



SMALL WARS JOURNAL

smallwarsjournal.com

Drone Attacks and Just War Theory

by William O'Hara

The philosopher Cicero once wrote: *Silent enim leges inter arma* – or laws are inoperative in war.¹ Despite the temptation in the age of technology to utilize new combative innovations to their full and most exact advantage, we must not fall prey to the falsehood presented by our Roman ancestor.² With a new capability for waging war comes the requirement of determining in what capacity that capability should be utilized within the confines of a modern limited war. It is with this in mind that the United States tactic of targeted killing utilizing unmanned aerial vehicles (termed drones) must be evaluated. While the Obama administration insists that they have been following all laws of war in the execution of their strikes, not all of the international community agrees.³

Utilizing the most fundamental principles of the law of war – Just War Theory (JWT) – this paper aims to frame the discussion surrounding targeted killing. Much of the international law applicable to drone attacks are derived from JWT, but current interpretations of that law are often quite diverse, from the hawkish to the overtly pacifistic. Some insist that the standing law indicates that drone strikes should be nearly unlimited; others argue that the practice should be conducted on a significantly limited basis. This paper will utilize thought from contemporary JWT scholars and the underlying purpose of limited war in an attempt to find a common ground in statutory interpretation.

While JWT offers guidance on both *when* to use force and *how* to use force, this paper will focus on the latter, commonly recognized as the *jus in bello* principles of distinction and proportionality used to conduct a limited war. Part I of the paper will provide a synopsis of JWT *jus in bello* development and principles, and how it has been adopted into both customary international law and international treaties. Part II of this paper will first apply JWT derived standing law to a standard example of drone targeted killings. Subsequently, JWT principle and law will be applied to two different case studies in which the utilization of drones threatens to breach the boundaries of JWT, while providing guidance as to where hard lines on the *jus in bello* application of drones should be drawn. The case studies serve one purpose – to create a fertile environment for different interpretations of *jus in bello* principles (codified into law) to be

¹ Cicero pleaded, ‘...silent enim leges inter arma’ (Laws are silent among those who use weapons). Cicero, Pro Milone, 4, 11 <http://www.thelatinlibrary.com/cicero/milo.shtml>.

² This has been evidenced throughout history. For example, the musket with its previously unmatched range and accuracy was effectively limited to conventional projectiles, as customary and codified law prevented the use of more hazardous munitions. See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Saint Petersburg, 29 November / 11 December 1868, available at <http://www.icrc.org/IHL.NSF/INTRO/130?OpenDocument>.

³ “This Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles”. See Harold Hongju Koh, Legal Advisor, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law, (Mar. 25, 2010). Conversely, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions thought the Obama administration’s justification of targeted killing amounted to little more than “You’ve got to trust us. I’ve looked at this very carefully. I’m very sensitive to these issues. And all is well.” Interview by Amy Goodwin with Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, on Democracy Now! The War and Peace Report (Apr. 1, 2010).

discussed. These interpretations, as mentioned earlier, are often disparate; in such cases, the original purposes of JWT, and contemporary scholarship on the subject will hopefully help highlight the proper opinion.

Part I: Just War Theory: Historical Background and Contemporary Implementation

The germinal theologian in JWT is commonly thought to be St. Augustine, a Christian bishop who lived around 400 A.D.⁴ While he contributed nothing to the formation of the *jus in bello* principles that we will later discuss, his thoughts on sovereign authority were quite formative in the creation of *jus ad bellum*, which is a commonly used in determining when to use force.⁵ St. Thomas Aquinas was the first philosopher to make any tactile contribution to the *jus in bello* components of JWT.⁶ He produced a largely *jus ad bellum*-centric codification of canon law in the mid-twelfth century that established three principles of a just war: (1) sovereign authority, (2) just cause, and (3) right intention.⁷ It was from the third principle of right intention that *jus in bello* principles were derived from by later philosophers.⁸

Following in the natural law tradition, Aquinas defined just intention as “one must intend to promote the good and avoid evil.”⁹ During the Reformation, Francisco de Victoria, along with Francisco Suarez and Hugo Grotius, elaborated on Aquinas’s meaning of just intention to create a clearer standard for *jus in bello*, and also added a new JWT innovation.¹⁰ To these philosophers, promoting good and avoiding evil required a certain amount of regulation regarding how war was conducted, which lead to the formulation of the principles of proportionality and distinction.¹¹ Victoria’s innovation contribution came in the stipulation that both opposing forces must adhere to *jus in bello* principles, due to the risk that assumed just cause might empower a combatant nation to disregard any regulation over the conduct of their campaign.¹²

A. The Meaning and Development of Proportionality and Distinction

The principle of distinction began to normalize around three hundred years after St. Thomas Aquinas added the “just intent” criterion to St. Augustine’s original requirements.¹³ Victoria generalized that “innocents” shouldn’t be killed, and Grotius elaborated one hundred years later that women and children should be spared.¹⁴ The first distinction between a man carrying a weapon and an unarmed one was made by Jean-Jacques Rousseau.¹⁵ He held that

⁴ Joshua Raines, Comment, *Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings*, 12 Transnat’l L. & Contemp. Probs. 217, 221 (2002).

⁵ William E. Murnion, *A Postmodern View of Just War*, in INTERVENTION, TERRORISM, AND TORTURE – CONTEMPORARY CHALLENGES TO JUST WAR THEORY 24 (Steven P. Lee ed., Springer) (2007).

⁶ Raines, *supra* note 4, at 222.

⁷ *Id.*

⁸ *Id.* at 223.

⁹ *Id.* at 222.

¹⁰ Murnion, *supra* note 5, at 24.

¹¹ Raines, *supra* note 4, at 223.

¹² Murnion, *supra* note 5, at 27.

¹³ Daphne Richemond, *Symposium on Reexamining the Law of War: Transnational Terrorist Organizations and the Use of Force*, 56 Cath. U.L. Rev 1001, 1018 (2007).

¹⁴ *Id.*

¹⁵ *Id.*

soldiers are state actors, and upon surrender of arms revert to becoming “mere men”, and immune from harm.¹⁶

Proportionality, too, was derived from Aquinas’s principle of just intent.¹⁷ Aquinas developed a theory of proportionality in the context of self-defense; in order for the use of force to be just, it must not be excessive.¹⁸ Grotius elaborated on Aquinas by turning this into a general principle of law.¹⁹

Ironically, the first true codification of the *jus in bello* principles did not come in the form of a treaty between the great powers of western Europe, where the underpinnings of JWT were developed, but rather were drafted and implemented by a German immigrant named Francis Lieber at the request of a Union Army general during the American Civil War.²⁰ True to the roots of St. Thomas Aquinas’s just intention criterion, Lieber emphasized the protection of the unarmed citizen who “is to be spared in person, property, and honor as much as the exigencies of the war will admit”, in other words to promote the wellness of noncombatants, and to avoid the evil of the innocent loss of life.²¹ The proportionality principle was also addressed, although slightly more obliquely, as it was referred to in the capacity of banning cruelty and certain weapons.²² The document, known as the Lieber Code, was surprisingly influential, heavily impacting the St. Petersburg Declaration in 1868, and the Brussels Declaration on chemical warfare shortly thereafter.²³ While not addressed at the original Geneva Conventions of 1949, the *jus in bello* principle of distinction and proportionality were included in 1977 in Additional Protocol I.²⁴

Contemporary JWT scholars have continued the theoretical pursuits of the early Christian philosophers, often on consistent vectors.²⁵ Michael Walzer, in his seminal work *Just and Unjust Wars*, defends the principle of distinction in modern warfare.²⁶ His argument rests on the premise that immunity from attack is an extension of the principle of military necessity; it is unjustifiable to attack civilians because no legitimate military advantage can be gained by doing so.²⁷ By becoming a member of the military, the former civilians gain the dubious distinction of being a valid military target and lose their noncombatant immunity.²⁸ Walzer also notes that proportionality is a largely utilitarian calculation; the attacking force must attempt to balance the

¹⁶ International Committee Of The Red Cross, *What Are The Essential Rules Of International Humanitarian Law?* (2002), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZFJU>.

¹⁷ Engle, Eric Allen, *The History of the General Principle of Proportionality: An Overview*, Williamette J. Int’l L. & Dis. Res. (forthcoming) (manuscript at 5, available at <http://ssrn.com/abstract=1431179>).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Richemond, *supra* note 13, at 1018.

²¹ *Id.* at 1019. Compare with “one must intend to promote the good and avoid evil.” Raines, *supra* note 4, at 222.

²² Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, Section 1(16), available at <http://www.icrc.org/ihl.nsf/FULL/1107OpenDocument> [hereinafter Lieber Code].

²³ Richemond, *supra* note 13, at 1021.

²⁴ See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979), [hereinafter Protocol I].

²⁵ Walzer’s theory mirrors Victoria’s that when a civilian takes up arms (or in Walzer’s case becomes a member of the military), the individual loses their immunity. See Richemond, *supra* note 14, at 1039.

²⁶ MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 146 (Basic Books 2006)(1977).

²⁷ *Id.*

²⁸ *Id.* at 145.

benefit accrued from destroying the valid target due to military necessity against the harm to individual civilians and the permanent interests of mankind.²⁹

B. Modern Statutory Implementation of Distinction and Proportionality

Protocols I and II of the 1949 Geneva Convention addressed several oversights in the original conference, namely the lack of codified *jus in bello* principles, such as distinction and proportionality.³⁰ In reference to distinction, the statutory language can generally be divided into two categories based on purpose: (1) language defining legitimate military targets (objects) or (2) language defining the distinction between combatants and noncombatants (people).

According to Article 52(2) of Protocol I, a valid military target is subject to a two-part test. First, the object must make an “effective contribution” to enemy military action, meaning that the target must by its location, nature, purpose or use benefit the enemy. Second, the object must by its destruction, capture or neutralization, offer a definite military advantage to the targeting force.³¹ By negative inference, all other targets are civilian objectives and therefore have a protected status.³² Civilian objectives (and their resultant immunity) cannot be used as a shield for the enemy military, and in places of worship, homes, or schools there is a presumption against the fact that it is making an effective contribution to the enemy military.³³ Also codified in the Geneva Convention is a prohibition against indiscriminate attacks.³⁴ This provision bans attacks that are “of a nature to strike military objectives and civilians or civilian objects *without distinction*” (emphasis added), which typically results from either a lack of proper targeting or the inability to accurately guide an attack to the desired target.³⁵

Out of the same vein, there are similar distinctions when targeting individuals vice “objects”. A civilian is any person not categorized as a combatant in the Third Geneva Convention Article 4:

- (1) [a m]ember of the regular armed forces of a belligerent party;
- (2) [a m]ember of militia and volunteer corps fulfilling the following conditions:
 - (a) to be commanded by a person responsible for his subordinates;
 - (b) to have a fixed distinctive emblem recognizable at a distance;
 - (c) to carry arms openly;
 - (d) to conduct operations in accordance with the laws and customs of war; and
 - (e) to be linked to a party to the conflict;
- (3) [an inhabitant] of a non-occupied territory who, on approach of the enemy, spontaneously takes up arms to resist invading troops...³⁶

²⁹ *Id.* at 129.

³⁰ Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. Rev. 1, 23 (2005).

³¹ Protocol I, *supra* note 24 art. 52(2).

³² See Protocol I, *supra* note 24 art. 52(1).

³³ See Protocol I, *supra* note 24 art. 52(3).

³⁴ See Protocol I, *supra* note 24 art. 51.

³⁵ Protocol I, *supra* note 24 art. 51(4); See also Heike Spieker, *Civilian Immunity*, Crimes of War, <http://www.crimesofwar.org/thebook/civilian-immunity.html>.

³⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [*hereinafter* Geneva Convention III].

The civilian, in contrast to the combatant, enjoys significant protections, such as not being subject to the use of force or reprisal.³⁷ Importantly, the civilian loses this protection “unless and for such time as they take a direct part in hostilities.”³⁸

In addition to addressing the lacking principle of distinction, Additional Protocol I also codified the *jus in bello* tenant of proportionality. Proportionality is often seen as complementing the principle of distinction, and deals largely with the prevention of unreasonable amounts of civilian deaths. Article 51(5)(b) augments the prohibition on indiscriminate attacks:

The following types of attacks are to be considered as indiscriminate: ... (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁹

While proportionality is also mentioned as a principle in Article 57(b), Article 51(5)(b) implies that any attack that causes civilian damage in excess to the military advantage anticipated automatically becomes an indiscriminate and therefore prohibited attack.

1. Proportionality and Distinction in Customary International Law

While Additional Protocol I of the Geneva Convention has codified the principles of distinction and proportionality, several notable countries (including the United States, Israel, Iran, Pakistan, Turkey, and Iraq) have not ratified the addition.⁴⁰ The influential International Committee of the Red Cross (ICRC), however, published a review in 2005 that designated the previously highlighted rules of Additional Protocol I regarding distinction and proportionality as customary international law, arguably making it binding on non-ratifying states.⁴¹ It did so based on two main criteria: (1) state practice, and (2) belief that such practice is required.⁴² In effect, this means that the ICRC recognizes that states have been using these laws already, as evidenced by how they conduct their strikes and within their internal rules and regulations. It is arguable that this acknowledgement of state practice took into account how states executed targeted killing, as the practice originated before the study was published.⁴³

Part II: The Principles of Distinction and Proportionality Applied to United States Targeted Killing Practices

Before exploring the nebulous boundaries of drone killing tactics, it is useful to establish how the JWT principles and statutory codification interact with the standard practice. First will be an example of an idealized drone strike which clearly illustrates the principles of distinction and proportionality. With such a baseline established, the first case study will be an example of a strike that challenges the JWT principle of distinction, and yields the opportunity to explore

³⁷ Protocol I, *supra* note 24 art. 51(2),(6).

³⁸ Protocol I, *supra* note 24 art. 51(3).

³⁹ Protocol I, *supra* note 24 art. 51(5)(b).

⁴⁰None of the above parties are listed as ratifying Protocol I. International Committee Of The Red Cross (2005), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S>.

⁴¹ Jean-Marie Henckaerts, International Committee Of The Red Cross, *International Review Of The Red Cross Customary Law, A Contribution To The Understanding And Respect For The Rule Of Law In Armed Conflict* 15 (2005). Found at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0860?opendocument>.

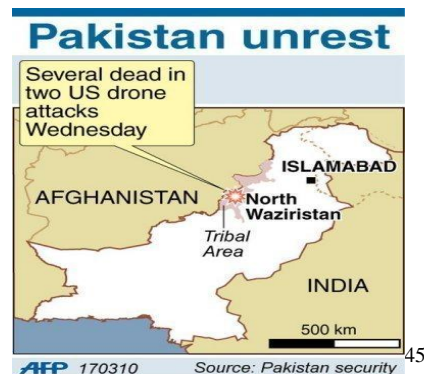
⁴² *Id.* at 5.

⁴³ Certainly, the practice of targeted killing via cruise missile had been employed for decades prior to the ICRC study. There have also been drone strikes at least since 2002. See Phillip Smucker, *The Intrigue Behind the Drone Strike*, The Christian Science Monitor, (2002), <http://www.csmonitor.com/2002/1112/p01s02-wome.html>.

different perspectives on the principle. The second case study will be the application of the principle of proportionality to a situation in which proportionality is subject to legal interpretation, and therefore difficult to evaluate.

A. Drone Strike I: A Clear Illustration of Distinction and Proportionality

The suspected U.S. drone attack on March 17th, 2010 in Pakistan is a fairly standard example of the practice.⁴⁴ The strike was aimed at a Taliban stronghold in North Waziristan, which is part of Pakistan's resistive tribal region.



Accounts of the attacks vary by news source, but all agree that the targets of the attack were active insurgents.⁴⁶ There were no reported civilian casualties from this strike, and the collateral damage consisted of a destroyed house and two destroyed vehicles.⁴⁷

1. Distinction: Combatant or Civilian?

Based on the Third Geneva Convention, Article 4, to be classified as a combatant (and therefore be a lawful target) an individual must satisfy certain criteria.⁴⁸ While we know little about the individuals targeted on March 17th, it is highly likely that they did not fall into the category of "combatant", as none of the required criteria are satisfied. Most likely, they were not members of the Pakistani (whom we are not at war with anyway) army, nor were they members of a militia wearing a fixed emblem.⁴⁹ Neither do they satisfy Art 4(6), which references the spontaneous resistance to an invading power, because the civilians would have had enough time to form a regular military unit to resist.⁵⁰ As such, it is reasonably clear that these individuals are not combatants in the sense described by Article 4, and therefore fall into the civilian category by negative inference. Indeed, most international scholars agree that insurgents do not qualify as combatants.⁵¹

⁴⁴ Kristen Chick, *US Drone Strikes Kill Seven in Pakistan Taliban Stronghold*, The Christian Science Monitor, March 17, 2010, <http://www.csmonitor.com/World/terrorism-security/2010/0317/US-drone-strikes-kill-seven-in-Pakistan-Taliban-stronghold>

⁴⁵ http://www.google.com/hostednews/afp/slideshow/ALeqM5gNLgP0dthWK0HwREeqdG3Kd3dX_Q?index=1&ned=us

⁴⁶ A French publication stated that the attacks killed 7 insurgents, but were unable to verify if any of them were high level Taliban fighters. A Pakistani publication stated that the fighters were linked to Hafiz Gul Bahadur, a leader of resistance against coalition forces. Chick, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ Geneva Convention III, *supra* note 35.

⁴⁹ *Id.*

⁵⁰ [an inhabitant] of a non-occupied territory who, on approach of the enemy, spontaneously takes up arms to resist invading troops without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. *Id.*

⁵¹ W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 Colum. J. Transnat'l L. 711, 723 (2007).

While civilians are not lawful targets under the Geneva Convention, the “insurgents” targeted on March 17 are unlikely to enjoy civilian immunity.⁵² Civilians lose their protected status “for such time as they take a direct part in hostilities.”⁵³ While we know little about the actual nature of the activities that the targeted individuals participated in, for the purposes of this discussion it is not unreasonable to assume (based on the consensus reporting by multiple news agencies) that the insurgents had recently participated in the execution of a hostile act and were armed. This fits “a direct part in hostilities” neatly. It is from this exception that the phrase “unlawful combatant” is derived, for the civilian, one who typically enjoys a protected status, is operating as a combatant.⁵⁴ As such, in this particular situation the JWT principle of distinction, as expressed in Additional Protocol I, is satisfied.

2. Proportionality: Collateral Damage Weighed

According to the Christian Science Monitor, the collateral damage resulting from the two strikes on March 17th was small – only one house and two vehicles were destroyed.⁵⁵ Per Article 51(5)(b) of Additional Protocol I, there must be a balancing determination made for a military strike to be proportionate.⁵⁶ In this case, the damage to civilian objects must be made against the “concrete and direct military advantage anticipated” from killing the insurgents.

The legal community generally agrees that this decision is made on a case-by-case basis, using the standard of a reasonable military commander.⁵⁷ The specifics of this particular example make it highly likely that the criterion of proportionality was satisfied. The military advantage anticipated is quite tangible – if the Pakistani news publication is to be trusted, a high level leader of anti-coalition forces now has less human capital at his disposal.⁵⁸ This advantage, weighed against the loss of one house and two vehicles, yields a situation where the incidental damage is not excessive in relation to the military advantage gained. Certainly, the situation would be more complex if the civilian objects destroyed were more meaningful, such as a mosque or a school, which have their own protected status that would need to be considered.⁵⁹

B. Drone Strike II: A More Nuanced Explanation of Distinction

During the week of December 11th, 2009, an alleged U.S. drone struck in Pakistan, reportedly killing Saleh al-Somali.⁶⁰ According to U.S. officials, al-Somali was an active operations planner for Al-Qaeda who was in charge of all operations outside of the Afghanistan/Pakistan region, and was likely in charge of operations against Europe and the United States.⁶¹ As an operative, al-Somali took guidance from senior leadership and

⁵² Protocol I, *supra* note 24 art. 51(2),(6).

⁵³ Protocol I, *supra* note 24 art. 51(3).

⁵⁴ Knut Dörmann, International Committee Of The Red Cross, *The Legal Situation Of “Unlawful/Unprivileged Combatants”* 2 (2003). Found at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList553/88140B29D25A47EFC1256D0B0046F105>

⁵⁵ Chick, *Drone Strikes*, *supra* note 44.

⁵⁶ Protocol I, *supra* note 24 art. 51(5)(b).

⁵⁷ Orna Ben-Naftali & Keren R. Michaeli, *“We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 Cornell Int’l L.J. 233, 280 (2003).

⁵⁸ *US Drone Strikes Kill Militants in North Waziristan*, Dawn Media Group, March 17, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/provinces/19-us-drone-strike-near-miranshah-kills-hh-02>

⁵⁹ Protocol I, *supra* note 24 art. 52(3).

⁶⁰ Luis Martinez & Martha Raddatz, *Al Qaeda Operations Planner Saleh Al-Somali Believed Dead in Drone Strike*, ABC News, December 11, 2009, <http://abcnews.go.com/International/Terrorism/al-qaeda-operations-planner-saleh-al-somali-believed/story?id=9314585>.

⁶¹ *Id.*

"translated it into operational blueprints for prospective terrorist attacks."⁶² He rose through the ranks of the Al-Qaeda propaganda division, but there is no indication that he physically led any attacks against coalition forces. In the multiple media outlets that reported the attack, there was no mention of civilian casualties.⁶³

1. Distinction: Planning as a "Direct Participation in Hostilities", and Temporal Problems

Non-combatants have immunity from attack "unless and for such time as they take a direct part in hostilities."⁶⁴ The legality of the strike will turn on the interpretation of this provision, in two ways. First, the determination must be made regarding the action of planning; is planning (a non-violent activity) included in "a direct part in hostilities"? Second, assuming that planning is included, if al-Somali was not planning at the moment he was targeted had his status reverted back to civilian immunity because of the "for such a time" clause?

The leading international scholar advocating a narrow interpretation of a "direct part in hostilities" is Professor Antonio Cassese who argues that there is only one situation in which a civilian may be justly attacked: he or she must be openly carrying a weapon or bomb.⁶⁵ If a person does not respond to summons made to ascertain whether they have explosives on their person, they may also be targeted.⁶⁶ The justification for such a standard is to prevent abuse and honest mistake in the targeting process. Allowing a government to make a determination about a civilian and kill them without any manifest evidence of hostilities (exemplified by a weapon) creates a "slippery slope" that is vulnerable to abuse.⁶⁷ Also, attacking an individual in civilian clothes (carrying no weapon) is likely to result in a high amount of honest mistakes, potentially making the practice of targeted killing indiscriminate. Al-Sadir, presumably unarmed, would be exempt from targeting under this narrow interpretation of "direct part of hostilities". Furthermore, even if planning could be included in the interpretation, al-Sadir would regain his immunity when he ceased the activity.⁶⁸

In general, the ICRC commentary on Additional Protocol I agrees with a relatively narrow interpretation of the "for such time as they take a direct part in hostilities", but not to the extent that Professor Cassese advocates. While not limited to carrying weapons, the ICRC argues that for an action to be hostile, the action itself must "adversely affect the military operation or military capacity" of the opposing force.⁶⁹ This translates into a contextual determination of "but for" causation, and "causal proximity" of the act to the foreseeable consequences.⁷⁰ While a coordinated insurgency would likely not be effective without planning

⁶² *Id.*

⁶³ Both the New York Times and The Washington Post agree with the lack of civilian casualties. See Mark Mazzetti & Squad Mekhennet, *Qaeda Planner in Pakistan Killed by Drone*, N.Y. Times, December 11, 2009, <http://www.nytimes.com/2009/12/12/world/asia/12drone.html>; see also Joby Warrick and Keren DeYoung, *Top al Qaeda Planner Apparently Killed in Pakistan*, Wash. Post, December 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/11/AR2009121104037.html>.

⁶⁴ Protocol I, *supra* note 24 art. 51(3).

⁶⁵ Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 Hastings L.J. 801, 885 (2005).

⁶⁶ Fisher, *supra* note 50, at 724.

⁶⁷ Proulx, *supra* note 64, at 886.

⁶⁸ This is analogous to the situation in which the insurgent lays down his weapon.

⁶⁹ International Committee Of The Red Cross, *Interpretive Guidance On The Notion Of Direct Participation In Hostilities Under International Humanitarian Law* 48 (2009)[*hereinafter* Direct Participation in Hostilities].

⁷⁰ *Id.* at 59.

(satisfying “but for” causation), planning may not have the causal proximity required. The phrase “direct participation” certainly implies that indirect participation (typically indicated by a lack of causal proximity) would not yield a loss of immunity.⁷¹ Typical examples in indirect participation are acts such as providing food for the military, distributing propaganda, or designing weapons.⁷² The ICRC states, however, that the “identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation” satisfy the causal criterion⁷³. Certainly, the act of planning an attack is more analogous to the latter than providing food or designing weapons. As such, it is very likely that under the ICRC commentary, civilians that plan hostilities lose their immunity from targeting.

The ICRC also weighed in on the temporal issues found in the language “for such a time.”⁷⁴ Civilians “lose protection against direct attack for the duration of each specific act.”⁷⁵ “Duration” encompasses all aspects of the hostile act, from the preparation of the act to the return from executing the act.⁷⁶ Under this guidance, while planning may very well classify al-Sadir as participating directly in hostilities, the fact that he was likely unengaged in planning at the time of the attack makes his targeting illegal.

Conversely, there are those that argue for a broader interpretation of both the definition of “a direct part in hostilities” and the temporal language found in Additional Protocol I. This cohort of scholars is perhaps best represented by Professor Michael Schmitt, who argues that the interpretation of Additional Protocol I language should be done with the underlying mission of the law in mind – to protect civilians.⁷⁷ His counter-intuitive argument focuses on the practical elements of warfare, and the ramifications of drawing too narrow of a line when interpreting who civilians are.⁷⁸ For example, with respect to qualifying what “hostilities” are, he states that:

Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by [legal] combatants endangered by their activities⁷⁹

This would, in effect, result in more civilians being subject to attack due to the resentful nature of the legal combatants. Furthermore, he views a narrow interpretation of hostilities as an incentive for civilians to become involved with the conflict, knowing that they can plan, provide weapons, or logistical support with impunity.⁸⁰ This school of thought also applies to the temporal question; by allowing civilians to self-select in and out of combatant status a “revolving door” of protected/unprotected status is created.⁸¹ To Schmitt, this can do nothing more than engender disrespect for the law by the legal combatants who are always subject to attack, and provide an incentive for civilians to become involved in the fight.⁸² Therefore, narrow

⁷¹ *Id.* at 54.

⁷² *Id.*

⁷³ *Id.* 56.

⁷⁴ *Id.* 19.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Michael Schmitt, “Direct Participation in Hostilities” and 21st Century Armed Conflict, in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berlin: BWV, Horst Fischer et al eds., 2004), at 509.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* 510.

⁸² *Id.* at 510.

interpretations of Additional Protocol I undermine the purpose of the law by subjecting more civilians to attack, degrading their protected status.⁸³ Under Schmitt's guidance, al-Sadir, in his role as a planner, would be subject to attack after (or before) the action of planning had taken place.

Just war theorists have tended to agree with a broader interpretation of the language "unless and for such time as they take a direct part in hostilities."⁸⁴ According to Walzer, when classifying citizens as targets, "the relevant distinction is... between those who make what soldiers need to fight and those who make what they need to live, like the rest of us."⁸⁵ Applying that to al-Qaeda, those civilians that provide food or clothing are immune from targeting. Those civilians that support the capability to fight, whether that means planning or supplying weapons, are subject to attack. In reference to the "revolving door" phenomenon that occurs under the narrow ICRC interpretation, the JWT focus on the purpose of limited war allows for a broader interpretation. Those that conduct "warlike activities" are always subject to attack because of their military necessity; doing so will end the war more quickly with the least expenditure of "time, life and money".⁸⁶

In summary, both the definition of "a direct part in hostilities" and the temporal language "for such a duration" can be interpreted in several different ways. Those that argue for a narrow interpretation do so in the belief that it will protect civilians in the most effective way. Those that interpret it broadly tend to believe the opposite - that a narrow interpretation will counter-intuitively lead to more civilian casualties. Finally, just war theorists tend to look at it from the perspective of ending the war in the quickest manner possible, which can include targeting civilians that have set themselves apart from other civilians by contributing to the military capacity to fight. The JWT interpretation is most analogous to the broad interpretation by Schmitt. Certainly, one of the underlying purposes of limited war is a pragmatic one - to end war quickly. To do so requires that militaries be able to act in their regulated (subject to JWT principles) self-defense. In that respect, a narrow interpretation will likely yield a longer conflict with more eventual casualties.

C. Drone Strike III: Proportionality as a Matter of Metrics

In August of 2009, the U.S. launched a drone attack on a home that Baitullah Mehsud was reportedly staying in with his second wife.⁸⁷ A Pakistani intelligence officer confirmed that Mehsud's torso had been severely damaged, and shortly thereafter President Obama confirmed that the U.S. "took out Mehsud".⁸⁸ The attack killed Mehsud, his wife, seven bodyguards, his parents-in-law, and one other officer, totaling 12 individuals.⁸⁹ According to *The New Yorker*, the U.S. attempted to kill Mehsud on 16 different occasions with drone strikes.⁹⁰ On March 17th, 2009, David Kilcullen, the individual largely responsible for the U.S. implementation of counter-

⁸³ *Id.*

⁸⁴ Fisher, *supra* note 50, at 744.

⁸⁵ Walzer, *supra* note 26, 146.

⁸⁶ M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 313-14 (Berkely, 1959).

⁸⁷ Apparently, Mehsud had been unable to father a boy with his previous wife. Christina Lamb, *High-Profile Victories in the Battle Against Terror*, Times Online, August 9, 2009,

http://www.timesonline.co.uk/tol/news/world/middle_east/article6788700.ece

⁸⁸ Obama: "We Took Out" Pakistani Taliban Chief, Reuters India, August 21, 2009,

<http://in.reuters.com/article/southAsiaNews/idINIndia-41873120090820>.

⁸⁹ Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, The New Yorker, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer

⁹⁰ *Id.*

insurgency doctrine (COIN) wrote in *The New York Times* that the U.S. was killing approximately 50 unintended targets for each intended target.⁹¹

There are three main hostile incidents that have been attributed to Mehsud. First, he was the primary suspect in the September 2007 bombings in Rawapindi which killed 25.⁹² Second, he has been blamed for the planning and coordination of the assassination of Benazir Bhutto, the former Pakistani prime minister who was again running for the position.⁹³ Third, he claimed credit for planning the March 2009 attack on a police academy in Lahore, Pakistan.⁹⁴ Perhaps the most important “achievement” of Baitullah Mehsud lay in his coordination of an estimated 80 percent of the suicide bombings in Afghanistan, which have killed countless numbers of civilians and combatants.⁹⁵ Lastly, at the time of his death he was in charge of an estimated 12,000 local fighters and close to 4,000 foreign fighters.⁹⁶

According to Additional Protocol I, the principle of proportionality prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁹⁷

Any attack that does not fit these criteria is deemed to be indiscriminate, and banned from being executed. The ICRC’s commentary on the principle of proportionality states that “the factors for assessing proportionality, in particular the notion of military advantage and that of collateral damage, are to be considered only in the short term.”⁹⁸ The purpose of this limited temporal interpretation is to equal the competing forces; without this interpretation civilian life would be measured against the long-term war effort of a nation as opposed to the immediate military impact. The ICRC commentary will be the construct that this drone attack will initially be evaluated within. The second construct will be from the JWT perspective. Using the known facts surrounding Mehsud as a leader and the amount of civilians killed, a reasonably accurate determination regarding the attack’s proportionality can be made under the two different interpretations.

1. Proportionality in Isolation

In accordance with the ICRC guidance, the concrete and definite military advantage from killing Mehsud is likely to be two-parted.⁹⁹ First, after the drone strike, there is simply one less

⁹¹ David Kilcullen & Andrew Exum, *Death From Above, Outrage Down Below*, N.Y. Times, Mar. 17, 2009. For an interesting article on Kilcullen’s contribution to COIN, see George Packer, *Knowing the Enemy, Can Social Scientists Redefine the “War on Terror”*, The New Yorker, December 18, 2006, http://www.newyorker.com/archive/2006/12/18/061218fa_fact2.

⁹² Noah Shachtman, *Eight Dead in Latest Killer Drone Strike*, Wired Danger Room, March 2, 2009, <http://www.wired.com/dangerroom/2009/03/new-drone-strik/>

⁹³ Carlotta Gall, *Pakistan Asserts Link to Al Qaeda in Bhutto Death*, N.Y. Times, December 29, 2007, http://www.nytimes.com/2007/12/29/world/asia/29pakistan.html?_r=1&bl&ex=1198990800&en=58edfbbcd63636f&ei=5087%0A.

⁹⁴ Alamgir Bhittani, *Baitullah Claims Responsibility for Manawan Attack*, Dawn Media Group, March 31, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/attack-on-police-academy-leaves-8-dead--150-injured--il>

⁹⁵ Imtiaz Ali, *Commander of the Faithful*, Foreign Policy, July 9, 2009, http://www.foreignpolicy.com/articles/2009/07/09/pakistans_bin_laden?page=full

⁹⁶ *Id.*

⁹⁷ Protocol I, *supra* note 24 art. 51(5)(b).

⁹⁸ Enzo Cannizzaro, International Committee Of The Red Cross, *Contextualizing Proportionality: Jus Ad Bellum And Jus In Bello In The Lebanese War*, 787 (2006).

⁹⁹ The ICRC insists on only a limited view, as opposed to the analysis of long term strategic military gains and long term collateral damage. *Id.*

individual fighting against the Pakistani government and coalition forces.¹⁰⁰ Second, there is the recognition that Mehsud was no ordinary insurgent. While it is publically unknown what Mehsud had been planning before he was killed, it is likely that the hostile attack – some of which had been spectacular successes - has been delayed, impeded, or thwarted.

On the other side of the pendulum is that fact that 11 individuals were killed in this strike, in addition to Mehsud. While it is likely that some fraction of the 11 had lost their civilian immunity due to their actions, it is equally likely that innocent civilians were also in their ranks (such as Mesud's second wife). While the death of civilians (in this case under 11) is a high price to pay to kill one man, Mehsud, as previously mentioned, had certain characteristics that make killing him far more significant. Looking at the attack from the limited viewpoint the ICRC advocates, there is little doubt that the strike was proportionate.

2. JWT Cumulative Proportion – A Sliding Scale?

In contrast to the ICRC, JWT generally advocates a much broader interpretation of proportionality.¹⁰¹ According to Walzer, when balancing military gain and civilian harm, “we are to weigh... not only the immediate harm to individuals but also any injury to the permanent interests of mankind, against the contribution that mischief makes to the end of victory.”¹⁰² This means that when weighing military advantage, the evaluation is done from wider lens. When weighing casualties in an attack, it is also done from a more holistic perspective.

Under JWT, the impact of killing Mehsud is much more significant, as it takes into account both primary and secondary military effects. Mehsud was commonly thought to be an effective envoy between the different factions of al-Qaeda and the Taliban throughout Pakistan and Afghanistan.

He has taken an oath of allegiance to Afghan Taliban leader Mullah Mohammed Omar. He is close to al Qaeda's top leadership in the Af-Pak border region and to Qari Tahir Yaldashev, leader of the Islamic Movement of Uzbekistan. He is also well-connected to the Punjabi militant groups that have long been operating in Indian-occupied Kashmir. And he maintains cordial ties with the Haqqani network, widely considered by Western officials to be one of the most dangerous groups of veteran jihadists in the region and the bridge between the Pakistani and Afghan Taliban movements.¹⁰³

By eliminating Mehsud, the U.S. tangentially impacted Al-Qaeda operations in both Afghanistan and Pakistan, despite Mehsud's singular role as external operations coordinator. Replacing him is another secondary effect, as it is unlikely that another leader will have as much success planning suicide bombings or high profile attacks in both Pakistan and Afghanistan without such a network of connections. The significance of successfully striking a high value target is important to the war effort in other ways as well; if one of the most important, and presumably well protected of the insurgents can be killed, it is a clear message that others can and will be targeted as well. The resulting effect is two fold: first, it makes operations of hostilities more difficult for insurgents when they cannot be seen in the open or communicate

¹⁰⁰ As will be elaborated on, there were likely other civilians who had lost their protected status among the dead, but it is impossible to know definitively.

¹⁰¹ Walzer, *supra* note 26, 129.

¹⁰² *Id.*

¹⁰³ Ali, *supra* note 93.

effectively. Second, it incentivizes the local populace to stay away from the insurgents, as the insurgent's cause is more likely to be seen as a losing one, and because there is the constant threat of attack from coalition forces.

The competing force of civilian casualties is likewise quite different under a JWT interpretation of proportionality. Instead of looking singularly at the impact of the event itself, a wider perspective is required to accurately determine whether the strike was proportional. It must be remembered that this very same action had occurred 15 times previously, never with the successful death of Mehsud.¹⁰⁴ Using metrics provided by David Kilcullen and Andrew Exum, it is quite possible that upwards of 700 unintended individuals had been killed while pursuing Mehsud.¹⁰⁵ Of those, approximately 66 percent are likely to be civilians that have lost their immunity.¹⁰⁶ Therefore, it is likely that over 200 innocents died in order for the U.S. to kill Mehsud.¹⁰⁷ Indeed, under a wide lens, with each passing strike where civilians were killed (and Mehsud lived), the individual targeting of Mehsud became increasing disproportionate, and therefore closer to being indiscriminate.

Under JWT, the result is a much heavier weight on the side military advantage, but also an increased weight on the side of civilian harm. It is ambiguous which side of the pendulum is heavier, but recent history would tend to say that the attack was disproportional. A workable analogy would be the Israeli strike in 2002 that targeted the senior Hamas leader Salah Shehade. An F-16 dropped a 2,000 pound bomb on the apartment building that he was presumed to be staying in, which also damaged and killed civilians nearby.¹⁰⁸ The civilian death count was significantly lower than the estimated one computed in the case of Mehsud, but the international community, including the United States, criticized the attack as at the very least being "heavy handed".¹⁰⁹

The counter-argument, of course, is practical in nature. Repeated attempts to kill Mehsud would never have been undertaken if he had not been an extremely high value target. The fact that there had been failed attempts with civilian casualties did not make his death any less of a priority to the coalition strategy. In this respect, the ICRC interpretation makes practical sense. Under JWT, if a target is particularly evasive, he will eventually gain immunity when the amount of civilian deaths breaches the military value of his death. The limited view outlook of the ICRC, not taking into account previous instances of civilian deaths, would allow for continued prosecution.

Despite the practicality of the ICRC interpretation, it does not interpret the proportionality in a manner that promotes the principles of limited war. Under JWT, the purpose of proportionality is to help conduct a restrained war, one that is not perpetuated through "provoking reprisals" or "causing bitterness that will long outlast" the conflict.¹¹⁰ While the military advantage of killing Mehsud never changed with the continued attempts, the attacks likely engendered the outrage of the population, which tends to violate the underlying purpose of limited war. Just as the ICRC interpretation makes practical sense (by not providing a safe

¹⁰⁴ Mayer, *supra* note 87.

¹⁰⁵ Kilcullen & Exum, *supra* note 89. 15 (strikes) * rate of 50 unintended casualties per strike = 750 unintended casualties.

¹⁰⁶ Peter Bergen & Katherin Tiedemann, *Revenge of the Drone*, New America Foundation, October 19, 2009, http://www.newamerica.net/publications/policy/revenge_of_the_drones.

¹⁰⁷ 750 unintended casualties * 34% civilians = 255 unintended civilian deaths.

¹⁰⁸ Fisher, *supra* note 50, at 743.

¹⁰⁹ Daniel Byman, *Do Targeted Killings Work?*, 85 Foreign Aff. 95, 95 (2006)

¹¹⁰ HENRY SIDGWICK, *THE ELEMENTS OF POLITICS*, 264 (LONDON, 1891).

harbor after a certain threshold of civilian deaths is reached), the JWT interpretation does as well – perhaps at some point the military advantage gained by killing Mehsud was curtailed due to the bitterness (and resulting reprisals) that the civilian deaths inspired.

Final Thoughts

The principles of distinction and proportionality are integral to the premise that wars should be conducted in a limited fashion. Derived from theologians in the just war and natural law traditions, these principles have made their way into statutory law, as exemplified by Additional Protocol I of the Geneva Conventions. But what is the best way to interpret these provisions? Does one trust the ICRC guidance, or guidance provided by either hawkish or pacifistic legal scholars? This paper's answer was to evaluate which perspective best fit the construct of JWT. While perhaps not always the perfect answer, it is a useful guide in sorting through the various interpretations of distinction and proportionality held in international law. Now, more than ever - with the Obama administration's use of targeted killing so prevalent - does this dialogue about drone attacks need to occur.¹¹¹

Lieutenant William O'Hara is a graduate of the United States Naval Academy, and is a juris doctor candidate at the George Washington University Law School, where he is the vice-president of the Military Law Association. The views expressed in this paper are the authors and do not represent the views of the United States Navy or the United States Department of Defense.

This is a single article excerpt of material published in [Small Wars Journal](#).

Published by and COPYRIGHT © 2010, Small Wars Foundation.

Permission is granted to print single copies for personal, non-commercial use. Select non-commercial use is licensed via a Creative Commons BY-NC-SA 3.0 license per our [Terms of Use](#).

No FACTUAL STATEMENT should be relied upon without further investigation on your part sufficient to satisfy you in your independent judgment that it is true.

Please consider [supporting Small Wars Journal](#).



¹¹¹ See Jane Perlez and Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, *N.Y. Times*, April 4, 2010, <http://www.nytimes.com/2010/04/05/world/asia/05drones.html?ref=instapundit>.