



Droning toward a shift in the morality of war?

A just war approach to the United States use of drones in
the War on Terror

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ABSTRACT

This essay examines the use of drones in relation to Just War Theory and Rational choice theory. In order to investigate the use of drones from these perspectives, case studies are used for facilitating the application of these theories. From this analysis, it becomes evident that the use of drones cannot be motivated fully by either of these theories. The results of the study also unearth several difficulties with applying these theories to drones, as well as several weaknesses in the theories. In conclusion, it becomes evident that the reasons for the failure of these theories in analysing the use of UAVs is derived from the fact that both of the theories make assumptions about the nature of war and state interests that cannot be substantiated by the current use of drones. This particular difficulty is interpreted as a fundamental shift in the nature and morality of warfare, which is attributed to the consequences of unilaterally using new technology that is not available for the other side in the war.

Word count: 170

ABBREVIATIONS

CAT: Convention Against Torture

CRC: Convention on the Rights of the Child

CIA: Central Intelligence Agency

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICERD: International Convention on the Elimination of Racial Discrimination

ICJ: International Court of Justice

IHL: International Humanitarian Law

IHRL: International Human Rights Law

JWT: Just war theory

RPA: Remotely Piloted Aircrafts

UAV: Unmanned Aerial Vehicle

UCAV: Unmanned Combat Aerial Vehicle

UDHR: Universal Declaration of Human Rights

UN: United Nations

US: United States

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INTRODUCTION

Why study drones? Unlike most of the authors, my motivation isn't because they're "frakin' cool"¹ or that I am worried that robots will gain singularity and take over the world, thus the need for advocating against their use. My interest lies in another direction, specifically that I am concerned of what the use of drones is doing to the nature of warfare and the morality of humans in war. These questions of course have been treated to some extent but often in short articles in philosophical and social justice magazines, limited to treating moral questions. I believe that there is a need not only to look at the use of drones in themselves but as an example on the effectiveness of morals and international law on states. How I do this will be described in the essay to come.

What is especially interesting with the use of drone is that it illustrates several aspects of the dark side on the war on terror and US actions in targeting their enemies. In this way, the use of drone says much about US foreign policy, national interests and the shift in US policies and goals post 9/11. Drones illustrate the duality and duplicity in the US government and the hypocrisy with which the US is currently arguing about their national interests, the laws of war and their actions in relation to the war on terror as related to these topics. Thus, in a way the use of drones will be an emblematic example of the shift in US and subsequently world politics after 9/11. Although this is inevitably much to simplified a statement, it is interesting to keep in mind when studying the use of UAVs in war.

My initial interest in Unmanned Aerial Vehicles (UAVs) was sparked by an article on Al Jazeera English's website. The article described why a case against the US government, for using a drone to kill US citizen Anwar al-Awlaki, was thrown out by a US judge based on the motivation that "there are circumstances in which the executive's unilateral decision to kill a US citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable."² To me, this seemed not only a blatant abuse of the political question doctrine but a violation of International Human Rights Law, International Humanitarian Law, the US constitution and its division of power among the US government, as well as basic human ethics and morals. The

¹ Singer, P.W., p. 1.

² Aljazeera.net, "US targeteg killings 'allowed', <http://www.aljazeera.com/indepth/features/2010/12/201012914367164938.html>, published 9 December 2010, latest accessed 20120105, 09.54

judgement was motivated by references to the “unique and extraordinary”³ circumstances of the case.

Later in this essay, this case will be discussed extensively. The point that needs to be stressed at this time is that, contrary to the judge’s opinion, the use of drones for killing terrorists is neither unique nor extraordinary. Drones are used by the US government all day every day, wherever the US is considered to have a national interest. Despite being described as a modern phenomenon, drones have actually existed as a weapon for several decades, beginning with the use of the V1 and V2 missiles during the Second World War.⁴ First used by NATO in the Yugoslavian war for reconnaissance, UAVs have become more popular in the recent years as technological advancements have made the technique better and more readily available for use in several areas that would otherwise be out of the grasp of the US government.⁵

Despite this, drones are still seen as the future of warfare, despite already being used frequently today. Development of new UAVs is rapid, especially in the US who is the number one nation when it comes to using drones. Although there are several discussions concerning the legality of the use of drones, it is a very difficult discussion to get into. Even among human rights advocates, views are extremely different with organisations such as Human Rights Watch taking a mainly positive stance towards UAVs while for instance Amnesty International conveys a more sceptic view of the phenomenon.⁶

Gary Solis, teacher at Georgetown University’s Law Center and previous director of the law programme at the US Military Academy, interviewed in the New Yorker article, makes evident the rapid change in US policy concerning the use of drones. As late as in June 2001, the US Ambassador to Israel Martin Indyk condemned Israel’s use of drones for targeted killings of supposed Palestinian terrorists, deeming them to be illegal extrajudicial assassinations.⁷ However, Solis currently does not consider the use of drones illegal in warfare, as declared in an interview on December 6th on Al Jazeera international.⁸ Predator drones have actually managed

³ Aljazeera.net, “US targeteg killings ‘allowed’”, <http://www.aljazeera.com/indepth/features/2010/12/201012914367164938.html>, published 9 December 2010, latest accessed 20120105, 09.54

⁴ Singer, P.W., p. 47-48.

⁵ Singer, p. 33.

⁶ Human Rights Watch (2008), “Troops in Contact”: Airstrikes and Civilian Deaths in Afghanistan, New York and Amnesty International(2011), “USA: A reflection on justice”, Amnesty International Publications, London, p. 1-3.

⁷ Mayer, p. 39.

⁸ Al Jazeera English Live news 00.21 5 December.

to catch Osama bin Laden on their surveillance rounds, however, it was not until after 9/11 that it was even considered to mount weapons on the drones, if the opportunity should rise again.⁹

Already during the first week in office, President Obama authorised the use of a drone strike and this practice was to increase exponentially during his administration. In the three last years of George W. Bush's administration, drone strikes killed at least 89 people. In the first year of the Obama administration, this number had risen to 273, with the dismal statistic of 59,7 percent civilian casualties, or collateral damage in the US government's more clinical language of choice.¹⁰ Although the percentage of civilian deaths have decreased under the years, in 2010, conflicting figures are claiming that deaths range from ten percent to as much as 100 percent constituting civilian deaths.¹¹ The big difficulty here is that most of these statistics take for granted that there is such a thing as a legitimate killing of terrorists, thus excluding the terrorist deaths from the civilian deaths. This will also be discussed later in the essay.

RESEARCH QUESTIONS

Interviewed by Mayer, Walzer expresses deep concerns about the use of drones and claims that there "should be a limited, finite group of people who are targets, and that list should be publicly defensible and available. Instead, it's not being publicly defended. People are being killed, and we generally require some public justification when we go about killing people." Walzer's concerns direct us to pose the question: Does the use of drones fit into the just war paradigm? What, if any, limits does Just War Theory impose on the use of drones in war and can a drone war be considered just in accordance with Walzer's Just War Theory?

Since Walzer stresses the moral dimension on state actions and the rules of International law, it would be beneficial to include a counterweight towards this utopian view of the world. In order to represent a grimmer version of what conducts state actions, Goldsmith and Posner's take on Rational choice theory will be investigated in relation to the use of war. The questions to be asked in relation to this theory will be if the rational choice theory can act as an explaining factor both for when states use and when states disregard JWT in the use of drones. Further questions include if the state is actually able to calculate the long-term consequences of the use of drones and what happens to the nature of warfare if purely national state interests are to govern state behaviour.

⁹ Singer, p. 34.

¹⁰ Schörnig, p. 16.

¹¹ Schörnig, p. 14.

The purpose of this essay is not to select a side of this debate. Rather, after applying JWT and rational choice theory on the case studies, the aim of this essay is to ponder on the outcome of these results, namely the resulting question if drones in fact are changing the face of battle and if this is a positive or a negative development, in favour of morality and humanity or against them.

LIMITATIONS

Even though the main focus of this essay will not be on questions of law, this subject will be treated indirectly throughout the essay when it comes to JWT and somewhat more directly when it comes to rational choice theory. However, the purpose of this essay is not to evaluate the normative content of international law regarding the use of drones. Instead, the main focus on this essay will be on JWT and the moral aspects this theory will bring in an analysis of the use of drones. Focus will be on the use of drones in battle, that is, when drones are used to target potential terrorists. Using drones for other purposes such as intelligence gathering will be excluded from the essay.

Although it is an interesting topic, it is not the purpose of this essay to investigate the potential ways in which this new technology can be used or the rapid development of new technology. Neither is the purpose of this essay to present an explanatory model for state behaviour with regard to the deployment of drones but merely to analyse some of the motives which so far have been made as regards the use of drones, limited to the scope of JWT and rational choice models.

(CRITICAL) BACKGROUND

When reading this essay, the reader must have a few things in mind already at the outset. This is what you need to know:

During this essay, it is important to keep in mind that the analysis will sometimes be made on the assumption that drones are used in an environment of war per se. However, this is not always the case. Along the way, it will become clear that drones are not used in situations of war exclusively, yet it is always claimed that they are used against an enemy or an opponent. In certain instances, I am going to assume that the use of drones in fact constitutes war, although it is important to recognise that this assumption, although made by most authors writing about the subject, is by no means supported by analysis but merely assumed without explanation and taken as a given rather than a situation which in itself needs analysis.

How does this add up? Can you use drones to fight a war outside a war zone? If Yemen can be called a war zone for the purposes of using drones to kill terrorists, does this also mean that a drone could be used against Taimor Abdulwahab when he was attempting a suicide attack on Drottninggatan? Would it have been justified to kill his entire family at their home, without a trial determining his guilt? Would it have been legitimate that his children and his wife was killed in order to prevent him from carrying out the attack? What is the fundamental difference between the use of drones in this situation in Yemen and in Sweden? Is it that the rebels in Yemen are several, better organised, more resources, funded by more radical groups? And who is actually the counterpart in the war in Yemen? Is it the Yemeni government or the US? Although the US claims to have approval and support from Yemen and Pakistan, it becomes obvious that relations are in fact not as crystal clear as the US would wish.

Sure, you could say that there is a fundamental difference between Sweden and Yemen, that Yemen has areas where the government is not fully in control over and that are used by terrorists as training camps for people just like Mr. Abdulwahab. However, can you say that the Swedish government was in control of Mr. Abdulwahab before he carried out his attack? Can you say that the house in which a terrorist and his or her family lives is not under the control of the government and therefore a legitimate target for drone attacks? Although it is not the purpose of this essay to answer this question, it is nonetheless interesting to keep this example in mind throughout the essay, since the actions of the US will help set a precedent regarding how these questions will be used in the future. According to the author, Walzer asks the right question in this context, namely: What does an individual need to do in order to *lose* the protection he or she

has?¹² How would the calculations of necessity and proportionality be carried out with regard to the use of drones in order for the state to decide that killing Me. Abdulwahab and deeming the collateral damage of civilian deaths acceptable? Some clues regarding how to answer this question will be given in the essay, to enable the reader to make up his or her mind on how this question should be answered.

DIFFICULTIES

SOURCES AND INFORMATION

We do not know what we don't know concerning the US use of drones. The information distributed is often reported by media, who mostly do not have access to the areas where drones are most frequently used. Eyewitness accounts can be unreliable, especially considering drones are targeting areas considered terrorist friendly. However, since official government reports are few and far between, researchers are often required to rely on information that is difficult to verify and that will not always come from objective sources. For instance, journalists have been banned from working in Waziristan, according to Pakistan because of the high risks in that area.¹³ Since few government reports enable us to compare and contrast information from these different sources, it is important to keep in mind that much of the information in this essay is used tentatively. However, given that this problem faces all researchers currently interested in this area, who managed to get their articles published, the information relied on cannot be deemed completely unreliable in all instances. Thus, the reader will need to make up his or her own mind regarding the assessment of the information, since it is merely the author's interpretation that is presented here and not an objective truth.

ASSESSING SUCCESS

Although there are no official numbers regarding how many people have been killed in UAV strikes, there are some estimates from certain organisations such as the Brookings Institute or pakistanbodycount.org. However, the accuracy of these figures is uncertain and the figures vary depending on the organisation's purported loyalties. For this essay, the author will rely on statistics presented by Schörnig, given the immense oversight of different sources and the qualifications included in presenting the figures makes the figures more credible than merely adopting a supposedly biased organisation's figures, given that most organisations will be

¹² Walzer, p. 145.

¹³ Mayer, p. 40.

considered biased in the US national debate at the moment. Schörning gives a range of deaths, spanning from 1,320 to 2,049.¹⁴ How many of these deaths are considered civilian deaths are also a subject of fierce debate, ranging from 100% according to pakistanbodycount.org or 10% if you believe thelongwarjournal.org. Most of the statistics are based on a mixture of mostly media reports and some reports from the government of the countries in which drones operate.¹⁵

However, how this count is made is dependent on which criteria you use to determine if a person should be considered a civilian or not. It will also be difficult to verify which people were actually killed in the attack, since basically nothing except a big hole remains after the attack has been carried out. Thus, there is no possibility of assessing success after the attack, everything must be judged by eyewitness accounts, or the material collected by the drones before the attack and this will not be distributed for external verification or checks, especially not to human rights organisations or potential critics.

CIA has also been charged of knowingly using drones with faulty software, thus contributing to flaws when using drones for eliminating potential targets.¹⁶ One potential instance of this could be in Afghanistan or even Iraq.

DEFINITIONS

It is important to note that the definitions used here is only for the purposes of this essay and does not relate to other contexts.

Drone/UAV/UCAV/RPV: These concepts will be used interchangeably in this essay, although some authors distinguish between the terms, mostly between drones/UAVs and UCAVs

Just war theory: As described by Walzer in *Just and Unjust wars* and interpreted by the author in the theory section. May briefly be boiled down to *jus ad bellum*: just cause and *jus in bello*: just means of fighting war.

Rational choice: As presented by Goldsmith and Posner and interpreted by the author in the theory section. Can briefly be outlined as describing states as rational actors with “consistent, complete and transitive”¹⁷ preferences about outcomes, based on game theory inspired models of Cooperation, Coercion, Coordination and Coincidence of interests.¹⁸

State interest: To be distinguished from state welfare. According to Goldsmith and Posner, state interests is equivalent to the current regime’s interests, thus primarily short-term. However, state interests is claimed to vary by context.¹⁹

¹⁴ Schörning, p. 14.

¹⁵ Schörning, p. 14.

¹⁶ Schörning, p. 16.

¹⁷ Goldsmith and Posner, p. 7-8.

¹⁸ Goldsmith and Posner, p. 8-9.

¹⁹ Goldsmith and Posner, p. 6-7.

Extrajudicial killings: executions, such as targeted assassinations, which are made outside international law safeguards as defined by IHRL.²⁰

Targeted assassinations: Policy in which an individual is targeted by the state and executed without a fair trial

Fair trial: As defined by article 13 ICCPR

Jus in bello: Just methods for fighting war

Jus ad bellum: Just methods for starting war

International Humanitarian Law: The Geneva- and Hague conventions

International Human Rights Law: The binding UN documents on Human Rights, i.e. ICCPR, ICESCR, CAT, CEDAW, CRC, ICERD the Convention on the Rights of Migrant workers, Convention against enforced disappearances, the Convention on the rights of persons with disabilities, and rights of UDHR in customary international law

²⁰ International Committee of the Red Cross, "International Humanitarian Law and the challenges of contemporary armed conflicts", Report 2011-10-31, p. 22.

THEORY

It is not the purpose of this section to provide the framework of analysis for the later sections of the essay, given that sufficient room for this exercise is not provided in this essay. Given that *Just and Unjust Wars* and *The limits of international law* are quite long, this section will not attempt to describe all the parts of either theory. Instead, the core parts useful for the purposes of this essay will be described, to give the reader a basic understanding of the two theories, which will be needed in order to understand the analysis to come when these theories are applied. The author's application of the theories in the later section will reflect the author's interpretation of the contents of these theories indirectly in the coming discussions.

JUST WAR THEORY

HISTORY

Just war theory is an old concept which can be traced back to Thomas of Aquinas.²¹ Just war theory originates in natural law, which inevitably is linked to the concept of Divine law. Although it impossible for just war theory to be disconnected from this heritage entirely, the use of just war theory should in no way be interpreted as an attempt to illustrate that there are universal good and bad values. Just war theory is merely an analytical tool in this context and the author will attempt to disconnect just war theory from supposedly eternal concepts of universal rights and wrongs. Of course, these aspects will be included but not taken for granted as a frame of reference but rather to illustrate that the shortcomings of international law.

Just war theory is often said to have its basis in a wide array of authors and over a period of time. However, it is important to remember that the theory of just war originates from and has been utilized within a Western context. Historically, traces could be said to exist in the Eastern tradition, although there needs to be a distinction between the Eastern doctrine of Righteous war and the Western Just war theory.²² Notions of what can rightfully be done in war is prevalent in most societies, although what is just is judged differently in different contexts and in different periods of time. Although Eastern traditions have been depicted in for instance Sun Tzu's *Art of War*, significant differences do exist between the different doctrines. This perspective will not be further delved into, given the limited scope of this essay but is

²¹ Walzer, p. xiv

²² Walzer, p. 226-227.

nonetheless important for the reader to keep in mind throughout the essay that the author does not purport to describe a universal standard for what can be considered just in wars.

WHY JWT ACCORDING TO WALZER?

One of the main reasons for selecting JWT as the frame of reference when looking at the use of drones is that JWT could be seen as a fundamental principle of international law, given its long history. JWT is frequently applied to several different types of situations, in order to get a moral aspect on an issue of law. Although Just War Theory (JWT) has a very long history in international law, my focus here will not be on any of the historic interpretations of this theory. Instead, I will base my interpretation of JWT on Michael Walzer's book *Just and Unjust Wars*(1977). The reason for this is that he is considered the JWT theorist in the 20th century. Walzer provides a somewhat updated and extensive account of JWT, which is applied consistently to both situations of jus ad bellum and jus in bello. Walzer's book can be seen as a response to the positivist and realist conception of international law, adding a moral component which Walzer sees as missing in these theories and to some extent in International Law.²³

According to Walzer, there is no such thing as inter arma silent morals. JWT is often described merely by stating that it has two components, jus ad bellum and jus in bello. Thus, there are two judgements of morality as regards to war, making it even more difficult to ignore the moral dimension in war. Walzer argues that even the most hard-boiled realist cannot escape making moral arguments, since this is done indirectly every time the state acts. Morality is a language of justification and justification is needed whenever a state takes action, whether the motivation needs to be done to get popular support for action or to convince the international community of the legality of you actions. Whenever the state selects one method for acting and a motivation for this action, the state will need to make a moral argument. Without the moral argument, the state could act, since every action involves some sort of selection bases on the preferences of the state. Given that selection in law is based on grounds of necessity and duress, the state cannot escape the moral components when justifying their selections, even if they rely in criteria imposed by law.²⁴

When applying JWT, it is important to keep in mind that the theory was originally intended for total warfare, for conventional wars fought between the armies of two states. This has not been the face of warfare since the Second World War. Modern warfare has either taken the form of proxy wars or guerrilla wars, thus constituting intrastate rather than interstate wars. Although

²³ Walzer, p. 4.

²⁴ Walzer, p. 13-16.

some would argue that the wars in Iraq and Afghanistan could be classified as intrastate wars, there is a wide consensus classifying them as internationalised interstate wars.²⁵ Although Walzer in some ways claims to account for new developments of war, the book as a whole has not been thoroughly reworked but the change of view is perhaps most evident in the foreword.

Regardless of if the state cares about morality, to publicly acknowledge that morality is not an issue will not be well received in the international community or at home. Given the process of globalization and human rights, every political leader is expect to pay lip service to supposedly universal values, regardless of it being blatantly obvious that this is not the case. Even Bashar Al Assad in Syria is keen to state his support for International Human Rights, despite the fact that the Syrian military as he is speaking is conducting a bombing raid killing tens of civilians in the city of Homs.²⁶ Rhetoric matters in international relations and as long as this is the case, morality is an important component, even if the only purpose of it is to outwardly justify your policies.

Although Goldsmith and Posner agrees that rhetoric often departs from international law, they do not consider the use of international law as a limit on the justifications or actions of the state. Instead, they allege that as soon as the state will lose their argument, they change their position or distinguish the situation further, pushing it outside the realm of international law.²⁷

This is one of the reasons why JWT is good for the purpose of this essay. Given that the use of drones is a new practice, rhetoric is important either in motivating the legality of the practice in International Law or distinguishing the use of UAVs as a case outside the current reach of International Law. Regardless of which motivation the state has and what your view on the legality of the use of UAVs in different contexts, one of the primary functions of using JWT instead of a strictly legal perspective is that I will not have to select one or the other approaches. JWT is as applicable regardless of if the use of drones falls under International Human Rights Law (IHRL) or International Humanitarian Law (IHL). Thus, although the legal debate is interesting, there is no need for me to get into this wasps nest of argumentation, since JWT is applicable regardless, given the fact that jus ad bellum will inevitably be applied in the interphase between war and peace.²⁸

²⁵ Uppsala Conflict Data Base, 'Afghanistan' and 'Iraq'

²⁶ Walzer, p. 19.

²⁷ Goldsmith and Posner, p. 170,

²⁸ International Committee of the Red Cross, "International Humanitarian Law and the challenges of contemporary armed conflicts", Report 2011-10-31

There have been some attempts to apply just war theory to the use of drones and other robotic killers. Often, these attempts are hampered by merely applying a very limited conception of the idea of just war, often merely necessity, proportionality and immediacy of danger. In addition, just war theory is often applied on a future scenario, constructed by the author him- or herself, in order to illustrate the point that difficulties exist when attempting to use drones for a just war. However, few attempts have been made to apply just war theory to case studies. Even fewer attempts have been made where just war theory is questioned as being utopian/idealist/legalist notions about war, and not relevant for states when deciding policy. In this essay, the author will use Goldsmith and Posner's book *The limits of international law* in order to question the paradigm of just war theory as relevant both for analysing past and for predicting future state actions.

RATIONAL CHOICE THEORY

In *The limits of international law*, Goldsmith and Posner sets out to explain state actions as motivated by rational choices, instead of governed by the limits of international law or morality. In order to explain rationality, they use four models to illustrate how states can act in different situations. According to Goldsmith and Posner, all state choices can be explained by rational choice and encompassed in one of these models. In this section, the models will be briefly explained. Further, the use of these models to refute that states act according to moral standards or international law will also be described shortly.

COINCIDENCE OF INTERESTS:

Goldsmith and Posner defines this as "a behavioural regularity among states [which] occurs simply because each state obtains private advantages from a particular action (which happens to be the same action) irrespective of the action of the other."²⁹

COERCION:

Is described as when a stronger state forces a weaker state to serve the stronger state's interests.³⁰

COOPERATION:

²⁹ Goldsmith and Posner, p. 27.

³⁰ Goldsmith and Posner, p. 28.

Is illustrated by the use of a repeated Prisoner's dilemma, where each state would learn that their action or inaction would result in mutually achieved benefits.³¹

COORDINATION

A situation in which "the state's interests converge, as in the case of coincidence of interests; but unlike the latter case, each state's best move depends on the move of the other state."³² Once the first-move problem has been overcome, the states will adapt their policies accordingly.

*"INTERNATIONAL LAW AND MORAL OBLIGATION"*³³

Goldsmith and Posner advocated the view that states have no moral obligation to follow international law, especially not if international law is conflict with state interests. Regardless of the state consenting to be bound to a rule of international law, the state can never derogate from its absolute right to serve its national interests. Goldsmith and Posner argues that international law's choice in subjects poses a dilemma regarding the bindingness of international law. Either, they claim, international law's subjects are the individuals and groups who controls the state, thus abolishing international law's *raison d'être* of regulating interaction between states.³⁴ Or, it is argued, international law will bind the state but then, the individuals have no moral obligation to abide by the state's legal obligations.³⁵ Thus, in itself, consent by either part of the state is neither necessary nor sufficient as the basis for creating legal obligation.³⁶

METHOD

³¹ Goldsmith and Posner, p. 30-31.

³² Goldsmith and Posner, p. 32.

³³ Goldsmith and Posner, p. 185.

³⁴ Goldsmith and Posner, p. 188.

³⁵ Goldsmith and Posner, p. 189.

³⁶ Goldsmith and Posner, p. 190.

In order to investigate the research questions, qualitative case studies will be used as a basis for the application of JWT and rational choice theory. The actual application of the theory to the case studies will be made in the Analysis section in a later part of this essay.

Applying Just war theory on the use of drones is useful since this theory also encompasses a moral element that can sometimes be a bit far removed from interpretations of international law. Just war theory has a built in element of morality and does not enable the use of black letter law to colour the perception of what is right and wrong. The advantage with using just war theory as that is explicitly relies on moral as well as legal reasoning and accounts for a human element in the reasoning of what is right or wrong, rather than what is legal or not. In this way, just war theory is good since it enables us to account for the human element, although from a purely academic perspective, this also means that it will be difficult to apply the theory in a neutral way, since there is no universal definition of morals and there is no way to isolate the author's opinions from the author's morals.

In order to abridge this gap, the author must instead make explicit this flaw, in order to illustrate the thought process and thus enable the reader to make own judgements on these issues. However, this is not an easy task since the author is constantly in control and editing the thought process, selecting what to put in the essay and what to exclude. Also, there is no way for the author to account for subjectivity since own biases are the most difficult to unearth, at least until an outsider makes them explicit for the author. This will mean that this essay will inevitably be written with large blinders, which the author will be oblivious to. Given that the purpose of this essay is to analyse drones and not the author's own subjectivities, the essay will inevitably have shortcomings in presentation of the thought process, however, this should not be interpreted as arrogance from the side of the author but rather as an attempt to present the author's interpretation of a complex problem, the solution of which will inevitably be different in the eyes of another but that is exactly as it should be. Thus, the author will look at her own viewpoint through a somewhat postmodern lens.

EMBLEMATIC CASE STUDIES:

The selection of case studies has been made in order to illustrate the wide range of circumstances that drones have been used in. A number of emblematic cases have been chosen, to exemplify how UAVs are utilized by the US and as a clue on how other countries may treat questions facing them regarding the choices they will face when using drones. During the course

of finding sources for this essay, the material seemed to be reflecting several different types of cases when drones were used. There were arguably purely “successful” cases where only terrorists were executed³⁷, cases reflecting mistakes where only civilians were assassinated, cases where US killed their own citizens and cases sanctioned by the UN under Chapter 7 of the UN Charter. These types of cases seemed to be recurring in the information available. Hence, the cases presented here are selected mainly because they represent a type of situation. These particular cases were selected since information was easily accessible for these cases but really, any case fitting one of the different types could have been selected.

YEMEN 2002:

This is the first instance of using a Hellfire missile launched from a Predator drone for killing suspected terrorist and al Qaeda leader Abu Ali al Harithi, believed to have been involved in the bombing of U.S.S. Cole in 2000. Given the success of the mission, an investigation for using Predator drones for taking out high value targets was initiated. Apart from killing al Harithi, four other suspected terrorists were killed in the same attack. The US claims that Yemen approved the attack³⁸, although this can be contested and will be discussed below with use of rational choice theory.

AFGHANISTAN 2006: NO TALL MAN WITH A BEARD IS SAFE ANYWHERE IN SOUTHWEST ASIA”³⁹

This case exemplifies an instance where a drone was used and the outcome was not as expected. Information gathered by the drone was used to target what was thought to be Osama bin Laden. It was later discovered that the persons killed in the attack were civilian youths gathering scrap metal in a mountainous area of Afghanistan. Because one of the youths was significantly taller than the others, he was suspected of being Osama bin Laden, who notoriously is very tall. Although the boy was not actually tall, other than in comparison to his friends, the information gathered by the drone was considered substantial and robust enough to launch an attack. It is often claimed that information gathered by drones will be useful, since it will enable more exact monitoring and targeting of individuals. However, this case questions the fact if the benefits of using drones will not actually bring with it as many difficulties as the problem that the UVAs are solving. It can be discussed if the fault actually lies with the persons interpreting the data/IMINT/SIGINT gathered by the drones. However, the analysis goes hand in hand with the great expectations that the US government and military has on the new technology. This case

³⁷ Kretzmer, p. 171-173.

³⁸ Kretzmer, p. 171-173.

³⁹ Meyer, p. 42.

could exemplify the culture of reliance on new technology established both in the CIA and in the military, as well as serve as an example of the one percent doctrine in practice.

YEMEN 2011

Drones are used to target American citizens abroad. Anwar al Awlaki, thought to be a senior member of Al Qaeda, was targeted and killed, together with his 17 year old son who went to visit his father. This example makes it abundantly clear that suspected terrorists, according to the US, do not need a trial and that the practice of killing them is judicially unreviewable.⁴⁰

LIBYA 2011

Maybe this is the most positive example in the use of drones. President Obama has authorised the use of Predator drones in Libya.⁴¹ However, the use of drones in Libya has initiated accusations of president Obama involving the US in a war without Congressional support, thus making his actions illegal. Could this have implications for a war being considered just?

According to Fox news, the drones were armed and deployed in order to “pick off targets in urban areas in Libya”.⁴² The action in Libya was supported by the UN and the Rebels in Libya reportedly welcomed the use of drones in the fight against Gaddafi.⁴³

AFGHANISTAN/IRAQ 2011

Recently, drones have been at the focal point of some median reports, since the CIA covert drone programme in Afghanistan “lost” an UAV over Afghan territory. After getting “lost” the drone, supposedly without CIA interference, flew into Iranian territory. This drone was subsequently intercepted by Iran and taken down, seemingly unharmed, leaving Iran with the very latest technology of US drones in their hands. Although it can be questioned that Iran already must be quite skilled within the field of technology, some think tanks claiming their Cyber Army to be better than China’s, it must also be questioned how useful the new technology will be in the

⁴⁰ Aljazeera.net, <http://www.aljazeera.com/indepth/features/2010/12/201012914367164938.html>, “US targeteg killings ‘allowed’, published 9 december 2010, latest accessed 20120105 09.54.

⁴¹bbc.com: “Libya: US to deploy armed drones – Robert Gates: <http://www.bbc.co.uk/news/world-africa-13166441>, published 22 April 2011, latest accessed 20120104, 12.38

⁴² Foxnews.com: “Obama approves use of Predator drones in Libya”, <http://www.foxnews.com/politics/2011/04/21/obama-approves-use-predator-drones-libya/>, published 21 April 2011, latest accessed 20120104, 12.41.

⁴³ Reuters.com: “U.S. sends drones to Libya, battle rages for Misrata” <http://www.reuters.com/article/2011/04/21/us-libya-idUSTRE7270JP20110421>, published 21 April 2011, latest accessed 20120104, 12.47.

hands of one of the world's so-called rogue states.⁴⁴ Thus, posing the question of what this new technology can do in the hands of rogue states seem to be fairly obvious when it comes to the analysis of state interest and the application of the rational choice model.

ANALYSIS

⁴⁴ Al Jazeera English Live News, 5 December, 00.21.

JUST WAR THEORY

JUS AD BELLUM

According to JWT, sending the UAV over Iranian territory has to be considered as aggression, which is one of the most serious crimes in international law. Although the US could attempt to justify their actions by motivating sending the UAV with self-defence, this motivation would not be believable. Aggression is forbidden according to JWT but comparing the motivation behind the attack to JWT, it could also be argued that the US acted in self-defence according to the Bush doctrine and the one percent doctrine. However, comparing these doctrines to legitimate self-defence according to JWT, it becomes evident that the criteria for self-defence are very different. Given that this essay uses JWT for analysing state actions, it will be presumed that since the US did not follow the criteria for legitimate self-defence, JWT was violated.⁴⁵

For the purposes of this essay, it will be assumed that the motivation for going into war in Libya was in accordance with the international dimension of the JWT, considering that the involvement in Libya was sanctioned by the United Nations (UN). However, there is another problem with the JWT in this case and this is the internal dimension, given that President Obama did not consult congress before deciding to deploy US drones in Libya. Either, we take this as a judgement that the use of drones in this case did not constitute war. However, do we make this judgement based on the fact that the drones were merely used for surveillance in the war? Because the situation in Libya could certainly be classified as war in and of itself. Given that the intelligence was used for the purposes of fighting the war and enable rebel troops and NATO forces to carry out the military operations, it would be difficult to argue that the drones were not used for war. The fact that they were deployed in the first place shows us that there is a use for drones outside their use in combat.

JUS IN BELLO

WAR IS HELL

⁴⁵ Walzer, p. 61-62.

Walzer rests his theory on the assumption that war is hell and that therefore, it is especially necessary to keep some rules to govern the conduct of combatants, since they all are forced to participate in this hell together. Thus, fighters on both sides are exposed to the same horrors, the same risks and should thus have the same rights. The horrors of war will also serve to reinforce JWT in republics, given that the people are not likely to support a policy which will involve them in the hell-like practice of war, if war is not absolutely necessary and justified.⁴⁶

However, using drones negates this assumption. War is not hell, at least not for the side who has the drones. The assumption that war is hell is in fact a restriction in itself, since if you participate in the hell, this acts as a limitation because your morality will act as a safeguard to what you feel you can and cannot do. If you experience hell, you do not want to reinforce the feeling that war is hell, thus you establish some ground rules for how battle should be fought justly and rely on both sides to utilize these rules since it is to the advantage of both sides if some kind of restraint is exercised, limiting the dangers the soldiers are exposed to.⁴⁷

However, drones change this fundamental dynamics, since only one side in this supposed war experiences this hell that is called war up close. Although it has been established that drone pilots can suffer from posttraumatic stress disorder (PTSD), this seems to be a fairly limited problem compared to those soldiers who are out in the battlefield. When you interact with the enemy through a computer screen and a computer programme, you inevitably become detached from the enemy. When you can work nine to five and then go home to your wife and children, you will not experience all the difficulties that soldiers in the battlefield experience. You will have an advantage since you can be well rested and relaxed, since you are not in any danger, despite the fact that you are participating in the hostilities, that you are fighting a war.⁴⁸

So, although the war on terror has made an imprint on civilians like few other events, the notion that war is hell can no longer be said to extend to both sides of the war on an equal basis. War becomes one-sided and responses from the other side are deemed to become even more desperate as the war drags on. It has been argued that if the other side has no chance of fighting back, the war can never be just.⁴⁹

⁴⁶ Walzer, p. 32.

⁴⁷ Walzer, p. 32, 35-36.

⁴⁸ Singer, p. 68-69.

⁴⁹ Killmister, p. 3.

PROPORTIONALITY

Although there is a requirement to minimise civilian casualties, collateral damage is a fact of war. The purpose of the principle of proportionality is to act as a safeguard of civilian immunity. Currently, there is considerable discussion regarding the use of drones and the principle of proportionality. While some claim that drones are diminishing the importance of the proportionality judgement, violating the laws of war and thus endangering the purpose of human rights and/or the laws of war, others believe that since drones are more precise, their attacks will not have a significant impact on others than its targets thus making it clear that no innocent lives will be hurt.

There are allegations that especially during 2008/2009, when several supposed al Qaeda leaders were killed, the laws of war were more or less discounted for these “high value targets”.⁵⁰ The problem with eliminating high value targets is that when one target is eliminated, the person next in line in the terrorist organisation’s hierarchy will automatically assume the classification as a high value target. Thus, this creates a hydra-headed serpent, which will be practically impossible to stop given the nature of guerrilla and terrorist warfare. Inevitably, a backlash to your disadvantage will be created, diminishing the positive effects of the use of UAVs.

Usually, the principle of proportionality will have two very different interpretations. One is that proportionality can to some extent be measured by the cost of human life and infrastructure alone is proportional to the goal of killing a terrorist. Thus, if a drone attack kills one potential terrorist and takes the terrorist’s whole extended family of twelve people with it in the attack, twelve innocent lives compared to one terrorist is clearly not proportional.⁵¹ This could be described as absolute, as compared to relative proportionality.

The other interpretation is that the loss of lives, including the civilian lives must be proportional to the military benefit of the attacker. Thus, if the terrorist is deemed to be sufficiently important for the military aim of the US, it does not matter that the terrorist’s family was killed.⁵² This can be compared to the sliding scale argument, which states that the more just the war is, the more measures the just party to the war has at its disposal, in order to win the war.

⁵⁰ Schörnig, p. 16.

⁵¹ Walzer, p. 129.

⁵² Walzer, p. 131.

Proportionality in both cases involves but perhaps mostly the absolute sort of morality will mean that the more terrorists get killed, the more civilian casualties can be accepted, as long as more terrorist than civilians gets killed. Thus, 25 percent of 1,320 or 25 percent of 2,049 will be as acceptable, regardless of the number of deaths. Especially outside of war situations, this reasoning becomes very dubious, given that civilians are killed without any rights whatsoever in both cases. In wars, killings in a way becomes more morally acceptable, collateral damage is a constant feature of war, regardless of war being fought is conventional warfare or as a guerrilla war using terrorist tactics.

These arguments are dangerous in that the just cause alone would justify basically any action in order to win the war.⁵³ Even if it could objectively and conclusively be determined (in advance or after the fact) that the war had a just cause, could a war in which the part with the just cause is allowed to act unjustly ever be considered just? This view would nullify the jus in bellum theory completely, since there would be no need for justifying or legitimising your actions, if you could do no wrong on the battlefield. And this is assuming that international law is still relevant as a yardstick on which to determine which actions would be lawful, which Goldsmith and Posner would question.

According to some military professionals and international law experts, drones are not even considered weapons as such but weapons platforms, needing to be equipped with machine guns and rockets.⁵⁴ However, this is rapidly changing since drones constituting weapons are constructed, so that the drone itself will dive towards its goal, eliminating both the goal and the drone in the process. Calculations of proportionality will likely be impacted by this, further complicating the use of drones in warfare.⁵⁵

Regardless of drones constituting weapons or not, when they are used, an assessment of the proportionality of the attack is needed. This is not only the case in situations of war. The US government has a responsibility to assess the proportionality of any executive action that is made by the government or one of their agencies, given both domestic US law and International Human Rights law. This is especially important when the target of the attack is an American citizen⁵⁶, suspected of being involved in terrorist activities, given that if the US could legally be allowed to extralegally kill their own citizens and violate international and domestic law in this

⁵³ Walzer, p. 131.

⁵⁴ Schörning, p. 13.

⁵⁵ Sharkey, p. 380.

⁵⁶ Walzer, p. 136.

way, basically nothing would be off limits in future situations of war or even future use of drones.

MILITARY NECESSITY

What becomes obvious when applying Walzer's reasoning on military necessity on the use of drones is that there seems to be a clear difference between how the enemy is perceived when it comes to the use of drones. Walzer discusses the killing of a single man, from a great distance, by use of soldier's accounts from the battlefield. According to Walzer, a common feature of all the accounts is that the killing of a single human being constitutes murder. Regardless in whose eyes and on what side the decision to kill should be taken, there seems to be a forceful moral deterrent against killing a man. Although it is a recognised military necessity and killing the soldier would be justified according to the laws of war, morally soldiers consider it to be murder. It becomes adamantly clear that there is a human dimension to war when it comes to making these decisions.⁵⁷

It is important to recognise the difficulty in that ample information about the decision-making process where drones are used to kill potential terrorists does not exist. However, reading accounts of how the decision to kill is made, it becomes clear that there is another type of distance between the decision maker and the killer. You could go as far as to argue that the effect is somewhat akin to that of the Milgram study experiment regarding administering electric shocks to "patients" in that the person making the decision will in most instances not be responsible for the consequences of the decisions, nor feel the consequences of a faulty decision. The effect of a bad decision will not get back to the person doing the killing in the same way as a potential retaliation in the battlefield. In a sense, the war on terror has no battlefield, since in the war on terror, there is no enemy. Terror is an abstract concept and not a tangible, defeatable group. It has been claimed that you can never win a guerrilla war and it could equally be claimed that you cannot win a war against terror. Without a clearly defined enemy, you can never win. Backlashes are an established phenomenon regarding guerrilla wars and the war against terror could at least in certain circumstances be defined as a guerrilla war.⁵⁸

It becomes clear that the moral limitations a soldier experiences when he or she is at the scene of battle is not felt, at least not in the same way, by a pilot sitting hundreds of kilometres away at a computer screen. Although there could be several explanations for this, the moral imperative

⁵⁷ Walzer, p. 239-241.

⁵⁸ Walzer, p. 194-196, Schörninger, p. 18.

does not seem to be as clearly noticed when you are so far removed from the situation/the battlefield. Singer talks about computer game experience, illustrating how the drone pilots perceive reality through the camera of a drone. This means that what is on the screen is perceived as a computer game rather than as reality. If the decision to kill is not taken by the person controlling the drone but rather by a sergeant even further removed from the scene, not even seeing the pictures on the computer screen, the consequences of killing a human being is of course not felt as intensely as when you are close enough to get blood on your hands.

But, you may ask, what is the problem with this? War is war, regardless of where the person who is fighting the war is located, right? Is this statement not removing the moral and ethical perspective from warfare entirely? Is not the purpose of having laws of war that there are some moral and ethical imperatives, boundaries which cannot be crossed no matter what the situation?

DEMI-MONDE

You would think that the fact that your own soldiers are at no risk would entail a stricter judgement of the principles of distinguishing, proportionality and maybe most of necessity. If your own troops and your own civilians are in no immediate or direct danger, does this not set further limits on what is allowed and what actions can legitimately be taken to defend your country, even in times of war? Is not the purpose of principle of distinction and necessity to safeguard civilians primarily and outsource the risks and consequences of the war to those fighting it? Will not the use of drones shift this entire balance against civilians, since guilt by association, or even guilt by proximity, seems to be the prevalent reason for civilian deaths when it comes to murder by drones/war by drones?

Here, you can that the Bush doctrine and the 1% doctrine have been imprinted in the entire military culture since 9/11. It could be argued that 9/11 established a different culture overnight. Although you could argue that the very change in the nature of the new type of war motivates these changes in military policy, you must also recognise that this perspectives essentially renders the laws of war obsolete. This also has the consequence of limiting your protection according to the laws of war. Reciprocity is a fundamental principle of international law and regardless of your counterpart, you cannot continue to rely on the rules of war to safeguard yourself and not extend the same rights to your already disadvantaged counterparts. The broad enemy of terror will enable the US to define the limits of war unilaterally and a 1% risk of terror could exist at any time anywhere. This means that to make the world safe for

democracy will become a full time project and every state judged exclusively in the eyes of the US. Hence, allowing this practice to set a precedent, or codifying the contemporary practices of using drones into law would not be in accordance with JWT.⁵⁹

SLIDING SCALE ARGUMENT:

First advocated by Hugo Grotius, this argument enables the use of unjust means, as long as they are effective when fighting a morally just war. The gist of the argument is that the more just your cause is, the more rights you have in the war, that is the more laws you can violate without it being morally reprehensible. The end justifies the means, so the nation with the most just case will have the advantage of using any means necessary to achieve the just goal.⁶⁰ However, using the just argument is likely to have the effect of all countries involved using any means necessary, since no country goes to war unless they can outwardly justify their goal as just and thus justify the use of any means necessary will be easy once the decision to fight is taken. This further reflects the highly subjective and thus somewhat arbitrary nature of justice and what is considered just. This argument receives further support from US policy after the attack on World Trade Center. Until September 11th, the US were against the use of drones for targeted killings, since they were thought morally reprehensible. Since 9/11 though, they have shifted their position completely, resorting instead to a sliding scale argument of morality.

SUPREME EMERGENCY:

Use often ideological, common sense to understand the meaning of the concept but regardless two criteria for determining the content: a) imminence of danger and b) nature of the danger.⁶¹ Walzer makes several important points regarding just war theory and adds a somewhat contemporary view on a theory that has been utilized basically as long as wars have been fought. However, although the book has been updated, it is clear that just war theory has not yet been sufficiently updated and differentiated from the use during the conventional total warfare days.

⁵⁹ Walzer, p. 216-222.

⁶⁰ Walzer, p. 230 and 246.

⁶¹ Walzer, p. 252.

The chapters on terrorism and guerrilla warfare assumes rather assumes that these measures are merely tactics, as an alternative to total warfare. Terrorism is mostly treated as a tactic for deterrence, to avoid fighting a full-scale war, not to fight a war. The theory has not been sufficiently distinguished from its use on total warfare, since there is no discussion about the nature of the war when these tactics are used. There are few qualifications or motivations of the possibility that terrorism can be used not only as a tactic for winning a war but rather utilized by groups such as drug traffickers and similar thugs who actually has something to gain by the state not retaining control over an area.⁶²

The theory also lacks a discussion about the fact that most of what we would classify as war today not necessarily would be considered war if the motivation of the so-called fighters were examined. It will be difficult to argue that most drug traffickers will want to take over the government or state functions of the territory they use for administrating their affairs. Rather, these thugs probably prefer the lack of state control over these areas but have no ambition to control the land they have as their base, other than establishing a monopoly of violence for their own protection. They would have nothing to gain from gaining independence from the state, since they would then be forced to carry out the obligations of a state.

REPRISALS

Even in the case of reprisals, it is clear that reprisals cannot be made on an arbitrary basis. Otherwise the reprisals will have the effect of signalling your own lack of commitment to the rules of war.⁶³ This means that reprisals need to follow the criteria set out in international law, regardless of the illegality of the attack to which the response is made. Reprisals are subject to judgement on grounds of necessity and proportionality, which are also difficult to estimate given the backward looking nature on the judgement of the harm caused by the other party to the conflict, compared to the estimation of future harm to be caused as a response.⁶⁴

The right of reprisal does not nullify the rights of the subjects of the reprisals. A reprisal can never legitimately be made in contravention to international law on the basis of reprisals. Revenge is never justified, no matter how horrendous the initial attack you are responding to has been. Reprisals have the inherent difficulty in that you most often cannot carry out the

⁶² Walzer, p. 197-203

⁶³ Walzer, p. 213.

⁶⁴ Walzer, p. 210-211.

reprisal on those who launched the first attack, thus often negating the possibility of punishing those responsible for the attack.⁶⁵

RATIONAL CHOICE THEORY

IN THE NAME OF STATE INTEREST – WHAT DOES THIS MEAN?

It is very difficult to establish what Goldsmith and Posener's definition of state interest is when the theory is applied, given that their perspectives change throughout the book. Do they conceive state interest in the long-term perspective or in the short-term perspective? Although this discussion takes place on several times throughout the book, no conclusive definition is made.⁶⁶ On several occasions, the short-term interests of the state is stressed, seemingly because the state is seen as an abstraction and thus an amalgamation of the collective will of the people, their representatives and interests of the people they have elected and permanent state policy or administrative organs.

However, this to some extent disregards the fact that regardless the actions and interests of these people, the state is a more permanent fixture than any of these people. The state will nonetheless make binding deals for a long time to come and will tie up future generations of people and governments against their consent. Although this is also accounted for in the book, the connection between the state's short term and long term interests, especially as accountable for the actual results towards its populace and towards other states concerning international responsibility is never completely sorted out or even treated at the same side.⁶⁷ They describe interests of the state but they do not establish a model for when and how these interests should be accounted for, nor do they describe which significance should be given to which type of interest and which type of interest should take precedence and why.

This means that their theory is based on a weak assumption, not fully acknowledged by the writers. Although I am not trying to advocate the view that state interests do not govern state actions, I think that a conclusive and consistent definition of state interests should be given and the balance between short-term and long-term interests need to be accounted for in all instances. In order to do this, I believe that it is of pivotal importance to make a stronger

⁶⁵ Killmister, p. 5.

⁶⁶ Goldsmith and Posner, p. 6.

⁶⁷ Goldsmith and Posner, p. 188-189.

separation of the interests of the “state” as an abstraction, the people governing the state and the citizens of the state. Depending on which view you have on the purposes of the state, such as what the state is obligated to do, if the state exists for the good of their citizens or the citizens exists for the good of the state, several possible views on this topic is possible. It is not the purpose of this essay to make this definition but the definition needs to be made in order to have a fruitful discussion about these topics in the future. Otherwise the theory will lack in relevance as an explaining factor of state actions as motivated by international law, international politics or state interests.

CONSEQUENCES OF SEEMINGLY RATIONAL CHOICES

Removing the pilots from the realm of war further has the consequence of establishing several legitimate military targets in US soil by the use of “cubicle warriors” in e.g. Las Vegas.⁶⁸ Throughout history one of the primary goals of US foreign policy has been to exclude acts of war as an option on US soil. This is exactly why the attack on World Trade Centre was so shocking to the American public. Despite the fact that they have fought several wars during the past years, American civilians very rarely bear the brunt of the consequences of the war and had up to this point not been primary targets in hostilities on such a large scale. They are never directly exposed to hostilities, although they of course were struck indirectly through the loss of family members in the military.⁶⁹

Could it be said that drone attacks, regardless of legality, is actually in the US national interest? For instance, in Pakistan 2009, counterinsurgency specialists advised against the use of drones given the massive public outcry against the use of UAVs in Pakistan. Drones were thought to contribute more to creating hostile local sentiments, creating a backlash when people turned towards insurgents rather than towards the US or the “supporting” Pakistani government. Thus, significant reasons exist for rethinking the use of drones and for assessing drone strikes as a successful method of removing terrorists and their supporters. However, there are no figures on this, so it becomes very difficult for both the US government to support their continued use of drones and for critics substantiating their views of significant detrimental effects from backlashes.⁷⁰

The use of drones also means that civilians will be forced to move from their homes as a response to the threat of drone strikes. This means that they are indirectly being forcibly

⁶⁸ Singer, p. 39, 331.

⁶⁹ Singer, p. 330-331.

⁷⁰ Schörnig, p. 16.

relocated from their homes, forced to leave for their safety, despite the fact that they officially are not in a situation of war.⁷¹ Forcibly removing populations could even constitute a violation of the Genocide convention, making the use of UAVs illegal based on the consequences of their use. Facing charges of genocide is politically dangerous and will have an effect on state interaction with other states, thus it is in the national interest to avoid these charges.

Also, the Pakistani government's responses have been to distance themselves from the US use of drones, in the latest instance forcibly expelling the US from the CIA covert drone programme base in Pakistan after a faulty airstrike, potentially conducted by drones, killing 24 Pakistani troops. This is despite advantages given from the US sharing the intelligence gathered by drones with Pakistan. The relationship between the US and Pakistan is a very good example on the Coercion explanation for state interactions.⁷²

Goldsmith and Posner in this situation have one flaw in their reasoning. They assume that states will argue their point based on international law and this does not seem to be the case in this situation, given that Pakistan does not need to give up their sovereignty to the US according to international law. Arguing based on international law would give Pakistan an advantage. Clearly, this situation is based on power politics, and although there is nothing stopping the US government and Pakistan from outwardly claiming cooperation, when this cooperation goes sour, it becomes adamantly clear that coercion is the underlying factor and even the arguments here cannot and has not been cloaked in international law terms of justification.

Also, the reasoning of Goldsmith and Posner as regards to game theory seems very arbitrary when it comes to calculating the relative (and absolute) costs and benefits of the countries in selecting one policy over the other. Assigning certain numbers to certain actions is actually simplifying reality since in most cases, there will be no clear-cut advantages that are not hampered by disadvantages.⁷³

ESTIMATING NATIONAL INTEREST – THE CHOICE BETWEEN SHORT-TERM AND LONG-TERM STATE INTEREST

Here, some of the flaws of the rational choice model become evident. Given the US response to Iran's interception of the CIA UAV, it seems that they did not calculate the costs of the probability of interception and the risks this would involve in adequate proportion relative the gain of the

⁷¹ Mayer, p. 41.

⁷² Goldsmith and Posner, p. 28-29.

⁷³ Goldsmith and Posner, p. 26-34.

information the UAV would have been able to gather. Listening to the rhetoric of the US government, it is likely that the US were looking for evidence of Iran's nuclear programme and development of nuclear weapons. Although it is perfectly rational of the US government to ask for their drone back and the gains for getting information regarding Iran's developments in these areas, these motives seem relatively short sighted when comparing Iran's long term gain from intercepting the drone and thus the US's long-term loss, if we are to accept the zero-sum game view on international relations.

The US state simply did not account for the fact that the drone could be intercepted. Whether this is a result of the notorious arrogance of the US foreign policy and intelligence analysis or the fact that the US did not have perfect information on which to calculate the risks of flying a drone in Iranian airspace, there is another problem that is not accounted for. What if the US calculated the risks and the potential losses but determined that the likelihood for the consequences was so low that they went ahead and risked something that would be opposed to their national interests? Although the rational choice theory accounts for actors not having perfect information, it does not factor in that states do not always act rationally, given that delusions of grandeur are fairly common among states.

For instance, when the US was attacked at Pearl Harbor and entered The Second World War against Japan, Germany did not have to declare war on the US. Despite Hitler's agreement with Japan, rational choice theory states that Hitler merely could have refused to adhere to the consensual agreement and avoided drawing the US into the European conflict. Hitler nonetheless declared war on the US, probably thinking either that the US would first go after Japan and not get to Germany before German victory over Europe, making it practically impossible for the US to attack, or that Germany could beat the US regardless. Regardless of Hitler's motivation, you cannot explain the choice by rational choice theory, illustrating one of its weaknesses.

Hence, rational choice theory does not account for the fact that state leaders will act in their interests based on emotions or other non-rational methods of making a decision. Rational choice theory also does not account for acts of altruism either, despite altruism arguably being a biologic function of humans, who represent the state.⁷⁴ Another weakness of rational choice theory is that the calculations used for determining which choice will be rational clearly cannot be made with certainty. How do you attribute value to one choice as compared to another

⁷⁴ Goldsmith and Posner, p. 207-210.

choice? The process of estimating the future value of a choice cannot amount to more than educated guesses. Rational choice theory thus does not offer a foolproof choice of methods to safeguard state interests.

Would it be in the states interest to initiate a process of extrajudicial killings of its own citizens? In answering this question, who do we consider to be the state? Is it the political elite of the state, state administration or the ordinary citizen of the state? How does the state benefit from killing one of its citizens? The state must be sure that the citizen would be more of a cost than the benefit he or she would bring, according to the rational choice theory. A short-term perspective of state interests would according to the rational choice theory be fairly clear. Given that the citizen constitutes a threat to the state, it would be in the state's interests to take the citizen out. It will always be right to eliminate threats to the state. However, pondering this question for a longer period of time will raise some questions regarding state interests. If the state are to take out every citizen that constitutes a threat, when would it be appropriate to do this, or would the long-term consequences of vigilante justice motivate an uprising and reorganisation of the state and its national interests?⁷⁵ However, this assumes that there is some inherent benefits in having a national and an international system of law and it could be questioned if this is the case.

Additionally, while a state may decide, the military will act and it is to their advantage to follow the rules: occupational pride and they will be in the line of fire, threatened by increasingly unjust and dangerous methods if a downward spiral of violating the laws of war is established. Goldsmith and Posner are careful to distinguish the state interest from the individual's action in contradiction to state interests though.⁷⁶

CALCULATING NATIONAL INTEREST

A further contributor to this discussion is the fact that there is no discussion on how the state should determine their interests or if the state is actually able to determine what is in its interest. Which part of the state would be capable of taking such an important decision? How large a factor would popular legitimacy be in arguing for either? Will the state ever, even with perfect information and no transaction costs, be able to determine what is in its *best* interest?

⁷⁵ Goldsmith and Posner, p. 216-218.

⁷⁶ Goldsmith and Posner, p. 187.

The state is imperfect, perhaps even more than humans. How does the state know what is best for it and will this not vary depending on the circumstances as well? But if the state does not know what is best for it, who will? Self-determination as close as we can come, unless we would favour the UN or create a World Government, which does not seem like a plausible option.

The problem with claiming the right to self-defence according to the Bush-doctrine and the 1% doctrine is that there are no limits to what the US can do if they adopt these policies. Regardless of what international law says about the invasions of Iraq and Afghanistan, or the use of military bases around the world for targeting suspected terrorists, these doctrines claim the right to override the law, on the basis of the US arguments, sharply criticised by the majority of the international community in the case of Iraq.

Since customary international law is constantly evolving and new practices will have an effect on future arguments concerning the interpretation of international law, the principle that violations of international law strengthens international law is not indefinite. There will be a turning point where there is more evidence towards the new customary law/interpretation of the old law, thus establishing a shift in the law as it was.⁷⁷ This means that arguing that international law is upheld by violating it, or by making exceptions to international law that are further in range than the positive law, will inevitably have an effect on the law, regardless of what one thinks about the power of positive law and the arguments distinguishing custom from it. Shifts in the dynamics of law happens on a daily basis and it would be foolish not to acknowledge at least the possibility of a shift in this instance, especially in the face of extensive evidence for it.

The US shifts the responsibility to the states which, according to the US, do not do enough to stop terrorists at their own territories. This reasoning is similar to the responsibility to protect doctrine, which has not yet been utilized and thus its existence is questionable. Also, this argument lacks consistency since the US are claiming that governments all over the world are responsible for hunting terrorists in their respective states, but that at the same time as these states are responsible enough to have the responsibility for defeating the terrorists, they are not responsible enough to judge if they are governing their area effectively enough.

Although governments have the responsibility to prevent their territory to be used for illicit purposes, it will not in every instance be legal for another state to seemingly arbitrarily judge if their actions are enough to safeguard against illicit activities. Also, there is an inherent difficulty

⁷⁷ Goldsmith and Posner, p. 37 and 195.

in the use of war to prevent war and a dual morality in claiming that you need to violate another country's sovereignty and citizens to protect your own sovereignty and citizens. As is evident by history, the claim that you can fight a war to stop all wars has not yet been successful and it is not likely that it ever will be.

Thus, in addition to being morally and legally wrong, there is also ample empirical evidence that the notion is wrong. This means that the claims made by the US must have other underlying motives which we are not privy to. However, it is not the purpose of this essay to discover these motivations but merely to evaluate the moral and legal reasoning in the use of drones for the purposes described. Although it is true that the reasoning will have an effect on the judgement if the war is both lawful and moral, an extensive account of these motives is practically impossible within the scope of this essay. Thus, what will be judged are the reasons which are claimed and the likelihood that these reasons are true, legal and moral, not the actual reasons used by the state, which cannot be uncovered here.

QUESTIONS FOR FUTURE RESEARCH

Will it be a good and just idea to create rules governing the use of robots and UAVs before their use is spread outside the Western world. Schörnig argues that it would⁷⁸ but I would not agree. If we are to learn anything from the development of the modern international system of society, it is that all actors need to be involved if the rules created are to be deemed legitimate and followed, since this is the only way that states will refrain from violations of the rules, given that they will have no interest of violating the rules if they got their national interests accounted for in the rules in the first place.

What is often missing from the discussions made public regarding the US government use of drones is the possibility of other hostile countries getting a hold on the new technology. Given the very liberal precedents of using drones, is it likely that the spread of technology would have the effect comparable to the nuclear bomb, limiting the use of the weapons because of their harmful effects if a response from the other party to the conflict would be made? The problem with the drones are not the drones themselves but how they are used. Even if some say we are approaching sophisticated singularity and others claim that what some constitute singularity would be no more sophisticated than your current washing machine, this debate is perhaps not likely.

Could we say that a customary international law legalizing the use of drones in these contexts is already developed? What will this mean for the future of warfare? Especially considering the currently stepped up rhetoric between the US and Iraq or North Korea and South Korea, what would be the consequences of using drones in total warfare or in situations of war where both parties had access to the technology? This scenario would not likely spare civilians and given the near-perfect track record of drones hitting their acquired targets, wilful killing would spread across the battlefields, thus making drones illegal to use even on troops in the military.

Thus, a change in the laws of war would be needed in order to make the use of drones in its current form legal in accordance with IHRL and IHL. Although not yet having the devastating effect of MAD if used, imagining a time when the use of drones could have similarly devastating effects is not impossible, it is not even difficult. The future is already on the move, the question is if human morality is ready for it.

⁷⁸ Schörnig, p. 28.

CONCLUSION

This essay has illustrated that there are several problems with applying JWT and rational choice theory to the US's use of UAVs. Neither of the theories can be used as a justification or explanation for state violations of IHRL or IHL. Although this does not mean that a normative framework for governing the use of UAVs does not exist, as evident by rational choice theory, something other than law and morality is needed to shape state action in ways that respect the current rules prohibiting the use of drones in illegal circumstances.

What the use of JWT and rational choice theory manages to show is that there are significant weaknesses in both theories if they are applied to drones. Even though it could be argued that neither of these theories is intended for application on the use of UAVs, they both purport to have an influence over state actions. As made evident by the application of the theories, we cannot find state motivations by use of either theory.

When applying JWT, it is evident that the current way in which drones are used is not just. However, what does this actually mean? As Goldsmith and Posner would ask: "Does it matter?". To tell the truth, I am not sufficiently sure that it does. JWT is an old theory and an attempt to argue the case for a moral perspective on war and law. But if JWT is not relevant for states after all this time, is this evidence that the theory is outdated, or evidence that there indeed has been a shift in the laws, morality and nature of war that makes JMW obsolete in itself and not simply because states ignore it? Although JWT may never have been a decisive factor in state actions according to Goldsmith and Posner, Walzer makes clear that at least state representatives and military officers attaches some weight to it and may even refuse to abide state orders, using JWT for justifying their refusal to act. Although Walzer argues that states inevitably have to resort to morality, if merely for show, does this actually mean that morality has been or will become a decisive factor in state decisions?

Or, is the rational choice theory advocated by Goldsmith and Posner more convincing in illustrating that state interests, based on rational thinking, actually will always govern state behaviour, at least to a larger extent than morality? Although Goldsmith and Posner never argues that morality cannot be a factor in determining state behaviour, they claim that morality in itself will never be a decisive factor and will never be adhered to if contrary to state interests. Morality is seen as a smoke screen for duping other states or the state's own citizens, if it is to be given any importance at all for deciding state behaviour.

Although the analysis of the use of drones has illustrated that there are several difficulties with the use of drones, it cannot be presumed that the use of drones is in all instances unjust. Although several problems exist with UAVs in their current form, especially regarding proportionality and distinction, this is not enough to justify a complete ban on new technology. It is inevitable that the face of warfare can and must change, at least until there is another comparable way to measure power among states. However, as the ICJ in the Legality of Nuclear Weapons case, it can be stated that using drones in the current form is not in alignment with just war theory, which is a customary international law, in some instances codified in positive international law. This means that using drones for the purposes and in the contexts they are most widely utilized in today is still not in accordance either with the positive laws of war, customary international law or human rights. Given that all of this has not managed to stop the development of drones or the ambition of governments to use the new technology to their advantage, this is unlikely to become a bar to the future development and use of drones. Perhaps this is the clearest illustration of the limits of international law and the problems that will face coming generations of scientists when analysing the development and practice of states in the context of international law.

Using drones as an example makes evident the conflict between the “old” natural law legacy of justice and the more contemporary international relations theory approach to international law. Although neither perspective has managed to substantiate their theories to such an extent as to convince all opposition, the use of drones illustrates the need for other approaches to international law and international relations, in order to move law from the constant philosophical debate regarding if international law is really law. This question is especially interesting in comparison to the question of drones, which also illustrates the shift from an old conception of law to the modern future of war and thus the interaction between states. In this way, this entire essay serves as an indication of the rapid developments in certain areas of the world. However, in other ways, drones illustrate that even the most modern and advanced technology is actually not excluded from the normative content of the JWT, dating back to the 1400s. This paradox is quite interesting, although cannot decisively be said to exist given other than in the author’s mind at the current time.

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