionalist position on the exceptionalism of war, legitimate authority, and the moral equality of combatants. The final paper considers the policy implications of the foregoing research as it applies to US direct action in the global "war on terror," a model case of asymmetric warfare. The papers proceed as follows:

Between War and Peace. This paper interrogates the exceptionalist claim that being in a state of war triggers a different moral paradigm for defensive harming than in ordinary life. Asymmetric warfare presents a challenge to this view because it does not fall neatly within the war or peace paradigms, prompting some exceptionalists to propose a third moral

paradigm referred to as *jus ad vim*. The *jus ad vim* framework, however, does not adequately explain how purportedly unique features of asymmetric warfare alter moral norms concerning defensive harming.

Legitimate Authority Beyond the State. In this paper, I argue that the asymmetric case exposes flaws in the traditionalist argument that only states and state-like groups possess legitimate authority to declare and wage war. Traditionalists uphold the Westphalian presumption that all states possess such authority, yet they claim that non-state groups which lack legitimate authority to rule also lack legitimate authority to go to war, and that their wars automatically are unjust. This position is inconsistent; states which lack legitimate authority to rule but nevertheless engage in war act unjustifiably, and their wars are criminal.

Moral Equality in an Unequal World. States which lack legitimate authority to declare war, however, cannot direct combatants to wage war justly on their behalf. The traditionalist view of legitimate authority, then, also undermines their position on the moral equality of combatants, or the Equality Thesis. Contractarianism offers the most promising means of saving traditionalism from these implications, yet it also fails to demonstrate why the Equality Thesis holds in all state-directed wars, but not in conflicts involving non-state actors.

Principles for Asymmetric Warfare. The above arguments constitute a compelling case for rejecting traditionalism in favour of an alternative approach, namely revisionism. Indeed, applying revisionism to asymmetric warfare poses none of the theoretical problems highlighted in the preceding papers. For this reason, the final paper is based loosely on revisionist principles insofar as it prescribes a reductivist and individualist approach to US

direct action in the global "war on terror," that is, kill or capture operations conducted against terrorist targets.

Taken together, the papers represent a sustained challenge to traditionalism that must be addressed if we are to accept that account of morality in war. I conclude by considering the implications of these findings for the theoretical debate between traditionalists and revisionists more broadly, as well as areas for future research.

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List of Abbreviations

AP I	First Additional Protocol
AUMF	Authorization for Use of Military Force
CIA	Central Intelligence Agency
DOD	Department of Defense
DOJ	Department of Justice
FLN	National Liberation Front
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ISIS	Islamic State of Iraq and Syria
ISR	Intelligence, Surveillance, and Reconnaissance
LOAC	Law of Armed Conflict
MUR	United Resistance Movement
NIAC	Non-International Armed Conflict
PMF	Popular Mobilization Forces
PPG	Presidential Policy Guidance
PPM	Presidential Policy Memorandum
PSP	Principles, Standards, and Procedures
SOFA	Status of Forces Agreement
UAV	Unmanned Aerial Vehicle
UN	United Nations

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1

Integrative Chapter

1.1 INTRODUCTION

> "Never think that war, no matter how necessary, nor how justified, is not a crime."
> - Ernest Hemingway, *Treasury for the Free World*, 1946[1]

There has been a welcome turn in just war theory where some moral philosophers now judge war according to the same normative standards as crime in domestic life. War is no longer elevated to a moral category where ordinary norms surrounding defensive killing are suspended, nativism outstrips humanity, and men can only shake their heads at the tragedies that inevitably occur as a result. Increasingly, individual rights are taken to count in war and these rights count equally all over the globe.

At the same time, individual rights have never been more at risk. For more than two decades, the twin forces of transnational terrorism and advances in remote warfighting technology have threatened to engulf the world in endless conflict. Powerful states have reacted to these tectonic forces by committing to wage low-intensity wars indefinitely, further blurring the line between war and peace. The United States, in particular, has been at the forefront of these forces in perpetuating the global "war on terror," the paradigm of asymmetric conflicts which, despite the looming threat of a return to great power

[1] Ernest Hemingway, "Foreword," in *Treasury for the Free World* (New York: Arco Publishing Company, 1946), xv.

competition and conventional warfare as seen in the 2022 Russian invasion of Ukraine, have become the primary mode of force in the international system.[2]

Alarmingly, just war theorists have paid relatively little attention to this shifting pattern of conflict. The debate in the literature still focuses largely on conventional warfare, where state-directed armies face each other on the battlefield. Theorists that do interrogate the "changing character of warfare" tend to focus either on the application of traditional just war theory to asymmetric warfare or on the need to develop new principles altogether.[3] Yet these efforts, while important, miss a fundamental point. Asymmetric warfare provides a crucial, but overlooked, test case for evaluating the internal logic of the conventional view of war, as encapsulated in Michael Walzer's *Just and Unjust Wars* (1977).[4]

This thesis aims to fill this gap from a normative perspective, drawing on the just war theory debate between traditionalism and revisionism. I argue that asymmetric warfare exposes serious flaws with the Walzerian view of war more broadly. The Walzerian account is logically inconsistent; it cannot explain why the moral principles which apply in conventional warfare do not do so equally in asymmetric warfare. Applying such principles in an asymmetric context casts doubt on the validity of traditionalists' arguments concerning the exceptionalism of war, the necessity of restricting legitimate authority to go to war to states and state-like groups, and the principle of the moral equality of combatants. The fact that traditionalism fails to give an adequate account of the moral

[2] Thomas Szayna et al., "What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?," *RAND Corporation* (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf.
[3] See, for example, Hew Strachan and Sibylle Scheipers, *The Changing Character of War* (Oxford: Oxford University Press, 2011).
[4] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015). Except where explicitly stated otherwise, all references to *Just and Unjust Wars* refer to the 5th edition.

principles which apply in asymmetric conflicts provides further reason to reject it, in addition to the revisionist criticisms which primarily address symmetric conflicts, and which are by now well-established.[5]

Each of the papers that follow addresses one of these key areas of debate. Taken together, the thesis provides an exegetical appraisal of traditionalism, independent from the revisionist critique, and raises questions about the coherence of the theory when viewed through the prism of asymmetric warfare. I will describe each of these papers, and how they relate to this aim, in greater depth at the end of this chapter.

1.2 SCOPE

The scope of this project is limited to asymmetric warfare, by which I mean conflicts between any combination of state or non-state actors involving disparate military capabilities or unconventional tactics.[6] Asymmetric conflicts differ from conventional wars insofar as they involve significant imbalances in power, legal status, tactics, or some combination thereof. The geographic and temporal boundaries of such conflicts tend to be poorly defined, with fighting often occurring in the midst of civilian life for an extended period of time, although these features are not limited to such conflicts. The vast majority of asymmetric wars are fought at least partially in secret through the use of special forces, proxies, drone strikes, and cyber operations.

[5] The leading revisionist, Jeff McMahan, has been at the forefront of criticism of the Walzerian view. See, for example, Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

[6] Walzer writes that "an asymmetric war is a war fought between a modern high-tech army and a low-tech insurgency, between the highly trained armed forces of a state and the barely trained militia of a non-state political party or movement." Michael Walzer, "Asymmetric War and Its Journalists," *Dissent,* 69(1), (2022): 77.

There are many different terms that have been used to describe this phenomenon: "unconventional warfare," "irregular warfare," "grey zone warfare," "hybrid warfare," "counterinsurgency," "limited force," and "force short of war" are but a few such examples. These terms are often used imprecisely and at times interchangeably with asymmetric warfare, resulting in considerable conceptual confusion. For simplicity, I use the term "asymmetric warfare" throughout.

Adding to this confusion, asymmetric tactics also may be used in conventional wars. In the ongoing Russian-Ukraine War, for example, Ukraine has made effective use of asymmetric tactics, including drones, to counter invading Russian troops.[7] Russia, moreover, has a long history of engaging in hybrid warfare that relies on covert operations and cyber attacks to advance its conventional military objectives.[8] These types of wars, however, still are fought mainly between state-directed armies, and therefore are not the primary focus of this thesis. Nevertheless, the increasing use of asymmetric tactics in conventional wars, as well as the direct participation of civilians in such conflicts, suggests there is no clear line between conventional and asymmetric warfare. Hence, the findings of this thesis ultimately may prove relevant to a broader range of conflicts than the scope I have described here.

It is worth briefly noting that there is no direct legal equivalent to the concept of asymmetric warfare. As defined above, asymmetric warfare may constitute either an international or non-international armed conflict, or indeed fall below the threshold of armed conflict altogether. The US drone strike that killed Iranian Quds Force Commander

[7] Margarita Konaev and Kirstin Brathwaite, "Russia's Urban Warfare Predictably Struggles," *Foreign Policy Magazine*, April 4, 2022, https://foreignpolicy.com/2022/04/04/russia-ukraine-urban-warfare-kyiv-mariupol/.
[8] See, for example, Ofer Fridman, *Russian 'Hybrid Warfare'* (Oxford: Oxford University Press, 2018).

Qassem Soleimani in January 2020, for example, was a form of asymmetric warfare that some legal scholars claim represented a brief international armed conflict between the United States and Iran.[9] More typically, asymmetric wars tend to be non-international armed conflicts, such as the armed conflict that the United States has claimed to be engaged in against terrorist groups since the attacks of September 11, 2001 (hereafter referred to as 9/11). The notion that the war on terror does in fact constitute an armed conflict is, however, contested.

1.3 METHODS

This thesis is grounded in analytic philosophy, although it also engages with law and public policy. The primary theoretical contributions are in the domain of moral philosophy and applied ethics. As a result, the methods employed throughout follow John Rawls' method of "reflective equilibrium" and rely on real and hypothetical case studies to draw out moral intuitions.[10]

Reflective equilibrium is the process of developing normative arguments by bringing into conformity our moral principles with our considered judgements. After identifying salient moral principles in particular cases, real or hypothetical, I then test these principles in different cases to see whether they conflict with our judgements about those cases. If the principles and judgements conflict, then one or the other must be revised until they coincide and approach the point of reflective equilibrium. As Rawls writes, it is "an equilibrium because at last our principles and judgments coincide; and it is reflective since

[9] Agnès Callamard, "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters," *Just Security*, January 8, 2020, https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/.
[10] John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971), 48.

we know to what principles our judgments confirm and the premises of their derivation."[11]

In approaching this exercise of reflective equilibrium, I tend to rely on real, rather than hypothetical, cases for two reasons. First, the use of hypothetical cases in analytic philosophy has come under criticism in some quarters for being too detached from the reality of war. Walzer asserts that "wars and battles are not 'cases' to which the law and morality of everyday life can be applied; by definition, they don't take place in civil society."[12] While I disagree, taking the moral principles governing everyday life to apply in war, this argument is made all the more salient through analysis of conflicts in the real world.

Second, the use of real-world cases is particularly instructive when it comes to the policy implications of this research. Policymakers rarely deal with hypotheticals, and certainly not of the variety that moral philosophers are fond of employing. Trolley problems and fat men falling would be more likely to confound this audience, rather than elucidate important moral truths. Still, hypothetical cases are useful insofar as they allow for controlled thought experiments where a single principle or factor can be isolated to test moral intuitions. I therefore occasionally employ hypothetical examples set in a real-world context to buttress a normative argument, when needed, before applying the resulting principle to actual cases.

1.4 THE LEXICON

Certain terms employed throughout the thesis require explanation. It is worth defining these terms here, especially in cases where the understanding of the term common among just

[11] Ibid., 20.
[12] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 337.

war theorists departs from colloquial usage. Other terms of art are more obscure and must be defined for the sake of clarity in the exposition.

When I say that a war is "just," I mean that it is fought for an objectively just cause. An unjust war is fought for an objectively unjust cause. My focus here is on whether acts are fact-relative wrongful, that is, wrongful in light of objective facts. Following Derek Parfit, I acknowledge that acts also may be evidence-relative or belief-relative wrongful insofar as they are, respectively, wrong in light of an agent's evidence or beliefs.[13] But evidence- and belief-relative wrongfulness is not my focus here.

In practice, it is not always a straightforward task to determine whether a war is fought for a just cause, in part due to epistemic limitations and disagreements about what constitutes justice. Most scholars agree, however, that self- or other-defence constitutes a just cause for defensive harming in general and that the same is true in war. Subsistence wars, humanitarian interventions, and other causes for war are more controversial, although it is generally accepted that the defence of fundamental individual rights may also provide a just cause for war when certain conditions are met, such as when the intervening power has obtained the consent of the people on whose behalf the wars are waged.[14]

Wars that are fought for a just cause are not necessarily justified. All things considered, a war fought for a just cause may be unjustified because it fails, for example, to meet the standards of necessity and proportionality. By contrast, a war fought for an unjust cause can never be justified because there is no moral good that can be achieved which would outweigh the moral harm of killing in war. The terms "justified" and

[13] Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011), 15-74.
[14] For a comprehensive account of the claim that the violation of subsistence rights provides a just cause for war, see Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 97-128. On humanitarian intervention, see Ibid., 166-206.

"unjustified," therefore, have a distinct meaning from "just" and "unjust"—the former represent an "all-things-considered" judgement, while the latter do not.

Unjust combatants are combatants who fight for an unjust cause, while just combatants fight for a just cause. The term "combatant," as Henry Shue argues, is strictly a legal, rather than moral, construct.[15] The mere fact that individuals possess combatant status in the legal sense of the term does not tell us anything about their moral status. This problem is particularly acute in asymmetric warfare, where powerful states often deny non-state actors the rights and immunities that come with combatant status by characterising them as criminals or "unlawful combatants." Throughout the thesis, I use the term "combatant" to mean anyone who fights on behalf of a political entity which possesses legitimate authority, although as we shall see in the second paper, "Legitimate Authority Beyond the State," my conception of legitimate authority diverges significantly from the conventional view. In particular, I do not subscribe to the view that only individuals who fight on behalf of states and state-like groups should be considered combatants. Under certain circumstances, non-state actors ought to be considered combatants in the same way as state-directed armies.

When I refer to rights, I mean moral rights, unless explicitly stated otherwise. I adopt, but do not defend here, the cosmopolitan view that all individuals have equal moral rights regardless of nationality or citizenship.[16] Similarly, any references to liability concern moral, and not legal, liability. I follow standard convention in just war theory in defining moral liability in terms of a loss of rights or immunities. Put simply, an individual

[15] Henry Shue, *Fighting Hurt* (Oxford: Oxford University Press, 2016), 416.
[16] For cogent defences of this view, see Fabre, *Cosmopolitan War*; Charles R. Beitz, "Cosmopolitanism and Global Justice," *The Journal of Ethics,* 9(1-2) (2005); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005).

is liable to be killed only if she has done something to lose the right not to be killed. An individual is not liable, and therefore is innocent in the relevant sense, if she has done nothing to lose this right. More precisely, I follow Jeff McMahan's responsibility account of liability in accepting that an individual is liable to be killed only if she is morally responsible for posing an unjust threat.[17]

The moral equality of combatants, or the Equality Thesis, is the view that just and unjust combatants have equal moral permissions to kill one another and are subject to the same moral responsibilities.[18] This principle is distinct from the legal equality of combatants, which pertains only to the equal application of a set of legal rules which applies to all parties. Although it would require some specific justification, it is perfectly plausible to reject the moral equality of combatants as a normative principle, while accepting the equal application of the law in practice. After all, combatants may have different moral permissions based on the justness of the cause for war, for example, and yet still be bound by the same legal rules. Moreover, accepting the equal application of the law does not necessarily entail accepting the law of armed conflict (LOAC), also referred to as International Humanitarian Law (IHL), as it currently stands. It could be that the structure of the law is correct insofar as it should be applied equally to both sides of a conflict, but that the content of extant laws should be changed.

The use of force is necessary only if it is a last resort and there are no less harmful

[17] See Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15(1) (2005). I do not discuss rival accounts of liability here, including the view that individuals are liable to be killed only if they are culpable for posing an unjust threat. For a defence of this view, see Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24(6) (2005). I am also not concerned with causal accounts of liability, which are implicit in the work of Judith Jarvis Thomson. See Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20(4) (1991).

[18] David Rodin and Henry Shue, "Introduction," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 1-3.

alternatives which will sufficiently mitigate a perceived threat. This definition follows the philosophical concept of minimal harm and corresponds with the legal notion of taking precautions in war. Necessity is distinct from the legal notion of military necessity, which implies that armed forces can do whatever is needed, so long as it is not unlawful, to achieve legitimate military objectives in war.[19]

My conception of proportionality is also distinct from legal and military usages of the term, which compare the incidental loss of life to military advantage.[20] As David Rodin argues, military advantage has instrumental value only to the extent it advances a just cause and therefore cannot be compared directly to the moral harm of killing innocent people.[21] As I use the term, the use of force is proportionate if and only if the anticipated moral goods outweigh the anticipated moral harms. I follow McMahan in distinguishing between "narrow" and "wide" proportionality, where the former means that a liable target suffers no more than the amount of harm to which she is liable.[22] Wide proportionality implies that both liable and non-liable targets suffer harm, but the overall moral good achieved still outweighs the moral harm inflicted upon non-liable targets.[23]

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[19] Nobuo Hayashi, *Military Necessity: The Art, Morality and Law of War* (Cambridge: Cambridge University Press, 2020), 1-16.

[20] The conventional view of proportionality, as stated in international law and the US Department of Defense Law of War Manual, is that combatants "must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained." "Department of Defense Law of War Manual," *Office of General Counsel Department of Defense* (June 2015 (Updated December 2016)): 241, https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

[21] David Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 53-54.

[22] McMahan, *Killing in War*, 20-21.

[23] Narrow proportionality is relevant to liability justifications for defensive harming, whereas wide proportionality is relevant to lesser evil justifications. For a discussion of how liability and lesser evil justifications interact, and the nature of the proportionality relationship in these justifications, see David Rodin, "Justifying Harm," *Ethics* 122(1) (2011): 74-110.

1.5 THE THEORETICAL LANDSCAPE

Throughout the thesis, I refer to the two major schools of thought in just war theory as "traditionalism" and "revisionism." Admittedly, these labels are imperfect and anachronistic, not least because traditionalism represents a sharp departure from medieval and early modern just war theory, which in some ways was more closely aligned with revisionist principles.[24] Contrary to traditionalism, early just war theorists did not consider combatants who fight for just and unjust causes to be morally equal.[25]

Alternative labels to traditionalism, however, are either similarly inaccurate or unwieldly. Some scholars refer to traditionalism as the orthodox view, but this characterisation wrongly implies that traditionalism represents the most widely held set of views in just war theory. That is no longer the case. Since the 1990s, revisionism has gained sufficient traction in just war theory, and to a certain extent in law and policy, such that it can no longer be considered the minority view.[26] Efforts to frame traditionalism as the "legalist paradigm," while more accurate, disregard the fact that traditionalists themselves claim they are proposing moral, and not legal, theories. More importantly, the law is still emerging when it comes to the complex types of cases this thesis seeks to understand, and

[24] While revisionists and early just war theorists reject the premise that just and unjust combatants are morally equal, they nevertheless hold different views on the conditions under which combatants become liable to be killed.

[25] For a discussion of the intellectual history of these just war theorists, see Gregory Reichberg, "The Moral Equality of Combatants - A Doctrine in Classical Just War Theory? A Response to Graham Parsons," *Journal of Military Ethics* 12(2) (2013); Gregory Reichberg, "Just War and Regular War: Competing Paradigms," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008); Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *The Journal of Ethics* 16(4) (2012).

[26] Yitzhak Benbaji and Daniel Statman write that "while in the 1980s and 1990s Walzer's view generally defined the paradigm within which debates about the ethics of war were conducted—designated as the 'orthodoxy,' so to speak—now the revisionist view has become paradigmatic in conferences and in the literature; in fact, it has become the new orthodoxy." See Yitzhak Benbaji and Daniel Statman, *War by Agreement: A Contractarian Ethics of War* (Oxford: Oxford University Press, 2019), 10.

it may very well diverge from traditionalism in important respects.

From a theoretical perspective, it is also misleading to refer to traditionalism and revisionism as unified schools of thought. The seminal traditionalist account, which serves as the foil for much of revisionism, is Walzer's *Just and Unjust Wars* (1977). The leading revisionist, Jeff McMahan, systematically critiques Walzer's account of liability and the moral equality of combatants in a series of articles and in his book, *Killing in War* (2009).[27] Yet while much of the traditionalist-revisionist debate has centred on these intellectual behemoths, it would be a disservice to the breadth and richness of just war theory to disregard other strands of research. I therefore use the terms "Walzerian traditionalism" and "McMahanian revisionism" when I intend to refer to the specific theories that these philosophers have proposed.

Outside of the Walzer-McMahan debate, the boundaries of the traditionalist and revisionist paradigms are less precise. As Seth Lazar argues, traditionalism and revisionism are actually a loose collection of theories bound together by a common set of assumptions which may overlap.[28] Lazar identifies two major fault lines within contemporary just war theory that fall along exceptionalist-reductivist and collectivist-individualist lines.[29] Exceptionalists maintain that war is *sui generis*, or an exceptional state that is bound by different moral rules than everyday life.[30] Another form of exceptionalism, referred to as *jus ad vim*, seeks to develop different moral principles for states of war, peace, and

[27] See McMahan, *Killing in War*; McMahan, "The Ethics of Killing in War," *Ethics* 114(4) (2004); and McMahan, "The Basis of Moral Liability to Defensive Killing,"
[28] Seth Lazar, "Just War Theory: Revisionists Versus Traditionalists," *Annual Review of Political Science* 20(1) (2017).
[29] Ibid.
[30] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 338.

everything in between.[31] Reductivists, by contrast, assert that morality is "all of a piece" and that the moral principles that govern war can be reduced to the moral principles that govern life outside of war.[32] The arguments in favour of exceptionalism and reductivism have also been referred to as the Discontinuity and Continuity Theses, respectively.[33]

Collectivists emphasise the moral significance of political communities and protecting a common way of life. While collectivists recognise the importance of individual rights, they tend to view collectives as more than the sum of their aggregate parts. Nation-states, for example, derive their rights to self-defence from the rights of their individual members, but the national right to self-defence extends beyond the sum of individual rights. Individualists, by contrast, view individuals as the salient unit of moral concern. Collectives are morally significant, according to individualists, only insofar as they safeguard individual rights and allow for human flourishing.

The archetypal traditionalist is an exceptionalist-collectivist, while the archetypal revisionist is a reductivist-individualist.[34] There are, however, notable exceptions to the rule. Some collectivists defend revisionist conclusions, while some individualists are traditionalists.[35] It is also possible to advance exceptionalist arguments for revisionism and reductivist arguments in favour of traditionalist conclusions, notably the moral equality of

[31] For an overview of the *jus ad vim* position, see Daniel Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations* (Oxford: Oxford University Press, 2021).
[32] Henry Shue, who is an exceptionalist, uses this apt phrase to describe the reductivist view. Henry Shue, "Do We Need a 'Morality of War'?," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 88.
[33] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 15.
[34] Lazar, "Just War Theory: Revisionists Versus Traditionalists," 41.
[35] See Saba Bazargan, "Complicitous Liability in War," *Philosophical Studies,* 165(1) (2013) and Patrick Emerton and Toby Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy & Public Affairs* 37(4) (2009).

combatants.[36] These exceptions, infrequent though they may be, underscore the difficulty of constructing a careful account of the various competing strands of thought in contemporary just war theory.

In the interest of both parsimony and accuracy, I shall refrain from using exceptionalism-collectivism and reductivism-individualism in lieu of traditionalism and revisionism. Instead, I will invoke the specific theoretical premise in question when it is appropriate to do so, such as when I argue against exceptionalism in the first paper, "Between War and Peace." When I make general arguments about the state of the literature, as in what follows, I rely on the terms traditionalism and revisionism to signify the theoretical divide between the archetypal exceptionalist-collectivist and the archetypal reductivist-individualist. These terms, while imperfect, are still widely employed in the scholarly literature and, to a lesser degree, in policy discourse, so there is some utility in maintaining them with the caveats above firmly in hand.

For the sake of clarity now and concision later, it is worth briefly articulating the broad contours of these theoretical debates. A survey of the literature reveals four main areas of disagreement between traditionalists and revisionists: (1) whether war is an exceptional state; (2) whether an actor must possess legitimate authority in order to go to war; (3) the basis of moral liability and the moral equality of combatants; and (4) the

[36] A reductivist, for example, might defend the traditionalist view of the moral equality of combatants by arguing that, even though the moral norms governing war and peace are the same, all combatants are, by nature of their occupation, morally equal insofar as they are significantly more likely to be morally responsible for posing an unjust threat than civilians. For a discussion on why killing civilians entails greater moral risk than killing combatants, see Seth Lazar, "Risky Killing and The Ethics of War," *Ethics* 126(1) (2015) and Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), 74-100. For a broader discussion on liability and the Equality Thesis, see Uwe Steinhoff, "Debate: Jeff McMahan on the Moral Inequality of Combatants," *The Journal of Political Philosophy* 16(2) (2008); Bazargan, "Complicitous Liability in War,"; and Seth Lazar, "Method in the Morality of War," in *Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015).

relationship between the laws of war and a distinct morality of war. This thesis aims to shed new light on the first three points of contention, while making the case that the current laws of war are not morally optimal. I argue that asymmetric warfare exposes problems with traditionalism, independent of the revisionist critique, that cast doubt on the coherence of the traditionalist view. Moving from the theoretical to the policy realm in the fourth paper, "Principles for Asymmetric Warfare," I consider whether alternative approaches, such as revisionism, can provide action-guiding principles that would more closely align the laws of war with the deeper morality of war.

Traditionalism

Traditionalism begins with the premise that war is morally exceptional. Traditionalists contend that war and ordinary interpersonal violence are fundamentally different, and that those differences imply that war should be subject to a different system of morality. War is organised, collective violence that unfolds on a large scale within an anarchical international system which lacks an effective enforcement mechanism. Interpersonal violence, by contrast, occurs between individuals, who may or may not be organised, and are subject to enforceable domestic rules and laws.

Traditionalists infer from these differences that the morality of war cannot be understood strictly in terms of the normative principles governing individual self- and other-defence. Walzer writes that the revisionist argument makes sense if "we imagine war to be a peacetime activity. Indeed, standard just war theory is untenable if we take wars and battles to be like street crimes and marital disputes."[37] The commitment to

[37] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 338.

exceptionalism, then, has significant implications for nearly every aspect of just war theory.

Importantly, exceptionalism entails that the principles governing defensive harming are substantively different inside and outside of war. While traditionalists such as Henry Shue assert that it is impossible to apply ordinary moral principles in the proverbial "fog of war," they also tend to make the far stronger claim that the demands of morality itself are altered by the very nature of war.[38] The question for traditionalists is not how to apply ordinary moral principles given the circumstances of war, but rather how the fact of being in a war triggers a different set of moral principles.

The morality of war that traditionalists envision radically departs from our basic intuitions about defensive killing in everyday life. To see why this is so, it is important to say a few words about defensive killing outside of war. In ordinary life, innocent people, that is, people who have done nothing to lose their right not to be killed, have a moral right to defend themselves against unjust threats. If a murderer enters a house with a gun intending to kill an innocent victim, the victim has a right to defend herself. She need not wait for permission from the relevant authorities to engage in self-defence, nor is it the case that the murderer has an equal right to try to kill her. The murderer in this scenario has forfeited his right to life by posing an unjust threat to the innocent victim.

Not so in war, on the traditionalist view. The exceptional morality of war dictates different rules both for the decision to go to war and for conduct in it. The first difference is that, unlike the right to individual self-defence, the right to national self-defence is limited to legitimate authorities, paradigmatically states and state-like groups.[39] Traditionalists consider legitimate authority to be necessary for fulfilling the conditions of

[38] Shue, "Do We Need a 'Morality of War'?," 87.
[39] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 54.

jus ad bellum, meaning that wars fought for a just cause without legitimate authority are by that very fact considered to be unjust.[40] Accordingly, individuals do not have the right to go to war, even in defence of their fundamental rights, and those who wage war without legitimate authority are considered to be criminals rather than combatants.

The second difference between war and self-defence, which has formed the basis for the revisionist critique, concerns moral liability to defensive killing. Traditionalism envisions a strict separation between the justice of the cause for war and conduct in it. Walzer claims that in war *jus ad bellum* and *jus in bello* considerations are "logically independent" because political leaders are responsible for the decision to go to war, while combatants are mere "pawns" who are responsible only for their conduct in it.[41] This proposition has been referred to as the Independence Thesis.[42] The implication of the Independence Thesis is that unjust combatants nevertheless fight justly when they do so in strict accordance with the established rules.

The Independence Thesis is a precondition for the traditionalist espousal of the principle of the moral equality of combatants, also referred to as the Equality Thesis or Symmetry Thesis, which states that just and unjust combatants have the same *jus in bello* rights and privileges.[43] The Equality Thesis implies that, just by starting a war of aggression, unjust combatants gain the moral permission to kill just combatants who are merely defending themselves against aggression. The domestic equivalent of this claim would be the assertion that a murderer and his intended victim have an equal right to kill

[40] Magnus Reitberger, "License to Kill: Is Legitimate Authority a Requirement for Just War?," *International Theory* 5(1) (2013): 67.
[41] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 21, 40.
[42] The terms "Independence Thesis" and "Symmetry Thesis" are borrowed from David Rodin. See Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," 44.
[43] Ibid.

one another, notwithstanding the fact that the victim has done nothing to lose her right not to be killed, which would be an extraordinary claim.

Traditionalists have provided various explanations in support of the Equality Thesis. Walzer asserts that combatants have equal moral status either through being forced to fight, such as through conscription, or because they have consented to kill and be killed.[44] Yitzhak Benbaji and Daniel Statman agree that combatants on both sides "waive" their rights not to be killed when they enlist to fight, in the same way that boxers waive their rights not to be punched when they enter the ring.[45] On this view, all combatants, through the bearing of arms, have made themselves, as Walzer puts it, into "dangerous men" who pose an equal threat to one another.[46]

Still other traditionalists attempt to provide a *de facto* justification for the Equality Thesis by demonstrating the demerits of the alternative approach, the Asymmetry Thesis, whereby just and unjust combatants follow different rules in war. Christopher Kutz warns that implementing asymmetrical rules would have dire moral consequences in practice by loosening restraint in war, providing incentives to prolong the fighting, undermining reciprocity, and leading to destabilising patterns of conflict within the international system.[47] Similarly, Shue contends that following symmetrical rules is more likely to produce stable norms and fewer mistakes about liability than following asymmetrical

[44] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 37.
[45] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 127.
[46] Walzer writes that a combatant who has been mobilised to fight has "allowed himself to be made into a dangerous man. For that reason, he finds himself endangered." Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 145.
[47] Christopher Kutz, "Fearful Symmetry," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 74-77.

rules.[48]

These types of arguments have pushed the theoretical debate towards the realm of non-ideal theory and sparked resurgent interest in the relationship between law and morality.[49] Traditionalists and revisionists alike recognise that law and morality serve different functions in the sense that the former must take into account the impact of rules on behaviour. Nevertheless, traditionalists tend also to view their account as providing a moral foundation or justification for the extant laws of war. Shue argues that, so long as the laws of war are morally justified, there is no need for a separate morality of war that is distinct from the law.[50] The morally optimal laws, according to Shue, are those that constrain violence as much as possible under conditions of epistemic uncertainty.[51] Traditionalists conclude from these arguments that the laws of war should remain largely as they are, a point that many revisionists concede, albeit for different reasons.

Revisionism

Revisionists challenge all of the above arguments on the morality of war. Revisionism begins with the premise that all individuals have fundamental moral rights, including the right not to be killed. Individuals hold these rights equally, irrespective of nationality, ethnicity, race, or other characteristics. Moral rights are held to be distinct from legal rights, and revisionists are concerned only with the former.

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[48] Henry Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," in *Walzer and War: Reading Just and Unjust Wars Today*, ed. Graham Parsons and Mark A. Wilson (Cham: Palgrave Macmillan, 2020), 206.
[49] For a comprehensive discussion of this debate, see Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017) and David Rodin, "Morality and Law in War," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011).
[50] Shue, "Do We Need a 'Morality of War'?," 89.
[51] Ibid., 104.

Revisionists reject the notion that war is morally exceptional on the grounds that the mere fact of being in a state of war does not alter the moral prohibitions and permissions that govern defensive killing. On the revisionist view, war is merely the aggregation of individual acts of self-defence that have reached a certain scale of violence. McMahan writes that:

> The difference between war and other forms of conflict is a difference only of degree and thus the moral principles that govern killing in lesser forms of conflict govern killing in war as well. A state of war makes no difference other than to make the application of the relevant principles more complicated and difficult.[52]

Cécile Fabre similarly argues that acts of defensive killing are governed by "the same moral norms, whether they are committed by combatants against other combatants, or by police officers against criminals (and vice versa)."[53] As a result, the moral norms that govern war are reducible to the moral norms governing individual and other self-defence.

Yet if all individuals have the right to self-defence against unjustified threats, as they do, and that right is unchanged by being in a state of war, then it is difficult to see how the right to wage war could be limited only to states and state-like groups. Revisionists conclude from this that legitimate authority is not in fact a necessary condition for waging war and that all groups, and even individuals, may go to war irrespective of such authority. McMahan argues that "it is not a necessary condition of just or justified war that it be initiated only by persons who are properly authorized to do so."[54] Fabre goes further in asserting that the right to go to war is a fundamental right, which all individuals have

[52] McMahan, *Killing in War*, 156.
[53] Cécile Fabre, "War, Policing, and Killing," in *The SAGE Handbook of Global Policing*, ed. Ben Bradford et al. (Los Angeles: SAGE Reference, 2016), 262.
[54] Jeff McMahan, "Just War," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin, Philip Pettit, and Thomas Pogge (Oxford: Blackwell Publishing, 2007), 671.

regardless of group membership.[55]

In approaching war from the perspective of individual self-defence, revisionism poses a significant challenge to the traditionalist view of moral liability. For if the moral considerations governing killing in war are fundamentally the same as the moral considerations governing individual self-defence, then it follows that just and unjust combatants are not morally equal. Unjust combatants are like the murderer in the domestic scenario articulated above; they are the aggressors who attack innocent victims. Just combatants, meanwhile, have done nothing to lose their right to be killed and are therefore innocent in the relevant sense. Like the victim, just combatants are not liable to be killed, while unjust combatants are liable. As in the domestic context, liability does not hinge on whether combatants pose a threat, but whether they are morally responsible for posing an unjust threat.[56]

This perspective on moral liability implies a rejection of the traditionalist separation of *jus ad bellum* from *jus in bello* and the corresponding Equality Thesis. Contra Walzer, revisionists argue that the justness of the cause for war is inextricably linked to the justness of conduct in war. The implication of this view is that unjust combatants, as well as some unjust non-combatants, may be liable to be killed insofar as they bear sufficient moral responsibility for posing an unjust threat, and killing them is a necessary and proportionate way to avert that threat.[57] In response, revisionists often emphasise that most unjust non-combatants will not be sufficiently responsible for unjust threats to rise to the

[55] Cécile Fabre, "Cosmopolitanism, Just War Theory and Legitimate Authority," *International Affairs* 84(5) (2008): 976.
[56] Jeff McMahan has done the most to advance this view. See McMahan, *Killing in War*.
[57] For a critique of this implication, see Seth Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38(2) (2010): 180-189 and Lazar, "Risky Killing and The Ethics of War," 91-94.

level of liability to be killed.[58] McMahan further points to the necessity of maintaining the principle of civilian immunity as a legal rule.[59]

Despite their rejection of the Equality Thesis, most revisionists share the traditionalist view on maintaining the existing laws of war, including the legal equality of combatants.[60] While McMahan rejects Shue's assertion that the laws of war are "morally optimal," he nevertheless concedes that the law serves a different purpose from morality. McMahan argues that the laws of war must diverge from the "deep morality" of war for consequentialist reasons.[61] He holds out the possibility, along with Rodin, that an international court could make impartial rulings on the justness of the cause for war, thereby solving some of the practical dilemmas with implementing revisionist views.[62] In the interim, however, the most revisionists hope to achieve in practice is to encourage combatants to refuse to fight in unjust wars.[63]

1.6 STRUCTURE

This is a thesis by four independent, but thematically linked, papers. Each paper examines a key point of contention within the traditionalist-revisionist debate. Following this brief introduction, the first three papers address fundamental problems with traditionalism with

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[58] McMahan, "The Basis of Moral Liability to Defensive Killing," 395.
[59] McMahan, *Killing in War*, 235.
[60] One notable exception is Victor Tadros, who proposes that the law of armed conflict should be revised to achieve "greater convergence" with moral principles. See, for example, Victor Tadros, *To Do, To Die, To Reason Why* (Oxford: Oxford University Press, 2020), 269-272.
[61] McMahan, "The Ethics of Killing in War," 731.
[62] Ibid., 63-64; Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 40; Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," 63.
[63] McMahan writes that he hopes his work will "challenge complacency about killing in war" and, in particular, "the view that moral responsibility for the wrongful killing that occurs when an unjust war is fought lies solely with the political leaders whose decision it was to go to war." McMahan, *Killing in War*, vii.

respect to the exceptionalism of war, the statist approach to legitimate authority, and the Equality Thesis. Moving from theory to applied ethics, the final paper then draws out the implications of this research for US policies on direct action, a paradigm case for asymmetric warfare.[64] The thesis concludes by considering whether the same normative principles apply to different types of asymmetric conflicts as the character of warfare continues to evolve.

Between War and Peace

In the first paper, I argue against exceptionalism by using the asymmetric case to interrogate the Discontinuity Thesis, namely, the exceptionalist claim that being in a state of war triggers different normative principles from those governing defensive harming in ordinary life.[65] I argue that asymmetric warfare gives rise to the problem of vagueness, in the sense used in analytic metaphysics, because it involves a range of borderline cases which do not fall neatly into either the war or peace paradigms. While vagueness does not represent a decisive argument against the Discontinuity Thesis, the exceptionalist response to this problem exposes fundamental flaws in the logic of exceptionalism. In particular, the exceptionalist proposal to create a *jus ad vim* framework for borderline cases fails to demonstrate how purportedly unique features of asymmetric warfare entail different moral norms for defensive harming. I conclude that asymmetric warfare poses no such problems for reductivism, which posits that the same moral norms governing defensive harming apply in times of both war and peace.

[64] Direct action involves "kill or capture" operations against targeted individuals, such as against members of terrorist groups.
[65] I borrow the term "Discontinuity Thesis" from Jonathan Parry, "Just War Theory, Legitimate Authority, and Irregular Belligerency," *Philosophia* 43(1) (2015): 181.

Legitimate Authority Beyond the State

Here, I evaluate the *jus ad bellum* requirement of legitimate authority in the context of conflicts between state and non-state actors. After mapping out the conceptual terrain, I examine problems with the traditionalist paradigm of authority, which accords war rights primarily to state and state-like groups. I argue that traditionalism fails to establish a normative basis for restricting the requirement in this way, particularly since it cannot explain why states that lack legitimate political authority in the domestic sphere nevertheless possess legitimate authority to declare war. Yet while traditionalism provides the wrong account of legitimate authority, the requirement still is necessary to ensure that individuals can exercise the right to self-defence without violating the fundamental rights of others as the scale and scope of violence increases. For this reason, I propose an alternative, Razian account of legitimate authority. On that account, legitimate authority is that which helps people conform with their pre-existing reasons for action under the conditions of war, that is, when faced with epistemic uncertainty and collective action problems. The resulting view is that non-state actors may possess the moral authority which entitles them to go to war.

Moral Equality in an Unequal World

Should *jus in bello* rules apply equally to state and non-state actors? Walzerian traditionalism is predicated on the Equality Thesis, whereby combatants have equal moral permissions and obligations irrespective of the justness of their cause for war because they are not responsible for the *jus ad bellum* decision to wage war. This thesis collapses in conflicts involving non-state actors, however, because such actors are responsible both for

the decision to wage war and for their conduct in it, implying that *jus ad bellum* and *jus in bello* considerations are not logically independent.[66] Yet, in such conflicts, traditionalists maintain that the Equality Thesis holds just when non-state actors possess legitimate authority to wage war. This argument raises doubts about the viability of the thesis more broadly: if state and non-state actors are morally equal just when they possess legitimate authority, then by the same token the Equality Thesis does not apply in all cases of inter-state warfare since, as I argued in the previous paper, some states may lack such authority. Here, I consider whether contractarianism can save traditionalism from this apparent inconsistency by explaining why the Equality Thesis holds in inter-state warfare, but not in conflicts involving non-state actors.[67] I conclude that contractarianism fails to establish a normative justification for applying the Equality Thesis selectively in this manner and consider whether there nevertheless are prudential reasons for maintaining the equal application of the law in practice.

Principles for Asymmetric Warfare

In the final paper, I move from the realm of moral philosophy to applied ethics in considering the implications of this research for US policy on direct action, that is, kill or capture operations against terrorist targets. This case study underscores the failure of traditionalism to address specific moral issues that arise in asymmetric conflicts and the need for an alternative approach.

A plausible alternative would be to adopt policies based on an amended form of revisionism, taking into account practical considerations and epistemic limitations in war.

[66] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 36, 196.
[67] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*.

While the problems with implementing revisionist principles are well known, I conclude that revisionists have conceded too much ground in accepting the limited applications of the theory in practice, namely by concluding that law and morality must diverge in war. Indeed, the focus on the divergence between law and morality has obscured the importance of developing morally-directed policy guidance for areas where the law is, for various reasons, indeterminate, open to interpretation, or difficult to reform. For this reason, I articulate general principles, based on revisionism, that could better align policymaking with my account of the ethics of asymmetric warfare. I then consider what this means in practice and how revisionist principles might provide a framework for making morally optimal decisions about the use of force in asymmetric warfare.

2

Between War and Peace

2.1 INTRODUCTION

In the past two decades, there has been a fundamental shift in the way that scholars and policy practitioners conceive of war. No longer bounded by time or geography, the concept of war has become increasingly elastic, encompassing the use of unconventional force in a range of circumstances that look markedly different from state-directed armies facing off on a battlefield. The rise of transnational terrorism has made war at once more global and more individualised, as states use extraterritorial force to prevent threats from non-state actors who fight in the midst of civilians. The advent of remote warfighting technologies has enabled and accelerated this shift, allowing states to target individuals anywhere, at any time, with ostensibly fewer risks and costs than conventional war.

These features of asymmetric warfare have blurred the line between war and peace, leading in some cases to a perpetual state of war. In this context, asymmetric warfare poses a challenge to the exceptionalist view that war is *sui generis* and therefore not subject to the normative principles governing defensive harming in domestic life. Exceptionalists claim that the mere fact of being in a state of war or peace triggers a certain moral universe or paradigm where a different set of norms apply. Asymmetric warfare, however, does not fit neatly into either the war or peace paradigms. Consequently, some exceptionalists propose a third moral paradigm, sometimes referred to as *jus ad vim*, for cases which are neither clearly war nor peace.

The *jus ad vim* framework, however, exposes fundamental problems with exceptionalism. Exceptionalists cannot explain how features which they claim are unique to asymmetric warfare, such as the smaller scale and scope of violence, generate different moral rules, nor do they provide an account of how to distinguish which moral paradigm applies in borderline cases. Absent such explanations, following the logic of exceptionalism creates a moral risk that norms will be applied incorrectly, since many borderline cases may be classified inappropriately as war even when they should be governed by norms that more closely resemble law enforcement. In such cases, exceptionalism may cease to be action-guiding in war and may be used to serve immoral ends.

This paper uses the asymmetric case to interrogate the Discontinuity Thesis, the exceptionalist claim that being in a state of war fundamentally alters the normative principles governing defensive harming in ordinary life. Following Seth Lazar, I argue that two premises both must be true for the Discontinuity Thesis to hold. First, the uniqueness premise dictates that there must be at least some properties of war which do not obtain outside of war. Second, the norms premise requires that those properties be morally salient insofar as they determine which distinct moral norms to war should govern defensive harming. In section 2.2, I consider the first premise and conclude that, while asymmetric warfare gives rise to the analytic philosophical problem of vagueness insofar as it involves a range of borderline cases which cannot be easily classified as war or peace, vagueness nevertheless does not provide a decisive argument against exceptionalism. I then turn to the second premise in section 2.3, where I argue that the exceptionalist framework of *jus ad vim* fails to demonstrate how unique properties of asymmetric warfare entail different

moral norms for defensive harming. This failure leads me to consider, in section 2.4, whether asymmetric warfare poses similar problems for the Continuity Thesis, where the same moral norms governing defensive harming apply in times of both war and peace.

2.2 THE SPECTRUM OF WARFARE

At the heart of Walzerian traditionalism lies the claim that war is governed by a distinct moral logic from defensive killing in peacetime. Proponents of this view, which has been referred to as "exceptionalism," contend that the mere fact that defensive killing occurs in the context of war makes certain acts morally permissible that would otherwise be morally impermissible in everyday life.[1] On this view, ordinary moral principles, namely the principles governing individual self- and other-defence, are suspended in war. Importantly, the exceptionalist claim is not that ordinary moral principles must be applied differently in the context of war, but rather the far stronger claim that the principles governing defensive harming are substantively different inside and outside of war.

Exceptionalism is based on what Jonathan Parry has termed the Discontinuity Thesis, that is, the premise that "war is morally disanalogous from ordinary causes of violence in some important respect, and thus cannot be analysed solely in terms of justifications for harming contained within ordinary interpersonal morality."[2] As noted, there are two premises that must be jointly true in order for the Discontinuity Thesis to

[1] As Seth Lazar argues, not all traditionalists are exceptionalists, just as not all revisionists are reductivists. The Walzerian view of traditionalism, however, does adopt an exceptionalist view of war. See Seth Lazar, "Method in the Morality of War," in *Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015), 23.

[2] Jonathan Parry, "Just War Theory, Legitimate Authority, and Irregular Belligerency," *Philosophia* 43(1) (2015): 181. Seth Lazar refers to the Discontinuity Thesis as "exceptionalism." See Seth Lazar, "National Defence, Self-Defence, and the Problem of Political Aggression," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014).

hold. First, the uniqueness premise dictates that there must be at least some properties of war which do not obtain outside of war. Second, the norms premise requires that those properties be morally salient insofar as they determine which distinct moral norms to war should govern defensive harming. In this section and the next, I will consider each of these premises in turn.

For the uniqueness premise to hold, exceptionalists must be able to define the concept of war and identify certain features that separate war from lesser uses of force. This is not as straightforward a task as it might first appear. Notwithstanding the usage of the term in common parlance, there is no widely accepted definition of "war." The *Oxford English Dictionary* defines war as a "hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state."[3] In more general terms, *Merriam-Webster* describes war as "an organized effort by a government or other large organization to stop or defeat something that is viewed as dangerous or bad."[4] According to this definition, war encompasses a broad spectrum of activities ranging from armies facing off on the battlefield, to rebellions, to gang violence.

These definitions, then, do not distinguish between war and lesser uses of force. The Correlates of War (COW) Project attempts to address this problem by defining war as sustained fighting involving organised groups that results in at least 1,000 battle-related deaths within the course of a year.[5] Not all fighting is sustained, however, and a state could be conquered with fewer fatalities or without ever firing a shot, as David Rodin points out

[3] "War," in *Oxford English Dictionary* (Oxford: Oxford University Press, 2022). https://www.oxfordlearnersdictionaries.com/definition/english/war.
[4] "War," in *Merriam-Webster Dictionary* (2022). https://www.merriam-webster.com/dictionary/war.
[5] Meredith Reid Sarkees, "The COW Typology of War: Defining and Categorizing Wars," *The Correlates of War Project*, 2007, https://correlatesofwar.org/data-sets/COW-war/the-cow-typology-of-war-defining-and-categorizing-wars/view.

in his discussion of the "bloodless invasion."[6] It is difficult to imagine, for example, that the Anglo-Zanzibar War of 1896, which resulted in roughly 500 casualties and lasted half an hour, was not truly a war.[7] Similarly, suppose Russian cyber attacks created massive blackouts and infrastructure outages in Ukraine, allowing Russian soldiers to capture the country without any fighting at all. According to the COW definition, neither of these examples would constitute a war, yet we would be hard-pressed to call them anything else. By the same standard, fighting between drug traffickers and the Mexican army in 2009, which resulted in more than 1,000 deaths, would have been considered a war rather than violence resulting from a crime.[8]

International law is of little help here. The term "war" is not a legal construct, and its closest equivalent in law is the notion of an "armed conflict," which may be international or non-international in nature. International armed conflicts occur between two or more states, whereas non-international armed conflicts occur between state military forces and non-state armed groups, or between such groups only.[9] The International Committee of the Red Cross proposes that a state of international armed conflict exists "whenever there is resort to armed force between two or more states," whereas non-international armed conflicts must be protracted, meet an intensity threshold, and involve parties that demonstrate a minimum level of organisation.[10]

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[6] David Rodin coined this term in his discussion of how the principles of self-defence pertain to war. See David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), Ch. 6.
[7] Myles Hudson, "Anglo-Zanzibar War," (Encyclopaedia Britannica, August 20, 2021). https://www.britannica.com/event/Anglo-Zanzibar-War.
[8] William Reno, "Crime Versus War," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 221.
[9] "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?," *International Committee of the Red Cross*, March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf.
[10] Ibid., 5.

Even with these definitions in hand, there is considerable disagreement in practice about what constitutes a war. The global "war on terror" is a case in point; the legal theory that threats from disparate terrorist groups can be aggregated to reach the intensity threshold for a non-international armed conflict remains controversial today.[11] The blurring of the line between limited force and war has pervaded discourse about war more broadly. On the eve of the US-led invasion of Iraq in March 2003, for example, Michael Walzer argued that war with Iraq could be avoided by intensifying the "little war" that the United States was already fighting in the form of no-fly zones, the interdiction of ships destined for Iraqi ports, and threats to resort to force.[12] Yet no-fly zones, which protect the civilian population by denying an adversary's aircraft access to their airspace, do not appear to meet any of the above definitions of war. Interdictions or the threat of force are still less likely to rise to the threshold of war.

This brief discussion of the definition of war underscores the conceptual vagueness of the term. There will always be borderline cases which are neither clearly instances of war nor outside of war, and it is impossible to set a threshold for war that is not morally arbitrary. Virtually no one would argue that 1,000 deaths constitute a war, but 999 deaths do not. But if 999 deaths are considered a war, so too then are 998, 997, and so forth; the lack of a non-arbitrary threshold seems to licence a deduction that leads to the conclusion that one or even zero deaths may count as a war, which seems obviously false (barring the possibility of a "bloodless" invasion). The task of distinguishing between war and lesser

[11] "Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications," *International Committee of the Red Cross*, May 7, 2015, https://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications.
[12] Michael Walzer, "What a Little War in Iraq Could Do," *The New York Times*, March 7, 2003, https://www.nytimes.com/2003/03/07/opinion/what-a-little-war-in-iraq-could-do.html.

uses of force is as daunting as trying to distinguish a forest from a grove; both contain a certain number of trees, but it is unclear precisely how many trees are needed for a grove to become a forest. Similarly, there is no clear point at which limited force becomes war for the purposes of applying the moral norms that exceptionalists claim pertain only to war.

The analytic problem of vagueness, however, does not represent a decisive argument against exceptionalism. For it remains open to exceptionalists to reply that there nevertheless are paradigmatic features of war that distinguish it from other forms of violence, even if there is no bright line between war and peace. Prototypical instances of war, for instance, usually involve collective violence of a large scale and scope that is fought for at least some political ends.[13] The large scale and scope of fighting, in turn, generates considerable epistemic uncertainty concerning the moral norms governing defensive harming—an element of the "fog of war."[14] Wars tend to unfold within the context of fractured or contested order, where the rules governing defensive harming that usually apply in domestic society are not functioning due to either poor governance within a state or the lack of an effective international law enforcement mechanism for resolving disputes between states.[15] Finally, exceptionalists rely on the legitimate authority criterion

[13] In the canonical expression of this view, Jean-Jacques Rousseau in *The Social Contract* (1761) wrote that: "War, then, is not a relation between man and man, but a relation between State and State, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. In short, each State can have as enemies only other States, and not individual men, inasmuch as it is impossible to claim any true relation between things of different kinds." Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses*, ed. Susan Dunn and Gita May (New Haven: Yale University Press, 2002), 160-161.

[14] Brian Orend observes that "there's no real war so to speak until the fighters *intend* to go to war and until they do so with a heavy quantum of force" (emphasis in original). See Brian Orend, *The Morality of War* (Peterborough: Broadview Press, 2006), 3.

[15] Daniel Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations* (Oxford: Oxford University Press, 2021), Ch. 1; Yitzhak Benbaji and Daniel Statman, *War by Agreement: A Contractarian Ethics of War* (Oxford: Oxford University Press, 2019), 182.

to distinguish between war and law enforcement activities, where groups which lack such authority are regarded as criminals rather than combatants.[16]

Yet asymmetric warfare nevertheless presents a challenge for exceptionalists because it typically includes uses of force which appear to fall below the threshold of war, but which are clearly beyond the purview of law enforcement. While asymmetric warfare rarely involves collective violence of a large scale and scope at a given place and time, as occurs in conventional battles, taken in aggregate over time these conflicts may rise to the level of a war. Epistemic uncertainty concerning the moral norms governing defensive harming is also acute in such conflicts, not necessarily because of the scope and scale of the fighting, but due to the fact that combatants often fight in the midst of civilian life, without uniforms or other identifying insignia. Perhaps to an even greater extent than conventional warfare, asymmetric conflicts nearly always unfold in ungoverned or poorly governed spaces, such as within failed or failing states. And, as I discuss in greater depth in the second paper, "Legitimate Authority Beyond the State," there is no reason to suppose that non-state actors cannot meet the criteria for legitimate authority under certain circumstances and therefore claim combatant status in the way that soldiers do.

Despite sharing many of the same features as war, policymakers often frame asymmetric warfare as a moral alternative to war. After the US withdrawal from Afghanistan in August 2021, for example, President Joe Biden declared before the United Nations (UN) General Assembly that he stood there "for the first time in twenty years, with the United States not at war."[17] Instead of war, Biden argued, the United States would rely

[16] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 185.
[17] "Remarks by President Biden Before the 76th Session of the United Nations General Assembly," The White House, September 21, 2021, https://www.whitehouse.gov/briefing-room/speeches-

on "over-the-horizon" capabilities to fight terrorism, primarily through drone strikes and the use of special forces. From a policy perspective, the Biden administration portrayed the over-the-horizon approach as a form of limited force, as a strategic and moral alternative to war that would incur lower risks and costs. But from a legal standpoint, the administration maintained that these operations were part of the armed conflict that began after the 9/11 terrorist attacks, and therefore constituted a "war" for the purposes of determining which rules governed the conduct of hostilities and who could be detained.[18] The over-the-horizon strategy, in other words, was portrayed both as war and an alternative to war, where the laws of war applied most of the time.

To further complicate matters, US policy guidance on direct action, that is, kill or capture operations targeting terrorist groups, suggests there is a widespread intuition that the laws of war are too permissive when applied to certain forms of asymmetric warfare.[19] Starting with the Obama administration, US drone strikes and other special operations outside of "areas of active hostilities" have been governed by a set of policy rules that approximate, although they still fall short of, some revisionist standards enshrined in international human rights law (IHRL).[20] The preference for capture over kill operations,

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remarks/2021/09/21/remarks-by-president-biden-before-the-76th-session-of-the-united-nations-general-assembly/.

[18] "United States v. Zayn al-Abidin Muhammad Husayn, aka Abu Zubaydah, et al.," No. 20-827, *Supreme Court of the United States*, October 6, 2021, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-827_l6gn.pdf.

[19] It bears emphasising that the policy guidance is not legally binding and has not always been followed in practice; decisionmakers can and have disregarded it. Nevertheless, the mere existence of the policy guidance suggests that policymakers perceive additional restrictions are needed beyond what the laws of war require.

[20] The extent to which subsequent iterations of the policy guidance have maintained this framing is unclear. The Trump administration's "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets," for example, contained no mention of "areas of active hostilities" and relaxed some of the Obama-era criteria, even though it maintained a general preference for capture over kill operations. The Biden administration has not yet completed its version of the policy guidance, the Presidential Policy Memorandum.

for example, is aligned with the interpretation of the necessity criterion under IHRL. Similarly, the "near certainty" requirement for lethal operations is in keeping with the IHRL provision that force should be used only if bystanders are unlikely to be harmed.

The notion of "areas of active hostilities," however, has added to the confusion surrounding the concept of war. The Obama administration explicitly stated that the criteria for determining whether a region constituted an "area of active hostilities" did not depend exclusively on whether an armed conflict was taking place, but also took into account "the size and scope of the terrorist threat, the scope and intensity of US counterterrorism operations, and the necessity of protecting US forces in the relevant location."[21] In practice, this definition has allowed the executive branch wide latitude to decide where to apply the stricter policy guidance versus the laws of war alone.

How can exceptionalists make sense of this conflagration of different typologies and rules for asymmetric warfare? There are two possible approaches. First, exceptionalists can deny that there is any "grey zone" between war and peace, and insist instead that all asymmetric operations should fall either under the law enforcement or war paradigms, however defined. Second, exceptionalists can accept that asymmetric warfare falls somewhere on the spectrum between war and peace, and propose a third set of moral norms that would govern such conflicts.

Leading proponents of the exceptionalist view largely subscribe to the latter view. Acknowledging that the war paradigm may be too permissive for certain types of force, scholars such as Michael Walzer have proposed that a new *jus ad vim* framework is needed

[21] "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," *The White House* (2016): 25, https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

to develop standards for the use of force that falls between law enforcement and war.[22] In the next section, I consider the logic of *jus ad vim* and the implications for the norms premise of the exceptionalist argument.

2.3 THE LOGIC OF *JUS AD VIM*

Some exceptionalists respond to the challenges that asymmetric warfare poses by developing a third moral paradigm, *jus ad vim*, for the use of force between war and peace. Proponents of this view argue that asymmetric warfare is distinct from both war and law enforcement in relevant ways, and that these distinctions are morally significant insofar as they trigger a different moral paradigm for defensive harming. Walzer, for example, claims that targeted airstrikes and other forms of asymmetric warfare fall short of the quantum force and duration of "actual warfare," and must therefore be governed by different norms.[23]

Exceptionalists contend that force which falls below the threshold of war, however defined, must be held to stricter *jus in bello* standards than the rules governing conduct in war. Walzer imagines three drone strikes which occur, respectively, in a "zone of peace" in Philadelphia, a "zone of war" in Afghanistan (which was, at the time, an actual war zone under international law), and an intermediary or "grey zone" in Yemen. The first drone strike should be governed by law enforcement standards, the standards which revisionists propose. The second strike, according to Walzer, should be governed by the norms of war which exceptionalists and traditionalists more broadly espouse. The final strike should be

[22] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), xv–xvi.
[23] Ibid.

governed by a third moral framework, which Walzer claims is more permissive than law enforcement but more restrictive than the rules governing conduct in war.[24]

Building on Walzer's argument, Daniel Brunstetter attempts to define the contours of this third framework in *Just and Unjust Uses of Limited Force* (2021).[25] Brunstetter argues that traditional just war theory principles must be recalibrated in the context of asymmetric warfare, guided by the overarching principle of "maximal restraint" and the moral intuition that the latter implies "less moral latitude to kill" than conventional warfare.[26] These new set of principles include a narrower interpretation of the necessity criterion, where limited force is used in anticipatory self-defence against imminent threats only, rather than to achieve some larger military victory. Furthermore, proportionality, according to this view, is understood in terms of the risk of escalation, where it would be disproportionate to conduct a strike if it would lead to large-scale war. Finally, Brunstetter argues for a reinterpretation of the principle of discrimination such that only combatants who pose an "active threat" may permissibly be targeted, as opposed to all combatants in conventional warfare.[27]

In order for this argument to hold, exceptionalists must demonstrate that there are unique features of asymmetric warfare which alter the moral permissions for defensive harming. As we have seen in the previous section, the fact that war is conceptually vague complicates efforts to distinguish what level of force falls outside of the war paradigm that

[24] Michael Walzer, "Just & Unjust Targeted Killing & Drone Warfare," *Daedalus* 145(4) (2016): 14.
[25] Notably, Brunstetter proposes to apply this framework, which he divides into *jus ad vim*, *jus in vi*, and *jus post vim* categories, to all instances of limited force occurring within and outside of asymmetric conflicts. Brunstetter also applies the framework, for example, to no-fly zones in conventional wars. Nevertheless, the primary application of this research is to asymmetric warfare as I have defined it here. Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations*, 20-26.
[26] Ibid., 202.
[27] Ibid., 231-232.

exceptionalists espouse.[28] Yet exceptionalists claim that asymmetric conflicts typically involve a lesser quantum of force and more limited aims than conventional warfare.[29] At the same time, exceptionalists argue that asymmetric conflicts involve more force than law enforcement operations in the domestic context, and that these conflicts tend to occur in ungoverned or poorly governed spaces where it often would be impossible to apprehend individuals for trial. Inevitably, not all asymmetric conflicts will retain these features and some conventional wars may share them. For the purposes of discussion, I simply concede the point that these features of asymmetric conflicts are unique. If that is the case, then exceptionalists must also demonstrate that the norms premise holds, that is, that these features alter the moral norms governing defensive harming in war or in ordinary life.

The scale and scope of violence appears to be the most promising means of differentiating between the moral norms governing law enforcement, asymmetric warfare, and conventional warfare. There are two ways in which scale and scope might alter such moral norms. First, large-scale violence might increase epistemic uncertainty, leading to more mistakes (or more serious mistakes) about moral liability. Second, large-scale violence might be employed only in pursuit of the most important moral aims, such as the defence of a communal way of life, and these weighty moral aims might justify following more permissive moral standards for defensive harming.

Exceptionalists place significant weight on the argument from epistemic uncertainty. As the scale and scope of violence increases, exceptionalists argue that moral

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[28] The *jus ad vim* framework adds to this conceptual confusion by proposing that even limited force *within* war should be governed by more restrictive norms than the laws of war, raising questions about what, precisely, triggers the war paradigm if not the act of being in a war itself.

[29] Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations*, 200-202. See also Walzer, *Just and Unjust Wars,* 4th ed., xv–xvi; Michael Walzer, "On Fighting Terrorism Justly," *International Relations* 21(4) (2007): 480-481.

liability becomes more difficult to discern accurately. On this view, combatants on the battlefield cannot be expected to determine which targets are morally responsible for posing an unjust threat. Worse still, Henry Shue contends that if combatants try to make such judgements in the fog of war they are likely to make "numerous, murderous mistakes" about moral liability that will have worse moral consequences than following the norms of the war paradigm.[30] Due to the risks of these mistakes, Shue claims we need simplified rules that can be applied in war, such as the rule to kill only combatants and never civilians. He argues that the best, morally justified rules for war are those that "can produce relatively few mistakes in moral judgment—relatively few wrongs—by angry and frightened mortals wielding awesomely powerful weapons."[31]

What is more, exceptionalists contend that the use of force in asymmetric conflicts is more predictable than in conventional warfare, thereby reducing epistemic uncertainty concerning moral liability and lesser evil justifications for defensive harming. Walzer asserts that the level of force has a direct impact on moral considerations: the more limited force is in scope, the less "unpredictable and often catastrophic consequences" that follow.[32] Brunstetter similarly argues that "compared to acts of war, *jus ad vim* actions…have a destructive outcome that is more predictable and smaller in scale, severely curtail[ing] the risk of civilian casualties."[33] On this view, advances in technology, particularly aerial surveillance and reconnaissance, have further reduced epistemic uncertainty in small-scale conflicts. As a result, exceptionalists would likely agree that the

[30] Henry Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," in *Walzer and War: Reading Just and Unjust Wars Today*, ed. Graham Parsons and Mark A. Wilson (Cham: Palgrave Macmillan, 2020), 206.
[31] Ibid.
[32] Walzer, *Just and Unjust Wars,* 4th ed., xv–xvi.
[33] Daniel Brunstetter and Megan Braun, "From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating Our Understanding of the Moral Use of Force," *Ethics & International Affairs,* 27(1) (2013): 87.

force of Shue's argument about "murderous mistakes" concerning liability in full-scale war is greatly diminished in asymmetric conflicts, since there is less risk that such mistakes will occur. If that is the case, then on the exceptionalist view more restrictive norms for defensive harming, such as killing people based on whether they pose a threat, rather than based on their combatant status, should apply in small-scale conflicts, while full-scale war should be governed by the existing rules of war.

Yet, the focus on degrees of epistemic uncertainty in different types of conflicts is misguided. The level of epistemic uncertainty in war, peace, and zones "in between" is not static and does not depend solely on the scale of fighting; it varies depending on a number of factors, including the organisation of the parties to the conflict, the intelligence collection capabilities of belligerents, and the mode of fighting. The use of advanced technology also is not limited to asymmetric conflicts, as evidenced by the use of intelligence, surveillance, and reconnaissance (ISR) drones in law enforcement settings, and in more conventional conflicts such as the Nagorno-Karabakh War in 2021, or the current war in Ukraine.[34] But even in such cases, the collection of greater volumes of information does not necessarily reduce epistemic uncertainty, since raw intelligence still needs to be analysed in order to make accurate determinations about moral liability. Confirmation bias, incomplete or conflicting intelligence, and outdated information can all

[34] Michael Smith, "Regulating Law Enforcement's Use of Drones: The Need for State Legislation," *Harvard Journal on Legislation* 52(2) (2015); Ridvan Bari Urcosta, "Drones in the Nagorno-Karabakh," *Small Wars Journal* (2020); and Dave Philipps and Eric Schmitt, "Over Ukraine, Lumbering Turkish-Made Drones Are an Ominous Sign for Russia," *The New York Times*, March 11, 2022, https://www.nytimes.com/2022/03/11/us/politics/ukraine-military-drones-russia.html.

contribute to mistaken judgements about liability, as was the case in the August 2021 drone strike that mistakenly killed an Afghan aid worker and his young family in Kabul.[35]

Ultimately, the probability of making numerous, tragic mistakes in war does not imply that we must follow extraordinary moral rules, but rather that we must pay careful attention to the circumstances under which ordinary moral rules are applied. In the domestic context, for example, a police officer apprehending someone for speeding may be reasonably confident that the perpetrator is reaching for his driving licence, rather than a gun, when he opens his glove compartment. Under different circumstances, such as when the perpetrator exhibits hostile behaviour, this assumption may be somewhat less reasonable. In war, however, soldiers cannot be so complacent; their mission requires them to pose harm to others and as a result they must be constantly alert to threats. Since the risk of harm is far greater in war than in the domestic context, soldiers must pay closer attention to signalling and patterns of behaviour than they might otherwise in times of peace.

Notwithstanding these distinctions, warring parties and law enforcement officers share a moral duty to reduce epistemic uncertainty as much as possible when it comes to decisions about life and death. This moral duty entails seeking out the most complete and accurate information possible before deciding to engage in defensive harming, taking into account the imminence of the threat.[36] As Cécile Fabre argues, agents ought to form beliefs about threats based not just on the evidence they have, but on the "best available evidence"

[35] Matthieu Aikins, "Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb," *The New York Times*, September 10, 2021, https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html.

[36] This duty holds even when the window of opportunity for mitigating threats is small, as is often the case in war, and it is even more imperative when advances in warfighting technology allow for prolonged surveillance before targeting decisions are made.

which they are able to obtain.[37] In the case of defensive harming, the "best available evidence" is that which agents can reasonably be expected to have acquired within the timeframe that is necessary to mitigate a threat. When police officers or soldiers systematically fail to acquire such evidence concerning defensive harming, we might call that culpable negligence. And when such agents are unable to acquire even basic facts in support of determinations about moral liability or lesser evil justifications, we might question whether they should be operating at all.

A second variation of the scale and scope argument is that the limited aims of asymmetric warfare trigger more restrictive norms concerning defensive harming. Exceptionalists argue that large-scale wars are fought for more important moral and strategic aims than small-scale conflicts, and that these aims justify following more permissive moral norms. Unlike conventional warfare, asymmetric conflicts do not typically involve large-scale invasions or the conquering of territory. Military victory, according to Brunstetter, is "morally truncated" insofar as it is difficult to justify significant collateral damage on the basis of killing one or two individuals who pose a threat.[38] Walzer likewise concludes that even killing a "high ranking insurgent or terrorist leader is not so important—especially since these leaders are quickly replaced—as to justify many civilian deaths."[39] Defending the homeland against a large-scale invasion, by contrast, may warrant such deaths.

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[37] Fabre makes this argument in her discussion of the ethics of espionage, but a similar logic could be applied to defensive harming. See Cécile Fabre, *Spying Through a Glass Darkly: The Ethics of Espionage and Counter-Intelligence* (Oxford: Oxford University Press, 2022), 32.
[38] Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations*, 232.
[39] Walzer, "Just & Unjust Targeted Killing & Drone Warfare," 14.

The implication of this view is that asymmetric war is fought for more limited aims and must therefore follow more restrictive norms than conventional war. Brunstetter asserts that "if the goals of limited force are themselves limited, then so too must be the scope of actions taken to achieve them. *Vim* acts should produce comparatively less harm than what typically happens in war."[40] This assertion impacts deliberations on discrimination, according to Brunstetter, such that only combatants who pose an "active threat," as opposed to all combatants, are considered to be legitimate targets.[41]

On the face of it, these distinctions are puzzling. For the aim of both conventional and asymmetric warfare is to deter or defeat threats, and the proportionality criterion already takes into account that amount of moral harms that may be inflicted to achieve moral goods. Even in conventional warfare, it would be disproportionate to use excessive force to achieve minor or relatively unimportant moral aims. The carpet bombing of an entire city in order to hold a small piece of territory that has little strategic value, for example, would be disproportionate. This type of victory similarly would be "morally truncated" in the way that Brunstetter describes and therefore it would appear that, on his own account, such an operation should be bound by more restrictive moral norms.

None of these observations hinge, morally speaking, on whether threats emanate from states or terrorist groups. Suppose a terrorist leader intends to set off a nuclear device in downtown New York City that will kill thousands of civilians and permanently injure thousands more. The White House acquires intelligence about the plot and deploys a drone to target the terrorist leader, which also kills as a side effect one hundred civilians who are

[40] Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations*, 203.
[41] Ibid.

living in the same compound. In such an operation, limited force (in the form of a single drone strike) has been employed, and the aim of the operation similarly is limited (kill a single terrorist leader). Despite this limited aim, the moral value of preventing a nuclear explosion that will kill and injure thousands of civilians is high; indeed, it may be far higher than the value of securing some piece of far-flung territory in conventional warfare. *Pace* Walzer, killing the terrorist leader *is* crucial for preventing the attenuation of an imminent threat, regardless of whether that leader will be quickly replaced (as indeed all leaders are, even heads of state). Limited force, even force with limited aims, does not necessarily lead to the "morally truncated" victory that Brunstetter describes.

Perhaps it is not the limited nature of asymmetric warfare that triggers a new moral paradigm, however, but rather the fact that these conflicts tend to occur in ungoverned or poorly governed spaces, where it would be difficult to apply law enforcement standards. Walzer contends that different moral standards should be applied to the drone strike in Yemen than the drone strike in Philadelphia because it would be impossible "to capture criminals and bring them to trial" in Yemen.[42] If Yemen could be made more like Philadelphia, according to Walzer, then it might be possible to apply the same moral standards to drone strikes in both locations.[43] Similarly, Brunstetter claims that the effectiveness, and therefore relevance, of the law enforcement paradigm diminishes in the presence of fractured and contested order.[44]

Yet order in the international system, too, is highly fractured. Just as there is no viable law enforcement mechanism within poorly governed or ungoverned countries, there

[42] Walzer, "Just & Unjust Targeted Killing & Drone Warfare," 14.
[43] Ibid.
[44] Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations*, 30-38.

is also no such mechanism for resolving disputes between countries. Anarchy, in other words, is a prominent feature of both conventional and unconventional wars. How, then, can exceptionalists claim that asymmetric conflicts should be governed by more restrictive principles than conventional wars? It is no more impossible to capture a terrorist in Yemen than it is to capture a prisoner of war on the battlefield; the main difference is that the former action may violate the sovereignty of another country which may not be a party to the conflict, risking escalation that leads to a broader war.

The risk of escalation, contrary to Brunstetter, is not a novel feature that is absent from conventional warfare. As Helen Frowe and David Rodin both argue, the proportionality criterion includes considerations of escalation because individuals are responsible not only for the moral harms they directly cause, but also for the foreseeable harms they prompt others to cause.[45] It would be disproportionate, for example, for the United States to intervene in the Russia-Ukraine War because doing so could potentially risk a wider conflict, including the possibility of nuclear escalation. Similarly, the US drone strike against Iranian Quds Force Commander Qassem Soleimani in January 2020 was disproportionate because it foreseeably led to heightened tensions with Iran that resulted in the inadvertent downing of a Ukrainian passenger plane with 176 civilians on board.[46] The Soleimani example underscores how the risk of escalation in asymmetric conflicts is already embedded in traditional just war theory.

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[45] Helen Frowe, "On the Redundancy of *Jus ad Vim*: A Response to Daniel Brunstetter and Megan Braun," *Ethics & International Affairs* 30(1) (2016): 121. See also David Rodin, "The Myth of National Self-Defence," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 87.

[46] Uri Friedman, "The Iran Plane Crash Is the Big Story," *The Atlantic*, January 14, 2020, https://www.theatlantic.com/politics/archive/2020/01/iran-plane-crash-soleimani-escalation/604852/.

In sum, none of the features that exceptionalists identify as unique to asymmetric warfare appear to trigger a new moral paradigm for defensive harming. Exceptionalists have not demonstrated how the smaller scale and scope of force, limited aims, anarchy, or the risk of escalation in such conflicts alter *jus ad bellum* or *jus in bello* norms. What exceptionalists have suggested is that our moral intuitions about asymmetric warfare conform more closely with a reductivist view of war, particularly concerning the principle of discrimination. These intuitions hold despite the fact that asymmetric warfare has markedly different features from "zones of peace," implying that the same moral norms apply within and outside of peacetime.

If I am wrong about this, and the scale and scope of violence do alter moral principles as exceptionalists claim, then by the same logic smaller conventional wars should be held to different moral standards than larger conventional wars. Some wars, in other words, must be more exceptional than others. On this view, combatants fighting in the Anglo-Zanzibar War, for example, should have been held to different moral norms than combatants fighting in the Iraq War, which in turn should have been governed by different norms than the Second World War. In practice, this approach would lead to an indefinite number of alternative moral paradigms and the collapse of just war theory as an action-guiding framework. While it remains open to exceptionalists to accept this conclusion, doing so would be at odds with one of the main exceptionalist critiques of reductivism, which is that reductivism fails to be action-guiding in war.

2.4 WAR AS POLICING

In this paper, I have argued that asymmetric warfare poses a fundamental challenge to the exceptionalist view of war. Asymmetric cases sit along a spectrum of conflict in between

conventional war and law enforcement, blurring the line between war and peace. These borderline cases underscore the conceptual vagueness of war, undermining exceptionalist claims that war is *sui generis*. Even if exceptionalists can distinguish systematically between war and the use of force outside of war, they cannot explain how these distinctions alter moral permissions and prohibitions concerning defensive harming. The *jus ad vim* framework, which prescribes a third moral paradigm for asymmetric warfare, does not adequately address this issue. Arguments concerning the scale and scope of violence, in particular, fail to establish the norms premise of the Discontinuity Thesis.

Asymmetric warfare does not pose the same theoretical problems for reductivism. The Continuity Thesis, which rejects the notion of multiple moral paradigms for the use of force, does not differentiate between zones of war and peace. Accordingly, it does not matter how asymmetric warfare is defined or whether it blurs the bright line between these zones. The moral principles governing defensive harming are the same as in the domestic context, even though they must be applied under conditions of fractured order and epistemic uncertainty.

The practical application of the rules, however, does pose particular problems for reductivism. The rule to kill only individuals who are morally responsible for posing an unjust threat, for example, is notoriously difficult to follow in war. For this reason, exceptionalists and reductivists agree that the laws of war should remain largely as they are, although they arrive at this conclusion for different reasons.[47] Leading reductivist Jeff McMahan acknowledges that, for "various reasons, largely pragmatic in nature, the law of

[47] Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008). See also David Rodin, "Morality and Law in War," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011).

war must be substantially divergent from the morality of war."[48] In the case of asymmetric warfare, McMahan also agrees with Walzer that the standards governing such operations might be more permissive than law enforcement because terrorists are significantly more difficult to apprehend than common criminals.[49]

Yet reductivists concede the point too quickly to exceptionalists in accepting that the continuity of moral norms applies in theory only, and not in practice. Asymmetric warfare undermines the exceptionalist case against reductivism because it demonstrates that the current laws of war are not the "morally best" laws in all circumstances outside of zones of peace. [50] To the contrary, the laws of war appear to be far too permissive in most asymmetric conflicts. Even if exceptionalists are correct that a third moral paradigm applies in such conflicts, asymmetric warfare reveals the moral risks of following the logic of exceptionalism, since many borderline cases may be classified inappropriately as war even when they more closely resemble law enforcement.[51] Given the conceptual vagueness of war, there is a high risk that policymakers either will not be able to discern the correct moral paradigm that applies in a great number of conflicts, and therefore follow overly permissive rules, or that norms intentionally will be misapplied to serve immoral ends. In either case, "numerous, murderous" mistakes are likely to be made.[52]

Exceptionalist positions on other social activities outside of war underscore the risk that this form of logic will be misapplied to serve immoral ends. As Rodin argues,

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[48] McMahan, "The Morality of War and the Law of War," 19.
[49] Jeff McMahan, "Targeted Killing: Murder, Combat, or Law Enforcement?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012), 147.
[50] Henry Shue, "Do We Need a 'Morality of War'?," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).
[51] *Jus ad vim* does not resolve this problem, since policymakers similarly may have difficulty determining which acts of limited force should fall under the *vim*, war, or peace paradigms.
[52] Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," 206.

advocates of slavery in the 19th century invoked exceptionalist arguments against abolitionists by claiming that it was impossible to apply ordinary moral principles to slavery, and that different rules were needed to regulate the practice of slavery.[53] One advocate made this impassioned speech (emphasis added):

> You tell me that slavery is morally impermissible because it is inconsistent with the dignity of persons and the fundamental precept that no human should be the chattel property of another. But this simply *begs the question* by applying the moral rules appropriate to ordinary life to the quite different activity of slave-holding. Nowhere have you demonstrated that there is a meaningful continuity between the moral rules appropriate to ordinary life and the moral rules appropriate to slave-holding. Indeed slave-holding is so different from ordinary life that the practice would be *utterly impossible* if one had to abide by ordinary moral rules such as the prohibition on owning another person—this is indeed one of the *tragic* things about slavery. But if we are to regulate the practice of slavery we must recognise that the content of those regulations must be very different from the content of ordinary morality and must allow the owning of other persons.[54]

Shue similarly writes that the reductivist premise that "ordinary life and war…are analogous, *begs the question* against the laws of war."[55] He goes on to say that "the morality for ordinary life, unadjusted for the differences between war and ordinary life…[makes] *impossible* demands upon the conduct of war."[56] Shue insists that "many of our specific moral rules, *tragically*, do not apply in war; they apply only to the rest of life"[57] (emphasis added in all).

Shue undoubtedly would reject the exceptionalist argument in favour of slavery in the strongest possible terms, and exceptionalists may argue that war is very different from slavery.[58] The burden of proof, however, is on the exceptionalist to explain why this is so.

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[53] Rodin, "Morality and Law in War," 458-459.
[54] Quoted in Ibid., 458.
[55] Shue, "Do We Need a 'Morality of War'?," 98.
[56] Ibid.
[57] Shue, "Do We Need a 'Morality of War'?," 95.
[58] Exceptionalists would likely argue that war and slavery are not analogous. Indeed, the choice to engage in the practice of slavery is primarily an internal decision for the state, whereas war may be forced on the

Moreover, these examples highlight the potential dangers of following the logic of exceptionalism. Perhaps in another century from now, when large-scale conventional war has been abolished, we too will look back on exceptionalist arguments in support of some of the laws of war and find them to be morally baseless.

While asymmetric warfare undermines the case against exceptionalism, it also demonstrates that it is not as difficult to follow reductivist principles as exceptionalists suppose. Both the *jus ad vim* framework that Brunstetter proposes and the US policy guidance on direct action, for example, draw significantly from reductivist principles in their interpretation of the principle of discrimination and proportionality. As I demonstrate in the final paper, "Principles for Asymmetric Warfare," a modified version of reductivist principles can be action-guiding in asymmetric warfare under certain conditions.

The law also has moved steadily in the direction of reductivism. While public international law historically considered war to be a state of legal exceptionalism where only the laws of war applied, many lawyers now reject this view. As Adil Haque argues, the laws of war, or international humanitarian law (IHL), cannot displace the individual rights enshrined in IHRL during an armed conflict.[59] On this view, the right under IHRL not to be arbitrarily deprived of life, for example, still applies in war. The International Court of Justice (ICJ) in its *Nuclear Weapons* advisory opinion affirmed that IHRL applies during periods of hostilities, although it ruled that, due to the rule of *lex specialis*, IHL may

state. Still, states can choose not to initiate wars of aggression, thereby upholding the prohibition on the use of force under Article 2(4) of the UN Charter. States can also choose to abide by more restrictive norms governing conduct in war. For a discussion on the relationship between the abolition of slavery and war see, James Lee Ray, "The Abolition of Slavery and the End of International War," *International Organization* 43(3) (1989).

[59] Adil Ahmad Haque, "Human Rights in Armed Conflict, Part I," *Just Security*, November 21, 2016, https://www.justsecurity.org/34631/human-rights-armed-conflict-part/.

modify the content of IHRL.[60] This legal view is contested, however, and scholars disagree on how different legal regimes interact with and modify each other.[61]

The point is that the philosophical debate on the divergence of law from morality tends to presume that the law is static or a single, unified source of guidance that cannot be aligned with the "deep morality" of war.[62] Yet there are many different domestic and international sources of law, beyond the law of armed conflict, which may apply to the initiation and conduct of hostilities, and the law itself is in constant flux and development. Ultimately, the extent to which the laws of war diverge from the morality of war will depend on how states interpret and apply existing bodies of law. As the law continues to evolve to adapt to the changing character of war, there may be instances where the different legal regimes applicable to conduct in war conflict, and where one legal regime diverges more from morality than another. The principal question, then, is not whether the law must diverge from morality, but rather whether the degree of this divergence is morally acceptable. The law is not immutable; it is guided by normative principles and shaped by powerful states acting on self-interest, states which must be persuaded to accept the morally optimal interpretation of the law.

All of this suggests that implementing reductivist principles in war may not be as farfetched as exceptionalists and reductivists sometimes suppose. The law enforcement

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[60] "Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons," (International Court of Justice, July 8, 1996). As Tom Dannenbaum argues, the ICJ ruling follows the logic of exceptionalism because it suggests that, while individual rights apply continuously during times of war and peace, the laws of war may be "the best approximation of what human rights can demand in armed conflict." Dannenbaum, "War Crimes and Just War Theory," in *The Palgrave Handbook of Applied Ethics and the Criminal Law*, ed. Larry Alexander and Kimberly Kessler Ferzan (Cham: Palgrave Macmillan, 2019), 777.

[61] For an overview of this debate, see Derek Jinks, "International Human Rights Law in Time of Armed Conflict," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Andrew Clapham et al. (Oxford: Oxford University Press, 2014).

[62] Jeff McMahan coined this term in "The Ethics of Killing in War," *Ethics* 114(4) (2004): 731.

model of warfare has already gained traction outside of philosophical circles under certain circumstances, notably direct action against terrorist groups. Indeed, direct action may be a natural case study where reductivist standards can be applied more easily after conducting sustained intelligence-gathering and ISR operations. Yet even large-scale wars, such as the current conflict unfolding in Ukraine, might be held to stricter standards of necessity, discrimination, and proportionality than the laws of war. Advances in surveillance and precision warfighting technology, primarily in the form of drones, may be employed in both conventional and unconventional conflicts to collect more information on individuals and engage in more precise targeting operations that avoid harming civilians and civilian objects. Ukraine, for example, has used Turkish Bayraktar TB2 drones effectively to target Russian forces who pose an active threat.[63] Russia, on the other hand, has eschewed the use of precision missiles or drones, launching indiscriminate attacks and failing to target only combatants who pose a threat.

As I shall argue, states have a moral duty to attempt to follow reductivist norms as closely as possible in war. Yet while the United States has recognised this duty in certain cases of direct action outside of "areas of active hostilities," reductivist principles have not been incorporated into its military operations more broadly. In the final paper, I articulate how ordinary moral principles can be applied in war and suggest reforms to more closely align the laws of war with ordinary morality.

[63] Philipps and Schmitt, "Over Ukraine, Lumbering Turkish-Made Drones Are an Ominous Sign for Russia."

3

Legitimate Authority Beyond the State

3.1 INTRODUCTION

"Do Palestinians have a right to self-defence?" The reporter caught State Department spokesperson Ned Price off guard, who a few minutes earlier had been justifying Israeli airstrikes in Palestinian territory based on the principle of self-defence.[1] Price stumbled through the answer, reiterating that the United States affirmed that the "concept of self-defence…applies to any state."[2] The reporter pressed the point: "if it applies to any state, are you saying the Palestinians don't have a right to self-defence?"[3]

The phrasing of this interaction is highly revealing. The reporter asks whether *Palestinians*, as a people, have the right to self-defence. The implication is that, even if the international community does not recognise Palestine as a state, the Palestinian people nevertheless have a moral, if not legal, right to self-defence. Yet while international law primarily permits states to use force to defend against armed attacks, non-state actors may also resort to force under certain circumstances, including to fight "against colonial domination, alien occupation or racist regimes."[4] In such cases, we might say that non-state

[1] "Department Press Briefing," *U.S. Department of State*, May 10, 2021, https://www.state.gov/briefings/department-press-briefing-may-10-2021/.
[2] Ibid.
[3] Ibid.
[4] International humanitarian law distinguishes between armed conflicts which are international or non-international in nature. International armed conflicts occur between states, whereas non-international armed conflicts involve one or more non-state armed groups. Article 1(4) of Additional Protocol I of the Geneva Conventions, in particular, extends armed conflict to wars of national liberation. See also Article 43 of Additional Protocol II to the Geneva Conventions, which gives non-state actors the right to participate directly in hostilities if they constitute "organized armed forces" which are capable of complying with international law.

actors have a right to go to war against the state.[5]

The moral right to go to war consists in two distinct, but often conflated, rights: the right to declare war and the right to prosecute or wage war. The former implies the right to order others to engage in coordinated defensive harming and war-like activities. The latter involves the right to commit violence for war-like purposes, independent of whether any entity has declared war. The right to engage in war-like violence rests on the individual right of self-defence and is not derived from any external source of authority. The right to engage in defensive harming, even if it involves war-like activities, is separate from the right to declare war. Nevertheless, there is an important connection between these rights; if an entity lacks the right to declare war, any war it does wage will be unjust, and individuals cannot then possess a right to prosecute that war on its behalf. In what follows, I will use the phrase "the right to go to war" to denote both the right to declare war and the right to prosecute that war.

Should non-state actors have the right to go to war? One plausible view is that only political entities which possess domestic legitimate authority to rule (call this "domestic legitimate authority") have legitimate authority to go to war (call this "legitimate authority"), and that individuals have the right to wage war only at the behest of entities which possess both. Traditionalism, following the Westphalian legalist paradigm, limits legitimate authority to states and state-like groups; all other groups which go to war do so unlawfully, and their members may be prosecuted for acts of violence for which they would otherwise be immune if they were acting at the behest of a legitimate authority. Legitimate

[5] For a moral assessment of the right to rebel, see Christopher Finlay, *Terrorism and the Right to Resist: A Theory of Just Revolutionary War* (Cambridge: Cambridge University Press, 2015). For a legal treatment of this issue, see Chiara Redaelli, "The Right to Rebel against Violations of Human Rights: A New Role for the Responsibility to Protect?," *The Palestine Yearbook of International Law* (2016).

authority, in other words, is what distinguishes war from murder on the traditionalist account. Revisionists, by contrast, reject the legitimate authority requirement on the grounds that all actors have the right to wage war based on the individual rights of self- and other-defence.

This paper aims to contribute to this debate by evaluating the role of legitimate authority in the context of state versus non-state actor conflicts. In section 3.2, I map out the conceptual terrain, examining problems with the traditionalist view of legitimate authority which, following the Westphalian paradigm, accords war rights primarily to states and state-like groups. In section 3.3, I consider whether legitimate authority is a necessary condition for being morally permitted to go to war, drawing on analogies with defensive harming in the domestic context. I conclude that such authority is necessary given the epistemic uncertainty and collective action problems that arise as the scale and scope of violence increases. This brings me to section 3.4, where I propose an alternative, Razian account of legitimate authority in war that delineates four criteria for claiming such authority, which I term the liberty, epistemic, institutional, and virtue requirements.

3.2 PROBLEMS WITH THE TRADITIONALIST VIEW

The start of this paper raised the problem that statehood does not provide a clear indication of whether political entities possess a moral right to go to war.[6] In the Westphalian international system, all states are granted *de jure* authority to declare war, regardless of

[6] It is important to distinguish between moral and legal rights here. Political entities have a moral right to resort to force if and only if they fulfil the conditions of *jus ad bellum*. By contrast, states are legally exempt from the prohibition on the use of force under Article 2(4) of the United Nations (UN) Charter in cases of self-defence, host state consent, or UN Security Council authorisation. To be precise, the law does not give states the right to go to war *per se* because, as Adil Haque observes, "the law does not permit what morality forbids…the law of targeting and attack contains no permissions but instead contains only prohibitions." Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), 20.

whether they possess domestic legitimate authority. Non-state actors, meanwhile, have higher justificatory burdens for claiming the right to declare war. Consequently, states enjoy broader permissions to go to war, while non-state actors will rarely, if ever, be permitted to overthrow potentially unjust and oppressive states.

The legitimate authority requirement seeks to address this problem by delineating the conditions under which political entities possess the moral right to go to war.[7] But the prevailing view of legitimate authority, as exemplified by Walzerian traditionalism, fails to set a consistent normative threshold for claiming such authority that applies equally to state and non-state actors. As a result, the legitimate authority criterion has lost its normative force and become little more than a box-checking exercise seemingly designed to prevent non-state actors from waging war. Indeed, some theorists have argued that legitimate authority is not necessary for waging war justly.[8]

In what follows, I argue that the traditionalist account rests on an implausible view of what constitutes such authority. The traditionalist account, which is based on the legalist paradigm and Westphalian international order, seeks to limit legitimate authority to certain types of group agents, paradigmatically state and non-state actors which resemble states.[9] Yet this account fails to explain why states which lack domestic legitimate authority to issue directives to their citizens, including the directive to go to war, nevertheless retain legitimate authority to declare war on their behalf. Even when states are totalitarian or

[7] The just war theory literature variously refers to this criterion as proper, competent, right, and sovereign authority. I use "legitimate authority" because it is the most prevalent term.
[8] Cécile Fabre and Jeff McMahan adopt this view. See Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 142-156 and Jeff McMahan, "Just War," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin, Philip Pettit, and Thomas Pogge (Oxford: Blackwell Publishing, 2007), 671.
[9] Under the legalist paradigm, the UN also possesses such authority. States may go to war, for example, if it has been authorised by the UN Security Council. David Caron, "The Legitimacy of the Collective Authority of the Security Council," *American Journal of International Law* 87(4) (1993).

genocidal, traditionalism never questions whether they possess legitimate authority, but only whether they fight for a just cause and in accordance with *jus in bello* rules. Seen in this light, it is clear that a truly normative account of legitimate authority cannot be based on the Westphalian state system. Contrary to traditionalism, not all states possess legitimate authority and a wider range of non-state actors may possess such authority than commonly supposed.

In just war theory, the legitimate authority criterion concerns the moral authority to go to war, as opposed to the capacity or legal power to do so. As such, legitimate authority is distinct from mere power or ascriptions of power, including the *de facto* ability to exercise control over a people or territory. Legitimate authority similarly should be distinguished from *de jure* authority, which is derived from international recognition of the legal authority to create rules and issue commands. While legitimate authority may overlap with *de jure* authority to some degree, to say that an entity has lawful authority is not to claim that it has moral authority in every instance.[10] Dictators, for example, possess lawful authority without the moral authority to govern, whereas spiritual leaders may have moral authority without the ability to create legal rules.

Traditionalism does not clearly distinguish between these types of authority. Following the legalist paradigm, traditionalism grants all states war rights on the basis of what Christopher Finlay refers to as "Lesser Authority," that is, the *de facto* and *de jure*

[10] The relationship between legitimate authority and *de jure* authority depends on a deeper account of the relationship between law and morality, as well as the extent to which law represents a moral theory. For such an account, see Haque, *Law and Morality at War*. See also the debate between Jeff McMahan and Henry Shue in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), Chs. 2 and 5.

authority to order combatants to go to war.[11] On this view, only state and non-state actors which resemble states are granted war rights; all other entities are subject to the standards of domestic law enforcement. This approach aligns with international law, which recognises that armed groups which aspire to nationhood may gain belligerent status when they achieve a certain level of organisation, hierarchical command and control, and capacity to adhere to the laws of war in the way that states do.[12]

The Westphalian view of legitimate authority has serious implications for conflicts involving non-state actors. As a necessary condition of *jus ad bellum*, the criterion plays a crucial role in determining whether the decision to go to war is just. Groups which lack legitimate authority are not permitted to go to war and any wars they do wage are considered to be unjust automatically, even when they fight for a just cause. As Magnus Reitberger observes, the criterion implies that "an otherwise just war could still be unjust for the only reason that the war-fighting agent is not a widely-recognised authority."[13]

Moreover, the criterion determines whether *jus in bello* rules, and the associated belligerent privileges that come with these rules, apply to conduct in war. Non-state actors who lack legitimate authority are denied such privileges on the grounds that they are criminals or "unlawful combatants," while combatants who fight for a recognised authority

[11] Finlay writes that Lesser Authority is the "purely conventional right to create a state of war even, apparently, in the absence of a just cause or despite a failure to fulfil the other terms of the *jus ad bellum*." Finlay, *Terrorism and the Right to Resist: A Theory of Just Revolutionary War*, 172.
[12] See, for example, the 1977 Additional Protocols to the Geneva Conventions. The *Tadić* decision in the International Criminal Tribunal for the former Yugoslavia also states that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." "The Prosecutor v. Dusko Tadić, IT-94-1-AR72, Appeals Chamber, Decision," (International Criminal Tribunal for the Former Yugoslavia, October 2, 1995), para 70. https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic.
[13] Magnus Reitberger, "License to Kill: Is Legitimate Authority a Requirement for Just War?," *International Theory* 5(1) (2013): 67.

are afforded expanded permissions to kill in war beyond the rules governing ordinary, interpersonal morality.[14] Under international humanitarian law (IHL), for example, combatants may target and kill people based on group membership, which is not an action that ordinarily may be performed in individual self-defence. In this way, legitimate authority makes morally permissible acts which are morally impermissible in everyday life.

Walzerian traditionalism grants all states legitimate authority based on social contract theory and the domestic analogy, whereby states derive their rights from the individual rights of their citizens. Adopting a distinctly communitarian perspective on war, Walzer claims that the "deepest purpose" of the state is to uphold communal values and defend a common way of life. He observes that the "rights of states rest on the consent of their members...'Contract' is a metaphor for a process of association and mutuality, the ongoing character of which the state claims to protect against external encroachment."[15] Since the purpose of the state is to fulfil this function, Walzer presumes that most states have a "genuine" social contract with the people and therefore legitimate authority to go to war on their behalf.[16]

This argument, however, is far too quick. Clearly enough, not all states do possess a genuine social contract with the people. The social contract is not immutable; it may be breached when oppressive states systematically or egregiously violate the rights of their citizens. The history of warfare is replete with examples of such breaches in the form of mass uprisings and revolutions. Indeed, the notion that states somehow automatically

[14] Ibid.
[15] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 54.
[16] Ibid.

represent and defend their people is a post-industrial, western-centric view which is detached from the experience of most of the developing world. The Arab uprisings in 2010-2011, which involved widespread anti-government protests and armed rebellions against oppressive regimes throughout the Middle East, demonstrated that the social contract is not intact across much of the region. In such cases, traditionalists must acknowledge that states have broken the social contract and therefore lack legitimate political authority to rule.

But if a state lacks domestic legitimate authority, then it is difficult to see how it can retain legitimate authority to declare war on the traditionalist view. Domestic legitimate authority gives states the moral standing to issue commands to their citizens which create duties of non-interference, compliance, or obedience.[17] States which lack such authority have no moral justification for issuing such directives, including the directive to go to war. A consistent account of legitimate authority in war, then, logically implies that states which lack domestic legitimate authority to govern their citizens must also lack legitimate authority to declare war on their behalf.

Traditionalism acknowledges the link between domestic legitimate authority and legitimate authority in war when it comes to conflicts involving non-state actors. In his analysis of guerrilla warfare, Walzer proposes that non-state actors acquire legitimate authority in war just when they meet a minimum threshold for domestic legitimate authority, which he defines as consent, public approval, and representative legitimacy.[18] While there is debate within the literature on whether these criteria are necessary and sufficient for claiming legitimate authority, there is a general consensus that non-state

[17] Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112(4) (2002): 689-692.
[18] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 54, 178-196.

actors must represent the people on whose behalf they fight.[19]

Yet the criteria for legitimate authority in war remain unsatisfactory. The problems with consent are well known, namely that it is difficult to determine what constitutes consent and whether it must be explicit, implicit, or hypothetical.[20] These difficulties are compounded in the case of non-state actors, who often operate under the shadow of an oppressive regime and lack the capacity to demonstrate consent through institutional procedures such as elections. Public approval, meanwhile, is little more than an imperfect proxy for consent, rather than an independent criterion. And while representative legitimacy may be a necessary criterion for domestic legitimate authority, it is not sufficient for legitimate authority in war. Many political entities possess representative legitimate authority without the attendant power to declare war, such as political parties, mayors, and other local officials.

My aim here is not to provide a full exegesis of the criteria for legitimate authority in war, but rather to underscore problems with the traditionalist account more broadly. Even if these criteria were satisfactory, traditionalism does not apply them equally to state and non-state actors. While states are presumed to possess such authority as a result of the function which they serve, non-state actors must submit to more robust tests to determine

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[19] See, for example, Christopher Finlay, "Legitimacy and Non-State Political Violence," *The Journal of Political Philosophy* 18(3) (2010): 287-312; Lionel McPherson, "Is Terrorism Distinctively Wrong?," *Ethics* 117(3) (2007): 524-546; Anne Schwenkenbecher, "Rethinking Legitimate Authority," in *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century*, ed. Fritz Allhoff, Nicholas Evans, and Adam Henschke (London: Routledge, 2013), 161; and Janna Thompson, "Terrorism, Morality and Right Authority," in *Ethics of Terrorism & Counter-Terrorism*, ed. Georg Meggle (Frankfurt: Ontos, 2005), 151-160.

[20] For an in-depth discussion on the problems with consent, see David Hume, "Of the Original Contract (1752)," in *David Hume, Essays Moral, Political, Literary*, ed. Eugene Miller (Indianapolis: Liberty Fund, 1987); Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings (1762)*, ed. Victor Gourevitch, 2nd ed. (Cambridge: Cambridge University Press, 2019); Charles Mills, *The Racial Contract (1997)* (Ithaca: Cornell University Press, 2014); Carole Pateman, *The Sexual Contract* (Oxford: Polity Press, 1988); Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); and John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971).

whether they represent and defend the people. The traditionalist account is therefore contradictory; states retain legitimate authority to go to war even when they lack domestic legitimate authority, yet non-state actors must prove that they possess domestic legitimate authority in order to gain legitimate authority to go to war.

Traditionalists could rectify this problem by holding state and non-state actors to the same normative threshold. Accordingly, states which failed to meet the criteria for domestic legitimate authority, however defined, automatically would lack legitimate authority to go to war, implying that any wars they did wage would be unjust. Like non-state actors, states which waged war without legitimate authority would be considered to be engaged in criminal activities, regardless of whether they fought for a just cause or followed *jus in bello* rules. Rather than being immune from prosecution, combatants fighting on behalf of such states would be liable for participating in an unauthorised war and could be tried for war crimes at the International Criminal Court (ICC) or some other international court.

Traditionalists might object, however, that there are strong prudential reasons for granting all states legitimate authority in war. On this view, it is necessary to give all combatants immunity from prosecution at the end of the war, irrespective of whether they fight on behalf of a legitimate authority, to ensure compliance with *jus in bello* rules. This view rests on the assumption that the threat of punishing combatants for their mere participation in a war fought on behalf of an illegitimate authority *post bellum* will create perverse incentives to break the rules or prolong the war to avoid such punishment.[21] Traditionalists might well conclude that it is necessary to grant all states legitimate

[21] Helen Frowe, a reductivist, summarises the traditionalist position nicely in Helen Frowe, *The Ethics of War and Peace: An Introduction*, 2nd ed. (London: Routledge, 2016), 104.

authority to go to war, irrespective of whether they possess domestic legitimate authority, to encourage restraint in war and reduce violence overall.

The argument from restraint, however, overstates the problems with denying some states legitimate authority. Traditionalism could acknowledge that illegitimate states, that is, states which lack domestic legitimate authority, also lack a moral right to wage war, while insisting on maintaining the equal application of the law on prudential grounds. This admission would have practical significance because, by publicly acknowledging that some (rogue) states wage war without legitimate authority, those states would incur reputational costs which could deter future acts of aggression. Moreover, traditionalism could excuse combatants from fighting on behalf of an illegitimate authority, while still holding illegitimate leaders to account for instigating acts of aggression. In theory, such leaders might even be subject to criminal prosecution at the ICC for war crimes or the crime of aggression. In this sense, the legitimate authority criterion would operate in the same way as the just cause criterion: states which fought without such authority would still be expected to abide by *jus in bello* rules in exchange for certain rights and immunities. Although states would retain *de facto* and *de jure* authority in such cases, non-state actors also would be granted wider latitude to challenge illegitimate states.

More plausibly, traditionalists might argue that restricting legitimate authority primarily to states is necessary to uphold the public monopoly on the use of force. On this view, maintaining the public monopoly on the use of force is morally significant because it precludes private warfare, which has the potential to be more widespread, destructive, and difficult to regulate than organised, state-directed violence. As A. J. Coates puts it, "to insist on the public monopoly of the use of force remains a fundamental step in the process

of pacification, and securing that monopoly is a precondition of civilized society."[22] This logic was reflected in the work of medieval just war theorists such as Augustine of Hippo, Thomas Aquinas, and Francisco Suárez, who wrote on legitimate authority at a time when the boundaries between public and private warfare were being tested continually.[23] More recently, the rise of transnational terrorism and proliferation of non-state actor conflicts has made this argument salient again.

Yet maintaining the public monopoly on violence does not in its own right promote morally desirable outcomes. While private warfare would be more difficult to regulate than inter-state wars, it is not clear that the former would be more destructive than the latter, particularly given the fact that states have a greater capacity to engage in mass killing. Maintaining the public monopoly on violence restricts the use of force to fewer actors, but this does not necessarily decrease the destructiveness of war overall.[24] Even if limiting the right to declare war to states did reduce violence, this moral good would have to be weighed against the potentially negative consequences of restricting the right to rebel against an illegitimate state. Moreover, non-state actors are likely to go to war regardless of whether they possess legitimate authority to do so. Granting legitimate authority to some non-state actors, then, would not undermine further the public monopoly on violence and, if it did, this would not necessarily produce undesirable moral outcomes.

Traditionalists could accept that the value of maintaining the monopoly of violence

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[22] A. J. Coates, *The Ethics of War*, 2nd ed. (Manchester: Manchester University Press, 2016), 125.
[23] See Saint Augustine, *Contra Faustum*, Library of Latin Texts, (Turnhout: Brepols Publishers, 2010), XXII: 75; Thomas Aquinas, *Summa Theologiae* (Lander: The Aquinas Institute for the Study of Sacred Doctrine, 2012), II, Q. 40; and Gregory Reichberg, "Suárez on Just War," in *Interpreting Suárez: Critical Essays*, ed. Daniel Schwartz (Cambridge: Cambridge University Press, 2012), 187-201. For a historical treatment of private warfare in the Middle Ages, see Gregory Reichberg, "Legitimate Authority: Aquinas's First Requirement of a Just War," *The Thomist* 76(3) (2012): 337-369.
[24] Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), 10.

is not absolute, but nevertheless insist that non-state actors meet higher justificatory burdens than states for possessing legitimate authority to go to war. Given the profound risk that challenging the state will result in individual rights violations on a large scale, traditionalists might argue that there should be a higher threshold for breaking the monopoly on violence than maintaining it. If that is the case, then it might be possible to justify setting asymmetrical thresholds for legitimate authority for state and non-state actors.

This argument, however, rests on the unsubstantiated claim that fewer individual rights violations would occur from maintaining the state's monopoly on violence than from challenging it. It is not obvious that this is necessarily, or even frequently, the case. Suppose a highly trained paramilitary group overthrows a dictator in a bloodless coup, taking power back from an oppressive state on behalf of the people. In such cases, it is clear that more individual rights violations would have occurred from maintaining the state's monopoly on violence than from the act of challenging it, since no one was harmed in the coup. Assuming the coup results in a smooth transition of power to a democratically-elected government, it is not unreasonable to presume that breaking, rather than maintaining, the dictator's monopoly on violence will result in fewer rights violations overall, at least in the long term.

A truly normative account of legitimate authority in war, then, cannot be based on the Westphalian paradigm, which grants such authority primarily to states. Traditionalists, by their own admission, acknowledge that domestic legitimate authority is necessary for non-state actors to possess legitimate authority to go to war.[25] Yet they provide no

[25] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 196.

compelling explanation for why states which lack domestic legitimate authority nevertheless retain legitimate authority to go to war. Arguments about incentivising restraint in war or the necessity of maintaining the public monopoly on violence do not provide normative or prudential reasons for accepting the traditionalist account. As a result, traditionalism is wrong to restrict legitimate authority to states and state-like groups, implying that the just war theory debate rests on a mistaken view of what constitutes such authority.

3.3 THE NECESSITY OF LEGITIMATE AUTHORITY

The problems with the traditionalist view of legitimate authority have led some just war theorists to conclude that the criterion should be abandoned.[26] Proponents of individualist accounts of war, which emphasise the moral salience of individual rights, rightly observe that the traditionalist view contravenes the demands of ordinary morality. If all individuals have a right to use force in self- and other-defence, as they do, then it cannot be the case that the use of defensive force in war is unjust solely because it is unauthorised. The implication of this view is that states, non-state actors, and even individuals have a right to use defensive force, even defensive force to the point of war, regardless of whether they possess legitimate authority in the conventional sense.

Rejecting the conventional view of legitimate authority, however, does not require us to reject the criterion altogether. While traditionalism proposes the wrong account of legitimate authority, the criterion plays a fundamental role in ensuring that the decision to go to war is just. In what follows, I argue that individualists are too quick to jettison this

[26] Cécile Fabre and Jeff McMahan are two main proponents of this view. See Fabre, *Cosmopolitan War* and Jeff McMahan, "War as Self-Defense," *Ethics & International Affairs* 18(1) (2004).

criterion and that legitimate authority, properly conceived, can be consistent with the claim that individuals have a moral right to engage in defensive harming regardless of whether that harm has been properly authorised. Indeed, legitimate authority is necessary, not to engage in the act of defensive harming, but to order others to do so in a coordinated fashion. The reason for this is two-fold. First, legitimate authority is necessary to give orders such that individuals have a reason to obey them. Second, coordinated defensive harming inevitably generates collective action problems and increased epistemic uncertainty compared to the case of individual self-defence, and legitimate authority is necessary to ensure that individuals are able to meet the demands of morality under these conditions.

The individualist position is that the possession or lack of legitimate authority has no bearing on the normative justification for resorting to the use of force. Jeff McMahan claims that "it is not a necessary condition of just or justified war that it be initiated only by persons who are properly authorized to do so."[27] Instead, war is justified when individuals become liable to be killed either because they have done something to lose their right not to be killed or because, in rare circumstances, this right is overridden by the necessity of preventing greater harm to others.[28] The right to go to war is thus derived from the individual right to self-defence and not from membership in a group that is authorised to fight. As Cécile Fabre argues, even individuals have the right to go to war because "group membership is morally irrelevant to individuals' fundamental human rights, which includes the right to go to war."[29]

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[27] McMahan, "Just War," 671.
[28] Seth Lazar, "National Defence, Self-Defence, and the Problem of Political Aggression," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 12.
[29] Cécile Fabre, "Cosmopolitanism, Just War Theory and Legitimate Authority," *International Affairs* 84(5) (2008): 976.

In the pre-societal state of nature, people do have a natural right to use force in self- and other-defence. When they leave the state of nature and enter into a social contract with the state, people accept (implicitly, explicitly, or hypothetically) certain limits on this right in exchange for the protection that the state provides. Individuals agree to defer to the authority of the state, for example, by refraining from force and giving state agents a monopoly on violence. The public monopoly on violence, however, does not override the individual right to self- or other-defence. Importantly, people may still resort to force to defend themselves or others from an imminent threat when the agents of the state are not present or fail to protect them. And when the state itself poses a threat, it is clear that the social contract has been breached and people regain the full liberty right to self-defence.

The natural right to self-defence, then, is at odds with the view that defensive harming should be limited to states. Returning to the Palestinian example raised in the beginning of this paper, the reporter suggests there is something morally wrong about denying the Palestinian *people* the right to self-defence simply because the US government does not recognise the legitimate authority of Hamas or other Palestinian groups. This argument is compelling because innocent people, that is, people who have done nothing to lose their right not to be killed, do retain the right to defend themselves and others against an unjustified attack.[30] Regardless of where one stands on the Israeli-Palestinian conflict, no one would argue that individuals must simply accept that they are collateral damage in war, like sheep to the slaughter.

[30] There is debate within just war theory on what innocent people are permitted to do to defend themselves against an attack that is justified, such that the attack merely infringes on, rather than violates, their rights not to be killed. On one view, if Israeli attacks were self-defensive in nature, then Palestinian civilians could interfere with the weapons systems to disrupt the attack, but they would not be entitled to use force, even in self-defence, against Israeli combatants. See Jeff McMahan, "Debate: Justification and Liability in War," *The Journal of Political Philosophy* 16(2) (2008): 227-244 and Helen Frowe, "A Practical Account of Self-Defence," *Law and Philosophy* 29(3) (2010): 245-272.

Indeed, the notion that individuals have a moral and legal right to engage in self- and other-defence is both intuitive and uncontroversial. If an aggressor attacks you or your family, you have a right to use all necessary and proportionate force to defend against the unjust attack. But suppose an aggressor attacks not one person, but two or three or four people. Surely each of these people retains the same right to self-defence. And if a hundred such people possess this right, why should they not be able to band together to act upon these rights? Extending this logic to larger groups, we begin to understand why the reporter insists that the Palestinian people have the right to self-defence, and why Price is unable to refute this claim. By aggregating individual rights to self-defence, we arrive at the conclusion that an entire group of people may possess a collective right to self-defence, and that it might use force, even force to the point of war, to act upon this right.

At the same time, most people do not think that the individual right to self-defence amounts to a right to go to war in this way. For war is a serious business, a consequential undertaking that destroys lives and livelihoods on a far larger scale than interpersonal violence. Perhaps for this reason, our moral intuition is to limit the right to go to war as much as possible. Surely not everyone is qualified to make such grave and consequential decisions. This is particularly the case when one considers the sheer capacity that states have for organised violence, the power to destroy thousands or millions of lives with the touch of a button that launches missiles, drones, or nuclear weapons. Virtually no one would advocate for giving the nuclear launch codes to the vast majority of elected officials, let alone an ordinary person on the streets.[31]

[31] The fact that many Americans, including House Speaker Nancy Pelosi, expressed concern about then-President Donald Trump having access to the nuclear launch codes underscores this point. John Bennett, "Pelosi Wants 'Unhinged' Trump to be Stripped of Nuclear Codes," *The Independent*, January 8, 2021,

These moral intuitions imply that legitimate authority does play a fundamental role in war. Even if the same normative principles governing defensive harming in the domestic context apply in war, as I believe they do, legitimate authority is a necessary condition for declaring war and engaging in coordinated defensive harming. Legitimate authority is necessary for declaring war because such a declaration by definition entails ordering others to go to war. As I argued above, it is widely accepted in the literature that domestic legitimate authority is a precondition for legitimate authority in war precisely because domestic legitimate authority is necessary for possessing the moral and political authority to issue directives to others, including the directive to go to war. Making a formal declaration of war, in other words, implies that the individual or entity making such a declaration has the legitimate domestic political authority to order others to resort to defensive harming.

Beyond mere declarations of war, legitimate authority is also necessary for waging war insofar as war involves coordinated defensive harming. As we move from individual to collective self-defence, acts of defensive harming tend to become increasingly coordinated as people band together to act upon their individual rights. Coordinated defensive harming, in turn, generates collective action problems and increased epistemic uncertainty compared to the case of individual self-defence. Legitimate authority is necessary to help individuals navigate these challenges and ensure they are able to meet the demands of morality even when they may be uncertain as to the right moral course of action.

To see why this is so, consider the following example. McMahan asks us to imagine

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https://www.independent.co.uk/news/world/americas/us-election-2020/pelosi-trump-riot-war-nuclear-weapons-b1784580.html.

a case where two people engage in self-defence against a common threat and then to extend this analogy to increasing numbers of people until we reach the level of war.[32] The same moral principles apply in both cases, according to McMahan, because war simply "lies on a continuum with self- and other-defense."[33] As we move along this continuum, however, there are two aspects of the situation that change as more people engage in defensive harming. First, the introduction of more people into the equation naturally leads to coordinated defensive harming, which in turn generates collective action problems. A villain or group of villains has posed an unjust threat to, not one, but several innocent people who have done nothing to lose their individual rights not to be killed. Those innocent people are likely to work together against the common threat, or at least to deconflict their individual defensive activities so they do not work at cross-purposes with one another. Either way, individuals will need to coordinate their activities to determine how they should engage in defensive harming. This process of coordination will involve consultation, and disagreements may very well arise as to how individuals should go about mitigating the unjust threat. Who should decide how individuals, banding together against a common threat, should act upon their individual rights through coordinated defensive harming? Legitimate authority is necessary for properly arbitrating these disagreements and ensuring that the group chooses the morally optimal course of action in terms of protecting the individual rights of its members.

Second, as more and more people engage in defensive harming, the situation becomes increasingly complex, generating more epistemic uncertainty than in the case of individual self-defence. Indeed, many people may have greater difficulty discerning the

[32] McMahan, "War as Self-Defense," 75.
[33] Ibid.

facts on the ground, making decisions about liability, and applying the principles of necessity, discrimination, and proportionality. Amidst the chaos that ensues from collective violence, there is a high risk that even individuals who try to follow the correct moral principles for defensive harming nevertheless will make mistakes about what morality requires in a given situation. The legitimate authority criterion, properly construed, seeks to limit these mistakes as far as possible by helping individuals perceive the morally optimal course of action under conditions of epistemic uncertainty.

From this discussion, it is clear that the case where two people act jointly in self-defence is not entirely analogous to the case where, say, a thousand people band together to realise their individual rights. If the case of two people engaging in self-defence is different from the case of a thousand people, then the right to wage war is not perfectly analogous with the individual right to self-defence. The analogy breaks down further when collective defence involves premeditated violence of a larger scale and scope. As McMahan himself observes, unlike in most cases of individual self-defence, soldiers may be permitted to act pre-emptively to stop attacks, even when threats are not strictly temporally imminent, because "war involves threats that consist of activities organized in phases over extended periods of time."[34] Even if an attacker does not pose an immediate threat, in the context of war there is good reason to suppose, far more so than in the domestic context, that he will pose a threat tomorrow and that it therefore may be justifiable to engage in defensive harming under certain circumstances.[35] Accepting this fact does not mean that we need to apply different moral principles in times of peace and war, but rather

[34] Ibid., 76.
[35] That is not to imply that imminence should be divorced from temporal considerations in war. As I argue in the final paper, temporal-based standards of imminence play a crucial role in determining the necessity of engaging in defensive harming in times of both war and peace.

that we must pay greater attention to the circumstances under which ordinary moral principles are applied in war.

The legitimate authority criterion allows us to apply these principles correctly in war as we move along the continuum from individual to collective self-defence. The purpose of legitimate authority, when it functions correctly, is to help people exercise their individual rights under conditions of epistemic uncertainty and given the collective action problems that arise from any activity involving multiple people.[36] As the scope and scale of violence increases, there is a greater risk that people will make mistakes about moral liability, perceiving threats where there are none and incorrectly identifying the source of these threats. Legitimate authority reduces, although it can never eliminate, these risks by ensuring that the most qualified people make decisions about war based on the best available information. Once these decisions have been made at the *ad bellum* level, legitimate authority also serves to minimise individual rights violations at the *in bello* level by ensuring that only the most qualified people implement the decision to use force. Restricting the use of force to properly trained agents, for example, ensures better adherence to the principle of proportionality because such agents ostensibly are better equipped than ordinary civilians to mitigate threats using the minimal necessary force.[37]

Yet even if legitimate authority serves to minimise individual rights violations in this way, it does not follow that legitimate authority is *necessary* to declare war. Individualists might agree that groups which possess legitimate authority do protect

[36] Following Arthur Ripstein, I accept that there is a difference between the norms regulating individual rights and the norms regulating the ways in which public authorities can authorise the enforcement of those rights. The latter set of norms, however, does not alter the substance of the underlying, first-order rights; you have a right not to be killed regardless of how public authorities might enforce that right. See Arthur Ripstein, "Reclaiming Proportionality (Society for Applied Philosophy Annual Lecture 2016)," *Journal of Applied Philosophy* 34(1) (2017).
[37] Cécile Fabre, "Mandatory Rescue Killings," *The Journal of Political Philosophy* 15(4) (2007): 376-377.

individual rights more effectively, without conceding that people should be allowed to wage war *only* if it is sanctioned by such authorities.[38] As Fabre puts it, "if we protect our rights more effectively by authorising some body to protect them on our behalf, then that body acts rightfully by protecting our rights through its agents such as the police and the judiciary."[39] Nevertheless, to say that an authority acts rightly in protecting individual rights is not to imply that individuals act wrongly if they defend themselves in the absence of such authority. Following Hugo Grotius, individualists might argue that people revert to the natural right of self-defence when the state is unable or unwilling to protect them, when the state itself violates their fundamental rights, or when people are beyond the jurisdiction of the state.[40] On this view, legitimate authority is not necessary to wage war and the individualist criticism appears to hold: the use of force cannot be unjust simply because it is unauthorised.

This argument is essentially correct if we conceive of legitimate authority as an independent criterion from just cause that is based on certain group characteristics. But if legitimate authority means possessing the judgement to ascertain whether the cause for war is just and marshalling the means to act effectively on this judgement, then legitimate authority is necessary for waging war justly. The purpose of legitimate authority is not to determine who has a right to self-defence, but rather how individuals can best exercise this right under the conditions of collective violence. That individuals have these rights, assuming they have done nothing to lose them, is never in dispute.

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[38] Fabre, *Cosmopolitan War*, 155-156.
[39] Fabre, "Mandatory Rescue Killings," 377.
[40] Cécile Fabre makes this argument in Fabre, *Cosmopolitan War*, 148. Grotius famously claimed that the Dutch East India Company, a quasi-political trading entity, could possess legitimate authority to wage war. See Anthony Lang, "Authority and the Problem of Non-State Actors," in *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, ed. Eric Heinze and Brent Steele (New York: Palgrave Macmillan, 2009), Ch. 9.

Even in the domestic context, legitimate authority sets certain limits on the right to self-defence in order to protect the rights of others. You have a moral right, for example, to use force to stop a knife-wielding attacker from harming you, subject to the constraints of necessity and proportionality. But you are not permitted to do whatever is takes to stop the attack. Specifically, you may not save yourself by violating someone else's right not to be harmed.[41] Deferring to agents of a legitimate authority, such as the police, reduces the risk that you will unintentionally violate someone else's right not to be harmed in the course of defending yourself. And if that is correct for cases of interpersonal violence, it is even more true in war. Given extreme epistemic uncertainty and collective action problems in war, there is a high risk that exercising the right to self-defence will result in the unattended violation of other peoples' right not to be harmed on a large scale. This risk places a limit on the individual right to self-defence under the conditions of war, which is that self-defence must be subject to the legitimate authority criterion.

To recapitulate, individualists are correct that the individual right to self-defence does not depend on group membership or legitimate authority. The rights to declare war and to engage in coordinated defensive harming, however, do depend on such authority. Declaring war unavoidably entails ordering others to fight, and legitimate authority in war (which is derived from domestic legitimate authority) is necessary to give people moral reasons to follow such directives. Coordinated defensive harming, moreover, creates epistemic uncertainty and collective action problems that increase the risk of making moral mistakes in war, mistakes which are likely to lead to the widespread violation of individual rights. This risk is similar to the risk of yelling fire in a crowded room; many people may

[41] Jeff McMahan, "Innocence, Self-Defense and Killing in War," *The Journal of Political Philosophy* 2(3) (1994): 195.

be killed unjustly if even one person mistakenly perceives smoke as the threat of fire and acts accordingly. Legitimate authority reduces, although it can never eliminate, such risks by ensuring that individuals exercise the right to self-defence in ways that are morally optimal under the conditions of war.

3.4 A RAZIAN ACCOUNT

This paper has reaffirmed the centrality of legitimate authority in just war theory, while underscoring problems with the traditionalist view. Traditionalism cannot explain why states which lack domestic legitimate authority nevertheless maintain legitimate authority to go to war, while non-state actors are denied legitimate authority to go to war unless and until they meet higher justificatory burdens for domestic legitimate authority. Arguments concerning the need to maintain the public monopoly on violence similarly fail to establish a normative basis for restricting the right to go to war to states and state-like groups. Yet while traditionalism provides the wrong account of legitimate authority, it does not follow that we must conclude, as individualists do, that the criterion should be jettisoned altogether. As individuals begin to engage in coordinated defensive harming, legitimate authority is necessary to ensure that individuals are able to exercise the right to individual self-defence without violating the fundamental rights of others.

How, then, should we think about legitimate authority in war? I have already alluded to the three basic functions of such authority: possessing the judgement to decide, the capacity to act on this judgement, and the moral justification for giving orders to others. In the space remaining, I propose a Razian approach to legitimate authority in war and identify four criteria which are necessary in order to claim such authority. This account

delineates the conditions under which people should surrender their private judgement and defer to legitimate authority, regardless of whether that authority emanates from supranational institutions, states, sub-state actors, or individuals.

A Razian approach to legitimate authority starts from the premise that authority must serve the people who are subject to it. In his service conception of authority, Joseph Raz asserts that the purpose of authority is to help people conform with the balance of reasons which apply to them.[42] More precisely, the Dependence Thesis states that authoritative directives should be based on reasons which already apply to people independently, such as the reasons that parents have to care for their children.[43] Once directives are formulated in this way, the Normative Justification Thesis states that authority is legitimate just if following it will help people better conform to the moral reasons which apply to them than if they followed their own reasons directly.[44] Directives issued from entities which have legitimate authority are morally binding insofar as they pre-empt all other reasons for action, rather than merely adding to them.[45]

When it comes to defensive harming, these normative reasons are likely to take two forms. First, people have a reason to resort to defensive harming when they are not liable to attack, meaning they have done nothing to lose their right not to be killed. Second, people have a reason to resort to defensive harming when doing so is the lesser of two evils, such as when killing some non-liable people is necessary to prevent even greater harm to others.[46] Thus, a plausible interpretation of the service conception is that an authority is

[42] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 43-44.
[43] Ibid.
[44] Raz, *The Morality of Freedom*, 53.
[45] Ibid., 46.
[46] Lazar, "National Defence, Self-Defence, and the Problem of Political Aggression," 12.

legitimate just if it helps people better conform with the logic of liability and the lesser evil principle than if they followed these reasons directly.

Given its emphasis on practical reason as the source of legitimate authority, the service conception sets a normative threshold that is independent from group characteristics or membership. Unlike the Westphalian paradigm, the service conception does not suffice to confer legitimate authority on states *qua states*, nor does it rest on dubious arguments concerning consent or representative legitimacy. The service conception also adopts a piecemeal approach to legitimate authority in its recognition that actors may possess such authority in one domain, but not another, or gain and lose it over time. A government may have legitimate authority to raise taxes, for example, but not to wage war. Or a government may have legitimate authority to declare war but lose this authority during the course of the war. Contrary to traditionalism, not all states have legitimate authority to declare war at all times.

In war, legitimate authority serves the people by helping them conform with their pre-existing normative reasons for defensive harming when faced with epistemic uncertainty and collective action problems. As Jonathan Parry observes, state and non-state actors alike have legitimate authority if, by obeying their commands, individuals are better able to distribute harm in war than by acting in accordance with their own private judgement.[47] If the state, for example, is better at identifying terrorist suspects than ordinary citizens, then by deferring to the authority of the state, citizens can better thwart terrorist threats. Given the difficulty of engaging in normative reasoning in war, Parry concludes that people are more likely to conform with their reasons for acting if they pre-

[47] Jonathan Parry, "Legitimate Authority and the Ethics of War: A Map of the Terrain," *Ethics & International Affairs* 31(2) (2017): 183-185.

emptively treat directives issued by legitimate authorities as morally binding, most of the time.[48]

Crucially, accepting this fact does not require unreflective obedience to legitimate authorities. On a service-based view, people are under no obligation to follow directives when there is clear evidence, for example, that the state is mistaken. Consider the following case. In 2015, *The New York Times* reported that the US military had instructed its soldiers serving in Afghanistan not to intervene when allied Afghan security forces engaged in *bacha bazi* (literally, "playing with children"), a centuries-old Afghan custom that involves boys being forced to engage in sexual acts.[49] Some of those instances of child abuse occurred on US military bases, where US forces were training the Afghan army.[50] Should the US soldiers have obeyed orders and let the Afghan commanders continue to rape young boys? Or should they have disobeyed the orders of an (arguably) legitimate authority and instead followed their own moral intuitions to stop the practice of *bacha bazi*? While Raz likely would conclude that most individuals should follow orders in war most of the time, in this case it seems clear that the soldiers should disobey the order because they have an underlying moral reason for acting in other-defence (as well as reasonable epistemic certainty about the facts on the ground) and following the directive does not help them conform with the reasons which apply to them.

This example highlights the importance of four criteria for claiming legitimate authority that have been neglected in the just war theory literature, which I term the liberty,

[48] Ibid.
[49] Joseph Goldstein, "U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies," *The New York Times*, September 20, 2015, https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html.
[50] Ibid.

epistemic, institutional, and virtue requirements. On a service conception reading of authority, these criteria are singly necessary for claiming legitimate authority to declare war and issue commands in the prosecution of that war. Taken together, these criteria form a minimum threshold for legitimate authority, although none establish such authority independently. A doctor, for example, may possess epistemic authority without possessing legitimate authority to issue directives that will be obeyed in war or elsewhere. With these clarifications in hand, I now turn to a more detailed examination of what the criteria entail.

The liberty requirement affirms that authority is legitimate only if it respects the agency of the people subject to it and their fundamental individual rights. This criterion is necessary because, in the absence of agency, authority amounts to little more than coercion. Moreover, authorities which fail to respect the fundamental rights of their subjects necessarily must fail to help these subjects conform with the reasons which apply to them. No one would have reason to deny themselves the right to liberty, security, and a flourishing life. On the service conception, it is impossible for an authority to be legitimate if it denies its subjects these basic rights. This view conforms with Raz's observation that authority can never validate "grossly immoral" acts because that would not serve the purpose of helping individuals conform with pre-existing normative reasons for action.[51] It is also consistent with Allen Buchanan's "minimal internal justice requirement," which claims that political entities must protect basic human rights in order to claim legitimate authority.[52] As a result, political entities which deliberately and consistently violate basic individual rights can never possess legitimate authority.

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[51] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 136.
[52] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003), 266.

Authorities which respect individual rights must also meet the epistemic requirement, which stipulates that they must be able to judge the justice of the cause for war and the prospects for its success better than ordinary civilians. In order to meet this requirement, authorities must have extensive access to both information and expertise that exceeds that of most individuals. As a practical matter, this requires the capacity to collect information from a wide range of sources, which may include human, signals, imagery, and open source intelligence. Moreover, it requires that procedures are in place to vet this information and ensure that it is credible. These procedures must be robust in order to minimise the potential for intelligence failures, which increase the risk that individual rights will be violated unjustly. When such failures do occur, such as in the case of the 2003 US-led invasion of Iraq, additional procedures must be put into place to evaluate and learn from these mistakes.[53] Authorities must also have access to experts who can advise them on a range of issues pertaining to the costs and consequences of war, as well as on alternative policy proposals for avoiding war altogether.

In addition to the epistemic requirement, authorities must meet the institutional requirement, which aims to make moral authority effective in practice. This requirement specifies that political entities must possess a high level of internal organisation in the form of robust institutions, meaning institutions based on formal rules that are able to enforce norms and engage in collective action. The purpose of the institutional requirement is to ensure that political entities are capable of serving the people by helping them coordinate and achieve their collective activities. As Nigel Biggar argues, “moral authority alone is

[53] The failure to find weapons of mass destruction following the invasion of Iraq prompted a massive reorganisation of the US intelligence community in an effort to prevent future intelligence failures and rebuild trust with the American public and the world. See Richard K. Betts, "Two Faces of Intelligence Failure: September 11 and Iraq's Missing WMD," *Political Science Quarterly* 122(4) (2007): 585-606.

not sufficient for political legitimacy: a legitimate political authority also needs to be able to make its moral authority effective."[54] Andrei Marmor goes even further in asserting that whether an authority is legitimate depends on the institutions and social practices which grant it normative power.[55]

In war, the institutional requirement manifests itself as the capacity to delegate responsibilities, allocate resources appropriately, and plan collective defensive activities. Other things being equal, the more robust the institutions that are in place, the more effectively political entities can achieve these ends. It bears emphasising that the institutional requirement at least partially finds its expression in international law, which similarly maintains that a certain level of organisation is necessary for giving combatant status to non-state actors engaged in non-international armed conflicts.[56]

Finally, authorities must meet the virtue requirement, meaning they must possess certain character traits which indicate that they will use their power to serve their subjects, rather than themselves. This requirement is important because legitimate authority fundamentally is a principal-agent relationship, where the principal must demonstrate that it is worthy of tasking the agent. In his application of the service conception to Confucian thought, Joseph Chan argues that office holders and institutions must possess virtues such as trustworthiness, benevolence, righteousness, tolerance, and impartiality in order to truly serve the people they govern.[57] He observes that "a ruler must demonstrate a good track

[54] Nigel Biggar, "Christian Just War Reasoning and Two Cases of Rebellion: Ireland 1916–1921 and Syria 2011–Present," *Ethics & International Affairs* 27(4) (2013): 395.
[55] Andrei Marmor, "An Institutional Conception of Authority," *Philosophy & Public Affairs* 39(3) (2011): 239.
[56] Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities," *International and Comparative Law Quarterly* 59(1) (2010): 186-189.
[57] Joseph Chan, *Confucian Perfectionism: A Political Philosophy for Modern Times* (Princeton: Princeton University Press, 2014), 41.

record in serving the public…to claim full and legitimate authority he must display virtue and skill."[58] Importantly, even if individual leaders lack such traits, the institutions which support the government's ability to function should exhibit them. Fulfilling the virtue criterion, therefore, requires a certain level of institutional transparency, as well as accountability and oversight mechanisms, to ensure that authorities are not corrupt, deceitful, or self-serving.

The virtue requirement, then, encompasses more than merely being morally good or acting in good faith. For even morally good people may act wrongly, and virtues in some situations may be faults elsewhere.[59] An honest person, for example, is widely considered to be morally good. But even an honest person should surely lie if Nazi agents appear at her door demanding to know which of her neighbours are Jewish so they can be sent to concentration camps. In such cases, we would not consider honesty to be a virtue. Virtues, therefore, must be applied correctly depending on the context. For this reason, the virtue requirement includes the Aristotelian concept of *phronesis* or practical wisdom, that is, the understanding to apply virtues and normative principles to a given situation.[60] This understanding is derived primarily from experience, which gives authorities the ability to grasp morally salient aspects of a particular situation under significant time constraints and pressure, such as when an attack appears imminent. Thus, legitimate authorities, whether they are institutions or individuals, will epitomise what is morally good, demonstrate practical wisdom in applying normative principles, and put mechanisms in place to ensure transparency and accountability.

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[58] Ibid.
[59] Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999), 102.
[60] C.D.C. Reeve, *Aristotle on Practical Wisdom: Nicomachean Ethics VI* (Cambridge: Harvard University Press, 2013).

According to the account I have proposed, can non-state actors claim legitimate authority in principle? While it may be difficult for non-state actors to meet the epistemic and institutional requirements for legitimate authority, given that they generally lack the capacity of states, it is by no means impossible for them to do so. Non-state actors can fulfil these requirements by demonstrating that they are organised and have established internal procedures for making sound policy decisions. In contrast to traditionalism, my account of legitimate authority does not require non-state groups to demonstrate broad popular support and representative legitimacy—two criteria that are highly contested and difficult to meet in the midst of a civil war or while living under the domination of a repressive state. Instead of relying on these external measures, my account focuses on the internal character of the group and the extent to which it serves its members. In this sense, the account that I have proposed does not favour states over non-state actors and can be applied to any scenario involving group entities.

Consider the following example. During the Second World War, the central French government, ostensibly the legitimate authority at the time, signed an armistice with Nazi Germany that effectively ceded more than half of French territory to German control. Marshal Philippe Pétain became the head of the new French government located in Vichy, where he collaborated with the Nazi regime. In response, French people from different social classes and backgrounds banded together to oppose the occupation and protect their fundamental rights. In 1943, the three most prominent resistance groups formed the *Mouvement Unis de Résistance* or United Resistance Movement (MUR), electing General Charles de Gaulle as its leader, an experienced military veteran who had fought the

Germans during the First World War.[61]

Did the MUR have legitimate authority to wage war, despite the fact that the Vichy government had signed an armistice with Nazi Germany? The account that I have proposed suggests that it did. The MUR fulfilled the liberty requirement because it did not coerce its members or violate their fundamental rights. It fulfilled the virtue requirement because its leader was widely respected as an honest and upstanding man who possessed practical wisdom gained from his vast military experience. And the MUR was highly organised, consisting of a political wing, intelligence branch, propaganda branch, and an armed wing known as the *Armée Secrète* or Secret Army.[62] As a result, the group had both the epistemic and institutional capacity to engage in sabotage, guerrilla attacks, and covert influence operations. In other words, the MUR fulfilled the criteria for legitimate authority, regardless of consent or whether it truly represented the French people at a moment when the country was bitterly divided.[63]

What about individuals who do not meet the criteria described above but nevertheless fight for a just cause? If they continue to fight in the absence of Razian legitimate authority, should we consider their struggle to be unjust? A contrived case based on how real-word events might have played out in the 2022 Russian invasion of Ukraine is instructive here. Suppose Ukraine has fallen to an invading and unjust Russian army, and that the latter has decapitated all Ukrainian leadership and established an occupation government. A loose collection of civilians, vigilantes, and what is left of Ukraine's armed

[61] Robert Gildea, *Fighters in the Shadows: A New History of the French Resistance* (London: Faber & Faber, 2015), 333.
[62] Olivier Wieviorka, *Histoire de la Résistance* (Paris: Perrin, 2013), Ch. 9.
[63] According to one historical account, the French Resistance amounted to no more than two per cent of the total population, a far cry from the *levée en masse* that Walzer envisions as a justification for claiming legitimate authority to declare war. See Gordon Wright, "Reflections on the French Resistance, 1940-1944," *Political Science Quarterly* 77(3) (1962): 338.

forces continue to resist the Russian army in what has been described as a war. Suppose, moreover, that this unorganised group of fighters have no elected leader and lack any form of intelligence or institutional resources. The group patently does not fulfil the epistemic and institutional requirements, nor is it a simple task, in the absence of a leader or governing body, to determine whether it fulfils the liberty and virtue requirements. On the Razian account I have proposed, do the Ukrainian fighters lack legitimate authority and, if so, is their war unjust?

On the whole, both questions should be answered in the affirmative. That is not to say that it would be wrong for a Ukrainian civilian, who has done nothing to lose her right not to be killed, to use force to defend herself or her neighbour against a Russian soldier who poses an unjust threat. It is certainly morally permitted, perhaps even required, for her to do so. But it would be morally wrong for that same civilian to order or incite all her neighbours to use defensive force without any planning, intelligence information, or organisation in place; such a mass uprising is likely to get all her neighbours killed, if not in battle, then in retaliation for their participation in hostilities. By the same token, the loose collection of Ukrainian fighters surely has a moral obligation to ensure that the group meets the Razian requirements for legitimate authority *before* ordering or inciting others to engage in coordinated defensive harming. Note that this observation is distinct from the claim that the Ukrainian fighters *never* may claim such authority. The fighters could meet the Razian requirements, for example, by electing a virtuous leader, putting organisational procedures in place, and soliciting intelligence and resources from external allies. My claim is only the more limited one that the Ukrainian fighters should not engage in coordinated

defensive harming before putting such measures in place, that is, before ensuring that they meet the Razian requirements for legitimate authority.

In this paper, I have exposed problems with the Westphalian paradigm of legitimate authority, while reaffirming the centrality of the criterion as a necessary condition of *jus ad bellum*. I have shown that the traditionalist view, which is based on the Westphalian paradigm, undermines the normative basis for legitimate authority and is incompatible with the realities of contemporary warfare. I have further shown that legitimate authority is necessary to declare war, although it should not be restricted to states and state-like groups. Finally, I have proposed an alternative account of legitimate authority, based on my interpretation of how the service conception should apply in war, that requires authorities to meet the liberty, epistemic, institutional, and virtue requirements. Contrary to traditionalism, non-state actors are able to fulfil these requirements in principle and some states may lack legitimate authority to go to war.

That some states will continue to claim legitimate authority, even when they clearly lack it, does not present a serious challenge to my account. By parity of reasoning, we should discard the just cause criterion because all states similarly claim that they are fighting for a just cause—which surely proves too much. The point of all moral theorising on war is to set normative standards for how actors should behave in war, and to hold them to account when they fail to meet these standards. International condemnation of actors that go to war despite clearly lacking legitimate authority can thus encourage restraint and deter others from engaging in reckless wars. This is a noble goal that is worth pursuing and certainly better than the current approach to legitimate authority, which is just to assume that all states possess it by default.

More importantly, allowing more non-state actors to claim legitimate authority will not necessarily increase the incidence of war. All too often, these actors are engaged in conflict anyway, regardless of whether the international community recognises their right to do so. The increase in the incidence of non-state actor conflicts in the past decade, which now exceeds the number of inter-state wars, underscores this fact.[64] That is not to imply that the legitimate authority criterion has no normative value; it can and should play an instrumental role in encouraging restraint regarding the decision to resort to war. Moreover, there are clearly some non-state groups which do not meet the threshold for legitimate authority and should be treated as criminal entities. For groups that do meet this threshold, however, allowing them to claim legitimate authority may actually decrease the destructiveness of war if it means that non-state actors begin to adhere more closely to *jus in bello* rules. If according more non-state groups combatant status ultimately leads to more compliance with the rules of war and less civilian deaths, then surely this step is consistent with the overall goal of limiting the destructiveness of war. In the next paper, I argue that state and non-state actors should be granted symmetrical war rights on prudential grounds, even though the asymmetric case poses a serious challenge to extant principled arguments in support of the Equality Thesis.

[64] Thomas Szayna et al., "What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?," *RAND Corporation* (2017): 1, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf.

4

Moral Equality in an Unequal World

4.1 INTRODUCTION

The darkness was so complete that it was difficult to distinguish where the water ended and the night sky began. Across the desolate shore of Long Island, a group of shadowy figures moved swiftly, unloading a cache of explosives intended for critical infrastructure in New York and elsewhere across the United States. A little further down the beach, a young Coast Guard officer spotted the shadowy figures and sounded the alarm. But the saboteurs slipped away into the night, leaving their weapons behind in the cold sand.

The plot was called Operation Pastorius and the saboteurs were acting at the behest of Nazi authorities.[1] They might just as easily have been members of Al Qaeda or the self-proclaimed Islamic State. Unlike these groups, however, the Nazi agents donned German military uniforms in a deliberate attempt to lay claim to the privileges that combatants enjoy, such as prisoner of war status, immunity from criminal prosecution, and the right not to be interrogated beyond name and rank.[2] When they were discovered, the saboteurs stripped off their uniforms and left them on the beach, blending back into the civilian population. Through a stroke of sheer luck, one of the Nazi agents reported the plot to the

[1] David Taylor, "The Inside Story of How a Nazi Plot to Sabotage the U.S. War Effort was Foiled," *Smithsonian Magazine*, June 28, 2016, https://www.smithsonianmag.com/history/inside-story-how-nazi-plot-sabotage-us-war-effort-was-foiled-180959594/.
[2] Tamar Meisels, "Combatants: Lawful and Unlawful," *Law and Philosophy* 26(1) (2007): 35.

US Federal Bureau of Investigation, and the group was later arrested, convicted by military tribunal, and six members were summarily executed.[3]

In the ruling *Ex Parte Quirin*, the US Supreme Court upheld the military tribunal verdict against the Nazi agents. The Court stated in its decision that "the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."[4] While no definition was codified in law, unlawful combatants were described by the Court as saboteurs, spies, and other belligerents who crossed enemy lines "without uniform" and with the intention of "waging war by destruction of life or property."[5] Unlike lawful combatants, these individuals were not granted immunity for participating in hostile acts and were instead executed. Following the 9/11 terrorist attacks, the US government revived the legal precedent set in *Ex Parte Quirin* to justify the targeting of non-state groups continuously in the global "war on terror," while denying their members prisoner of war status and other combatant privileges.[6]

Should state and non-state actors have equal rights in war? While much ink has been spilled on the legality of unprivileged belligerency, just war theory has not interrogated the underlying claim concerning the moral (in)equality of combatants in asymmetric warfare, by which I mean here conflicts between state and non-state actors. In the paradigm case of inter-state warfare, Walzerian traditionalists assert in the Equality

[3] Taylor, "The Inside Story of How a Nazi Plot to Sabotage the U.S. War Effort was Foiled."
[4] "Ex parte QUIRIN. Ex parte HAUPT. Ex parte KERLING. Ex parte BURGER. Ex parte HEINCK. Ex parte THIEL. Ex parte NEUBAUER. UNITED STATES ex rel. QUIRIN v. COX, Brig. Gen., U.S.A., Provost Marshal of the Military District of Washington, and 6 other cases. | Supreme Court | US Law | LII / Legal Information Institute," Legal Information Institute Cornell Law School, 2021, https://www.law.cornell.edu/supremecourt/text/317/1.
[5] Ibid.
[6] See, for example, Jason Callen, "Unlawful Combatants and the Geneva Conventions," *Virginia Journal of International Law* 44(4) (2004).

Thesis that combatants on both sides of a conflict are morally equal and therefore should have symmetrical rights in war.[7] Revisionists, by contrast, reject the Equality Thesis on normative grounds, but typically accept the symmetrical application of the law based on the presumption that reciprocal, stable norms are necessary to constrain violence in practice.

The asymmetric case lends credence to the revisionist view by exposing additional normative problems with the Equality Thesis. In inter-state warfare, traditionalists contend that this moral equality stems from the Independence Thesis, or the separation of *jus ad bellum* from *jus in bello* considerations.[8] In non-state actor conflicts, however, traditionalists acknowledge that the Independence Thesis collapses, since non-state actors are responsible both for the decision to wage war and their conduct in it.[9] Nevertheless, traditionalists claim that state and non-state actors are morally equal, and have symmetrical war rights, when and only when the latter possesses legitimate authority to wage war. But this argument is inconsistent and gives rise to what I term the *Equality Contradiction*: if state and non-state actors are morally equal when and only when they possess legitimate authority, then by the same logic the Equality Thesis does not apply in all cases of inter-state warfare since, as I argued in the previous paper, some states may lack such authority.

Contractarianism appears to rescue traditionalism from this inconsistency by providing a plausible normative explanation for why the Equality Thesis holds in inter-state, but not asymmetric, warfare. In what follows, I consider the merits of these

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[7] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 36.
[8] Ibid.
[9] On guerrilla warfare, for example, Walzer writes that "In the theory of war, as we have seen, considerations of *jus ad bellum* and *jus in bello* are logically independent, and the judgements we make in terms of one and the other are not necessarily the same. But here they come together." Ibid., 196.

arguments and the implications for the Equality Thesis. In section 4.2, I demonstrate that the asymmetric case presents particular problems for traditionalism by exposing the Equality Contradiction. In section 4.3, I consider whether contractarianism can save traditionalism from this critique and conclude that it cannot. I evaluate, and ultimately reject, what I take to be the strongest contractarian argument in favour of the Equality Thesis, as articulated by Yitzhak Benbaji and Daniel Statman in *War by Agreement* (2019).[10] Finally, I explore in section 4.4 prudential reasons for insisting on the equal application of the law in asymmetric warfare and weigh various proposals for what this might look like in practice.

4.2 THE EQUALITY CONTRADICTION

The character of warfare has undergone important shifts in the past two decades. The state-centric paradigm of conventional armies facing each other on the battlefield is no longer the primary mode of force in the international system. The number of conflicts involving non-state actors now has surpassed the incidence of inter-state wars, resulting in decentralised political violence without clear temporal or geographical boundaries.[11] The rise of transnational terrorism and technological advances have accelerated this trend, blurring the line between war and peace and making it more difficult to distinguish between combatants and civilians.

Against this backdrop, traditionalism has struggled to define the conditions under

[10] Yitzhak Benbaji and Daniel Statman, *War by Agreement: A Contractarian Ethics of War* (Oxford: Oxford University Press, 2019).
[11] Thomas Szayna et al., "What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?," *RAND Corporation* (2017): 1-5, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf.

which the Equality Thesis holds in asymmetric warfare. In inter-state warfare, the principle of the moral equality of combatants is predicated on the Independence Thesis, which states that *jus ad bellum* and *jus in bello* considerations are logically independent because policymakers are responsible for the decision to wage war and soldiers are responsible only for their conduct in it. Walzer contends that soldiers are mere "instruments" of the state who are not morally responsible for any wrongful acts of killing they may commit in the prosecution of an unjust war, provided they follow the *in bello* rules of necessity, discrimination, and proportionality.[12] Accordingly, soldiers who follow the rules are accorded combatant privileges—notably, the right to surrender, prisoner of war status, and freedom from prosecution—while those who do not are treated as war criminals to be prosecuted at the end of the conflict.

This logic seemingly breaks down in conflicts involving non-state actors where, in the absence of the state, there is no clear division of moral responsibility between policymakers and combatants.[13] As Walzer himself acknowledges, *jus ad bellum* and *jus in bello* judgements necessarily "come together" in asymmetric warfare because non-state actors are responsible both for the decision to wage war and for their conduct in it.[14] The collapse of the Independence Thesis in such cases raises the prospect of the moral inequality of combatants, where non-state actors are not entitled to the same rights and

[12] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 36-39.
[13] It is possible to argue that, at least within organised non-state groups, there typically is a leadership cadre responsible for making the decision to go to war and a group of "foot soldiers" responsible for carrying out those orders. Both Al Qaeda and ISIS, for example, have core leadership groups, including *shura* councils, that are often consulted before carrying out large-scale attacks. Terrorist attacks, however, tend to be highly decentralised in nature, given the need to maintain operational secrecy and the large number of affiliates which claim to act on behalf of the group. It is therefore doubtful that the Independence Thesis holds in the same way as it does for states, on the traditionalist account. Cameron Glenn, "Al Qaeda v. ISIS: Leaders & Structure," *The Woodrow Wilson International Center for Scholars*, September 28, 2015, https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure.
[14] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 196.

liabilities as combatants fighting on behalf of states, regardless of whether non-state actors fight for a just cause or follow *jus in bello* rules.[15]

Traditionalists respond to this problem by observing that the Equality Thesis must be applied differently in asymmetric warfare because we must first examine the *ad bellum* question of whether non-state actors possess a right to wage war. Even when non-state actors adhere to *in bello* rules, Walzer argues that it is "not clear that they are themselves entitled to prisoner of war status when captured, or that they have any rights at all. For if they don't make war on noncombatants, it also appears they don't make *war* on soldiers."[16] We cannot be sure, according to Walzer, whether non-state actors are engaged in the act of war or simply committing "murder" in a "potato field."[17] Walzer concludes that the only way to discern whether non-state actors have war rights is to determine whether they are acting on behalf of a legitimate authority, the requirement which distinguishes killing in war from murder. On this view, the Equality Thesis holds in asymmetric warfare just when non-state actors meet the legitimate authority requirement.

If that is the case, then traditionalists must agree that the Equality Thesis should be applied selectively, on a case-by-case basis, depending on whether non-state actors possess legitimate authority. The selective application of the principle does not pose a serious challenge to the traditionalist account. Traditionalists simply can reply that the moral equality of combatants holds in war and that non-state actors who lack legitimate authority are not engaged in war, but rather in criminal activity.

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[15] International law and state practice may diverge here. Non-state actors, for example, are not entitled to prisoner of war status or combatant immunity under international law, but states sometimes have granted them such rights in exchange for compliance with the Geneva Conventions and their Additional Protocols.
[16] Emphasis in original. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 182.
[17] Ibid.

There is, however, another implication of this view which poses a deeper problem for traditionalism. The application of the principle based on legitimate authority gives rise to what I term the *Equality Contradiction*, where selectively applying the Equality Thesis to non-state actors implies that state-directed combatants, too, may be morally unequal when they fight for states which lack legitimate domestic political authority. If war rights are dependent on such authority, rather than the Independence Thesis, then there may be instances of inter-state warfare where the Equality Thesis similarly does not apply. As I demonstrated in the previous paper, a truly normative account of legitimate authority must accept that some non-state groups may possess legitimate authority to wage war, while some states may lack it. If we accept the traditionalist argument that non-state groups which lack legitimate authority should be denied war rights, then the same logic must also apply to states which lack legitimate domestic political authority. Like non-state actors, they should be viewed as criminal or rogue states beyond the protection of the war conventions.

Yet, applying the principle in this way causes it to lose much of its intuitive appeal. For, as Christopher Kutz argues, we should accept the moral equality of combatants not as a matter of principle ("it is surely and unproblematically false") but rather at the "pragmatic level of institution and application."[18] At this level, the moral equality of combatants is presumed to be the morally optimal rule for reducing overall violence in war given epistemic uncertainty and the lack of an enforcement mechanism in the international system. Proponents of the principle argue that it is straightforward to follow in the "fog of war" and allows states to maintain obedient armies that are able to deter and defend against

[18] Christopher Kutz, "Fearful Symmetry," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 69.

aggression.[19] Thus, even if the principled argument in favour of the moral equality of combatants is weak, there nevertheless may be good reasons for maintaining the rule if it effectively reduces violence in practice.

The putative benefits of moral equality, however, are based on reciprocity and the fact that the rules apply equally to all parties regardless of *jus ad bellum* considerations. These pragmatic benefits would be greatly reduced if the Equality Thesis instead applied only to belligerents who fought on behalf of a legitimate authority. If that were the case, a two-tiered system of morality would emerge dictating different rules for legitimate and illegitimate authorities. Such a system would be just as difficult to implement in practice as following asymmetrical rules based on the justness of the cause for war, and belligerents similarly would lack incentives to follow it in the absence of reciprocity. Thus, applying the Equality Thesis selectively to political entities which possess legitimate authority undermines the principle on practical, as well as theoretical, grounds.

Traditionalism must address these challenges if we are to accept the Equality Thesis. Contractarianism represents the most plausible approach for saving traditionalism from the Equality Contradiction. In their defence of the moral equality of combatants, contractarians contend that the principle is based on mutual agreement, rather than the Independence Thesis or legitimate authority. This account holds out the prospect of explaining why the principle applies in all inter-state conflicts, but not in conflicts involving non-state actors.

[19] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 122.

4.3 A CONTRACTARIAN RESPONSE

> "When he comes to the Great Game he must go alone—alone, and at peril of his head…We of the Game are beyond protection. If we die, we die. Our names are blotted from the book."
> – Rudyard Kipling, *Kim*, 1901.[20]

At the dawn of the 19th century, the British and Russian Empires were engaged in a diplomatic and military contest for influence in Central Asia in what became known as the "Great Game."[21] Popularised by Rudyard Kipling's novel *Kim*, the term rapidly has become synonymous with the pursuit of political hegemony through means of intrigue, espionage, sabotage, and war.[22]

In the novel, the protagonist Kimball O'Hara, an Anglo-Irish orphan, is begging on the streets of India when his life is transformed by a chance meeting with an aged Tibetan spiritual guide, the *lama*. Together, they embark on a quest to find the legendary "River of the Arrow" and attain enlightenment.[23] Along the way, Kim acts as an agent for the British secret service, passing messages and collecting intelligence on the Russians that will cause thousands of men to die in battle. Rather than questioning the morality of his actions, Kim accepts that he is a pawn in the Game and that his role is simply to follow the rules. Even when he knowingly engages in morally wrongful acts, acts that he himself recognises as "evil," Kim continues to play the Game "for its own sake."[24]

The Game is a jejune metaphor for the contractarian view of war. Contractarianism is, principally, a collection of theories based on the notion that norms derive their moral

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[20] Rudyard Kipling, *Kim* (Garden City: Doubleday, Page & Company, 1922), 205, 320.
[21] Fromkin David, "The Great Game in Asia," *Foreign Affairs* 58(4) (1980): 936.
[22] Ibid.
[23] Kipling, *Kim*, 16.
[24] Ibid., 4.

force from mutual agreement, rather than from pre-existing values or truths.[25] As in the Game, contractarianism posits that combatants agree to be bound by a contract, whether implicit or explicit, encompassing a set of mutually beneficial rules for conduct in war. Unlike in the Game, however, combatants do not follow the war conventions solely out of prudential, self-interested reasons. Rather, assuming that certain initial conditions are met, the fact that all parties have agreed or would agree to be bound by the war contract provides a moral justification for following *jus in bello* rules.

Benbaji and Statman have provided the most developed contractarian account of the ethics of war hitherto, in the course of which they defend the Equality Thesis. Accordingly, I address their work as representative of this tradition. Benbaji and Statman articulate at least three conditions that are individually necessary and jointly sufficient for social rules to become morally binding. First, the initial bargaining position must be fair, such that it does not perpetuate or create unjust inequalities, such as the legacy of colonialism or slavery.[26] This condition is intended to prevent bargaining outcomes where each party is, in the words of Rawls, merely acting "according to his threat advantage."[27] Second, the agreement must be mutually beneficial insofar as it renders at least some parties better off, and no parties worse off, than would be the case from following the

[25] Theorists have distinguished between "contractarianism"—the Hobbesian view that people consent to the social contract in order to maximise their self-interest—and "contractualism," the Kantian notion that mutual agreement arises out of respect for others and the need to justify actions publicly, and in moral terms. Somewhat inconsistently, contractualism also refers to T.M. Scanlon's work exclusively. For this reason, I use the term "contractarianism" throughout the paper, although I do not commit myself to the Hobbesian account of rationality. See Ann Cudd and Seena Eftekhari, "Contractarianism," *Stanford Encyclopaedia of Philosophy*, March 15, 2017, https://plato.stanford.edu/archives/sum2018/entries/contractarianism/.
[26] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 46-49.
[27] John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971), 141.

demands of pre-contractual morality.[28] Relatedly, the parties to the contract must be instrumentally rational insofar as they engage in preference-maximising behaviour.[29] Finally, social rules are morally effective, according to Benbaji and Statman, only if they meet the actuality criterion, meaning that they are accepted and followed in practice.[30]

The actuality criterion implies that laws are morally effective because most people (implicitly) consent to abide by them.[31] Individuals consent to follow the laws, according to the authors, "by merely belonging to a society and participating in the social practices within it."[32] This broad definition of consent shows that the actuality criterion is in fact overly permissive because virtually all conventions will meet it. On this view, even conventions that are blatantly immoral, such as a law prohibiting ethnic minorities from owning land, might meet the actuality criterion simply by virtue of people living in a society that follows such practices. Needless to say, merely belonging to a society is not sufficient to demonstrate consent, nor is it a good indication of whether individuals actually accept and agree to follow certain conventions.[33]

While there are good reasons to be sceptical about the necessity of the actuality

[28] Crucially, the mutual benefit criterion does not require that the rules benefit everyone equally, but only that they lead to Pareto optimal outcomes. The criterion represents an *ex ante* condition in that it concerns anticipated, rather than actual, benefits. Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 44.
[29] Benbaji and Statman assume rationality as part of the mutual benefit criterion. Ibid., 45. Some contractarians assert that moral duties are grounded in rationality such that, as David Gauthier puts it, "to choose rationally, one must choose morally." On this view, compliance with moral rules is rational only if bargaining does not make individuals worse off than non-interaction. See David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986), 4.
[30] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 46-47.
[31] Ibid., 68-69.
[32] Ibid., 47.
[33] David Hume, "Of the Original Contract (1752)," in *David Hume, Essays Moral, Political, Literary*, ed. Eugene Miller (Indianapolis: Liberty Fund, 1987), 475.

criterion, a full examination of these arguments is beyond the scope of this paper.[34] Instead, I give Benbaji and Statman the benefit of the doubt in assuming that the criteria they identify are correct and that the legal conventions that regulate war are morally binding just when they are met. Still, some further explanation is needed to understand how mutual agreement can ever permit what pre-contractual morality forbids, particularly when it comes to determinate rights, or rights which exist in the absence of society.

It has been argued, wrongly I think, that mutual agreement changes the scope and distribution of the determinate right not to be killed. Benbaji and Statman observe that "by freely accepting a legal system, individuals implicitly consent to be governed by it. Consequently, citizens waive some of their pre-contractual rights."[35] Individuals waive the pre-contractual right to self-defence, according to Benbaji and Statman, when they enter into a rules-based society which gives the state the monopoly on public violence. Similarly, the authors contend that combatants waive their right not to be killed when they enlist in the armed forces. Benbaji concludes that, like boxers in a boxing match, combatants accept the rules of the game when they enter into it and waive their right not to be killed unjustly, while gaining the right to kill each other regardless of the justness of the cause for war.[36]

Perhaps the game analogy has gone too far here. War, after all, is not a game but a serious business where losing results in destruction, injury, and death. Whereas boxers choose to enter into the ring, soldiers often do not have the same luxury. Instead, they are dragged into it through conscription or, more commonly, the sheer necessity of defending

[34] For an alternative approach to contractarianism, see Arthur Ripstein, "Lecture I: Rules for Wrongdoers," in *Rules for Wrongdoers: Law, Morality, War*, ed. Saira Mohamed (Oxford: Oxford University Press, 2021), Ch. 1.
[35] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 70.
[36] Yitzhak Benbaji, "The War Convention and the Moral Division of Labour," *The Philosophical Quarterly* 59(237) (2009): 599.

against internal or external threats.[37] What is more, boxers harm only each other, whereas soldiers often harm innocent people in the course of prosecuting both just and unjust wars. In the words of Leo Tolstoy's character Prince Andrei in *War and Peace*: "War is not a polite recreation but the vilest thing in life, and we ought to understand that and not play at war. Our attitude towards the fearful necessity of war ought to be stern and serious. It boils down to this: we should have done with humbug and let war be war and not a game."[38]

Not only is war clearly not a game, but it seems doubtful that mutual agreement could ever alter the moral right not to be killed. Perhaps, by virtue of enlisting in the military, combatants merely accept certain conditional limits on this right, such as the increased risk that they will be targeted and killed in the course of their professional duties.[39] Or perhaps states waive the legal right to punish combatants for unjust killing at the end of the war, even though combatants retain the underlying moral right not to be killed unjustly.[40] In either case, the notion that individuals voluntarily waive their right not to be killed through mutual agreement—or, more disturbingly still, that states waive these rights on their behalf through international treaties—vastly oversimplifies the matter by failing to account for the epistemic conditions, pressures, and motivations surrounding the decision to enlist.

I shall not press the point further here. Instead, I want to grant the contractarian premise, for the sake of argument, and consider whether this account can save traditionalism from the Equality Contradiction. For contractarianism appears to represent

[37] Uwe Steinhoff, "Benbaji on Killing in War and The War Convention," *Philosophical Quarterly* 60(240) (2010): 658.
[38] Leo Tolstoy, *War and Peace (1869)*, ed. Amy Mandelker (Oxford: Oxford University Press, 2020), 921.
[39] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 52.
[40] Steinhoff, "Benbaji on Killing in War and The War Convention," 658.

the strongest possible defence of traditionalism by providing a normative explanation for holding state and non-state actors to different standards, irrespective of whether they can fulfil the legitimate authority criterion. If this argument is correct, then contractarianism bolsters the traditionalist account and provides a reason for accepting the moral equality of combatants both in principle and practice.

The contractarian defence of traditionalism maintains that the moral equality of combatants applies in all inter-state conflicts, but not in asymmetric warfare.[41] Departing from the Walzerian position, Benbaji and Statman contend that the moral equality of combatants has no normative force in conflicts involving non-state actors fighting against states because it is not fair, mutually beneficial, or actually followed in practice. The war contract is not fair because it perpetuates unjust inequalities and oppressive power dynamics between state and non-state actors. Benbaji and Statman observe that "in its current form, the war agreement systematically discriminates against non-state actors in general, and stateless nations in particular."[42] The contract is not mutually beneficial insofar as some parties, namely stateless nations that are fighting for a just cause, are made worse off by the agreement.[43] Finally, in many relevant cases, the war conventions are not actually accepted or followed in practice because non-state actors do not abide by them. Moreover, some powerful states such as the United States refuse to adhere to the Additional Protocols in conflicts with non-state actors.

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[41] Benbaji and Statman use the term "asymmetric warfare" to refer to conflicts between state and non-state actors. While they acknowledge that some non-state actors could be considered parties to the war convention, they nevertheless maintain that "the power differences in asymmetrical conflicts are so great that the traditional war contract is neither mutually beneficial nor fair; in a war of independence regulated by pre-contractual morality, the just weak side has better chances to achieve its just aim." The authors then go on to propose modifications to existing *jus in bello* rules which would apply only to non-state actors. Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 151-158.
[42] Ibid., 89.
[43] Ibid., 152-153.

It is undoubtedly true that the existing war conventions are neither fair, mutually beneficial, nor actually followed in many conflicts involving non-state actors. Non-state actors, for the most part, played no role in the bargaining process that resulted in the war conventions and continue to be excluded from negotiations on the international rules of war. In some cases, these rules preclude non-state actors from fighting at all, including for a just cause. Additionally, there are no mechanisms through which non-state actors can object to the rules or their application, since they are not represented in the United Nations (UN) or similar international fora, with the rare exception of groups which have been granted observer status only.[44] As Benbaji and Statman themselves conclude, the contractarian account of war implies that there is no moral equality of combatants in cases where radical power asymmetries exist between state and non-state actors.

Rather than resolving the Equality Contradiction, however, this argument creates a revised version of the same problem. For war, on some level, is always unequal. The history of warfare, from David and Goliath to the feudal conflicts of the Middle Ages to the French Revolution, is replete with stories of stronger powers attempting to subdue the weak; in fact, this is largely what war is all about. The wars of the 21st century are not unique in this respect, though they are marked by extreme asymmetries in warfighting technology that enable a few global hegemons to dominate a nearly limitless battlespace, unbound by time or geography. This military dominance has reshaped the ways in which we think about war in general, and non-state actors in particular, since as Carl Schmitt observes, "the partisan is defined by his "concrete antithesis…the power and significance of his irregularity [is]

[44] Palestine and the Holy See, for example, have been granted permanent non-member observer status at the United Nations. "Non-Member States Having Received a Standing Invitation to Participate as Observers in the Sessions and the Work of the General Assembly and Maintaining Permanent Observer Missions at Headquarters," *United Nations*, https://www.un.org/en/about-us/non-member-states.

dependent on the power and significance of the regularity that he challenges."[45]

Yet even in regular warfare, states are often vastly unequal in terms of power and capacity. Suppose France goes to war with Lebanon, its former colony. France has a formidable military and access to the most advanced warfighting technology. The Lebanese Armed Forces, by contrast, are ill-equipped and poorly trained. Given these power dynamics and the legacy of colonialism, it appears as though, for the same reason as in the case of non-state actors, the war contract ceases to be fair or mutually beneficial. According to Benbaji and Statman's approach, the moral equality of combatants and the war conventions have no normative force in a conflict between France and Lebanon.

Moreover, while all states have a seat at the bargaining table in the UN General Assembly, it is only a handful of powerful states on the Security Council which retain veto power over important decisions concerning war and peace. Since 1946, the five permanent members of the UN Security Council—the United States, United Kingdom, Russia, China, and France—have exercised the veto power 293 times, including to protect their national interests vis-à-vis smaller states and former colonies.[46] Indeed, the historical record shows that the so-called "Big Five" refused to accept the UN Charter without this veto power and repeatedly blocked initiatives from smaller powers to change the Geneva Conventions, including a proposal to insert a provision that would provide combatant immunity to state and non-state belligerents.[47] Thus, while weak states certainly were more involved in the

[45] Carl Schmitt, "Theory of the Partisan: Intermediate Commentary on the Concept of the Political (1963)," *Telos Press* 127 (2004): 3.
[46] "UN Security Council Working Methods: The Veto," *UN Security Council Report*, December 16, 2020, https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php#:~:text=23)%E2%80%94the%20veto%20has%20been%20recorded%20293%20times.
[47] Karma Nabulsi, *Traditions of War* (Oxford: Oxford University Press, 1999), 17; Michael Veuthey, "Guérrillas et Droit Humanitaire," (1976): 193, https://international-review.icrc.org/sites/default/files/S003533610008391Xa.pdf.

bargaining process than non-state actors, the extent to which such states were able to influence the trajectory of the negotiations on the war conventions is unclear.

Not only are some states weak, but some non-state actors may be more powerful than Benbaji and Statman suppose. The notion of "terrorist armies," a phrase that has been widely adopted in Israeli defence circles, underscores this point.[48] There is a growing recognition that "hybrid actors"—armed groups which engage in state-like functions such as diplomacy, war, intelligence gathering, propaganda, and the provision of public goods—pose a substantial threat to states.[49] Hezbollah, for example, possesses a large missile arsenal that can reach deep into Israeli territory, elite ground attack forces, offensive cyber tools, drones, and sophisticated intelligence and counterintelligence capabilities.[50] The group also has a formal organisational structure that includes a political council and military wing.[51] In nearly every respect, Hezbollah has a greater capacity, and perhaps even more *de facto* authority, than the Lebanese Armed Forces.[52] It would seem inconsistent, therefore, to accord war rights only to the Lebanese Armed Forces, but not to Hezbollah.

This inconsistency is even more glaring in cases where sub-state paramilitary groups operate alongside regular armed forces and are integrated into military chains of

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[48] Yaakov Lappin, "How Israel Is Adapting to the Growing Threat of Terror Armies," *Begin-Sadat Center for Strategic Studies*, January 13, 2021, https://besacenter.org/perspectives-papers/israel-terror-armies-threat/.

[49] Examples of such groups include the Amal Movement, Lebanese Hezbollah, the Popular Mobilization Forces, various Kurdish parties in Iraq, the Iraqi Awakening, and ISIS. Thanassis Cambanis et al., *Hybrid Actors: Armed Group's and State Fragmentation in the Middle East* (New York: Century Foundation Press, 2019). https://production-tcf.imgix.net/app/uploads/2019/11/15165406/TheCenturyFoundation_HybridActors.pdf.

[50] Shaan Shaikh and Ian Williams, "Hezbollah's Missiles and Rockets," *Center for Strategic and International Studies* (July 5, 2018), https://www.csis.org/analysis/hezbollahs-missiles-and-rockets.

[51] Daniel Byman, "The Lebanese Hizballah and Israeli Counterterrorism," *Studies in Conflict and Terrorism* 34(12) (2011): 930-932.

[52] Aram Nerguizian, "The Lebanese Armed Forces and Hezbollah: Military Dualism in Post-War Lebanon," *The Carnegie Endowment for International Peace* (October 30, 2018), https://carnegie-mec.org/2018/10/30/lebanese-armed-forces-and-hezbollah-military-dualism-in-post-war-lebanon-pub-77598.

command. The Popular Mobilization Forces (PMF) in Iraq, for example, is an umbrella organisation comprising more than forty Shia militant non-state groups that is also formally part of the Iraqi military.[53] This dual-hatted authority complicates efforts to determine which moral and legal frameworks apply, particularly since groups within the PMF continue to receive material assistance from Iran to attack US forces in Iraq, which are engaged in training and supporting the Iraqi military.[54]

Benbaji and Statman might reply that the PMF are morally equal to US combatants just when they are acting in their capacity as members of the Iraqi military. This is a plausible response, but one which suggests that the application of the moral equality of combatants is less straightforward than is commonly presumed. For it may be just as epistemically challenging to determine whether the PMF is acting on behalf of a Shia militant group or the Iraqi military as it is to determine individual liability for posing an unjust threat. Even when they discard their uniforms, we cannot be certain that the PMF is acting exclusively at the behest of Shia militant groups any more than in the case of Nazi saboteurs working for the German government in *Ex Parte Quirin*.

Finally, it is not the case that states always follow the rules and non-state actors never do. Indeed, it is an empirical fact that states often do not follow the rules, and that

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[53] Michael Knights, Hamdi Malik, and Aymenn Jawad Al-Tamimi, "The Future of Iraq's Popular Mobilization Forces," *The Washington Institute for Near East Policy* (May 28, 2020), https://www.washingtoninstitute.org/policy-analysis/future-iraqs-popular-mobilization-forces; Renad Mansour and Faleh Jabar, "The Popular Mobilization Forces and Iraq's Future," *The Carnegie Endowment for International Peace* (April 2017): 12, https://www.jstor.org/stable/pdf/resrep12970.pdf?ab_segments=0/basic_SYC-5187_SYC-5188/test&refreqid=fastly-default:025dc9c6fe91121c8562e66e5ef647cb.

[54] In response to these attacks, the United States conducted a drone strike in December 2019 against Iranian Quds Force Commander Qassem Soleimani and PMF deputy head Abu Mahdi al-Muhandis, which nearly provoked a war with Iran and the expulsion of US troops from Iraq. Matthew Schwartz, "Who Was The Iraqi Commander Also Killed In The Baghdad Drone Strike?," *National Public Radio*, January 4, 2020, https://www.npr.org/2020/01/04/793618490/who-was-the-iraqi-commander-also-killed-in-baghdad-drone-strike.

some consistently break them.[55] States which do not want to be seen as breaking the rules—either because of reputational costs or punitive consequences in the form of sanctions and other measures—may turn to non-state groups to break the rules on their behalf. State sponsors of terrorism may direct non-state groups to target civilians because they cannot do so directly without fear of punishment or reprisals. Strong and weak states alike, then, may seek to circumvent the rules to maintain plausible deniability, avoid reputational costs, and indirectly challenge their adversaries without fear of escalation.

If states break the rules, it is also the case that non-state actors can sometimes follow them. Non-state actors frequently issue declarations, manifestos, or codes of conduct that align with international law and norms surrounding the protection of civilians to varying degrees. The Kurdistan Workers' Party (PKK), for example, has repeatedly affirmed its commitment to respect the Geneva Conventions and the First Additional Protocol in its conflict with Turkish state forces, including to treat captured enemy combatants as prisoners of war.[56] The Taliban also periodically issues codes of conduct, or *layeha*, to its members which, among other things, prohibit torture and require suicide bombers to "take great efforts to avoid casualties among the common people."[57] While such statements are often viewed as mere propaganda, and commitments do not signify compliance with international law, it is nevertheless noteworthy that non-state actors do engage in the

[55] The breadth of Russian violations of international law in the ongoing war in Ukraine underscores this point. For a discussion on how states break the rules, see Nina Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000).
[56] "PKK Statement to the United Nations," January 24, 1995, http://www.hartford-hwp.com/archives/51/009.html.
[57] Kate Clark, "The Layha: Calling the Taleban to Account," *Afghanistan Analysts Network* (2012), https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf.

process of rule-making in war.[58]

Contractarians might respond here that I am focusing on the exceptional cases. All things being equal, perhaps there is a greater risk that non-state actors will break the rules more often than states, either because they lack the capacity to adhere to them or because they cannot win otherwise. If that is the case, it is not unreasonable to presume that non-state actors will rarely, if ever, be able to fulfil the actuality criterion. Moreover, these violations have normative consequences insofar as non-state groups place civilians at unacceptable risk of harm through their disregard for the principle of distinction, deliberate use of human shields, and targeting of civilian infrastructure.[59]

This argument brings us back to an earlier point, however, which is that non-state actors, according to the account that Benbaji and Statman propose, cannot be expected to follow an agreement which they did not themselves conclude. Perhaps non-state actors would comply with the rules of war if, like states, they had a say in the content of the rules and benefitted from them. Compliance might increase if the rules were different, or if non-state actors were accorded combatant privileges, such as combatant immunity or prisoner of war status.[60] The historical record suggests that this is indeed the case. During the Algerian war of independence, for example, France initially executed National Liberation Front (FLN) members as unlawful belligerents, but later created special camps for detained fighters who were treated similarly to prisoners of war. The FLN, for its part, agreed to "accept and apply the Geneva Conventions" and apply the same measures to French

[58] Sandesh Sivakumaran, "Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War," *International Review of the Red Cross* 93(882) (June 2011): 10, https://www.icrc.org/es/doc/assets/files/review/2011/irrc-882-sivakumaran.pdf.
[59] Tamar Meisels makes this argument in suggesting that irregular belligerents do not play by the rules and therefore are not entitled to their protection. Meisels, "Combatants: Lawful and Unlawful," 57.
[60] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), Ch. 12.

combatants "on condition of reciprocity on the part of the Government of France."[61]

All of this suggests that states are not as different from non-state actors as they might first appear. Some states are powerful, others are weak. Some states follow the rules, while others purposefully break them. At the same time, some non-state actors are powerful, even to the point of maintaining "armies," while others lack the capacity to challenge the state. And some non-state actors do follow the rules, while others should rightly be called terrorist or criminal organisations. As a result, it is impossible to apply moral rules consistently based solely on whether an entity is a state or non-state actor. Even if we accept the logic of contractarianism in war, it does not follow that the moral equality of combatants holds in all cases of inter-state warfare and not in any cases of asymmetric warfare. As with traditionalism, there are at least some cases of inter-state warfare where the principle similarly does not apply.

4.4 REIMAGINING THE WAR CONTRACT

In this paper, I have argued that the asymmetric case reveals fundamental inconsistencies in the traditionalist and contractarian accounts of the moral equality of combatants. The traditionalist contention that non-state actors acquire war rights based on legitimate authority gives rise to the Equality Contradiction, where states which similarly lack such authority also must be beyond the protection of the war conventions. Contractarianism does not resolve this contradiction; the premise that the moral equality of combatants ceases to have normative force in the presence of radical power asymmetries implies that

[61] "Lettre de la Délégation Algérienne au Caire à David de Traz, 23 Février 1956," quoted in Françoise Perret, "L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie (1954-1962)," *International Review of the Red Cross* 86 (2004): 926. The original text reads: "sous réserve de réciprocité de la part du Gouvernement de la République Française."

combatants, too, may be morally unequal under certain conditions. Both the traditionalist and contractarian arguments lead us to conclude that the moral equality of combatants does not apply in all cases of inter-state warfare.

The asymmetric case poses a serious challenge to extant principled arguments in support of the moral equality of combatants. How then should we proceed? If we reject the moral equality of combatants as a matter of principle, then we are forced to consider alternative arrangements, namely the moral inequality of combatants or the asymmetric application of the rules. Should the laws of war be changed to reflect the "deep morality of war," that is, the observation that combatants are morally unequal depending on the justness of their cause for war?[62]

Adopting laws that reflect the moral inequality of combatants raises a number of practical problems which are well known, chiefly epistemic limitations in determining moral liability and the lack of an enforcement mechanism in the international system.[63] Critics and proponents of the principle agree that near omniscience would be required to make accurate judgements about moral liability in the fog of war. As Henry Shue puts it, "one cannot judge the relative moral responsibility of individual members of a group of strangers accurately and quickly even in peacetime, and it is worse than pointless to try during battle."[64] Compounding this problem, the lack of an international enforcement

[62] Jeff McMahan coined this phrase to refer to the moral principles that govern conduct in war, as distinct from the legal regimes that do so. See Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114(4) (2004): 730.

[63] The difficulties of determining whether individuals are sufficiently morally responsible for posing an unjust threat to render them morally liable to be killed has, in particular, raised the troubling prospect that unjust civilians, as well as combatants, could be targeted in war, thereby fundamentally undermining the principle of non-combatant immunity.

[64] Henry Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," in *Walzer and War: Reading Just and Unjust Wars Today*, ed. Graham Parsons and Mark A. Wilson (Cham: Palgrave Macmillan, 2020), 206.

mechanism suggests that there is nothing to stop all states from claiming war rights for themselves based on the perceived justness of their cause, while denying combatant privileges to their adversaries.

Various proposals have been put forward to address these problems. The leading revisionist Jeff McMahan has observed that an international court, such as the International Criminal Court, could rule on the justness of the cause for war, thereby clarifying which rules should apply and the distribution of moral liability.[65] Even if it were impossible to make such determinations *ex ante*, given limited information at the start of a conflict, the court could make *ex post* rulings that might deter future unjust wars. David Rodin further suggests that states might agree to adopt a form of "restrictive asymmetry," where unjust combatants have no or reduced *in bello* privileges in war.[66] Conversely, Benbaji and Statman support the relaxation of *in bello* restrictions for the weak side of a conflict, allowing non-state actors to target civil society—including buildings and other public infrastructure—while retaining the prohibition on deliberately attacking civilians by warning them to leave in advance of attacks.[67]

This last proposal in particular underscores the potential for the application of asymmetric rules to erode the principle of non-combatant immunity. The contention that civilian infrastructure could be targeted without harming civilians is implausible; recent Israeli military experience in the Gaza Strip demonstrates that civilians often ignore

[65] Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 40 and McMahan, "The Ethics of Killing in War," 63-64. The Rome Statute of the International Criminal Court already covers the crime of aggression and war crimes.
[66] David Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 55.
[67] Benbaji and Statman, *War by Agreement: A Contractarian Ethics of War*, 157; Yitzhak Benbaji, "Justice in Asymmetric Wars: A Contractarian Analysis," *Law & Ethics of Human Rights* 6(2) (2013): 196-198.

warnings to vacate the area, which in any case fails to account for vulnerable individuals who may be unable to leave, such as the infirm and the elderly.[68]

In short, the principled arguments in favour of the moral equality of combatants, as found in traditionalism and contractarianism, are weak, but implementing the moral inequality of combatants in practice would likely undermine the principle of non-combatant immunity. There may be good reasons, therefore, for preferring the equal application of the law, even if the principled arguments in support of the moral equality of combatants are unsound. If it is impossible to follow asymmetrical rules, or following such rules leads to more non-liable civilian and combatant deaths overall, then we may have pragmatic and moral reasons for accepting the entrenched rule, the legal equality of combatants.

At the level of application, revisionists and traditionalists agree on maintaining the legal equality of combatants, although for different reasons. McMahan observes that we can accept the rule based on the divergence between morality and law, the notion that the law serves a different purpose from morality insofar as it must take into account the effect that conventions will have on behaviour.[69] Seth Lazar goes further in arguing that the entrenched rule is the best approximation for morality because, all things being equal, civilians are less likely to be morally liable for posing an unjust threat than combatants.[70]

Shue rejects these accounts on the grounds that the entrenched rule is in fact morally justified because it produces stable norms based on reciprocity and is action-guiding

[68] Steven Erlanger and Fares Akram, "Israel Warns Gaza Targets by Phone and Leaflet," *The New York Times*, July 8, 2014, https://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html.
[69] McMahan, "The Ethics of Killing in War," 730.
[70] Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), 74-100.

"amidst the smoke, noise, danger, and stress of battle."[71] On this view, the existing war conventions are morally justified because they "produce relatively few mistakes in moral judgement—relatively few wrongs—by angry and frightened mortals wielding awesomely powerful weapons."[72] The war conventions are like "Dutch dikes," which though they are imperfect by design in that they let in some sea-water, the design is nevertheless justified because "trying to hold back all the sea-water is what would erode them by asking more than what is possible."[73] Applying the rules asymmetrically based on the justness of the cause for war, according to Shue, would open the floodgates of violence and undermine the bedrock prohibition on the use of force.

But even if we accept this premise, it does not follow that we must accept the moral equality of combatants. The pragmatic case against asymmetry does not lend credence to the Equality Thesis; it merely supports the creation of stable norms through the symmetrical application of the rules. Yet there are any number of alternative rules which similarly could produce stable norms and be action-guiding under conditions of epistemic uncertainty. The rules may apply equally to all parties in a conflict without relying on the conventional, statist, and status-based approach to killing in war. Symmetry, after all, is not synonymous with equality.

What other form might the rules of war take? We could imagine a new rule based on individual liability, but applied symmetrically to both sides of a conflict regardless of the justness of the cause for war. Perhaps state and non-state actors could conclude a treaty that commits to an individual-rights based approach to liability, where people are killed

[71] Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," 205.
[72] Ibid., 206.
[73] Ibid., 205.

based on their individual responsibility for posing a threat whether or not they fight on behalf of a state. Such a treaty would apply equally to both sides in the sense that it would not differentiate between just and unjust threats. It would create stable norms in the same way that the war conventions between states currently do, if non-state actors were included in the bargaining process and had incentive to comply with the rules.[74] And it would be action-guiding, even under conditions of extreme epistemic uncertainty, if it included a clause permitting state and non-state actors to derogate these responsibilities and revert to status-based killing in cases of supreme emergency, where it may not be possible to make determinations about individual liability. In order to prevent all parties from reverting to status-based killing, parties that invoked the supreme emergency clause might be required to make a public case stating the reasons for temporarily adopting a less protective stance towards individuals.[75]

Following such an approach need not be more epistemically demanding than following the current laws of war. As I have already demonstrated, applying the Equality Thesis in asymmetric conflicts may be just as epistemically challenging as determining individual liability. Indeed, the prevalence of non-state actor conflicts, technological

[74] As Sandesh Sivakumaran argues, non-state actors might have more incentive to comply with the rules if they were offered some form of combatant privileges in the form of prisoner of war status or combatant immunity. Even if states do not want to offer full combatant privileges for fear of legitimising certain non-state groups, they could implicitly offer such privileges or agree to a minimum standard of treatment for non-state belligerents. Sivakumaran, *The Law of Non-International Armed Conflict*, Ch. 12.

[75] The European Convention on Human Rights, for example, permits State Parties to derogate the obligation to protect the individual right to life at all times, including in war, "to the extent strictly required by the exigencies of the situation" and under the condition that they have "fully informed" the Secretary General. The International Covenant on Civil and Political Rights, which the United States has ratified, adopts a similar approach by permitting derogations "in time of public emergency which threatens the life of the nation" and "strictly as required by the exigencies of the situation." See "European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms," *European Court of Human Rights Council of Europe* (June 1, 2010): Art. 15, https://www.echr.coe.int/documents/convention_eng.pdf; "International Covenant on Civil and Political Rights," *United Nations Human Rights Office of the High Commissioner* (December 16, 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

advances, and the blurring of the line between war and peace in modern warfare all greatly undermine the pragmatic case in favour of the Equality Thesis. Like the Dutch dikes that hold back the waves, warfighting technology is constantly evolving, allowing us to collect more information, for longer periods of time, that may greatly reduce epistemic uncertainty concerning individual moral liability in war. In such cases, we might very well conclude that more "numerous, murderous mistakes are likely to be made" by following the existing war conventions than an approach based on individual liability.[76] The next paper explores the contours of such an approach and proposes policy recommendations for implementing it practice.

[76] Shue, "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?," 206.

5

Principles for Asymmetric Warfare

Dusk was falling in Mosul as the Zeidan family sat down to dinner on March 5, 2016. Grandparents watched fondly as children played with their cousins, little suspecting that their home was at that moment in the crosshairs of the most powerful military on earth. A few seconds later, two missile strikes reduced the house to rubble and dust. A family member described the scene: "There was fire everywhere…we searched for our relatives, picking them up piece by piece and wrapping them."[1] When the smoke cleared, twenty-one family members had been killed, including thirteen children. One mother recognised the charred remains of her daughter only from the purple dress she was wearing.[2]

In the spring of 2016, Mosul was at war. The United States was backing an Iraqi government offensive to retake the city from the Islamic State of Iraq and Syria (ISIS). The fighting was fierce and progress was painfully slow, with the campaign lasting nearly a year. A case study in modern urban warfare, the battles played out on the streets and in private homes, with ISIS commandeering civilian facilities for military purposes.

From the air, a different kind of campaign was being waged. Unmanned aerial vehicles, colloquially known as drones, continuously scanned the sky, searching for threats. Strike cells comprised of air force pilots, intelligence analysts, lawyers, and even weather specialists operated remotely from thousands of miles away, processing the drone feeds and communicating with special operations forces on the ground. The intelligence

[1] Azmat Khan, "The Human Toll of America's Airwars," *The New York Times*, December 19, 2021, https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html.
[2] Ibid.

collected from these feeds resulted in conventional airstrikes, drone strikes with hellfire missiles, and elite commando raids. No matter the method, the result was the same. As the global "war on terror" expanded beyond the Afghanistan-Pakistan region and Iraq, the United States engaged in direct action—kill or capture operations against terrorist targets—both within and outside of war zones in Yemen, Somalia, West Africa, Syria, and elsewhere. Civilians in these countries were held perpetually at risk, living under the shadow of drones.

These counterterrorism wars exemplify what some scholars have referred to as the "changing character of war."[3] In the post-9/11 period, there was a dramatic shift in the way that the United States waged war. The Bush administration declared "war" on terror, a tactic rather than an enemy, and proclaimed for the first time that it was engaged in a global armed conflict against non-state actors with connections to the group that carried out the original attacks. This war would be waged anywhere that terrorists operated, from the mountainous terrain of rural Afghanistan to urban centres. Strikes against suspected terrorists would turn weddings into funerals, reduce hospitals to rubble, and target civilian homes mistaken for weapons depots, as in the case of the Zeidan family. This war at times would be fought far from any battlefields, in the midst of civilian life, and without clear temporal or geographic boundaries. Two decades later, America's longest war continues in the form of "asymmetric warfare," a term that, while not entirely accurate, nevertheless encapsulates the asymmetries in power and tactics that characterise these post-9/11 conflicts.

[3] Hew Strachan and Sibylle Scheipers, *The Changing Character of War* (Oxford: Oxford University Press, 2011). See also Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed. (Cambridge: Polity Press, 2012).

This paper evaluates the normative principles which should govern asymmetric warfare through a case study examination of US policy on direct action in the war on terror.[4] In doing so, the thesis moves from the realm of analytic philosophy to applied ethics in constructing a morally-directed, pragmatic account of the norms which should apply in such cases. The case study, and the resulting policy recommendations, focus on US operations due to the outsized role of the United States in initiating and shaping these counterterrorism wars. This focus raises the question of how many, if any, of the recommendations are applicable to other states. US coalition partners in Europe and the United Kingdom, in particular, occasionally have diverged from the US approach to counterterrorism and its interpretation of how international law applies in such conflicts. Nevertheless, the findings are relevant insofar as the United States continues to set precedents for the use of force that state and non-state actors will seek to follow, putting pressure on the existing rules-based order in the international system.

The paper proceeds as follows. The first section provides an overview of salient features of US direct action, drawing particular attention to continuity and change in warfighting in the post-9/11 period. In section 5.2, I examine how these features have exposed ethical dilemmas for policymakers that traditional just war theory largely has neglected. I propose to address some of these dilemmas in section 5.3, where I develop an action-guiding, normative framework for direct action. In section 5.4, I consider, and ultimately reject, pragmatic and consequentialist arguments against adopting this framework in practice. I conclude in section 5.5 that the risks of maintaining the status quo,

[4] Direct action covers both lethal action, which involves the targeted killing of individuals, and operations designed to capture high-value targets. I focus primarily on lethal action here, since capture operations are rare, but the same normative principles apply to both.

as prescribed by traditional just war theory, far outweigh pragmatic considerations, and that states have a moral duty to adopt policies based loosely on revisionism.

5.1 THE CHANGING CHARACTER OF WAR?

There are certain points in history that appear to coincide with shifts in the ways in which wars are waged. The end of the Cold War was thought to usher in a new era of peace, where great power conflicts were rare. In the 1990s, Mary Kaldor argued that the forces of globalisation would lead to the promulgation of new, unconventional wars fought by non-state actors.[5] Steven Pinker similarly observed that inter-state warfare, and violence in general, was in decline and soon would be obsolete.[6] The prevalence of non-state actor conflicts, technological advances, and reliance on unconventional tactics in the wake of the 9/11 attacks seemed to lend credence to the view that the character of warfare was fundamentally changing.[7]

Proponents of the "new wars" thesis, which is highly contested, have questioned whether the norms and laws that have governed warfare for centuries remain relevant today. The rise of transnational terrorism has decreased the perceived utility of conventional armies, as states are forced to rely more on limited strikes, special forces, intelligence operations, cyber warfare, and counterinsurgency tactics. Asymmetric conflicts appear to challenge the equal application of the rules of war, as well as the

[5] Kaldor, *New and Old Wars: Organized Violence in a Global Era*.
[6] Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity* (London: Penguin, 2012).
[7] As Azar Gat points out, however, great power conflict has in fact become "increasingly rare since the beginning of the industrial-technological age, becoming even less likely in the nuclear age. At the same time, the return of capitalist non-democratic powers, above all China and also Russia, may result in the resumption of at least some level of great power tensions and rivalry." See Azar Gat, "The Changing Character of War," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 44.

Westphalian order. Advances in remote warfighting technology have shifted the balance of risk very substantially to the weaker side of the conflict and the surrounding civilian population. And the lack of clearly defined battlefields has made the concept of war more amorphous, with states at times adopting the laws of war, rather than more restrictive law enforcement standards, within and outside of areas of active fighting.

Yet while there have been significant shifts in the past two decades, it is important to identify the precise contours of both continuity and change before considering appropriate policy responses. Importantly, one does not need to buy into the "new wars" thesis to accept that a new policy approach is needed. Contrary to proponents of this thesis, I argue that the post-9/11 wars are marked as much by continuity as change. A paradigm shift is needed, not because these conflicts are novel, but because they underscore the weaknesses of the traditionalist view of war. In what follows, I trace the evolution of what I take to be the paradigmatic case of the "new wars," US direct action in the war on terror, before identifying salient features of this conflict that requires a different policy approach.

The Longest War: The Global War on Terror

The 9/11 attacks elevated some US counterterrorism operations from the realm of law enforcement to the level of war, setting the United States on the path of perpetual conflict. The Bush administration declared, controversially, that the United States was engaged in a non-international armed conflict (NIAC) with transnational terrorist groups, even while it prepared to invade Afghanistan and, subsequently, Iraq. The 2001 Authorization for Use of Military Force (AUMF), passed just days after the attacks, provided broad domestic legal authority for the president to use force "against those nations, organizations, or

persons" he determined to have "planned, authorized, committed, or aided" the attacks in order to "prevent any future acts of international terrorism against the United States."[8] The 2002 AUMF, which authorised the US-led invasion of Iraq in 2003, provided an additional statutory basis for both conventional and unconventional military operations in the country.[9]

The advent of the drone programme coincided with these developments, giving policymakers a tool for monitoring and trying to weaken transnational terrorist networks. The Bush administration developed a secret list of "high value" targets for removal from the battlefield, starting with Al Qaeda military commander Mohammed Atef in Afghanistan.[10] Deliberate strikes against pre-planned targets involved weeks or months of surveillance, whereas dynamic strikes were conducted with minimal planning against perceived imminent threats to US forces or allies on the ground. In a practice known as "signature strikes," some non-state actors were targeted based on suspicious patterns of behaviour associated with terrorist activity.[11] By the end of his time in office, President George W. Bush had conducted approximately fifty drone strikes in Pakistan and Yemen,[12]

[8] "Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States," *Public Law 107-40*, September 18, 2001, https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf.
[9] "Authorization for Use of Military Force Against Iraq Resolution of 2002," *Public Law 107-243*, October 16, 2002.
[10] Christopher Fuller, "The Origins of the Drone Program," *Lawfare*, February 18, 2018, https://www.lawfareblog.com/origins-drone-program; Peter Bergen and Jennifer Rowland, "Drone Wars," *The Washington Quarterly* 36(3) (2013): 8.
[11] Lynn David, Michael McNerney, and Michael Greenberg, "Clarifying the Rules for Targeted Killing: An Analytical Framework for Policies Involving Long-Range Armed Drones," *RAND Corporation*, 2016, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf.
[12] Jessica Purkiss and Jack Serle, "Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush," *The Bureau of Investigative Journalism*, January 17, 2017, https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush.

with the majority of strikes occurring in 2008 following technological advances in surveillance and precision-strike capabilities.[13]

President Barack Obama inherited the drone programme at a moment when these technological advances were accelerating, which enabled increased operations worldwide. On January 23, 2009, just three days after Obama's first inauguration, a US drone strike in northwest Pakistan targeting Al Qaeda militants reportedly killed at least ten civilians, nearly half of whom were children.[14] This strike marked the beginning of a lethal campaign that expanded in size and scope under Obama's watch, with credible non-governmental reports indicating that 550 strikes were conducted in Pakistan, Somalia, and Yemen.[15] On average, the Obama administration conducted one drone strike every 5.4 days in office, although the total number of strikes decreased dramatically during his second term.[16] The administration also took the unprecedented step of conducting a drone strike against a dual US-Yemeni citizen, Anwar al-Awlaki.[17]

Reflecting on this legacy, President Obama claimed his policies struck the right balance between safeguarding national security and protecting civilians in a "dangerous

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[13] Peter Bergen, David Sterman, and Melissa Salyk-Virk, "America's Counterterrorism Wars: Tracking the United States' Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya," *New America*, June 17, 2021, https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/; "The Bush Years: Pakistan Strikes 2004-2009," *The Bureau of Investigative Journalism*, https://www.thebureauinvestigates.com/drone-war/data/the-bush-years-pakistan-strikes-2004-2009.

[14] Bergen and Rowland, "Drone Wars," 15; Micah Zenko, "Obama's Embrace of Drone Strikes Will Be a Lasting Legacy," *The New York Times*, January 12, 2016, https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy.

[15] Purkiss and Serle, "Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush."; Bergen, Sterman, and Salyk-Virk, "America's Counterterrorism Wars: Tracking the United States' Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya."

[16] Micah Zenko, "The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama," *Council on Foreign Relations*, March 2, 2017, https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama.

[17] "Anwar al-Awlaki, Yemen, and American Counterterrorism Policy," *The Brookings Institution*, September 17, 2015, https://www.brookings.edu/wp-content/uploads/2015/08/20150917_awlaki_yemen_transcript.pdf.

world with terrorists who would gladly blow up a school bus full of American kids."[18] The tension between security and values, according to Obama, was a false choice: the United States could conduct a lawful, effective, and ethical targeted killing campaign.[19] Yet juxtaposing the hypothetical bus full of American children against the real bodies of children killed in US strikes throughout the Middle East, South Asia, and Africa raises the question: Did the United States pursue a morally optimal approach to direct action?

At the conclusion of Obama's presidency, there were many who would have answered in the affirmative. The administration routinised and institutionalised direct action, seeking to impose stricter controls on targeted killing outside of active battlefields through the imposition of restrictions on targeting, improved interagency vetting procedures, and increased transparency surrounding the drone programme and civilian casualty reporting. President Obama indicated his intention to shift responsibility for the majority of covert drone operations from the Central Intelligence Agency (CIA) to the Department of Defense (DOD), where strikes would be more transparent, as well as subject to military reporting requirements and the department's training and requirements for applying the laws of war in all military operations.[20] Most significantly, the Obama administration developed and later publicly released a declassified version of the Presidential Policy Guidance (PPG), which set strict standards for direct action outside of "areas of active hostilities," including the "near certainty" criterion that no civilians would

[18] Ta-Nehisi Coates, "'Better is Good': Obama on Reparations, Civil Rights, and the Art of the Possible," *The Atlantic*, December 21, 2016, https://www.theatlantic.com/politics/archive/2016/12/ta-nehisi-coates-obama-transcript-ii/511133/?utm_source=feed.
[19] "Remarks of John O. Brennan, 'Strengthening our Security by Adhereing to our Values and Laws,'" *The White House*, September 16, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.
[20] Jim Acosta, "Obama to Make New Push to Shift Control of Drones from CIA to Pentagon," *CNN*, April 27, 2015, https://edition.cnn.com/2015/04/27/politics/drones-cia-pentagon-white-house/index.html.

be harmed.[21] In 2016, the White House also released a comprehensive report on the legal and policy frameworks governing the use of force that included parameters for direct action.[22]

From the confines of Washington, DC, these policies appeared to reduce civilian harm in war, allowing US officials to claim that America's air wars were the most "precise" and "humane" in military history.[23] In the final year of the Obama presidency, some estimates suggested that drone strikes outside of areas of active hostilities resulted in zero civilian deaths.[24] But the unofficial record told a different story, a story of the uncounted civilian deaths that were improperly classified as "enemy combatants" killed in action. Investigative reporting from *The New York Times* conducted years later revealed a systemic pattern of civilian harm during both the Obama and Trump administrations, where strike cells deemed civilians to be combatants based on flimsy intelligence and inappropriately characterised strikes as "self-defence" to circumvent strict policy rules.[25]

Moreover, any progress the Obama administration did make in restricting direct action was easily reversed. The policy guidance on direct action and the executive order on civilian casualties were not enshrined in domestic law, allowing President Donald

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[21] "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," *The White House* (May 22, 2013), https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf.
[22] "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," *The White House* (2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.
[23] John O. Brennan, "The Efficacy and Ethics of U.S. Counterterrorism Strategy," *Speech at the Woodrow Wilson International Center for Scholars*, April 30, 2012, https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy. For an overview of the emergence of "humane" warfare, see Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Straus and Giroux, 2021).
[24] Micah Zenko, "Obama's Final Drone Strike Data," *Council on Foreign Relations*, January 20, 2017, https://www.cfr.org/blog/obamas-final-drone-strike-data.
[25] Dave Philipps, Eric Schmitt, and Mark Mazzetti, "Civilian Deaths Mounted as Secret Unit Pounded ISIS," *The New York Times*, December 12, 2021, https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html.

Trump to overturn or relax key restrictions with the stroke of a pen. While the Trump administration maintained a version of the PPG in the renamed Principles, Standards, and Procedures (PSP), the new policy guidance gave operators greater flexibility and authority to engage in direct action against terrorist networks "across the globe."[26]

As the conflict expanded geographically, the PSP relaxed restrictions designed to reduce civilian harm, including by requiring "near certainty" that civilians would not be killed or injured only in accordance with "reasonably available information and means of verification."[27] The near certainty standard reportedly applied only to women and children, while a lower standard of "reasonable certainty" was set for civilian adult men.[28] Notably, the standards in the PSP did not apply to lethal action taken in "unit self-defense of U.S. or foreign partner forces," such as the strikes that occurred in Baghuz, Syria, in March 2019—which killed as many as sixty civilians, most of whom were unarmed women and children.[29]

Throughout the Trump administration, there was little transparency about the standards for direct action. President Trump did not publish a declassified version of the PSP nor disclose information on drone strikes from government agencies beyond DOD. He removed a key section of the Obama-era Executive Order 13732, which would have required him to publish civilian casualty figures resulting from all strikes conducted by US

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[26] "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets," *The White House* (April 30, 2021): 1, https://www.aclu.org/sites/default/files/field_document/2021-4-30_psp_foia_final.pdf.
[27] Ibid., 4.
[28] Hina Shamsi, "Trump's Secret Rules for Drone Strikes and Presidents' Unchecked License to Kill," *Just Security*, May 3, 2021, https://www.justsecurity.org/75980/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill/.
[29] "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets," 1; Brianna Rosen et al., "Questions on the Baghuz Strikes," *Just Security*, November 15, 2021, https://www.justsecurity.org/79218/questions-on-the-baghuz-strikes/.

government agencies outside of active battlefields, as opposed to only those strikes conducted by DOD.[30] The administration therefore inhibited public scrutiny of direct action, even as it increased the tempo of airstrikes to nearly one every four days, with expanded targeting in Somalia and Yemen.[31]

Perhaps most significantly, the Trump administration expanded direct action beyond the counterterrorism realm by introducing targeted drone strikes into inter-state relations. In January 2020, President Trump authorised a strike against Iranian Quds Force Commander Qassem Soleimani in Iraq—the first time a drone was used to target a senior official of another state outside of armed conflict.[32] The administration cited Article II authorities and the 2002 AUMF as the legal basis for the operation, notwithstanding the fact that Soleimani, as an Iranian official, did not constitute a "continuing threat posed by Iraq," the criterion required for action under the AUMF.[33] The Solemani strike marked a critical departure in US policy, signalling a broader willingness to ignore fundamental constraints on the use of force.

Two decades after the war on terror began, and notwithstanding the withdrawal of US troops from Afghanistan, the Biden administration maintains that it is still engaged in an armed conflict with a range of terrorist groups. In a speech before the United Nations

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[30] Rita Siemion, "Trump's Revocation of Reporting on Lethal Strikes: All Eyes on Congress, Now," *Just Security*, March 8, 2019, https://www.justsecurity.org/63123/trumps-revocation-reporting-lethal-strikes-eyes-congress/.

[31] Kelsey Atherton, "Trump Inherited the Drone War but Ditched Accountability," *Foreign Policy*, May 22, 2020, https://foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/.

[32] The strike also killed Iraqi official Abu Mahdi al-Muhandis, the deputy head of the Popular Mobilization Forces. Anthony Dworkin, "Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order," *Just Security*, January 7, 2020, https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/.

[33] Maggie Haberman and Catie Edmondson, "White House Notifies Congress of Suleimani Strike Under War Powers Act," *The New York Times*, January 4, 2020, https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html?action=click&module=Top%20Stories&pgtype=Homepage.

(UN) General Assembly in September 2021, President Joe Biden declared that, for the first time in twenty years, the United States was "not at war."[34] Yet rather than ending the war on terror, the withdrawal has prompted the Biden administration to rely increasingly on "over-the-horizon" counterterrorism operations in the form of drone strikes and special operations in Afghanistan, Somalia, Syria, Yemen, and elsewhere.[35] And while the White House has committed to working with Congress to develop "a more narrow and specific framework" for the authorisation of military force abroad, the 2001 and 2002 AUMFs remain in place, providing a source of domestic legal authority that could be re-interpreted for future operations.[36]

The Biden administration has yet to complete its policy guidance on direct action, the Presidential Policy Memorandum (PPM), which reportedly seeks to synthesise the Obama and Trump-era policy guidelines.[37] The White House initially paused drone strikes while conducting a counterterrorism review, resulting in a dramatic decrease in the tempo of operations.[38] In July 2021, however, the US military resumed strikes against Al Shabaab

[34] Despite not being at "war," the Biden administration continues to maintain that the United States is engaged in an armed conflict with certain terrorist groups. "United States v. Zayn al-Abidin Muhammad Husayn, aka Abu Zubaydah, et al.," No. 20-827, *Supreme Court of the United States*, October 6, 2021, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-827_l6gn.pdf; "Remarks by President Biden Before the 76th Session of the United Nations General Assembly," The White House, September 21, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/21/remarks-by-president-biden-before-the-76th-session-of-the-united-nations-general-assembly/.
[35] Brianna Rosen, "The Longest War is Over the Horizon," *Just Security*, November 1, 2021, https://www.justsecurity.org/78818/the-longest-war-is-over-the-horizon/.
[36] Bryan Bender and Andrew Desiderio, "Biden Backs New War Powers Vote in Congress, White House Says," *Politico*, March 5, 2021, https://www.politico.com/news/2021/03/05/biden-war-powers-congress-473843.
[37] Charlie Savage and Eric Schmitt, "Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones," *The New York Times*, March 3, 2021, https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html.
[38] Joe Dyke and Imogen Piper, "Airwars: Biden Dramatically Decreased Global Airstrikes in 2021," *Responsible Statecraft*, December 24, 2021, https://responsiblestatecraft.org/2021/12/24/how-do-the-forever-wars-look-under-president-biden/.

in Somalia in "collective self-defense" of US partners on the ground.[39] The rapid fall of Afghanistan to the Taliban the following month further complicated the administration's efforts to complete its policy review, since drone strikes likely could no longer be carried out with the consent of the Afghan government. The final lethal act of the United States in the war in Afghanistan was to conduct a drone strike on August 29, 2021, in Kabul that mistakenly killed ten civilians, including a humanitarian worker and seven children.[40]

Continuity and Change

What is new about the post-9/11 counterterrorism wars? The wars of the past two decades have been marked as much by continuity as change when viewed in the broader context of military history. The rise of non-state actor conflicts is reminiscent of the wars in the Middle Ages, where fighting amongst feudal lords and outlaws continuously blurred the line between public and private warfare.[41] Similarly, the history of war is replete with examples of insurgencies and counterinsurgencies, from imperial Britain's "small wars" against native peoples in the 1800s and early 1900s to the guerrilla tactics employed in the Vietnam War.[42] And while scholars such as Kaldor have emphasised the changing role of

[39] "U.S. Military Carries Out First Air Strike in Somalia Under Biden," *Reuters*, July 20, 2021, https://www.reuters.com/world/africa/us-military-carries-out-first-air-strike-somalia-under-biden-2021-07-20/.
[40] Matthieu Aikins, "Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb," *The New York Times*, September 10, 2021, https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html.
[41] Gregory Reichberg, "Just War and Regular War: Competing Paradigms," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).
[42] For a historical account of Britain's "small wars," see T. R. Moreman, "'Small Wars' and 'Imperial Policing': The British Army and the Theory and Practice of Colonial Warfare in the British Empire, 1919-1939," *Journal of Strategic Studies* 19(4) (1996).

the state in relation to war, contemporary conflicts have unfolded largely within an international order dominated by states and among groups which aspire to statehood.[43]

The "new" wars of the 21st century, then, are not as novel as they first appear. Yet technological advances in remote warfighting capabilities have enabled changes in the ways that states and non-state actors wage war. Drones allow for continuous surveillance and reconnaissance, as well as more precise strikes against individual targets. Compared to conventional airstrikes against a peer or near-peer adversary, drone strikes pose little to no risk to the remote military forces which employ them, giving rise to the perception that drones are a "riskless" and more cost-effective form of warfare. These characteristics of drone warfare have led many observers to argue that drones pose unique moral and legal dilemmas.[44]

Technological advances, however, are an enduring feature of war, and drone warfare involves many of the same calculations, costs, and consequences as more conventional modes of fighting. While drones and other remote warfighting technologies make it easier to resort to force, the focus on the technology is misleading. Ultimately, drone strikes are only as precise as the intelligence on which they are based, as discriminating as the targeting thresholds they seek to meet, and as just as the ends for which they are employed.[45] There is nothing inherently problematic about drone technology; it is the ways in which this technology has been used that has created troubling normative and legal precedents.[46]

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[43] Kaldor, *New and Old Wars: Organized Violence in a Global Era*.
[44] See, for example, David Cortright, Rachel Fairhurst, and Kristen Wall, *Drones and the Future of Armed Conflict* (Chicago: University of Chicago Press, 2015).
[45] Brianna Rosen, "To End the Forever Wars, Rein in the Drones," *Just Security*, February 16, 2021, https://www.justsecurity.org/74690/to-end-the-forever-wars-rein-in-the-drones/.
[46] Bradley Strawser argues that policymakers have a moral obligation to use drones insofar as they are more precise than more conventional weapons such as airstrikes. This argument fails to consider the moral costs

Beyond these cursory distinctions, the war on terror is distinct from conventional conflicts insofar as it is not limited by temporal or geographical boundaries, is fought both within and outside of active battle zones, and clandestinely targets a secret list of enemies. This war is not characterised by battlefields, insignia, or uniformed combatants that might distinguish war from civilian life. It does not end in negotiations, treaties, or a transition to peace. Even the enemy is faceless and amorphous, since the full list of terrorist groups with which the United States is at war remains classified. These hallmarks of the war on terror are absent in conventional conflicts, although the two may occur simultaneously and serve mutually reinforcing ends, such as in the cases of Afghanistan and Iraq.

A plausible objection to the new wars thesis is that the United States is mistaken in its declaration of "war" on terror and has made a fundamental category mistake in upholding the legal argument that it is engaged in an armed conflict against terrorist groups that is global in scope and where the laws of war apply. Perhaps the war on terror is not, in fact, a war at all, but rather should be viewed as a form of law enforcement activity. If that is the case, then direct action in the war on terror does not tell us anything about the war paradigm itself; such operations are simply distinct from war and as such should be governed by different norms.

Michael Walzer and Jeff McMahan agree on this point, despite their deep disagreements on the norms that should govern war in general. McMahan writes that "anti-terrorism isn't war…[it] is law enforcement, and should be governed by the norms of law enforcement, until we can devise better norms that are intermediate between those for war

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of drones, however, and overstates the precision of these type of weapons systems. Bradley Jay Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: Oxford University Press, 2013).

and those for police action."[47] Here we can only assume that McMahan is talking about legal, rather than moral, norms, since his philosophical work contends that the norms governing conduct in war should be the *same* as the norms governing defensive harming in ordinary life, the standards to which police action is held. Walzer similarly observes that the "war" on terror is "mostly police work" that operates in a distinct moral universe.[48]

The conclusion that counterterrorism is distinct from war, however, is far too quick. Counterterrorism operations often occur in the midst or on the fringes of what reasonable people would call war, against groups which are also fighting more conventional insurgencies. An airstrike targeting ISIS members fighting Kurdish forces appears to fall squarely in the realm of war, as does a strike against a weapons depot five miles away. A strike against a private residence thirty miles from the fighting somewhat less so. But what is the moral difference between five and thirty miles? It is impossible to draw the line between zones of war and peace in such circumstances, such that it is clear when the laws of war or law enforcement standards apply. For this reason, Walzer concedes that sometimes the war on terror is more like a war because it occurs outside of a "zone of peace."[49] In a similar vein, McMahan admits that "anti-terrorist action cannot be well governed within either the law-enforcement paradigm or the war convention."[50]

This blurring of the line between war and peace poses particular moral, legal, and policy challenges. The risk of direct action in the war on terror is that the perceived costs of resorting to the use of force are lower than full-scale war, even while the rules governing

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[47] Amy Davidson and Jeff McMahan, "Live Chat: The Ethics of Drone Warfare," *The New Yorker*, February 13, 2013, https://www.newyorker.com/news/news-desk/live-chat-the-ethics-of-drone-warfare.
[48] Michael Walzer, "On Fighting Terrorism Justly," *International Relations* 21(4) (2007): 480.
[49] Ibid., 481.
[50] Jeff McMahan, "Targeted Killing: Murder, Combat, or Law Enforcement?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012), 155.

the use of force within areas of active conflict are often held to be the more permissive rules of war. This situation creates moral risk where policymakers are more likely to resort to force under the rubric of war, regardless of whether the war paradigm is appropriate. Being in a perpetual state of war also signals that the norms concerning self- and other-defence in times of peace are not immutable, but rather can be replaced with less restrictive standards indefinitely. These problems are well known, but have not been adequately addressed, even as the war on terror enters its third decade. In what follows, I articulate the main ethical dilemmas that policymakers still face before proposing normative principles to begin to address them.

5.2 ETHICAL DILEMMAS: PHILOSOPHY FOR THE WHITE HOUSE[51]

The frozen sidewalk crunched beneath his feet as he strode across the narrow street separating the Eisenhower Executive Office Building (EEOB) from the White House. He took the stairs two at a time down to the basement, darting into his cave-like office to prepare for an early morning meeting in the Situation Room. It was a Tuesday, "Terror Tuesday," and President Obama's top counterterrorism advisor John Brennan still needed to review the "kill list" that the agency had sent over the night before.

"How old are these people?" the president asked, pointing to mug shots of fifteen Al Qaeda suspects in Yemen, some of whom were young girls still in their teens. "If they are starting to use children, we are moving into a whole different phase."[52] Obama seemed

[51] The phrase "philosophy for the White House" is borrowed from Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010).
[52] Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, May 29, 2012, https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.

pensive, almost as if his thoughts were drifting back to his first few days in office, when a misguided drone strike targeting Al Qaeda militants in Pakistan killed at least ten civilians, nearly half of whom were children.[53] It was January 2010, exactly one year since that tragic incident, but the administration was taking no risks after thwarting a terrorist plot to blow up a commercial airliner over Detroit on Christmas Day.

The president faced a moral dilemma, one which plagued his entire time in office. Obama played judge, jury, and, indirectly, executioner for countless individuals overseas, poring over kill lists late into the night to decide who would be the next target of US lethal action. It was a weighty moral burden that he took seriously, despite the quip he once made that he was "good at killing people."[54] The policy guidance on direct action, which came into effect in 2013, was supposed to add critical guardrails to this process, upholding US national security interests in a way that was consistent with American values.

Brennan, it has been said, was the priest who absolved Obama of his sins during these periods of moral introspection.[55] Waving around traditional just war theory, Brennan invoked the *jus in bello* principles of necessity, proportionality, and discrimination to defend a counterterrorism war that purportedly was "legal, ethical, and wise."[56] Speaking about the drone programme, Brennan claimed technological advances allowed the administration to adhere to the principle of discrimination with "surgical precision."[57] In a speech at the US National Defense University in May 2013, Obama echoed these

[53] Zenko, "Obama's Embrace of Drone Strikes Will Be a Lasting Legacy."
[54] Jeffrey Goldberg, "The Obama Doctrine," *The Atlantic*, April 15, 2016, https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/.
[55] Becker and Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will."
[56] Brennan, "The Efficacy and Ethics of U.S. Counterterrorism Strategy."
[57] Ibid.

sentiments, proclaiming that this was "a just war—a war waged proportionally, in last resort, and in self-defense."[58]

The justness of the cause for war was never really in doubt. There is broad agreement in philosophical, legal, and policy circles that self- and other-defence constitutes a just cause for war.[59] Virtually no one would deny that the 9/11 attacks represented an act of aggression against the United States, and that terrorism more broadly targets innocent victims who have done nothing to lose their right not to be killed. Indeed, while people might disagree on whether the facts surrounding a particular war support the claim that a state is engaged in self- or other-defence, the act of defensive harming itself is unquestionably just. For the purposes of this paper, therefore, I assume the United States after 9/11 had a just cause for targeting those terrorist groups which posed an ongoing threat of attack, and that it continues to have a just cause for resorting to force insofar as it is genuinely engaged in defensive harming against groups which pose an unjust threat at present.[60]

Yet even if the war itself is fought for a just cause, it may nevertheless prove to be unjustified if, for example, it has not been properly authorised and does not stand a reasonable chance of success. More instructive questions, then, arise as to whether the war has been sanctioned by the people on whose behalf it is fought and whether it can achieve

[58] "Remarks by the President at the National Defense University," *The White House*, May 23, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

[59] Jeff McMahan observes that "the one aim that, except among pacifists, is universally recognised as a just cause for war is self-defence against armed aggression." McMahan, "Preventive War and the Killing of the Innocent," in *The Ethics of War: Shared Problems in Different Traditions*, ed. Richard Sorabji and David Rodin (Aldershot: Ashgate, 2006), 171.

[60] Given the evolving nature of terrorist threats, it is contested whether the United States does in fact face ongoing threats from all the groups with which the United States considers itself to be engaged in armed conflict today. This is a debate on the facts of the matter, however, and not on the justice of defensive harming against such unjust threats in general.

its (ostensibly just) aims. Thorny moral questions also arise concerning necessity, imminence, and who counts as a legitimate target. Finally, policymakers must grapple with the most pressing and urgent question of all: what constitutes victory and how does the war on terror end?

Authorisation and Consent

There are strong normative reasons to suppose that wars should be authorised by the people on whose behalf they are fought. Wars typically are very costly, both in terms of economic and human capital, and the public ultimately must bear the brunt of these costs in the form of taxes, conscription, voluntary military service, damaged property, or loss of life. This moral intuition is encapsulated in the *ad bellum* criterion of legitimate authority, discussed in the second paper, which as I have argued is a necessary condition for declaring war justly.

By parity of reasoning, wars which are fought purely in defence of others similarly should be authorised by those on whose behalf they are waged. With few exceptions, it is generally considered impermissible to use force on behalf of someone else without their express consent.[61] This moral requirement finds its expression in international law, where consent of the host state represents one possible exception to the general prohibition on the use of force found in Article 2(4) of the UN Charter.[62] In cases where the state represents

[61] For a deeper treatment of the relationship between other-defence and consent, see Cécile Fabre, "Permissible Rescue Killings," *Proceedings of the Aristotelian Society* 109 (2009).
[62] Other exceptions to the prohibition on the use of force include UN Security Council authorisation and self-defence. For a more comprehensive discussion on the prohibition on the use of force, see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, 2nd ed. (London: Zed Books, 2021).

the people, official government statements may satisfy the requirement for host state consent.

The question of authorisation and consent has plagued US operations in the war on terror for nearly two decades. From a domestic legal perspective, Congress acted on behalf of the American people when it authorised the war through a nearly unanimous resolution passing the 2001 AUMF in the days immediately following the 9/11 attacks. But that authorisation was granted in haste, before any robust public debate on the war occurred, and it remains in place twenty years later despite continuous calls to repeal and replace the statute. Indeed, some current members of Congress were children at the time of the attacks, and so played no role in explicitly authorising the wars that followed, not even by casting a ballot in the elections by which the then authorising Congress was appointed.[63]

This lack of meaningful authorisation is even more problematic in light of the expansive and evolving nature of the conflict. At the start of the war, the United States was fighting Al Qaeda and the Taliban in Afghanistan. Since then, the 2001 AUMF has been used to justify the use of force against a range of "associated forces" in at least twenty countries, including non-state groups that were fighting Al Qaeda or did not exist at the time of the 9/11 attacks.[64] In 2014, for example, the Obama administration adopted an expansive legal interpretation of the term "successor forces" to include ISIS, and later Al

[63] A plausible objection here might be that Congress in the past has declined to repeal and replace outdated AUMFs, even when the executive branch has supported such a move. Nevertheless, congressional inaction on this issue should not be construed as tacit consent.

[64] "The 2001 AUMF and War Powers: The Path Forward," *House Foreign Affairs Committee Hearing*, March 2, 2022, https://foreignaffairs.house.gov/hearings?ID=63A05C6D-C6D7-4047-AA8E-334EBE265A2E.

Shabaab in Somalia.[65] The full list of successor forces with which the United States is at war remains classified.

The clandestine nature of this war further complicates the question of authorisation. It is difficult to argue that the American people have authorised this war when the public, and indeed even some members of Congress, do not know where and who the United States is fighting. Tacit consent, expressed through the ballot box, is woefully insufficient when even the people's representatives are ill-informed about the nature and scope of the war on terror.[66]

Indeed, executive branch overreach and the failure of Congress to exercise its constitutional responsibilities have frayed the connection between the nation, which embodies the will of the people, and the government, represented by the state. Decades of secretive national security lawyering have enabled the president to resort to force with far too few constraints, giving the executive branch unparalleled freedom of action against the metastasizing threat of transnational terrorism.[67] The executive branch has relied on increasingly strained interpretations of the 2001 AUMF (and, to a lesser extent, the 2002 AUMF) as the legal justification for attacking groups which did not even exist when Congress passed the authorisations. Meanwhile, operations conducted outside of those congressional authorisations, primarily strikes taken under the president's commander-in-chief authority in Article II of the US Constitution, generally have been reported to

[65] Matthew Weed, "A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals," *Congressional Research Service*, February 21, 2017, https://sgp.fas.org/crs/natsec/R43760.pdf.
[66] Brian Finucane, "Failure to Warn: War Powers Reporting and the 'War on Terror' in Africa," *Just Security*, October 4, 2021, https://www.justsecurity.org/78450/failure-to-warn-war-powers-reporting-and-the-war-on-terror-in-africa/.
[67] Oona Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?," *UCLA Law Review* 68(1) (2021).

Congress but have stretched the boundaries of the president's unilateral authority to an almost limitless extent.[68]

Successive democratic administrations have pledged to work with Congress to address these issues and repeal and replace the 2001 AUMF. Progress has been incremental, however, and congressional efforts to restore oversight have not yet borne fruit. The bipartisan National Security Powers Act of 2021, for example, proposes to close loopholes in the War Powers Resolution of 1973—which sought to ensure greater congressional oversight of US conflicts abroad—by defining hostilities as "any situation involving any use of lethal or potentially lethal force by or against United States Forces."[69] This Act, which has not yet been passed into law and may never be, would give Congress and the American people more insight and input into direct action. Other proposed reforms, such as initiating a sunset clause in any new authorisations for the use of force to prevent open-ended conflicts, and explicitly precluding the blanket use of force against "associated" groups, have been rejected by the Biden administration, although it has said that it supports repealing and replacing the 2001 AUMF more broadly.[70]

The issue of obtaining domestic consent is further complicated by the fact that many counterterrorism campaigns include a mix of operations conducted in self- and other-defence. The counter-ISIS missions in Iraq and Syria, for example, have relied on both

[68] The executive branch has maintained that "hostilities" which fall below the threshold of "full military engagement" are not necessarily subject to the 48-hour reporting requirement to Congress and 60-day termination provision contained in the War Powers Resolution of 1973. See Harold Hongju Koh, "Libya and War Powers Testimony," *U.S. Department of State*, June 28, 2011, https://2009-2017.state.gov/s/l/releases/remarks/167250.htm#ftn7. See also Finucane, "Failure to Warn: War Powers Reporting and the 'War on Terror' in Africa."

[69] "Bill S.2391: National Security Powers Act of 2021," *The Senate of the United States*, July 20, 2021, https://www.murphy.senate.gov/imo/media/doc/National%20Security%20Powers%20Act%202021.pdf.

[70] Tess Bridgeman et al., "Principles for a 2021 Authorization for Use of Military Force," *Just Security*, March 5, 2021, https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/.

self-defence and collective defence justifications. In September 2014, Obama announced the acceleration of the counter-ISIS campaign based on the need to protect "the people of Iraq and Syria, and the broader Middle East—including American citizens, personnel and facilities."[71] While he admitted that the United States had not detected any specific ISIS plots against the homeland, Obama claimed that "if left unchecked, these terrorists could pose a growing threat beyond that region, including to the United States."[72]

Iraq arguably gave consent for these counter-ISIS operations, but Syria did not. When the United States intervened in Iraq to save the Yazidis trapped on Mount Sinjar from ISIS, for example, it did so legitimately at the invitation of the Iraqi government. US military operations conducted in Syria, by contrast, have not been authorised by the Syrian government.[73] Instead, the Obama administration relied on the "unwilling or unable" doctrine to carry out operations in Syria based on the argument that the Syrian regime was unwilling to confront the threat posed by ISIS or did not have the ability to do so once it had lost effective control of much of its territory to ISIS in September 2014.[74]

In practice, the "unwilling or unable" doctrine has allowed the United States to assert the right to use force against non-state actors anywhere, regardless of whether the host state (or the people residing within it) have consented to the use of force on their territory. This violation of state sovereignty and lack of consent for US direct action poses

[71] "Statement by the President on ISIL," *The White House*, September 10, 2014, https://obamawhitehouse.archives.gov/realitycheck/the-press-office/2014/09/10/statement-president-isil-1.
[72] Ibid.
[73] Even if the Syrian government had provided such consent, it is unclear at this point in the civil war whether such consent would have been meaningful, given that the government clearly did not represent the people it was fighting.
[74] Brian Egan, "International Law, Legal Diplomacy, and the Counter-ISIL Campaign," *Remarks at the American Society of International Law*, April 1, 2016, https://2009-2017.state.gov/s/l/releases/remarks/255493.htm.

normative, as well as legal, problems.[75] The US government arguably did not have the consent of the American people to go to war in Syria, given both the outdated nature of the 2001 AUMF and the tenuous legal theory that it covered ISIS in the first place. Moreover, the United States did not seek the consent of the Syrian government (or its people) for such operations. In short, the United States neither had domestic nor foreign consent for military operations in Syria, suggesting that, notwithstanding the justness of the cause for war, the war itself may have been unjustified overall.

Carl von Clausewitz notably observed that war is a clash of "wills" involving the ability to act and resist.[76] The "unwilling or unable" doctrine implies, however, that civilians may be held perpetually at risk of the violence of war without ever having consented, through their representatives or otherwise, to participate in that war. US direct action, therefore, does not represent a Clausewitzian clash of wills so much as it does the domination of one group of people exercising their will over another.[77] Civilians living under the shadow of drones have no representation in decisions that the US government makes concerning standards for direct action, nor any effective course of redress for when

[75] For a discussion of some of these legal problems, see Craig Martin, "Challenging and Refining the 'Unwilling or Unable' Doctrine," *Vanderbilt Journal of Transnational Law* 52(2) (2019).

[76] In *On War,* Clausewitz writes: "War is nothing but a duel on an extensive scale. If we would conceive as a unit the countless number of duels which make up a War, we shall do so best by supposing to ourselves two wrestlers. Each strives by physical force to compel the other to submit to his will: each endeavours to throw his adversary, and thus render him incapable of further resistance. War therefore is an act of violence intended to compel our opponent to fulfil our will." Carl von Clausewitz, *On War*, ed. J. J. Graham (Champaign: Project Gutenberg, 1999), 15.

[77] I use the term "domination" in the feminist sense here to mean the abuse of power to inflict one's will on another such that moral standards and/or their best interests are compromised. In employing the term thus, I do not ascribe to the Petittian sense of domination, which implies that relationships of domination exist wherever there is an imbalance of power as such, as routinely occurs in the international system. For a discussion on the relationship between domination and power, see Eva Feder Kittay, *Love's Labor: Essays on Women, Equality and Dependency* (New York: Routledge, 1999), 33-34; Philip Pettit, "Republican Freedom and Contestatory Democratization," in *Democracy's Value*, ed. Ian Shapiro and Casiano Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 119-120.

these policies result in civilian harm. This mode of domination is one of the primary moral wrongs of the war on terror.

Force as a Last Resort

The second ethical dilemma that arises in the war on terror concerns the *jus ad bellum* criterion of last resort, also referred to as necessity, and anticipatory self-defence. Just war theory specifies that the decision to resort to force must be a last resort, when all less harmful options have been exhausted.[78] "War is hell," as the saying goes, and so policymakers must not undertake the decision to go to war lightly. The criterion of last resort therefore imposes a necessity condition on the use of force, requiring policymakers to consider whether resorting to force can achieve a just cause and whether force is indispensable to achieving this cause.[79] As Henry Shue puts it, war "must be necessary in the sense that there is no effective means to the prevention of the evil that might be resisted that will create less evil than war will."[80]

In a strict interpretation of the requirement, states may resort to defensive force only to repel an armed attack that is ongoing or about to occur, that is, when a threat is temporally imminent.[81] This notion of imminence is contained in the landmark pronouncement of the internationally-recognised Caroline rule, which asserts that force

[78] For an overview of the legal issues concerning the *jus ad bellum* criterion of necessity, see *Necessity in International Law*, ed. Jens David Ohlin and Larry May (Oxford: Oxford University Press, 2016).
[79] Suzanne Uniacke, "The Condition of Last Resort," in *The Cambridge Handbook of the Just War*, ed. Larry May, Shannon Fyfe, and Eric Ritter (Cambridge: Cambridge University Press, 2018), 101.
[80] Henry Shue, "Last Resort and Proportionality," in *Oxford Handbook of Ethics of War*, ed. Helen Frowe and Seth Lazar (2015), 263.
[81] David Rodin argues persuasively that preventive war cannot be morally justified on consequentialist, psychologically necessity, or human rights-based grounds. He contends that the latter approach gives rise to a paradox where, if following the doctrine of prevention is morally justified, then waging preventive wars must be unjustified and vice versa. See Rodin, "The Problem with Prevention," in *Preemption: Military Action and Moral Justification*, ed. Henry Shue and David Rodin (Oxford: Oxford University Press, 2007).

may be used in self-defence only when the threat is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[82] In such cases, as Dapo Akande and Thomas Liefländer argue, "there seems to be an almost irrebuttable presumption here that such a use of force in self-defense would pass the test of necessity."[83]

This interpretation of the criterion, however, has come under increasing strain in the war on terror, as the United States has relied on expanded notions of imminence in its justification of anticipatory self-defence. In the 2002 US National Security Strategy, the Bush administration fundamentally redefined the concept of imminence, claiming the right to resort to force in response to "emerging threats before they are fully formed."[84] This doctrine of preventive war marked a sharp departure from the Caroline standard, and formed the basis for justifying the invasion of Iraq and official positions taken in subsequent counterterrorism wars.[85]

The Obama administration cemented the shift in its embrace of the Bethlehem principles, which broadened the concept of imminence beyond temporal factors.[86] In a

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[82] See "British-American Diplomacy: The Caroline Case," in *Treaties and Other International Acts of the United States of America*, ed. David Hunter Miller (Washington: United States Government Printing Office, 1931).

[83] Dapo Akande and Thomas Liefländer, "Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense," *The American Journal of International Law* 107(3) (2013): 564.

[84] "The National Security Strategy of the United States of America," *The White House* (September 2002): 2, https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.

[85] US officials frequently have referred to this doctrine as one of "preemptive," rather than "preventive," war. However, as David Rodin notes, this is merely "a rhetorical sleight of hand. According to well-established legal usage, preemption consists in a first strike against an enemy who has not yet attacked but whose attack is clearly imminent. It involves 'anticipating' an aggressor who is literally poised to attack. Prevention, on the other hand, involves a first strike against a potential future aggressor who does not yet pose an imminent threat." Rodin, "The Problem with Prevention," 144. See also McMahan, "Preventive War and the Killing of the Innocent," 170.

[86] The Bethlehem principles define imminence in terms of "the nature and immediacy of the threat; the probability of an attack, whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss, or damage." Daniel Bethlehem, "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or

speech in 2011, Brennan claimed that "the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations."[87] That same year, a leaked Department of Justice (DOJ) White Paper indicated that a "broader concept of imminence" was needed because waiting until "some theoretical end stage of planning" would place American lives at "unacceptably high risk."[88] Attorney General Eric Holder confirmed this view in a speech in 2012, where he argued that whether "an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the US."[89]

As part of these discussions, US officials adopted the view that lethal force could be used against "continuing, imminent" threats, a seemingly paradoxical concept since continuity implies an ongoing threat, whereas imminence suggests the threat has not yet begun. The 2011 DOJ White Paper defined "continuing, imminent" threats as cases where terrorist groups were "continually planning" attacks and would "engage in such attacks regularly" if they were able to do so.[90] Then State Department Legal Advisor Harold Koh defended this concept, which he referred to as "elongated imminence," by comparing

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Actual Armed Attack by Nonstate Actors," *The American Journal of International Law* 106 (2012): 1-8; Egan, "International Law, Legal Diplomacy, and the Counter-ISIL Campaign."

[87] John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," *Speech at Harvard Law School*, September 16, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

[88] "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," *Department of Justice White Paper* (November 8, 2011), https://irp.fas.org/eprint/doj-lethal.pdf.

[89] Eric Holder, "Attorney General Eric Holder Speaks at Northwestern University School of Law," *Speech at Northwestern University*, March 5, 2012, https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

[90] "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," 7-8.

counterterrorism operations to the "Battered Spouse Syndrome," where a wife might pre-emptively kill an abusive husband who demonstrated a "consistent pattern" of abuse and was likely to do so again.[91]

The problem with elongated imminence is that, on an individual rights-based account of war, its legitimacy turns on the reasonableness of the presumption of future liability to be killed.[92] Clearly enough, a history of violence alone is not a sufficient justification for engaging in defensive harm. The husband may have repented from his abusive ways; the wife may be misinterpreting current actions based on past history.[93] Was it reasonable for the wife to presume that her husband would kill her, and that he therefore would forfeit his right not to be killed, based on the information available to her at the time? In such cases, there is a risk that decisions about defensive harming made solely on the basis of past actions, without reference to intent to commit future attacks and evidence of actions to eventuate that intent, may resemble punishment more than self-defence. A pattern of conducting past attacks, then, is not a sufficient criterion for engaging in defensive harming when a threat is not temporally imminent.

What about suspects who are "continually planning" attacks, even long before such attacks are about to be committed? The answer to this dilemma lies in the relationship between the last resort criterion and imminence. While the relationship between last resort and imminence is complex, in general, the shorter the timeframe before an attack is expected to occur, the less stringent the requirement is to evaluate alternative options as

[91] Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston: Houghton Mifflin Harcourt, 2012), 219.
[92] For a consequentialist defence of preventive war, see David Luban, "Preventive War," *Philosophy & Public Affairs* 32(3) (2004).
[93] McMahan, "Preventive War and the Killing of the Innocent," 172-181.

required by the last resort criterion. If a murderer is about to fire his gun, the intended victim has far less time to identify and evaluate alternative means for effectively mitigating the threat than if the murderer merely is planning an attack. The last resort criterion, therefore, is subject to two constraints, which I term the availability and probability of success conditions. First, the option must be available to the victim, based on the evidence at the victim's disposal or evidence that the victim reasonably could have acquired. Second, the option must be as likely, or nearly as likely, to succeed in mitigating the threat as more harmful options.

Temporal factors play a role in shaping the availability and probability of success constraints. If a threat is temporally imminent, both conditions may be less stringent; there is less time to gather evidence on alternative courses of action and it is less likely that those alternatives will succeed in averting the threat. Conversely, a longer timeframe until the threat eventuates suggests that policymakers have a moral duty to investigate and employ less harmful options, such as working with a third country liaison partner to arrest the would-be attacker. Ultimately, the fact that an attacker is "continually planning" attacks does not tell us anything about whether the availability and probability of success conditions have been met; only the stage of planning and actions taken to carry out those plans provide an indication of the temporal window before the attack will take place.

To see why this is so, consider the following example. Suppose Red has a longstanding rivalry with Blue, such that there is a history of tit-for-tat attacks between them. Red has intelligence that Blue is planning to conduct another attack in the future, but the intelligence is not specific about the location or timing of the attack. Should Red pre-emptively attack Blue to disrupt the potential attack? At this point in time (call it t_1), we

would say that Red should not attack Blue because the intelligence is vague and could be wrong. Red cannot know, with any epistemic certainty, that Blue poses a threat and is therefore liable to be killed. Instead, Red should gather more information in an attempt to construct a fuller picture of the planned attack, while strengthening its defences.

Red decides to collect more intelligence and discovers, at time t_2, that Blue has bought a cache of explosives that it intends to use on Red's soil. At this point, Red still has several policy options; it can try to interdict the explosives, for example, or work with liaison partners to do so. At time t_3, however, Red intercepts an electronic communication indicating that a bomb maker in the employment of Blue is planning to travel to Red. Red has an opportunity to conduct a drone strike against the bomb maker before he travels under alias documents, causing Red to lose track of him.

At time t_3, unlike at time t_1 or t_2, Red has greater confidence that the threat will eventuate, even though the precise timing of the attack is still unknown. Even in such circumstances, necessity requires Red to arrest, rather than kill, the bomb maker if it is able to do so. But if it is not able to do so, Red is not required to put innocent lives at risk by doing nothing; Red may kill the bomb maker. What is necessary at time t_3 is different than what is necessary at time t_1 or t_2.

This discussion highlights the connection between the last resort and imminence criteria. The relevant question is not whether a threat is temporally imminent per se, but rather whether it is necessary to use military force to mitigate a threat at a certain point in time. As we have seen, the principle of last resort is sensitive to temporal factors in terms of determining the availability and effectiveness of alternative defensive options. The focus on imminence as a separate criterion therefore is misplaced; policymakers instead should

consider temporal factors in the context of fulfilling the last resort and necessity requirements.

Necessity

Once policymakers have made the decision to resort to force, the *jus in bello* normative principle of necessity further requires operators to use the least harmful defensive means necessary to mitigate threats. In other words, even if resorting to force is necessary as a matter of last resort, operators have an additional moral duty to ensure that the least harmful defensive option is used that would still be effective in averting, eliminating, or otherwise substantially reducing the threat. In contrast to conceptions of military necessity, the normative principle of necessity requires operators to choose the defensive option which causes the least morally-discounted harm, meaning the option that causes the least harm to the would-be attacker without inflicting harm on innocent victims.[94]

The Obama administration incorporated the spirit of necessity in the policy guidance on direct action by expressing a preference for capture over kill operations. The PPG states that "the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action. Lethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to

[94] The DOD Law of War Manual defines military necessity as "all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war." "Department of Defense Law of War Manual," *Office of General Counsel Department of Defense* (June 2015 (Updated December 2016)): 52, https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

effectively address the threat."[95] While the Trump administration weakened this requirement in the subsequent iteration of the policy guidance, the PSP nevertheless affirmed that the "capture of terrorist targets is generally preferred over lethal action" and that direct action should be employed only when "reasonably necessary."[96]

Neither of these formulations, however, fully reflect the normative considerations at stake. The guidance on direct action requires policymakers to consider only "reasonable alternatives" for effectively mitigating a threat, not all less harmful defensive options. Since no definition of reasonableness is provided, it is not clear whether and to what extent officials must conduct due diligence in identifying and evaluating alternative policy options. The guidance focuses on capture as an alternative to lethal action, but does not urge decisionmakers to consider other policy options, including defensive measures that could be taken at home. The discussion of capture operations, moreover, centres on questions of feasibility, without providing any indication of the criteria for making such determinations. In practice, it is possible that these feasibility assessments represented little more than a box-checking exercise, given the risks to US forces and legal complexities involved with capturing and detaining terrorist suspects.

Legitimate and Illegitimate Targets

In addition to necessity, another *in bello* policy challenge concerns the question of who counts as a legitimate target and under what circumstances that person can be targeted. In war, the principles of discrimination—also referred to in law as distinction—and non-

[95] "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," 1.
[96] "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets," 3-4.

combatant immunity dictate that combatants must be distinguished from civilians, and only the former are legitimate targets. Combatants on both sides of a conflict may target and kill each other on a continuous basis, even when they are not directly engaged in active hostilities, without violating international law.

While it is hardly controversial, at least from a legal perspective, to assert that all combatants are legitimate targets in war, there are two issues that arise with respect to the use of force outside of conventional warfare. First, it is unclear whether the practice of status-based targeting—killing individuals solely because they are members of an armed group—is permissible outside of "areas of active hostilities." International law unequivocally prohibits such targeting outside of an armed conflict. Yet a substantial number of drone strikes occur in the "grey zone" between war and peace, which complicates efforts to assess whether International Humanitarian Law (IHL), which permits status-based targeting, applies.

In non-international armed conflicts (NIACs), the International Committee of the Red Cross (ICRC)'s Interpretive Guidance allows for both status-based and conduct-based targeting. On this view, individuals may be targeted if and only if they are members of the armed forces of a state or organised armed group (defined as individuals who have a "continuous combat function") or when they are directly participating in hostilities.[97] The latter determination is made by satisfying three elements: (1) threshold of harm, where the act must "adversely affect the military operations or military capacity" of a party to an armed conflict or those protected against direct attack; (2) direct causation, where there must be a "direct causal link" between the act and the resulting harm that is separated by

[97] Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law," *International Committee of the Red Cross* (May 2009): 36.

no more than "one causal step"; and (3) belligerent nexus, where the act must be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[98]

Second, even with these legal categories in hand, it is often very difficult in practice to make factual determinations about whether individuals meet the above criteria. In the absence of uniformed armies facing off on the battlefield, combatants may be indistinguishable from civilians unless and until they take up arms. Insurgents fight from rooftops and doorways, blending into both the local terrain and civilian population. The civilian-combatant distinction is eroded further when civilians participate in the conflict, directly or indirectly, by taking up arms, as well as providing shelter, food, weapons, intelligence, and tactical assistance. Afghan farmers, for example, may fight for the Taliban for three months of the year before returning to their farms. Under such circumstances, it may be difficult to apply the principle of discrimination accurately.

During the Obama administration, the policy guidance sought to address this issue by requiring direct action to be "as discriminating and precise as reasonably possible" in that combatants alone may be deliberately targeted.[99] A combatant in this context is defined as "an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense."[100]

There is no settled legal standard, however, for determining who should qualify as a combatant by virtue of membership in an organised armed group. The United States

[98] Ibid., 46-64.
[99] "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," 1.
[100] Ibid.

makes this determination based on whether individuals are "formally or functionally" part of a non-state armed group, using definitions of "formal" and "functional" membership that allow individuals who perform a wide range of non-military functions for the group to be targeted continuously.[101] Evidence of formal or functional membership in an armed group may include, for example, intent to fight against the United States or its coalition partners, swearing an oath of allegiance to an armed group, providing "substantial" support to the group, "accessing facilities, such as safehouses, training camps, or bases used by the group," "traveling along specific clandestine routes used by the group," or "traveling with members of the group in remote locations or while the group conducts operations."[102] In practice, this broad definition has allowed the United States to conduct "signature strikes" where individuals are targeted based on pattern-of-life activity and certain characteristics that are associated with terrorism.[103]

The United States also diverges from widely accepted interpretations of international law on what constitutes "direct participation in hostilities." The DOD Law of War Manual asserts: "civilians who take a direct part in hostilities forfeit protection from being made the object of attack," but explicitly states that taking "direct part in hostilities" does not imply US acceptance of the direct participation in hostilities rule in Article 51 of Additional Protocol I (AP I) of the UN Charter (nor the ICRC's interpretive guidance on the matter).[104] In the US view, taking a direct part in hostilities "extends beyond merely

[101] By "non-military functions," I mean individuals who are not engaged in the act of fighting, such as financiers and couriers. "Department of Defense Law of War Manual," 222-224.
[102] Ibid.
[103] The United States also has conducted strikes against targets who were assessed to be involved in plotting attacks, even when it did not know the identities of those involved. Becker and Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will."
[104] "Department of Defense Law of War Manual," 226. Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law."

engaging in combat" to include certain acts which "effectively or substantially contribute to an adversary's ability to conduct or sustain combat operations."[105] Assessing whether individuals are taking direct part in hostilities is therefore highly context dependent, and various factors may be taken into consideration such as "the degree to which the act is temporally or geographically near the fighting."[106] In contrast to the ICRC's position, the US military also maintains that there is no "revolving door" of protection for civilians, where civilians are immune from attack "between instances of taking a direct part in hostilities."[107]

From a normative perspective, the above definitions allow for considerable leeway in determining who is a legitimate target in asymmetric conflicts. To a far greater extent than in conventional warfare, these criteria allow operators to target a wide range of civilians who are engaged in non-military activities and therefore are less likely to be sufficiently morally responsible for posing an unjust threat that would render them liable to be killed. The risk of making mistakes about liability is exacerbated by the fact that it is not clear which, if any, of the targeting criteria are necessary and sufficient for an individual to be added to the "kill list." Intent to fight against the United States, for example, is an insufficient reason to target an individual, but, as was noted in *Awad v. Obama*, this criterion may be "compelling" when there is "additional evidence of conduct consistent with an effectuation of that intent."[108]

Finally, these criteria do not address the fundamental issue of signature strikes outside of clearly defined conflicts. While signature strikes are a common military practice

[105] "Department of Defense Law of War Manual," 228-229.
[106] Ibid., 230.
[107] Ibid., 235.
[108] See "Awad v. Obama," in *608 F.3d 1* (D.C. Cir. 2010), at 9. https://casetext.com/case/awad-v-obama-3.

in conventional warfare, this tactic raises serious normative concerns in the context of targeted killings outside of active battlefields.[109] Notably, the criteria outlined in US policy documents do not foreclose the possibility of such strikes; killing individuals based on travel patterns, for example, is a form of signature-based targeting. Applying these types of standards to targeting decisions may lead to outcomes such as in the Zowi Sidgi case in 2012, in which two drone strikes in Pakistan reportedly killed 18 mining and farm labourers, including those who rushed to the scene after the first strike in an attempt to rescue survivors.[110] These strikes took place three miles from the Afghan border, in an area that was a well-known travel corridor for Taliban fighters.[111]

The Zowi Sidgi case underscores the importance of ensuring that robust targeting criteria are in place. The Obama administration took important steps towards developing such criteria in the PPG, namely by adding the stipulation that lethal action should be authorised "only if there is near certainty that the action can be taken without injuring or killing non-combatants."[112] While the "near certainty" requirement imposes far higher standards than what is required under IHL, the normative force of this criterion depends on whether the United States is properly defining who counts as a combatant in the first place.

Even with stricter standards in place, however, the problem of misidentification, where civilians are mistaken for combatants, will persist and result in civilian harm. Acute epistemic uncertainty concerning liability to be killed is an inherent feature of asymmetric warfare due to the conflict unfolding in the midst of civilian life, against combatants who

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[109] Daniel Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," *The Brookings Institution*, June 17, 2013, https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/.
[110] "Will I be Next?: US Drone Strikes in Pakistan," *Amnesty International* (October 2013): 24-27, https://www.amnestyusa.org/files/asa330132013en.pdf.
[111] Ibid.
[112] "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets," 1.

wear no uniforms or other identifying insignia. While reconnaissance and surveillance technology in drones can reduce epistemic uncertainty to a certain extent, there is a high risk that strikes based on inaccurate or outdated intelligence will mistakenly target civilians. Technology, moreover, is not a silver bullet for reducing epistemic uncertainty in war. Surveillance platforms are an expensive and finite resource, and advanced sensors cannot be deployed in every military confrontation. Even when advanced technology is deployed, the "soda straw" problem, where drone operators fail to perceive civilians just outside the surveillance radius, means that multiple drones are often required to assess the situation accurately.[113]

The problem of epistemic uncertainty is compounded by confirmation bias, where operators perceive patterns of otherwise innocuous activities as suspicious based on preconceived notions and misinterpretations of intelligence reporting.[114] A man carrying a gun in rural Afghanistan, for example, may pose a threat or may simply be seeking to protect himself. Two men talking on the radio may be planning an attack, or simply communicating with family members. And a man filling his jeep with drums presumed to be full of explosive materials may turn out to be a humanitarian aid worker filling up water jugs for his family, as in the August 29, 2021 drone strike in Kabul.[115]

In such cases, international law requires a higher standard than the US military. Article 57 of AP I requires belligerents to "take all feasible precautions" to verify that targets are not civilians nor civilian objects, and Article 50 states: "in case of doubt

[113] Thomas Ricks, "Five Big Problems with the Drone Programs," *Foreign Policy*, December 10, 2015, https://foreignpolicy.com/2015/12/10/5-big-problems-with-the-drone-programs/.
[114] Brianna Rosen, "Tragic Mistakes: Breaking the Military Culture of Impunity," *Just Security*, November 23, 2021, https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/.
[115] Charlie Savage et al., "Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike," *The New York Times*, January 19, 2022, https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html.

whether a person is a civilian, that person shall be considered a civilian."[116] The ICRC Commentary on the Additional Protocols similarly affirms that in situations where there may be "room for doubt" or "hesitation," "the interests of the civilian population should prevail."[117]

The US military does not operate under this presumption of civilian status as a matter of law. The DOD Law of War Manual requires officers to take "feasible precautions" (decidedly avoiding the standard international term of "*all* feasible precautions") to "reduce the risk of harm to civilians," and then goes on to say that these precautions must be based simply on "good faith" interpretations of the information "available to them at that time."[118] On this view, there is no requirement to refrain from conducting attacks when there is doubt about an individual's status, even when a strike is not taken in self-defence or under significant time pressure.

In short, it is impossible for the US government to reduce civilian harm in these types of conflicts if it does not first address the risk that civilians will be misidentified as combatants in the first place and take all feasible precautions to mitigate this risk.[119] But here, again, civilian harm is a systemic problem stemming from an overly broad definition of who counts as a "combatant" and overly permissive rules of engagement.

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[116] "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977," *United Nations*, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf.

[117] "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949," *International Committee of the Red Cross*, June 9, 2020, https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949.

[118] "Department of Defense Law of War Manual," 63. In contrast to the DOD Law of War Manual, Article 57 of AP I requires belligerents to "take all feasible precautions" to verify that targets are not civilians nor civilian objects. "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977."

[119] Adil Haque argues that a "precaution should be considered feasible unless taking that precaution would increase the risk to soldiers substantially more than taking that precaution would decrease the risk to civilians." Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), 156. For an in-depth treatment of the legal and moral considerations surrounding precautions, see Ibid., Ch. 7.

The Tipping Point

Finally, policymakers must grapple with the difficult question of how the war on terror ends. Previous US administrations have not adequately addressed this question, which has significant implications for targeting and detention practices. Most notably, the end of the armed conflict that has been ongoing since 9/11 would signal a return to the law of peace, or International Human Rights Law (IHRL). Since IHL does not apply outside of war, members of terrorist groups could no longer be targeted continuously based on their status and those who had been detained would have to be released.

The Obama administration envisioned the end of the war on terror as occurring at a "tipping point" where terrorist groups were largely defeated and law enforcement would suffice to deal with threats to US national security.[120] Proponents of this approach argued that, once the threat had receded, terrorists should be arrested and tried in accordance with domestic and international criminal law. Still others argued that terrorism was a "crime against humanity," and that the United States never should have treated the 9/11 attacks as an act of war in the first place.[121]

The tipping point, however, never came. For years, US officials claimed victory against terrorist groups such as Al Qaeda and ISIS while continuing to wage war on their affiliates.[122] Policymakers neglected to set any recognisable end point for this war, any achievable milestones which, once reached, would signal a return to peace. Without the

[120] Jeh Charles Johnson, "The Conflict Against Al Qaeda and its Affiliates: How Will it End?," *Oxford Union*, November 30, 2012, https://www.lawfareblog.com/jeh-johnson-speech-oxford-union.
[121] Michael Ratner, "A Crime Against Humanity and Not War: Making Us Safer at Home and Stopping Carnage Abroad," *Guild Practice* 129 (2001): 134.
[122] Antony Blinken, "Press Release On the Second Anniversary of ISIS's Territorial Defeat," *U.S. Department of State*, March 23, 2021, https://www.state.gov/on-the-second-anniversary-of-isiss-territorial-defeat/.

prospect of a negotiated settlement, victory was measured not in terms of the restoration of order, but in terms of national security, often defined loosely as the number of attacks thwarted or deterred. Killing thus became both the principal means and end in the war, even as real threats, foreign and domestic, persisted.

As the war on terror enters a third decade, there is still no victory in sight. There are now more terrorist organisations worldwide than there were twenty years ago.[123] The Taliban has regained control of Afghanistan, and US military officials assess that terrorist groups such as ISIS and Al Qaeda could reconstitute and pose a threat to the United States in as little as a year.[124] Al Qaeda, meanwhile, maintains a foothold in Yemen, while Al Shabaab poses a growing threat in Somalia that has already spilled beyond its borders.[125] While direct action has produced real tactical successes, some studies suggest that successful counterterrorism operations may actually increase the incidence of terrorist attacks.[126] The efficacy of counterterrorism policy is beyond the scope of this paper, but US official statements lend credence to the view that the goal of eliminating terrorist threats

[123] Audrey Kurth Cronin, "The Future of America's Drone Campaign," *Foreign Affairs*, October 14, 2021, https://www.foreignaffairs.com/articles/afghanistan/2021-10-14/future-americas-drone-campaign.
[124] In a US Senate hearing on September 2021, the Chairman of the Joint Chiefs of Staff General Mark Milley warned that transnational terrorist groups in Afghanistan could reconstitute and threaten the US homeland in as little as 12 to 36 months. "Hearing to Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations," *U.S. Senate Committee on Armed Services*, September 28, 2021, https://www.armed-services.senate.gov/imo/media/doc/21-73_09-28-2021.pdf.
[125] Luke Hartig and Oona Hathaway, "Still at War: The United States in Yemen," *Just Security*, March 24, 2022, https://www.justsecurity.org/80806/still-at-war-the-united-states-in-yemen/; Oona Hathaway and Luke Hartig, "Still at War: The United States in Somalia," *Just Security*, March 31, 2022, https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia/.
[126] In an empirical study on US drone strikes in Pakistan, Anouk Rigterink demonstrates that strikes which successfully hit terrorist leaders were associated with an increase in terrorist attacks compared to strikes which missed their targets. See Anouk S. Rigterink, "The Wane of Command: Evidence on Drone Strikes and Control within Terrorist Organizations," *American Political Science Review* 115(1) (2021): 32.

has never been and will never be achieved, even though the importance of mitigating such threats remains.[127]

Even in the absence of a broader strategy for achieving victory, the United States continues to apply the war paradigm to most counterterrorism operations. The 2001 AUMF remains in place as the domestic legal authority for such operations, and US officials maintain that the armed conflict with Al Qaeda and "associated forces" is ongoing despite the end of conventional fighting in Afghanistan. As a result, the laws of war, rather than law enforcement standards, still apply in many places around the world.

The fluid nature of the war on terror, which encompasses both the purported armed conflict against terrorist groups and direct action outside of "areas of active hostilities," makes it difficult to discern the scope of this conflict. Indeed, "area of active hostilities" is not a legal term of art and does not map neatly onto the notion of armed conflict. The Obama administration explicitly stated that "whether a region constitutes an 'area of active hostilities' does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope of the terrorist threat, the scope and intensity of US counterterrorism operations, and the necessity of protecting US forces in the relevant location."[128] While the stricter policy guidance concerning targeting and detention applied

[127] In a speech articulating core counterterrorism principles for the Biden administration, Assistant to the President for Homeland Security Liz Sherwood-Randall observed that "even though we judge that the threat of large-scale attacks against the homeland is currently diminished, we must remain vigilant." Liz Sherwood-Randall, "Remarks as Prepared for Delivery by Assistant to the President for Homeland Security, Dr. Liz Sherwood-Randall on the Future of the U.S. Counterterrorism Mission: Aligning Strategy, Policy, and Resources," *The White House*, September 8, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-assistant-to-the-president-for-homeland-security-dr-liz-sherwood-randall-on-the-future-of-the-u-s-counterterrorism-mission-aligning-strategy-policy-and-resources/.

[128] "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," 25.

outside of areas of active hostilities, only the baseline laws of war applied within such areas.

This conceptual confusion concerning the scope of the war on terror complicates efforts to determine when and how it ends. In legal and practical terms, identifying the end of NIACs is particularly difficult due to the lack of established international law, inconsistent state practice, and the complexity of factors that ultimately bring such conflicts to an end. As Dustin Lewis, Gabriella Blum, and Naz Modirzadeh argue, "the current plurality of legal concepts of armed conflict, the sparsity of IHL provisions that instruct the end of application, and the inconsistency among such provisions thwart uniform regulation and frustrate the formulation of a comprehensive notion of when wars can, should, and do end."[129] Drawing on existing international law and scholarship, the authors suggest that NIACs end: (1) when either the intensity of hostilities or organisation of the non-state actor group falls below the threshold of armed conflict; (2) upon the general cessation of combat operations; (3) when there is no "reasonable risk" of a resumption of hostilities; or (4) when a peaceful settlement has been reached.[130]

The updated ICRC Commentary to Article 3 of the first Geneva Convention states that an assessment of when NIACs have come to an end should take into account four factors. First, the NIAC may cease when one of the parties to the armed conflict ceases to exist, such as in the case of a complete military defeat of one of the parties. Second, ceasefires, peace agreements, or other negotiated settlements are "neither necessary nor sufficient" to signal the end of a NIAC, since hostilities may resume regardless of such

[129] Dustin Lewis, Gabriella Blum, and Naz Modirzadeh, "Indefinite War: Unsettled International Law on the End of Armed Conflict," *Harvard Law School Program on International Law & Armed Conflict* (February 2017): ii.
[130] Ibid.

agreements. Third, a "lasting cessation" of armed confrontations "without real risk of resumption" will "undoubtedly" constitute an end of a NIAC. Four, a "temporary lull" in armed confrontations does not "automatically" constitute the end of a NIAC.[131]

These legal theories, however, do not address the fundamental question of when NIACs should end. When is the United States morally obligated to end the war on terror and how can this be done in a way that is morally optimal? Since terrorism will always pose a threat, and there is always a "reasonable risk" that hostilities will resume, should the United States commit to fighting this war indefinitely? Should the United States continue to engage in a strategy of targeted killing or are there other policy tools that could mitigate the threat? These normative questions have been largely neglected in the philosophical literature, notwithstanding resurgent interest in *jus post bellum*.

5.3 TOWARDS AN ALTERNATIVE APPROACH

Thus far I have identified ethical dilemmas that arise in the US-led war on terror concerning authorisation and consent, the meaning of necessity and imminence, liability to be killed, and the moral obligation to stop fighting. I have argued that, notwithstanding the two-decade-old 2001 AUMF, the war on terror has not been properly authorised due to the classified nature of the conflict, and that this has inhibited robust public debate. The concept of imminence, meanwhile, has been stretched beyond recognised temporal factors to the point where it no longer provides a meaningful constraint on the use of force as a last resort. At the same time, targeting standards have become more permissive to include

[131] "Commentary of 2020 Article 3: Conflicts Not of An International Character," *International Committee of the Red Cross* (2020): Paras 522-526, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#4_B.

not only combatants, broadly defined, but also civilians who may be considered to be "directly participating in hostilities" without firing a single shot. These rules have become the norm, rather than the exception, due to the failure to identify any moral, legal, or strategic endpoint for the war on terror.

The preceding discussion suggests several areas for reform. In revising the policy guidance on direct action, US officials should draw inspiration from revisionist, rather than traditionalist, just war thinking. In the past two decades, the increasing "humanisation" of international law and the normative emphasis on reductivism have marked a shift away from collectivism towards a more cosmopolitan, individualist approach to the use of force.[132] More than ever before, the preservation of individual rights has become the lodestar for public policy and the normative standard by which it is judged. A reorientation of US counterterrorism policy is needed to reflect these trends and affirm the salience of individual rights in war.[133] To that end, the US government should take the following steps:

1. Ensure all operations are properly authorised under new AUMFs and seek consent of the host state prior to engaging in direct action.

It is well past time to repeal, and not merely repeal and replace, the outdated 2001 AUMF. If domestic legal authorities are still needed for counterterrorism operations, then Congress,

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[132] See Jennifer Welsh, "The Individualisation of War: Defining a Research Programme," *Annali della Fondazione Luigi Einaudi* 53(1) (2019): 9-28; Gabriella Blum, "The Individualization of War: From War to Policing in the Regulation of Armed Conflicts," in *Law and War*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Redwood City: Stanford University Press, 2014), Ch. 3; Janina Dill, "Should International Law Ensure the Moral Acceptability of War?," *Leiden Journal of International Law* 26(2) (2013): 253-270.

[133] This project has advanced most significantly under the rubric of "revisionism," a loose collection of just war theories based on reductivism—the notion that the moral principles that govern war are reducible to the principles that govern everyday life—and individualism. For insightful and robust defences of these claims, readers are advised to refer to Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); and David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002).

with input from the American people, should have those debates and pass new legislation for each terrorist group that poses an ongoing threat within a particular geographic area. In addition to ensuring that counterterrorism operations are properly authorised, repealing the 2001 AUMF would send an important signal that the war on terror has ended, lending credence to the view that US targeting and detention practices should now align more closely with law enforcement standards, rather than the laws of war.

The Biden administration has committed to repealing and replacing the 2001 AUMF with a "narrow, specific framework" for the use of force.[134] Yet in a House Foreign Affairs Committee hearing in March 2022, US Deputy Secretary of State Wendy Sherman stated that the administration does not support adding a "sunset clause" to a replacement AUMF, a key reform that would ensure appropriate congressional deliberation regarding the scope of any new conflicts.[135] Notwithstanding the administration's commitment to revise the AUMF, a report from President Biden to Congress indicated that in 2021 there were no changes in the targeting criteria or the ways in which the 2001 AUMF has been applied in Afghanistan, Iraq, Syria, and Somalia.[136]

From a domestic perspective, ensuring that counterterrorism operations are properly authorised is a basic and fundamental component of democratic accountability.[137]

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[134] "Senate Hearing on the Authorization for Use of Military Force (AUMF)," *Senate Foreign Relations Committee*, August 3, 2021, https://www.c-span.org/video/?513875-1/senate-hearing-authorization-military-force-aumf.
[135] Ibid.
[136] "Letter to Certain Congressional Committees on the Annual Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," *The White House*, March 1, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/letter-to-certain-congressional-committees-on-the-annual-report-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations/.
[137] Christopher Kutz writes that there are "at least three important connections between democracy and war: relations of support, ends, and means. The support relation asks whether the choice to fight a war is grounded in democratic activity…waged on the basis of authorization of the polity, or its representatives." Christopher Kutz, *On War and Democracy* (Princeton: Princeton University Press, 2016), 198-199.

Democratic accountability plays an important role in restraining the tendency to resort to collective violence, particularly forms of violence that policymakers perceive to be "riskless," such as drone warfare. The choice to go to war, particularly a war fought through clandestine means, therefore must be grounded in the support of the people, or at least their elected representatives.

From an international perspective, the issue of consent and authorisation also has important ramifications for the perceived legitimacy of US military operations abroad. Afghanistan will be an important litmus test. In the wake of the US withdrawal in August 2021, the United States can no longer rely on host state consent from the previous government as the international legal basis for operations in the country. Since the Taliban regime has not yet been formally recognised as the official government of Afghanistan, it is unclear whether the United States should seek consent from the Taliban prior to conducting counterterrorism operations in country, whether the group would grant such consent if asked, and whether such consent would be meaningful in light of the fact that the Taliban are not the elected representatives of the people. As in Syria, the United States may choose to rely on the "unable or unwilling" doctrine to provide a fig leaf of legitimacy for "over-the-horizon" operations in Afghanistan.

US officials should resist this path. Expanding the "unable or unwilling" doctrine to more states risks further eroding international laws and norms surrounding state sovereignty. These norms are important insofar as they are designed to ensure, as much as possible, that states do not operate on the territory of other states without the consent of the people living there, which would infringe upon their individual rights. In cases of other-defence, consent is a necessary condition for the use of force, and policymakers must seek

such consent from the people living in countries which are subject to direct action, either through their elected representatives or other means. Official statements from the host state, for example, would demonstrate that the United States has consent to conduct counterterrorism operations on the territory of that state.

2. Adopt a strict view of necessity, taking into account the immediacy and gravity of the threat.

The necessity criterion stipulates that the use of force should be a last resort, employed in cases where less harmful alternatives will insufficiently address a threat that is imminent. The perceived lower costs of direct action, however, have rendered it a politically expedient option short of war, thereby foreclosing serious debate on less harmful means of mitigating threats. Consequently, targeted killing in many instances has become the default policy option for countering the diffuse and ubiquitous threats posed by transnational terrorism.

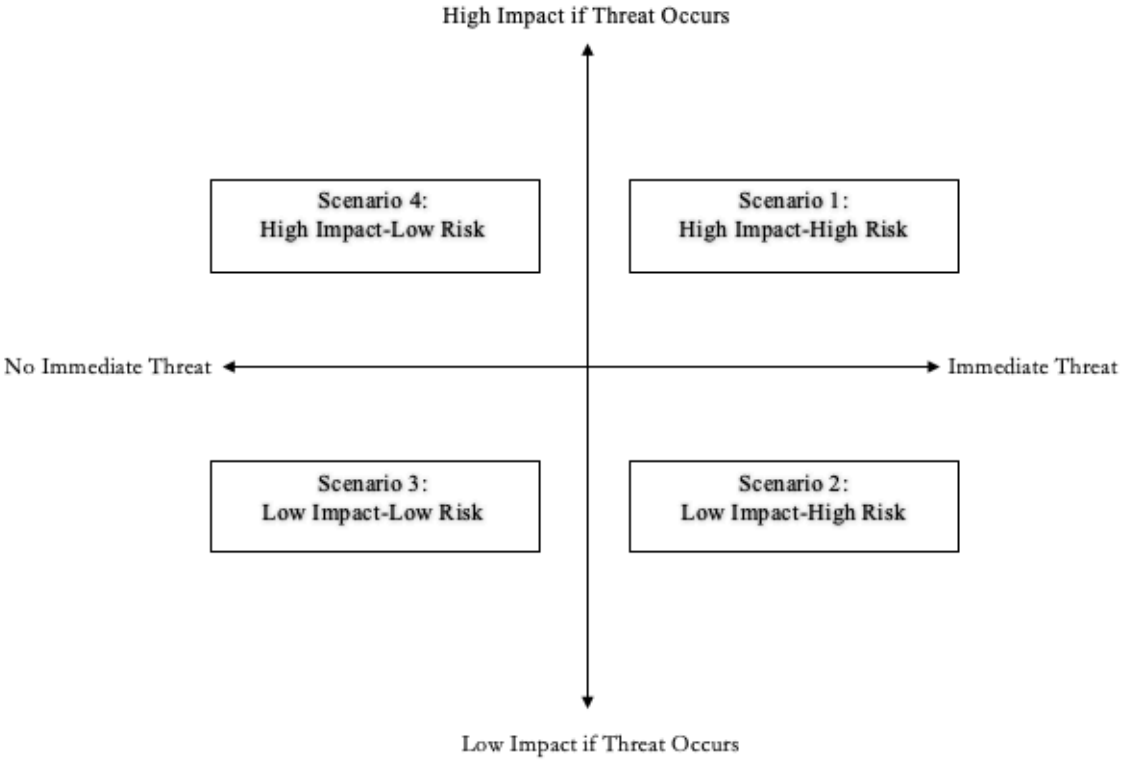
Addressing this problem requires a different approach to necessity. Above all, the United States should recommit to the principle of using force as a last resort, imposing only the minimal harm necessary. In line with the US government's stated preference for capture over kill operations, the policy guidance on direct action should be strengthened by requiring that all options—including, but not limited to, capture—are considered before lethal action.[138] Pre-strike assessments should be broadened to determine whether it is feasible to use other policy tools to mitigate threats effectively, such as strengthening defensive capabilities, interdicting weapons shipments, conducting cyber operations, and working with liaison partners to arrest potential suspects. Crucially, these assessments must

[138] "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," 8-11.

define the criteria for "feasibility," since this term encompasses a wide-range of meanings from operational feasibility—which denotes whether the United States has the available resources to execute a proposed plan—to political feasibility, which concerns reputational costs and the risk of blowback.[139]

In reviewing alternative policy options, policymakers should take into account the immediacy and gravity of the threat. The below threat-risk matrix in Figure 1.1 is intended to help policymakers make these assessments in a systematic manner.

Figure 1.1 Threat-Risk Matrix for Necessity Assessments



[139] It has been alleged, for example, that the Obama administration considered capture operations to be politically infeasible due to the challenges of imprisoning and bringing terrorist suspects to trial, particularly at a time when the administration was prioritising efforts to close the detention facility at Guantánamo Bay. Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, 55-59.

In Scenario 1, the most dangerous case, there is both a high risk that the threat will eventuate and a high probability that, if it does, the consequences will be severe in terms of the resulting harm. Intelligence indicating that terrorists are about to blow up an office building in broad daylight, for example, would fall into this category. In Scenario 2, there is a high risk that the threat will eventuate, but only a low probability that, if it does, the consequences will be severe. For example, policymakers might receive intelligence indicating that terrorists are about to blow up an abandoned warehouse in the middle of the night. Scenario 3 represents the least dangerous case, where there is both a low risk that the threat will eventuate and a low probability that it will result in serious harm. Long-term terrorist planning to attack a symbolic target when no one is nearby could constitute such a scenario. In Scenario 4, there is a low risk that the threat will eventuate, but a high probability that it will result in significant harm if it does. A terrorist attack involving nuclear, chemical, or biological weapons could fall into this category.

How do these various scenarios impact determinations about necessity? In Scenario 1, the necessity criterion is less restrictive, given the immediacy and gravity of the threat. When a threat is temporally imminent and would have grave consequences in terms of failing to prevent individual rights violations, policymakers are under no obligation to review every possible alternative to lethal force. In Scenario 3, the necessity criterion is more restrictive, since the threat is neither immediate nor particularly grave. In such cases, policymakers must review all possible alternative policy options and consider whether these options would be effective in mitigating the threat before making the decision to resort to force.

Scenarios 2 and 4 represent harder cases. In both scenarios, policymakers should consider whether there are alternative defensive options short of force and whether these options would mitigate the threat within the expected timeframe prior to the attack. If the threat is temporally imminent, but will result in little harm, other defensive options such as evacuation should be pursued, since it is plausible that resorting to force may result in more harm than the threat itself. When there is a longer time horizon before a threat eventuates, but the threat is severe, policymakers should still make every effort to collect additional intelligence before resorting to force in order to ascertain the best means of deterring or preventing the threat.

In practice, policymakers must ask two questions when it comes to necessity. First, they must ask whether the US government has the resources to pursue a less harmful course of action. Could the Department of Homeland Security strengthen US border defences, airport procedures, and initiate early terrorism warning systems to catch potential attackers? Does the State Department or Intelligence Community have liaison partners in other countries who would be willing and able to arrest suspects, interdict weapons, or warn innocent civilians? Does the United States have the capacity, independently or working through partners, to evacuate areas that are the target of the planned attack? Could Special Operations Forces be deployed to capture suspects or protect innocent victims?

Second, policymakers must ask whether any of these options effectively would mitigate the threat within the expected timeframe prior to the attack. If the exact timing of the attack is unknown, policymakers should consider not whether they have a window of opportunity to act, but rather whether it is the very *last* window of opportunity to mitigate the threat, such that it either would be impossible to defend against the threat later on or

that doing so would raise the costs or decrease the effectiveness of such defensive efforts considerably.

Reflecting this view of necessity, the United States should commit to using force only if there is a reasonable belief that no less harmful means exist for effectively stopping a terrorist attack, where a reasonable belief is one that is formed on the basis of credible evidence, such as intelligence corroborated by multiple reporting streams.[140] The United States should recalibrate its position on imminence to clarify that threats should be temporally imminent as a rule, with rare exceptions for cases where there is a high level of confidence that the threat will materialise, that there will be no other opportunity to mitigate it, and that failing to act will entail significant harm in terms of individual rights violations.

3. Reinterpret the proportionality criterion in terms of weighing moral goods and harms.

The conventional view of proportionality, as stated in international law and the DOD Law of War Manual, is that combatants "must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained."[141] The Manual further states that "proportionality may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or

[140] Even in such cases, structured analytical tools should be used to guard against potential cognitive biases that may cause counterterrorism experts to disregard conflicting information, insufficiently examine commonly-held assumptions, and overstate confidence levels. The potential for cognitive bias is particularly acute in cases where the risks of failure are high, which is nearly always the case in counterterrorism operations. See, for example, Robert Jervis, "War and Misperception," *The Journal of Interdisciplinary History* 18(4) (1988): 675-700; Shiri Krebs, "Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of Both Terrorism and Counterterrorism," *Florida State University Law Review* 44(3) (2017).

[141] "Department of Defense Law of War Manual," 241.

excessive."[142] The 2016 policy framework for the use of lethal force follows this definition, adding that "great care is taken to adhere to the principle of proportionality in both planning and execution to ensure that collateral damage is kept to a minimum."[143]

This formulation of proportionality, however, does not adequately capture the normative considerations at stake. Military advantage has no intrinsic moral value and therefore cannot be directly compared to the serious moral harm of killing in war. Indeed, military advantage has instrumental value only insofar as it contributes to the advancement of a just cause. Thus, a strike that is legally proportionate—that is, in which military advantage outweighs the loss of civilian lives—may be morally disproportionate.

Rather than focusing narrowly on military advantage or collateral damage, a normative approach to proportionality should determine whether the harms inflicted on non-liable individuals are justified as the lesser evil when compared to the moral goods underpinning the just cause for war.[144] These moral goods may include, for example, the prevention or elimination of an unjust threat that foreseeably would result in more individual rights violations if left unchecked. Making such a determination requires, at a minimum, an extensive assessment of the strategic goals of a counterterrorism campaign, a clear articulation of why these goals are just, what the benchmarks for success are, and how success will be measured empirically.

Against these just cause goods, policymakers must weigh the anticipated moral harms resulting from the use of force. Moral harms include all expected violations of

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[142] Ibid., 60.
[143] "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," 21.
[144] Jeff McMahan, "War Crimes and Immoral Action in War," in *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), 155-156; David Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 54.

fundamental individual rights, by which I mean principally the right not to be killed—since this is the right upon which all others depend—but also rights that are crucial for a flourishing life, such as the right to a basic level of security and the right to be free from psychological harm.[145] The proportionality calculus, therefore, must take into account civilian harm more broadly—including injury, psychological trauma, damage to civilian infrastructure, and serious economic harms. Policymakers should factor into these calculations, for example, the psychological harms to those who are forced to live under drones at perpetual risk of being killed.[146] US forces, too, may suffer lethal or psychological harm as a result of direct action, which constitute an additional moral harm assuming that these soldiers fight for a just cause and therefore are not liable to be harmed.[147]

Incorporating broader considerations about civilian harm into the proportionality calculus is not always a straightforward task. A useful heuristic for US policymakers would be to consider whether it would be proportionate to impose foreseeable harms on individuals if they were American citizens.[148] Would it be proportionate to kill, injure, or otherwise traumatise ten American citizens in pursuit of one terrorist target? If the answer

[145] Martha Nussbaum articulates the central capabilities needed to attain a "minimally flourishing life." See Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Belknap Press of Harvard University, 2011), 33-34.
[146] For a detailed account of these harms, see "The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions," *Columbia Law School Human Rights Clinic and the Center for Civilians in Conflict* (2012): 24-26, https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf.
[147] The moral harm that combatants suffer, however, may be weighed less heavily than that of non-combatants for a number of reasons, such as the fact that combatants knowingly consent to the risk of harm when they enlist. On some views, even harm suffered by unjust combatants may impact determinations about proportionality. Killing a large number of unjust combatants who make only a small contribution to the advancement of an unjust cause, for example, would be disproportionate. Jeff McMahan, "Proportionality in the Afghanistan War," *Ethics & International Affairs* 25(2) (2011): 151-153. See also Adil Ahmad Haque, "Necessity and Proportionality in International Law," in *The Cambridge Handbook of the Just War*, ed. Larry May, Shannon Fyfe, and Eric Ritter (Cambridge: Cambridge University Press, 2018), 261.
[148] McMahan, "Proportionality in the Afghanistan War," 147.

is no, then it follows that it cannot be proportionate to inflict the same harm on Afghan citizens, for example, in pursuit of the target. In making determinations about proportionality, equal weight ought to be given to all non-combatants, irrespective of nationality.

In sum, policymakers should adopt a measured approach to proportionality that seeks to minimise individual rights violations. Just cause goods should be evaluated, not strictly in terms of military advantage, but whether such advantage substantially advances a strategic campaign that is just in its aim of preventing individual rights violations. Policymakers should ask themselves, will this strike prevent more individual rights violations than it causes?

Following this approach leads to different policy outcomes than following current interpretations of proportionality. According to the formula I have proposed, it would be disproportionate to kill or traumatise *any* number of innocent people in order to target low-level militants whose death is unlikely to advance US counterterrorism objectives substantially, assuming those objectives are just. The "mowing the grass" approach to counterterrorism, where states periodically engage in widespread attacks to destroy terrorist capabilities, is likely to be disproportionate on the view that I have described here because it is unlikely that indiscriminate killing would be the lesser evil when compared to the dubious value of deterring threats that have not yet emerged.[149]

Making accurate predictions about the moral goods and harms resulting from future operations is difficult. Crucially, these assessments must be made *ex ante* as part of pre-strike planning efforts, drawing on all-source intelligence reporting. Wherever possible,

[149] Daniel Byman, "Mowing the Grass and Taking Out the Trash," *Foreign Policy*, August 25, 2014, https://foreignpolicy.com/2014/08/25/mowing-the-grass-and-taking-out-the-trash/.

these assessments should be based on intelligence that is corroborated by multiple sources, in order to reduce the epistemic uncertainty that inevitably arises when predicting the impact of future actions.

4. ***Prohibit all forms of status-based targeting outside of war zones, including dynamic strikes against suspected targets, except in cases of self- or other-defence where a threat is temporally imminent.***

In traditional just war theory, the principle of discrimination is construed as the requirement to distinguish between individuals based on whether they hold combatant or civilian status. Combatants are viewed as legitimate targets because they pose a threat, whereas civilians are immune from targeting because they are innocent in the relevant sense of being non-threatening. In other words, combatants are liable to be killed—meaning they have done something to lose their right not to be killed—and civilians are non-liable.

By contrast, revisionism contends that moral liability is not coextensive with combatant or civilian status. To see why this is so, consider this domestic analogy. In ordinary life, individuals become liable to be killed only if they are morally responsible for posing an unjust threat. A murderer, for example, is liable to be killed if he attacks an unsuspecting victim. The victim, however, does not forfeit his right not to be killed by virtue of being attacked, and he may permissibly use force to defend himself against the murderer. As a result, a moral asymmetry arises between the murderer and the victim, as the former is liable to be killed and the latter is non-liable.

Applied to direct action, this analogy suggests that decisions about liability should be made on a case-by-case basis according to individual moral responsibility for posing an

unjust threat.[150] Like the unsuspecting victim, individuals fighting for a just cause—that is, self- or other-defence against an attacker—have done nothing to lose their right not to be killed.

In practice, this reinterpretation of the principle of discrimination indicates that targets should not be selected based on group membership alone. Instead, individuals must be actively involved in planning, supporting, or conducting unjust attacks. Individuals should not be targeted solely because they are members of a particular group; there must be additional evidence that they *qua individuals* pose an unjust and imminent threat.

An important caveat is necessary here. Basing targeting decisions on individual liability, rather than status, does not imply a weakening of the prohibition against deliberately attacking civilians. While civilians may contribute to unjust threats—such as by providing assistance, information, or shelter to militants—these contributions rarely rise to the level of moral responsibility necessary to meet targeting thresholds.[151]

5. Revise the US interpretation of "direct participation in hostilities" to conform with international law and the ICRC guidance.

In addition to eschewing status-based targeting, the United States should revisit its interpretation of what constitutes "direct participation in hostilities" for targeting and detention purposes. The current criteria are too permissive insofar as they allow for the targeting of civilians who are unlikely to be sufficiently causally and morally responsible for posing an unjust threat. Civilians who provide material support to terrorists, for

[150] McMahan, *Killing in War*, Chs. 1 and 4; Fabre, *Cosmopolitan War*, Chs. 2 and 4; Helen Frowe, "Non-Combatant Liability in War," in *How We Fight: Ethics in War*, ed. Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2014), Ch. 10; and Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," Ch. 3.
[151] Cécile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120(1) (2009): 61-63.

example, contribute to the group's ability to conduct or sustain operations, but this level of support does not necessarily render them liable to be killed (although they might render them liable to lesser forms of defensive harming).[152] While identifying the precise threshold for liability is beyond the scope of this paper, policymakers would have to consider, among other things, the degree of causality between the support and the attack, whether the support was freely given or coerced, and the extent to which civilians were aware that their support would contribute to an unjust attack.

Making such determinations, particularly in the heat of battle, is nearly always impossible. Extended drone surveillance is unlikely to provide sufficient information on whether civilians intend to contribute to an unjust threat. A civilian accessing a facility or travelling on a route used by terrorists, for example, may be unaware of that fact. Moreover, the facility or route in question may no longer be used by terrorists. Triaging drone footage with signals or human intelligence may increase our confidence that civilians are directly morally responsible for such threats, and therefore are liable to be killed, but in the absence of such evidence the moral course of action would be to presume that the person under surveillance is a civilian, and thus not a legitimate target.

In light of these challenges, the US interpretation of "direct participation in hostilities" should conform more closely with international law and the ICRC's interpretive guidance, including by evaluating the threshold of harm, direct causation, and belligerent nexus.[153] In particular, the United States should adhere to the requirement that the act undertaken by the civilian at issue be no more than a single causal step removed from the

[152] For a discussion of whether providing military or welfare resources impacts liability, see Cécile Fabre, "Guns, Foods, and Liability to Attack in War."
[153] Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law," 46-64.

harm, as well as adopt the view that civilians are not liable to attack when they are not taking a direct part in hostilities.[154]

6. Strengthen the guidance on precautions and set confidence-level thresholds for targeting decisions.

In making targeting decisions, there invariably will be a degree of epistemic uncertainty concerning liability to killed. Even in the domestic case, jurors can never know with certainty that the criminal they have convicted is morally responsible for her crime. Indeed, such omniscience is not required; the jury must only demonstrate that the purported criminal is guilty "beyond a reasonable doubt." What is reasonable, of course, is open to some interpretation and has been the subject of considerable debate in criminal law.[155]

There has been far less debate, however, about what is reasonable when it comes to killing in war. How can soldiers make morally-informed decisions about liability under limited time constraints, epistemic uncertainty, or both? In direct action and asymmetric warfare more broadly, as we have seen, there is considerable uncertainty about liability given the fluid nature of the battlefield. Combatants fight in the midst of civilian life, civilians participate in hostilities, and both often eschew the wearing of identifying insignia. In such cases, the risk of making mistakes about liability is high, far higher than in the domestic case or in conventional warfare.

In light of this risk, the need for precautions is clear. Consider an example from domestic life. Suppose a police officer is patrolling a neighbourhood in south London. She

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[154] In its present form, the DOD Law of War Manual states: "Although it is not enough that the act merely occurs during hostilities, there is no requirement that the act be only a single causal step removed from the harm." "Department of Defense Law of War Manual," 229.

[155] See, for example, Victor Tadros and Stephen Tierney, "The Presumption of Innocence and the Human Rights Act," *Modern Law Review* 67(3) (2004).

receives an anonymous tip that a group of young men have stored weapons in an apartment building, which they have booby-trapped with bombs, and are planning to use them to target local officials in the near future. If the young men see anyone going near the apartment, if any evacuations are made, or if the police make any arrests, they will set off the bomb and blow it up, killing many innocent civilians inside. The police officer feels she must act quickly to stop the threat, which could materialise at any time, but the only information she has is from the anonymous tipster. Should she set up a sniper on the roof of an adjacent building and shoot the men inside the apartment given the opportunity to do so?

In this case, it seems clear that the police officer should refrain from shooting the men until she has gathered more information about the potential threat. The information could be fabricated; the tipster could be a jilted lover or ex-business partner of one of the young men. Even though the stakes are high and time is short, the police officer at a minimum has a moral duty to research who owns the apartment and is living there, whether they have a criminal record, and whether gun stores have sold weapons to anyone registered at that address. Failing to do even basic due diligence would be negligent, potentially even criminally negligent, and a dereliction of her duties as a police officer.

The same is true of soldiers in war. Soldiers, like police officers, have a duty to verify, to the greatest extent possible, that their targets are liable to be killed before shooting, even though the threat of harm generally is much higher for soldiers than police officers. Nevertheless, in cases of doubt, soldiers too should err on the side of caution, since it is morally worse to violate someone's right not to be killed than it is to do nothing.[156]

[156] As Jeff McMahan writes, "virtually all of us, even consequentialists, act on the presupposition that the constraint against harmful killing is in general stronger that the constraint against harmfully allowing

Even if it is impossible to make definitive determinations about liability in the fog of war, soldiers should at least hold a justified belief, on the basis of the evidence they have, which they have taken due care to gather, that a person is liable to be killed before engaging in defensive harming.[157]

The policy guidance on direct action and US law more broadly fall short of this normative standard. In direct action, there are two areas where epistemic thresholds play a role in targeting decisions outside of areas of active hostilities. First, decisionmakers must have "reasonable certainty" that a specific, pre-approved target is present (during the Obama administration this standard was "near certainty").[158] Second, decisionmakers must have "near certainty" that civilians will not be harmed (during the Trump administration, this standard reportedly was lower in practice for adult-age men, requiring only "reasonable certainty").[159] The DOD Law of War Manual further requires that the "risk of harm to civilians" merely be "reduced" based on "good faith" interpretations of available information at the time; there is no requirement to collect all possible information that might avoid the inadvertent targeting of civilians.[160]

It is open to debate whether "reasonable certainty" is a sufficient standard in either case. Morality would seem to require both standards to approach "near certainty,"

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someone to die, when all relevant factors, such as intention, are the same in both cases." Jeff McMahan, "The Just Distribution of Harm Between Combatants and Noncombatants," *Philosophy & Public Affairs* 38(4) (2010): 369. For a discussion of how the distinction between doing and allowing harm impacts the need for precautions, see Haque, *Law and Morality at War*, 155-156.

[157] For a cogent discussion of how legal rules might be adjusted to better reflect these and other normative considerations, see Adil Ahmad Haque, "Killing in the Fog of War," *Southern California Law Review* 86(1) (2012): 110-115.

[158] Michael Adams and Ryan Goodman, "'Reasonable Certainty' vs 'Near Certainty' in Military Targeting — What the Law Requires," *Just Security*, February 15, 2018, https://www.justsecurity.org/52343/reasonable-certainty-vs-near-certainty-military-targeting-what-law-requires/.

[159] Savage and Schmitt, "Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones."

[160] "Department of Defense Law of War Manual," 58-63.

particularly when a threat is not temporally imminent, given the high risk of making mistakes in asymmetric warfare, as well as the serious moral and strategic costs of targeting someone who is innocent in the relevant sense. Nevertheless, the concept of "near certainty" is not well understood and may be applied differently in different contexts. Needless to say, there does not appear to be a solid moral justification for holding adult-age men to different standards for targeted killing; although men may be more likely to engage in terrorist activity than other groups, gender plays no definitive role in determining liability to be killed.[161]

The policy guidance should be revised to address these problems. At the outset, the guidance should state, as a matter of principle, the requirement to take all feasible precautions to avoid civilian harm and to refrain from acting in cases of considerable doubt. The guidance also should set a high epistemic bar for determining individual liability to avoid the risk that civilians will be misidentified as combatants in the first place. As Adil Haque argues, adhering to this precautions rule "requires attackers to pursue accessible information—both to verify that potential targets are lawful targets as well as to assess the effects of potential attacks on nearby civilians—unless the pursuit of such information would increase risk to attackers substantially more than doing so would reduce the risk of mistakenly targeting civilians or of disproportionately harming civilians."[162]

Epistemic uncertainty, moreover, should be conceived of as a sliding scale, rather than a definitive threshold. In cases where a threat is temporally imminent and where

[161] For an in-depth discussion of the role that gender should and should not play in counterterrorism operations, see Fionnuala Ní Aoláin and Jayne Huckerby, "Gendering Counterterrorism: How to, and How Not to — Part I," *Just Security*, May 1, 2018, https://www.justsecurity.org/55522/gendering-counterterrorism-to/.
[162] Haque, *Law and Morality at War*, 156.

failing to mitigate the threat would result in significant individual rights violations, operators should follow the "reasonable certainty" standard based on information available at the time. In cases where threats are not temporally imminent, however, or where failing to mitigate the threat would not result in significant individual rights violations, there should be a higher bar for epistemic uncertainty across all targeting decisions—operators should have "near certainty" that the target is liable to be killed, that the target is present, and that no civilians (or anyone who might be misidentified as a combatant) will be harmed. Near certainty should be defined as having thoroughly researched all available intelligence and open-source databases, as well as tasking the collection of additional intelligence in cases of conflicting or insufficiently detailed information. Such collection ideally should include multiple intelligence streams, including signals and human intelligence, since ISR capabilities alone may not address intelligence gaps concerning intent.

7. ***Define the conditions that would result in victory and an identifiable endpoint for the war on terror.***

Even if all the above reforms are implemented, these measures will fall short in the absence of a clear strategic vision for how the war on terror ends. For a war may be fought justly, for just ends, and still be unjustified if it continues past the point where there is a moral obligation to stop fighting. Indeed, perpetual wars rarely are ever justified; there must be a reasonable chance of victory that will allow for the transition back to peace. Moreover, the transition from war to peace itself may be unjust if it is done in a way that results, for example, in significant human rights violations or the abandonment of allies.

How should policymakers approach this problem? As we have seen, there is no settled view in international law on when NIACs end.[163] From a factual perspective, it is difficult to ascertain precisely when the circumstances that have led to a state of armed conflict have changed sufficiently so as to no longer warrant such a state. The prolonged nature of many contemporary conflicts, which may last decades rather than years, attests to this fact.

Focusing on when armed conflicts end, however, elides the more important question of when wars *should* end. David Rodin's account of *jus terminatio*, or the justice of ending wars, is instructive here. Rodin argues that it is a mistake to think that wars should end simply when *jus ad bellum* conditions cease to be fulfilled.[164] A war, for example, might be *ad bellum* proportionate in terms of the (just) objectives that can be achieved versus the anticipated lives lost. Yet that war might become disproportionate over time as cost assessments change, requiring a reassessment of whether it is permissible to continue fighting.[165] At that point, Rodin argues, policymakers must weigh countervailing moral considerations: the unjustness of continuing to fight a war that has become disproportionate versus the fact that the lives lost are "sunk costs" and one final "surge" of troops may deliver victory in support of a just cause.[166] Even when the initial cause for war

[163] For a discussion of this issue, see "Commentary of 2020 Article 3: Conflicts Not of An International Character."
[164] David Rodin, "Ending War," *Ethics & International Affairs* 25(3) (2011): 360. See also the discussion in the 2015 *Ethics* symposium on this topic and, in particular, David Rodin, "The War Trap: Dilemmas of Jus Terminatio," *Ethics* 125(3) (2015).
[165] For a discussion on proportionality and how to weigh sunk moral costs in war over time, see Seth Lazar, "Moral Sunk Costs," *The Philosophical Quarterly* 68(273) (2018); Uwe Steinhoff, "Lazar on 'Moral Sunk Costs' and the 'Discount View'," *Ratio Juris* 35(1) (2022); Victor Tadros, "Past Killings and Proportionality in War," *Philosophy & Public Affairs* 46(1) (2018); Jeff McMahan, "Proportionality and Time," *Ethics* 125(3) (2015); Elad Uzan, "Moral Sunk Costs in War and Self-Defence," *The Philosophical Quarterly* 71(2) (2021); and Cécile Fabre, "War Exit," *Ethics* 125(3) (2015).
[166] Rodin, "Ending War," 360-361.

is unjust, invading states nevertheless may have a moral obligation to stay and rectify the damage they have created.[167] In either case, it is clear that the justness of terminating a war does not depend solely on the justness of initiating it.[168] Similarly, the justness of continuing to wage war on terror does not rest exclusively on whether terrorist groups continue to pose an unjust threat.

In the context of the war on terror, *jus terminatio* would appear to require a comprehensive reassessment of the aims and costs of the war, what constitutes success, and whether there are countervailing moral reasons to continue or stop fighting. If the goal of the war on terror is to eliminate all terrorist threats then the United States should stop fighting; this is an impossible goal that has no reasonable chance of success. Even the more limited goal of mitigating terrorist threats and stabilising certain regions is extremely ambitious, and US officials should think carefully about whether war is the best means of ensuring regional stability in the long term.

A strong point in favour of ending the war on terror might be the legal and normative precedents that it is setting for future conflicts, precedents that US adversaries are already seeking to follow. By loosening the geographic and temporal restrictions on war, and expanding targeting to include larger groups of individuals performing non-military functions, the war on terror fundamentally has altered the ways in which we conceive of war and the permissions surrounding defensive harming in a range of contexts.

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[167] Ibid., 362.

[168] As Cécile Fabre writes, "we must sever the ethics of war termination from the ethics of war initiation: a belligerent who embarks on a just war (from its point of view) at time t_1 might have a duty to sue for peace at t_2 before it has achieved its ex hypothesi just war aims; conversely, a belligerent who embarks on an unjust war at t_1 might acquire a justification for continuing at t_2. Moreover, when assessing whether a belligerent must exit or continue with its war, we must pay attention to the various ways in which it might do so and to the goods and bads which a particular exit strategy would bring about relative to other strategies." Fabre, "War Exit," 652.

War, in other words, is no longer exceptional, if indeed it ever was, and the exceptional rules that are said to apply in it have now become the norm, undermining the prohibition on the use of force and leading to increasingly permissive interpretations of necessity, discrimination, and proportionality. The full costs and consequences of these developments are still emerging, but the precedents set now are likely to damage individual rights in pernicious, fundamental, and irreversible ways.

5.4 COUNTERARGUMENTS

The preceding discussion has laid out policy recommendations based on revisionism that more closely align direct action with the "deep" morality of war. Inevitably, there will be critics who contend that this approach is impractical or entails even greater moral or strategic risks than accepting the status quo ante. Critics are likely to argue that the principles outlined above are: (1) too epistemically demanding; (2) create high compliance costs; and (3) will be ignored or manipulated by adversaries. These concerns largely are pragmatic or consequentialist in nature, but the normative implication is that following revisionist principles might either inhibit direct action in pursuit of a just cause or otherwise enable unjust actors to act with impunity.

Following revisionist principles is epistemically demanding, but no more so than following the traditionalist account of morality in asymmetric warfare. Indeed, the practical benefits that traditionalism purports to provide in constructing an account of moral liability based on combatant status may be greatly reduced in such conflicts. Due to the fluid nature of the battlefield and lack of identifying insignia, it is epistemically demanding, even on the traditionalist account, to determine who counts as a combatant in areas outside of active

hostilities. In such cases, the notion of "directly participating in hostilities" suggests that it is not implausible to base liability entirely on actions that individuals take, rather than group membership, even though international law in its present form permits both status-based and conduct-based targeting in NIACs.

What is more, the problem of epistemic uncertainty may be overstated. The traditionalist claim that combatants are unable to discern whether the cause for war is just is undermined by the fact that those same combatants are presumed to have the mental capacity to make other moral judgements about war, including the judgement needed to follow *jus in bello* rules. It is also now widely acknowledged that self- and other-defence are the primary, if not only, just causes for war. Reasonable people might disagree about whether the facts on the ground support claims of self- or other-defence, and soldiers may be misled by disinformation, but these excuses are harder to accept when the international community as a whole condemns wars which are clearly acts of aggression. When the UN General Assembly, an international body comprised of 193 states, passes a resolution condemning a war, it is analogous to the domestic case of a jury of peers condemning a criminal—that is the moment when soldiers ought to know their war is unjust and to lay down their arms.[169]

There are steps that policymakers can take to reduce epistemic uncertainty in asymmetric warfare, particularly when it comes to direct action against targeted individuals. Advances in warfighting technology, notably ISR capabilities, allow for

[169] Following the 2022 Russian invasion of Ukraine, for example, the UN General Assembly overwhelmingly voted in favour of a resolution that demanded that Russia "immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders." A total of 141 countries, out of the total 193 UN member states, voted for the resolution. "General Assembly Resolution Demands End to Russian Offensive in Ukraine," *United Nations*, March 2, 2022, https://news.un.org/en/story/2022/03/1113152.

continuous monitoring of targets over time to determine patterns of behaviour. While this technology is imperfect, integrating aerial surveillance into ground operations and triaging it with signals or human intelligence can reduce the epistemic burden that revisionist principles impose.

Even if epistemic uncertainty can be reduced to a certain extent, critics still will likely argue that this approach generates high compliance costs. Deploying advanced ISR capabilities is highly resource intensive, and multiple drones may need to be deployed over an extended period of time to fully capture a target's activities. Drone feeds will need to be analysed, and intelligence analysts may need to task additional signals or human intelligence collection to fill crucial gaps. All of these activities may take time and could divert resources away from other national security priorities.

The proposed reforms to the policy guidance on direct action may also introduce another layer of bureaucracy, which can slow down targeting decisions, thereby decreasing the pace of operations and potentially leading to missed opportunities to eliminate terrorist threats. There is a perceived trade-off between maintaining operational flexibility and adhering to more restrictive targeting rules. The desire to streamline bureaucratic decision-making was a key consideration in the Trump administration's revisions to the Obama-era policy guidance, and the Biden administration reportedly is considering keeping some of these changes in place for the same reason.[170]

These compliance costs have normative implications. Following the approach outlined above, for example, may prevent policymakers from responding in a timely manner to terrorist threats. Or it might direct resources away from preventing even more

[170] Savage and Schmitt, "Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones."

serious threats, such as the looming threat of great power competition or nuclear escalation. Put simply, critics may argue that the more restrictive standards that revisionism prescribes prevent policymakers from effectively waging wars that are just.

The force of this argument, however, is less than it might appear. First, the reforms to the policy guidance do allow for operational flexibility in cases where threats are temporally imminent and where failing to act would result in serious individual rights violations. The proposed sliding scale of liability, for example, is intentionally designed to preserve an element of operational flexibility in certain types of cases. Second, the United States should strengthen its domestic resilience to ensure that, even if the policy guidance prevents the mitigation of some threats, terrorists have little opportunity to harm innocent people.[171] Finally, as a resource rich country that spends more than the next eleven countries combined on military defence, the United States has a moral obligation to devote a fraction, by comparison, of these resources to waging war justly.[172] The trade-off between fighting terrorism justly and pivoting to focus on great power competition represents a false choice; the United States can and must do both.

The final challenge to this approach is that, even if the United States adopts restrictive principles for direct action, less scrupulous actors will either ignore such principles or, worse, manipulate them to integrate further into the civilian population to evade attacks.[173] As Major General Charles Dunlap Jr. argues, US adversaries may resort to "lawfare," or the manipulation of the rules "to turn respect for the law in the United

[171] Luke Hartig, "Playing Defense is Totally Fine," *The Atlantic*, September 26, 2021, https://www.theatlantic.com/ideas/archive/2021/09/playing-defense-against-terrorism-endless-war/620205/.
[172] "The United States Spends More on Defense than the Next 11 Countries Combined," *Peter G. Peterson Foundation*, July 19, 2021, https://www.pgpf.org/blog/2021/07/the-united-states-spends-more-on-defense-than-the-next-11-countries-combined.
[173] Blum, "The Individualization of War: From War to Policing in the Regulation of Armed Conflicts," 48-83.

States and other democratic countries into a vulnerability."[174] Terrorist groups might rely increasingly on human shields, for example, knowing that US officials' hands are tied by strict interpretations of necessity, discrimination, and proportionality.

That some actors may ignore these principles is not a reason for the United States to avoid adopting them. By the same logic, the United States should not follow any of the laws of war, or indeed international law at all, simply because some actors refuse to follow the rules. The lawfare objection presents a more serious challenge. But here, again, Dunlap and others neglect to consider the vulnerabilities that may arise in the absence of strict guardrails on direct action. While following more restrictive rules may make US military operations more vulnerable to adversaries at the tactical level, not following these rules create serious vulnerabilities at the strategic level. Every US drone strike that kills an innocent civilian is fodder for terrorist recruitment and propaganda efforts, as demonstrated by the footage that groups such as ISIS regularly release after such strikes occur. Following more permissive rules undermines the United States' ability to exercise moral authority in international affairs, eroding respect for the rule of law and undermining bedrock legal norms concerning the prohibition on the use of force. Following permissive rules also incurs reputational costs with US allies, particularly in Europe, which may inhibit counterterrorism cooperation, reduce interoperability in joint operations, or prevent allies from giving basing permissions for drones operating out of their territory. All of these outcomes have political costs, suggesting that following the principles I have proposed is not only a moral imperative, but a strategic one.

[174] Charles Dunlap Jr., "Lawfare 101: A Primer," *Military Review* (May-June 2017): 10.

5.5 MORAL RISK AND RESTRAINT

Throughout this paper, I have argued that the principles which govern asymmetric warfare should be informed by the logic of revisionism, rather than traditionalism. In rejecting the "new wars" thesis, I have shown that asymmetric warfare, while not novel, nevertheless exposes fundamental flaws with the traditionalist view. The ethical dilemmas that US policymakers face when contemplating direct action in the war on terror, which I take to be a paradigmatic case of asymmetric warfare, underscore this point. To address these problems, I proposed an alternative approach based on revisionist principles. I then considered, before ultimately rejecting, plausible counterarguments to adopting this approach in practice.

The foregoing discussion has revealed that, not only is it possible to implement revisionist-oriented principles in practice, but also that it is imperative to do so. The case study analysis of US direct action reinforced a key theme that emerged in the theoretical chapters concerning the moral risks of maintaining the current traditionalist-cum-legalist approach. Following this approach is likely to lead to serious and systemic mistakes about liability, resulting in unnecessary civilian harm. Indeed, rather than representing the "morally best" principles for asymmetric warfare, current US policies concerning direct action appear far too permissive overall.

The moral risks of adopting increasingly permissive standards for defensive harming are compounded by the risk of setting norms and precedents that undermine the prohibition on the use of force. It would be a mistake to focus only on *jus in bello* questions, without addressing fundamental issues concerning whether the use of force is both justified and judicious in the long term. In the absence of broader war powers reform, tinkering at

the margins with Obama and Trump-era procedures for direct action will not produce meaningful change and may perpetuate, not end, the war on terror.

In order to end this perpetual war, the US government should focus on the initiation and termination of hostilities. Addressing the initiation of hostilities starts with war powers reform and repealing outdated AUMFs. Instead of vaguely committing to work with Congress to replace the 2001 AUMF with a "narrow and specific framework," the executive branch should engage congressional staffers proactively to determine how to implement reforms such as instituting a sunset clause that would automatically terminate the authorisation after a period of time.[175]

Congress, for its part, should avoid simply replacing the 2001 AUMF with an "updated" version of the law. A new AUMF that spans multiple groups would only further lend credence to the view that the United States is engaged in a monolithic "war" against terrorism. Instead, Congress should simply repeal the 2001 AUMF and then pass separate AUMFs for each group that poses a specific, direct threat of attack against the United States and limit those US force commitments to a discrete geographic location. In doing so, Congress would take a consequential step towards leaving the war path by rejecting the notion that counterterrorism operations are part of a global armed conflict.

Rejecting the global war on terror implies that direct action will, for the most part, fall below the threshold of armed conflict. In such cases, it is clear that drone strikes, special operations, and train, advise, and assist missions should follow conditions approximating those of individual self-defence, where force can be used only to stop a temporally imminent threat of attack. This would preclude resorting to tactics that often result in the

[175] Bridgeman et al., "Principles for a 2021 Authorization for Use of Military Force."

most civilian harm, notably targeting unidentified individuals based on factors such as their group membership, affiliation, gender, or patterns of activity. And it would require US officials to adopt a posture of strategic restraint where force is authorised only when there is high epistemic certainty, based on multiple intelligence streams, that the use of force will prevent an imminent threat to life.

Above all, US officials must consider when and how the war on terror ends. Beyond stopping attacks that are truly imminent, all force, even limited force, is justified only insofar as it provides a window of opportunity for diplomacy and other policy tools to work. But drone strikes and special operations may detract from broader policy efforts to counter violent extremism and rarely, if ever, lead to negotiated settlements which would pave the way for peace. Without an overarching plan for restoring order and transitioning counterterrorism operations to local government control, direct action in the war on terror will serve only to entrench existing patterns of domination within the international system, allowing powerful states to hold one group of people perpetually at risk in an attempt to guarantee the safety of another.

6

Conclusion

In this thesis, I have argued that asymmetric warfare exposes fundamental flaws with the internal logic of traditionalism. Traditionalists, by their own account, acknowledge that the principles they propose in conventional warfare are overly permissive when applied in the asymmetric context, leading to morally suboptimal outcomes. Yet they provide no satisfactory explanation for why different moral paradigms should apply in conventional and asymmetric conflicts, nor an account of what triggers the initiation of these different paradigms. Applying the logic of traditionalism consistently in both types of conflicts leads to conclusions that many traditionalists would reject, such as the suggestion that not all combatants are in fact morally equal. The asymmetric case thus serves as a foil for challenges to the traditionalist account, raising deeper questions about the viability of the theory more broadly.

The first three papers reinforce this theme, illuminating, respectively, theoretical problems with the traditionalist position on the exceptionalism of war, legitimate authority, and the moral equality of combatants. The final paper moves from the realm of theory to applied ethics in considering the policy implications of the foregoing research in the context of US direct action in the so-called "war on terror." Taken together, the papers represent a sustained challenge to traditionalism that arises independently from the revisionist critique, further bolstering the case against traditionalism.

The first paper, "Between War and Peace," interrogates the exceptionalist claim that being in a state of war triggers a different moral paradigm for defensive harming than

in ordinary life. Asymmetric warfare presents a challenge to this view because it does not fall neatly within the war or peace paradigms, prompting some exceptionalists to propose a third moral paradigm referred to as *jus ad vim*. Exceptionalists cannot explain, however, how purportedly unique features of asymmetric warfare alter moral norms concerning defensive harming. Exceptionalist arguments about the scale and scope of violence, in particular, fail to establish the claim that lesser uses of quantum forces should be governed by more restrictive norms. If we accept this argument, then by the same token smaller conventional wars should be governed by different norms than larger conventional wars, leading to an indefinite number of moral paradigms that would fail to be action-guiding. While it remains open to traditionalists to accept this claim, reaching such a conclusion would weaken pragmatic arguments in favour of traditionalism.

In the second paper, "Legitimate Authority Beyond the State," I argue that the asymmetric case exposes flaws in the traditionalist argument that only states and state-like groups possess legitimate authority to go to war. Traditionalists propose that non-state groups possess such authority just when they also possess legitimate political authority in the domestic sphere. All other groups are considered to be criminal actors and their wars, even wars fought for a just cause, are deemed to be unjustified. Yet traditionalists decline to hold states to the same standard; on their view, states may declare and wage war with impunity regardless of whether they possess legitimate domestic political authority. This position is inconsistent, and leads us to conclude that not all states do in fact possess legitimate authority to go to war. Like non-state actors, states which lack such moral authority but nevertheless engage in war act unjustifiably, and their wars are criminal.

States which lack legitimate authority to declare war, however, cannot direct combatants to wage war justly on their behalf. The traditionalist view of legitimate authority, then, also undermines their position on the moral equality of combatants, or the Equality Thesis. For, as I argue in the third paper, "Moral Equality in an Unequal World," if traditionalism is to be logically consistent, then only those who act on behalf of a legitimate authority can be morally equal, since all other entities wage war unjustifiably. This position gives rise to what I have termed the "Equality Contradiction," where traditionalism must explain why the Equality Thesis holds in all cases of inter-state warfare, but not in all conflicts involving non-state actors.

Contractarianism does not save traditionalism from these implications. Contractarianism offers the most promising means of rescuing traditionalism from the Equality Contradiction because it attempts to provide a normative argument in support of the view that the moral equality of combatants holds only in inter-state warfare. As I demonstrated in the third paper, however, even if we accept the contractarian account of war, the theory fails to demonstrate that the war contract is morally binding for all state actors, and not for any non-state actors. In contrast to the contractarian and traditionalist approaches, not all state-directed combatants are morally equal and some non-state actors may be morally equal.

In addition to exposing theoretical inconsistencies, the asymmetric case also undermines pragmatic arguments in support of traditionalism. Following the logic of exceptionalism in asymmetric conflicts is difficult, as it is not clear which moral paradigm should apply in borderline cases or what triggers the shift to a new paradigm. The *jus ad vim* argument that limited force should be governed by more restrictive norms opens the

door to an indefinite number of moral paradigms for conventional and unconventional conflicts. When state or non-state actors lack legitimate authority to go to war, their activities are criminal and should fall outside the war paradigm, meaning that principles such as the moral equality of combatants cease to apply. Applying the moral equality of combatants selectively based on legitimate authority, however, greatly decreases its utility as an action-guiding principle.

Not only is it difficult to follow traditionalist principles in asymmetric warfare, but doing so also creates moral risks that pervade decisionmaking at the *jus ad bellum* and *jus in bello* levels. At the *ad bellum* level, the difficulty of classifying borderline cases suggests that operators may inadvertently or deliberately apply the wrong moral paradigm to asymmetric conflicts, such as by operating under the war paradigm when the law enforcement paradigm should apply instead. These cases generate additional moral risks at the *in bello* level because combatants operating under the war paradigm will follow more permissive rules concerning, for example, detention and liability to be killed, than they would otherwise. Combatants following these rules are likely to make grave mistakes about liability, particularly in the absence of uniforms or other identifying insignia. In short, following the logic of traditionalism in asymmetric warfare increases the risk of applying the wrong moral paradigm, following overly permissive norms, and making mistakes about liability.

One implication of the above arguments is that we should reject traditionalism in favour of an alternative approach, namely revisionism. In several of the papers, I have alluded to the fact that the asymmetric case does not pose the same theoretical problems for revisionism as it does for traditionalism. The revisionist view on the continuity of moral

norms concerning defensive harming in war and peace, for example, is perfectly compatible with asymmetric conflicts that may fall between these zones. Revisionists need not trouble themselves with whether asymmetric conflicts rise to the level of a "war" as such, nor do they propose to apply different moral norms to state and non-state actors. As a result, the asymmetric case does not expose any logical inconsistencies with the revisionist position. For this reason, the final paper, "Principles for Asymmetric Warfare," is based loosely on revisionist principles insofar as it prescribes a reductivist and individualist approach to direct action.

Nevertheless, the primary aim of my research has been to challenge traditionalism, and a full defence of revisionism is beyond the scope of the thesis. Indeed, at times I have questioned whether the traditionalist-revisionist debate has missed the mark entirely, such as on the question of legitimate authority in war. I have argued that revisionists have focused too narrowly on the misguided traditionalist view of legitimate authority, prompting them to jettison the criterion altogether. Yet legitimate authority, properly conceived, not only is consistent with the revisionist view of war, but also is necessary to protect individual rights in cases of coordinated defensive harming. My proposed Razian account of legitimate authority in war, therefore, is an attempt to marginally improve on the revisionist position in this respect.

At a practical level, I have argued that both revisionists and traditionalists are mistaken in their conception of the law and how it relates to morality. The traditionalist-revisionist debate on whether the law should conform to a "deeper" morality of war misses a fundamental point: the law is not static and immutable; it has changed and may still evolve in ways that are more protective of individual rights in war. Revisionists, then,

concede too much when they accept the traditionalist claim that the laws of war should remain largely as they are.

The precise contours of these laws, and how they should be changed as a result of the findings in this thesis, represent a key area of enquiry for future research. As a study grounded in philosophy, the thesis has not engaged substantively with the complexities of various mechanisms that could align the law, or at least policy, with my account of the ethics of asymmetric warfare. The final paper has sketched out some general policy principles for doing so in the case of direct action, but further research is needed to operationalise and apply this account, particularly to different types of asymmetric conflicts such as cyber warfare.

As the spectre of the return of great power competition and conventional warfare looms following the Russian invasion of Ukraine, another important line of enquiry is whether the findings of this research hold in conventional and hybrid conflicts. Many of the precedents set in the war on terror, such as the US view on what constitutes direct participation in hostilities, are shaping the legal and normative environments in which both conventional and unconventional conflicts unfold. Increasingly, state and non-state actors are seeking to follow these precedents and incorporate asymmetric tactics into a range of military operations. Russia's mastery of hybrid warfare, which combines elements of asymmetric warfare with conventional battles, illustrates this point. Against this backdrop, it is more crucial now than ever to consider the morality of force in asymmetric warfare and how this account relates to war more broadly.

References

"The 2001 AUMF and War Powers: The Path Forward." *House Foreign Affairs Committee Hearing*, March 2, 2022, https://foreignaffairs.house.gov/hearings?ID=63A05C6D-C6D7-4047-AA8E-334EBE265A2E.

Acosta, Jim, "Obama to Make New Push to Shift Control of Drones from CIA to Pentagon." *CNN*, April 27, 2015, https://edition.cnn.com/2015/04/27/politics/drones-cia-pentagon-white-house/index.html.

Adams, Michael, and Ryan Goodman, "'Reasonable Certainty' vs 'Near Certainty' in Military Targeting — What the Law Requires." *Just Security*, February 15, 2018, https://www.justsecurity.org/52343/reasonable-certainty-vs-near-certainty-military-targeting-what-law-requires/.

"Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons." International Court of Justice, July 8, 1996.

Aikins, Matthieu, "Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb." *The New York Times*, September 10, 2021, https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html.

Akande, Dapo. "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities." *International and Comparative Law Quarterly* 59(1) (2010): 180-192.

Akande, Dapo, and Thomas Liefländer. "Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense." *The American Journal of International Law* 107(3) (2013): 563-570.

"Anwar Al-Awlaki, Yemen, and American Counterterrorism Policy." *The Brookings Institution*, September 17, 2015, https://www.brookings.edu/wp-content/uploads/2015/08/20150917_awlaki_yemen_transcript.pdf.

Aquinas, Thomas. *Summa Theologiae.* Lander: The Aquinas Institute for the Study of Sacred Doctrine, 2012.

Atherton, Kelsey, "Trump Inherited the Drone War but Ditched Accountability." *Foreign Policy*, May 22, 2020, https://foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/.

Augustine, Saint. *Contra Faustum.* Library of Latin Texts. Turnhout: Brepols Publishers, 2010.

"Authorization for Use of Military Force against Iraq Resolution of 2002." *Public Law 107-243*, October 16, 2002.

"Awad v. Obama." In *608 F.3d 1*, D.C. Cir. 2010. https://casetext.com/case/awad-v-obama-3.

Bazargan, Saba. "Complicitous Liability in War." *Philosophical Studies,* 165(1) (2013): 177-195.

Becker, Jo, and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will." *The New York Times*, May 29, 2012,

https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.
Beitz, Charles R. "Cosmopolitanism and Global Justice." *The Journal of Ethics,* 9(1-2) (2005): 11-27.
Benbaji, Yitzhak. "Justice in Asymmetric Wars: A Contractarian Analysis." *Law & Ethics of Human Rights* 6(2) (2013): 172-200.
———. "The War Convention and the Moral Division of Labour." *The Philosophical Quarterly* 59(237) (2009): 593-617.
Benbaji, Yitzhak, and Daniel Statman. *War by Agreement: A Contractarian Ethics of War.* Oxford: Oxford University Press, 2019.
Bender, Bryan, and Andrew Desiderio, "Biden Backs New War Powers Vote in Congress, White House Says." *Politico*, March 5, 2021, https://www.politico.com/news/2021/03/05/biden-war-powers-congress-473843.
Bennett, John, "Pelosi Wants 'Unhinged' Trump to Be Stripped of Nuclear Codes." *The Independent*, January 8, 2021, https://www.independent.co.uk/news/world/americas/us-election-2020/pelosi-trump-riot-war-nuclear-weapons-b1784580.html.
Bergen, Peter, and Jennifer Rowland. "Drone Wars." *The Washington Quarterly* 36(3) (2013): 7-26.
Bergen, Peter, David Sterman, and Melissa Salyk-Virk, "America's Counterterrorism Wars: Tracking the United States' Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya." *New America*, June 17, 2021, https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/.
Bethlehem, Daniel. "Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors." *The American Journal of International Law* 106 (2012).
Betts, Richard K. "Two Faces of Intelligence Failure: September 11 and Iraq's Missing WMD." *Political Science Quarterly* 122(4) (2007): 585-606.
Biggar, Nigel. "Christian Just War Reasoning and Two Cases of Rebellion: Ireland 1916–1921 and Syria 2011–Present." *Ethics & International Affairs* 27(4) (2013): 393-400.
"Bill S.2391: National Security Powers Act of 2021." *The Senate of the United States*, July 20, 2021, https://www.murphy.senate.gov/imo/media/doc/National%20Security%20Powers%20Act%202021.pdf.
Blinken, Antony, "Press Release on the Second Anniversary of ISIS's Territorial Defeat." *U.S. Department of State*, March 23, 2021, https://www.state.gov/on-the-second-anniversary-of-isiss-territorial-defeat/.
Blum, Gabriella. "The Individualization of War: From War to Policing in the Regulation of Armed Conflicts." In *Law and War*, edited by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey. Redwood City: Stanford University Press, 2014.
Brennan, John O., "The Efficacy and Ethics of U.S. Counterterrorism Strategy." *Speech at the Woodrow Wilson International Center for Scholars*, April 30, 2012, https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

———, "Strengthening Our Security by Adhering to Our Values and Laws." *Speech at Harvard Law School*, September 16, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

Bridgeman, Tess, Ryan Goodman, Stephen Pomper, and Steve Vladeck, "Principles for a 2021 Authorization for Use of Military Force." *Just Security*, March 5, 2021, https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/.

"British-American Diplomacy: The Caroline Case." In *Treaties and Other International Acts of the United States of America*, edited by David Hunter Miller. Washington: United States Government Printing Office, 1931.

Brunstetter, Daniel. *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations.* Oxford: Oxford University Press, 2021.

Brunstetter, Daniel, and Megan Braun. "From *Jus Ad Bellum* to *Jus Ad Vim*: Recalibrating Our Understanding of the Moral Use of Force." *Ethics & International Affairs,* 27(1) (2013): 87-106.

Buchanan, Allen. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law.* Oxford: Oxford University Press, 2003.

———. "Political Legitimacy and Democracy." *Ethics* 112(4) (2002): 689-719.

"The Bush Years: Pakistan Strikes 2004-2009." *The Bureau of Investigative Journalism*, https://www.thebureauinvestigates.com/drone-war/data/the-bush-years-pakistan-strikes-2004-2009.

Byman, Daniel. "The Lebanese Hizballah and Israeli Counterterrorism." *Studies in Conflict and Terrorism* 34(12) (2011): 917-941.

———, "Mowing the Grass and Taking out the Trash." *Foreign Policy*, August 25, 2014, https://foreignpolicy.com/2014/08/25/mowing-the-grass-and-taking-out-the-trash/.

———, "Why Drones Work: The Case for Washington's Weapon of Choice." *The Brookings Institution*, June 17, 2013, https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/.

Callamard, Agnès, "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters." *Just Security*, January 8, 2020, https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/.

Callen, Jason. "Unlawful Combatants and the Geneva Conventions." *Virginia Journal of International Law* 44(4) (2004): 1025-1072.

Cambanis, Thanassis, Dina Esfandiary, Sima Ghaddar, Michael Wahid Hanna, Aron Lund, and Renad Mansour. *Hybrid Actors: Armed Group's and State Fragmentation in the Middle East.* New York: Century Foundation Press, 2019. https://production-tcf.imgix.net/app/uploads/2019/11/15165406/TheCenturyFoundation_HybridActors.pdf.

Caney, Simon. *Justice Beyond Borders: A Global Political Theory.* Oxford: Oxford University Press, 2005.

Caron, David. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87(4) (1993): 552-588.

Chan, Joseph. *Confucian Perfectionism: A Political Philosophy for Modern Times.* Princeton: Princeton University Press, 2014.
"The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions." *Columbia Law School Human Rights Clinic and the Center for Civilians in Conflict* (2012). https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf.
Clark, Kate. "The Layha: Calling the Taleban to Account." *Afghanistan Analysts Network* (2012). https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf.
Clausewitz, Carl von. *On War.* Edited by J. J. Graham. Champaign: Project Gutenberg, 1999.
Coates, A. J. *The Ethics of War.* 2nd ed. Manchester: Manchester University Press, 2016.
Coates, Ta-Nehisi, "'Better Is Good': Obama on Reparations, Civil Rights, and the Art of the Possible." *The Atlantic*, December 21, 2016, https://www.theatlantic.com/politics/archive/2016/12/ta-nehisi-coates-obama-transcript-ii/511133/?utm_source=feed.
"Commentary of 2020 Article 3: Conflicts Not of an International Character." *International Committee of the Red Cross* (2020). https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#4_B.
"Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949." *International Committee of the Red Cross*, June 9, 2020, https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949.
Corten, Olivier. *The Law against War: The Prohibition on the Use of Force in Contemporary International Law.* 2nd ed. London: Zed Books, 2021.
Cortright, David, Rachel Fairhurst, and Kristen Wall. *Drones and the Future of Armed Conflict.* Chicago: University of Chicago Press, 2015.
Cronin, Audrey Kurth, "The Future of America's Drone Campaign." *Foreign Affairs*, October 14, 2021, https://www.foreignaffairs.com/articles/afghanistan/2021-10-14/future-americas-drone-campaign.
Cudd, Ann, and Seena Eftekhari, "Contractarianism." *Stanford Encylopedia of Philosophy*, March 15, 2017, https://plato.stanford.edu/archives/sum2018/entries/contractarianism/.
Dannenbaum, Tom. "War Crimes and Just War Theory." In *The Palgrave Handbook of Applied Ethics and the Criminal Law*, edited by Larry Alexander and Kimberly Kessler Ferzan. Cham: Palgrave Macmillan, 2019.
David, Fromkin. "The Great Game in Asia." *Foreign Affairs* 58(4) (1980).
David, Lynn, Michael McNerney, and Michael Greenberg, "Clarifying the Rules for Targeted Killing: An Analytical Framework for Policies Involving Long-Range Armed Drones." *RAND Corporation*, 2016, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf.
Davidson, Amy, and Jeff McMahan, "Live Chat: The Ethics of Drone Warfare." *The New Yorker*, February 13, 2013, https://www.newyorker.com/news/news-desk/live-chat-the-ethics-of-drone-warfare.

"Department of Defense Law of War Manual." *Office of General Counsel Department of Defense* (June 2015 (Updated December 2016)). https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

"Department Press Briefing." *U.S. Department of State*, May 10, 2021, https://www.state.gov/briefings/department-press-briefing-may-10-2021/.

Dill, Janina. "Should International Law Ensure the Moral Acceptability of War?". *Leiden Journal of International Law* 26(2) (2013): 253-270.

Dunlap Jr., Charles. "Lawfare 101: A Primer." *Military Review* (May-June 2017).

Dworkin, Anthony, "Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order." *Just Security*, January 7, 2020, https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/.

Dyke, Joe, and Imogen Piper, "Airwars: Biden Dramatically Decreased Global Airstrikes in 2021." *Responsible Statecraft*, December 24, 2021, https://responsiblestatecraft.org/2021/12/24/how-do-the-forever-wars-look-under-president-biden/.

Egan, Brian, "International Law, Legal Diplomacy, and the Counter-ISIL Campaign." *Remarks at the American Society of International Law*, April 1, 2016, https://2009-2017.state.gov/s/l/releases/remarks/255493.htm.

Emerton, Patrick, and Toby Handfield. "Order and Affray: Defensive Privileges in Warfare." *Philosophy & Public Affairs* 37(4) (2009): 382-414.

Erlanger, Steven, and Fares Akram, "Israel Warns Gaza Targets by Phone and Leaflet." *The New York Times*, July 8, 2014, https://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html.

"European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms." *European Court of Human Rights Council of Europe* (June 1, 2010). https://www.echr.coe.int/documents/convention_eng.pdf.

"Ex Parte Quirin. Ex Parte Haupt. Ex Parte Kerling. Ex Parte Burger. Ex Parte Heinck. Ex Parte Thiel. Ex Parte Neubauer. United States Ex Rel. Quirin v. Cox, Brig. Gen., U.S.A., Provost Marshal of the Military District of Washington, and 6 Other Cases. | Supreme Court | US Law | Lii / Legal Information Institute." Legal Information Institute Cornell Law School, 2021, https://www.law.cornell.edu/supremecourt/text/317/1.

"Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications." *International Committee of the Red Cross*, May 7, 2015, https://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications.

Fabre, Cécile. *Cosmopolitan War.* Oxford: Oxford University Press, 2012.

———. "Cosmopolitanism, Just War Theory and Legitimate Authority." *International Affairs* 84(5) (2008): 963-976.

———. "Guns, Food, and Liability to Attack in War." *Ethics* 120(1) (2009): 36-63.

———. "Mandatory Rescue Killings." *The Journal of Political Philosophy* 15(4) (2007): 363-384.
———. "Permissible Rescue Killings." *Proceedings of the Aristotelian Society* 109 (2009): 149-164.
———. *Spying through a Glass Darkly: The Ethics of Espionage and Counter-Intelligence.* Oxford: Oxford University Press, 2022.
———. "War Exit." *Ethics* 125(3) (2015): 631-652.
———. "War, Policing, and Killing." In *The Sage Handbook of Global Policing*, edited by Ben Bradford, Beatrice Jauregui, Ian Loader and Jonny Steinberg. Los Angeles: SAGE Reference, 2016.
Ferzan, Kimberly Kessler. "Justifying Self-Defense." *Law and Philosophy* 24(6) (2005): 711-749.
Finlay, Christopher. "Legitimacy and Non-State Political Violence." *The Journal of Political Philosophy* 18(3) (2010): 287-312.
———. *Terrorism and the Right to Resist: A Theory of Just Revolutionary War.* Cambridge: Cambridge University Press, 2015.
Finucane, Brian, "Failure to Warn: War Powers Reporting and the 'War on Terror' in Africa." *Just Security*, October 4, 2021, https://www.justsecurity.org/78450/failure-to-warn-war-powers-reporting-and-the-war-on-terror-in-africa/.
Fridman, Ofer. *Russian 'Hybrid Warfare'.* Oxford: Oxford University Press, 2018.
Friedman, Uri, "The Iran Plane Crash Is the Big Story." *The Atlantic*, January 14, 2020, https://www.theatlantic.com/politics/archive/2020/01/iran-plane-crash-soleimani-escalation/604852/.
Frowe, Helen. *Defensive Killing.* Oxford: Oxford University Press, 2014.
———. *The Ethics of War and Peace: An Introduction.* 2nd ed. London: Routledge, 2016.
———. "Non-Combatant Liability in War." In *How We Fight: Ethics in War*, edited by Helen Frowe and Gerald Lang. Oxford: Oxford University Press, 2014.
———. "On the Redundancy of *Jus Ad Vim*: A Response to Daniel Brunstetter and Megan Braun." *Ethics & International Affairs* 30(1) (2016): 117-129.
———. "A Practical Account of Self-Defence." *Law and Philosophy* 29(3) (2010): 245-272.
Fuller, Christopher, "The Origins of the Drone Program." *Lawfare*, February 18, 2018, https://www.lawfareblog.com/origins-drone-program.
Gat, Azar. "The Changing Character of War." In *The Changing Character of War*, edited by Hew Strachan and Sibylle Scheipers. Oxford: Oxford University Press, 2011.
Gauthier, David. *Morals by Agreement.* Oxford: Oxford University Press, 1986.
"General Assembly Resolution Demands End to Russian Offensive in Ukraine." *United Nations*, March 2, 2022, https://news.un.org/en/story/2022/03/1113152.
Gildea, Robert. *Fighters in the Shadows: A New History of the French Resistance.* London: Faber & Faber, 2015.
Glenn, Cameron, "Al Qaeda v. ISIS: Leaders & Structure." *The Woodrow Wilson International Center for Scholars*, September 28, 2015, https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure.

Goldberg, Jeffrey, "The Obama Doctrine." *The Atlantic*, April 15, 2016, https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/.
Goldstein, Joseph, "U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies." *The New York Times*, September 20, 2015, https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html.
Haberman, Maggie, and Catie Edmondson, "White House Notifies Congress of Suleimani Strike under War Powers Act." *The New York Times*, January 4, 2020, https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html?action=click&module=Top%20Stories&pgtype=Homepage.
Haque, Adil Ahmad, "Human Rights in Armed Conflict, Part I." *Just Security*, November 21, 2016, https://www.justsecurity.org/34631/human-rights-armed-conflict-part/.
———. "Killing in the Fog of War." *Southern California Law Review* 86(1) (2012): 63-116.
———. *Law and Morality at War.* Oxford: Oxford University Press, 2017.
———. "Necessity and Proportionality in International Law." In *The Cambridge Handbook of the Just War*, edited by Larry May, Shannon Fyfe and Eric Ritter. Cambridge: Cambridge University Press, 2018.
Hartig, Luke, "Playing Defense Is Totally Fine." *The Atlantic*, September 26, 2021, https://www.theatlantic.com/ideas/archive/2021/09/playing-defense-against-terrorism-endless-war/620205/.
Hartig, Luke, and Oona Hathaway, "Still at War: The United States in Yemen." *Just Security*, March 24, 2022, https://www.justsecurity.org/80806/still-at-war-the-united-states-in-yemen/.
Hathaway, Oona. "National Security Lawyering in the Post-War Era: Can Law Constrain Power?". *UCLA Law Review* 68(1) (2021): 2-102.
Hathaway, Oona, and Luke Hartig, "Still at War: The United States in Somalia." *Just Security*, March 31, 2022, https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia/.
Hayashi, Nobuo. *Military Necessity: The Art, Morality and Law of War.* Cambridge: Cambridge University Press, 2020.
"Hearing to Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations." *U.S. Senate Committee on Armed Services*, September 28, 2021, https://www.armed-services.senate.gov/imo/media/doc/21-73_09-28-2021.pdf.
Hemingway, Ernest. "Foreword." In *Treasury for the Free World*. New York: Arco Publishing Company, 1946.
Holder, Eric, "Attorney General Eric Holder Speaks at Northwestern University School of Law." *Speech at Northwestern University*, March 5, 2012, https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.
"How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?." *International Committee of the Red Cross*, March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf.

Hudson, Myles. "Anglo-Zanzibar War." Encyclopedia Britannica, August 20, 2021. https://www.britannica.com/event/Anglo-Zanzibar-War.
Hume, David. "Of the Original Contract (1752)." In *David Hume, Essays Moral, Political, Literary*, edited by Eugene Miller. Indianapolis: Liberty Fund, 1987.
Hursthouse, Rosalind. *On Virtue Ethics.* Oxford: Oxford University Press, 1999.
"International Covenant on Civil and Political Rights." *United Nations Human Rights Office of the High Commissioner* (December 16, 1966). https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
Jervis, Robert. "War and Misperception." *The Journal of Interdisciplinary History* 18(4) (1988): 675-700.
Jinks, Derek. "International Human Rights Law in Time of Armed Conflict." In *The Oxford Handbook of International Law in Armed Conflict*, edited by Andrew Clapham, Paola Gaeta, Tom Haeck and Alice Priddy. Oxford: Oxford University Press, 2014.
Johnson, Jeh Charles, "The Conflict against Al Qaeda and Its Affiliates: How Will It End?." *Oxford Union*, November 30, 2012, https://www.lawfareblog.com/jeh-johnson-speech-oxford-union.
"Joint Resolution to Authorize the Use of United States Armed Forces against Those Responsible for the Recent Attacks Launched against the United States." *Public Law 107-40*, September 18, 2001, https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf.
Jørgensen, Nina. *The Responsibility of States for International Crimes.* Oxford: Oxford University Press, 2000.
Just and Unjust Warriors: The Moral and Legal Status of Soldiers. Edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
Kaldor, Mary. *New and Old Wars: Organized Violence in a Global Era.* 3rd ed. Cambridge: Polity Press, 2012.
Khan, Azmat, "The Human Toll of America's Airwars." *The New York Times*, December 19, 2021, https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html.
Kipling, Rudyard. *Kim.* Garden City: Doubleday, Page & Company, 1922.
Kittay, Eva Feder. *Love's Labor: Essays on Women, Equality and Dependency.* New York: Routledge, 1999.
Klaidman, Daniel. *Kill or Capture: The War on Terror and the Soul of the Obama Presidency.* Boston: Houghton Mifflin Harcourt, 2012.
Knights, Michael, Hamdi Malik, and Aymenn Jawad Al-Tamimi. "The Future of Iraq's Popular Mobilization Forces." *The Washington Institute for Near East Policy* (May 28, 2020). https://www.washingtoninstitute.org/policy-analysis/future-iraqs-popular-mobilization-forces.
Koh, Harold Hongju, "Libya and War Powers Testimony." *U.S. Department of State*, June 28, 2011, https://2009-2017.state.gov/s/l/releases/remarks/167250.htm#ftn7.
Konaev, Margarita, and Kirstin Brathwaite, "Russia's Urban Warfare Predictably Struggles." *Foreign Policy Magazine*, April 4, 2022, https://foreignpolicy.com/2022/04/04/russia-ukraine-urban-warfare-kyiv-mariupol/.

Krebs, Shiri. "Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of Both Terrorism and Counterterrorism." *Florida State University Law Review* 44(3) (2017): 943-992.
Kutz, Christopher. "Fearful Symmetry." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
———. *On War and Democracy.* Princeton: Princeton University Press, 2016.
Lang, Anthony. "Authority and the Problem of Non-State Actors." In *Ethics, Authority, and War: Non-State Actors and the Just War Tradition*, edited by Eric Heinze and Brent Steele. New York: Palgrave Macmillan, 2009.
Lappin, Yaakov, "How Israel Is Adapting to the Growing Threat of Terror Armies." *Begin-Sadat Center for Strategic Studies*, January 13, 2021, https://besacenter.org/perspectives-papers/israel-terror-armies-threat/.
"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." *Department of Justice White Paper* (November 8, 2011). https://irp.fas.org/eprint/doj-lethal.pdf.
Lazar, Seth. "Just War Theory: Revisionists Versus Traditionalists." *Annual Review of Political Science* 20(1) (2017): 37-54.
———. "Method in the Morality of War." In *Oxford Handbook of Ethics of War*, edited by Seth Lazar and Helen Frowe. Oxford: Oxford University Press, 2015.
———. "Moral Sunk Costs." *The Philosophical Quarterly* 68(273) (2018): 841-861.
———. "National Defence, Self-Defence, and the Problem of Political Aggression." In *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar. Oxford: Oxford University Press, 2014.
———. "The Responsibility Dilemma for Killing in War: A Review Essay." *Philosophy & Public Affairs* 38(2) (2010): 180-213.
———. "Risky Killing and the Ethics of War." *Ethics* 126(1) (2015): 91-117.
———. *Sparing Civilians.* Oxford: Oxford University Press, 2015.
"Letter to Certain Congressional Committees on the Annual Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations." *The White House*, March 1, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/letter-to-certain-congressional-committees-on-the-annual-report-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations/.
Lewis, Dustin, Gabriella Blum, and Naz Modirzadeh. "Indefinite War: Unsettled International Law on the End of Armed Conflict." *Harvard Law School Program on International Law & Armed Conflict* (February 2017).
Luban, David. "Preventive War." *Philosophy & Public Affairs* 32(3) (2004): 207-248.
Mansour, Renad, and Faleh Jabar. "The Popular Mobilization Forces and Iraq's Future." *The Carnegie Endowment for International Peace* (April 2017). https://www.jstor.org/stable/pdf/resrep12970.pdf?ab_segments=0/basic_SYC-5187_SYC-5188/test&refreqid=fastly-default:025dc9c6fe91121c8562e66e5ef647cb.
Marmor, Andrei. "An Institutional Conception of Authority." *Philosophy & Public Affairs* 39(3) (2011): 238-261.

Martin, Craig. "Challenging and Refining the 'Unwilling or Unable' Doctrine." *Vanderbilt Journal of Transnational Law* 52(2) (2019): 387-461.
McMahan, Jeff. "The Basis of Moral Liability to Defensive Killing." *Philosophical Issues* 15(1) (2005): 386-405.
———. "Debate: Justification and Liability in War." *The Journal of Political Philosophy* 16(2) (2008): 227-244.
———. "The Ethics of Killing in War." *Ethics* 114(4) (2004): 693-733.
———. "Innocence, Self-Defense and Killing in War." *The Journal of Political Philosophy* 2(3) (1994): 193-221.
———. "The Just Distribution of Harm between Combatants and Noncombatants." *Philosophy & Public Affairs* 38(4) (2010): 342-379.
———. "Just War." In *A Companion to Contemporary Political Philosophy*, edited by Robert E. Goodin, Philip Pettit and Thomas Pogge. Oxford: Blackwell Publishing, 2007.
———. *Killing in War.* Oxford: Oxford University Press, 2009.
———. "The Morality of War and the Law of War." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
———. "Preventive War and the Killing of the Innocent." In *The Ethics of War: Shared Problems in Different Traditions*, edited by Richard Sorabji and David Rodin. Aldershot: Ashgate, 2006.
———. "Proportionality and Time." *Ethics* 125(3) (2015): 696-719.
———. "Proportionality in the Afghanistan War." *Ethics & International Affairs* 25(2) (2011): 143-154.
———. "Targeted Killing: Murder, Combat, or Law Enforcement?". In *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Claire Finkelstein, Jens David Ohlin and Andrew Altman. Oxford: Oxford University Press, 2012.
———. "War as Self-Defense." *Ethics & International Affairs* 18(1) (2004): 75-80.
———. "War Crimes and Immoral Action in War." In *The Constitution of the Criminal Law*. Oxford: Oxford University Press, 2013.
McPherson, Lionel. "Is Terrorism Distinctively Wrong?". *Ethics* 117(3) (2007): 524-546.
Meisels, Tamar. "Combatants: Lawful and Unlawful." *Law and Philosophy* 26(1) (2007): 31-65.
Melzer, Nils. "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law." *International Committee of the Red Cross* (May 2009).
Mills, Charles. *The Racial Contract (1997).* Ithaca: Cornell University Press, 2014.
Moreman, T. R. "'Small Wars' and 'Imperial Policing': The British Army and the Theory and Practice of Colonial Warfare in the British Empire, 1919-1939." *Journal of Strategic Studies* 19(4) (1996): 105-131.
Moyn, Samuel. *Humane: How the United States Abandoned Peace and Reinvented War.* New York: Farrar, Straus and Giroux, 2021.
Nabulsi, Karma. *Traditions of War.* Oxford: Oxford University Press, 1999.
"The National Security Strategy of the United States of America." *The White House* (September 2002). https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.

Necessity in International Law. Edited by Jens David Ohlin and Larry May. Oxford: Oxford University Press, 2016.
Nerguizian, Aram. "The Lebanese Armed Forces and Hezbollah: Military Dualism in Post-War Lebanon." *The Carnegie Endowment for International Peace* (October 30, 2018). https://carnegie-mec.org/2018/10/30/lebanese-armed-forces-and-hezbollah-military-dualism-in-post-war-lebanon-pub-77598.
Ní Aoláin, Fionnuala, and Jayne Huckerby, "Gendering Counterterrorism: How to, and How Not to — Part I." *Just Security*, May 1, 2018, https://www.justsecurity.org/55522/gendering-counterterrorism-to/.
"Non-Member States Having Received a Standing Invitation to Participate as Observers in the Sessions and the Work of the General Assembly and Maintaining Permanent Observer Missions at Headquarters." *United Nations*, https://www.un.org/en/about-us/non-member-states.
Nussbaum, Martha. *Creating Capabilities: The Human Development Approach.* Cambridge: Belknap Press of Harvard University, 2011.
Orend, Brian. *The Morality of War.* Peterborough: Broadview Press, 2006.
Parfit, Derek. *On What Matters.* Oxford: Oxford University Press, 2011.
Parry, Jonathan. "Just War Theory, Legitimate Authority, and Irregular Belligerency." *Philosophia* 43(1) (2015): 175-196.
———. "Legitimate Authority and the Ethics of War: A Map of the Terrain." *Ethics & International Affairs* 31(2) (2017): 169-189.
Pateman, Carole. *The Sexual Contract.* Oxford: Polity Press, 1988.
Perret, Françoise. "L'action Du Comité International De La Croix-Rouge Pendant La Guerre D'algérie (1954-1962)." *International Review of the Red Cross* 86 (2004).
Pettit, Philip. "Republican Freedom and Contestatory Democratization." In *Democracy's Value*, edited by Ian Shapiro and Casiano Hacker-Cordón. Cambridge: Cambridge University Press, 1999.
Philipps, Dave, and Eric Schmitt, "Over Ukraine, Lumbering Turkish-Made Drones Are an Ominous Sign for Russia." *The New York Times*, March 11, 2022, https://www.nytimes.com/2022/03/11/us/politics/ukraine-military-drones-russia.html.
Philipps, Dave, Eric Schmitt, and Mark Mazzetti, "Civilian Deaths Mounted as Secret Unit Pounded ISIS." *The New York Times*, December 12, 2021, https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html.
Pinker, Steven. *The Better Angels of Our Nature: A History of Violence and Humanity.* London: Penguin, 2012.
"PKK Statement to the United Nations," January 24, 1995, http://www.hartford-hwp.com/archives/51/009.html.
"Principles, Standards, and Procedures for U.S. Direct Action against Terrorist Targets." *The White House* (April 30, 2021). https://www.aclu.org/sites/default/files/field_document/2021-4-30_psp_foia_final.pdf.
"Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities." *The White House* (May 22, 2013). https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf.

"The Prosecutor v. Dusko Tadić, It-94-1-Ar72, Appeals Chamber, Decision." International Criminal Tribunal for the Former Yugoslavia, October 2, 1995. https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic.

"Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977." *United Nations*, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf.

Purkiss, Jessica, and Jack Serle, "Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush." *The Bureau of Investigative Journalism*, January 17, 2017, https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush.

Ratner, Michael. "A Crime against Humanity and Not War: Making Us Safer at Home and Stopping Carnage Abroad." *Guild Practice* 129 (2001): 134-135.

Rawls, John. *A Theory of Justice.* Cambridge: Belknap Press of Harvard University, 1971.

Ray, James Lee. "The Abolition of Slavery and the End of International War." *International Organization* 43(3) (1989): 405-439.

Raz, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason.* Oxford: Oxford University Press, 2009.

———. *The Morality of Freedom.* Oxford: Oxford University Press, 1986.

Redaelli, Chiara. "The Right to Rebel against Violations of Human Rights: A New Role for the Responsibility to Protect?". *The Palestine Yearbook of International Law* (2016): 8-41.

Reeve, C.D.C. *Aristotle on Practical Wisdom: Nicomachean Ethics Vi.* Cambridge: Harvard University Press, 2013.

Reichberg, Gregory. "Just War and Regular War: Competing Paradigms." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.

———. "Legitimate Authority: Aquinas's First Requirement of a Just War." *The Thomist* 76(3) (2012): 337-369.

———. "The Moral Equality of Combatants - a Doctrine in Classical Just War Theory? A Response to Graham Parsons." *Journal of Military Ethics* 12(2) (2013): 181-194.

———. "Suárez on Just War." In *Interpreting Suárez: Critical Essays*, edited by Daniel Schwartz. Cambridge: Cambridge University Press, 2012.

Reitberger, Magnus. "License to Kill: Is Legitimate Authority a Requirement for Just War?". *International Theory* 5(1) (2013): 64-93.

"Remarks by President Biden before the 76th Session of the United Nations General Assembly." The White House, September 21, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/21/remarks-by-president-biden-before-the-76th-session-of-the-united-nations-general-assembly/.

"Remarks by the President at the National Defense University." *The White House*, May 23, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

"Remarks of John O. Brennan, 'Strengthening Our Security by Adhereing to Our Values and Laws'." *The White House*, September 16, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.
Reno, William. "Crime Versus War." In *The Changing Character of War*, edited by Hew Strachan and Sibylle Scheipers. Oxford: Oxford University Press, 2011.
"Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations." *The White House* (2016). https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.
Ricks, Thomas, "Five Big Problems with the Drone Programs." *Foreign Policy*, December 10, 2015, https://foreignpolicy.com/2015/12/10/5-big-problems-with-the-drone-programs/.
Rigterink, Anouk S. "The Wane of Command: Evidence on Drone Strikes and Control within Terrorist Organizations." *American Political Science Review* 115(1) (2021): 31-50.
Ripstein, Arthur. "Lecture I: Rules for Wrongdoers." In *Rules for Wrongdoers: Law, Morality, War*, edited by Saira Mohamed. Oxford: Oxford University Press, 2021.
———. "Reclaiming Proportionality (Society for Applied Philosophy Annual Lecture 2016)." *Journal of Applied Philosophy* 34(1) (2017): 1-18.
Rodin, David. "Ending War." *Ethics & International Affairs* 25(3) (2011): 359-367.
———. "Justifying Harm." *Ethics* 122(1) (2011): 74-110.
———. "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
———. "Morality and Law in War." In *The Changing Character of War*, edited by Hew Strachan and Sibylle Scheipers. Oxford: Oxford University Press, 2011.
———. "The Myth of National Self-Defence." In *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar. Oxford: Oxford University Press, 2014.
———. "The Problem with Prevention." In *Preemption: Military Action and Moral Justification*, edited by Henry Shue and David Rodin. Oxford: Oxford University Press, 2007.
———. *War and Self-Defense.* Oxford: Oxford University Press, 2002.
———. "The War Trap: Dilemmas of Jus Terminatio." *Ethics* 125(3) (2015): 674-695.
Rodin, David, and Henry Shue. "Introduction." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
Rosen, Brianna, "The Longest War Is over the Horizon." *Just Security*, November 1, 2021, https://www.justsecurity.org/78818/the-longest-war-is-over-the-horizon/.
———, "To End the Forever Wars, Rein in the Drones." *Just Security*, February 16, 2021, https://www.justsecurity.org/74690/to-end-the-forever-wars-rein-in-the-drones/.
———, "Tragic Mistakes: Breaking the Military Culture of Impunity." *Just Security*, November 23, 2021, https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/.

Rosen, Brianna, Luke Hartig, Tess Bridgeman, and Ryan Goodman, "Questions on the Baghuz Strikes." *Just Security*, November 15, 2021, https://www.justsecurity.org/79218/questions-on-the-baghuz-strikes/.

Rousseau, Jean-Jacques. *The Social Contract and Other Later Political Writings (1762)*. Edited by Victor Gourevitch. 2nd ed. Cambridge: Cambridge University Press, 2019.

———. *The Social Contract and the First and Second Discourses.* Edited by Susan Dunn and Gita May. New Haven: Yale University Press, 2002.

Sarkees, Meredith Reid, "The COW Typology of War: Defining and Categorizing Wars." *The Correlates of War Project*, 2007, https://correlatesofwar.org/data-sets/COW-war/the-cow-typology-of-war-defining-and-categorizing-wars/view.

Savage, Charlie, and Eric Schmitt, "Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones." *The New York Times*, March 3, 2021, https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html.

Savage, Charlie, Eric Schmitt, Azmat Khan, Evan Hill, and Christoph Koettl, "Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike." *The New York Times*, January 19, 2022, https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html.

Schmitt, Carl. "Theory of the Partisan: Intermediate Commentary on the Concept of the Political (1963)." *Telos Press* 127 (2004): 11-78.

Schwartz, Matthew, "Who Was the Iraqi Commander Also Killed in the Baghdad Drone Strike?." *National Public Radio*, January 4, 2020, https://www.npr.org/2020/01/04/793618490/who-was-the-iraqi-commander-also-killed-in-baghdad-drone-strike.

Schwenkenbecher, Anne. "Rethinking Legitimate Authority." In *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century*, edited by Fritz Allhoff, Nicholas Evans and Adam Henschke. London: Routledge, 2013.

"Senate Hearing on the Authorization for Use of Military Force (AUMF)." *Senate Foreign Relations Committee*, August 3, 2021, https://www.c-span.org/video/?513875-1/senate-hearing-authorization-military-force-aumf.

Shaikh, Shaan, and Ian Williams. "Hezbollah's Missiles and Rockets." *Center for Strategic and International Studies* (July 5, 2018). https://www.csis.org/analysis/hezbollahs-missiles-and-rockets.

Shamsi, Hina, "Trump's Secret Rules for Drone Strikes and Presidents' Unchecked License to Kill." *Just Security*, May 3, 2021, https://www.justsecurity.org/75980/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill/.

Sherwood-Randall, Liz, "Remarks as Prepared for Delivery by Assistant to the President for Homeland Security, Dr. Liz Sherwood-Randall on the Future of the U.S. Counterterrorism Mission: Aligning Strategy, Policy, and Resources." *The White House*, September 8, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-assistant-to-the-president-for-homeland-security-dr-liz-sherwood-randall-on-the-future-of-the-u-s-counterterrorism-mission-aligning-strategy-policy-and-resources/.

Shue, Henry. "Do We Need a 'Morality of War'?". In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
———. *Fighting Hurt.* Oxford: Oxford University Press, 2016.
———. "Keeping Exceptions Exceptional in War: Could Any Revisionist Theory Guide Action?". In *Walzer and War: Reading Just and Unjust Wars Today*, edited by Graham Parsons and Mark A. Wilson. Cham: Palgrave Macmillan, 2020.
———. "Last Resort and Proportionality." In *Oxford Handbook of Ethics of War*, edited by Helen Frowe and Seth Lazar, 2015.
Siemion, Rita, "Trump's Revocation of Reporting on Lethal Strikes: All Eyes on Congress, Now." *Just Security*, March 8, 2019, https://www.justsecurity.org/63123/trumps-revocation-reporting-lethal-strikes-eyes-congress/.
Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict.* Oxford: Oxford University Press, 2012.
———. "Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War." *International Review of the Red Cross* 93(882) (June 2011). https://www.icrc.org/es/doc/assets/files/review/2011/irrc-882-sivakumaran.pdf.
Smith, Michael. "Regulating Law Enforcement's Use of Drones: The Need for State Legislation." *Harvard Journal on Legislation* 52(2) (2015): 423-454.
"Statement by the President on ISIL." *The White House*, September 10, 2014, https://obamawhitehouse.archives.gov/realitycheck/the-press-office/2014/09/10/statement-president-isil-1.
Steinhoff, Uwe. "Benbaji on Killing in War and the War Convention." *Philosophical Quarterly* 60(240) (2010): 616-623.
———. "Debate: Jeff Mcmahan on the Moral Inequality of Combatants." *The Journal of Political Philosophy* 16(2) (2008): 220-226.
———. "Lazar on 'Moral Sunk Costs' and the 'Discount View'." *Ratio Juris* 35(1) (2022): 21-29.
———. *On the Ethics of War and Terrorism.* Oxford: Oxford University Press, 2007.
———. "Rights, Liability, and the Moral Equality of Combatants." *The Journal of Ethics* 16(4) (2012): 339-366.
Strachan, Hew, and Sibylle Scheipers. *The Changing Character of War.* Oxford: Oxford University Press, 2011.
Strawser, Bradley Jay. *Killing by Remote Control: The Ethics of an Unmanned Military.* Oxford: Oxford University Press, 2013.
Szayna, Thomas, Stephen Watts, Angela O'Mahony, Bryan Frederick, and Jennifer Kavanagh. "What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?". *RAND Corporation* (2017). https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf.
Tadros, Victor. "Past Killings and Proportionality in War." *Philosophy & Public Affairs* 46(1) (2018): 9-35.
———. *To Do, to Die, to Reason Why.* Oxford: Oxford University Press, 2020.

Tadros, Victor, and Stephen Tierney. "The Presumption of Innocence and the Human Rights Act." *Modern Law Review* 67(3) (2004): 402-434.
Taylor, David, "The Inside Story of How a Nazi Plot to Sabotage the U.S. War Effort Was Foiled." *Smithsonian Magazine*, June 28, 2016, https://www.smithsonianmag.com/history/inside-story-how-nazi-plot-sabotage-us-war-effort-was-foiled-180959594/.
Thompson, Janna. "Terrorism, Morality and Right Authority." In *Ethics of Terrorism & Counter-Terrorism*, edited by Georg Meggle. Frankfurt: Ontos, 2005.
Thomson, Judith Jarvis. "Self-Defense." *Philosophy & Public Affairs* 20(4) (1991): 283-310.
Tolstoy, Leo. *War and Peace (1869).* Edited by Amy Mandelker. Oxford: Oxford University Press, 2020.
"U.S. Military Carries Out First Air Strike in Somalia under Biden." *Reuters*, July 20, 2021, https://www.reuters.com/world/africa/us-military-carries-out-first-air-strike-somalia-under-biden-2021-07-20/.
"UN Security Council Working Methods: The Veto." *UN Security Council Report*, December 16, 2020, https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php#:~:text=23)%E2%80%94the%20veto%20has%20been%20recorded%20293%20times.
Uniacke, Suzanne. "The Condition of Last Resort." In *The Cambridge Handbook of the Just War*, edited by Larry May, Shannon Fyfe and Eric Ritter. Cambridge: Cambridge University Press, 2018.
"The United States Spends More on Defense Than the Next 11 Countries Combined." *Peter G. Peterson Foundation*, July 19, 2021, https://www.pgpf.org/blog/2021/07/the-united-states-spends-more-on-defense-than-the-next-11-countries-combined.
"United States v. Zayn Al-Abidin Muhammad Husayn, Aka Abu Zubaydah, et al.," No. 20-827. *Supreme Court of the United States*, October 6, 2021, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-827_l6gn.pdf.
Urcosta, Ridvan Bari. "Drones in the Nagorno-Karabakh." *Small Wars Journal* (2020).
Uzan, Elad. "Moral Sunk Costs in War and Self-Defence." *The Philosophical Quarterly* 71(2) (2021): 359-377.
Veuthey, Michael. "Guérrillas Et Droit Humanitaire." (1976). https://international-review.icrc.org/sites/default/files/S003533610008391Xa.pdf.
Waldron, Jeremy. *Law and Disagreement.* Oxford: Oxford University Press, 1999.
———. *Torture, Terror, and Trade-Offs: Philosophy for the White House.* Oxford: Oxford University Press, 2010.
Walzer, Michael. "Asymmetric War and Its Journalists." *Dissent,* 69(1), (2022): 76-84.
———. "Just & Unjust Targeted Killing & Drone Warfare." *Daedalus* 145(4) (2016): 12-24.
———. *Just and Unjust Wars: A Moral Argument with Historical Illustrations.* 4th ed. New York: Basic Books, 2006.
———. *Just and Unjust Wars: A Moral Argument with Historical Illustrations.* 5th ed. New York: Basic Books, 2015.

———. "On Fighting Terrorism Justly." *International Relations* 21(4) (2007): 480-484.
———, "What a Little War in Iraq Could Do." *The New York Times*, March 7, 2003, https://www.nytimes.com/2003/03/07/opinion/what-a-little-war-in-iraq-could-do.html.
"War," in *Merriam-Webster Dictionary* (2022). https://www.merriam-webster.com/dictionary/war.
"War," in *Oxford English Dictionary* (Oxford: Oxford University Press, 2022). https://www.oxfordlearnersdictionaries.com/definition/english/war.
Weed, Matthew, "A New Authorization for Use of Military Force against the Islamic State: Issues and Current Proposals." *Congressional Research Service*, February 21, 2017, https://sgp.fas.org/crs/natsec/R43760.pdf.
Welsh, Jennifer. "The Individualisation of War: Defining a Research Programme." *Annali della Fondazione Luigi Einaudi* 53(1) (2019): 9-27.
Wieviorka, Olivier. *Histoire De La Résistance.* Paris: Perrin, 2013.
"Will I Be Next?: US Drone Strikes in Pakistan." *Amnesty International* (October 2013). https://www.amnestyusa.org/files/asa330132013en.pdf.
Wright, Gordon. "Reflections on the French Resistance, 1940-1944." *Political Science Quarterly* 77(3) (1962): 336-349.
Zenko, Micah, "The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama." *Council on Foreign Relations*, March 2, 2017, https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama.
———, "Obama's Embrace of Drone Strikes Will Be a Lasting Legacy." *The New York Times*, January 12, 2016, https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy.
———, "Obama's Final Drone Strike Data." *Council on Foreign Relations*, January 20, 2017, https://www.cfr.org/blog/obamas-final-drone-strike-data.