

A BLAST FROM THE PAST: ARMED DRONES, INTERNATIONAL  
HUMANITARIAN LAW, AND IMPERIAL VIOLENCE

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## ABSTRACT

Scholars of conflict and its regulation have regarded armed drones as a new ‘puzzle’ for international humanitarian law’s (IHL) theory and application to adapt. While drones indeed offer exceptional technological capabilities, their significance to the future of war resides not in their strategic or tactical possibilities but in their ability to reveal the contradictions in the idea of war embodied in its regulating law. This dissertation argues that the seemingly novel challenges weaponized drones present to IHL are, in fact, not new at all. Rather, it is *through* the introduction of drones that the kinds of violences occurring for centuries in the global periphery are made both visible and recognizable. The real trouble drones pose for IHL is that critical analyses of their regulation under IHL yields conclusions that directly challenge the persuasiveness of IHL’s ostensibly humanitarian motives. These conclusions reveal that IHL was developed and applied to facilitate the use of force by hegemonic and imperial state actors against foreign populations by means of increasingly sophisticated weapons technologies. In arguing this, the dissertation revisits not only IHL’s history, but also the narratives that have been (and continue to be) told about the regime’s origin, development, and application. It considers the particular actors, weapons, and violences IHL incorporated across the trajectory of its historical development, as well as the representation of war it depicts versus its realities. The argument is illustrated by way of a case study examining drone use by the State of Israel in the Occupied Palestinian Territories.

## DEDICATION

To the “collateral damage” victims of drone strikes.

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# INTRODUCTION

## 1. RESEARCH QUESTION

Although the stakes associated with drone use in armed conflict vary dramatically depending upon the perspective from which they are considered, there is a near consensus in political, military, and legal communities that drones are a meaningful departure from any previous weapons platform.<sup>1</sup> While some in these communities welcome the ascendancy of drones as ushering in a new era of humane war, others argue that the novel weapons constitute a legal (and moral) aberration. The extent to which drones depart from their predecessors has wide ranging policy implications—all of which touch upon the regulation of war’s violences. These communities’ interventions generally present modern international humanitarian law (‘IHL’) as a self-contained and inflexible regime that exists outside of the violences and weapons it regulates. In this formulation, drones emerge from a realm of human activity entirely separate from law, and thus a foreign object that is defined by its compatibility and adherence to IHL. This dissertation challenges this framing. It retells the story of drones and IHL’s relationship as one of deep connection and shared history. The question pursued here moves beyond the issue of whether armed drone use constitutes a disruption in how war and its violences are regulated under IHL, and instead considers why drones can elicit such wildly divergent accounts of IHL and the weapon’s regulation therein. In short, it asks: what is it about drones that trouble IHL?

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<sup>1</sup> Michael C. Horowitz, Sarah E. Kreps, and Matthew Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” *International Security* 41, no. 2 (2016): 7–42, <https://doi.org/10.1162/ISEC>; Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge: Cambridge University Press, 2014); Amitai Etzioni, “The Great Drone Debate,” *Military Review*, 2013, 1–13; Denise Garcia, “Killer Robots: Why the US Should Lead the Ban,” *Global Policy* 6, no. 1 (2015): 57–63, <https://doi.org/10.1111/1758-5899.12186>; Kenneth Anderson, “The Case for Drones,” *Commentary*, June 2013.

Answering this question requires first locating the apparent tension between drones and the body of law and then loosening the knot so its constitutive fibres may be individually examined. To accomplish this, this dissertation revisits not only IHL's history, but also the narratives that have been (and continue to be) told about the regime's origins, development, and application. I consider the particular actors, weapons, and violences IHL incorporated across the trajectory of its historical development, as well as its representation of war it depicts versus its realities. The answer is illustrated by way of a case study examining drone use by the State of Israel in the Occupied Palestinian Territories ('OPT').

Scholars of conflict and its regulation have regarded armed drones as a new 'puzzle' for IHL's theory and application to adapt. However, as I argue, the seemingly novel challenges weaponized drones present to IHL are, in fact, not new at all. Rather, drones make apparent many of war's features that have been present throughout history and integrated into IHL. The *real* trouble drones pose for IHL is not their new and futuristic technologies, but that critical analyses of their regulation under IHL yields conclusions that directly challenge the persuasiveness of IHL's ostensibly humanitarian motives. These conclusions reveal that IHL was developed and applied to facilitate the use of force by hegemonic and imperial state actors against foreign populations by means of increasingly sophisticated weapons technologies. This account of IHL's *raison d'être* runs against conventional understandings of the regime and indeed the regime's own articulated self-understanding. While drones indeed offer exceptional technological capabilities, their significance to the future of war resides not in their strategic or tactical possibilities but in their ability to reveal the contradictions in the idea of war embodied in its regulating law. I argue here that it is *through* the introduction of drones that the kinds of violence occurring for centuries in the global periphery are made both *visible* and *recognizable*.

The thesis argued here is located where the historical vectors of IHL and drones converge in the current moment. Rather than treating drones as a ‘disruptive technology’, drones are presented here as the next step in the development of colonial violence and its legal regulation. The dissertation argues that the existing features and use of drones is consistent with the logic that has informed IHL’s theory and praxis for centuries. As Grégoire Chamayou describes in *A Theory of a Drone*, “the greatest crimes lie not in an open flouting of the law but in the recesses of its sovereign application.”<sup>2</sup>

Scholar Samuel Moyn similarly observes that traditional narratives of war and its imagined norms have continually circumscribed and avoided colonial conflicts that did not illustrate this idealized vision of war.<sup>3</sup> For example, the use of what are often referred to as *terrorist* tactics in today’s conflicts are similar in their form and function to those methods and goals carried out by European powers during periods of imperial expansion. While empire’s weapons have developed considerably since the first wave of European colonialism in fifteenth century, its goals and methods have endured. The increasing use and reliance on drones has made the continued use of violent colonial tactics by neoimperial states impossible to ignore any longer. This recognition places in irreconcilable contradistinction the two radically different narratives of the so-called West’s modern ascension and hegemony—one of inherent Western superiority and the other of its political, legal, and economic domination at any cost. Such divergent accounts are mirrored in the contemporary debates over armed drones’ significance, or lack thereof.

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<sup>2</sup> Grégoire Chamayou, *A Theory of the Drone* (New York: The New Press, 2015), 216–17.

<sup>3</sup> Samuel Moyn, “Drones and Imagination: A Response to Paul Kahn,” *European Journal of International Law* 24, no. 1 (2013): 231, <https://doi.org/10.1093/ejil/cht011>.

The constellation of these accounts presents a virtually incoherent image of drones and their relationship to war's violences and regulation. Yet what *appears* to be the paradoxical status of drones under IHL is merely the visible manifestation of a deeper tension between war's theory and praxis. *The paradox revealed by drone use resides between what war has been historically imagined to be—including its legal regulation and remedies—and how it is truly waged.* This is the analytical starting point of the following dissertation.

## 2. TOPIC & CONTEXT

### War

Considerations of war, drones, and the law must first visit each aspect in its most basic form as an ontological category. This enables the discussion to move from the abstract realm to one that is grounded in the material world. Only after such analyses are undertaken can the implications of their combination be grasped with a degree of clarity. Indeed, the *lack* of clarity that accompanies wartime, frequently referred as the 'fog of war', is often extended to discussions of what are identified as war's constituent subjects, objects, and features. The concept of war only exists in relation to the concept of peace, or, the temporary or permanent cessation of hostilities within the context of a given conflict. The limits to war's temporal (*i.e. wartime*) and spatial (*i.e. warzone*) dimensions must be demarcated in order to identify its presence or absence. Put differently, war is "violence compressed in time and space."<sup>4</sup> Without one or both of these limits, war(s) cease to be a derivation from an otherwise pacific norm, and

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<sup>4</sup> Tarak Barkawi, "Decolonising War," *European Journal of International Security* 1, no. 2 (2016): 201, <https://doi.org/10.1017/eis.2016.7>.

risks becoming a status quo state of affairs. One might ask, for example, whether a continuous war, such as the ‘War on Terror’, should even be referred to as a ‘war’ at all.

As a state of being, conventional definitions of war necessitate the use of violence that satisfies a constantly changing threshold of scale, prevalence, and intensity. The abstract distinction between ‘war’ and ‘peace’ is generally distinguished by the involvement of organized *state* violence. However, a deeper understanding of war appreciates its relational character, and how the threat of armed force looms over situations of ‘peace’ between and within states.<sup>5</sup> There is a similarly unfixed line that distinguishes periods of major social unrest punctuated by unorganized militia violence from the more familiar circumstances of intra/interstate conflicts. Once again, when and where a conflict erupts are key factors in shaping how a conflict is understood before, during, and after a period of armed hostilities. Governments, militaries, and international lawyers all rely on ontologically dichotomizing wartime from peacetime and battlefields from sanctuaries in order to project a temporality that renders permissible certain action(s) that would otherwise be prohibited. These parameters are currently laid out and given meaning in the IHL regime. However, the regime’s ontological categories are unstable and have changed across to time and place to suit the needs of those interpreting and applying it. Such temporal and spatial dichotomies do not historically exist in areas under colonial administration and where populations resisting occupation faced *continual* state violence. A similar situation still exists in the postcolonial world and peripheral borderlands living beneath the gaze of their drones.

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<sup>5</sup> Barkawi, 203–4.

## **International Law**

The most salient criticism of international law generally, and international humanitarian law specifically, is that it does not ‘exist’. By this it is meant that international law largely lacks what domestic legal systems possess: an executive branch of government tasked with enforcing its juridical outcomes. Without a global ‘government’ empowered to police international legal transgressions, can international law be said to be a legal system, properly speaking? Many have attempted to answer this question, and it is not the prerogative of this dissertation to provide yet another interpretation. Rather, what is pertinent is interrogating the position from which this criticism is posed. The critique is premised on a singular, limited understanding of society, property, law, and justice that are conceptually located in the writing of prominent Enlightenment era thought and social contract theory. The question assumes that *inter-national* legal arrangements should reflect *contemporary, domestic* legal systems and the subjects they implicate. However, such legal systems imbue an understanding of the law that is neither universal nor historical, since law’s form and function varied across time and place. Thus, adopting a given domestic legal system as the interpretive framework for analyzing international law produces extraordinarily limited outcomes that are not generalizable nor of clear analytical value.

In few areas of international law is this lack of interpretive consensus more apparent than IHL. Prevailing notions of IHL are the intellectual offspring of a select few states across history, namely, European, and other ‘Western’ powers. The concept of a ‘state’—and its sovereign autonomy—is presumed by international lawyers to have existed prior to imperialism and

constitutes both the subject and object of IHL.<sup>6</sup> This sovereignty grants states near absolute freedom in exercising the violence they possess a monopoly over within their territorial boundaries—a violence that is theoretically subject only to the constraints of international human rights law (‘IHRL’). Violence directed outside a state’s borders is somewhat more limited in terms of under what circumstances it may be resorted to (*jus ad bellum*) and how it may be used (*jus in bello*). These laws are mainly expressed in international treaties and conventions. However, conventional wisdom regarding how these codified rules manifest also smuggles in the assumption that they are only enforceable insofar as states are willing and able to enforce them upon themselves and other actors.

Traditional international relations and international legal theory subscribes to a positivist epistemology that considers global politics a science which operates according to a particular logic. This logic is discoverable through the objective observations of social scientists, and the explanations of which are reducible to universal rules. These rules that are unchanging across time and place produce consistent patterns of behaviour and interactions amongst its rational subjects. In this Hobbesianesque international system, states are individual sovereigns engaged in zero sum, competitive struggles with one another for scarce resources necessary for survival. This ‘state of nature’ in which states find themselves lacks a globally sanctioned Leviathan to enforce states’ fundamental right to sovereignty. Consequently, (militarily) dominant state actors may engage in any action vis-à-vis less powerful state actors that are effectively helpless to

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<sup>6</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), xii.

challenge a superior power. When giving account of this power dynamic, it is orthodoxy that the story of the ‘Melian dialogue’ be invoked for illustrative purposes.<sup>7</sup>

A corollary of a Hobbesian ‘state of nature’ is the possibility of multiple states allying to achieve a power parity against the hegemonic state(s) to create a balance of powers capable of enforcing states’ sovereign autonomy. The resulting scenario is either a ‘unipolar’ or ‘multipolar’ world, and in either of these situations, what constitutes the ‘law’ is determined and/or applied at the pleasure of the most powerful state actor(s), rather than some overarching authority. Such a system embodies an uneven rule of law that renders the sovereignty, and perhaps most importantly, the territorial integrity of states insecure. While secure control over a delineated territory is the primary preoccupation of international law as we know it today, there are alternative theoretical frameworks that challenge this basic feature as well as many other premises foundational to orthodox international legal thought.

One such alternative framework is sometimes referred to as ‘Third World Approaches to International Law’ (‘TWAAIL’). This dissertation applies TWAAIL in its analysis of international law’s history and form. According to this critique, international law is “deeply rooted in the political, cultural and economic backdrop of the European imperial project, and that the colonial patterns persist within the structures, institutions and norms of international law.”<sup>8</sup> As a consequence of being ‘rooted’ in empire-building, international law has served as a technology through which imperial projects were both justified and undertaken. During the period of European imperial expansion, colonial territorial acquisition was legally permissible through

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<sup>7</sup> Michael Walzer, *Just and Unjust Wars*, Fourth (New York: Basic Books, 2006), 5–13.

<sup>8</sup> John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017).

conquest, cessation, and settlement.<sup>9</sup> As a consequence of this and related practices, TWAIL includes both normative and emancipatory dimensions to its purpose by constructing alternative ideas and structures for international legal governance.<sup>10</sup> In other words, by drawing on the lived experiences of peoples living in the Third World, it attempts to transform the legal regime into an ‘international law of emancipation’.<sup>11</sup>

Postcolonial theory similarly incorporates emancipatory goals and is applied in the analysis to follow for its ability to capture and give account of the organic connection between colonialism and international law’s formation. As it is understood in reference to IHL, postcolonial theoretical perspectives interrogate the significance of colonialism in the formation and development of IHL’s theory, codification, and praxis. The approach interprets relevant actors and rules with reference to the positions they occupy in the contemporary, state-based governing institutions and international public legal norms that mediate the complex network of power relations in the postcolonial world. A postcolonial analytical framework demands that ideological abstractions, such as what constitutes justice in international legal regimes, are made material by discussions of the different subjects and subjectivities they implicate, e.g. civilian, combatant, etc.

### **Empire, imperialism, colonialism, and postcolonialism**

Empires have existed within and across various continents in various forms for thousands of years. The empires this dissertation concerns itself with are those which officially ended most recently, e.g. Ottoman and Spanish Empires, as well those which continue to exist to this day in a

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<sup>9</sup> Alpana Roy, “Postcolonial Theory and the Law: A Critical Introduction,” *Adelaide Law Review* 29, no. 2 (2008): 324.

<sup>10</sup> Reynolds, *Empire, Emergency and International Law*.

<sup>11</sup> Reynolds.

modified or truncated form, e.g. the British Commonwealth and U.S. territories. During the transition from the fifteenth to the sixteenth century, the Portuguese and Spanish empires began to take form across much of Central and South America, as well as West Africa and the East Indies. Some of these imperial territorial holdings persisted, while others were lost to rival imperial powers that went onto forge new empires in Africa, Asia, and the Middle East late in the nineteenth century. The following analysis is limited to these empires for three reasons. Firstly, these empires were either the penultimate or immediate antecedents to the independent states that emerged from them following decolonization. Secondly, these empires were the context in which the elaborate legal principles and military ethics to be analyzed were drafted. Thirdly, these empires witnessed vast developments in weapons technology and aerial warfare germane to this dissertation's concern with drones and the laws of armed conflict. Examining empires' extension into IHL and weapons technology provides the only means by which contemporary drone use can be fully grasped and its significance fully appreciated. Thus, a serious analysis of IHL's treatment of drones must first look backwards in order to look forward.

This dissertation's consideration of empires moves chronologically forward through time. This movement charts the inception, graduated expansion, and complete realization of war's regulation through imperial activities. The analysis concludes with a single case study in the present moment: Israeli colonialism in Palestine. The Israel-Palestine case constitutes a rare example of a territory that has been part of several empires without ever securing formal decolonization. The current settler colonial project underway in the OPT is illustrative of postcolonial dis/continuity before, during, and after the wave of decolonial liberation movements

in the 20<sup>th</sup> century.<sup>12</sup> Unlike the British empire that preceded it, Israel's colonial project is limited to a single geographical area that has ebbed and flowed in its scale since 1948. Yet the fundamental material and ideological dynamics between the colonized and colonizer have remained broadly similar over the decades and are opened up for consideration later in this dissertation.

Significant to both this dissertation's consideration of Israel-Palestine as well as broader postcolonial theorizing is the concept of empire and the distinction between imperialism and colonialism. 'Empire' confounds the type of objective, scientific definition that traditional international relations would like to ascribe to it. As author April Biccum explains, "It's only by a feat of historical imagination that empires can be conceptualized as distinct and delineated political units" of which like can be compared with like.<sup>13</sup> At the most abstract level, imperialism is the practices of empire, and colonialism is the practice of settling territories.<sup>14</sup> Specifically, imperialism goes beyond a bilateral metropole-colony relationship to include an expansive organized *system* of economic domination that may or may not involve political domination as well.<sup>15</sup> Imperial activities following the United Nations' (UN) establishment have been referred to as 'neocolonialism' for their colonial features absent physical colonies.<sup>16</sup> As an ideological undertaking, imperial projects and empire-building are concerned with a dominance that is conceptually unstable and changes dramatically over time and place. This creates the possibility

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<sup>12</sup> Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012).

<sup>13</sup> April Renee Biccum, "What Is an Empire? Assessing the Postcolonial Contribution to the American Empire Debate" 20, no. 5 (2018): 713.

<sup>14</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 11.

<sup>15</sup> Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self Determination* (Princeton: Princeton University Press, 2019), 16, <https://doi.org/10.23943/princeton/9780691179155.003.0003>.

<sup>16</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 11–12.

of informal or socially located empires, in contrast to territorial empires in which colonial policies are carried out materially with the movement of populations or extraction of resources. Colonialism is therefore a practice that is bound up in the *relationship* between the colonizer (as administrator or settler) and the colonized at the site of the colony.

A precept of postcolonial theory's foundational theorizing is that colonialism only ended in a legal sense, and the effects of colonialism remain for both colonizer and colonized. These effects incorporate social and material elements, as well as the colonial governing modalities and the legal, educational, and political institutions through which they are discharged.<sup>17</sup> Thus, imperialism can continue, consolidate, and even elaborate after formal decolonization.<sup>18</sup> The remaining systems of discursive and material control should be understood as a constellation of overlapping paradigms that permeate cultural and social relations.<sup>19</sup> For this reason, the term postcolonialism is particularly useful for capturing all these features of colonial processes.

Postcolonial accounts of international law are demonstrative of the contestation characterizing both postcolonial theories and their subject-matter. Some aspects of the debates within postcolonial scholarship are taken up in chapters to follow. However, a common premise amongst most postcolonial scholars is the that international law is neither an innocent institution highjacked by imperial powers, nor a pure expression of empire that only acts in its service. Rather, international law embodies tensions that render it a site of paradoxical possibilities. It is this reason that author Sundhya Pahuja describes international law is itself postcolonial in that "it both sustains and contains within it what we might call the condition of the postcolonial." By this

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<sup>17</sup> Roy, "Postcolonial Theory and the Law: A Critical Introduction," 317–18; Jamie Allinson, "The Necropolitics of Drones," *International Political Sociology* 9, no. 2 (2015): n. 3, <https://doi.org/10.1111/ips.12086>.

<sup>18</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 11–12.

<sup>19</sup> Reynolds, *Empire, Emergency and International Law*.

Pahuja means that international law both reproduces the ‘Self’ and ‘Other’ distinction while including the excluded in its universalist aspirations.<sup>20</sup> This feature of international law is what authors John Reynolds and Adom Getachew refer to as ‘repressive inclusion’ and ‘unequal integration’, respectively.<sup>21</sup>

## **Subjects and objects**

In advancing its argument, this dissertation systemically critiques the account of global politics’ primary subjects and objects presented in traditional academic approaches and political rhetoric. Starting with frequently taken for granted assumptions about knowledge (epistemology) and being (ontology), I use TWAIL and related postcolonial accounts of global politics to unpack the unspoken commitments of traditional theories and open them up to further interrogation. Such assumptions include those described above, namely, the basic subjects and objects of global politics and the nature of their interactions. The following analysis disputes traditional presentations of states as the primary subjects and objects of global politics, generally, and international law, specifically. This assumed European state is singularized and anthropomorphized as a logical actor imbued with a capacity for reason. This particular ontological formulation of the state is an imaginary ideal that, in addition to being perfectly rational, is all-powerful within its territorial boundaries, and contemplates its foreign policies free from the interference of any other. I instead introduce alternative units of analysis, including individuals, groups, and communities, and attempt to locate their position in both ideological and material networks of power and its re/production.

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<sup>20</sup> Sundhya Pahuja, “The Postcoloniality of International Law,” *Harvard International Law Journal* 46, no. 2 (2005): 459–60, <https://doi.org/10.4324/9780429499715-26>.

<sup>21</sup> Reynolds, *Empire, Emergency and International Law*; Getachew, *Worldmaking After Empire: The Rise and Fall of Self Determination*, 9.

Much in the same way there are unequal statuses for different persons involved in or adjacent to conflict, the tactics and weapons they deploy are given unequal weight and legal standing. In addition to being of questionable accuracy, these categories are themselves the product of violence in the service of empire building. The construction of race and the European ‘Self’ as defined in opposition to the non-European ‘Other’ emerged as concepts during the Enlightenment and saturated categories of being inside and outside of armed conflict.<sup>22</sup> Yet the distinction between ‘us’ and ‘them’ as it pertains to the laws of war is also seen in some of its earliest iterations in Ancient Rome, through to the so-called ‘Westphalian system’ and beyond.

This dissertation argues that this distinction is continually reasserted throughout international legal thought and underlays the current international order. The analysis identifies and traces this line of thought in its different iterations and transformations through the Ancient world to the post-World War II explosion of treaties codifying the laws of armed conflict. This ‘line’ embodies a particular violence that is either legitimized *by* the state or is legitimizing *for* the state and is carried out at the expense of peoples and places situated outside of the conceptually unstable ‘West’. The bulk of early chapters’ content is dedicated to analyzing how and when IHL came into being, as well as the worldviews that informed its development. These chapters work to build a knowledge base upon which the question of drones may be introduced.

## **Drones**

This dissertation’s preponderant object of consideration is the drone. As it is used here, the term ‘drone’ encompasses other related categories, including unmanned combat aerial vehicles, remotely piloted aircraft, and unmanned aircraft systems. The drones in question are

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<sup>22</sup> Roy, “Postcolonial Theory and the Law: A Critical Introduction,” 323.

surveillance drones capable of being armed with ballistic missile payloads—also known as ‘hunter-killer’ drones. Drones of this particular class are generally Medium-Altitude Long-Endurance (MALE) and include—but are by no means limited to—the familiar General Atomics MQ-1 Predator and MQ-9 Reaper drones as well as the lesser-known Israeli Aerospace Industries Heron TP drone. Surveillance drones and loitering munitions (occasionally referred to as ‘suicide drones’) are discussed where relevant, however, the majority of the analysis is focused on those carrying large munitions. The primary reason for this being that armed drone capabilities are the nexus of most varieties’ and thus constitute a *gestalt* of drone possibilities.

The novelty of drones is highlighted by both their detractors and advocates—however, this supposed originality is a somewhat misleading assertion. These weapons are not a wholly new means of engaging in armed conflict, and the history of pilotless aircraft carrying surveillance and lethal payloads can be traced back to the early twentieth century.<sup>23</sup> Similarly, aerial bombardment and policing strategies have been practiced for approximately a century, predominately in the colonial world. What *is* innovate about drones is the rapid developments in their variety and technological capabilities over the past few decades. Weaponized drones are becoming increasingly sophisticated, and a greater reliance upon their use in conflict situations has sparked debates in within government, military, and legal communities that have spread to an ongoing public debate.

Initial discussions of these weapons survey the conventional arguments around drones’ potential uniqueness as a weapon. This involves addressing the discourse’s most frequently asked questions of whether drones: 1) Are qualitatively different than all other weapons; 2) Are

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<sup>23</sup> Ann Rogers and John Hill, *Unmanned: Drone Warfare and Global Security* (Toronto: Between the Lines, 2014), 13–15.

inherently un/just weapons of war; 3) Pose an insurmountable obstacle for redress by the laws of armed conflict in their current form; and 4) Do greater harm than good to strategic military aims. This dissertation gives special attention to the limitations of these questions and the firm doctrinal boundaries that produce them.

### **3. TOPIC ORIGINALITY/DISCIPLINE CONTRIBUTION**

#### **Current developments**

Academic discourse on drone use by official state and military actors has largely transformed the issue into a normative question that asks whether there is something about drones that renders them intrinsically (un)ethical and/or (il)legal. In answering this question, different interventions have introduced varying ethical commitments and political calculus to their arguments, with supporting evidence located in either abstracted theoretical debate or particular instances of drone use. The diversity of considerations undergirding these interventions has produced conclusions endorsing every permutation of drone's possible ethical or legal permissibility.<sup>24</sup> This debate is overwhelmingly presented as an either/or situation, and its discussants are often firmly situated within disciplinary silos that rarely extend their analyses outside of their particular fields. The resulting image of drones and their relationship to IHL is muddled, contradictory, and reduces answering the question to a consideration of particular methodologies and competing value sets.

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<sup>24</sup> Etzioni, "The Great Drone Debate"; Noel Sharkey, "The Moral Case Against Autonomous and Semiautonomous UAVs," in *Handbook of Unmanned Aerial Vehicles*, 2015, 2919–32, [https://doi.org/10.1007/978-90-481-9707-1\\_101](https://doi.org/10.1007/978-90-481-9707-1_101); Garcia, "Killer Robots: Why the US Should Lead the Ban"; Bradley Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: Oxford University Press, 2013); Anderson, "The Case for Drones."

The types of questions raised by these interventions are often fixated on an underdetermined account of relationship between law and ideology, in which they hope to locate deep insights to inform drone policies and attitudes. The serious flaw in orthodox methodological approaches to analyzing drones is not, *per se*, their tendency to compare material accounts of what is (*i.e.* instances of drone use) against what ought to be (*i.e.* what IHL requires); although this is of questionable analytical utility given the aforementioned cornucopia of values that inform what ‘is’ and ‘ought to be’. Rather, the deeper issue(s) take place on the ontological and epistemological level. Ontologically, these approaches “write the history of drones as the history of remote control and robots”, rather than placing drones within the long history of weapons technology developments well as practices of aerial policing and imperial war waging.<sup>25</sup> Instead, they hold drones up against the current state of weapons arsenals available and treat drones as a value-neutral machines with value-inclined operators. Epistemologically, these approaches accept the immutable sovereign autonomy of states and the carefully constructed myths surrounding why and how states engage in conflict. These criticisms and their myopic shortcomings are explored in greater detail in chapter 1. Such myopia engenders a narrow phenomenological interpretation of an event, as well as an uncritical acceptance of the righteousness of the law’s idealism—a characteristic particularly pronounced in the case of IHL. This places unforgiving limits on the insights yielded by such analyses of drone’s relationship to international law and politics more generally.

### **Future constructions**

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<sup>25</sup> Majed Akhter, “The Proliferation of Peripheries: Militarized Drones and the Reconfiguration of Global Space,” *Progress in Human Geography* 43, no. 1 (2019): 68, <https://doi.org/10.1177/0309132517735697>.

This dissertation's originality makes three unique contributions to the existing English-language drone literature. First, by taking up the combined topic of drones and IHL in a manuscript-length work. Although the past decade has seen a steady growth in drone-related publishing, the field is crowded out by authors writing from traditional, 'mainstream' perspectives, i.e., variations of liberal and realist thought. Notably, authors somewhat critical of drones may be so while remaining firmly situated in conventional disciplines' parochial schools of thought. The remaining interventions authored from critical theoretical standpoints are analytically great (as evidenced by extensive references to their work throughout this dissertation) but numerically few. Indeed, this scholarship is often limited by the page-lengths limits of the academic journals in which it appears.

Conversely, those critical authors publishing books on drones generally discuss the weapons' use for surveillance or assassinations, and/or approach their discussions from a discipline unrelated to international relations, e.g. media and communications. This dissertation's lengthy examination of weaponized drone use during situations of armed conflict in which IHL is the applied legal framework sets it apart from the existing literature. Further, by grappling with the minutiae of one of mainstream international relations thinkers' favoured preoccupations—war's legal regulation—it inserts new analytical considerations into scholarly debates between international law's entrenched supporters and detractors. Deep engagement with drones' situation under IHL bridges the disciplinary gap that frequently determines *who* discusses *which* aspect of drones and to what *ideological* end. The field of academic discourse is benefited when its players are confronted by those from different teams—which this dissertation aims to do.

This dissertation's second scholarly contribution follows from the first: methodological approach. The examination to follow synthesizes TWAIL and postcolonial theoretical methods

to carry out an original analysis of drones' interaction with IHL. My reexamination of IHL's history makes use of TWAIL scholars' deep understanding and cutting critiques of historical political narratives and the development of global governance institutions. The dissertation peels back the veneer of liberal mythology that surrounds the body of IHL to highlight where and when the peoples and places of the world's so-called periphery were involved in the regime's formation. This allows me to aggregate the collection of revelations about specific legal norms or documents as well as introduce several new observations of my own. My consideration of drones likewise makes use of postcolonial theory's interrogation of historically ascribed categories and their meanings. This allows me to disrupt taken for granted assumptions about past and present populations, locations, cultural signifiers, and weapons. Using existing postcolonial theorizations of time and space allows for a better understanding of their operation in war's violent actions and their legal assessment—including drone strikes.

The final scholarly contribution made here concerns the Israeli-Palestinian case study. General scholarship on the Occupation is not lacking, however, English-language scholarship on Israeli drone use in the Occupation is remarkably scarce—the significance of which is explained in chapter 5. Consequently, any new research on the subject is *de facto* original. Similarly, there is ample analysis of the ongoing developments in the Occupation's legal regime and its continually shifting legal footing. Yet the relatively little attention afforded to Israeli drone use has allowed the legal particularities of their use in the conflict go relatively unexamined. This is especially important considering the Israeli state's dual role as an IHL violator and pioneer. This dissertation deliberately situates itself in the traditions of these critical theories to share in their goal to produce knowledge in support of resistance to the injustices of colonialism, conflict, and their enduring pathologies. The need to end the over half century military occupation of Palestine

is made more urgent by the expanding role of drones in the Occupation's maintenance. It is hoped that the argument advanced here will add another voice to academic work directed towards influencing states' drone procurement and use policies.

#### **4. METHODOLOGY**

The methodology that guides this dissertation's critical exploration of the drone paradox is what allows it to undertake an original analysis. The following chapters draw on the analytical insights of TWAIL, postcolonial, and critical legal theoretical approaches examine international law's past and present and technological advancements in aerial war waging.

##### **Postcolonial theory**

My methodology draws most strongly from postcolonial theory in its sensitivity to time, temporality and spatiality, since the postcolonial situation in which the world exists is "inextricably tied to both temporal and spatial global processes."<sup>26</sup> 'Time' itself is conceptualized to better understand how its embedded values structure experience.<sup>27</sup> A central analytic is post-Enlightenment thought's commitment to temporal movement through staged civilizational advancement that understand the colonised as lacking in movement and therefore lacking in civilizational progress. Colonial populations were constantly thought of as 'lagging behind' Europe's and subsequently subjected to policies and practice otherwise prohibited.<sup>28</sup> This carried over to nineteenth century positive legal thinking that further refined the concept of the 'state' as international relations' preeminent subject. This process established a regulatory

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<sup>26</sup> Roy, "Postcolonial Theory and the Law: A Critical Introduction," 318–19.

<sup>27</sup> Amanda Glasbeek, Katrin Roots, and Mariful Alam, "Postcolonialism, Time, and Body-Worn Cameras," *Surveillance and Society* 17, no. 5 (2019): 744.

<sup>28</sup> Branwen Gruffydd Jones, "Time, History, Politics: Anticolonial Constellations," *Interventions* 21, no. 5 (2019): 600, <https://doi.org/10.1080/1369801X.2019.1585919>.

framework that limited legal subjectivity to European states (internationally) and individuals (domestically), which was used as a justification for colonial projects.<sup>29</sup>

Asking how ideas of time and space were operationalized through the law opens IHL up to a deeper analysis that treats international relations and international law's presentation of postcolonial spaces—and the identities of the subjects therein—as contested, changing, and relationally-defined.<sup>30</sup> Throughout the entire dissertation I systematically discuss the various categories of subjects and objects implicated by armed conflict and its legal remedies, e.g. non/state, non/combatant, unlawful combatant, battlefield, *etc.* In international humanitarian legal texts, these designations describe a particular relationship to the violence in question. The Israel-Palestine case study discussed in greater detail below provides concrete illustration to these different legal categories and relationships. This approach enables my argument to move from the two-dimensional realm of written treaty texts to the three-dimensional realm of intellectual origins and practical application. When this methodology is extended to drones, the consequences of their dynamic relationship with temporality and spatiality becomes ever more apparent as the distance between drones, their operators, and their targets changes.

## **TWAIL**

Rather than asking whether drones and their use as a weapon possess an innate il/legality, this dissertation expands the scope to include questions like: Is IHL still a persuasive source of guidance for combatants in contemporary conflicts? Was it ever? In addressing these issues, the following place drones in the context of developments in weapons technology and aerial warfare

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<sup>29</sup> Roy, "Postcolonial Theory and the Law: A Critical Introduction," 328–29.

<sup>30</sup> Geeta Chowdry and Sheila Nair, eds., *Power, Postcolonialism and International Relations: Reading Race, Gender and Class* (New York: Routledge, 2002), 10, 238, <https://doi.org/10.1017/S1537592706680274>.

across time and space. Introducing these dimensions into the analysis at the methodological level enables it to move from the theoretical to the material realm. The repressive inclusion/unequal integration account of international legal development is operationalized in this dissertation as a method by examining where international law sought to incorporate, rather than wholesale exclude, its non-European Other. My account of empire's legalization examines how both regularized bureaucratic practices and states of emergency formalized colonial populations' marginalization. In this sense, repressive inclusion functions in a manner similar to Achille Mbembe's theory of necropolitics. However, unlike the 'state of exception' theorized in necropolitics, repressive inclusion subjugates life and death in the colonial space using racialized dialectics of spatial and juridical order that inscribe a native population.<sup>31</sup> Unlike Agamben's Eurocentric *homo sacer*, repressive inclusion recognizes how a colonized population's agency and resistance transgresses the role the colonizing power ascribes to it.<sup>32</sup> Unequal integration describes a similar process of domination engrained in international structures, particularly those associated with sovereignty, that became more racialized during the late nineteenth and early twentieth centuries.<sup>33</sup> Both domestic and global governing institutions established through imperial interactions have reproduced an "underlying pattern of domination and subordination" that transformed during decolonial moments and endured through to the present moment.<sup>34</sup> This

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<sup>31</sup> Reynolds, *Empire, Emergency and International Law*. For a more detailed account of the 'state of exception' drone explanation and its uses, see: Dawn L. Rothe and Victoria E. Collins, "The Normality of Political Administration and State Violence: Casuistry, Law, and Drones," *Critical Criminology* 22, no. 3 (2014): 375, <https://doi.org/10.1007/s10612-014-9234-7>.

<sup>32</sup> Reynolds, *Empire, Emergency and International Law*, 41, 57, 205.

<sup>33</sup> Getachew, *Worldmaking After Empire: The Rise and Fall of Self Determination*, 2, 9.

<sup>34</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, xii.

institutional flexibility enabled it to “accommodate itself to the loss of direct control by deploying the international structures of unequal integration.”<sup>35</sup>

### **Critical legal theory**

In addition to postcolonial theories of global politics, this dissertation’s approach to the research topic also draws on critical legal theory. Critical legal theory encompasses a wide array of perspectives that all share in a rejection of what author Alpana Roy refers to as “liberal legalism, legal objectivity and neutrality, and an ideological commitment to a contextual analysis of the law.”<sup>36</sup> Scholarly interventions by legal academics associated with and drawing from postcolonial theories of politics have provided alternative accounts of what IHL is, its historical trajectory, and its relationship with weapons technologies developments.<sup>37</sup> This scholarship situates the logic of international law within the prevailing attitudes and beliefs that shaped how ‘Western’—and particularly European—approaches global politics understood colonial interactions with various peoples and territories.

Such norms were (and continue to be) firmly rooted in Enlightenment Era ideas and ideals that attempt to understand the world through Eurocentric hierarchical taxonomies, and adopt a ‘Manichean’ perspective of the world that divides peoples and places into ‘good’ and ‘bad’,

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<sup>35</sup> Getachew, *Worldmaking After Empire: The Rise and Fall of Self Determination*, 22.

<sup>36</sup> Roy, “Postcolonial Theory and the Law: A Critical Introduction,” 320.

<sup>37</sup> See: Chowdry and Nair, *Power, Postcolonialism and International Relations: Reading Race, Gender and Class*; Anne Orford, ed., *International Law and Its Others* (Cambridge: Cambridge University Press, 2006); Mohammad Shahabuddin, *Ethnicity and International Relations: Histories, Politics and Practices* (Cambridge: Cambridge University Press, 2016); Frederic Megret, “The Humanitarian Problem With Drones,” *Utah Law Review* 5 (2013): 1283–1319; Anna M. Agathangelou and Kyle D. Killian, eds., *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives* (New York: Routledge, 2016); Antony Anghie, “The Evolution of International Law: Colonial and Postcolonial Realities,” *Third World Quarterly* 27, no. 5 (2006): 739–53, <https://doi.org/10.1080/01436590600780011>.

‘right’ and ‘wrong’, ‘Self’ and ‘Other’.<sup>38</sup> Various iterations of the ‘European’ identity were asserted using these binaries against which it could only be understood in relation and righteous opposition to the conceptually unstable but ever-threatening ‘non-European’. These subject categories were mobilized by governments to establish a sovereign right to rule domestically as well as abroad by way of imperial undertakings. Upon the ‘discovery’ of the Americas, the Manichean mindset that originally reduced the world to the ‘East’ and ‘West’ was again reimagined to incorporate an expansive non-European geopolitical landscape. This had major implications for how postcolonial spaces and populations have and continued to be imagined by imperial powers, including what kind of laws can be applied to whom and when.<sup>39</sup> The violences of territorial conquest were given account of by European intellectual and ruling elite in legal principles that regulated the use of force. These writings were part of the patchwork of doctrines that would eventually become IHL. Revisiting these primary texts in their original context reveals the lengths imperial powers went to establish both an ethical and legal basis for their use of force in the non-European world generally, and their colonial holdings, specifically. *Through a postcolonial lens, international law can be understood as a justification and means through which historical colonial projects were carried out.*

This function is especially true of IHL, since it was during the era of European imperial expansion that IHL underwent the theoretical development that would imbue its future conventions and treaties.<sup>40</sup> Resistance by occupied and colonized populations was intentionally

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<sup>38</sup> Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 2004), 14; Roy, “Postcolonial Theory and the Law: A Critical Introduction,” 321.

<sup>39</sup> Edward Said, *Orientalism* (New York: Vintage, 1979).

<sup>40</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*; Paul W. Kahn, “Imagining Warfare,” *European Journal of International Law* 24, no. 1 (2013): 199–226, <https://doi.org/10.1093/ejil/chs086>; Frédéric Mégret, “From ‘Savages’ to ‘Unlawful

proscribed under this legal regime, and consequently, members of these groups could make claim to far fewer rights than those of state armed forces. This dissertation analyzes how this logic was also extended to state armed forces' weapons—arguing that drones appear uniquely equipped to satisfy the requirements of IHL.<sup>41</sup> Once the imperial circumstances under which IHL was developed are taken into account it no longer seems coincidental that the bulk of drone use is in formerly and currently colonized areas of the world. Thus, a postcolonial analysis can demystify the apparent drone paradox: *drones are the ideal weapon for carrying out legal colonial violence*. Nowhere is this reality more apparent than in Israel's current colonial project in the OPT.

## 5. CASE STUDY

Drones are being used in the OPT to assert and extended a colonial project being undertaken in the context of a military occupation. As such, Israeli drone use constitutes an appropriate case study in which to analyze the interaction between drones and IHL. Israel has been leading in drone development and production since the late 1970s,<sup>42</sup> and reports indicate Israel has been using armed drones in the OPT since 2004.<sup>43</sup> The majority of armed drone use

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Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" in *International Law and Its Others*, ed. Anne Orford (Cambridge, 2006), 265–317, <https://doi.org/10.1017/CBO9780511494284.011>; Moyn, "Drones and Imagination: A Response to Paul Kahn."

<sup>41</sup> Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military*, 36.

<sup>42</sup> Daniel Byman, *A High Price: The Triumphs and Failures of Israeli Counterterrorism* (New York: Oxford University Press, 2011); Orna Ben-Naftali and Karen R Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings," *Cornell International Law Journal* 36, no. 2 (2003): 233–92; Danny Garrett-Rempel, "Will JUSTAS Prevail? Procuring a UAS Capability for Canada," *The Royal Canadian Air Force Journal* 4, no. 1 (2015): 19–31; David Rodman, "Unmanned Aerial Vehicles in the Service of the Israeli Air Force: 'They Will Soar On Wings Like Eagles,'" *Middle East Review of International Affairs* 14, no. 3 (2010): 77–85; Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation, Political Geography* (New York: Verso, 2007), <https://doi.org/10.1016/j.polgeo.2008.10.001>.

<sup>43</sup> Mary Dobbing and Chris Cole, "Israel and the Drone Wars: Examining Israel's Production, Use and Proliferation of UAVs," 2014, 10.

occurs in the Gaza Strip territory where Israel has engaged in perennial wars against the governing Palestinian organization Hamas. Israel is an occupying power in the Palestinian territories—despite insisting for decades that it is merely a belligerent party to the conflict and upholding its obligations under IHL as such.<sup>44</sup> The reasons for this insistence (explained in detail in chapter 5) expose the extent of IHL’s internal inconsistencies, commitment to artificial ideas of war, and systemic repression of populations in the global periphery—especially those facing imperial occupations and/or colonialism. However, most scholarly analyses of IHL and its breaches in the Palestinian-Israeli Conflict (Conflict) do not historicize IHL and apply the legal regime as it is. Thus, this dissertation’s historically contextual approach both guides its analysis and yields uniquely productive insights. *It is important to consider not only what IHL reveals about the Conflict, but what the Conflict can reveal about IHL.* This is even more acute in the case of armed drone use since English language research about Israeli drone use is largely absent. An analysis of IHL’s development, theoretical underpinnings, institutions, and application in the OPT provides this dissertation with the relational methodology that enables the project to move from the *theoretical* humanitarian use of drones to consider their *actual* use in a contemporary conflict.

The case study entails analyses accounts of Israeli drone use from a variety of sources. This includes official military and government statements, non-governmental organization publications, academic scholarship, as well as interviews conducted with veterans of the Israeli state military, known as the Israeli Defense Forces (‘IDF’). These accounts are considered using

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<sup>44</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004); State of Israel, “The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects,” 2009, [http://www.mfa.gov.il/MFA\\_Graphics/MFA\\_Gallery/Documents/GazaOperation w Links.pdf](http://www.mfa.gov.il/MFA_Graphics/MFA_Gallery/Documents/GazaOperation%20w%20Links.pdf).

the theoretical and methodological approaches described above, and are found to be consistent with the dissertation thesis—both in terms of the nature of Israeli drone use and legal responses to it.

## **6. CHAPTER OUTLINE**

The overarching analysis here is best understood as a multi-dimensional exploration of a single argument. The argument in its most basic form proposes that the apparent drone paradox is resolved by the following thesis: Drones trouble IHL because they embody the regime’s latent incoherence that pursues two, mutually exclusive objectives. As the dissertation shows, drones’ technological advancements fulfil IHL’s ostensibly humanitarian promise *so* well that they expose its historical imperial formation. The fundamental tension in IHL is its aim to endorse the violence necessary to advance imperial goals while simultaneously restricting it—or at the very least slapping a ‘humanitarian’ title on it. This guiding hypothesis requires an examination of both the theoretical and material dimensions of the relationship between drones and IHL. Such an examination itself requires a consideration of how time (understood as history and temporality), and space (understood as geography and vertical and lateral distance), are integral to this relationship. This requires asking when and where IHL was conceived, developed, and applied, as well when and where aerial warfare and drones have been deployed.

The dissertation is constituted in two parts, each of which speaks to either drones or IHL. Part 1 provides the background information and historical context essential to understanding the stakes of the subject as well as the dissertation’s fundamental thesis. These chapters both explain and critique the dominant narratives and mainstream schools of thought on the topics of drones and international legal history. Part 2 picks up at the turn of the twentieth century and brings the reader into the more familiar terrain of a world armed with aerial weapons capabilities and an

international humanitarian legal regime as it is recognized today. These chapters use drones to explain the dis/continuities in war's theory and praxis in the sixteenth century and the current moment. Building on the essential knowledge base established in the first part, part 2's chapters more concretely lay out the dissertation's central claim by bringing it into the present. It concludes by illustrating its argument with an example of a contemporary conflict in which drone use is both regulated and permitted by IHL as part of a larger policy of colonialism.

Chapter 1 introduces drones as a topic and gives account of their historical development and use. The chapter ensures the reader is equipped with an understanding of the different drone varieties and their development trajectory required to grapple with the consequences associated with their use. Chapter 2 reviews the existing literature on armed drones' ethical and legal implications. It begins with a discussion of the flawed parameters of the debate alluded to above and moves onto discuss the popular arguments relating to drones' intrinsic uniqueness or qualitative difference as a weapon. This includes arguments for and against drone use from ethical, legal and military perspectives. Some of the questions posed by these perspectives include: Are drones inherently just? Unjust? Neither? Are they an insurmountable obstacle for the laws of armed conflict in their current form? Do they ultimately do greater harm and conflict with security and strategy goals?

Chapter 3 provides an introduction to the historical conjunctures in time and space from which international law's theorizing and foundational principles emerged, starting with late-Medieval Christian theorists through to the post-Enlightenment Era. In doing so, it draws on the writings of Antony Anghie, John Reynolds, Siba Grovogui, and Martii Kioskenniemi, among others. The chapter reopens the origins of international law, its theorists, and the intra-European rivalries and imperial encounters that defined the intellectual environment in which they wrote. It

argues that the changing understanding of sovereignty over time has been essential to justifying and maintaining empire-building and modes of thought. It retells the story of international law's origins with attention to the intra-European rivalries and imperial confrontations that defined their intellectual environment. It introduces the idea of imperial time and temporalities and demonstrates how they continue to inform contemporary international legal thought and practice.

Chapter 4 explains the main thrust of the dissertation thesis and endeavours to resolve the aforementioned drone 'paradox' in which the weapons appear to be simultaneously il/legal, un/ethical, and un/strategic. It begins by building off the broader, mainly historical considerations of the previous chapter and brings it into the twentieth century through to the contemporary moment. It explores where and when aerial bombardment was first used, why, and under what legal pretences. This exploration explains that the earliest experiments in aerial war were in imperial policing in the colonies and fabricated the legal bases for types of violences made possible by the new technology. These policing strategies were at odds with the *jus in bello* principles of discrimination and proportionality by intentionally targeted civilian populations with excessive violence. Following this recognition, the chapter argues that drone use today embodies this legacy of aerial bombardment that has disproportionately targeted postcolonial and periphery territories and populations. This argument proceeds with an examination of drone's relationship with IHL's subjects (nations, peoples, states, individuals, *etc.*) and the continued existence of its 'other', *i.e.*, those whom it has always repressively included. This involves considering IHL's application with regard to its intended spatial—both horizontal (geographical) and vertical—as well as temporal parameters. To this end, the chapter puts forward the alternative explanation of IHL's purpose introduced in the preceding chapters that war's regulation is inextricably bound up with political purposes and empire building. When this

approach to IHL is used to interpret drones, it becomes apparent that drones are the logical cumulative result of centuries of weapons technology development and strategies of waging war, as well as the ideal weapons for imperial conflicts and colonial projects. The valuable insights of authors Frédéric Mégret, Ronak K. Kapadia, Thomas Gregory, and Rupka and Baggiarini are drawn on extensively in arguing this conclusion.

Chapter 5 introduces the Israeli state's use of drones in the OPT as the single case study for analysis. The Israeli case applies expands upon the methodology described above to include a discourse analysis of interview responses with former members of the IDF on IHL and drones. The chapter is divided into three sections that familiarize the reader with the case, present the interview results, and discuss the argument as it applies to the case. The first provides a general history of Israeli use, development, manufacturing, and sale of drones. It goes on to frame the analysis context with existing accounts of Israeli use of drones in the OPT in the context of both the broader occupation as well as specific assaults on Gaza. This features some of the ways in which drones are being used by the state to aid its colonial project. The second section discusses the current state of IHRL and IHL in the OPT, as well as the legal debates surrounding it. Using existing work on legal pluralism, this section breaks down the different, overlapping legal systems in the OPT. The third section narrows in focus to consider how drones affect the Conflict's main actors' behaviours and interactions. It looks at the way drones alters and produces new legal subjectivities, and the way IHL absorbs and enhances the Conflict's violence.

## **Conclusion**

By the final pages of this dissertation, the reader will hopefully find that an answer has been provided to drones' paradox. As the reader will see, what prevents IHL from limiting and

redressing war's violences is not a characteristic particular to drones *per se*. Rather, drones are a unique heuristic for revealing the ontological commitments informing the legal regime's underlying logic. It is this logic that renders IHL inadequate for achieving its *raison d'être*. The paradox of drones is, in many respects, the paradox of IHL and the foundational assumptions of how wars are fought. Through a methodical examination of international law and IHL, the *actual* battlefield over which drones operate is revealed, and the contradictions contained within both drone use and its governing laws are laid bare. The ultimate resolution of the drone paradox is not arrived through a harmonious marriage of both sides, but rather the transcendence of their conceptual limits.

## Part 1: Drones and international law then

*“the drone has learned to disguise itself as a shard of sky    the drone’s soft hum is a disembodied echo    the drone was mistaken for a star once    the drone renders itself celestial”*<sup>45</sup>

Clint Smith

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<sup>45</sup> Clint Smith, “The Drone,” *Poetry*, October 2018,  
<https://www.poetryfoundation.org/poetrymagazine/poems/147872/the-drone>.

## CHAPTER I: WHAT'S IN A NAME?

This opening chapter's function is to familiarize the reader with the preeminent object for analysis. Its situation in the overarching framework in which the argument is laid out is primarily informational. The information presented is fundamental to resolving the drone paradox because it confronts and dispels many of the most pernicious drone myths, misunderstandings, and misrepresentations. Many of these myths are the intellectual offspring of liberalism's ideological commitments—including scientific progress and benevolent violence—that also constitute basic premises in IHL. Establishing a rudimentary understanding of drones' capabilities and limitations, as well as who is using them and where, creates a firm foundation upon which future chapters analytically build. This chapter takes stock of the current moment, after which point the analysis proceeds to reach far back in history with chapter 2, where it then moves forward through time in chapters 3 and 4 to track the key developments that shaped and defined the international humanitarian legal landscape and weapons of today—best illustrated in chapter 5's case study.

### 1. HISTORY OF THE 'DRONE'

Authors Roger and Hill describe some of the challenges associated with attempts to identify the significance of drones in the current moment. They explain that it is impossible to determine what changes to state and military behaviour is attributable to the introduction of drones, and which are a result of the “evolving nature of global violence.”<sup>46</sup> The macro-level

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<sup>46</sup> Ann Rogers and John Hill, *Unmanned: Drone Warfare and Global Security* (Toronto: Between the Lines, 2014), 6.

evolution the authors describe also occurred at the individual weapon level. Over the past century, drones also underwent an evolution. The technology first emerged from attempts to improve early aerial warfare and have since developed into a tool of espionage and destruction. This chapter introduces the drone's origins while outlining its most significant historical junctures and who is using them where. It places drones along a broader historical trajectory of preeminent global powers solidifying and expanding their influence over foreign peoples and places. The weapon's current trajectory has seen drone use also turn inwards, as they are increasingly used by governments to manage politically destabilizing minority groups and low-level insurgent movements. As greater numbers of state and non-state actors embrace drones, their possibilities have begun to unfold into an increasingly violent future.

### **Drone nomenclature**

#### *What they are*

The word 'drone' has various meanings, almost all of which have martial meaning and application. Used as a noun, the word drone is generally defined as a type of male honeybee, the sole purpose of which is search out a female queen bee with which it can mate, and subsequently die. Alternatively, the word has also be used to refer to a person involved in a form drudgery. Used as a verb, it refers to a continuous, monotonous noise. Tactical drones classified as 'loitering munitions' embody a nearly identical *raison d'être* nearly to their insect counterparts: their purpose is singular and self-destructive. The labourer analogy is similarly apt, since drones are regarded as ideally suited to 'dull, dirty, and dangerous' tasks that are unstimulating and/or hazardous to humans.<sup>47</sup> Lastly, the sound produced by the engines of medium- and high-altitude

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<sup>47</sup> Rogers and Hill, 50–51.

drones is described by those living beneath them as a constant buzzing sound, much like an insect.<sup>48</sup> Despite a technical inaccuracy, the technologies generally referred to as ‘drones’ are astutely named.

For all its numerous applications, the word ‘drone’ is a catch-all term of varying utility. The definition of a drone requires that the vehicle in question—be it ground, aerial, or submarine—operate according to a program, rather than a remote control. However, this dissertation limits its consideration to aerial vehicles, and will keep with accepted practice to use the term interchangeably with ‘remotely piloted aircraft’ (RPA).<sup>49</sup> While the difference between drones and RPAs is not particularly significant for the discussion here, it is important to initially distinguish the different types of unmanned systems found in military arsenals today, and some of the questions raised by each. Contemporary remotely controlled vehicles currently operate in water, air, and on the ground with a variety of purposes and relationships to violence. These tasks range from ISR (intelligence, surveillance, reconnaissance), detecting and clearing unexploded ordnances, and carrying out search and rescue missions, to providing combat support through laser targeting and mounted weapons systems capable of carrying out their own attacks. These vehicles operate with varying degrees of autonomy but are overwhelmingly remotely operated.

A popular alternative to the more traditional side-stick form of remote operation for aerial vehicles is the use of global positioning system (GPS) coordinates in both high and low-end

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<sup>48</sup> Stuart Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” *International Review of the Red Cross* 94, no. 886 (2012): 598, note 7, <https://doi.org/10.1017/S1816383113000118>; Daniel Greene, “Drone Vision,” *Surveillance and Society* 13, no. 2 (2015): 237.

<sup>49</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 14.

drones. The impact of GPS integration on drone capabilities is difficult to understate. With GPS, the entire world is opened up to drones, more intuitive piloting, and higher quality imaging.<sup>50</sup> Loitering munition drones commonly are programmed to home in on particular sets of GPS coordinates where they then detonate.<sup>51</sup> Similarly, the United States military's Predator and Global Hawk drones receive flight path directions from GPS positions transmitted via satellite, and are guided to targets by laser rangefinders that work in conjunction with the vehicle's internal GPS. Even American Boarder Patrol uses surveillance drones programmed to fly certain patterns.<sup>52</sup> Remote control and GPS together constitute the most popular and common methods for operating drones.

#### *What they aren't*

To date, there are no fully autonomous, lethal drones in operation.<sup>53</sup> While the *possibility* of a drone possessing this type of artificial intelligence (AI) tends to garner the greatest amount of public and media attention, it remains a significantly far-off prospect. There are two related but distinct reasons for this.

Firstly, the necessary technology is simply not yet available. In contrast to what defence and security technology developers and manufactures would have the government and wider public believe, AI is more of an ambiguous, catch-all promotional term than a coherent

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<sup>50</sup> Peter Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century* (New York: Penguin, 2009), 58.

<sup>51</sup> Israeli Air Force, "הסודות של דלילה," Air Force Journal, 2008, <https://www.iaf.org.il/2158-28495-he/IAF.aspx>.

<sup>52</sup> Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century*, 40.

<sup>53</sup> Here, 'drone' refers to unmanned vehicles—airial or otherwise. While no fully autonomous, lethal drones may exist, there are autonomous weapons systems in the form of what are often referred to as 'sentry guns'. These firearms automatically detect and fire at targets and are currently in use on the South Korean side of the Korean Demilitarized Zone. See: Vincent Boulanin (Ed.), "The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk," *Stockholm International Peace Research Institute*, vol. 1, May 2019, 60, <https://doi.org/10.1007/BF01891720>. Such weapons satisfy the three-fold definition of robots: sense, think, act. Almost every drone can engage in the latter, but few can bring all three functions in concert.

descriptor of a weapons technology. The term AI refers to the decision-making capacity of a robot, which is not generally a priority for remotely operated armed drones. Features like an autopilot flying programs that enable the drone take off and land or move from point A to point B to successfully deliver payloads are of greater priority for such drones.

Sensors are the material requirement of any flying program. The type of sensors on a drone is crucial to differentiate its operational capabilities. At the most basic level, sensors are what allow drones to stay in the air and respond to the remote signals of its operator(s). The sensors available on the most sophisticated drone platforms are those that also draw the greatest attention from media commentators and prospective government and military clients. These sensors are used to facilitate ‘machine learning’ for drones deployed in surveillance-intensive operations. Such machine learning methods include information management in reconnaissance and surveillance systems, and anomaly detection. American and other state military drones employ hyperspectral imaging sensors capable of searching a given area for certain spectral signatures (*i.e.*, physical attributes) possessed by a target, *e.g.* vehicle colours.<sup>54</sup> Anomaly detection is the AI of choice for prolonged occupation and constant monitoring situations where an observed population’s movement patterns are ‘learned’ in order to produce un/predictable behaviour patterns that can be used to identify what it considers suspicious or possibly threatening activity.<sup>55</sup> Chapters 4 and 5 of this dissertation will elaborate on how this method renders the existence of entire populations threatening—particularly in the OPT.

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<sup>54</sup> Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century*, 81.

<sup>55</sup> Neal Curtis, “The Explication of the Social: Algorithms, Drones and (Counter-)Terror,” *Journal of Sociology* 52, no. 3 (2016): 527, <https://doi.org/10.1177/1440783316654265>.

The second reason there are not yet fully autonomous drones in the sky is a longstanding desire in political and military institutions to keep human beings ‘in the loop’ as a matter of policy. This means that a human maintains the authority to intervene at any stage in the decision-making process involved in a military combat operation.<sup>56</sup> By maintaining a loop presence, weapons systems such as the missile detection systems used during the Cold War are limited to partial or human-supervised autonomy. Theoretically, maintaining a loop presence pre-empts any issues that may arise around the question of accountability in the case of actions found violate IHL. However, this question is hardly settled amongst the relevant scholarly communities.<sup>57</sup> Practically, ensuring human supervision of otherwise autonomous weapons systems is intended to be a safety measure against any accidental uses of force caused by machine error. Yet real events consistently establish that misplaced trust in technology combined with human error and bias result in mistaken assassinations and collateral damage regardless.

The unreliability of computers like early detection warning systems have historical and contemporary precedent. During the Cold War there were numerous events where false alarms nearly triggered nuclear conflict were it not for the logic and patience of human interveners.<sup>58</sup> However, greater faith in and deference to algorithmic decision-making in the years since the Cold War’s conclusion has resulted in avoidable tragedies. One such example was the downing of Iran Air Flight 655 by USS *Vincennes* in 1988 during the Iran-Iraq War. In this case, the

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<sup>56</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 120–21.

<sup>57</sup> See: Noel Sharkey, “The Moral Case Against Autonomous and Semiautonomous UAVs,” in *Handbook of Unmanned Aerial Vehicles*, 2015, 2919–32, [https://doi.org/10.1007/978-90-481-9707-1\\_101](https://doi.org/10.1007/978-90-481-9707-1_101); Nils Melzer, “Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare,” 2013, <https://doi.org/10.2861/213>; Denise Garcia, “Killer Robots: Why the US Should Lead the Ban,” *Global Policy* 6, no. 1 (2015): 57–63, <https://doi.org/10.1111/1758-5899.12186>; Marcus Schulzke, “Robots as Weapons in Just Wars,” *Philosophy and Technology* 24, no. 3 (2011): 293–306, <https://doi.org/10.1007/s13347-011-0028-5>; Department of Defense, “Directive: Autonomy in Weapons Systems,” *Department of Defense*, 2012.

<sup>58</sup> Boulanin, “The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk,” 45–46.

Aegis Combat System operating on the ship misregistered the Iranian passenger aircraft as military and shot it out of the sky, killing all passengers aboard. Despite the contradictory data of numerous sources, the *Vincennes* crew chose not to overrule the computer's identification of the aircraft as a fighter jet.<sup>59</sup> More recently, the 8 January 2020 downing of Ukraine International Airlines flight 752 by the Islamic Revolutionary Guard Corps (IRGC) as the aircraft took off from the Tehran's Imam Khomeini Airport appears to be another example of computer system aircraft misidentification. The aircraft was hit by two short-range surface-to-air missiles fired by a Tor-M1 anti-aircraft installation that Iranian authorities say were fired as a result of "human error" that is more accurately described as "human-enabled machine error."<sup>60</sup> The common link between these two passenger flight shootdowns is the broader military hostilities context in which they occurred. In the case of the 2020 Ukrainian International Airlines flight, the downing occurred just five days after the U.S. assassinated IRGC General Qasem Soleimani by drone strike shortly after his arrival at Bagdad International Airport.<sup>61</sup>

Instances of lethal misidentification are significantly more common in the case of remotely piloted drone strikes. Despite their supposedly unrivalled visual intelligence systems, there is copious amounts of evidence of mistaken identity drone strikes that intentionally struck civilians who resembled other targets.<sup>62</sup> Despite the fact that drone operators possess greater amounts operational information than ever before, groups and individuals continue to be

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<sup>59</sup> Stuart S. Yeh, "A Failure of Imagination: Unmanned Aerial Vehicles and International Security," *Comparative Strategy* 30, no. 3 (2011): 237, <https://doi.org/10.1080/01495933.2011.587680>.

<sup>60</sup> News Wires, "Iran Confirms It Fired Two Missiles at Ukrainian Plane," *France 24*, January 21, 2020, <https://www.france24.com/en/20200121-iran-confirms-it-fired-two-missiles-at-ukrainian-plane>.

<sup>61</sup> Agence France-Press in Ottawa, "Justin Trudeau: US Escalation Partly to Blame for Iran Plane Deaths," *The Guardian*, January 14, 2020.

<sup>62</sup> I refer to all targets as such because, regardless of their legal status, they are intentionally targeted for attack. It would be inaccurate to describe those killed as a result of mistaken identity as 'civilians' and those whose identity they were incorrectly ascribed as 'combatants', since not all desired targets are necessarily combatants.

unlawfully targeted. In Afghanistan, Iraq, and Somalia, civilians have been misidentified as militants while labouring in fields, attending weddings, and even driving personal vehicles.<sup>63</sup>

Beyond the limits of technology there exists an array of socio-political factors that contribute to higher-than-expected civilian casualty rates that are explored in future chapters.

## **2. FROM AD HOC TO AD ASTRA**

### **Development history**

The trajectory of drone development is far from straightforward and witnessed many diversions and false starts. In contrast to most the drones of the day, aerial vehicles programed with autopilot guidance were some of the first drones entered into military service. Drone design and use were (and remain) a dialectical development process that reflects the technological capabilities and geostrategic realities of their moment. The chronological development trajectory first saw drones as single-use target practice and kamikaze bombers, later transitioning into reusable offensive weapons, then surveillance, and were finally synthesized as surveillance offensive weapons.<sup>64</sup>

The very earliest experiments in unmanned flights were hot air balloons. Bomb-carrying, pilotless balloons were used in the 1849 Italian War of Independence as well as the American Civil War.<sup>65</sup> Similar balloons were also deployed, to varying degrees of success, in both World Wars, where they were sent floating across enemy lines by both the British and Japanese. In the

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<sup>63</sup> Thomas Gregory, "Targeted Killings: Drones, Noncombatant Immunity, and the Politics of Killing," *Contemporary Security Policy* 38, no. 2 (2017): 213, <https://doi.org/10.1080/13523260.2017.1336296>.

<sup>64</sup> Katherine Fehr Chandler, *Unmanning: How Humans, Machines and Media Perform Drone Warfare* (New Brunswick: Rutgers University Press, 2020), chaps. 1, 2.

<sup>65</sup> Michael C. Horowitz, Sarah E. Kreps, and Matthew Fuhrmann, "Separating Fact from Fiction in the Debate over Drone Proliferation," *International Security* 41, no. 2 (2016): 10, <https://doi.org/10.1162/ISEC>.

World War One (WWI), some forty-five unmanned biplanes carrying explosives were constructed by the United States Army. Known as the Kettering Bug, these planes were the functional equivalents of a cruise missile, and were guided using a barometer, gyroscope, and timer. However, these drones never saw combat beyond acting as practice targets for their own anti-aircraft gunners. During World War Two (WWII) the Germans experimented with flying bombs that found moderate success, but they were not widely deployed.<sup>66</sup>

Early in the 20th century, removing the pilot from the cockpit was primarily an effort aimed at safety rather than new strategy formation. The two World Wars' main belligerent parties had hoped to spare pilots from the dangers of high-risk flight missions while simultaneously enhancing their own anti-aircraft capabilities. The years following WWII saw a strategic shift away from drones equipped with munitions to those designed for surveillance during the Cold War. This shift from munition to surveillance shaped the course of future developments, and drones continue to be primarily developed for ISR purposes.<sup>67</sup> Munitions technology continued to advance independent of drones, and witnessed major advancements in targeting that brought about the rise of so-called smart bombs. This includes laser-guided bombs and cruise missiles, which respectively home in on a target painted with a laser and guide themselves to their targets at undetectably low altitudes.<sup>68</sup> What makes systems like the Reaper so unique (and desirable to operators) is their integration of both ISR and munitions capabilities.<sup>69</sup>

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<sup>66</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 13–28.

<sup>67</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 12–15; Peter Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century* (New York: Penguin, 2009), 7, 47–48.

<sup>68</sup> Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century*, 56–57.

<sup>69</sup> Despite significant incentives for shifting from manned to unmanned aircraft, there has been decades of uninterrupted fighter jets research and development. The reasons for this are numerous but can be essentially

## Who uses what?

### *The who*

For years, the countries that first experimented with drone development retained an effective oligopoly on military drone technology. As of 2014, the United Kingdom, the U.S., and Israel were the only countries confirmed to have deployed armed drones. At that time, other states known to possess armed drones included China, Iraq, Iran, Nigeria, Pakistan, Saudi Arabia, Spain, and the Netherlands.<sup>70</sup> However, North Atlantic Treaty Organization (NATO) member countries, such as Australia, Germany, and Canada leased drones for use in their missions in Afghanistan. For example, in 2008, the Canadian government signed a two-year lease to rent Israeli-made Heron drones that carried out their first operational mission in 2009.<sup>71</sup> Similarly, Germany began leasing Israeli-made drones in 2010 and in 2018 the government approved a nearly one billion euro to purchase drones from Israel's state-owned Israel Aerospace Industries (IAI).<sup>72</sup> Since then, the number of countries in possession of armed drones has expanded to around forty.<sup>73</sup> At least twenty non-state actors also have known drone capabilities, but the list of those using military grade drones is much smaller and includes groups like Hamas and Hezbollah.<sup>74</sup>

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reduced to the incredible power of America's domestic military industrial complex, and ii) the projection of absolute military superiority required to sustain American global hegemony and imperialism.

<sup>70</sup> Horowitz, Kreps, and Fuhrmann, "Separating Fact from Fiction in the Debate over Drone Proliferation," 11.

<sup>71</sup> Captain Kyle Welsh, "Task Force Erebus: Providing Essential Support to Canada's Mission in Afghanistan," *The Canadian Air Force Journal* 3, no. 2 (2010): 19–20.

<sup>72</sup> Assaf Uni, "Germans and Israelis - Comrades-in-Arms," *Globes*, August 2020, <https://en.globes.co.il/en/article-germans-and-israelis-comrades-in-arms-1001340285>.

<sup>73</sup> Agnès Callamard, "A/HRC/44/38 Use of Armed Drones for Targeted Killings," 2020, para. 7, <https://doi.org/10.1017/s0020818300024334>.

<sup>74</sup> Peter Bergen, Melissa Salyk-Virk, and David Sterman, "World of Drones," *New America*, 2019, 5, <https://www.newamerica.org/international-security/reports/world-drones/>; Callamard, "A/HRC/44/38 Use of Armed Drones for Targeted Killings," para. 9.

There has been much handwringing in the political and military establishments of NATO and NATO-allied countries over the threat posed by drone ‘technology’ falling into the wrong hands, *i.e.*, governments and groups not fully integrated into the Anglo-American state security matrix. Currently, these warnings are at risk of becoming a ‘chicken little’ scenario. It is indeed true that the destructive potential of some drones’ payloads is so extreme that were they acquired by an organization bent on wanton, indiscriminate violence it could produce incredible devastation. However, the broader proliferation fearmongering by governments already in possession of armed drones is misleading and based on questionable premises.

Firstly, it is inaccurate to suggest that drones, as such, are necessarily weapons with technological capabilities that are difficult to otherwise access or mimic. There has been an explosion in the proliferation of consumer drones that are being used for nearly every conceivable purpose—from herding sheep and tracking marine life migration to construction management and filming wedding ceremonies. These consumer drones are often remotely piloted quadcopters that offer their operators ever-increasing range, speed, and payload capacity. Lashing a small munition, such as a grenade, to a high-end consumer drone is a far cry from being an ‘advanced weapons technology’ and is precisely what the Islamic State integrated into its fighting in Iraq and Syria.<sup>75</sup> Such technology is easily procured, inexpensive, and hardly a closely guarded military secret.

Conversely, existing drones that do carry and embody sophisticated software and instruments are not easily replicated, nor guaranteed to function with foreign military systems.

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<sup>75</sup> Nick Waters, “Types of Islamic State Drone Bombs and Where to Find Them,” Bellingcat, 2017, <https://www.bellingcat.com/news/mena/2017/05/24/types-islamic-state-drone-bombs-find/>; Mark Pomperleau, “How \$650 Drones Are Creating Problems in Iraq and Syria,” *C4ISRNET*, 2018, <https://www.c4isrnet.com/unmanned/uas/2018/01/05/how-650-drones-are-creating-problems-in-iraq-and-syria/>.

Iranian armed forces' successful takeover of an American stealth RQ-170 Sentinel drone discovered flying over Iranian territory in 2011 presents a lesson in the kind of resources necessary to mimic complex drone technology. After acquiring the Sentinel, Iran attempted to reverse engineer it for the purposes of producing its own equivalent. Early versions of what would become the Saegheh-2 drone, manufactured by Shahed Aviation Industries, appeared to be significantly lower quality than the original American drone during its first successful test flight in 2014.<sup>76</sup> However, the Iranian drone continued to improve and what appeared to be a fully functional version of the Saegheh-2 was shot down by the Israeli Air Force in early February 2018 after allegedly being spotted flying over Israeli territory near the Jordanian border. While it is not clear if the Iranian copy can carry weapons, its design appeared to be a miniaturized Sentinel drone.<sup>77</sup>

While those commentators inclined to stoke fear about the Iranian government were quick to panic over the possible consequences of the Iranian military possessing such technology, this incident brings to light two important revelations. The first is that it took a powerful state military at least three years of research and development to reproduce something that *resembled* a Sentinel drone, to say nothing about the Saegheh's ISR or munitions capabilities. This means the chances that a non-state actor looking to produce a stealth drone could muster the resources necessary to undertake a similar process is slim to none. The second, and perhaps more important revelation, is that it is only a matter of time before the US loses its supremacy over

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<sup>76</sup> "Iran Carries Successful Test Flight of Reverse Engineered RQ-170," Defence Radar, 2014, <https://web.archive.org/web/20141110130745/http://defenceradar.com/2014/11/10/iran-carries-successful-test-flight-of-reverse-engineered-rq-170/>.

<sup>77</sup> Judah Ari Gross, "Iranian UAV That Entered Israeli Airspace Seems to Be American Stealth Knock-Off," *Times of Israel*, February 10, 2018, <https://www.timesofisrael.com/iranian-uav-that-entered-israeli-airspace-seems-to-be-american-stealth-knock-off/>.

high-end drone technology. Indeed, there is reason to believe this process is already well underway. As of early 2020, the number of states *known* to be developing armed drones is twenty-nine, although the actual number is likely much higher.<sup>78</sup>

### *The what*

At the other end of the spectrum from pizza-delivery drones are those capable of flying up to fifty thousand feet while travelling 230 miles per hour, namely, the General Atomics MQ-9 Reaper drone. These drones carry expensive, highly sensitive payloads, such as the aforementioned sensors, and total \$64.2 million per unit.<sup>79</sup> The Reaper, its predecessor the Predator, the Israeli Aerospace Industries' Eitan, and many others, are what is known as Medium Altitude, Long Endurance (MALE) drones.<sup>80</sup> Armed drones that are not loitering munitions are often of this class, and can be equipped with numerous amounts and assortments of ordnances with varying blast radii. Above MALE drones fly High Altitude, Long Endurance (HALE) drones such as the RQ-4 Global Hawk that cruise at heights (approximately sixty thousand feet) optimized for surveillance, rather than strikes.<sup>81</sup>

However, bigger is not always better in the case of drones. Drones operated by armed forces span all weight classes. While some armed drones can take-off with over 600kg of weight, surveillance drones tend to have a maximum take-off weight of under 150kg.<sup>82</sup> For instance, the hand-launched RQ-11B Raven has proved to be the most popular choice within the US military.

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<sup>78</sup> Bergen, Salyk-Virk, and Sterman, "World of Drones," 4.

<sup>79</sup> United States Air Force, "Fact Sheet: MQ-9 Reaper," United States Air Force, 2015, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/>.

<sup>80</sup> More recently, the Turkish made Bayraktar and Chinese made Wing Loong II MALE drones have become a popular, inexpensive alternative to their American-manufactured equivalent.

<sup>81</sup> Hugh Gusterson, *Drones: Remote Control Warfare* (Cambridge: The MIT Press, 2016), 20.

<sup>82</sup> United Nations Office for Disarmament Affairs, "Study on Armed Unmanned Aerial Vehicles," *United Nations* (New York, 2015), vii, [http://sutlib2.sut.ac.th/sut\\_contents/57409.pdf](http://sutlib2.sut.ac.th/sut_contents/57409.pdf).

Coming in at two hundred sixty thousand dollars per unit, this five-pound drone provide its pilots with visual information from three cameras and a range of ten kilometres.<sup>83</sup> What makes the Raven so convenient is its ability to be launched and operated by a single individual. This stands in contrast to aircrafts like the Reaper that ultimately require the about 170 people spread out across different locations to successfully operate.<sup>84</sup>

As the full spectrum of military uses for drones continues to unfold, the size development trends appear to be diverging. On one end, the US military is said to be developing sixth generation fighter jets that can be flown by either an onboard or remotely operating pilot.<sup>85</sup> On the other end of the spectrum, there is the Black Hornet. This drone, currently under development as part of a \$39.6 million dollar contract with the US Army, represents the future of individualized drones. The Black Hornet is a ‘personal reconnaissance system’ weighing 1.14 ounces and capable of flying up to twenty-five minutes while providing its operator a live video feed and high definition photos.<sup>86</sup> The Black Hornet has already been procured by the Dutch, German, Norwegian, and British militaries and been used by the latter in the context of their operations in Afghanistan.<sup>87</sup> Afghanistan is just one of many countries in the Middle East, Africa, and Asia theatres where drone operations are previously or currently underway.

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<sup>83</sup> United States Air Force, “Fact Sheet: RQ-11B Raven,” 2017.

<sup>84</sup> Gusterson, *Drones: Remote Control Warfare*, 21.

<sup>85</sup> Sebastien Roblin, “6th Generation Jet Fights Will Leave Russia’s Su-57 And America’s F-35 Far Behind,” National Interest, 2019, <https://nationalinterest.org/blog/buzz/6th-generation-jet-fights-will-leave-russias-su-57-and-americas-f-35-far-behind-109366>.

<sup>86</sup> Jim Cannon, “FLIR Systems Awarded \$39.6 Million Contract for Black Hornet Personal Reconnaissance Systems for US Army Soldier Borne Sensor Program,” FLIR, 2019.

<sup>87</sup> Charlie Osborne, “US Military Equipped with Tiny Spy Drones,” ZDNet, 2019, <https://www.zdnet.com/article/us-military-equipped-with-tiny-spy-drones/>. However, the British Armed Forces have since discontinued their Black Hornets. See: *“UK Armed Forces Equipment and Formations 2017” (PDF)*. [www.gov.uk](http://www.gov.uk). UK MOD. 6 July 2017, and Carl James Boyd, “Black Hornet Spycam Is a ‘lifesaver’ for British Troops,” *BBC*, February 13, 2013, <https://www.bbc.com/news/av/uk-21450456/black-hornet-spycam-is-a-lifesaver-for-british-troops>.

## When and where

As chapter 5 explores in greater detail, time and place have directly shaped how drones have been developed and are currently used. The rise of drones cannot be divorced from the contemporaneous rise of asymmetric warfare and counterterrorism policy in response to decolonial movements alongside the Cold War and the proxy wars its sponsors engaged in.<sup>88</sup> First conceived of as target practice aids, drones' experimental use for munitions delivery was quickly eclipsed by their ISR potential. The rapid shift in focus following the end of WWII to the U.S.-Soviet Union rivalry defined the parameters of their development. The numerous proxy armed conflicts around the globe that characterized the Cold War anticipated the frequency of non-traditional conflicts that would come to dominate the next few decades of fighting. As the importance of intelligence agencies and their ideological fervor grew, so did the need for far-reaching information. American surveillance drones flew in the Vietnam War, as did Israeli drones in the 1982 Lebanon War. Even the notorious Predator drone was originally unarmed when it was first deployed over Bosnia in the 1990s.<sup>89</sup>

As the number of states the Cold War superpowers sought to influence broadened, so did their approach to drone applications. Curiously, drones found themselves outside of the competitive arms race dynamic that incorporated all other weapons development thinking. In contrast to the highly performative displays of nuclear-related weapons technology, drones were quietly worked on behind closed doors. A particularly dramatic example of this occurred during

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<sup>88</sup> Sean Rupka and Bianca Baggiarini, "The (Non) Event of State Terror: Drones and Divine Violence," *Critical Studies on Terrorism* 11, no. 2 (2018): 346, <https://doi.org/10.1080/17539153.2018.1456735>.

<sup>89</sup> Horowitz, Kreps, and Fuhrmann, "Separating Fact from Fiction in the Debate over Drone Proliferation," 10; Royal United Services Institute for Defence and Security Studies, "Hitting the Target," *Hitting the Target? How New Capabilities Are Shaping International Intervention*, 2013, 20, <https://doi.org/10.1145/604251.604255>.

the already dramatic Cuban Missile Crisis, where a plan to send the U.S. Air Force's only two reconnaissance drones to fly over Cuba was aborted at the last minute. The plane carrying the drones was taxiing on the takeoff runway when the Air Force Chief of Staff intervened to prevent the drones' existence from being revealed to the Soviet Union.<sup>90</sup>

A year later and across the Pacific, American drones were being flown in the extraordinarily destructive aerial bombardment campaigns of the Vietnam War. During the final decade of the war, tactical drones provided both reconnaissance and enemy positions.<sup>91</sup> The war's surveillance drone use was unprecedented and initiated what authors Shaw and Akhter refer to as the "dronification of state violence."<sup>92</sup> However, the high cost and low capability of these drones relative to manned aircrafts dampened enthusiasm for their continued use in the conflict.<sup>93</sup> Following the Vietnam War's conclusion, a secret 1986 U.S. Central Intelligence Agency (CIA) report explained that the drone's true potential was in the "Third World" to "prevent conflict and maintain stability in tense Middle Eastern and Asian areas" through surveillance.<sup>94</sup> This was well evidenced by a multi-billion dollar American drone research program that ran parallel to the experiments in Vietnam and focussed entirely on strategic reconnaissance nuclear facilities in China.<sup>95</sup> This conceptualization of drones as surveillance tools was dominant following the end of WWII.

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<sup>90</sup> Konstatin Kakaes, "From Orville Wright to September 11: What the History of Drone Technology Says About Its Future," in *Drone Wars*, ed. Peter L. Bergen and Daniel Rothenberg (Cambridge: Cambridge University Press, 2014), 368, <https://doi.org/10.1017/CBO9780511491757.014>.

<sup>91</sup> Horowitz, Kreps, and Fuhrmann, "Separating Fact from Fiction in the Debate over Drone Proliferation," 10.

<sup>92</sup> Ian G.R. Shaw, "Scorched Atmospheres: The Violent Geographies of the Vietnam War and the Rise of Drone Warfare," *Annals of the American Association of Geographers* 106, no. 3 (2016): 689, <https://doi.org/10.1080/00045608.2015.1115333>.

<sup>93</sup> Kakaes, "From Orville Wright to September 11: What the History of Drone Technology Says About Its Future," 370.

<sup>94</sup> Chandler, *Unmanning: How Humans, Machines and Media Perform Drone Warfare*, 104–5.

<sup>95</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 23.

In contrast to decades of uncoordinated and stalled drone development in America, Israeli drones were developed in a much more focussed manner that indicates longer-term thinking about their trajectory within domestic military and intelligence institutions. Israeli drones were first used to conduct surveillance over Egypt in 1971 in the lead-up to the 1973 Arab-Israeli War. The following decade saw rapid developments and Israeli drones were used in 1982 Lebanon War target acquisition. By the 2006, Israel's drones were armed and conducting strikes in the Second Lebanon War. Yet nowhere have strike-capable Israeli drones been flown more than over Gaza, where they have been a continual presence since at least 2004.<sup>96</sup>

The way drones were used in each of these conflicts tracks with developments in drone technology as well as changing strategic goals over time. In the fifty years that Israel has been deploying drones, it has maintained that its drones are not armed despite a 2010 U.S. embassy cable published in WikiLeaks detailing how Israeli drone strikes were conducted between 2008-09 during Operation Cast Lead in Gaza.<sup>97</sup> Currently, Israeli drones also patrol other territories that share an ambiguous conflict status. This includes the occupied Golan Heights region bordering with Syria, as well as the Sinai region in Egypt.<sup>98</sup> These different operations form a pattern of use that adheres to a broader strategic logic and attends to the state's colonial goals. This pattern is more fully fleshed out in chapters 4 and 5, however, there are still important basic observations of Israeli drones to make here. Since they first went into operation, Israel's drones

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<sup>96</sup> Mary Dobbing and Chris Cole, "Israel and the Drone Wars: Examining Israel's Production, Use and Proliferation of UAVs," 2014, 8; Dr. Atef Abu Saif, "Sleepless in Gaza: Israeli Drone War on the Gaza Strip" (Ramallah, 2014), 11, <http://www.rosa-luxemburg.com/wp-content/uploads/2014/02/Sleepless-in-Gaza-by-Atef-Abu-Saif-RLS-Palestine.pdf>.

<sup>97</sup> Dobbing and Cole, "Israel and the Drone Wars: Examining Israel's Production, Use and Proliferation of UAVs," 8.

<sup>98</sup> Sarah Kreps and Micah Zenko, "The Next Drone Wars: Preparing for Proliferation," *Foreign Affairs* 2, no. April (2014): 1-7, <https://doi.org/10.1525/sp.2007.54.1.23>.

have come to demonstrate the fullest extent of the weapons possible use; from surveillance to offensive attack weapons in occupied, contested, and undeclared conflict zones. It is the last of these three operational contexts that has preoccupied the world's most notorious drone user, the U.S.

### *Drone 'diplomacy'*

American drone strikes first entered the global collective consciousness through the international news media coverage of their use in the 2011 killing of Anwar Al-Awlaki, an American citizen, while he was in Yemen.<sup>99</sup> Unknown to most Americans, a decade prior to Al-Awlaki's assassination a different American citizen, Abu Ahmad al-Hijazi, had been killed in the first known U.S. drone assassination.<sup>100</sup> The optics of an American being hunted down and assassinated by a flying robot without due process was no doubt a shock to those unaware of their existing use in similar situations against non-Americans. While most Western media controversy concerns drone strikes in non-traditional conflict zones like Yemen (*i.e.*, where the American military is not officially operating), the majority of actual strikes have taken place as part of US military operations in Iraq and Afghanistan.<sup>101</sup> Research on Yemeni drone strikes between 2009 and 2014 indicated more than 80 percent of civilian deaths were caused by drones.<sup>102</sup> It is difficult if not impossible to determine precise official casualty figures attributed to drone strikes in these wars since they are collated along with those from conventional aircraft

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<sup>99</sup> Laurie R. Blank, "After Top Gun: How Drone Strikes Impact the Law of War," *University of Pennsylvania Journal of International Law* 33, no. 3 (2012): 676.

<sup>100</sup> Mary Ellen O'Connell, "Remarks: The Resort to Drones Under International Law," *Denver Journal of International Law & Policy* 39, no. 4 (2011): 587.

<sup>101</sup> Rosa Brooks, "Drones and the International Rule of Law," *Ethics & International Affairs* 28 (2014): n. 20, <https://doi.org/10.1017/S0892679414000070>.

<sup>102</sup> Callamard, "A/HRC/44/38 Use of Armed Drones for Targeted Killings," para. 19.

strikes. Authorities rely on drone-video feeds to detect civilian casualties, resulting in undiscovered victims and calculations errors; for example, studies in Iraq and Syria show that initial military estimates missed fifty-seven percent of casualties.<sup>103</sup> What *is* known is that as the number of people and places implicated in the US-led ‘War on Terror’ grows, so too does the number of countries over which their drones fly. This has contributed to what author Steve Niva described as a “modular form of war that could be delinked from the conventional military battlespace and extended across new cartographies.”<sup>104</sup>

The signature piece of U.S. legislation following the events of September 11<sup>th</sup> 2001 (9/11), the Authorization for the Use of Military Force (AUMF), granted authority to kill suspected terrorists with American drones to both the Defense Department *and* the CIA. Al-Awlaki’s targeting was itself the result of coordinated action between the intelligence agency and the military (acting through the Joint Special Operations Command).<sup>105</sup> The al-Awlaki operation differs substantially from the 2002 strike against al-Hijazi, despite their many similarities. Both the CIA and U.S. Air Force were involved in the two operations. However, unlike the al-Awlaki case, the Air Force refused to carry out the strike in 2002 and it was executed by the CIA instead. The details of the strike were not widely reported in U.S. media, and domestic criticism was virtually non-existent. Possible reasons for the different media treatment of al-Awlaki and al-Hijazi include the fact that al-Awlaki was the target of the strike, whereas al-Hijazi was travelling in a passenger vehicle in Yemen alongside the *actual* target, an alleged Al Qaeda

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<sup>103</sup> Callamard, para. 23.

<sup>104</sup> Katharine Hall Kindervater, “Drone Strikes, Ephemeral Sovereignty, and Changing Conceptions of Territory,” *Territory, Politics, Governance* 5, no. 2 (2017): n. 16, <https://doi.org/10.1080/21622671.2016.1260493>.

<sup>105</sup> Anthony Dworkin, “ECFR/84 Policy Brief: Drones and Targeted Killing: Defining a European Position,” 2013, 3; Kindervater, “Drone Strikes, Ephemeral Sovereignty, and Changing Conceptions of Territory,” 209.

leader. Just one year after the events of 9/11 it was unlikely a suspected ‘terrorist’ or their companions would be openly mourned in U.S. media. However, foreign governments and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, targeted killing Asma Jahangir referred to it as a clearly extrajudicial killing.<sup>106</sup>

A hallmark of America’s initial experiments with drones was their clandestine development and use. The CIA’s early interest in drones also envisaged the agency’s future and highly controversial drone assassination program that will be more thoroughly discussed below. As authors Ann Rogers and John Hill explain, nearly fifty years passed between WWII’s end and the Predator’s Balkans premiere, during which time drone programs were highly secretive and most supported by the U.S. intelligence community. When the U.S. Air Force was flying drones, it was part of its existing reconnaissance and surveillance missions in hostile territories over which piloted planes posed a safety risk for the pilot and a diplomatic risk for the patron-state.<sup>107</sup>

The political advantages for drone operating states go far beyond the elimination of a possible pilot shoot down and capture. Drones also provide “diplomatic cover” by potentially reducing the *perception* of having violated another state’s sovereignty by flying drones over its territory.<sup>108</sup> While the presence of American military and intelligence agencies is a longstanding phenomenon for many countries in the periphery, drones have enhanced existing missions by scaling up the territory covered and ISR acquired. This phenomenon is visible in ongoing American drone strikes across the Middle East, West Asia, and Africa that are conducted without the explicit consent of the countries over whose territories these drones operate.

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<sup>106</sup> Gusterson, *Drones: Remote Control Warfare*, 16.

<sup>107</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 19.

<sup>108</sup> Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 22.

These states are often unwilling or unable to effectively assert their territorial sovereignty against the U.S. for diplomatic, strategic, and/or economic reasons. For instance, the diverse political commitments of Pakistani leadership have elicited a variety of official government positions on the legality of CIA drone strikes in the semi-autonomous Federally Administered Tribal Areas (FATA) of northwest Pakistan. Former president Pervez Musharraf acknowledged providing qualified consent to CIA drone strikes that began in 2004,<sup>109</sup> whereas current Prime Minister (then party chairman) Imran Khan has been a vocal critic of the CIA program as well as Pakistan's own government for failing to uphold its commitment to end the drone strikes.<sup>110</sup> Such ambiguity is partially attributable to the independent cooperation of Pakistani and American intelligence agencies that have potentially undermined the ability for Pakistan to bring the situation on the ground in line with the government's official stance.<sup>111</sup> Despite the tacit consent of different state actors and agencies, a 2013 Peshawar High Court judgement declared the American strikes unlawful and a war crime.<sup>112,113</sup> Specifically, the High Court ruled that such strikes violated Pakistani sovereignty as understood in the UN Charter, the CIA should compensate strike victims, and that the Pakistani state has a positive obligation to stop the strikes by force.<sup>114</sup>

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<sup>109</sup> Ray Acheson, Matthew Bolton, and Elizabeth Minor, "The Humanitarian Impact of Drones," 2017, 85, <https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian-impact-of-drones.pdf>.

<sup>110</sup> Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects*, 2015, n. 148, <https://doi.org/10.4324/9780203521779>.

<sup>111</sup> Acheson, Bolton, and Minor, "The Humanitarian Impact of Drones," 95.

<sup>112</sup> Acheson, Bolton, and Minor, 92.

<sup>113</sup> By 2017, it is estimated that the CIA had carried out over 400 drone strikes in Pakistan causing 2500 deaths. See: Christine Agius, "Ordering without Bordering: Drones, the Unbordering of Late Modern Warfare and Ontological Insecurity," *Postcolonial Studies* 20, no. 3 (2017): 371, <https://doi.org/10.1080/13688790.2017.1378084>.

<sup>114</sup> Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects*, 150.

Further south in the Arabian Peninsula the U.S. military officially operates drones, although there is evidence that the CIA maintains a mandate and ability to carry out strikes there as well.<sup>115</sup> An American special forces base in Djibouti also serves as a launch site where drones piloted from the U.S. mainland fly missions over Yemen, Saudi Arabia, Somalia, Ethiopia, and Egypt via satellite link.<sup>116</sup> These states are spread across both the AFRICOM and CENTCOM combatant command theatres in which the Defense Department operates several ongoing military operations that use drones extensively for surveillance and strikes. Taken together, these states are representative of the postcolonial periphery where the state apparatus is weakened by varying degrees of significant civil war and/or unrest, past and present. As of 2017, there have been at least 706 confirmed drone strikes in Yemen, Somalia, and Pakistan, that killed between 3,668 and 5,643 people, including an estimated 1,191 civilians.<sup>117</sup>

## **Why**

At first glance, it is difficult to say for certain whether the concentrated use of drones in irregular wars is a result of their popularity as weapons in these conflict scenarios, or because most wars of the past few decades have been irregular in character. However, upon closer examination, an explanatory pattern emerges. This pattern is characterized by state drone use for surveillance, counterterrorism assassinations, and counterinsurgency operations in the world's remote borderlands.<sup>118</sup> These borderlands are territories where state sovereignty is

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<sup>115</sup> Katharine Hall Kindervater, "The Emergence of Lethal Surveillance: Watching and Killing in the History of Drone Technology," *Security Dialogue* 47, no. 3 (2016): 231, <https://doi.org/10.1177/0967010615616011>.

<sup>116</sup> Acheson, Bolton, and Minor, "The Humanitarian Impact of Drones," 60.

<sup>117</sup> Gregory, "Targeted Killings: Drones, Noncombatant Immunity, and the Politics of Killing," 215–16.

<sup>118</sup> Derek Gregory, "From a View to a Kill: Drones and Late Modern War," *Theory, Culture & Society* 28, no. 8 (2011): 189, <https://doi.org/10.1177/0263276411423027>; Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 62–66.

contested, creating a situation politically unstable enough to allow foreign and/or domestic state actors to intervene using lethal force. The majority of such borderlands are states in the global ‘periphery’, are marginalized in the global economic hierarchy, and frequently postcolonial sites. A holistic definition of the periphery conceptualizes it as resulting from colonial state power, and existing at “multiple scales and across scattered sites.”<sup>119</sup> These sites have spatial (i.e., territorial) and a temporal (i.e., historically particularized) parameters within which social, political, and economic differences stratify the population. Consequently, peripheries always contain marginalized and oppressed communities from which the population(s) targeted by drones will almost certainly be members of. The periphery and its various populations exist in relation to what is referred to as the ‘core’. The former and contemporary colonial powers that belong to the core are also those constituting the bulk of states owning and operating drones—and doing so exclusively in the periphery.

In the past few years, the relationship that the core and periphery states have with drones has undergone a significant transformation. Some peripheral states have made the decision to operate drones domestically. Often the colonial governing modalities that inform these postcolonial states’ socio-legal schema are what make a certain population’s devaluation bureaucratically possible. This is what author Majed Akhter describes as the ‘proliferation of peripheries.’<sup>120</sup> Pakistan is once again a case study for its policies in Kashmir and Waziristan. The Kashmir region is contested externally and internally. Although the region is administered by India, Pakistan has long claimed rightful authority over the territory. Within Kashmir, the

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<sup>119</sup> Majed Akhter, “The Proliferation of Peripheries: Militarized Drones and the Reconfiguration of Global Space,” *Progress in Human Geography* 43, no. 1 (2019): 66, <https://doi.org/10.1177/0309132517735697>.

<sup>120</sup> Akhter, 64.

Muslim-majority population has sought autonomy from the Indian government and undertook a Pakistan-backed insurgency movement in the late 1980s. Since then, there is ongoing domestic and international unrest in Kashmir. In August 2020 it was reported that Pakistan was procuring Chinese Cai Hong-4 armed drones to deploy at the *de facto* border line between India and Pakistan in Kashmir.<sup>121</sup> Pakistan's transition from hosting foreign drones to operating its own is demonstrative of the militarization of the periphery's own periphery inside Pakistan and beyond.

In 2015, the Pakistani military claimed to have killed three Pakistani Taliban members in Northern Waziristan in the state's first-ever drone strike.<sup>122</sup> The next year Turkey, Iraq, and Nigeria all reported conducting drone strikes against militant groups operating in their respective territories.<sup>123</sup> What makes these cases unique is that they were strikes taken *within* the operating state's own territory. Although this is a marked departure from past practice of foreign states conducting strikes in the periphery, it is also consistent with historical trends. Namely, the militarization of domestic policing and intelligence institutions across the globe, as well as the ontological recasting of certain sub-state groups to as not-quite-human and therefore innately targetable. The drone's particular visual perspective exacerbates and accelerates this phenomenon by mediating the relationship between the operator and populations with the targeting and surveillance frame of a weapon. The NATO mission in Afghanistan demonstrates how this is operationalized.

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<sup>121</sup> IANS, "Pakistan Buys Armed Drones From China in Bulk amid Border Tensions with India," Business Insider, 2020, <https://www.businessinsider.in/defense/news/pakistan-buys-armed-drones-from-china-in-bulk-amid-border-tensions-with-india/articleshow/77588750.cms>.

<sup>122</sup> Usman Ansari, "Pakistan Surprises Many With First Use of Armed Drone," *Defense News*, September 8, 2015, <https://www.defensenews.com/air/2015/09/08/pakistan-surprises-many-with-first-use-of-armed-drone/>.

<sup>123</sup> Bergen, Salyk-Virk, and Sterman, "World of Drones," 6.

The U.S. military deployed drones as part of its counterinsurgency operations against the Taliban in Afghanistan. In this context, individuals may be legally targeted for either actual *or* suspected Taliban membership. These categories correspond with what are known as targeted ‘personality’ and ‘signature’ strikes. These terms respectively refer to known, individual targets and unknown individual(s) who display ‘pattern of life’ behaviour that suggests they may be militants.<sup>124</sup> Wearing a military uniform is the traditional determining factor for identifying an individual’s status. However, the ability to readily distinguish between combatants and non-combatants is severely diminished in asymmetric conflicts against insurgency groups where combatants are generally civilians who take up arms. While the issue of uniforms is characteristic of non-international armed conflicts and counterinsurgencies, the U.S. has proactively broadened its own definition of targetable individuals to the effect of further obscuring the process of assigning target status. In 2009, it was discovered that the Defense Department’s ‘kill list’ included Afghan drug lords suspected of financing the Taliban—the targeting of whom is illegal under IHL.<sup>125</sup> This categorical ambiguity clarifies how the combination of surveillance and strike capabilities enables states to widen the net of who is targetable. The drone’s technology mediates the relationship between operator and observed subjects such that the latter’s ontological status becomes unstable, and thus legally precarious.

*Politics by other means*

Drone research and development around the globe opens seemingly endless possibilities for future of drone technology and its application. Yet there are strong indicators of the direction

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<sup>124</sup> Agius, “Ordering without Bordering: Drones, the Unbordering of Late Modern Warfare and Ontological Insecurity,” 372.

<sup>125</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” 612.

their development will take based on their past and present use. States that integrated drones into their military arsenals have rapidly expanded their use in declared situations of armed conflict, e.g. Iraq and Afghanistan counterinsurgency operations. However, strikes taken by non-military actors show that drones are also seen as foreign policy tools to be used in the absence of declared war, e.g. CIA assassinations in Pakistan.<sup>126</sup>

More recently, drone manufacturing states have begun operating drones in foreign military conflicts to advance their domestic interests. This is not a new phenomenon, *per se*, since the U.S.-led wars and intelligence assassinations across the Middle East and North Africa (MENA) are themselves efforts to advance the interests of American empire. However, the official pretense for their use is significant, as are transformations in who is flying which drones. For example, both the Turkish-made ‘Bayraktar’ and Chinese-made ‘Wing Loong II’ strike-capable drones have been deployed extensively in the Libyan civil conflict since 2016.<sup>127</sup> Whereas China has not officially entered into the war to support Libyan National Army nor does it have a *prima facie* interest in its outcome, Turkey formally intervened with ground troops in support of the opposing Libyan Government of National Accord (GNA) in early 2020.<sup>128</sup> That the GNA were flying Turkish drones four years prior to Turkey’s official entrance into the war is not a coincidence. While China is not obviously invested in the outcome of the Libyan conflict, neighbouring Turkey has shown its hand by entering talks with the GNA to secure exploration rights to Libyan oil and gas.<sup>129</sup> It is worth noting that, like Pakistan, Libya is no stranger to

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<sup>126</sup> Gregory, “From a View to a Kill: Drones and Late Modern War,” 189.

<sup>127</sup> The Wing Loong II drones are being flown by United Arab Emirates pilots—their original purchaser. See: Alex Gatopoulos, “‘Largest Drone War in the World’: How Airpower Saved Tripoli,” Al Jazeera, 2020, <https://www.aljazeera.com/news/2020/05/libya-battle-sky-air-superiority-changed-war-200527135230131.html>.

<sup>128</sup> Diego Cupolo, “Turkish Parliament Approves Troop Deployment to Libya,” *Al-Monitor*, January 2, 2020.

<sup>129</sup> Onur Ant, “Turkey Discussing Oil and Gas Exploration in Libya,” *Bloomberg*, September 10, 2020.

drones. NATO members carried out 145 drone strikes in their efforts to topple Libyan leader Muammar Gaddafi as part of their 2011 intervention in the country.<sup>130</sup> More recently, the rekindled Azerbaijan-Armenia conflict over the contested Nagorno-Karabakh region saw Azerbaijan flying Turkish Bayraktar and Israeli loitering munition ‘Harop’ drones. Drones are proving particularly effective against older air-defence artillery systems in both the Libyan civil conflict and the Azerbaijan-Armenia conflict. However, unlike the Libyan case, only Azerbaijan is flying drones. Moreover, Azerbaijan was able to leverage this imbalance into a strategic advantage and strike targets deeper inside Armenian-held territory.<sup>131</sup>

Preliminary assessments suggest that Turkish-made loitering munitions used against the Libyan National Army may have been decisive in the final stages of the Libyan civil war leading up to the Fall 2020 ceasefire.<sup>132</sup> It is unclear whether drones will continue winning battles as drones and anti-drone systems continue proliferating and their advantages diminish when not used unilaterally. What is clear is that drone tactics allow a greater, faster escalation of hostilities in territorial military confrontations. It is similarly clear that drone use abroad can serve to avoid war or act as a prelude to it. Domestic drone operations can be used to pre-emptively disrupt would-be insurgencies, or to fight those already well underway. The common theme in all these scenarios is an existing power asymmetry in which drone violence is most often wielded to serve the interests of those possessing the greater amount of power. As has been demonstrated here,

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<sup>130</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” 608; Gusterson, *Drones: Remote Control Warfare*, 17.

<sup>131</sup> EurAsian Times Desk, “CLASH OF DRONES: How Israeli & Turkish Drones Have Created Havoc In Azerbaijan-Armenia War?,” *The EurAsian Times*, October 10, 2020, <https://eurasianimes.com/clash-of-drones-how-israeli-turkish-drones-have-created-havoc-in-azerbaijan-armenia-war/>.

<sup>132</sup> Maria Cramer, “A.I. Drone May Have Acted on Its Own in Attacking Fighters, U.N. Says,” *The New York Times*, June 3, 2021, <https://www.nytimes.com/2021/06/03/world/africa/libya-drone.html>.

the proliferation and array of drone technology has flattened previously pronounced weapons capabilities between certain actors, while simultaneously exaggerating others. This dis/continuity also characterizes the effect drones have had in a number of areas—the greatest import for the analysis here being international humanitarian law.

Drone revelations from this chapter set the stage for the literature review to follow. Key takeaways include drones' initial concealed use in the global periphery as part of large power conflicts in the Cold War, as well as their continued quiet use in postcolonial states today. Drone powers remain enraptured by the promise of a remote-controlled risk-free killing machine capable of performing with the simple press of a button a task that used to require complex and resource-intensive operations planning. This elusive panacea to do away with disruptive populations in unruly territories has seen drone-developing states attempt to overcome weapon's limits with persistent financial investments. The array of interests captured by potential drone futures has produced an entirely new class of 'experts' on the weapons, many of whom are equally invested in maintaining the international order status quo. With this chapter having set the figurative stage for the current drone debate, chapter 2 introduces its foremost interlocutors.

## CHAPTER 2: DRONE CHAMPIONS AND CRITICS

*“Drones don’t kill people, people kill people.”*<sup>133</sup>

Rosa Brooks

Chapter 2 introduces the reader to drones as a subject for analysis through a survey of the current debates surrounding their use. Rather than presenting the various debates within a singular theoretical approach, this review presents the main points of contention currently circulating drone use across different theoretical approaches. As is shown, certain positions on the political, legal, and military stakes associated with drone use are not specific to any single theory of global politics or IHL. The dis/continuities in drone attitudes even within a single theoretical perspective point to the challenge posed by the drone paradox: the trouble with drones is not in the weapons but the entire legal regime (and by extension, the international order) in which the weapons are used and regulated.

Drones are a lightning rod for longstanding debates in international legal and military theory due to their tendency to make pronounced issues that may have been previously papered over or obfuscated, e.g. the decisiveness of air power in counterinsurgency operations. While these debates are had across civil society, government, and private enterprise, this chapter focuses exclusively on how they have played out in mainstream academic scholarship. These debates are aggregated into three thematic groups that are concerned with drones’ ethical, legal, and strategic implications. The following analysis demonstrates that the fundamental question on which all others hang is whether drones are meaningfully different from previous weapons. This

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<sup>133</sup> Rosa Brooks, “Drones and Cognitive Dissonance,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 231, <https://doi.org/10.1017/CBO9780511491757.014>.

chapter argues that existing attempts to answer this question contain critical flaws that preclude a definitive answer.

First, these attempts fail to contextualize the particular time and place in which drones appeared, and their dis/continuity with other historical and contemporary means of waging war. Second, they inadequately appreciate how issues raised by other disciplinary perspectives relate to their own and are themselves essential to fully grasping what is at stake in debates over drones. By contrast, interdisciplinary critical theoretical approaches accommodate and integrate these features, as well as introduce new and insightful analytical concerns. What is often missing from mainstream debates about remote warfare are the humans it necessarily implicates. Postcolonial drone theorizing accounts for how war is *embodied* by its operators and targets, and how their subjectivities are altered and occasionally reconstructed by their encounters through the weapon.<sup>134</sup> This and related critical approaches are developed in subsequent chapters as part of arguing the dissertation's central thesis: drones are the product of historical imperial war-making that informed and continues to find expression through the contemporary international legal regime governing state violence.

The analysis here is informed by the aforementioned claim that colonialism only ever ended in a strictly legal sense.<sup>135</sup> For this reason, the following chapters interrogate the ways in which colonialism was, to a significant extent, established by legal institutions and their mechanisms for governance. While the legal relationships between colonial powers, settler populations, and colonized populations can *officially* change, many of the social, economic, and

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<sup>134</sup> Rebecca A. Adelman and David Kieran, eds., *Remote Warfare: New Cultures of Violence* (Minneapolis: University of Minnesota Press, 2020), 8–9.

<sup>135</sup> Roy, "Postcolonial Theory and the Law: A Critical Introduction," 318.

political power structures remain and are continually reproduced in a myriad of ways. The macro-level structures are addressed in chapter 3, which provides a general historical overview punctuated by analysis of relevant texts. The micro-level structures are addressed in chapters 4 and 5, which explore how the general themes and trajectories identified in the previous chapters find application to the concrete. These two levels of analysis are synthesized by their shared methodology that reveals their interconnectivity across time and space. This chapter presents the landscape of perspectives through which drones' situation in contemporary postcolonial structures should be understood.

### **1.1 DEBATING DRONE EXCEPTIONALISM**

Debating the question of whether drones are exceptional weapons is an inherently relational exercise. To understand what may or may not be unique about drones requires comparing them to other *existing* means of waging war. These comparisons are made along one of two lines: the form a drone takes (*i.e.*, unmanned aerial vehicle), or a drone's function (*i.e.*, a delivery system of lethal force). Every position from which a comparison is initiated is implicitly or explicitly informed by IHL's basic requirements for combatant conduct: distinction and proportionality. These refer to discriminating between combatants and non-combatants and ensuring that collateral damage is proportional to an attack's military advantage, respectively. The following section takes up each of these two lines of comparative thought and how they are framed in the relevant literature. It then moves to the actual content of these comparisons and the arguments they put forward. The impulse to reduce drones to either their *form* or *function* is a common and unacknowledged premise in which commentators ground their analyses and one of the key contributors to their aforementioned drone 'paradox'. Many of the *a priori* arguments about drones make claims about their *potential* use. However, as is argued in the following

sections, their actual potential is realized at nexus of their form and function—drone imaginaries and realities are dialectical. Derek Gregory explains how this occurs at the nexus of drone’s ISR capabilities that are necessarily incomplete and conditional. Subjects and objects captured by optical sensors are *constituted as targets* by their representation through the drone’s visual frame. The drone mediates and shapes the relational subjectivity between drone operators and persons as they appear on the screen. Pilots in WWI described aerial warfare’s asymmetry in terms of hunter and prey.<sup>136</sup> In WWI, the enemy hunted on the ground was plural, amorphous, and not particularized. This dynamic is altered and refined by the drone’s high-definition camera. The drone’s weaponized gaze narrows this relationship such that *individuals* are prey to be targeted for attack.<sup>137</sup> This transformation changes the calculus in debates over drone exceptionalism and is further examined here.

### **Drone form**

Drones’ ability to conduct ‘precision strikes’ is a feature—while not unique to drones as weapons platform—that their proponents highlight for its promise to fulfil the idea of a ‘clean’ war conducted with surgical precision that perfectly satisfies IHL’s distinction principle.<sup>138</sup> In his seminal text, *Theory of a Drone*, author Grégoire Chamayou notes how the debate over drones’ precision is the result of confusing drones’ form and function. Chamayou illustrates this by way of opening up the concept of ‘precision’, the vagueness of its definition, and how this vagueness further complicates the issue. According to Chamayou, drone analyses often compare drones’

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<sup>136</sup> Thomas Hippler, *Governing from the Skies: A Global History of Aerial Bombing* (London: Verso, 2017), 39.

<sup>137</sup> Derek Gregory, “From a View to a Kill: Drones and Late Modern War,” *Theory, Culture & Society* 28, no. 8 (2011): 193, <https://doi.org/10.1177/0263276411423027>.

<sup>138</sup> Kristin Bergtora Sandvik and Kjersti Lohne, “The Rise of the Humanitarian Drone: Giving Content to an Emerging Concept,” *Millennium: Journal of International Studies* 43, no. 1 (2014): 153, <https://doi.org/10.1177/0305829814529470>.

precision strike capability against those of pre-existing aerial weapons systems. An example of a comparison based on similar *form* is contrasting WWI and WWII aerial bombing campaigns to drone strikes—from which latter appears significantly more precise. However, this evaluation is inappropriate since a drone’s *function* is not the same as an aircraft’s during these two wars, namely, carpet bombing. Rather, the broad function of a drone is tactical strikes, for which then there are more relevant, contemporary comparisons.<sup>139</sup> Within the range of comparable functions, the most precise use of lethal force in armed conflict is a precision ‘sniper’ rifle firing a single bullet at their target. The least precise use of lethal force it is appropriate to compare a drone to is a missile strike made by an attack helicopter or fighter jet.<sup>140</sup> On this continuum along which there is a sniper at one end, and a volley of attack helicopter missiles at the other, a drone more closely resembles the latter. By introducing an alternative framing of ‘precision’ that is sensitive to both target identification and strike damage, a drone no longer appears nearly so precise in its targeting. There is, as Chamayou notes, “a difference between hitting the target and hitting *only* the target.”<sup>141</sup> This is the point at which the question of drones’ function and the concept of a ‘targeted killing’ become analytically relevant. IHL does not conceptually distinguish targeted killing from other types of lethal attack in situations of armed conflict. Consequently, use of the term by government or military representatives indicates an effort to represent a legally ambiguous use of lethal force as an accepted and regularized practice.

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<sup>139</sup> Grégoire Chamayou, *A Theory of the Drone* (New York: The New Press, 2015), 140–43.

<sup>140</sup> Author Stuart Casey-Maslen introduces the question of the missiles drones commonly fire. He concludes that with the exception of one Hellfire missile variety, drone missiles have a smaller blast radius than those fired by traditional aircrafts like fighter jets. See: Stuart Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” *International Review of the Red Cross* 94, no. 886 (2012): 607, <https://doi.org/10.1017/S1816383113000118>.

<sup>141</sup> Chamayou, *A Theory of the Drone*, n. 141. Emphasis added.

## **Drone function**

Many of the arguments asserting the uniqueness of drones are actually arguments about the legal and moral permissibility of assassination in different contexts and/or autonomous weapons systems. These two issues are the most distinctive behaviour and/or policy changes generally discussed in relation to the introduction of armed drones. However, these are not novel issues at all. While drones have almost certainly affected how and when a targeted killing is carried out, the technologies required for aerial assassinations and weapons systems capable of target identification and acquisition have not changed dramatically under drones. What *has* changed is the discourse around aerial assassinations.

Although there is no practical difference between assassination and targeted killing, there is an important legal distinction between the two. Whereas assassinations are a *de facto* breach of international customary law, targeted killing is permitted in the exceptional circumstances of armed conflict.”<sup>142</sup> According to Philip Alston, the United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, targeted killing “is the intentional, premeditated and deliberate use of lethal force by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”<sup>143</sup> Alston accurately connects the rise in targeted killing to a broadening definition of terrorism and drones as the means by which these killings are executed. Political and legal discussions of targeted killing emerged concurrently with counterterrorism discourse and the two are often seen as inextricably connected. The term is

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<sup>142</sup> Philip Alston, “A/HRC/14/24/Add.6 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on targeted killings,” 2010, para. 10.

<sup>143</sup> Alston, para. 1.

not defined under international law and first entered into common usage following the Israeli state's 2000 announcement of its targeted killing policy against alleged terrorists in the OPT.<sup>144</sup> The next year would see the US adopt its own targeted killing policy as part of its War on Terror less than a week after the events of 9/11.<sup>145</sup> Unlike Israel's legal justification for its policy, American targeted killing is often justified by what the state considers a legal 'black hole' in which terrorists are illegitimate combatants who are protected by neither IHRL nor IHL.<sup>146,147</sup> Both states have since carried out targeted killings within and without official armed conflict contexts that should be categorized as assassinations according to Alston's definition.<sup>148</sup> Both states have also fabricated elaborate legal and strategic justifications for these policies that ostensibly claim targeted killings disrupt the larger organizational structures within which an individual terrorist may operate, e.g. training camps, even if there are no hostilities taking place at the time of the strike.

Authors Samuel Issacharoff and Richard Pildes discuss how drone use for counterterror operations in asymmetric conflicts has relied on a paradigmatic shift in how the issue of responsibility is understood. The authors attempt to transcend arguments about the legal minutiae of assassinations—either inside or outside traditional battlefields—and instead focus on what

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<sup>144</sup> Alston, paras. 2, 7.

<sup>145</sup> Hugh Gusterson, *Drones: Remote Control Warfare* (Cambridge: The MIT Press, 2016), 12.

<sup>146</sup> Shadi A. Alshadaifat and Sanford R. Silverburg, "Illegitimacy and Illegality in International Law," *Gonzaga Journal of International Law* 24, no. 1 (2020): 88–89.

<sup>147</sup> The existence of such a 'black hole' was explicitly rejected by the Israeli High Court of Justice, see para. 61 of HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* (2005).

<sup>148</sup> Notwithstanding the long history of assassinations committed by US intelligence agencies, the assassination of individuals like Anwar Al-Awlaki and Osama Bin Laden are accurately described as target killings because of their post-9/11 War on Terror context. Israel first began counterterror targeted killings in the 1950s, however, retributive assassinations were also conducted, e.g. Operation Wrath of God targeted the operatives involved in the Munich Olympics massacre. See: Orna Ben-Naftali and Karen R Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings," *Cornell International Law Journal* 36, no. 2 (2003): 39–40.

they refer to as the “individuation of enemy responsibility.”<sup>149</sup> Rogers and Hill put forward a similar observation that they term “nanowar”, defined as “the ability of states to bring military-scale force to bear on specific individuals.”<sup>150</sup> Both pairs of authors latch onto what they consider the reconceptualizing of the ‘enemy’ as an individual who constantly carries this status with them such that they continue to be morally culpable and therefore legally targetable even outside of the battlefield. They identify drones as enabling this new phenomenon and note that it is accompanied by equally new legal justifications that stretch (and in some cases) completely reshape previous pretenses for the use of lethal force against individuals.

Abstractly recategorizing ‘the enemy’ as an individual for an actual drone to hunt down and target is illustrative of the dialectical relationship between drone imaginaries and realities. Drones’ ability to survey large areas while hovering at great heights for hours on end has reduced the major physical limitations placed on state actor’s capacity to assassinate individuals in foreign and/or hostile locations.<sup>151</sup> Taken together with the War on Terror’s changing political climate and narrative, reducing the *physical* constraints for conducting assassinations has also reduced its *political* constraints. As a result, drone operating states’ policies regulating the use of lethal force have changed to reflect newly imagined battlefields and combatants. This reality is well-captured by Rapporteur Philip Alston’s successor, Christof Heyns, who suggests that “the proliferation of drones may lower social barriers in society against the deployment of lethal force and result in attempts to weaken the relevant legal standards.”<sup>152</sup>

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<sup>149</sup> Samuel Issacharoff and Richards Pildes, “Drones and the Dilemma of Modern Warfare,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 400–405.

<sup>150</sup> Ann Rogers and John Hill, *Unmanned: Drone Warfare and Global Security* (Toronto: Between the Lines, 2014), 2–5.

<sup>151</sup> ‘Hostile’ should be understood as both a figurative (diplomatically unfeasible) and literal (physical unsafe) state.

<sup>152</sup> Christof Heyns, “A/68/382 Extrajudicial, Summary or Arbitrary Executions,” 2013, para. 17.

The drone's technological features mediate how its operators ontologically understand the lands and peoples its sensors capture. Recalling the way drones have simultaneously flattened and exaggerated pre-existing power differentials bound up in weapons capabilities, they have also simultaneously expanded and narrowed weapons' figurative and literal scope. The battlefield has been broadened to include previously inaccessible areas, such as the mountainous terrain of Pakistan's FATA region. The category of individuals targetable has also expanded to include everyone from a combatant to a petty criminal. Conversely, the targeting scope has contracted to ascertain individual identities. Conceptualizing individuals as combatants is itself evidence of the individuation of war and conflation of combatants with criminals, since "[t]he criminal is always an individual, the enemy is not."<sup>153</sup>

Much of the discussion on the changing technologies and practices that have followed drone proliferation is symptomatic of confusing their form and function. This confusion has also spilled into debates over whether drones are a distinctly different kind of weapon. The following section takes up the key points that each side of this debate puts forward in their arguments. Arguments for drones' sameness are found to hang mostly on their function as an aerial weapon, while their difference is mainly argued from their robotic (i.e., 'unmanned') form.

### **Arguing the status quo (as you see it)**

Many of the authors arguing against the idea that drones are somehow unique among weapons share Chamayou's belief that those who consider in the weapons exceptional are conflating their form and function. However, differing implications follow from this consensus. Recognizing that drones are the weapon of choice for a targeted killing almost immediately

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<sup>153</sup> Paul Kahn as quoted in Derek Gregory, "Drone Geographies," *Radical Philosophy* 183 (2014): 12.

invokes a normative assessment of the targeted killing and the particular context(s) within which it occurs. Authors invariably fall on either side of this normative position. Those asserting the importance of due process, the proscription against assassination, and the disproportionate numbers of targeted killing among certain communities are quick to identify how drones are in lockstep with existing trends. Contrastingly, authors who embrace the opportunities presented by drones engage often in a discursive sleight of hand that redirects the discussion to the ‘actual’ debate (i.e., their preferred narrow topic for consideration) and its stakes. The result is wildly different arguments and conclusions on the applicability of elusive legal principles to combatant behaviour in contemporary conflicts. Consequently, the drone, as such, is generally sidelined in favour of promoting a given ideological or policy commitment—at which point it is then subsumed an entirely different debate.

Thus, to understand whether drones are a game-changer, one must understand the drone itself. Authors arguing for drone’s homogeneity with other weapons identify and address what they consider to be fundamental misunderstandings about drones. In her piece surveying the landscape of academic scholarship on the topic, author Stephanie Carvin rejects the notion that drones have somehow done away with regulated warfare and been replaced with a ‘Wild West’ of standards and practices.<sup>154</sup> Instead, she suggests that the issues much of the drone scholarship attributes to the weapons are not new at all. Rather, they are the latest iteration of longstanding debates on the interplay between technology and the laws of war. Carvin’s dispassionate overview of how questions of distance, regulation, and accountability have cropped up over the past few centuries concludes that the more important question is interpreting and applying the

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<sup>154</sup> Stephanie Carvin, “Getting Drones Wrong,” *International Journal of Human Rights* 19, no. 2 (2015): 132, <https://doi.org/10.1080/13642987.2014.991212>.

proportionality principle to war.<sup>155</sup> Carvin’s conclusions are helpful analytical starting points for more holistic research approaches—however, the path she takes to this conclusion flattens out *any* uniqueness to drones. This attempt to overcome the form-function confusion problem is at risk of dampening analytical insights from research approaches outside of those that she critiques, namely, the mainstream. Many of the research issues Carvin highlight are most pronounced in early scholarship on the subject.

Early examples of drone criticism demonstrate how growing amounts of publicly available information about their use transformed the way scholars framed the topic and introduced their arguments over time. In her 2010 testimony before the American House Congressional Subcommittee on National Security and Foreign Affairs, law professor Mary Ellen O’Connell remarked that drones would increase adherence to IHL in conflicts, but that their use could not be justified outside of official warzones.<sup>156</sup> Writing in 2011, author Marcus Schulzke’s criticism of drones identifies concerning trends in drone use while also observing that fighting from a distance without being subject to return fire is not new nor unique to drones.<sup>157</sup> Lastly, author Medea Benjamin explains in her 2012 book, *Drone Warfare: Killing by Remote Control*, that “drones aren’t a unique evil.” Rather, they demonstrate continuity with current and historical war practices, and are a progression of war’s growing emphasis on surveillance and “making murder clean and easy.”<sup>158</sup> It is noteworthy that these early contributions to drone literature did not allow

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<sup>155</sup> Carvin, 133–34.

<sup>156</sup> Daniel Brunstetter and Megan Braun, “The Implications of Drones on the Just War Tradition,” *Ethics & International Affairs* 25, no. 03 (2011): 345, <https://doi.org/10.1017/S0892679411000281>.

<sup>157</sup> Marcus Schulzke, “Robots as Weapons in Just Wars,” *Philosophy and Technology* 24, no. 3 (2011): 297, <https://doi.org/10.1007/s13347-011-0028-5>.

<sup>158</sup> Medea Benjamin, *Drone Warfare: Killing by Remote Control* (Brooklyn: Verso, 2013), 218.

the relative novelty of the weapon system to lead them to conclude it was somehow more significant than preceding weapons technologies when they were first introduced.

### **Arguing difference(s)**

Paul Kahn presents a philosophical case against drones centred around their form; namely, the absence of a corporeal pilot in the aircraft. According to Kahn, ‘war’ requires an imagined reciprocal risk relationship that forms the “internal morality of combat.”<sup>159</sup> Drones do away with this important dynamic by eliminating the risk for one side and creating an asymmetry that calls into question whether it is appropriate to categorize the situation as ‘war’.<sup>160</sup> This sentiment is echoed by Frédéric Mégret who considers the asymmetry between those who possess drones and those who do not so vast that it “destroys the idea of war as a contest” that “historically undergirds the entire idea of warfare.”<sup>161</sup> However, Mégret takes this conclusion even further by concluding that situations where only one party has access to drones “renders war essentially meaningless as a concept.”<sup>162</sup>

In contrast to Kahn’s concern for drones’ form, author Alan Dowd is more concerned with their function. Dowd cautions policymakers against understanding drones as tool for pursuing policy goals, and to instead contemplate how drones may themselves shape the form these goals take. In addition to the oft-expressed concern that drones will lower the threshold for going to war, Dowd notes that “they may also make it easier to keep wars going.”<sup>163</sup> The contemporaneous emergence of drones and the War on Terror (and its unclear objectives)

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<sup>159</sup> Paul W. Kahn, “Imagining Warfare,” *European Journal of International Law* 24, no. 1 (2013): 201, <https://doi.org/10.1093/ejil/chs086>.

<sup>160</sup> Kahn, 200–201, 218.

<sup>161</sup> Frederic Megret, “The Humanitarian Problem With Drones,” *Utah Law Review* 5 (2013): 1310.

<sup>162</sup> Megret, 1311.

<sup>163</sup> Alan W. Dowd, “Drone Wars: Risks and Warnings,” *Parameters* 42, no. 4 (2013): 12.

displays how the two create a positive feedback loop of ‘endless’ war-waging that shows no signs of slowing. Author Thomas Hippler directly connects perpetual warfare to drones, suggesting that the resort to the drone-based ‘elimination’ (i.e., total destruction) strategies used in the 2003 Iraq War are inherited from colonial warfare’s own perpetual conflicts.<sup>164</sup> This prospect was apparent to even those in the highest echelon of American leadership. Speaking in 2003 on the War in Iraq, U.S. General David Petraeus infamously remarked: “Tell me how this ends.”<sup>165</sup>

Dowd also proposes an alternative argument for drones’ uniqueness that emphasizes the significance of their proliferation and is an example of an analysis that conflates their form and function. Specifically, he suggests that the ‘race’ for drone technology will disrupt the status quo power balance and destabilize international security. This position is relatively less represented in the political science and legal scholarship, but undoubtedly occupies the minds of military and foreign policy strategists across the globe. The prospect of ‘instability’ in the ‘international system’ invokes a host of ideological commitments that presume the international system (read: liberal international order) is or has ever been ‘stable’ for most of the globe’s population, and that its perseverance is a self-evident good. For this reason, possible ‘disruption’ in any form to American global hegemony underlies all liberal interventions on the topic of drones, regardless of the discipline from which the author intervenes.

Consequently, it is important to interrogate what value there is in posing the question of drone’s uniqueness in the first place. What are possible implications of their exceptionalism? Answers verge on the hypothetical since they often imply that the most extreme possible

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<sup>164</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 188.

<sup>165</sup> As quoted in Brooks, “Drones and Cognitive Dissonance,” 249.

outcome is also most probable. Namely, that the entire world will soon be subjected to the lethal, panopticon gaze of a fully autonomous flying robot. For reasons outlined above, this future is not immediately around the corner. The more likely and pernicious short-term outcome of drone proliferation is their expanded use by domestic police departments, armed forces, and security agencies. Some potential uses include dispersing crowds with drone-compatible riot control methods; land and sea border patrol; sovereignty assertions (e.g. operating above contested territories); national security intelligence gathering (e.g. counterterror investigations); and general police surveillance. However, the prospect of aurally dispersed tear gas and personal privacy violations do not arouse the same sorts of reaction from the media, politicians, and academia as attention grabbing allusions to a future resembling the *Terminator* film does.<sup>166</sup> Perhaps more importantly, these implications also lack a certain scholastic sexiness towards which security and weapons scholars have often been drawn. A far less sexy but equally bombastic question those writing on drones sometimes pose is: is it *right* to use drones at all?

## 1.2 THE 'ETHICAL' OPTION

The most contradictory conclusions about drones result from normative debates over their moral status. The normative frameworks most authors grapple with fundamentally invoke the foundational ideas of the European Enlightenment that inform the prevailing liberal traditions in international relations theory and international law. These ideas include the assumption that humans have a capacity for rational thought, and that technological progress is an expression of

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<sup>166</sup> Denise Garcia, "Killer Robots: Why the US Should Lead the Ban," *Global Policy* 6, no. 1 (2015): 57, <https://doi.org/10.1111/1758-5899.12186>.

civilizational progress. Taken together, these premises bridge and intellectually ground positions argued in both the ethical *and* legal debates around drone use.

The primary ethical objections to drones are concerned with either their unmanned character, or their potential autonomous decision-making. These arguments insist there is a moral hazard associated with using offensive drones, particularly those with higher degrees of autonomy.<sup>167</sup> Those arguing that drones are ethically permissible do so by either narrowing their ethical calculus to reducing risk to the soldiers of drone operating countries, or their hypothetical use by perfectly moral actors, or both. The most popular position across the disciplines considered here is that drones are simply tools of human agents, and consequently as im/moral as their operators.

Writing in the edited volume, *Drone Wars*, author David True explains how managing drone technology is a matter of both policy and morality. He grounds his argument in the Just War Theory (JWT) tradition—a theoretical antecedent to IHL and a key source of its foundational principles. True explains how, according to ethical assessments based in JWT, drones *appear* as a “moral weapon”—a claim he proceeds to unpack and wholesale reject. Instead, True concludes that drones challenge JWT to the point that the tradition must be reconsidered for today’s world and wars.<sup>168</sup> The concept of a moral weapon may sound incoherent but is fully consistent with an idea of war that is righteous and will bring into being a

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<sup>167</sup> Sarah Kreps and Micah Zenko, “The Next Drone Wars: Preparing for Proliferation,” *Foreign Affairs* 2, no. April (2014): 1–7, <https://doi.org/10.1525/sp.2007.54.1.23>.

<sup>168</sup> David True, “Disciplining Drone Strikes: Just War in the Context of Counterterrorism,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 286, 289, 298, <https://doi.org/10.1029/2003JD004173.Aires>.

just outcome. This conviction, though rarely stated so plainly, is foundational to IHL and presumed by those analytically operating within its framework.

The ‘Campaign to Stop Killer Robots’ (Campaign) best represents the autonomy-based argument against drones. The international Campaign is a coordinated effort between mainly nongovernmental organizations with the goal of creating a blanket ban on the use of fully autonomous lethal weapons systems, which it believes “crosses a moral threshold.”<sup>169</sup> This position is broad and the obvious point must be made that a fully autonomous lethal weapon is not the same thing as a ‘killer robot’. An explosive laden consumer drone may well be a killer robot; however, it is not a fully autonomous lethal weapon, nor are the vast majority of drones in operation. Yet the Campaign has made several attempts to connect the issue of fully autonomous lethal weapons systems with drones. Drawing this connection is a very effective promotional and awareness-raising strategy since the Predator’s silhouette is universally recognizable and connotes an inhuman ability to wreak death and destruction. It appears that although AI development futures are the Campaign’s *real* target, drones are a more evocative symbol of a ‘killer robot’.

The Campaign has received support from several high-profile figures in the United Nations, the European Parliament, as well as several state national parliaments.<sup>170</sup> For reasons explained above, advanced fully autonomous lethal drones are not on the horizon, however, there are several basic ‘killer robots’ in operation today worth bringing to attention. Examples include two Israeli-manufactured loitering munitions and a sentry gun. The IAI ‘Harpy’ can

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<sup>169</sup> “The Problem,” Campaign to Stop Killer Robots, 2020.

<sup>170</sup> “Supporters of a Ban on Killer Robots,” Campaign to Stop Killer Robots, 2020, <https://www.stopkillerrobots.org/endorsers/>.

autonomously fly, detect, and attack anti-aircraft systems with a 16kg warhead,<sup>171</sup> while the Elbit Systems ‘Sky Striker’ can identify and attack ‘operator designated targets’ (i.e., objects with particular electro-optical signatures) with a 5kg warhead.<sup>172</sup> On the ground, the Rafael ‘Samson Remote Control Weapons Station’ is stationed in guard tower pillboxes spaced in intervals along the Gaza border fence. The Samson system can fire a variety of grenades, as well as a fully automatic machine gun that has an optional ‘hunter-killer’ mode that currently requires human approval before firing, but was designed with an eye to future ‘closed loop’, fully autonomous operation.<sup>173</sup> Details about precisely *how* these systems operate are scant, however, with their smaller warheads and without any explicit limits on target designation, the Harpy and Sky Striker could conceivably identify human targets much in the same way the Samson system does. While these sorts of killer robots are not useful for most types of military operations and would therefore unlikely find widespread use in conflicts, they indicate intensifying efforts to offload the collecting and interpreting of data used for categorizing people and objects. The burden of AI shortcomings is expected to be shouldered by civilians as collateral damage.<sup>174</sup>

According to the Campaign, machine programming lacks the ability to distinguish combatants and civilians and evaluate the proportionality of an attack which only humans possess.<sup>175</sup> Consequently, these weapons are incapable of adhering to IHL and should be found illegal under it. This is the point at which identifying drones with fully autonomous weapons

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<sup>171</sup> State of Israel, “HARPY: Autonomous Weapons for All Weather,” Israel Aerospace Industries, 2020, <https://www.iai.co.il/p/harpy>.

<sup>172</sup> Elbit Systems, “Sky-Striker:Tactical Loitering Munitions for Covert and Precise Airstrikes,” 2018, <https://elbitsystems.com/landing/wp-content/uploads/2018/07/Sky-Striker.pdf>.

<sup>173</sup> Noah Shachtman, “Robo-Snipers, ‘Auto Kill Zones’ to Protect Israeli Borders,” Wired, 2007, <https://www.wired.com/2007/06/for-years-and-y/>.

<sup>174</sup> “The Problem.”

<sup>175</sup> “The Problem.”

becomes potentially fraught and can *appear* as a tacit endorsement of the international legal status quo. If most lethal drones are not fully autonomous, then there is no reason to oppose their continued legal use. Conversely, the degree to which humans can carry out the sophisticated moral calculations required to apply IHL must be satisfactory. It is here that the liberal, Enlightenment thought underpinning the prevailing international governing norms and institutions begins to bump up against itself and reveal its limitations. This logic is committed to humanity's inherent rationality and its formal expression in different institutions, including legal regimes. The assumption that technological progress is inseparable from civilizational progress has been extended to IHL throughout its historical trajectory. Weapons technology has developed so as to increase a soldier's destructive capabilities while decreasing their physical risk, since it is the soldier's mind (and not their body) that is rational. As is explained in depth in chapter 3, this logic requires that weapons technology will always bring war's conduct *closer* to IHL's ideals, not further away. Whether this rationality can be extended to a machine is up for debate. Thus, the Campaign's attempt to simultaneously embrace liberalism's legal manifestation (i.e., IHL) while rejecting its conclusions (i.e., endorsing high-tech weapons) is *arguably* incoherent. This incoherency is seized upon by those arguing that drones are the most moral weapon.

Chamayou refutes the claim of drone moral superiority along with all other strategic, political, and philosophical defenses of drone use.<sup>176</sup> He explains the dual claims made in arguments that drones save lives, or, in other words, are the moral weapon of choice. The first is the self-evident claim that drones save the lives of their operators by removing them from harm's

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<sup>176</sup> Adelman and Kieran, *Remote Warfare: New Cultures of Violence*, 8.

way. So far, so moral. The second claim attempts to extend this from the ‘us’ to ‘them’ by asserting that a non-combatant is better protected from *unintentional* attacks when a drone is used. This claim is made by virtue of the fact that drones have greater information and improved ground visuals as compared to a traditional aircraft, as well as precision ordnances. According to this logic, everything that makes the drone more effective as a weapon *also* makes it more moral.<sup>177</sup>

The argument that there is a moral imperative to use drones is most forcefully (and infamously) made by author Bradley Strawser.<sup>178</sup> Strawser reminds his readers that states have an obligation to their soldiers to avoid putting them in unnecessary harm, but not at the expense of the enemy’s non-combatants. Yet *because* drones are much safer for civilians (for the reasons just laid out above), they are morally obligatory.<sup>179</sup> At this point, it is worth recalling the numerous human faults and frailties that drones ostensibly remedy, e.g. boredom, fatigue, etc. This list can be further augmented by the expectation that a soldier will not act impulsively or violently to preserve the physical drone to the degree they might act to preserve their own body. Without the risk of losing one’s own life, it follows from this logic that a drone-piloting soldier will go to greater lengths to preserve that of civilians below. With a diminished risk for both soldier *and* civilian the drone is clearly the lesser of all evils and therefore obligatory.<sup>180</sup> In the aptly titled *The Case for Drones*, author Kenneth Anderson takes up an argument similar to

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<sup>177</sup> Chamayou, *A Theory of the Drone*, 145–46.

<sup>178</sup> Daniel Brunstetter and Megan Braun, “From Jus Ad Bellum to Jus Ad Vim: Recalibrating Our Understanding of the Moral Use of Force,” *Ethics & International Affairs* 27, no. 1 (2013): 91, <https://doi.org/10.1017/S0892679412000792>.

<sup>179</sup> Chamayou, *A Theory of the Drone*, 136–37.

<sup>180</sup> Bradley Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: Oxford University Press, 2013), 36.

Strawser's—going so far as to describe drone warfare as “honorable.”<sup>181</sup> Indeed, a concern for honourable conduct in war is a paramount concern in the Just War theoretical tradition.

### **Just weapons, unjust warriors**

A common position held by those who believe drones are not meaningfully different from other weapons is that it is not the weapon that matters but *how* it is used. In their consideration of drones and IHL, Daniel Brunstetter and Megan Braun's suggest that the weapons are “only discriminate to the extent that their human operators chose to employ them discriminately.”<sup>182</sup> Here, the drone is conceived of as a tool of neutral moral weight that is wielded by a soldier who may do so in an im/moral manner. Accordingly, the moral in/correctness of an action is determined in accordance with JWT doctrine and its ethical tenets. These tenets are expressed in their simplest form through IHL's discrimination and proportionality requirements. However, unlike IHL's supposedly secular expression, JWT has a theological foundation that began developing in the First Century A.D.

Author Naomi Sussmann observes that “Just war theory was formulated *in* a different world, *for* a different world.”<sup>183</sup> It follows that the ‘world’ in question has since passed on, and with it JWT's utility. This sentiment is echoed in the writings of authors like Hamner Hill, who brazenly concludes JWT “sla[*in*]” by the “ugly fact” of contemporary war.<sup>184</sup> Drones—and more specifically, their *function*—are one such “fact” of contemporary war that threatens to render JWT obsolete. Yet for every scholar who insists on JWT's irrelevancy, there are as many

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<sup>181</sup> Kenneth Anderson, “The Case for Drones,” *Commentary*, June 2013, 15.

<sup>182</sup> *Supra*, note 7 at p. 351

<sup>183</sup> Naomi Sussmann, “Can Just War Theory Delegitimize Terrorism?” *European Journal of Political Theory* (2013) 12.4, p. 439. Emphasis original.

<sup>184</sup> Hamner Hill, “Can Just War Theory Survive The War On Terror?” *The Journal of the Institute of Justice & International Studies* (2010) 10, p. 79

insisting on its timeless resonance. Indeed, the JWT tradition is frequently introduced into discussions of drone's legality and most often invoked by drone advocates.

Author Marcus Schultze acknowledges that the requirements laid in out in JWT are aspirational and cannot reasonably be expected to find application in practice. However, he finds that drones have the ability to bring practice more closely in line with the theory's ideals and should therefore be welcomed, albeit with some degree of caution.<sup>185</sup> By contrast, Strawser uses no such qualifiers, stating plainly that “the use of these unmanned vehicles is only as good or as evil as the moral agents controlling them,” and that they are “useful tools that the just war tradition can accommodate.”<sup>186</sup>

By conceptualizing drones as an extension of its piloting soldier these authors are attempting to establish a chain of moral command. Insisting that drones have no moral weight is a normatively configured version of the aforementioned form/function issue. While it would be absurd to insist that an object is inherently ‘evil’, it is equally absurd to insist that objects, particularly weapons, are in any way ‘neutral’. Speaking on ‘The Morality of “Drone Warfare”’, Jennifer M. Welsh references fellow author Derek Gregory and his observation that in addition to being neither inherently “good” or “bad”, drones are not “fixed” or “determinate”. With this last point, Welsh complicates the ‘morality’ question and forces readers to confront how drones’ form effects their function. This applies to drone use both within and without a declared conflict where their unique technological capabilities influence how the drone is used. Specifically, drone strikes may be undertaken more frequently and in legally or morally dubious situations *because*

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<sup>185</sup> Schulzke, “Robots as Weapons in Just Wars,” 295–96.

<sup>186</sup> *Ibid.*, at p. 38

they are perceived as more proportionate than alternative means of attack.<sup>187</sup> This point reveals the dangers and practical shortcomings of applying (mis)conceptions about a particular weapon to decisions of moral import, *e.g.* a drone strike. It is helpful at this point to consider a better-known conflict hypothesis of conflict and its potential connection to drone narratives: Immanuel Kant's 'democratic peace hypothesis'.

### **Kant's hypothesis**

Kant is a key Enlightenment thinker whose influence looms large across Western political consciousness. The democratic peace hypothesis assumes that a government's willingness to go to war is restrained by the domestic population effectively leveraging institutions of democratic accountability.<sup>188</sup> The validity of the hypothesis is long disputed and the data generally indicates that while democratic states in the Anglo-American/European sphere are indeed less likely to go to war with one another they remain very much conflict-prone.<sup>189</sup> Setting aside the veracity of Kant's claim we can consider the central presupposition that popular support (or lack thereof) will influence a democratically organized government's decision to declare war. Relevant to the analysis here is not whether this less ambitious claim is true, but the degree to which this claim is assumed and embedded in international law.

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<sup>187</sup> David Cortright and Rachel Fairhurst, eds., "Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications" (Chicago: University of Chicago Press, 2015), 24.

<sup>188</sup> Matthew Fuhrmann Horowitz, Michael C., Sarah E. Kreps, "Separating Fact from Fiction in the Debate over Drone Proliferation," *International Security* 41, no. 2 (2016): 20, <https://doi.org/10.1162/ISEC>.

<sup>189</sup> The hypothesis' failures are conceptual and actual. What constitutes a 'democracy' and 'war' varies dramatically over time and place to the point that it becomes extremely difficult to analyze democratic state relations. Likewise, military interventions in the periphery during the Cold War, 'humanitarian interventions' throughout the 1990s, and 'War on Terror' invasions and occupations by democratic states all point to their willingness to resort to force. For a full discussion of these issues see: Tarak Barkawi and Mark Laffey, "The Imperial Peace: Democracy, Force and Globalization," *European Journal of International Relations* 5, no. 4 (1999): 405–6, <https://doi.org/10.1177/1354066199005004001>; and Kiron K. Skinner and Thomas Schwartz, "The Myth of the Democratic Peace," *Orbis* Winter (2002): 159–72.

Authors across almost all international relations theory traditions reference a version of Kant's hypothesis, either explicitly or implicitly, in their moral arguments against drone use.<sup>190</sup> However, the argument's popularity should not be interpreted as confirmation of its conclusion. It is certainly true that using lethal force with a drone is 'easier' than with a corporeal soldier for the reasons discussed above. It is less clear whether this will invariably lead to a greater use of lethal force in every and all cases. What these authors writing from different theoretical traditions agree upon is the basic and amoral military principle of preserving one's own soldier's lives within *existing* conflict situations. Efforts to conserve military resources, human or otherwise, give reason to believe that states will resort to putting drones at risk instead of soldiers when feasible. This argument is more easily verifiable than the democratic peace hypothesis and relies on a logic of cost reduction rather than the responsiveness of liberal democratic governments to popular sentiment or a population's ability to dictate foreign policy. More importantly, the available evidence supports the claim that access to drones leads to an increased reliance on them in existing conflict situations.<sup>191</sup>

The case that greater availability yields greater use is illustrated by the preeminent drone users and exporters, Israel and the U.S. There are similarities and differences in the reasons for which each country has embraced drones. It is frequently suggested that a primary motivation for former U.S. President Barack Obama's aggressive expansion of military and intelligence drone

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<sup>190</sup> Horowitz, Kreps, and Fuhrmann, "Separating Fact from Fiction in the Debate over Drone Proliferation"; Ugo Pagallo, "Robots of Just War: A Legal Perspective," *Philosophy and Technology* 24, no. 3 (2011): 307–23, <https://doi.org/10.1007/s13347-011-0024-9>; Ray Acheson, Matthew Bolton, and Elizabeth Minor, "The Humanitarian Impact of Drones," 2017, <https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian-impact-of-drones.pdf>; Gusterson, *Drones: Remote Control Warfare*; True, "Disciplining Drone Strikes: Just War in the Context of Counterterrorism"; Kreps and Zenko, "The Next Drone Wars: Preparing for Proliferation."

<sup>191</sup> Peter Bergen, Melissa Salyk-Virk, and David Sterman, "World of Drones," *New America*, 2019, <https://www.newamerica.org/international-security/reports/world-drones/>.

programs was a reversal in popular support for U.S. troops' continued ground presence in Iraq and Afghanistan.<sup>192</sup> It seems likely that this was at least one of several factors contributing to increased drone use—including the War on Terror's general strategic shift toward assassinations. It seems considerably less likely that any American president would be moved by moral objections to the continued loss of American lives fighting abroad. Yet the same cannot be said of America's Israeli counterparts, who have made their sparing their soldier's lives a clear priority in a country with mandatory military service. This is made evident by the Israeli state practice of exchanging Palestinian prisoners for IDF members being held hostage,<sup>193</sup> as well as the broader budget and manpower cost rationale presented for disengaging from the Gaza Strip in 2005.<sup>194</sup> Both countries have also taken up the practice of targeted killing suspected terrorists. While American courts rejected the justiciability of "warmaking, national security, and foreign relations,"<sup>195</sup> they found combatants without uniforms to be "unlawful" and consequently not entitled to the rights of prisoners of war.<sup>196</sup> Whereas the Israeli High Court of Justice found that a targeted killing can be legal if certain criteria are met.<sup>197</sup> While the legality of drone strikes, *per se*, was not in direct question in either case, each had major implications on the legality of their function in conflicts.

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<sup>192</sup> Christian Enemark, *Armed Drones and the Ethics of War* (New York: Routledge, 2014), 376.

<sup>193</sup> Ziv Bohrer, "Proportionality in War: Protecting Soldiers From Enemy Captivity, and Israel's Operation Cast Lead—"The Soldiers Are Everyone's Children"," *Southern California Interdisciplinary Law Journal* 22 (2013): 638.

<sup>194</sup> Jonathan Rynhold and Dov Waxman, "Ideological Change and Israel's Disengagement from Gaza," *Political Science Quarterly* 123, no. 1 (2008): 30; Eyal Lewin, "The Disengagement from Gaza: Understanding the Ideological Background," *Jewish Political Studies Review* 27, no. 1 (2015): 25.

<sup>195</sup> Cortright and Fairhurst, "Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications," 170.

<sup>196</sup> Charles Blanchard, "This Is Not War by Machine," in *Drone Wars*, ed. Peter L. Bergen and Daniel Rothenberg (Cambridge, 2014), 124.

<sup>197</sup> HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel.

### 1.3 OLD LAWS, NEW WEAPONS

Drone use for targeted killing both inside and outside armed conflicts constitutes the bulk of legal academic discussion on the weapons—discussions that most commonly fall into the form/function problem. One possible reason for this is legal academics’ tendency to analytically operate exclusively within the bounds of established legal discourse. These interventions display a general preoccupation with drone use for targeted killing under IHRL,<sup>198</sup> and the weapon’s ability to satisfy the distinction criteria under IHL.<sup>199</sup> Concomitant considerations of whether drones are an insurmountable obstacle to IHL have also followed from these analyses, with most authors ultimately supporting the legal regime’s longevity. Generally speaking, the conclusions reached in interventions on drone’s legal implications are more conservative and less ambitious than those of official state and judicial representatives (including military lawyers) who are in closer proximity to decisions of when and where drones may be used. The relevant legal scholarship rarely engages in making or interpreting policy, instead preferring thought experiments and case-specific analyses that are less prone to ambiguous conclusions. Authors willing to look outside the law as such and take an interdisciplinary approach produce significantly more creative arguments with open-ended conclusions. This section surveys these different approaches by opening with the most straightforward, legalistic approaches and closing with a discussion of authors that introduce political and/or historical depth to their work.

Interventions in the literature arguing for the legality of drones as weapons and their use for targeted killing are responding to concerns raised by voices in academe, politics, and civil

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<sup>198</sup> Alston, “A/HRC/14/24/Add.6 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on targeted killings.”

<sup>199</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law.”

society that drones are used in an unregulated, clandestine manner by unaccountable operators. Their responses attempt to meet these concerning images with the *appearance* (if not the effect) of a stable international legal order governing states' drone conduct. While this clearly serves short-term political interests it is also a crucial element of the overarching narrative in which technological advancement signals civilizational advancement, and the civilizing effect of such technology's violences. The holistic definition of 'technology' used here refers to both weapons technology *and* legal, administrative, and institutional management systems.<sup>200</sup> By understanding how different technologies can be mobilized in support of different forms of domination, so too can the importance of epistemic communities in reproducing hegemonic discourses be identified.

### **Eternal laws for eternal principles**

The most moderate position taken by legal academics is that IHL has lost none of its validity in the face of drone use. This stance is rooted in the liberal theoretical tradition despite being the most conservative in its conclusion. Authors Issacharoff and Pildes are of one mind with Mary Ellen O'Connell, insisting that drones are not a revolutionary weapon nor do they present unique legal issues.<sup>201</sup> Author Ryan Vogel takes a slightly more qualified approach, acknowledging that while drones do constitute a *challenge*, the laws of armed conflict are "more than adequate to govern their wartime deployment."<sup>202</sup> However, not all legal scholars are as confident in the law's continued persuasiveness. In their 2014 article, authors Sarah Kreps and

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<sup>200</sup> Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006): 747, <https://doi.org/10.1080/01436590600780011>.

<sup>201</sup> Issacharoff and Pildes, "Drones and the Dilemma of Modern Warfare," 397; Mary Ellen O'Connell, "Remarks: The Resort to Drones Under International Law," *Denver Journal of International Law & Policy* 39, no. 4 (2011): 599.

<sup>202</sup> Ryan J Vogel, "Drone Warfare and the Law of Armed Conflict," *Denver Journal of International Law & Policy* 39, no. 1 (2010): 137.

Michah Zenko cling to a rapidly fading hope that the existing treaty and norms regime instructing combatant behaviour in conflict can be an effective check on drone use. The authors believe this scenario requires American leadership in an informal international coalition of drone possessing states.<sup>203</sup> These authors all share a firm commitment to IHL and attempt to address concerns about drones directly.

By contrast, author Charles Blanchard takes drone misconceptions as his starting point. Blanchard bemoans the ‘public debate’ that he believes has confused and overshadowed what drones *really* do.<sup>204</sup> Despite his goal to clarify ambiguities, Blanchard’s claims are heavily qualified and poorly evidenced. Blanchard previously served as General Counsel of the U.S. Air Force and Army, and his argument is broadly representative of that put forward by other authors in the military nexus. Blanchard agitates against those voices “prejudiced by the novelty” of drones, and instead looks to fact-driven discussions.<sup>205</sup> He is especially preoccupied with the idea of drone operations being ‘unmanned’, highlighting the numerous personnel their missions involve. Blanchard emphasizes the role of lawyers in assessing potential drone strikes and how their consultation *might* affect an operation’s approval.<sup>206</sup> He unequivocally asserts that drones’ technological possibilities have increased its user’s *capacity* to adhere to IHL. Much in the same way he qualifies lawyers’ degree of involvement in operations, Blanchard’s language implicitly acknowledges that a capacity for a behaviour does not mean it is realized. However, he neglects to explore these implications further and quickly turns to the question of drone use for targeted killing operations against American citizens abroad. He claims these operations are consistent

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<sup>203</sup> Kreps and Zenko, “The Next Drone Wars: Preparing for Proliferation.”

<sup>204</sup> Blanchard, “This Is Not War by Machine,” 119.

<sup>205</sup> Blanchard, 124–25.

<sup>206</sup> Blanchard, 120.

with American law by appealing to a U.S. Department of Justice White Paper on the topic. The evidence supporting this claim is tenuous at best, and completely glosses over the applicability of IHRL to such attacks. Regardless of the applicable legal regime, Blanchard believes that drones' form is a "more humane tool" that enables the U.S. to "better comply with our international legal obligations."<sup>207</sup>

Author and law professor Rosa Brooks offers an especially sophisticated example of the aforementioned sleight of hand by arguing that, while drones are not unique, their use for targeted killing *is* and effectively reveals law's inability to deal with such policies. The more important task is to explain these targeted killing events within the existing legal framework to the degree possible, and then tweak the law whatever amount necessary to simultaneously accommodate and limit their use—much in the same way IHL does for other regularized forms of violence.<sup>208</sup> In her numerous articles on drones and the law, she insists that there is nothing about the weapons that is unique amongst other military technology, particularly those used in aerial bombing. Seemingly irritated by peaceniks who aggressively decry the use of drones, Brooks confidently asserts that "drones are not evil," and puts very plainly her belief that drones are no more objectionable than other military technologies.<sup>209</sup> If anything, drones are an improvement on existing weapons systems. She even goes so far as to assert that drone strikes kill civilians at no higher rate, and almost certainly a lower rate, than most other common means of warfare<sup>210</sup>—a factual claim for which she provides no evidence. She additionally invites

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<sup>207</sup> Blanchard, 125.

<sup>208</sup> Rosa Brooks, "Drones and the International Rule of Law," *Ethics & International Affairs* 28 (2014): 98, <https://doi.org/10.1017/S0892679414000070>.

<sup>209</sup> Brooks, "Drones and Cognitive Dissonance," 233, 237.

<sup>210</sup> Brooks, 231.

readers to compare civilian deaths from drone strikes to those resulting from large-scale armed conflicts but does so without seeming to consider that drones are used *as part of* large-scaled armed conflicts.<sup>211</sup> The implication of her collective publications is that drones are likely a benign if not beneficial introduction to armed conflicts.

In her efforts to present herself as a bi-partisan voice of reason, Brooks does not let drones' greatest champions off the hook either, and encourages them to look beyond short-term tactical advantage to long-term international security implications. She largely limits her analysis to American drone strikes, particularly the *policy* (or lack thereof) informing their use for targeted killing. Such targeted killings “defy straightforward legal categorization,”<sup>212</sup> and consequently create new legal challenges that have the potential to do “irreparable damage to the rule of law” if unaddressed.<sup>213</sup> The greatest risk associated with this legal ambiguity is that states like China, Russia, Iran, or North Korea may think that they *too* can fly around the world assassinating whomever they like by invoking a vague, amorphous definition a state’s right to ‘self-defence’ in Article 51 of the UN Charter. It is significant then that the U.S. cited self-defence as the legal basis upon which it assassinated General Soleimani—the first known instance in which an official state representative was assassinated in another state’s territory.<sup>214</sup> Several authors reflect a similar anxiety that undesirable agents will adopt the same strategies and/or tactics of American drone use. Authors William Banks and David Dunn separately evoke this spectre in the form of Hezbollah possessing armed drones and the threat of nonstate actors embracing

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<sup>211</sup> Brooks, 232.

<sup>212</sup> Brooks, “Drones and the International Rule of Law,” 83.

<sup>213</sup> Brooks, “Drones and Cognitive Dissonance,” 238.

<sup>214</sup> Agnès Callamard, “A/HRC/44/38 Use of Armed Drones for Targeted Killings,” 2020, para. 60, <https://doi.org/10.1017/s0020818300024334>.

drones as the “ideal means for terrorist attack in the twenty-first century.”<sup>215</sup> Dowd provides a complementary warning by inviting readings to imagine states with “mediocre drones deployed by mediocre militaries” and the scale of international incidents that could follow.<sup>216</sup> Such patent fearmongering is characteristic of a liberal internationalist approach that finds the idea of the U.S. dominated Westphalian legal order being challenged to be the most horrifying repercussion of drone proliferation.<sup>217</sup>

### **Uncharted legal territories**

There are few legal voices sounding the alarm that neither IHL nor IHRL can fully incorporate drones into their regulatory regimes. The most interesting example comes from an article published in the *International Review of the Red Cross*, where it is suggested that drones constitute a new method of warfare, and as such should be legally reviewed in accordance with the Additional Protocol I to the Geneva Conventions.<sup>218</sup> Yet this is the exception that proves the rule, and most international lawyers and scholars take a much more cautious approach to their drone assessments. There is no doubt a degree of authorial self-preservation at play in these arguments, since international lawyers stand to gain little and lose much by claiming their discipline is facing redundancy. However, this position is also typical of legalistic approaches to global politics. Both domestic and international legal schemes and the traditions they draw on are

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<sup>215</sup> William C. Banks, “Regulating Drones Are Targeted Killings by Drones Outside Traditional Battlefields Legal?,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 154, <https://doi.org/10.1017/CBO9780511491757.014>; David Hastings Dunn, “Drones: Disembodied Aerial Warfare and the Unarticulated Threat,” *International Affairs* 89, no. 5 (2013): 1242, <https://doi.org/10.1111/1468-2346.12069>.

<sup>216</sup> Dowd, “Drone Wars: Risks and Warnings,” 15.

<sup>217</sup> Brooks, “Drones and Cognitive Dissonance,” 246; Banks, “Regulating Drones Are Targeted Killings by Drones Outside Traditional Battlefields Legal?,” 143, 154.

<sup>218</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” 600.

innately conservative in their response to novel legal issues. The reasons for this are many, including:

- they are usually located in complex documents that are difficult to alter;
- they generally ground their reasoning in legal precedent; and,
- their continuity supports their perceived coherence and validity.<sup>219</sup>

That the law's content is mostly reflective of a society's prevailing power relations and efforts to sustain the interests of those most powerful also contributes significantly to the instinct to preserve rather than reimagine. America's empire and international institutional hegemony is no different in this regard. Early interventions in American international legal discourse reflected attitudes closely aligned with Brooks and Blanchard. This has noticeably shifted over time and there are a growing number of international legal scholars willing to criticize the tenuous legality and unclear policy surrounding American drone use. Despite this growing dissent, criticism of drone use in existing conflict situations often remains limited and vulnerable to accusations of unrealistic expectations. Namely, expectations of law's efficacy in an unpredictable environment such as conflict, and the viability of an antiquated legal system in the twenty-first century. For those unwilling to outright reject drones and post-9/11 counterterror policy, their arguments co-opt aspects of their critics' and repurpose them for their own ends. This is accomplished by conceding some of the challenges to IHL's prospects (e.g. the need to categorically account for 'terrorists') while rejecting others (e.g. its uneven or failed application).

The most hawkish liberal interventions take up many of the same premises of authors like Brooks and Blanchard but, with them, reach more revolutionary conclusions. Author Brad

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<sup>219</sup> Brad Allenby, "How to Manage Drones: Transformative Technologies, the Evolving Nature of Conflict, and the Inadequacy of Current Systems of Law," in *Drone Wars*, ed. Peter L. Bergen and David Rothenberg (Cambridge: Cambridge University Press, 2014), 439.

Allenby considers drones to be the next phase in transformative technology systems, but rejects technological determinism as a logic for understanding their political and legal implications.<sup>220</sup> Allenby explains how IHL reflects eighteenth through twentieth European military conflicts and thus struggles to account for the structures of contemporary counterinsurgency conflicts where military action often overlaps with policing functions.<sup>221</sup> He concludes that the current laws of war “may be inadequate in whole or part for addressing emerging issues regarding conflict”, including drones.<sup>222</sup> In light of how drones have been integrated into American counterterrorism policy (i.e., targeted killing outside of a defined battlefield), Allenby goes so far as to conclude that the IHL-IHRL bifurcation has become ‘obsolete’ and with it the laws governing the use of lethal force.<sup>223</sup> Such suggestions that the laws of armed conflict have lost relevancy in a post-9/11 world use similar arguments to those suggesting JWT’s contemporary understanding is outdated in the twenty first century. Specifically, that conflicts today are increasingly non-international, civil wars fought by sub-state actors that do not observe traditional conduct conventions, e.g. insurgent groups operating in an urban environment without uniforms and engaging in suicide-bombing.<sup>224</sup>

These arguments presume that there was a time in which the majority of conflicts resembled that which is described in IHL, namely, state armies engaging on a battlefield. This pervasive myth cuts across all disciplines that concern themselves with drone use and is rarely

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<sup>220</sup> Allenby, 424–26.

<sup>221</sup> Allenby, 433.

<sup>222</sup> Allenby, 435.

<sup>223</sup> Allenby, 436.

<sup>224</sup> Eric Patterson, “Just War in the 21st Century: Reconceptualizing Just War Theory after September 11,” *International Politics* 42 (2005): 116–34, <https://doi.org/10.1057/palgrave.ip.8800100>; Mark Douglas, “Changing the Rules: Just War Theory in the Twenty-First Century,” *Theology Today*, 2003, 529–45, <https://doi.org/10.1177/004057360305900402>.

challenged. While it is true that IHL appears to struggle to incorporate such combatants and tactics, it is equally true that conflicts have never adhered to the idea of war imagined in IHL. Scholar Samuel Moyn explains how contemporary counterinsurgency is actually “highly legalized.”<sup>225</sup> He suggests that the actual challenge facing IHL is applying these new normative expectations to a longstanding form of war: counterinsurgency as part of colonial wars.<sup>226</sup> This dissertation suggests that this crucial analytical starting point is almost entirely absent from mainstream drone debates, particularly those in the legal scholarly community. Although critical legal theorists have actively resisted this tendency, their work constitutes the minority of what is published.

Among his contemporaries, author Craig Martin comes closest to directly acknowledging the misalignment of IHL’s theory and practice while still broadly operating within mainstream analytical orthodoxy. In doing so, Martin also brings a genuinely novel contribution to the often-repetitive legal academic drone debate. He begins with plain observations about drones’ form and the intuitive conclusions about their function that follow. He proceeds to turn these ideas on their head, arguing that “the features of the armed drone that are most likely to make it compliant with IHL may, counter-intuitively, facilitate violations of international law.”<sup>227</sup> Martin explains this conclusion as a ‘means-method paradox’ in which drones as a means (i.e., weapon) capable of extended surveillance and precise missile delivery lend themselves to illegal methods (i.e., targeting) as a consequence of faulty intelligence and improper targeting criteria.<sup>228</sup>

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<sup>225</sup> Samuel Moyn, “Drones and Imagination: A Response to Paul Kahn,” *European Journal of International Law* 24, no. 1 (2013): 231, <https://doi.org/10.1093/ejil/cht011>.

<sup>226</sup> Moyn, “Drones and Imagination: A Response to Paul Kahn.”

<sup>227</sup> Craig Martin, “A Means-Methods Paradox and the Legality of Drone Strikes in Armed Conflict,” *International Journal of Human Rights* 19, no. 2 (2015): 144, <https://doi.org/10.1080/13642987.2014.998864>.

<sup>228</sup> Martin, 142–44.

## 1.4 TACTICAL VS. STRATEGIC DRONES

This chapter's final section lays out the array of arguments on drones' strategic value. Drones' rapid proliferation has made the question of whether they *ought* to be introduced to state military arsenals moot. This sentiment is captured in former CIA director Leon Panetta's description of drones as "the only game in town."<sup>229</sup> Instead, it is now a question of *how* to best introduce them, and the corollary of *when* and *where* they should be used. There is no one-size-fits-all policy for drone operating countries to determine whether they are appropriate in a particular operational environment. As discussed earlier in this dissertation, drones are currently deployed in nearly every security situation imaginable, including civil wars, interstate border disputes, counterterrorism, counterinsurgency, assassinations, and intelligence gathering. The tactical advantages offered by drones for states operating them are seemingly endless. The medium- and long-term benefits of their use are less clear and are the greatest point of contention in the literature. The two most prominent concerns are their use for assassinations potentially backfiring in counterinsurgency operations, and the declining strategic advantage associated with their proliferation.

Unlike other areas of the broader drone debate, there is considerably less academic discussion of drones' strategic usefulness because it is simply assumed. Public-facing criticisms of drones rarely make a military case against their use, instead preferring ethical and political objections. This approach plays well for drone advocates, who often preclude debates over their strategic usefulness by making direct appeals to their military value as exceeding any moral concerns associated with their use. Framing drones as strategically invaluable calls on the same

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<sup>229</sup> Cortright and Fairhurst, "Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications," 121.

narrative that drones' particular technological capabilities actually make them *more* ethical, not less. As explained above, this narrative is based on imagined conflicts that have very rarely existed in reality and remains a persuasive myth that pervades both public and academic discourses. Yet this lack of public contestation is almost certainly complemented by vigorous debates among military policymakers and public relations strategists behind closed doors. These groups have a shared interest in 'winning' the battle for public opinion and not openly undermining the drone industry's political and financial successes. Additionally, defence and security policymakers may be disinclined to publish their contributions, lest their insights inadvertently aid the assortment of unfriendly state and nonstate actors flying drones of their own.

Answering the question of whether drones serve state and military interests requires answering related questions: Whose interests are being pursued by drones in the first place? And what are their particular interests? Chapter 1 offered preliminary answers to these questions, arguing that their use for surveying and assassinating populations in postcolonial borderlands is in the service of sustaining hegemony and postcolonial modes of governance. This is explored in greater detail in chapter 5, which argues that drones are the ideal weapon for *legally* waging colonial wars and sustaining neo-imperial relations. However, this chapter's remaining literature review is limited to the immanent debates of states already operating drones. This entails micro-level discussions of drone-specific operations and macro-level discussions of aerial warfare. It is shown that drone usefulness rises with the former and falls with the latter.

### **Silver bullet**

Assessing the degree to which drones are integrated into the military activities of current conflicts requires considering both day-to-day operations as well as special operations and

assassinations. A U.K. Ministry of Defence report portrayed drones as ideally suited to tasks considered ‘dull’, ‘dirty, and ‘dangerous’ for a piloted aircraft. Examples of such tasks include pattern of life surveillance, operating chemical, biological, radiological and nuclear missions (CBRN), and missions that involve putting a human operator at substantial risk.<sup>230</sup> Different types of drones serve different functions but generally fall under one of two categories: ‘cheap, simple and expendable’ or ‘complex, and therefore probably expensive, but with high survivability.’<sup>231</sup>

A drone’s survivability is largely dependent on the context in which it operates. Because of the comparatively slow speeds with which drones fly, they are easily shot down and have consequently been referred to by a U.S. Air Force general as “useless in a contested environment.”<sup>232</sup> This appears true of both highly advanced and comparatively rudimentary drones. For example, the Iranian downing and subsequent parading of an American RQ-4A Global Hawk allegedly operating over Iranian air space demonstrated the intense vulnerability of even the most sophisticated drone technologies.<sup>233</sup> By contrast, an Israeli quadcopter conducting surveillance along the Israel-Lebanon boarder was allegedly shot down by a civilian wielding a hunting rifle.<sup>234</sup>

Authors Horowitz, Michaels, and Kreps explain that drones possess both strengths and weaknesses that constrain what military tasks they are assigned. For example, because most

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<sup>230</sup> Ministry of Defence, “Joint Doctrine Note 2/11: The UK Approach to Unmanned Aircraft Systems,” 2011, para. 307.

<sup>231</sup> Ministry of Defence, para. 310.

<sup>232</sup> Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 17.

<sup>233</sup> Chad Garland, “Iran Attack Marks First Known Successful Strike on High-Flying Global Hawk Drone,” *Stars and Stripes*, June 20, 2019.

<sup>234</sup> “Israeli Drone Shot down over Lebanon Border,” *Middle East Monitor*, October 23, 2019.

armed drones fly at relatively low altitudes at a significantly lower speed than traditional fighter aircrafts, they are vulnerable to being shot down by anti-aircraft artillery defences. In this sense, existing armed drone systems are not wholesale replacements for all other aircraft systems.<sup>235</sup>

However, drones have augmented both the frequency and feasibility of counterterror and counterinsurgency assassinations. A drone is an effective substitute for assassinations on foreign soil where these operations were previously conducted with human intelligence and assets.

Drones are similarly effective replacements for aircrafts operating in a conflict environment in which the pilot may have greater vulnerability, such as an attack helicopter.

Author and vocal drone advocate Amitai Etzioni capitalizes on the lack of direct, concrete evidence used by drone critics to defend against what he regards as unfounded accusations against the weapon. He rejects the assertions that drones “make war more likely or its extension more acceptable,” and that drones reduce the time and resources invested in counterterrorism as compared to traditional strategies that require deploying conventional military personnel.<sup>236</sup>

Etzioni likewise insists that there is “no fully reliable [...] way to determine the ratio of civilian to militant casualties caused by drone strikes,”<sup>237</sup> and that there is questionable evidence to argue to the ‘obviously true’ statement that drone strikes alienate populations so as to produce greater a number of militants than they kill.<sup>238</sup>

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<sup>235</sup> Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 16–17.

<sup>236</sup> Amitai Etzioni, “The Great Drone Debate,” *Military Review*, 2013, 11.

<sup>237</sup> Etzioni, 3.

<sup>238</sup> See: Etzioni, 10–11. Etzioni refers to PEW Global Attitudes Project survey results to argue that American unfavourability amongst Pakistani respondents did not track with instances of drone strikes. This argument relies on a single variable which captured the popularity of a country within another, which does not clearly serve as a reliable indicator of attitudes on drone strikes. Thus, the data is clearly not strong evidence for the point Etzioni is attempting to make. Additionally, it is doubtful that PEW was able to reach residents living in those areas most effected by drone strikes, *i.e.*, the Federally Administered Tribal Areas, where literacy rates are below the national average and technological industrialization is limited. Also, Etzioni does not seek to ground his argument in the contestation of evidence that would suggest otherwise. Rather, he ham-fistedly fabricates a dubious argument.

Authors Kreps and Zenko more fully take up the issue of drones and incentives. The authors do not believe drones will incentivize those countries already in possession of the weapons to engage in “traditional interstate war” but may indeed increase the likelihood of limited military conflicts.<sup>239</sup> Horowitz, Michaels, and Kreps take a similar approach, suggesting that drones’ vulnerability means they will “have a minimal impact on interstate relations” and are unlikely to “provoke international crises or incite regional instability.” Conversely, disputed territory boarder monitoring with drones could “reassure states” and may actually have a *stabilizing* effect on international security.<sup>240</sup> This bizarre conclusion is contradicted by the aforementioned drone use in disputed territories like Kashmir where introducing the weapons has been part of escalating tensions. The conclusion additionally overlooks what drones are most often used for: assassinations. Take for instance the assassination of General Qasem Soleimani that was widely criticized for its illegality and lack of strategic rationale.<sup>241</sup> Not only did Soleimani’s death prompt a retaliatory Iranian strike against American troops stationed in Iraq that could have easily escalated into greater military engagement, but it also had a ripple effect on the fight against ISIS due to Soleimani’s involvement with Hezbollah-affiliated and Iraqi militias fighting in Iraq and Syria. While the U.S. could have just as easily struck Soleimani with a missile fired from a conventional aircraft, a drone was clearly preferred. The authors’ efforts to correct what they consider the “conventional wisdom” on drones is an analytical dead-end.<sup>242</sup>

U.S. Air Force Major Christopher Jones makes a similar and noticeably more coherent claim by way of historical example. According to Jones, “[t]he genesis event for the UAV was

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<sup>239</sup> Kreps and Zenko, “The Next Drone Wars: Preparing for Proliferation.”

<sup>240</sup> Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 9.

<sup>241</sup> Callamard, “A/HRC/44/38 Use of Armed Drones for Targeted Killings,” paras. 82-5 (Annex).

<sup>242</sup> Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 7–9.

the downing of Francis Gary Powers' U-2 spy plane over the Soviet Union on 1 May 1960 by an SA-2 missile.”<sup>243</sup> While shooting down a spy aircraft was a uniquely politically charged event in the Cold War context, the lessons learned from the incident apply to most if not all bilateral state relations. Being discovered conducting surveillance missions in the airspace of a foreign country is, without doubt, diplomatically fraught. However, depending on the circumstances, downing a foreign military's piloted aircraft could trigger an armed conflict. Framed thusly, drones appear to be the *only* means by which surveillance missions should be conducted, lest they trigger an international diplomatic incident of unknown consequences.

In *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, Patrick B. Johnston attempts to set up and knock down what he considers the four main critiques of drones: removing terrorist leadership is largely inconsequential, drone strikes have proven ineffective at denying terrorists a safe haven, strikes have a negative effect on foreign relations, and drone strikes ultimately end up creating more new terrorists than they kill. To the first two points, Johnston provides examples of where removing leadership (through assassination or arrest), sometimes referred to as the ‘decapitation’ strategy,<sup>244</sup> precipitated organizational collapse, as well as the capability hampering effects of sustained, intense strikes against organizations. Regarding to these last two points, he also suggests that drone strikes have bolstered relationships between the U.S. and its allies by eliminating threats to these governments, and that the vocal drone critics among populations living in states over which

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<sup>243</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 20.

<sup>244</sup> Callamard, “A/HRC/44/38 Use of Armed Drones for Targeted Killings,” para. 84.

drones operate already “harbor anti-American sentiment” and are essentially using drones as an excuse to join terrorist organizations.<sup>245</sup>

This failure to fully serve *all* America’s counterterrorism goals does not itself constitute a problem for war waging. However, there appears to be a simultaneous shift towards adopting drone strike tactics and as a general counterinsurgency strategy that is not yet coherent—which is itself a strategic vulnerability.<sup>246</sup> Almost all authors that attempt to engage with the benefits and drawbacks of drone warfare seem to agree that drones are tactically effective but are, at best, potentially strategically ineffective, and, at worst, strategically counterproductive.<sup>247</sup>

### **A Pyrrhic strategy**

There majority of authors taking up the question of drone use identify a tension between tactics and strategy when it comes to their integration into state armed forces. However, unlike Etzioni and Johnston’s defence of drones might suggest, this tension does not directly translate into advising against their use. In the case of America and Israel, their drone tactics are surveillance and assassination as part of a broad counterterrorism strategy. The context for these counterterror operations is some form of counterinsurgency, which is the point where a tension emerges. Counterinsurgents almost necessarily live and operate amongs the general population, which makes their identification challenging. Carrying out assassinations in this environment

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<sup>245</sup> Cortright and Fairhurst, “Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications,” 133.

<sup>246</sup> Audrey Kurth Cronin, “Why Drones Fail: When Tactics Drive Strategy,” *Foreign Affairs*, 2013, 44.

<sup>247</sup> John Kaag and Sarah Kreps, *Drone Warfare* (Malden: Polity Press, 2014); Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge: Cambridge University Press, 2014), 11; Brooks, “Drones and Cognitive Dissonance”; Horowitz, Kreps, and Fuhrmann, “Separating Fact from Fiction in the Debate over Drone Proliferation,” 52.

invariably alienates the very local population whose cooperation is necessary to counter insurgent groups.<sup>248</sup>

In the final paragraph of his book, *Drone: Remote Control Warfare*, author Hugh Gusterson sums up drones' unfulfilled promise of strategic gain for its operators: "Liquidating people on a kill list is not the same as defeating a counterinsurgency."<sup>249</sup> Drones do not "enable the painstaking accumulation of human intelligence and cultural understanding, or the patient building of relationships between imperial administration and native collaborators" that was key to past successful counterinsurgencies.<sup>250</sup> Ongoing surveillance and assassination tactics encourage short-term strategies that are fixated with eliminating individuals, rather than the long-term strategy building necessary for the supposed goal of military operations: strengthening state security.<sup>251</sup> While this seemingly obvious fact is somehow forgotten in the public military discourse, it is no doubt remembered by the most senior staff of states' armed forces.

This and other realities are clearly recognized by the various members of the U.S. military, intelligence, and legal community that contributed to the 'Recommendations and Report of the Task Force on US Drone Policy'. The variety of "stakeholder constituencies" consulted for the report makes its conclusions uniquely revealing of American-state attitudes.<sup>252</sup> The Task Force warns that American drone use may contribute to the erosion of sovereignty norms, community blowback over civilian casualties, a 'slippery slope' that leads to continual or

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<sup>248</sup> Rogers and Hill, *Unmanned: Drone Warfare and Global Security*, 62–64.

<sup>249</sup> Gusterson, *Drones: Remote Control Warfare*, 160.

<sup>250</sup> Gusterson, 160.

<sup>251</sup> Brooks, "Drones and Cognitive Dissonance," 236.

<sup>252</sup> Ret.) Gen. John P. Abizaid (US Army and Rosa Brooks, "Recommendations and Report of The Task Force on US Drone Policy," *The Stimson Center*, 2014, 5, [http://www.stimson.org/images/uploads/task\\_force\\_report\\_final\\_web\\_062414.pdf](http://www.stimson.org/images/uploads/task_force_report_final_web_062414.pdf).

wider wars, and a lack of strategic analysis of drones as counterterrorism weapons.<sup>253</sup> That the report recommendations are virtually identical to those made in mainstream academic scholarship indicates the intellectual hegemony of liberal theory across American academic and governance institutions. The amount of scholarship repeatedly flagging the same concerns surrounding drones and strategy does not appear to be met with any noticeable change in official American state drone policy. It appears that the opposite actually occurred under the administration of former President Donald Trump, who dismantled and removed the rules of engagement for counterterror operations and drone strikes.<sup>254</sup>

This tactic-strategy tension is itself indicative of a second, related tension in the broader ideological structure according to which ongoing Anglo-American interventions in postcolonial territories operate. The liberal theoretical tradition that informs ‘Western’ efforts to sustain global hegemony also demands that less human and financial resources be expended in the service of empire. This puts pressure on those governments to find more efficient and ‘clean’ means of applying police and military violence. Drones *appear* to satisfy all these goals by allowing pilots to remotely operate aircrafts far less expensive than conventional fighter jets. However, as the Cold War demonstrated, open-ended wars against ideologies like ‘terrorism’ reject limits on the lives and dollars they entail. Maintaining colonial governing modalities post-independence similarly require state interventions—often in the form of martial violence. Drones sit at a crossroads of the ‘West’s imperial ambitions and its supposed commitment to liberal democratic values, like ‘life’ and ‘liberty’. Author Thomas Hippler explains that in the current

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<sup>253</sup> Gen. John P. Abizaid (US Army and Brooks, 10–11.

<sup>254</sup> Nathalie Weizmann, “Drones and Other Unmanned Weapons Systems Under International Law,” in *Drones and Other Unmanned Weapons Systems under International Law*, ed. Stuart Casey-Maslen, Maziar Homayounnejad, and Hilary Stauffer (Boston: Brill | Nijhoff, 2018), nn. 147–150, <https://doi.org/10.1163/9789004363267>.

circumstances, “the imperial peace now coincides with a perpetual low-intensity war.”<sup>255</sup> Drone’s moral critics point to the death and fear drones bring to the populations they fly above as evidence of their failure to fulfil the promise of a casualty-free war. Drone’s strategic critics point to their failure to effectively counter insurgent movements and incapacitate terrorist organizations. Contrary to Johnston’s insistence that drone strikes against organizational leaders are effective, the mid-level members that are most frequently targeted for strikes belong to organizations arranged in flat hierarchies and are thus able to regroup with relative ease.<sup>256</sup> Despite repeated claims by governments operating drones that the weapons are uniquely well-suited to counterterror purposes, the evidence suggests that targeted killing is only effective against terrorist groups more hierarchically structured than al Qaeda—America’s number one non-state adversary.<sup>257</sup>

Why are drones not working the way they are *supposed* to? The reasons(s) appear to have something to do with *how* they are used, rather than some sort of technological shortcoming. To fully understand drones’ strategic function requires situating them within the context and history of aerial warfare. The first air attacks occurred as part of European imperial projects that targeted whole populations and their socio-economic structures.<sup>258</sup> While aerial bombing was deployed tactically during WWI, “it was in the colonies that aviation was used as a *strategic* weapon, able to decide the outcome of a conflict, rather than as tactical support for other operations.”<sup>259</sup>

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<sup>255</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 200.

<sup>256</sup> Hippler, 203.

<sup>257</sup> Cronin, “Why Drones Fail: When Tactics Drive Strategy,” 44–45.

<sup>258</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, xv.

<sup>259</sup> Hippler, 47, 58–59.

As early as 1921, British imperial administrative leadership were questioning the usefulness of air control schemes for policing British colonies. Their doubts were based on the expectation that the bombing would create unmanageable situations on the ground that required ground troop deployment.<sup>260</sup> Conversely, aerial policing proponents hoped that it would replace ground occupations.<sup>261</sup> Authors Rebecca Adelman and David Kieran explain that aerial war is not always effective in the way it is *imagined* to be, historically and currently. From WWII, through Vietnam, to Operation Desert Storm and the NATO intervention in Kosovo, strategic bombing is yet to “prove the case of its most outspoken advocates.”<sup>262</sup> However, the authors fail to take account for aerial war’s origins as a means of terrorizing colonial populations. The use of aircrafts in colonies was known as ‘police bombing’ for its policing function characterized by low-intensity conflict. In fact, colonial administrators who supported the practice appealed to the efficacy of *terror* in subduing colonized populations.<sup>263</sup> Aerial bombardment appears perfectly suited to the task when its goal is reimagined as provoking widespread terror among populations rather than tactically bombing strategically significant targets. While firebombing German and Japanese cities, destroying Vietnamese forests and villages with napalm fires, and bombing Serbian civilian infrastructure were not decisive to victory in these conflicts, these applications of aerial war succeeded in terrorizing each country’s respective populations.

Polarized opinions over drones’ strategic effectiveness must be situated within larger debates over aerial war’s effectiveness. The current debate over drone’s strategic effectiveness

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<sup>260</sup> Afxentis Afxentiou, “A History of Drones: Moral(e) Bombing and State Terrorism,” *Critical Studies on Terrorism* 11, no. 2 (2018): 301, <https://doi.org/10.1080/17539153.2018.1456719>.

<sup>261</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, xv.

<sup>262</sup> Adelman and Kieran, *Remote Warfare: New Cultures of Violence*, 5.

<sup>263</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 72.

exemplifies historically recurring tensions in the liberal theoretical tradition. Specifically, the tension between the ideas and aims of war as presented in the tradition on one hand, and its actual features and goals on the other. The incongruity between the expectation and outcome of strategic bombing reappears in drone debates. This incongruity is explained by air power's colonial history and development. Drones should be understood as contiguous with the police bombing and surveillance of colonial conflicts, past and present.<sup>264</sup> The effort to avoid ground occupations by going vertical was first attempted by colonial administrators for practical reasons that would later include pushing back against the sovereignty rights extended to former colonies. Drones are a continuation of aerial warfare's goal of replacing—and in some cases, augmenting—ground occupations in postcolonial areas. Just as aerial bombing failed to fully replace territorial occupation, drones are failing to satisfy the requirements of counterinsurgency and counterterror operations that characterize today's imperial projects.

## **Conclusion**

This review of drone scholarship supports Adelman and Kieran's claim that drone debates "tend towards intractability and re-entrenchment" even when efforts to incorporate a broad range of perspectives are made.<sup>265</sup> Drones' tendency to elicit incompatible and paradoxical conclusions permeates every attempt to intellectually engage the weapons. Even Chamayou, for all his efforts to overcome the methodological limitations that he vigorously critiques, falls into a similar trap of dualistic thinking. His concern over the ever-growing distance between drone operators and targets overlooks how drones reshape, rather than replace, their intimate relational

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<sup>264</sup> Hippler, 204–5.

<sup>265</sup> Adelman and Kieran, *Remote Warfare: New Cultures of Violence*, 8–9.

subjectivity.<sup>266</sup> This dichotomized way of thinking about drones is most apparent in drone critiques less complex than his. These critiques are often fixated on the word ‘evil’ as it applies to the weapon and those wielding it. Drones are almost personified by such descriptions, and assertions that the weapons are/not evil are abound. This good or evil dynamic is further entrenched in American use of drones in its post-9/11 war on “evil.”<sup>267</sup> The War on Terror evokes a particular eschatological outcome on account of American Evangelicalism and its embrace by the Bush administration. The (terrorist) enemy constructed by War on Terror is not a faceless and amalgamated state military, but an individual whose (im)moral commitments renders them irrationally and irredeemably *evil*. This Manichean understanding of the world long predates the War on Terror and is embedded in the logic of imperialism and its regulating legal system.

Building on the knowledge of chapter 1, this chapter emphasizes how profound and widespread are the misconceptions and misrepresentations in academic discourses about drones. Some of these errors lead to what appear as deliberately misleading conclusions. For example, drone advocates who insist the spectacular weapons are unfairly maligned often hold similarly dubious views on who may be legally targeted and for what reason. By contrast, other drone misrepresentations appear optimistic that the promising weapons have the potential to make airstrike civilian casualties a thing of the past. Such perspectives caution against drones’ wholesale embrace or rejection and represent the liberal consensus most troubled by the weapon’s IHL implications. Liberal internationalist support for ‘precise’ and ‘targeted’ drone

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<sup>266</sup> Adelman and Kieran, 8–9.

<sup>267</sup> George W. Bush as quoted in Sarah Kreps and John Kaag, “The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis,” *Polity* 44, no. 2 (2012): n. 65, <https://doi.org/10.1057/pol.2012.2>.

strikes now finds more common ground with hawkish realists who have long recognized the power-differentials that shape international law. This convergence signals, among other things, an impending crisis of legitimacy for IHL rooted in its contradictory goals and imperial past.

This chapter concludes with three observations of academic interventions in the drone debate: 1) there is a fixation on American drone use at the expense of research on other state drone use; 2) there is a disproportionate concern about drones used for targeted killing and/or their interaction with the laws of going to war (*jus ad bellum*); and 3) There is a general unwillingness to discuss IHL's actual persuasiveness and application (or lack thereof) to existing conflicts in which drones are currently used. The remainder of this dissertation addresses each of these shortcomings, beginning with a discussion of international law's history.

### CHAPTER 3: INTERNATIONAL LAW'S IMPERIAL PAST AND PRESENT

*“It was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.”*<sup>268</sup>

Antony Anghie

This chapter is a historiographic retrospective of modern international law's early iterations. It tracks the Western canon of international legal thought as it took shape through early European colonialism in the Americas and beyond. The chapter demonstrates how fundamental international legal concepts, chief among which is 'sovereignty', were appropriated from Christian theories of authority and governance and refashioned for the rulers of proto-European nation-states to provide the moral and legal foundations for their secular empires. This examination shows how these concepts transformed during the Enlightenment period while retaining their core function of enabling sovereign violence. The overarching drone paradox argument claims that the weapon' use expresses the Enlightenment liberal values of progress, reason, and a superior European Self that are defined against regression, irrationality, and the non-European Other, respectively. The chapter supports this claim by identifying points of ideological continuity between imperial Renaissance, liberal Enlightenment, and contemporary Western ideas about the authority to govern and over whom. IHL's conception and gestation directly supported earlier European imperial conflicts that sought to destroy the non-European

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<sup>268</sup> Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006): 742, <https://doi.org/10.1080/01436590600780011>.

Other with ever more advanced weapons and reconstitute Them in its own image. These attitudes endured and would go onto form the ideological kernel of IHL's constitutive texts and documents. IHL's toleration for 'civilizing' violence enables drones to act as a vehicle of imperial power to control wealth, resources, and populations today.

The earliest forms of what could be described as an 'international law' were efforts to regulate violence between political actors that began some two thousand years ago. Attempts to theorize and codify these relations are located in familiar texts, such as those authored by Sun Tzu, Thucydides, and Cicero, as well as religious works, such as Saint Augustine of Hippo's personal writings, Saint Thomas Aquinas' scholarship, the Quran, and the Torah. All these works predate any current understanding of a nation, state, or international legal community, and yet greatly influenced the conventional wisdom concerning war's regulation. The reason for their continued resonance in international treaty law is not accidental and reflects the close connection between claims of divine authority and an earthly right to rule. For centuries, the concept of empire mediated between God's spiritual imperium over heaven and its extension onto the earth. Early international legal theorizing gave meaning and content to these empires by using the related concept of sovereignty for interpretation.

The idea of sovereignty is the foundational principle that defines contemporary organized interactions between political communities. All theories of international relations engage with the notion of sovereignty—establishing continuity in the discipline's development. The concept is possessive, relational, and exclusionary: one's own sovereignty necessarily exists in relation to another's, and wherever a claim to sovereignty is made, so too is an exclusion from it. International relations theory and practice demonstrates that eligibility to claim sovereignty and the form it takes is always contested. The concept immediately implicates related questions, such

as: What authority arbitrates sovereignty claims? Who is found to possess the right to rule? Who is not? Over whom and what does this right extend? Why or why not? Put simply, the answers to these questions will always reflect which actor(s) have accumulated ideological and/or material power vis-à-vis the prevailing international governing institutions. Consequently, sovereignty has been constantly reformulated over time to reflect shifting power interests and identity formations.

This chapter limits its consideration of sovereignty to its integration within the European intellectual tradition and expression through state practice. The analysis argues that European Christian notions of the divine sovereign's right to rule were explicitly invoked by human rulers in support of their own claims to govern over different peoples and places. While some European Renaissance theorists attempted to reconcile a divine and universal natural law with that of independent princes within the Christian commonwealth, others aligned themselves with increasingly independent and ambitious leaders advancing their own new legal visions. The justifications for this authority were secularized during the Enlightenment, but the fundamental idea of sovereignty remained, and its authority was shifted from God to individual 'sovereigns', the 'nation', and, ultimately, the 'state'.

While it *appears* that international law's development during the Enlightenment featured innovative thinking and dissent among its theorists and practitioners, it was actually the *pre*-Enlightenment struggles between competing imperial powers and their respective Christian denominations that established the parameters for these future debates. In this sense, the Enlightenment's liberal deliberations were imbued with the sensibilities and intellectual proclivities of pre-Enlightenment European society. All 'modern', post-Enlightenment international law shares a commitment to the liberal tradition and its accompanying assumptions

about what the world *is* and *how* it should be changed.<sup>269</sup> Namely, that nature provides for an ordering of the world and its peoples. This order naturalizes and legitimizes the hierarchies and inequities between political communities irrespective of whether it is revealed through divine expression or secular scientific inquiry.

This chapter examines the development of international law's character and content by analyzing the theories and historical circumstances of its preeminent thinkers. It proceeds by chronologically connecting these theories to their articulation in international legal norms and texts. These ideas emerge at historical junctures beginning in the Middle Ages and conclude with the present moment.<sup>270</sup> The chapter reveals that key legal concepts like sovereignty are viewed in mainstream international legal thought as being defined by broader conceptual oppositions, such as the naturalist and positivist legal traditions, that necessarily require the triumph of one over the other. However, much like the unstable dichotomies that define the international legal precepts considered thus far (e.g. wartime and peacetime, combatants and non-combatants, etc.), these seemingly incompatible concepts can only exist in relation to one another. Rather than being in irreconcilable opposition, they share an imagined idea of international relations with common fundamental ontological categories that expose their apparent disputation as a false dilemma. This imagined idea is an interpretation of a social reality that is communicated in international law's language – past and present. The international legal tradition did not emerge

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<sup>269</sup> Martti Koskenneimi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 5.

<sup>270</sup> This method is similar to author Martti Koskenneimi's "deconstructive" analysis of international legal discourse in which he takes explicit arguments and moves to the structure that forms their assumptions and doctrines. See: Koskenneimi, 7.

wholly formed and was continually contested and re-imagined to suit changing realities, all the while presenting itself as a natural and objective account of global political behaviours.<sup>271</sup> The chapter argues that this idea of international relations is intrinsically bound up with the Enlightenment values of science, objectivity, progress, and the idea of the West in contradistinction to all things non-Western in thought and origin. Crucially, the Western *nations* envisaged by international relations—as a discipline and practice—exercised disproportionate influence over the hegemonic institutions of international law that continue to inform its interpretation and application today.

The chapter sections are as follows. The first section introduces international law's earliest iterations, highlighting key debates among its formative theoretical schools. This section challenges dominant accounts of international law's coalescence and retells it with a narrative highlighting concurrent imperial expansion and geopolitical rivalries. The second section identifies unique events that have taken on mythic significance in the academic canons of international relations and international law. The third section considers the implications of the first two on international law's ultimate institutional expression. It specifically examines how early European governing practices relied on a religiously informed understanding of the world and the passage of time that was transformed and secularized during the Enlightenment. The final section concludes with an explanation of how these narratives and their theoretical tradition established a legal edifice for empire-building that imbues international legal institutions to this day.

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<sup>271</sup> Koskenniemi, 9–12.

## 1.1 INTER-NATIONAL—WHICH NATIONS?

The standard view of international law today is that states create it through formal treaties or long-established customary practices.<sup>272</sup> Customary practices are considered to be legally compelling because they are developed and refined over time.<sup>273</sup> By contrast, the advent of international treaties—despite having existed in some form or another for thousands of years—is temporally fixed. International treaties’ emergence is historically imagined to have coincided with the creation of international lawyers, best exemplified by the sixteenth century Italian jurist Alberico Gentili and his seminal work, *De iure belli (The Law of War)*. In this text, Gentili asserted a positive international law and rejected the natural legal theory of his Spanish contemporaries known as the ‘Salamanca School’. At the heart of these debates were religious sectarianism, duelling monarchic loyalties, and the question of whether sovereign princes derived their right to rule from the divine or from ‘the people’. Despite the weight afforded to these scholars’ abstract differences, all their determinations were informed by their material conditions and found common cause in justifying the sovereign’s right to wield state violence through war. Constraining war-waging power to sovereigns prefigured future international legal peremptory norms that limit the legitimate use of violence to formal states and render sub-state and non-state actor violence *de facto* illegal.

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<sup>272</sup> Jean L. Cohen, “Whose Sovereignty? Empire Versus International Law,” *Ethics & International Affairs* 18, no. 03 (2004): 1, <https://doi.org/10.1111/j.1747-7093.2004.tb00474.x>.

<sup>273</sup> Customary international law is considered to be the law unless otherwise prescribed by a particular treaty. See: Preamble of “Vienna Convention on the Law of Treaties (1969),” 1969, <https://doi.org/10.1017/cbo9781139152341.005>.

## International law's 'prehistory'

International law is conventionally understood as being 'founded' by Dutch scholar Hugo Grotius in the seventeenth century. The ideological reason for this claim is his historical proximity to the 1648 Peace of Westphalia—presented in the mainstream international relations tradition as the monumental moment European sovereigns officially eschewed religious hierarchy for a social contract formed between sovereign *states*.<sup>274</sup> Such broad divisions in the academic and professional literature are maintained here for the purpose of representing the debates as they occurred. For this reason, the period of international legal theorizing prior to Grotius is referred to as international law's 'prehistory'.<sup>275</sup> Key thinkers of this prehistory are the Salamanca theologians, most notably Francisco de Vitoria, who embraced the Catholic teachings of Thomas Aquinas that they applied to questions of jurisdiction, the laws of war, and the legal basis of Spanish conquest in the Americas. Grotius, Gentili, and the Salamancans' adaptations of early JWT constitute the theoretical and textual basis of modern IHL.

The Salamancans narrowed war's moral implications to the classic JWT issues that preoccupied Aquinas, such as whether a soldier sins when he wages war at the command of a sovereign prince. They ultimately determined that a prince—and by extension, the state—possesses the unique right to declare war. This conclusion effectively addressed the uncertain

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<sup>274</sup> Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, *Beyond the Anarchical Society* (Cambridge: Cambridge University Press, 2002), 2–3, <https://doi.org/10.1017/cbo9780511491474>; The Treaties of Westphalia's misrepresentation and mythologizing are the subject of extensive critique and are not taken up here. For succinct discussion, see Anne Orford, ed., *International Law and Its Others* (Cambridge: Cambridge University Press, 2006), 7–8.

<sup>275</sup> Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011), 297–99, <https://doi.org/10.1093/acprof:oso/9780199599875.001.0001>.

question of ‘right authority’ under *jus ad bellum*. As for the question of *jus in bello*, the Salamancans found that a soldier does not sin when following the authority of a prince’s law. Further, Vitoria instructs that what is now described as collateral damage be avoided unless military victory is in doubt, in which case indiscriminate violence is warranted. Lastly, Vitoria determines that soldiers are morally correct to maintain obedience to a prince who knows that war they wage has an unjust cause. Vitoria’s overriding concern for soldiers’ souls ultimately brings him to the conclusion that it is possible for two parties to wage a just war if they do so in good faith (i.e., provable ignorance of fact or law). It is the *authority* to wage war and not its *cause* that determines its un/just character.<sup>276</sup> Thus, a war may be just, even if its cause is not.

The Salamancan’s logic locates the authority to wage a just war exclusively with the divine. A Catholic prince can wage a war to convert an infidel sovereign’s subjects to Christianity *because* he is a vessel of divine will and authority. A prince cannot, in their capacity as an individual subject, embark upon a war without just cause. Such a prince would cease being a sovereign and become a tyrant instead. However, the Spanish theologians do not provide any clear means by which this distinction should be determined, even when a war was manifestly unjust. The default interpretation is that a sovereign’s action is *itself* evidence of the law’s just content *because* they are a sovereign. Accordingly, wars were not seen as conflict between two symmetrical sovereignties (as they would later be regarded), but as “public procedure against a wrong-doer” where one side’s cause is necessarily unjust.<sup>277</sup> Any dispute dealt with by a sovereign was always understood as an act of divine and cosmic justice that transcended a

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<sup>276</sup> Kingsbury and Straumann, 164–69.

<sup>277</sup> This provides a circular reasoning in which sovereign action is just because it is done by a sovereign. See: Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 101–3.

sovereign's individuality. This meant there were no *a priori* immutable limits on a righteous sovereign's earthly authority.

Gentili's criticisms of the Salamanca scholastics responded to the "obvious weakness" of this conclusion.<sup>278</sup> He indicted what he perceived as Spain's goal of a 'universal monarchy', as well as the hazards of investing a single man (i.e., the pope) with the right to determine the Christian commonwealth's collective interest. Gentili's theorizing on the laws of armed conflict hollowed out JWT's moral reckoning and substituted a utilitarian calculus in its place. Whereas the Salamanca scholars had gone to great lengths to justify a system of private property, rights of travel, and rights of trade, Gentili simply asserted an absolutist power of government that bore no obligations to papal authority or its particular moral foundation. Gentili believed princes in and of themselves possessed a divine right and that they could be equally correct in their perceived just cause—thus hollowing out the moral content of war.<sup>279</sup> It is this view that allied him with the King of England and the reorienting of sovereignty and property that accompanied England's Protestant conversion and expanding global trade regime.<sup>280</sup>

Europe's 'discovery' of the Americas presented the first serious challenge to papal power's ability to dispense with new lands and peoples. Spain's claim to sovereign rights over the Americas against that of the English and Dutch put them at odds with not only these other European powers but with Protestantism and the capitalist transformation of their economies. The Spanish and Portuguese undertook their expeditions with papal backing that Protestant privateers refused to recognize. This undermined the Pope's authority to determine what was in

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<sup>278</sup> Koskenniemi, 103.

<sup>279</sup> Koskenniemi, 106.

<sup>280</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 299–303.

the common interest of the Christian commonwealth, and, by extension, God's own authority. It was within this broader geopolitical context that international legal theorists were set to work.<sup>281</sup>

### **The Grotian 'revolution'**

Grotian international law petitioned a positivist law of war for the seventeenth century.<sup>282</sup> Grotius was anti-papist, believing that princes should regulate church and state relations, and for the secularization of state officials.<sup>283</sup> For these reasons, Grotius is often contrasted with the Catholic Vitoria. However, the two shared an argumentative structure that relies on the persuasiveness of a single authority, irrespective of its particular identity. This authority and its normative conclusions are accessible through divine revelation, in the case of Vitoria, or objectively deducible from first principles, in the case of Grotius. The two men resolved that while the law's content is contestable, the authority of its source is not.<sup>284</sup> This common conclusion remains instilled in international law's self-understanding and reproduction. There is an acceptance that international law's authority is singular, and that novel principles and legislative efforts are bound by convention to ground their ideological source in existing, foundational precepts.<sup>285</sup>

Grotius' great departure from the Spanish scholastics was motivated by his concern for just war principles to be applicable to all wars, regardless of their 'justness'. He grasped the frailty of

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<sup>281</sup> Kingsbury and Straumann, 303–5.

<sup>282</sup> Kingsbury and Straumann, 316.

<sup>283</sup> Kingsbury and Straumann, 321–22.

<sup>284</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 95–99; Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 167.

<sup>285</sup> For example, the Preamble to Ottawa Treaty states that the "State Parties [...] Stressing the role of public conscience in furthering the principle of humanity [...] urging the international community [...] Basing themselves on the principle of international humanitarian law." Note the invocation of the 'principle of humanity', the so-called 'international community', and a 'principle of international humanitarian law'—all of which are allusions to established historical international legal precepts. See: "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction," 1997.

the just/unjust war dichotomy in instances where only one party may have ‘just cause’, and the need to preserve JWT’s persuasiveness. Grotius’ solution was to augment war with an additional category: *formally* legal wars. Such wars may be unjust but still legal, and, as such, combatant conduct is still subject to JWT’s dictums. According to Grotius, *all* wars fought between sovereigns are legal. This crucial pivot worked to establish sovereign rights as neither conceptually nor practically contingent upon Church endorsement. Grotius’s innovation was managing to cleave principles of divine action from the practical authority to wage a war.<sup>286</sup>

Grotius was not alone in his efforts to wrangle princes’ authority from Church hands, nor was he pulling these ideas out of thin air. Both Grotius and Gentili drew from French theorist Jean Bodin’s concept of sovereignty to argue the state is an agent with a *legal* standing in international relations that permitted it to declare and wage war. Bodin’s articulation of sovereignty was bound up in *territorial* governance that invested the ruler with an autonomy “responsible only to God.” In Bodin there is again compatibility of a divine and natural law with the absolute actual power of a monarch.<sup>287</sup> With the French Revolution, international law’s religious content is hollowed out, and is reconstituted as the positive international law proposed by Grotius.<sup>288</sup> It is this positivist quality that imbues contemporary international law’s treaty-based organization, stated most clearly in the 1969 Vienna Convention on the Law of Treaties.<sup>289</sup> Linking sovereignty, legal standing, and positive law (as treaties) to state actors is a crucial

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<sup>286</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 103–4.

<sup>287</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 307.

<sup>288</sup> Kingsbury and Straumann, 316.

<sup>289</sup> The treaty begins by “Considering the fundamental role of treaties in the history of international relations, Recognizing the ever-increasing importance of treaties as a source of international law.” See: “Vienna Convention on the Law of Treaties (1969).”

formulation that precludes non-state actors from fully participating in international law. The consequences of circumscribing legal participation to ‘states’ are illustrated by the historical treatment of pirates and contemporary treatment of terrorists under international law.

### **Pirates and exclusionary sovereignty**

The issue of piracy and international law prefigured the future logic and legal mechanisms by which no European governments and territories would be refused sovereignty. The Salamanca School, Grotius, and Gentili all found common cause for rejecting pirates standing under international law, albeit for dramatically different reasons. The case of pirates further illustrates how the supposedly diametrically opposed arguments proposed by different schools of international legal thought actually shared a great deal more in common than traditional accounts suggest.<sup>290</sup> While the premises change, their relationship and overall argument structure are strikingly similar, as are their conclusions. Taking up pirates as a heuristic device assists in recasting international law’s historical trajectory, as well as those who were sidelined and excluded in the process. The implications of being denied the full participation (i.e., state status) in international law appear acutely in IHL for both post/colonial states and nonstate actors, where they are afforded fewer protections from and privileges to engage in armed conflict—the workings of which are explored in chapter 4.

Author Amendeo Policante chronicles campaigns of violence against pirates during the eighteenth century, known as *persecutio piratarum*, connecting it to future forms and logics of imperial violence.<sup>291</sup> Catholic ontology defined earth’s inhabitants, pirates or otherwise, by their

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<sup>290</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 181.

<sup>291</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept*, *The Pirate Myth: Genealogies of an Imperial Concept* (New York: Routledge, 2015), 5, 28–29, <https://doi.org/10.4324/9781315757223>.

membership within or without the Christian commonwealth. This extended to the medieval Catholic international legal consensus, also known as the *res publica Christiana*, in which the sea was considered shared and pirates were initially granted some standing comparable to national sovereigns.<sup>292</sup> Catholic imperium was embodied by Spanish and Portuguese imperial claims over the Atlantic Ocean—a historically understood common space. However, the Spanish and Portuguese monarchies’ asserting imperial claims in the Americas did so in the name of the pope and were threatened by both the destabilizing insubordination and wealth-plundering of Protestant nations’ pirates. English privateers in the Americas were consequently branded enemies of the *res publica Christiana* for challenging the Church’s singular imperial authority. By challenging this imperial right, English corsairs became not only rogues but “enemies of the entire Christian system of international law,” and by extension, an enemy of mankind.<sup>293</sup>

Grotius and Gentili called for excluding pirates from a public international law using arguments that were, once again, distinct yet similar to those of their Catholic contemporaries. While the Salamanca School’s argument was in service of preserving an old order, Grotius and Gentili posed theirs in hopes of establishing a new one. Pirates lacked the moral and political status they believed sovereign states possessed and could consequently not be tolerated within this emergent state system.<sup>294</sup> This system expressed itself at sea as the ability of sovereigns to engage in trade with merchant ships. Even though the sea remained outside the legal jurisdiction of a single state, it remained subject to common, *international* principles that protected the seas as a trade route. A new kind of universalist order was required, and the authority of the law of

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<sup>292</sup> Policante, 136.

<sup>293</sup> Policante, 29–33.

<sup>294</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 174.

nations, conceived of and enforced by a *community* of nations, would usurp that of the *res publica Christiana*. The following century was marked by wars in the Atlantic that revealed the internal weakness of the laws of armed conflict when challenged from the margins—as was the case of pirates.<sup>295</sup>

The parallels of historical piracy and contemporary ‘terrorism’ are both discursive and legislative. The Salamanca School and positivist theorists found common ground in what they considered to be the fundamental threat posed by pirates, namely, their uncivilized barbarism. Regardless of whether that world is organized under divine imperium or secular rule of law, pirates were a chaotic force that threatened all nations and needed to be stopped at all costs. Pirates were ‘de-nationalized’ much like the modern ‘terrorist’ and subject to a legalized lethal violence in accordance with a *universal* jurisdiction.<sup>296</sup> Preceding chapters in this dissertation describe how suspected terrorists may be *legally* targeted by drones with little regard for national boundaries, much like a pirate in open sea. Both categories of criminals remain under a universal jurisdiction today that must be understood in relation to historical and contemporary strategies of imperial violence and international law writ large. Like a pirate, the ‘uncivilized’ terrorist is presented as refusing to abide by international law. They are thusly seen as a threat to the same legal system and are subsequently incorporated into it, but not as an equal. Neither pirates nor terrorists (according to American laws of engagement) are recognized as possessing a legitimate combatant status and can be hunted for a bounty.<sup>297</sup> This repressive inclusion creates legal mechanisms by which attacks against them are not only compatible with the legal framework but morally

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<sup>295</sup> Kingsbury and Straumann, 174–75.

<sup>296</sup> Policante, *Pirat. Myth Geneal. an Imp. Concept*, 85–86.

<sup>297</sup> Policante, 99–101.

supported by it. Imperial violence is most ruthlessly pursued at the margins against those who constitute the penumbra of the law, however defined at the time.

## 1.2 DIVINE EMPIRE AND SECULAR DOMINION

When Spain and Portugal's Catholic monarchs first encountered the 'New World' and its surrounding open seas, neither was previously considered to be under the authority of the Church or an individual sovereign. The Church's metaphysical empire was territorially expressed by the dominions of its affiliated sovereigns. However, these dominions were definitionally bound by strict territorial demarcations. The Church's desire to ensure undisrupted trade and travel to and from the Americas required it expand the area over which it claimed a right to impose order. This in turn required reimagining existing ideas of sovereignty as well as introducing new ones. Rather than constituting these new imperial spaces as *outside* of the civilized world and its governing legal order, socio-legal categories were carefully crafted to bring *inside* the law imperial policies (including colonialism) that would otherwise be unacceptable in the imperial homeland. These colonial encounters disrupted the existing, unstable notions of European sovereignty and catalyzed their improvised philosophical reimagining. In the case of sixteenth century emerging European empires, "[t]here was probably no other empire building in history in which the legal and moral justification played such an important part."<sup>298</sup> This claim is evidenced through engagement with the arguments located in Vitoria and his contemporaries' writings, which fabricate a far more sophisticated legal foundations for empire than a simple

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<sup>298</sup> John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017), nn. 50–3.

right of conquest.<sup>299</sup> This imperial past is, according to TWAIL scholars, “ingrained in international law as we know it today.”<sup>300</sup>

### **Competing authorities**

Author Anne Orford adopts Carl Schmitt’s argument that modern sovereignty is “a secularized notion of a theological concept” in which the ‘people’ have displaced God as its source.<sup>301</sup> Writing in 1613, Spanish theologian Francisco Suarez provides this demarcation by distinguishing between temporal (i.e., earthy) and spiritual governments. He determines that it was not possible for these two powers to be equally balanced, and whenever the distinction between the two broke down the spiritual power would intervene in the secular realm to ensure its welfare. Most important to secular rulers was that these interventions on behalf of spiritual welfare could take the form of violent punishment and warfare.<sup>302</sup> Thus, if a sovereign found themselves at odds with the Church it could prove utterly disastrous for them. However, if these two powers were in harmony, there was very little they could not theoretically justify in their supposed civilizing mission to convert those outside the Christian Commonwealth.

Questions about the Spanish state’s claim to dominion over the territory and ‘barbarian’ peoples of the ‘New World’ were raised by its own scholars who adopted the idea of a *jus gentium* (law of nations) but reached varying conclusions about its operations. In contrast to Vitoria, scholastics like Suarez adhered to Medieval notions of spiritual power, arguing that Spanish rights to conquer were dependent upon papal backing. He argued that only priests and

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<sup>299</sup> Reynolds, 50–53.

<sup>300</sup> James Thuo Gathii as quoted in Anne Orford, “The Past as Law or History? The Relevance of Imperialism for Modern International Law,” 2, 2012, 1.

<sup>301</sup> Orford, *International Law and Its Others*, 9–10.

<sup>302</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 304.

not lawyers could answer the question of whether dominion could extend to people not already regarded as subjects of the Spanish Crown. There was a positive *jus gentium* that coexisted with *jus naturae* (natural law), and the former flowed from the latter. A Christian prince's sovereignty came from the commonwealth's God-given sovereignty. By contrast, the pope's power is derived directly from God and can thus subject a prince to his discretion and (indirect) intervention.<sup>303</sup>

While Vitoria agreed with Suarez that a prince does not possess a sovereignty capable of removing that of another, he inverted the power configuration. For Vitoria, the *jus gentium* was a natural law ascertained by reason that replaces the papal administration of divine law. Natural law would now be administered by sovereigns.<sup>304</sup>

### **Serving both church and state**

Vitoria's relocating natural law's conduit from the pope to the sovereign is why it is possible to claim that Vitoria was the first to "found a positive law of peoples on the basis of natural law", and why he is included in traditional accounts of international law's origins.<sup>305</sup> This shift coincided with his belief that *jus gentium* was an exception to the Christian commonwealth's collective ownership and instead existed between individual sovereigns. For Vitoria, sovereignty was effectively a scaled-up form of private property in which all actors (including those in the New World) possessed newly created rights to travel and trade. Vitoria's *jus gentium* offered theological support for Spanish commerce and aggressive territorial acquisition as part of its empire-building.<sup>306</sup>

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<sup>303</sup> Kingsbury and Straumann, 303.

<sup>304</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 20.

<sup>305</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 167.

<sup>306</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 20–21.

Unlike many of his contemporaries that considered the Americas' population as heathens and animals without rights, Vitoria argued for their humanity and participation in the same universal natural law that also bound the Spanish. Spanish and 'Indian' sovereignty were coterminous, rather than competitive, and in this sense, appeared to participate in the same system as equals.<sup>307</sup> However, and perhaps most importantly, this did not mean their respective sovereign rights were symmetrical or free from intervention. Cross-cultural comparisons determined the indigenous peoples had failed to politically self-organize in a civilized (i.e., Catholic) manner. Conveniently for the Spanish, Vitoria's theory assumed that Spain's particular dominion was the model on which all other political organizing should be based. Vitoria's interpretation of the *jus gentium* demanded that Spain rule in the common interest towards a general welfare, and in the case of the Americas' inhabitants, the Spanish should act as trustees and establish a correct government over them.

From this determination followed two important logical implications. Firstly, it ontologically distinguished between Spanish society and that of the local inhabitants such that two similarly distinct ideas of governance would also be required. Secondly, it opened up procedural processes by which local populations could be (and indeed were) subjected to unlimited Spanish military violence.<sup>308</sup> Vitoria rejected the Church's and Spanish Crown's shared belief in the public function of *divine* punishment through just war fought by Catholic sovereigns, and instead relocated the correcting of a wrong in the sovereign themselves. In contradistinction to Suarez's argument that spiritual power should intervene over secular

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<sup>307</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 302–3; Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 21.

<sup>308</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 15–16.

authority in distinctly temporal relations, Vitoria found papal jurisdiction to end where secular sovereign authority began, namely, with property. The Spanish could not deny the existence of the local inhabitants' property rights simply *because* of their status as non-believers. However, this status was evidence of the Other's cultural deficiency and need for correction. Vitoria created both an opportunity and moral duty for Spanish monarchs to subjugate the native American inhabitants and appropriate their lands.

As a theological scholar, Vitoria's legal formulation officially recognized the universality of divine law but limited it to exclusively spiritual issues. Natural law and not papal authority informed relations between the Spanish and Americans as between sovereigns, including questions of ownership and property. However, under the same natural law, Spain's cultural practices were taken as the highest possible form—particularly their Christian character. Consequently, Catholic conversion should be aggressively pursued, and any resistance would constitute a Spanish self-defence *casis belli*.<sup>309</sup> Through the conversion process America's 'Indians' would become Spanish subjects that were definitionally more fulfilled, civilized humans.

This logic would be redeployed in the Enlightenment, where it would wear the cloak of liberalism rather than Catholicism. For this reason, Vitoria's line of argument is presented in orthodox international legal discourse as relatively liberal compared to the race-based arguments of some of his contemporaries.<sup>310</sup> A TWAIL perspective, by contrast, notes how his universalist formulation was simultaneously cosmopolitan and imperial.<sup>311</sup> For Vitoria, Spanish imperial

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<sup>309</sup> Anghie, 22–23.

<sup>310</sup> Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," 742–44.

<sup>311</sup> Policante, *Pirat. Myth Geneal. an Imp. Concept*, 33–35.

sovereigns were agents of natural law. The liberal cosmopolitanism introduced most famously by Kant during the Enlightenment would also be paired with imperialism during the second wave of European imperialism in the late nineteenth century.

Irrespective of their ‘schools’, the early theorists’ arguments did not explicitly distinguish between the concrete and the abstract, nor description and prescription. They did not attempt to hide the fact that they were responding to new religious, political, and legal realities as they happened. Yet for all the similarities these theories had to those dominant during Era of Enlightenment, their failure to effectively distance their subjective and immediate circumstances from their scholarship disturbed the Enlightenment value of objectivity. Objectivity was needed to differentiate theory from policy, and subordinate what is subjective to eternal rules and principles that exist above and beyond what is particularized.<sup>312</sup>

The traditional international relations and legal theories that materialised from the Enlightenment unambiguously asserted this objectivity in relation to the states they analyzed. International law steadily distanced and disinterested itself from its subjects that it presumed were roughly equal in their relative characteristics and strength. This detachment would give it the appearance of a neutral arbiter of adversarial relations—none more so than armed conflicts. Its subjects became less human in their appearance and were no longer represented as individual sovereigns but as the institution of ‘the State’. By limiting its considerations to states, the law was simultaneously empowered to gatekeep who/what was a state and consequently who/what could make claims vis-à-vis legal regimes. Those actors that did not meet the criteria for

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<sup>312</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2.

statehood, namely, individuals and non-European political entities, were found disproportionately without protections or rights.

## 2.1 INTERNATIONAL RELATIONS AND DISCIPLINARY ORIGINS

Mainstream international relations theory is committed to modern epistemologies and ontologies. What is considered ‘modern’ is a secular set of “sensibilities, concepts and practices producing a kind of human and a set of social institutional arrangements.”<sup>313</sup> What is modern is also synonymous with what is considered ‘European’ and was articulated earliest in the liberal theory that developed during the Age of Enlightenment. Enlightenment political philosophy was heavily influenced by the developments of the Scientific Revolutions, particularly its positivist epistemology that used logic and technology to guide its research methods and inductive forms of reasoning. These epistemologies were integrated into concurrent imperial endeavours. Author April Biccum describes how “European political and scientific thought is inseparable from imperial history” through its connection to theories of property rights and scientific projects.<sup>314</sup> Through this development, spiritual and faith-based explanations of the natural world were replaced by secular, reason-based explanations that claimed universal truths. International relations’ theorists became self-styled scientists attempting to describe, explain, and predict different political communities’ interactions. International order would be divined through reason and applied through the technology of law. This required creating a lexicon for categorizing these behaviours and standardizing the subjects engaging in them. The discipline of

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<sup>313</sup> Anna M. Agathangelou and Kyle D. Killian, eds., *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives* (New York: Routledge, 2016), 11.

<sup>314</sup> April Renee Biccum, “What Is an Empire? Assessing the Postcolonial Contribution to the American Empire Debate” 20, no. 5 (2018): 707.

international relations consequently emerged via two foundational ontological ideas: the secularized nation-state and the international system in which it exists.

The following section explains how each of these ideas came to rise, the necessary exogenous and endogenous factors that contributed to it, and international law's contributions to their ascendance. It gives special attention to what are referred to as 'imperial' or 'divine' temporalities from Medieval European thought that were secularized, universalized, and reimagined so as to be integrated into Enlightenment ways of understanding global politics and international law.<sup>315</sup> This refers, specifically, to a belief that technological progress is inherently good, that humanity is on a path to an ultimate and peaceful salvation, and that war, when waged by the correct people(s), is an act of divine providence that is eminently justifiable in both ethical and legal terms.

The proceeding analysis recasts international law's history by highlighting specific historical junctures responsible for fabricating what is now recognized as the international relations discipline. The section demonstrates that the 'state' and 'international system' were not the product of a natural evolution in global politics. Rather, they were the result of concentrated efforts independently undertaken by late-Renaissance and Enlightenment European rulers and thinkers in pursuit of their unique political interests. These discrete interventions became gradually more coordinated and centralized over time and place. The values infused in these interventions represented a nascent liberal hegemony that, among other things, always further sharpened distinctions between the (European) 'Self' and (non-European) 'Other'. The unstable, emerging European identity was continually reformulated in an attempt to reconcile the recurring

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<sup>315</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*.

tensions inherent to international relation's liberal theorizing that were introduced in preceding chapters.

### **Disciplining time**

This chapter's revisit of international relation's origins and outcomes reaffirms the larger contention that there is no one, single source of international law. It has so far pinpointed moments in time when key contributions to the discipline occurred—most of which are lifted directly from traditional doctrine. These significant moments were reconsidered and their respective roles in developing the discipline retold to establish their mythological origins and narratively important function. Orthodox international relations theories rely on these moments as narrative signposts to provide continuity and the appearance of a logic-driven development. This reliance is largely unacknowledged, despite the fact that the discipline's creation and maintenance is a function of time (and place). By contrast, postcolonial theorizations of time situate it within its ontological, epistemological, and institutional arrangements, which privilege Eurocentric temporalities (as lived experience) and their accompanying value sets.<sup>316</sup>

A noted feature of European Enlightenment theorizing is a linear understanding of time and its passing. Its passage constitutes literal and figurative progress that moves the earth and its inhabitants closer to a final, perfected state in the image of the European. Some thinkers explicitly integrated this into their theorizing. One such example is Kant, who found time to be a fundamental dimension and environment through which all thought ebbed and flowed.<sup>317</sup> Kant's understanding of time was indeed central to his argument that different types of progress would track with the

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<sup>316</sup> Agathangelou and Killian, 1.

<sup>317</sup> Keya Ganguly, "The Cambridge Companion to: Postcolonial Literary Studies," ed. Neil Lazarus (Cambridge: Cambridge University Press, 2004), 163, <https://doi.org/10.1017/CCOL0521826942>.

passage of time. Hegel's theory of history took up Kant's presentation of European time and universalized it to the degree that it became a value neutral variable.<sup>318</sup> Kant and Hegel are remarkable for their intentional theorization of time. These thinkers are subject to postcolonial critiques not because they theorized time, but because they did not do so in a manner that was not self-aware or reflexive of their personal historical circumstances. They are further critiqued for the far-reaching effect of their theorizing within the Continental philosophical canon that defined modern European thought, including political and legal theory.<sup>319</sup> This is reflected in traditional international relations theory, which understands global politics' past, present, and future as unfolding along an *a priori* trajectory punctuated by defining moments, e.g. Treaties of Westphalia for its recognition of secular sovereign power, the League of Nations' establishment for its goal to maintain peace, the first Gulf War for its invocation of 'collective security', etc.

The continued persuasiveness of customary international law as a legal source also continues to reproduce universalized Eurocentric temporalities. This reproduction narrowly demarcates the imagined European 'customs' of a period to which it then confers great significance. The customary practices of non-European polities across time are not legally relevant. Despite not being explicitly recognized, liberal theory's teleological narrative of time is pronounced in international relations and international legal theories. Assigning names and categorizing historical eras is a retrospective exercise through which international law literally creates its own histories and futures. Values are then ascribed to these isolated moments in time as is their relationship to one another—constituting a normative temporality.<sup>320</sup> Examples of this include the 1648 Peace of

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<sup>318</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*, 13.

<sup>319</sup> Ganguly, "The Cambridge Companion to: Postcolonial Literary Studies," 163–70.

<sup>320</sup> Ganguly, 162.

Westphalia (for reasons already explained), the 1949 Geneva Conventions for their scope and magnitude, and the 2011 Libyan NATO operation for first claiming ‘Responsibility to Protect’ as legal grounds for intervention. Liberal international theory projects that time passes as part of global political trajectory that ‘ends’ with world peace. For instance, the United Nations Charter’s own purposes includes developing “friendly relations and the achievement of cooperation among nations.”<sup>321</sup> That the United Nations Charter—qua liberalism’s pacific promise writ large—fails to be universally recognized or enforced is always cast by liberal theory a *temporary* state that is part of a larger advancement towards its complete realization in the future. Such a fatalistic, inflexible understanding of its past and present functions both arrests international law’s potential future development and justifies its most egregious violences.

International law has always presented itself in an imagined, idealized form despite being mainly the product of very real political violence. The developmental narrative that saw spiritual law brought down from the heavens and reinvested in the hand of earthly sovereigns never abandoned its divine temporal articulations. Divine temporality is eternal and unchanging, in contrast to erratic and contingent human temporality. This provides stability that, according to Agathangelou and Killian, “identifies, explains and naturalizes hierarchy.”<sup>322</sup> The international legal project that emerges from the Enlightenment depends wholly on European ideas of time that are both secularized and transcendent (i.e., not explicitly religious yet unbound by the human limitations). When this *idea* of time is introduced by an imperial regulatory power as part of its institutional and administrative structures it is implicated in the empire’s maintenance and

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<sup>321</sup> As attributed in the Preamble of “Vienna Convention on the Law of Treaties (1969).”

<sup>322</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*, 9.

reproduction. This universal time in both its religious and secularized form became hegemonic across the early (sixteenth century) and later (nineteenth century) imperialism that midwifed other related concepts like ‘progress’.

The idea of progress—civilizational, technological, legal, or otherwise—is temporal. There must be a spectrum between ‘backward’ and ‘forward’ in order for progress to take place. Indeed, the *place* where this progress is (or is not) undertaken is one of the international relations’ primary preoccupations. The high-level separation of time and space is an oft-overlooked example of how international relations creates its analytical axes through dichotomizing acts. The discipline’s concern with territorial place—the defining feature of the state—prioritizes space over time, and for this reason completely obscures the latter’s presence. This obscurity is augmented by the array of temporal metaphors used, which are masked or spatialized so as to hide their function. For example, the United Nations Charter reaffirms several times its commitment to promoting “conditions of economic and social progress and development,” in “territories whose peoples who have not yet attained a full measure of self-government” (i.e., colonial, mandatory, and administrative territories).<sup>323</sup> This spatialized “political, economic, social, and educational advancement” is then assigned a temporal status that describes these spaces as being in “varying stages of advancement.”<sup>324</sup> It is to this end that the United Nation’s imperial powers “assume responsibilities for the administration of territories” not yet independent as part of a “sacred trust” obligation.<sup>325</sup>

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<sup>323</sup> “United Nations Charter,” 1945, chap. IX, art. 55, 73.

<sup>324</sup> “United Nations Charter,” 1945, chap. IX, art. 73.

<sup>325</sup> “United Nations Charter,” chap. IX, art 73.

Representing divine temporality in a secular liberal guise gives the appearance of objectively ascertained differences, the dynamics of which are essential for violent corrective interventions.<sup>326</sup> These interventions can take the form of direct imperial administration, economic coercion and extraction, or aerial military operations—all of which show the continuity between imperial and international institutions and their systems of exploitation and control.<sup>327</sup> Interventions made in the name of religious difference during law’s prehistory were rebranded with a less recognizably moralistic normative order that used the language of ‘progress’. In order for one space to be a site of progress another must necessarily be regressive. Regressive spaces are necessarily non-European, peripheral, and/or postcolonial by virtue of being non-Western. These categories are continually reified in disciplinary international relations to provide a stable foundation for analyses that asserts immutable differences between places and the peoples that occupy them. However, like the liberal dichotomies examined so far, the significance of this ‘dynamic of difference’ is also an unstable fiction.<sup>328</sup>

The state’s ascendancy as the primary international legal subject appeared to end earlier debates over right authority that were haunted by the spectre of Church authority. Vitoria and then Grotius made these initial moves to the state as a secular authority embodied by its sovereign ruler. Private wars amongst princes were subsumed by depersonalized conflicts between ‘states’ behaving in accordance with a *jus gentium*. It is no longer papal assent that determines whether a war is just, but whether it travels through the correct institutional channels

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<sup>326</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*, 11–12.

<sup>327</sup> Orford, “The Past as Law or History? The Relevance of Imperialism for Modern International Law,” 1.

<sup>328</sup> After Kant, this idea was most clearly articulated in Francis Fukuyama’s 1992 book, *The End of History and the Last Man*.

of approval or checks certain procedural boxes. Despite this shift, the fundamental correctness of violence is still determined by its source. As observed by Agathangelou and Killian: “Death is acceptable where it is the property of the state.”<sup>329</sup>

The international legal theorists that sought to secularize and territorialize a divine right to rule through a *jus gentium* also sought to endow sovereigns with a divine temporality. Enlightenment political theorizing looked to transcend the state’s explicitly religious function, which was re-introduced with the same omnipotent and awe-inspiring power. States and their sovereigns were no longer implicated in an eschatological process beyond their understanding and control and would instead appear free to pursue a project driven by human reason. However, as explained above, the argument structure underlying this transition endured, as did its appeal to authority. Secular formations appealed to a new authority to engage in similar imperial projects well into the nineteenth century. Divine universal time and imperium were emptied of their religious content and replaced by earthly European empires and imperial temporality. The divine temporality that defined existence in the Christian Commonwealth and operated according to God’s natural law was repackaged.<sup>330</sup>

### **Disciplining space**

Spaces are not neutral. There is ‘our’ space, and there is ‘theirs’, and the ways in which each is understood, related to, and interacted with is uneven.<sup>331</sup> In traditional international relations, peripheral space, ‘their’ space, is presented as backwards. Put differently, the people

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<sup>329</sup> Agathangelou and Killian, *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives*, 12.

<sup>330</sup> Agathangelou and Killian, 14.

<sup>331</sup> Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden: Blackwell Publishing Ltd, 2004), 17, <https://doi.org/10.1145/2505515.2507827>.

occupying their space(s) are somehow *presently* living in the *past*. Recalling how Vitoria found America's 'Indians' to be both within and without the *jus gentium*, one can see how they were also denied participating in shared time. Today, 'backward' civilizations outside the West are most often invoked in relation to politics in the MENA.<sup>332</sup> Identifying these communities as 'civilizations' distinct from Europe's serves to order international hierarchy and regulate participation or entry into the European 'system'.<sup>333</sup> These civilizations are 'primitive' because they do not self-organize in the European image. Modern Europe's impressions of these societies were formed in the fifteenth and sixteenth centuries and then frozen in time. Their temporal circumstances, which are defined by their location and space, are refused any opportunity to 'catch up' to 'Western' temporalities. As Branwen Gruffydd Jones explains, "Europe presented the myth of progress to the colonised through the simultaneous configuration of its opposition – lack of movement, lack of civilisation."<sup>334</sup> Their 'primitiveness' means that they have a different relationship with violence, namely, its presence, duration, and variety. Forms of violence that are unimaginable in the European centre are quite easily imagined amongst 'savages', be they inhabitants of the New World in the sixteenth century or the Middle East today. Because such violence is *imaginable* it is rendered *possible* and often acceptable to governments and populations in the West. Even where moral objections are made to the degree of violence enacted, it is nonetheless simultaneously understood as a regrettable *reality* or *inevitability*. The outcomes of international relations' fatalism varies according to place, and death becomes an evil

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<sup>332</sup> For the most infamous and influential example of this, see: Samuel P. Huntington, "The Clash of Civilizations?," *Foreign Affairs*, no. Summer (1993): 22–49.

<sup>333</sup> Ritu Mathur, "'The West and the Rest': A Civilizational Mantra in Arms Control and Disarmament?," *Contemporary Security Policy* 35, no. 3 (2014): 333, <https://doi.org/10.1080/13523260.2014.960164>.

<sup>334</sup> Branwen Gruffydd Jones, "Time, History, Politics: Anticolonial Constellations," *Interventions* 21, no. 5 (2019): 600, <https://doi.org/10.1080/1369801X.2019.1585919>.

necessary to drag barbaric civilizations into the *present*. Yet these colonized populations' ongoing violence and differential treatment also demands that they never succeed in temporally entering the *present*. This historicizing is described by historian Dipesh Chakrabarty as "somebody's way of saying 'not yet' to somebody else."<sup>335</sup> These temporal metaphors are spatialized when they are discursively deployed by state representatives, the media, or the military. They naturalize the hierarchies that produce the conditions for which violence is necessary and civilizing.

The 'system' and 'states' that permeate international relations theory discourse and debates are historically particularized ideas. Mainstream theories tend to take for granted the state's existence as an ahistorical and universal form of political organization. According to the aforementioned Westphalian myth, it is this moment in 1648 that states spontaneously manifest, fully formed like Athena from Zeus' split brow. This state was decidedly 'modern' in its bureaucratic organization, possessed a monopoly on domestic use of violence, autonomously sovereign, and principled in its approach to interacting with other states. It was necessary to develop a systemic understanding of the globe before the 'international system' as an interrelated whole could even be described as such. This homogenous image called directly on the idea of European states.

Koskenniemi explains that eighteenth-century French thinkers imagined a European system with a broad cultural continuity that allowed it to be captured by scientific vocabulary and principles. From Bodin onwards, debates amongst French legal scholars were preoccupied with providing an account of the French state's condition that was instrumental and scientific.

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<sup>335</sup> As quoted in Gruffydd Jones, 600.

The state would no longer be understood as an expression of the sovereign's power or a collection of religious adherents, but in terms of its territory, resources, climate, and population. The state as a variable set—existing relative to other states with comparable variables—was operating within a morally neutral, or amoral, system. Nature was reintroduced into the international system but not for its divinely imbued moral hierarchies, but its predictable, knowable features. This also gave fuller meaning to the 'state of nature', which both naturalized the (nation) state and analogized it as an individual operating amongst other individuals. These interactions were seen to have played out in a 'system' characterized by a 'balance of power' that was self-sustaining and amoral.<sup>336</sup>

Nineteenth century states were now re-presented without an inherent moral righteousness or divine function. Instead, states and their leaders were tasked with maximizing their own national power, wealth, and 'happiness'.<sup>337</sup> The state as a happiness-maximizer reconceptualized and reintroduced morality to the state in the form of a purpose. This purpose was found in liberal Enlightenment values, namely, pursuing the national good. Setting aside the question of exactly what constitutes the 'national good', it is important to note that this goal directly places the individual state at odds with the application of some sort of *international law*. The coexistence of domestic and international law is not so easily realized as the two distinct categories might suggest. Anghie points out that the seemingly irresolvable paradox of the state's relationship to constitutional and international law is that a state or sovereign is somehow simultaneously within

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<sup>336</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 78–82.

<sup>337</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 317–19.

and without international legal boundaries.<sup>338</sup> This dichotomy is conceptually fragile, and demands a contrived and overwrought narrative to reconcile its paradoxical tensions. Such a state must be extra-territorial and other-worldly to satisfy such an ontologically unstable definition.

### **Sovereign states reimagined**

Mainstream international legal history identifies Gentili's intervention as a Copernican Revolution from which a continuous tradition of international legal thought can be traced into the twentieth century.<sup>339</sup> Yet Vitoria and the Spanish scholastic's earlier assertion that the state is the only authority that can justly wage war is hardly at odds with Gentili's identical conclusion. Traditional narratives credit Gentili with simultaneously embracing and denying the principles of national sovereignty being asserted by the newly emerging modern state. Internationalizing the idea of a community would circumscribe European sovereigns' power and subject it to a universal rule of law. However, this is a revisionist history. A closer reading of these post-Enlightenment theorists reveals that they had no concept of a legal 'system' outside of the state to limit its excesses. Rather, they simply rejected a universal, Catholic normative order from which principles of sovereign power would be located.

The new normative order would instead serve 'reason' as defined by European imperial powers. The requirement to satisfy certain criteria to be a sovereign state during the age of empires *appeared* to change over time and facilitate decolonization. Indeed, contemporary liberal international relations theory presents decolonization as being of European ideological origin and a consequence of the international dissemination of European ideals like democracy

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<sup>338</sup> Antony Anghie, "Rethinking Sovereignty in International Law," *Annual Review of Law and Social Sciences* 5 (2009): 291, 306.

<sup>339</sup> Kingsbury and Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, 298.

and self-determination.<sup>340</sup> This narrative is crucial for establishing ideological continuity for the liberal internationalist project's self-understanding. As Orford observes, “[f]or many international lawyers [...] international law and the international community are essentially anti-colonial,” and “colonialism is a legal aberration.”<sup>341</sup> However, post-decolonization a former colony's ability to participate in global politics (including trade and diplomacy) was contingent upon their satisfaction of these new criteria. These criteria initially required a willingness to conform to particular ideas of ‘statehood’ and ways of centrally organizing the state apparatus. Crucially, the autonomy necessary to internally reorganize was aggressively resisted by former and latent imperial powers, lest this new mode of governing undermine their relationship with the territory and people. Even after years of sustained efforts by postcolonial states to achieve formal sovereignty, the inequitable distribution of power within international legal institutions precluded any meaningful shift in global political dynamics. Unevenness and inequalities in international legal regimes were explained away as “the consequence of inherent characteristics or failed leadership of post-colonial states, rather than the effects of a historically constructed global political and economic system.”<sup>342</sup> It gradually became clear that newly independent states would never be recognized as sovereign within their own territories without embracing a hegemonic global capitalist order that demanded its internal political and economic restructuring, as well as acceptance of inequitable terms of trade and investment. Such concessions preclude any meaningful exercising of sovereignty.

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<sup>340</sup> Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self Determination* (Princeton: Princeton University Press, 2019), 14, <https://doi.org/10.23943/princeton/9780691179155.003.0003>.

<sup>341</sup> Orford, “The Past as Law or History? The Relevance of Imperialism for Modern International Law,” 1.

<sup>342</sup> Orford, 1.

## 2.2 SECULAR EMPIRES

This final section surveys the ways in which European Enlightenment theorizing made use of early international legal thought to build an intellectual foundation on which imperial global governing practices were constructed. This process proceeded in several stages. The first appealed to a transcendent, universal authority that was first iterated as natural law channeled through the divine, then as natural law revealed through reason. This authority reaffirmed the need for a European-dominated global political order, as well its explicitly righteous and civilizing character. Property and trade rights became key indicators of civilization, and their vigorous enforcement was represented as central to maintaining the law's integrity.<sup>343</sup> Lastly, organized state violence undertaken to uphold this order was not only eminently justifiable, ethical, and legal, but also transformative. Under the earlier religious order, war could pacify the non-Christian realm and bring it into the *Pax Christiania*. The post-Enlightenment order maintained the corrective character of its ideological predecessor, but did so in the name of a humane, earthly, cosmopolitan order. These new empires would reinvigorate the Roman concept of *imperium* that justified imperial power without the Church's recognition.<sup>344</sup>

The Enlightenment succeeded in wresting sovereignty back from the Church and reconstituting it in the hands of sovereign, secular nations. The liberal tradition prevailed and re-established the connection between territory and sovereign autonomy to the effect that international law would henceforth be 'made' through treaties or customary practice.<sup>345</sup> These two

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<sup>343</sup> This is explicit in the Preamble to the Chemical Weapons Convention, which states a desire to "promote free trade [...] in order to enhance the economic and technological development of all States Parties." See: "Chemical Weapons Convention," 1993, <https://doi.org/10.4324/9780429043321-4>.

<sup>344</sup> Biccum, "What Is an Empire? Assessing the Postcolonial Contribution to the American Empire Debate," 707.

<sup>345</sup> Cohen, "Whose Sovereignty? Empire Versus International Law," 1.

means by which the law is created are an attempt to resolve the tension between liberalism's abstract goals and temporal realities—specifically, its aim to establish objective legal principles that transcend the subjectivity of individual sovereigns and the unavoidable fact that the law's content and application is a function of individual sovereigns. Liberal theory takes politics' subjectivity as a premise upon which its argument for non-politicized rules is based.<sup>346</sup> Consequently, international rules must be objective, timeless, and exist above and beyond individual actors in order to successfully combat what would otherwise be an anarchic 'state of nature'. The 'solution' is that rules bearing formerly God-like properties would be re-presented as being situated in liberal 'reason'.

International law's main preoccupations are explicitly liberal themes, including self-determination, independence, consent, and the rule of law. These topics implicate the question of how to legitimate a social order that maintains individual freedom.<sup>347</sup> The Enlightenment's embrace of legal positivism required that sovereigns consent to be bound by the international laws they create.<sup>348</sup> This globally scaled version of a social contract takes a state's sovereignty as an innate right that can only be diminished through consent.<sup>349</sup> While this concept has theoretically universal application, this chapter demonstrated how sovereignty is neither universally claimed nor held. Not every territory or people can assert an ability to consent as a feature of their sovereignty.

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<sup>346</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 533.

<sup>347</sup> Koskenniemi, 5.

<sup>348</sup> Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," 740–41.

<sup>349</sup> The Preamble to the Vienna Convention on the Law of Treaties notes that "the principles of free consent [...] are universally recognized." See: "Vienna Convention on the Law of Treaties (1969)."

It would be inaccurate to present postcolonial societies as possessing a ‘qualified’ sovereignty, because that would require that their sovereign autonomy was initially equal and then diminished. Rather, it is apparent in early international legal theory that colonized people’s sovereignty was never conceived as being identical to that of European powers. The New World’s indigenous societies had a God-given possession and legitimate authority of their territory—however, this did not exempt it from Spanish acquisition. The presence and asymmetry of colonial and postcolonial sovereignty illustrates a repressive inclusion in *jus gentium*, rather than outright exclusion.<sup>350</sup> Colonial spaces possessed a sovereignty that was often only nominally present, even once officially extended following decades of sustained anticolonial movements and conflicts. As explained by Roy, decolonization applied yet another fiction to colonial territories. Lands and peoples were transformed first into imperial acquisitions and then independent ‘states’, both of which reproduced the legal principle that underlies sovereignty and is crucial to the ontology of empire: *uti possidetis*.<sup>351</sup>

The interplay between sovereignty and repressive inclusion is captured by the principle *uti possidetis*, or ‘as you possess’. Derived from Roman law, the principle affirms that territorial boundaries are fixed unless transferred through treaty. This principle both underlines the connection between territory as property, and legally legitimizes the colonial boundaries as they existed the moment decolonization occurred. A 1986 International Court of Justice ruling on a territorial dispute between Burkina Faso and Mali revealed the principle’s power and frailty. The ruling affirmed “the obligation to respect pre-existing international frontiers in the event of a State

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<sup>350</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 100–101.

<sup>351</sup> Alpana Roy, “Postcolonial Theory and the Law: A Critical Introduction,” *Adelaide Law Review* 29, no. 2 (2008): 334.

succession” as a general principle of international law regardless of the legal formula in which it is expressed. However, the ruling also recognized that principle appeared to be at odds with newer international legal principles like self-determination. This tension is resolved by asserting that the principle is crucial to preserve the gains of independence struggles and provide for the “essential requirement of stability in order to survive” and avoid “disruption.”<sup>352</sup> The ruling implies that if the principle were eschewed by postcolonial states, they would open themselves up to potential re-colonization by other states, which poses a greater threat to their independence than inheriting imperial boundaries. This and related rulings enshrined postcolonial boundaries in the prevailing order, fixing them in both time and space as inflexible subjects.

The territorial boundaries of postcolonial states were repeatedly compromised despite being officially recognized and reaffirmed by *uti possidetis*. No sooner had these various states ascended to statehood was their territorial integrity aggressively violated. These two processes were overlapping rather than distinct and successive. Postcolonial state efforts to assert sovereign autonomy were met with counter-efforts with varying degrees of effect. Nervous former colonial administrators fabricated pretenses for interventions, as was the case with England and France in the 1956 Suez Crisis. The Cold War’s ascending hegemons likewise transformed their ideological empires into material action that attempted to turn postcolonial and peripheral states into proxies for direct confrontations. The quality of these intrusions ranged from supporting insurrection movements to full scale military occupations and wars. Regardless of their severity, these actions challenged and sometimes crippled the sovereignty of postcolonial states at various stages of decolonization. The ‘triumph’ of cosmopolitan liberalism, its human rights project and the

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<sup>352</sup> International Court of Justice, Case Concerning The Frontier Dispute (Burkina Faso/Republic of Mali) (1986), para. 25.

subsequent War on Terror rapidly and violently unraveled the fundamental principle of non-intervention, subordinating it first to the demands of humanitarian intervention and later in the name of counterterrorism.

### **Inescapable legacies**

The sovereignty doctrine is perhaps the most pervasive idea in international law. This chapter illustrated Antony Anghie's argument that sovereignty's international legal articulation was developed to "account for relations between the European and non-European worlds in the colonial confrontation."<sup>353</sup> Sovereignty's development represents international law's overall relational development writ large. Authors Tarak Barkawi and Mark Laffey remind their readers that Eurocentric studies often miss "the multiple and integral relations between the weak and the strong" that are "jointly responsible for making history."<sup>354</sup> TWAIL interventions do not *reduce* the classical European thinkers surveyed here to their imperial contexts, nor do they permit the discipline to abstract itself from and sanitize the relationship between its intellectual cannon and imperialism.<sup>355</sup> Each articulation of sovereignty across time was reproduced as needed, with different justifications to serve imperial ambition and its contestation. The first articulation was the extension of divine rule on earth, which reaffirmed societal difference and justified the creation of new empires. Sovereignty was then either diluted or withheld entirely to guarantee the good governance in 'backward' colonies and Mandate territories—ensuring colonial governing modalities were maintained. It then transformed into something officially extended universally,

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<sup>353</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 3.

<sup>354</sup> As quote in Mathur, "The West and the Rest': A Civilizational Mantra in Arms Control and Disarmament?," 339.

<sup>355</sup> Branwen Gruffydd Jones, *Decolonizing International Relations*, ed. Branwen Gruffydd Jones (Lanham: Rowman & Littlefield, 2006), 3.

but without meaningful power reconfigurations, and thus allowing exiting institutional inequality among states to continue. Sovereignty was finally expressed as a qualified status contingent upon upholding certain domestic political and economic policies subject to humanitarian intervention. Such requirements subordinate an individual state's right to non-intervention to the demands of a cosmopolitan liberal human rights project.

In his book, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, author Edward Keene unpacks two of the namesake theorist's key propositions that are glossed over in mainstream accounts of his contributions to international law. The first pertains to the rights of public authorities and private individuals in the law of nations. Specifically, Grotius presents sovereign rights as both divisible and transferable, such that one state could lawfully acquire and exercise another's sovereign prerogatives. The second pertains to the conditions under which individuals may legally appropriate 'unoccupied' lands over which they can then claim property rights.<sup>356</sup> Taken together, these two principles informed the legal order that would define interactions between Europeans and non-Europeans, particularly with respect to colonial and imperial forms of governance.

Keene considers this parallel history of international relations to be equally as significant to international law's development as the narrative given in orthodox histories of the discipline.<sup>357</sup> Traditional accounts of sovereignty's legal evolution present it as a legal status that was incrementally extended to decolonized territories in the periphery. Thus, eventual decolonization appears as consistent with the logic of a liberal world order and the "expansion of international

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<sup>356</sup> Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, paras. 57–9.

<sup>357</sup> Keene, 1–6.

society.”<sup>358</sup> However, TWAIL scholarship’s engagements with international law’s primary source texts exposes the ways in which this account is truncated and incomplete.<sup>359</sup> Sovereignty was and remains the keystone to an international legal order, the purpose of which is a civilizing mission of ‘backwards’ peoples. Rather than sovereignty simply being denied and spontaneously granted, colonial powers *acknowledged* the liminal sovereignty of non-European forms of governance without legally *recognizing* it due to its incongruency with European property laws. Treaty-making between European sovereigns and indigenous populations from the mid-eighteenth century onwards were unequal and mainly functioned to extinguish any existing sovereignty claims.<sup>360</sup> A growing recognition of colonized population’s sovereignty continued up to and beyond formal decolonization. However, the most significant aspects of sovereignty were retained by the imperial power, namely, those which ensured trade, commerce, and private property rights. Additionally, prior sovereignty rights were contingent and subject to revocation at the discretion of the colonial power.<sup>361</sup>

According to Keene, the international legal order in place by the mid to late nineteenth century was established to promote toleration in Europe, and civilization without. The significance of sovereignty in the effort to divide the world into a European and non-European sphere is made apparent by analyzing its ideational and institutional articulation over time. A recurring topic in international law’s orthodox scholarship is the civilizing mission explicitly and implicitly embedded in these European colonial projects. Significant attention is given to

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<sup>358</sup> Jones, *Decolonizing International Relations*, 3.

<sup>359</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 6.

<sup>360</sup> Mostafa Minawi, “International Law and the Precarity of Ottoman Sovereignty in Africa at the End of the Nineteenth Century,” *The International History Review*, 2020, 5, <https://doi.org/10.1080/07075332.2020.1765837>.

<sup>361</sup> Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, 7.

spreading practices of reciprocal sovereignty recognition and their eventual extension to non-European states.<sup>362</sup> However, this is an inadequate analytical starting point. Beyond the obvious observation that the ‘state’ is not a timeless, preformed subject of international order, it is important to note that this process was not a linear, coherent project. The normative and cultural signifiers constituting a European conception of ‘civilization’ were likewise neither pre-formed nor pre-given.

The European ‘Self’ attempting to civilize the non-European ‘Other’ was continually recreated and defined in opposition to the ‘Other’. These ontological categories were (and remain) unstable, unfixed, and dependent upon one another to provide meaning and distinction. They developed through intra-European contestation and extra-European interactions at both an ideological and material level. These categories were informed by the hegemonic political and legal orders in late-Medieval and Renaissance Europe that were challenged and changed by regional rivalries and colonial encounters. The Enlightenment would emerge victorious from these figurative and literal battles and go on to define a ‘Western’ global political order that understood itself as a vehicle for good governance and civilization both domestically and abroad. This is stated plainly in the 1969 Vienna Convention on the Law of Treaties, which says that the “codification and progressive development of the law of treaties [...] will promote [...] the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations.”<sup>363</sup>

The twentieth century, by contrast, was characterized by an effort to merge (but not undo) these two distinct patterns into a singular world order. After WWI, the inconsistency between

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<sup>362</sup> Keene, 7–8.

<sup>363</sup> “Vienna Convention on the Law of Treaties (1969),” Preamble.

European Enlightenment values, such as democracy, individual rights, and religious toleration, and actual European policy in the extra-European world threatened to destabilize the progressive narrative underpinning Europe's imperial political order.<sup>364</sup> The 1919 Treaty of Versailles and establishment of the League of Nations arranged for the fate of the Ottoman Empire and Imperial Germany's territories after their respective empire dissolved. The League established a Mandate System, which recognized European imperial state authority, or 'tutelage', over of these territories. Instead of being formally annexed, the territories were given a certain 'Class' status that correlated to different degrees of autonomous governance. Mandates co-existed with imperial Protectorates, the latter of which exercised less autonomy.<sup>365</sup> However, the secret 1916 Sykes-Picot agreement between England and France betrayed both formal agreements between European and Arab leaders and the Mandate System's superficiality. This so-called liberal post-WWI international legal order was highly conservative. How this translated to IHL policies pertaining to conflicts in Mandate and Protectorate territories before, during, and after decolonization is considered in the next chapter.

Before international law's continuities can be fully grasped its structural biases need disentangling and its discontinuities isolated. Koskenneimi observes that

“[i]n any institutional context, there is always [a] structural bias, a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied [...] But when the bias works in favour of those who are privileged, against the disenfranchised, at that point the bias becomes 'part of the problem'.”<sup>366</sup>

In revisiting International Relation's preminent myths, it is essential to avoid the discipline's tendency to project a singular narrative or reading of history. Of equal importance to

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<sup>364</sup> Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, 8.

<sup>365</sup> “The Covenant of the League of Nations (Including Amendments Adopted to December, 1924),” Yale Law School, 2008, art. 22, [https://avalon.law.yale.edu/20th\\_century/leagcov.asp](https://avalon.law.yale.edu/20th_century/leagcov.asp).

<sup>366</sup> Koskenneimi, *From Apology to Utopia: The Structure of International Legal Argument*, 608–9.

acknowledging international law's deep, prolonged bias is avoiding a fatalist reading of history that presents international law's trajectory as a straightforward, uninterrupted process of coordinated violence against postcolonial and peripheral populations. International law's totality is an assemblage of various contested institutions and practices that emerged at different moments across history, almost always in the face of significant resistance. Koskenniemi remarks that "[i]t might even be suggested that since its inception in the sixteenth century, international law has been used to facilitate European expansion and to discipline and subordinate non-European peoples."<sup>367</sup> However, in recognizing this pattern, Koskenniemi is careful not to suggest that international law is itself motivated by the long-term goal of marginalizing non-European peoples. He invites deeper examinations of international law's unique rules and how they operate as specific policies with specific goals. Chapter 4 examines the specific policies and goals of drone use under IHL, beginning with the technological and legal environment in which aerial warfare arose.

## **Conclusion**

Section 1 of this chapter's revisitation of international legal history provided ideological context for the positions explored in chapter 2 and the disciplinary traditions from which they were advanced. This examination showed that the previous chapter's consideration of various mainstream approaches to drones' use and legal regulation all sprung forth from the same intellectual developments that began centuries prior. These developments were the dialectical synthesis of a divinely inspired natural legal ordering and bordering of the globe. God's totalizing imperium was supplanted by monarchs claiming terrestrial sovereignty. These

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<sup>367</sup> Koskenniemi, 607–8.

sovereigns retained Christian notions of civilizational boundaries and a God-like self-understanding that determined their encounters with those outside the West. The dynamic of difference between the West and the Rest was given significance that affected treaty-making and rights-based claims. The moral and legal pretense for imperial state's excessive use of force against foreign populations effectively provides the same pretense for drone use in postcolonial and peripheral locations today. Namely, a violence that is humane not in its application but in its effect: civilizational advancement.

Section 2 of this chapter applied postcolonial methods to this and related TWAIL and critical legal theory insights for a deepened analysis in support of the drone paradox thesis. First, by examining how the relational subject formation that took place during these colonial encounters constituted certain un/acceptable wartime practices and generated legal categories of persons. This includes the revisionist narratives written in international legal history and legal norms that remain authoritative points of reference in discussions of drone use under IHL today. Second, by interrogating how time, temporality, and space were integrated into early international legal theory and praxis. The religiously significant temporal and spatial dimensions of sovereignty were transformed by international law's canonical forefathers and fully renounced by post-Enlightenment statesmen. However, temporal and spatial metaphors remain in positivist international legal theory and praxis, as does their core function: distinguishing between the advanced Us and the stubbornly backwards Them. Thus, a technologically advanced drone becomes the civilized weapon of choice for bombing Them into the future.

## Part 2: Drones and international law *now*

*“[T]he Allies as righteous gods, raining retributive thunderbolts on their wicked enemies.”*<sup>368</sup>

Paul M. Johnson

*“The first lesson to be learned on the battlefield was that the closer you were to the enemy, the less did you hate him.”*<sup>369</sup>

Hannah Arendt

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<sup>368</sup> Paul Johnson, *Modern Times: The World from the Twenties to the Nineties*, Revised (New York: Harper Collins, 1991), 402.

<sup>369</sup> Hannah Arendt in Jesse Glenn Gray, *The Warriors: Reflections on Men in Battle* (Lincoln and London: University of Nebraska Press, 1999), ix.

## CHAPTER 4: DRONES, IHL, AND IMPERIAL IMAGINATIONS

*“What is at stake here is not in the first place the prevalence of moral or humanitarian concepts, but the recognition that mankind should not be the slave of technology and should put a stop to the development of ever more sophisticated means of destruction.”*<sup>370</sup>

Bert V.A. Röling and Olga Šukovic

*“[A]ir bombardment is the terrorism of the rich.”*<sup>371</sup>

Stephen Graham

This chapter ‘resolves’ the aforementioned drone paradox that troubles IHL and results in the weapon appearing to be simultaneously il/legal, un/ethical, and un/strategic. It argues that drones’ apparently paradoxical and contradictory qualities are a function of IHL’s own paradoxes—the most central of which is enabling the very types of violences the legal regime ostensibly proscribes. IHL’s overriding aim is to make armed conflict more humane by limiting who may be targeted and the amount of acceptable harm that can be inflicted on those who may not be targeted. Yet this virtuous goal is consistently undermined by the prevailing interests of those state actors responsible for its practice and enforcement. Rather than a defect of the regime, these ulterior motives are bolstered by IHL. Both IHL and drone development are *theoretically* informed by the same imagined idea of war that does not exist, and *materially* informed by efforts to establish, expand, and/or maintain different imperial projects. The trouble with drones is that they adhere *too* well to the ideological commitments and political intentions that inform

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<sup>370</sup> Bert V. A. Röling, Olga Šukovic, and Stockholm International Peace Research Institute, *The Law of War and Dubious Weapons* (Stockholm: Almqvist & Wiksell International, 1976), 74.

<sup>371</sup> Stephen Graham, *Cities, War, and Terrorism: Towards an Urban Geopolitics* (Malden: Blackwell Publishing Ltd, 2004), 22.

their design and use. Drones are the latest product of a longstanding trend in weapons technology developments that attempts to distance weapons' operators from their targets. These developments occurred within a political and legal narrative informed by the Enlightenment modes of thought discussed in chapter 3, which provided a logic for building and justifying empire and its violences. This logic synthesizes a dedication to cultural and scientific progress in the name of civilizing the world over in the image of the post-Enlightenment European nation-state. When this logic is applied to weapons it finds the most advanced weapons technologies to also be the most ethical, legal, and corrective. In this sense, drones are the ideal tool of liberalism's empires and their civilizing mission.

The chapter proceeds in four sections. The first picks up where chapter 3 left off by introducing the initial wave of liberal internationalist positive IHL. It provides a brief overview of pre-WWII IHL and the types of conflicts it was intended to apply to, including attempts to regulate certain weapons categories. This is followed by a consideration of early experiments in aerial bombardment undertaken as part of European imperial policing strategies in colonial territories. This section shows how aerial policing was the predecessor to drones because of their shared goal to replace so-called 'boots on the ground', as well as their similar form (i.e., aerial bombing) and function (i.e., imperial administration). The section concludes that aerial policing violates the *jus in bello* principles of discrimination and proportionality by intentionally targeting civilian populations in postcolonial and peripheral territories. Such violations are symptomatic of IHL's ideological and operational paradoxes that allow for the collective punishment of civilian populations, and in which the drone paradox is situated.

The second section discusses the subjects and subjectivities of the targets and combatants captured by IHL, and the unique ways they are affected and produced by drones. This discussion

explores the primary historical narrative of combatant-civilian relations as clear and fixed categories of persons and explains this narrative's crucial significance among the different myths present in IHL. The section then considers how this narrative is affected by conflicts in which drones are used, as well as the particular relational subjectivities and differing temporalities between drone operators and the populations over which they fly. This analysis reflects on how ideas of race and representations of the non-European Other inform drone use in these territories and their legal assessment. It concludes that IHL is prejudiced in favour of parties operating sophisticated weapons—to whom it ascribes a rational, European behaviour—and against those engaging in armed resistance or guerilla warfare who it assumes belong to an irrational and backwards civilization.

The final two sections unpack war's spatial dimensions—horizontal (geographical) and vertical (aerial)—and their operation in IHL. It examines drones' impact on how space is experienced and interacted with in conflict areas. To this end, the chapter concludes by putting forward the alternative explanation of IHL's purpose introduced in the preceding chapters: war's regulation is inextricably bound up with specific political purposes and empire-building projects out of which drones have directly emerged. Further, drones are the cumulative result of centuries in weapons development and war waging strategies that reproduce imperial and neocolonial governing modalities that attempt to terrorize populations into submission using aerial police bombing.

Chamayou states that “[t]he drone is the weapon of an amnesiac postcolonial violence.”<sup>372</sup> Yet an ‘amnesiac violence’ does not mean that it is confined to the past. Rather, it suggests that

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<sup>372</sup> Grégoire Chamayou, *A Theory of the Drone* (New York: The New Press, 2015), 95.

drones' reproduction and continuation of both postcolonial and neocolonial violence often goes unrecognized by the weapon's many commentators. Drones are the model weapons for use in *contemporary* imperial conflicts for two reasons that directly correlate to their form and function.

The first reason is that they embody war's ideal archetype in weapon form. This archetype sits at the intersection of various myths and misrepresentations implicating technology, control, and progress. Drones *appear* to bring 'Us' closer to the future liberalism promised in which scientific technology-driven progress produces weapons capable of delivering humane and the civilizing violence rooted in European imperial narratives. State actors, by definition, have a monopoly on the legal use of violence that Western states have attempted to expand to include a monopoly on the legal use of high-power drone violence.<sup>373</sup> This offers these states' leadership the sense of omniscience and omnipotence that traditional international relations theory promises accompany such relative military power advantages.

The second, related way in which drones are the ideal imperial weapon is their integration of ISR and lethal force into a single platform. Such vertical integration efficiently consolidates the collection and processing of information with lethal force decision-making and delivery. Intel and violence are essential to colonial governing—however, the requisite personnel and resources are costly to the metropole so inevitably lead to efforts aimed at reducing capital investment. Drones again appear as an ideal type insofar as they *seem* to fulfil the functional goal of effective and efficient imperial administration without the need for military occupation or colonial settlements. With an ability to fly for hours on end over vast swaths of land, drones look as if they allow the continued control of a territory and population without the need for a full-scale

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<sup>373</sup> Anna M. Agathangelou and Kyle D. Killian, eds., *Time, Temporality and Violence in International Relations: (De)Fatalizing the Present, Forging Radical Alternatives* (New York: Routledge, 2016), 47.

military and administrative presence. However, the following section shows that this goal is impossible and itself a function of the deep misunderstandings and myths that pervade traditional international relations and legal thought,<sup>374</sup> specifically, that a liberal international community can achieve perpetual peace that is efficiently managed by high-tech, low-cost weapons with minimal blood spilt.

IHL's history is marked by both continuity and dramatic shifts. Much like international relations, international law's scholarly tradition relies extensively on isolated events that act as markers in the discipline's historical development in order to establish a normative and narrative continuity. Much of what is 'modern' about IHL, including customary international law and treaties, has ancient historical precedents from across the globe. However, these similar forms did not reflect similar content, nor lend themselves to a Eurocentric and linear trajectory. Thus, international law's historiographical story is something of a patchwork collection of discrete moments in time. By contrast, there is some noticeable continuity over the past few hundred years in how wars have been waged and new weapons integrated. As Talal Asad remarks, "the growing literature on new military technologies and strategies pays very little attention to the continuities of the new wars with earlier colonial wars."<sup>375</sup> There are various reasons for this omission, among which two stand out. One is international law's aforementioned impulse to treat European imperialism as a temporary aberration in what is otherwise a consistent advancement of a universal liberal rights project. This reflects the disciplinary orthodoxy that assumes international law's humanitarian character. The second reason is the discipline's tendency to

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<sup>374</sup> It is worth providing a clarifying note regarding what is meant by "empires" here. While neo-colonial economic imperialism calls on various forms of violence as part of capital's disciplinary mechanisms, the empires referred to here are those which *directly* implicate armed conflict.

<sup>375</sup> Talal Asad, *On Suicide Bombing* (New York: Columbia University Press, 2007), 35.

identify novel weapons as ‘disruptive’, or a ‘revolution in military affairs’ in proportion to the amount of technological advancement they represent. The synthesis of this revisionist international legal history with weapons technology fetishism is best exemplified in the presentation of drones as a ground-breaking weapons system capable of unparalleled IHL adherence and/or violation. As Gerrit Gong argues, when the technological ability to wage war is synonymous with civilization, then international law is reduced to the efficacy of force,<sup>376</sup> of which drones are the example par excellence.

## 1. ‘MODERN’ IHL AND IMPERIAL MODES OF GOVERNANCE

Much of modern IHL is informed by concepts traced back to Enlightenment modernity. Previous chapters demonstrated how war’s idea—as found in key theoretical texts and legal documents—is imagined as occurring on a major scale between sovereign nation-states in the West. As Tarak Barkawi explains, smaller, sub-state level hostilities—like those involved in expanding and maintaining empire—are consequently “relegated to derivative categories.”<sup>377</sup> This Eurocentrism is also reflected in the rules of engagement’s categories and vocabulary that rely on a variety of binaries, including war/peace and interstate/intrastate. Barkawi documents how this binary inadequately captures both the West’s own experiences with war as well as those in postcolonial and periphery territories. International law mobilizes these inflexible bifurcations to the effect that the insurgencies, emergencies, interventions, uprising, and police actions constituting much of twentieth and twenty-first century conflict are subject to far less rigorous

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<sup>376</sup> Ritu Mathur, “‘The West and the Rest’: A Civilizational Mantra in Arms Control and Disarmament?,” *Contemporary Security Policy* 35, no. 3 (2014): 341, <https://doi.org/10.1080/13523260.2014.960164>.

<sup>377</sup> Tarak Barkawi, “Decolonising War,” *European Journal of International Security* 1, no. 2 (2016): 199, <https://doi.org/10.1017/eis.2016.7>.

and restrictive behaviour limitations than interstate war. Barkawi offers the battle/repression scheme as a war/peace binary alternative that better captures how the use of force is a regular state of global affairs, rather than the exception. This was and remains acute in postcolonial territories, where the initial 1492 colonial encounter “engendered near continual, if geographically dispersed, warfare and violent repression” that can be approximated as a state of “permanent war.”<sup>378</sup>

Reynolds’ ‘repressive inclusion’ concept shares a broad framework with Barkawi’s—narrowing in on its operationalization in law. The regularization of imperial use of force is a feature of international law’s ‘unequal integration’ of peripheral and colonial locations. Reynolds details how the legal institutions that emerged from different liberal international human rights projects were introduced to manage the harms associated with major crises like interstate war, while overlooking the ongoing extreme forms of violent repression occurring in European colonial territories being maintained through treaty-based schemes. The actions of German and Japanese military and leadership during WWII that most derogated from human rights norms were strongly condemned by the post-War II IHL regime. However, this same regime endorsed the excessive use of force by imperial states, including Allied powers, in responding to anti-colonial rebellions across the world because it was undertaken within the context of a declared ‘state of emergency’. This permissibility was and remains a function of the presumptive sovereign autonomy ungirding all international law as well as the ongoing presentation of colonial territories as areas requiring a unique, partial application of the rule of law to reflect

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<sup>378</sup> Barkawi, 205.

their undeveloped and ‘backward’ space status.<sup>379</sup> These developments can be chronologically plotted out from the late nineteenth century onwards alongside those of liberal internationalist thought.

Both *jus ad bellum* and *jus in bello* make use of the concept of armed conflict or hostilities as a condition defined by international law. However, historical differentiation between the *jus ad bellum* and *in bello* categories was not always clear and the two are often enumerated in the same legal texts and documents. The fragility of their bifurcation is like that of other above discussed binaries in international legal thought. *Jus ad bellum* determines the legality of a use of force or resort to armed conflict, which is regulated by *jus in bello* regardless of its lawfulness. A conflict is categorized as either international or non-international in character once armed hostilities commence. Different legal implications follow from how these categories are assigned, some of which are relevant to drone use. Recall from chapter 1 how existing drone scholarship is almost exclusively focussed on the complexities of the weapon’s relationship with *jus ad bellum*. States’ interest in territorial sovereignty violations and *cassis belli*—rather than genuine humanitarian concern—is reflected in the abundance of academic publishing considering governments’ use of drones for conducting assassinations. Yet the relative lack of scholarship analyzing drones’ interaction with *jus in bello* does not indicate a lack of importance. Rather, it is the consequence of an overarching disinterest in the lives and deaths of people already living in conflict zones and whose existence is already taken to be precarious. Thus, this dissertation’s concern with drones and international legal efforts to constrain war’s *conduct* is its most defining and original scholarly contribution. This chapter, specifically, attempts to fill the

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<sup>379</sup> John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017), 111–17.

*jus in bello*-related ‘gap’ in the literature by considering how drones are being used in *existing* situations of armed conflict and their relationship to IHL. For this reason, this chapter’s discussion of *jus ad bellum* is limited to the authority to declare war, which provides essential context for understanding *jus in bello* and the laws of war’s historical development and application.

This chapter shows that the consequences of introducing drones to existing armed conflict situations go beyond simply enhancing aerial war waging; they expose IHL’s fundamentally imperial features, imagined realities, and irreconcilable paradoxes—some of which have already been analyzed. Having established the imperial origins of IL, generally, and IHL, specifically, the following chapter demonstrates that the relationship between *jus in bello* and drones allows a deeper understanding of IHL’s internal incoherence as it applies to issues of civilian-combatant distinction and proportionate collateral damage. This incoherence is situated at the intersection of the *expected* and *actual* results of drone use. According to liberal theories of international relations and law, drones’ unique ISR, targeting, and attack capabilities should make them a highly discriminate weapon that results in low collateral damage. However, their use in colonial (e.g. Israeli) and neocolonial (e.g. American) political projects demonstrates that such expectations were (and remain) an ideological fiction that sits at the core of IHL. Drones’ form *should* encourage their discriminate and proportionate use, but their *actual* function shows how the discrimination and proportionality principles were developed to facilitate their own legal violation. In this sense, drones tear off the mask of liberal IL to reveal that no amount of good intentions and ‘precision’ weapons can change IHL’s fundamentally imperialist preoccupation.

## Regulating war's methods

Post-Enlightenment conceptions of international society's peaceful development entangle the sovereign autonomy *grundnorm* with civilizational superiority. The overarching logic that frames liberal theorizing's commitment to a progressive and staged temporality also posits peace as the default situation for states in the international system. Such peace is thus only ever interrupted by conflicts that are themselves essential steps towards an eventual perpetual peace.<sup>380</sup>

Peaceful relations are one of the civilizational criteria that were transformed into legal principles formally laid out in the 1919 League of Nations Covenant.<sup>381</sup> According to hegemonic liberal international relations narratives, the League of Nations ('League') was first and foremost an organization established to create a collective security that would displace the unilateral right to wage war and introduce a process by which transgressive actions against one state could be adjudicated and peacefully remedied.<sup>382</sup> This collective security precluded the possibility of absolute neutrality in inter-state conflicts and required that third-party states favour and/or actively assist the "victim of aggression."<sup>383,384</sup> What constituted "aggression" at the time was of crucial importance, since decolonial wars of "national self-determination" were regarded as an

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<sup>380</sup> Barkawi, "Decolonising War," 202; Branwen Gruffydd Jones, "Time, History, Politics: Anticolonial Constellations," *Interventions* 21, no. 5 (2019): 600, <https://doi.org/10.1080/1369801X.2019.1585919>.

<sup>381</sup> "The Covenant of the League of Nations (Including Amendments Adopted to December, 1924)," Yale Law School, 2008, art. 19, [https://avalon.law.yale.edu/20th\\_century/leagcov.asp](https://avalon.law.yale.edu/20th_century/leagcov.asp).

<sup>382</sup> Michael Schmitt and Jelena Pejic, "International Law and Armed Conflict: Exploring the Faultlines," *Martinus Nijhoff Publishers*, vol. 15 (Leiden, 2007), 7.

<sup>383</sup> Schmitt and Pejic, 15:46, 544.

<sup>384</sup> There are legal scholars that continue to believe the principle of third-party neutrality permits support for governments during civil war but prohibits support for insurgents. This remains important for situations in which domestic governments rule while under foreign military occupation, domestic populations are attempting to overthrow an illegitimate government, or where colonial policies are being actively carried out. For a greater discussion of the principle of non-intervention, see: Pietro Pustorino, "The Principle of Non-Intervention in Recent Non-International Armed Conflicts," *Questions of International Law, Zoom-In* 53 (2018): 17–31.

illegal use of violence until the First Additional Protocol (AP I) to the Geneva Conventions in 1977 that expanded the definition of international conflict.<sup>385</sup> The League also attempted to supplant a unilateral right to wage war, which was supplemented by the 1928 Kellogg-Briand Pact that rejected use of war as an instrument of national policy.<sup>386</sup> These two principles are early articulations of *jus ad bellum* that would be more clearly enumerated in the UN Charter.

A less popularized account of the League's origins emphasizes how its formation and activities expressly pursued civilizing practices, bolstered imperial administrative regimes, and institutionalized racial inequality to a degree not seen prior.<sup>387</sup> Edward Said noted that at this time, "[t]here was a virtual unanimity that subject races should be ruled, that they *are* subject races, that one race deserves and has consistently earned the right to be considered the race whose main mission is to expand beyond its own domain."<sup>388</sup> The League marks a shift in both international legal discourse and policy wherein the concept of 'race' became the primary means by which 'peoples' were distinguished. Britain's representative at the League's founding conference expressed the dominant understanding of race in his argument that "it was true in a certain sense that all men of a particular nation were created equal; but not that a man in Central Africa was created equal to a European."<sup>389</sup> Enlightenment era 'race science' had developed

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<sup>385</sup> Helen M. Kinsella and Giovanni Mantilla, "Contestation before Compliance: History, Politics, and Power in International Humanitarian Law," *International Studies Quarterly*, 2020, 3, <https://doi.org/10.1093/isq/sqaa032>; "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977," 1977, art. 1, para. 4.

<sup>386</sup> Schmitt and Pejic, "International Law and Armed Conflict: Exploring the Faultlines," 15:7, 46.

<sup>387</sup> The Japanese had proposed a principle of racial equality that was rejected by the time the League's Covenant was written. See: Mathur, "'The West and the Rest': A Civilizational Mantra in Arms Control and Disarmament?," 342.

<sup>388</sup> As quoted in Branwen Gruffydd Jones, *Decolonizing International Relations*, ed. Branwen Gruffydd Jones (Lanham: Rowman & Littlefield, 2006), 2.

<sup>389</sup> As quoted in Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton: Princeton University Press, 2019), 22, <https://doi.org/10.23943/princeton/9780691179155.003.0003>.

alongside positivist theories of natural science that were analogized in ‘social’ science by nineteenth century political and legal scholars and embedded into civilizational discourses. Civilization was something to be advanced, with standards against which peoples and their progress could be measured.<sup>390</sup> The League’s Covenant indicates that the “character of the mandate” must reflect the “stage of the development of a people,” and identifies select world regions as being in various stages in their development. South-West Africa and the South Pacific Islands are identified by the document as least developed, followed by Central Africa, and finally, former Turkish Empire communities. The Covenant directly ties civilizational progress to self-determination and autonomy rights, stating that “*certain* communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized” and therefore the “wishes of these communities must be a principle consideration in the selection of the Mandatory [power].”<sup>391</sup> The unacknowledged implication of this qualified provision is that the wishes of all other territories are not to be taken into consideration whatsoever. Because statesmen and scholars active during the time the League was formed were critical of the overt colonialism of the past, a new geographically and temporally based civilizational discourse was taken up instead. Cultural, economic, and political development took place on a linear continuum where races were now discussed in terms of geographical situation and as either ‘advanced’ or ‘backward’.<sup>392</sup>

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<sup>390</sup> Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford: Oxford University Press, 1984), 47, <https://doi.org/10.2307/20042014>.

<sup>391</sup> “The Covenant of the League of Nations (Including Amendments Adopted to December, 1924),” art. 22. Emphasis added.

<sup>392</sup> Antony Anghie, “The Evolution of International Law: Colonial and Postcolonial Realities,” *Third World Quarterly* 27, no. 5 (2006): 746, <https://doi.org/10.1080/01436590600780011>.

Vitoria's legacy as a humanist in traditional international legal history was celebrated and explicitly drawn on by the League's supporters. The early twentieth century's 'civilization' construction was equal to Vitoria's in its malleability and efficacy at arbitrarily denying certain 'peoples' the descriptor of 'nations' for various reasons, including overtly race-based categorizations. The list of civilizational criteria included "the capacity to organize for 'self-defence', adherence to the laws of war, maintenance of diplomatic communications, and adherence to the 'accepted norms' and practices of the 'civilized' international society."<sup>393</sup> The norms and practices requirements, in particular, are as fluid in their content as the cultural indicators Vitoria relied upon to establish the *jus gentium*. The League's own international court—the International Court of Justice's predecessor—referenced "the general principles of law recognized by civilized nations" as those which it would apply, yet never clearly articulated the contents of.<sup>394</sup> The distinction between civilized and uncivilized was assumed to be "ever made manifest" and never debated.<sup>395</sup> The general parameters for membership in international society introduced in the previous chapter were clarified and codified to include an ever-expanding list of standards of 'civilization' that must be met to enjoy the security benefits of official membership in organizations like the League. For example, European countries claiming to meet such civilizational standards expanded the status' implications to include legal rights, such as the 'extraterritorial jurisdiction' of domestic European courts in non-European territories.<sup>396</sup>

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<sup>393</sup> Mathur, "'The West and the Rest': A Civilizational Mantra in Arms Control and Disarmament?," 341.

<sup>394</sup> The League of Nations, "Statute of the Permanent Court of International Justice" (1920), art. 38, <https://www.icj-cij.org/en/statute>.

<sup>395</sup> Gong, *The Standard of "Civilization" in International Society*, para. 73.

<sup>396</sup> Gong, viii.

The League Covenant's utmost concern is for maintaining "international peace and security"<sup>397</sup> in pursuit of which it finds the "just treatment of the native inhabitants of territories under [Mandatory] control" essential.<sup>398</sup> The League's Mandate system rationale reflects that provided by Vitoria for Spain's trustee governance over the 'Indians'.<sup>399</sup> Nineteenth century jurist and international legal scholar James Brown Scott praised the League's Covenant for formally christening the key principle of Vitoria's internationalist vision, namely, that "enlightened nation[s]" should educate "these children of nature" that lagged in the "march of civilization."<sup>400</sup> The 'children' in question were the inhabitants of European colonies and Mandate territories,<sup>401</sup> who the Covenant identified as "*not yet* able to stand by themselves" and would be directly governed (in the case of colonies) or administered (in the case of Mandates) in accordance with the "sacred trust of civilization."<sup>402</sup> In addition to proscribing meaningful self-governance, these quotes are illustrative of IL's temporal metaphors. WWI's end and the dismantling of defeated empires had placed non-European populations *back* in time though infantilization and denial of the opportunity to join the *present*. Although the League's Covenant embraced the rhetoric of self-determination as a political principle, it was not explicitly recognized as a legal right, much less one that could be invoked to justify an armed rebellion.<sup>403</sup> The victorious Allied powers would not risk disrupting the governing dynamic in their existing

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<sup>397</sup> "The Covenant of the League of Nations (Including Amendments Adopted to December, 1924)," art. 1.

<sup>398</sup> "The Covenant of the League of Nations (Including Amendments Adopted to December, 1924)," art. 23.

<sup>399</sup> Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," 743.

<sup>400</sup> Anne Orford, "The Past as Law or History? The Relevance of Imperialism for Modern International Law," 2, 2012, 14.

<sup>401</sup> Mandate territories were those previously under control of Germany or the Ottoman Empire.

<sup>402</sup> The Avalon Project, "The Covenant of the League of Nations (Including Amendments Adopted to December, 1924)," Yale Law School, 2008, art. 22, [https://avalon.law.yale.edu/20th\\_century/leagcov.asp](https://avalon.law.yale.edu/20th_century/leagcov.asp). Emphasis added.

<sup>403</sup> Daniel Wippman, *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998); United Nations General Assembly, "Definition of Aggression General Assembly Resolution 3314 (XXIX)," 1974.

or recently acquired territorial ‘possessions’, nor would they tolerate challenges to it. Imperial governance would continue in Mandates in the name of ‘tutelage’—making the Western social legal model appear “natural, inevitable, and inescapable.”<sup>404</sup>

European powers worked to block all legal avenues to self-liberation for populations living in their empires. Having legally precluded the availability of sovereignty and right to self-defence claims, these states then criminalized and branded as terrorism any violence taken in the context of decolonization efforts. International anti-terrorism legal efforts go as far back as the League and the 1937 Convention for the Prevention and Punishment of Terrorism. The latter instrument was abandoned because no comprehensive definition could be agreed upon. History repeated itself in 1972 when the United States proposed Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism was abandoned after failed attempts to define terrorism. A key reason for the 1972 Draft Convention’s rejection was its focus on violence by non-state actors against states without any exception for self-determination struggles. The Convention would have proscribed decolonial wars of independence from which a host of constraints on third-party state actions would follow, including a prohibition on providing material aid to the non-state.<sup>405</sup> Combined with the existing principle of non-intervention by third party state actors in non-international armed conflict, the Convention would have denied the legitimacy of armed resistance to colonialism and foreign support of it. Although the non-intervention principle’s meaning and exception(s) are contested—most recently finding

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<sup>404</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 146.

<sup>405</sup> Molly McNab and Megan Matthews, “Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law,” *Denver Journal of International Law & Policy* 39, no. 4 (2014): 666–67.

qualification under R2P—it is often interpreted as only prohibiting only support of non-state actor insurgent groups involved in the conflict. Thus, legal third party sponsoring of national liberation movements was always on shaky footing.

The League’s efforts to constrain *when* war could be declared built directly upon the earlier and concurrent attempts to apply basic restrictions to *conduct* in war using positive law. These treaties’ prevailing concern was for combatant rather than civilian rights and protections, despite the general scholarly focus on the latter category.<sup>406</sup> These treaties included the 1856 Paris Declaration Respecting Maritime Law that abolished privateering,<sup>407</sup> the 1868 Saint Petersburg Declaration, the 1899 and 1907 Hague Conventions that called on armies to “diminish the evils of war so far as military necessities permit,”<sup>408</sup> the 1864, 1906, and 1929 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, and the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>409</sup> The first Geneva Convention of 1864 would go on to be revised and expanded to eventually constitute the four Geneva Conventions and two Additional Protocols (AP) in place today. Over time, the signatories to these various documents expanded in number and geographical location—however, they consistently excluded existing and often newly-independent colonies.<sup>410</sup> Parties must be treaty signatories to benefit from their

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<sup>406</sup> Kinsella and Mantilla, “Contestation before Compliance: History, Politics, and Power in International Humanitarian Law,” 2–3.

<sup>407</sup> Schmitt and Pejic, “International Law and Armed Conflict: Exploring the Faultlines,” 15:46.

<sup>408</sup> Eyal Benvenisti, “Human Dignity in Combat: The Duty to Spare Enemy Civilians,” *Israel Law Review* 39, no. 2 (2006): 93, <https://doi.org/10.1017/S0021223700013029>.

<sup>409</sup> Marco Sassòli, Antoine Bouvier, and Anne Quintin, “How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,” *Revue Internationale de La Croix-Rouge/International Review of the Red Cross* 81 (1999): pt. 1, ch. 3, 3, <https://doi.org/10.1017/S1560775500104080>.

<sup>410</sup> Rare exceptions include the participation of Mexico in the 1899 Hague Convention and Brazil in the 1906 Hague Convention—both of which had already gained independence.

privileges and protections, which allowed states to legally refuse to uphold the laws of war in conflicts against ‘non-civilized’ populations. Additionally, nineteenth century military lawyers indirectly linked weapons technology to participation in the laws of war by citing fighting effectiveness as a ground for colonies’ exclusion from treaty participation.<sup>411</sup>

These various regulations are particularly noteworthy examples of how civilizational modes of thought and discourse had tangible effects on legal protections in war. Their documents were understood as “agreements among the civilized, based on the opinions of the civilized” to the exclusion of all others who lacked, among other things, ‘sovereign’ status.<sup>412</sup> Treaty participation was not a perfunctory matter of signing, but directly determined to whom these protections were afforded or not. This reality was made clear in the preamble to the 1899 Hague Regulations that contained the renowned ‘Martens clause’. The clause is oft-cited for its reference to the humanitarian spirit underlying what is now understood to be customary international law. The clause specifically invokes a universalist-naturalist ideology, identifying the “principles of the law of nations, as they result from usages established among civilized peoples.”<sup>413</sup> However, these principles’ universality did not translate into universal application, and those beyond the ‘civilized’ pale could be treated differently than European combatants and be subject to targeting with weapons deemed too inhumane for war among the Regulation’s Contracting Parties. A similar caveat appears in one of the earliest arms control regimes, the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles

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<sup>411</sup> Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” in *International Law and Its Others*, ed. Anne Orford (Cambridge, 2006), 299, <https://doi.org/10.1017/CBO9780511494284.011>.

<sup>412</sup> Mathur, “‘The West and the Rest’: A Civilizational Mantra in Arms Control and Disarmament?,” 341.

<sup>413</sup> Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” 273.

Under 400 Grammes Weight.<sup>414</sup> The Declaration is generally referenced as an indicator of law's advancement and war's gradual restraining because it explicit invokes of the 'laws of humanity' and identifies military forces as the only legitimate targets.<sup>415</sup> However, the Declaration also states that "the *progress of civilization* should have the effect of alleviating as much as possible the calamities of war" by restricting the use of the excessively maiming munitions "*between* civilized nations."<sup>416</sup> A Russian delegate to the Declaration highlighted its exception for use of so-called 'dum-dum' (hollow) and exploding bullets against 'savages'—reaffirming signatories right to use inhumane weapons against those for whom it was appropriate.<sup>417</sup>

The logic behind this unequal integration was that 'savages' existed in a primordial state that established "Europeans' relations with them in a pre-modern realm of fragile natural obligations" in which such brutality was permitted.<sup>418</sup> It was not that non-European peoples *as such* were excluding from humanity and therefore from humane treatment also. Rather, these peoples were *not yet* developed enough to be treated by civilized nations in the same manner they treated one another. The bar for entry to civilized treatment was not so much high as it was blurred. There was no one thing that an 'uncivilized' nation could do to become 'civilized' other than simply wait until international society facilitated this gradual integration.<sup>419</sup>

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<sup>414</sup> Schmitt and Pejic, "International Law and Armed Conflict: Exploring the Faultlines," 15:46.

<sup>415</sup> Stephanie Carvin, "Getting Drones Wrong," *International Journal of Human Rights* 19, no. 2 (2015): 130, <https://doi.org/10.1080/13642987.2014.991212>.

<sup>416</sup> "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight," 1868, [http://www.weaponslaw.org/assets/downloads/1868\\_St\\_Petersburg\\_Declaration.pdf](http://www.weaponslaw.org/assets/downloads/1868_St_Petersburg_Declaration.pdf). Emphasis added.

<sup>417</sup> Kinsella and Mantilla, "Contestation before Compliance: History, Politics, and Power in International Humanitarian Law," 2–3.

<sup>418</sup> Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" 283.

<sup>419</sup> Mégret, 305.

The liberal internationalist thought that defined post-Enlightenment European ideas of humanity, the international community, and sovereign autonomy were secular but retained much of their intellectual predecessor's paternalism. By the early twentieth century, the limited autonomy of American 'Indians' that Vitoria recognized had transformed into a diluted sovereignty that was extended to colonial and mandate territories in accordance with the wishes of European states. Thus, the League could decry formal colonialism and rhetorically endorse self-determination but only as something granted rather than independently claimed. Self-determination was considered a principle as opposed to a right and could therefore not be invoked by colonized territories for the purposes of self-liberation or secession. Such a right to secession, the League believed, would introduce anarchy to the international system they had so carefully sought to craft and stabilize. It was not until the decolonization movements following WWII that self-determination was recognized as a legal right. Even here it functioned in strictly instrumental terms that did not compromise a state's territorial integrity through secession, since it assumed the territorial separation of the imperial power and its colony.<sup>420</sup> The eventual extension of self-determination beyond European states to colonial and mandate territories did not involve reimagining state sovereignty, and instead was folded into liberal logic as the inevitable decolonization of colonial possessions European imperial powers no longer had the resources to maintain.<sup>421</sup>

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<sup>420</sup> Wippman, *International Law and Ethnic Conflict*, 7–11.

<sup>421</sup> Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012), 15.

## International versus non-international armed conflict

From the disparate treaties and customary practices of pre-WWII Europe an overarching *jus in bello* framework ultimately coalesced into the Geneva Conventions and AP I and II—finally covering all types of armed conflict. Protections under IHL are dependent upon the conflict type, and the Geneva Conventions categorize armed conflict as either international or non-international in character based on the parties to the conflict.<sup>422</sup> AP I and II supplement the laws of international armed conflict (IAC) and non-international armed conflict (NIAC), respectively. The Protocols extend greater protection from war’s violences to civilians, and injured and sick soldiers, as well as regulate both war’s means and methods. IAC arises between “two or more of the High Contracting Parties, even if the conflict not recognized by one of them.”<sup>423</sup> The term ‘armed conflict’ is used instead of ‘war’ because it removes any definitional ambiguity that may follow from a State refusing to recognize that a hostile act constitutes war-making.<sup>424</sup> An armed conflict arises when the armed forces of two States are involved, as compared to lower-level violence like assassination by the agent of a foreign government.<sup>425</sup> International Criminal Court (ICC) jurisprudence compounds this definition by providing for a conflict intensity threshold in cases of armed conflicts inside the territory of a state occurring between government authorities and organized armed groups.<sup>426</sup>

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<sup>422</sup> Kinsella and Mantilla, “Contestation before Compliance: History, Politics, and Power in International Humanitarian Law,” 3.

<sup>423</sup> “The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949,” art. 2, para. 1.

<sup>424</sup> The capitalized form of ‘State’ is used when referring to a treaty’s contracting parties.

<sup>425</sup> Sassòli, Bouvier, and Quintin, “How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,” 22–23.

<sup>426</sup> United Nations, “Rome Statute,” International Criminal Court (1998), art. 8, para. 2, (f) <https://doi.org/10.1017/cbo9780511975035.013>.

Internal state violence that does not meet the threshold of NIAC is subject to IHRL provisions, which pertain to peacetime and apply greater limits to state use of lethal force as compared to those which exist under IHL. The level of violence necessary to meet the NIAC threshold remained undefined until AP II and is a notably higher threshold than that required to constitute IAC.<sup>427</sup> AP II defines armed conflict as *sustained* and *concerted* military operations carried out between a State and dissident *armed forces* or other organized armed groups. The reason IHRL pertains to lower-level intrastate hostilities is that the laws of war are traditionally understood as applying exclusively to IAC. This contrasts with NIAC, which was understood as being outside the application of IHL provisions until 1949 and the adoption of Common Article 3—thusly named because it is common to all four Geneva Conventions. Common Article 3 pertains to NIAC and calls for the protection of persons not actively participating in hostilities as well as the humane treatment of prisoners of war.<sup>428</sup> The article’s scope is limited because of British and French diplomatic interventions during the Convention’s negotiations that attempted to keep their respective colonial conflicts free from international regulation. As a result, Common Article 3 is both over-defined (in terms of the conditions it requires) and under-defined (in terms of its ambiguous definition).<sup>429</sup> It was not until the 1977 AP I that decolonial armed conflicts were deliberately contemplated and incorporated into IHL.

Because IHL’s primary subjects are states it fails to adequately incorporate non-state actors such as irregular troops, guerrillas, ‘terrorists’, and populations engaging in spontaneous

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<sup>427</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977,” 1977, art. 1, para. 1.

<sup>428</sup> “The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949” ch. 1, art. 3.

<sup>429</sup> Kinsella and Mantilla, “Contestation before Compliance: History, Politics, and Power in International Humanitarian Law,” 3.

resistance to occupation into the legal framework. Crucially, this failure was a deliberately exclusionary act rather than an oversight.<sup>430</sup> Nonstate actor's eventual integration into IHL did not occur until decolonization was well underway and UN membership included a greater number of peripheral and postcolonial states. Most important to this dissertation's analysis is that AP I extended IAC status to include anti-occupation and decolonial violence undertaken in realizing a right to self-determination. Such conflicts were previously classified as NIAC and did not subject parties to any international legal obligations. The expanded definition was significantly resisted when first introduced for its perceived infringement on State sovereignty and potential legitimatizing of dissident sub-state actors.<sup>431</sup> To this day, several states, including the United States and Israel, have not acceded to either AP I or II—the reasons for which are more fully explained in chapter 5.

### **A principled approach**

Two fundamental guiding principles undergird the constellation of treaties and customs constituting IHL: distinction, also known as discrimination, and proportionality.<sup>432</sup> The following section demonstrates the ways in which these principles imagine a clean war wherein decisions are reduced to rational calculations, fully removed of the uncertainties and contingencies inherent to human experience and decision-making. It explains how their imperial origins were reformulated for a post-Enlightenment international legal order that sought to preserve the IHL's unequal integration of colonial territories and populations.

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<sup>430</sup> Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” 305–6.

<sup>431</sup> Geoffrey Corn, Ken Watkin, and Jamie Williamson, *The Law of War: A Concise Overview* (Oxon: Routledge, 2018), 7–15.

<sup>432</sup> McNab and Matthews, “Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law,” 665.

## Distinction

Distinction refers to the difference between civilians and civilian objects and combatants and military objects. Illegitimate attack targets include civilians and civilian objects, whereas legitimate attack targets include military objects, combatants, and civilians directly participating in hostilities.<sup>433</sup> The principle's fundamental logic is the importance of determining who is responsible for a perceived threat, on the basis of which it can then be determined whether they are or are not liable to be harmed.<sup>434,435</sup> The distinction principle does not acknowledge the possibility of *degrees* of responsibility, and instead reflects an all-or-nothing liability that labels some *one* or some *thing* either military or civilian. From this basic differentiation emerges the two ostensibly clear categories of combatant and non-combatant. However, this dichotomy is another example of IHL's unstable and bifurcated concepts. Mégret identifies this blind spot in which IHL presumes that we know what a combatant is, as if they existed naturally and not as an "elaborate normative and social construct."<sup>436</sup> Civilians (as presented in treaty law) are likewise more accurately compared to a Platonic ideal that is "essential for understanding but forever out of reach."<sup>437</sup>

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<sup>433</sup> "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977," art. 51, 52.

<sup>434</sup> Jens David Ohlin, Larry May, and Claire Finkelstein, eds., *Weighing Lives in War* (Oxford: Oxford University Press, 2017), 156, 165.

<sup>435</sup> This liability exists alongside a complementary privilege wherein a combatant forfeits the right to not be killed when they participate in hostilities and gain the right to kill. This is what is sometimes referred to as the 'protective' and 'permissive' sides of the law of targeting. See: Kretzmer, D., Ben-Yehuda, A., & Furth, M. (2014), "Thou Shall Not Kill": The Use of Lethal Force in Non-International Armed Conflicts, *Israel Law Review*, 47(2), 208-9.

<sup>436</sup> Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" 304.

<sup>437</sup> Thomas W. Smith, *Human Rights and War Through Civilian Eyes*, University of Pennsylvania Press (Philadelphia, 2016), 22, <https://doi.org/10.9783/9780812293616>.

The distinction principle is laid out in Common Article 3 to the Geneva Conventions and Article 51 and 52 of AP I. The Article 51(2) prohibition on attacking civilian individuals and population is qualified by Article 51(3) that permits their targeting “for such time as they take a direct part in hostilities” (‘DPH’).<sup>438</sup> However, IHL does not provide guidance for deciding how and when a civilian is found to be DPH, nor particular actions that may amount to DPH. International judicial and quasi-judicial bodies’ attempts to define DPH make use of broad indicators, such as posing a threat, intent to cause harm, or membership in an armed group, as well as more narrow indicators, like the active commission of hostile acts.<sup>439</sup> State domestic courts and tribunals have also contributed definitions, the most notable of which is the 2005 Israeli Supreme Court ruling on Israel’s aforementioned targeted killing policy that is discussed in greater detail in chapter 5. This ruling cast a wide net of activities captured under its DPH definition, including collecting intelligence, transporting combatants and/or their weapons or ammunition, and acting as “voluntary human shields.”<sup>440</sup> The U.S. adopted a similarly expansive list of terrorism-supporting activities to justify including some fifty Afghan drug lords suspected of financially supporting the Taliban to the Pentagon’s assassination list.<sup>441</sup>

While the distinction between the two categories appears straightforward in writing, it is significantly less clear during NIAC. In situations of NIAC the state party combatants are the

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<sup>438</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977,” art 51, para. 3.

<sup>439</sup> Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 618, para 1942.

<sup>440</sup> Emily Crawford, “Who Is a Civilian? Membership of Opposition Groups and Direct Participation in Hostilities,” in *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, ed. Mark Lattimer and Philippe Sands (Oxford: Hart Publishing, 2019), 20–30, <https://doi.org/10.1155/2010/706872>.

<sup>441</sup> Stuart Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” *International Review of the Red Cross* 94, no. 886 (2012): 612, <https://doi.org/10.1017/S1816383113000118>.

official armed forces, whereas the non-state parties to the conflict may be volunteer militias or organized armed groups—the members of which are frequently civilians who have spontaneously taken up arms. In these cases, the non-state parties to a conflict are often physically interspersed with the civilian population and do not wear uniforms. Wearing a uniform is the easiest means by which combatants may be distinguished from non-combatants and is considered a basic requirement for parties to a conflict. However, uniforms require resources and capital not always available to non-state actors and was criticized by states in the global periphery for this reason. Postcolonial states successfully petitioned the issue, and AP I relaxed the uniform requirement for irregular, non-state armies who, by the nature of the hostilities in which they engage, find it difficult to distinguish themselves from civilian populations.<sup>442</sup> This victory alongside the extension of IAC to wars of national liberation remain keys reason for state opposition to AP I.<sup>443</sup>

Distinguishing between civilian and military objects likewise calls on specific interpretations informed by general guidelines. Article 52(2) of AP I provides a cumulative, two-pronged test to determine whether an object may be legally targeted as a military objective in both IAC and NIAC situations. The first test requires that the object make an effective contribution to military action by its nature, location, purpose, or use. A missile launching site is an example of an object that is intrinsically military in its nature, location, and purpose. The second test requires that its attack offer definite military advantage under the given

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<sup>442</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977,” art. 44, para. 3.

<sup>443</sup> Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” 306.

circumstances. Both prongs are satisfied in most but not all situations, such as dual-use objects that can move between civilian or military use, e.g. fuel production facilities.<sup>444</sup>

Several Western states hold the view that an area of land may be a military objective if its capture or destruction offers definite military advantage.<sup>445</sup> This definition is potentially problematic because it shifts greater significance to the military advantage component of proportionality calculations and could result in an increased finding of military objectives. For example, an Israeli Foreign Affairs Report reflecting on military operations in Gaza stated that “even the presence of enemy combatants can make the otherwise civilian site amenable to attack. This is a harsh reality of urban warfare.” However, the mere presence of an enemy combatant in a civilian site does not necessarily transform it into a military objective. An example of such a situation in an asymmetric conflict is a combatant seeking shelter in a civilian home. According to the Israeli Manual on the Rules of Warfare, in these circumstances, “[t]he legal responsibility for the deaths of civilians in such a case is that of the side that made unreasonable use of a civilian target rather than on the side who attacked this target.”<sup>446</sup> It is apparent from these two examples that civilian immunity is dynamic, precarious, and subject to the discretion of individual soldiers or commanding officers. The general scholarly acknowledgement that many scenarios in which there is unclear or debatable military objectives can only be determined on a case-by-case basis highlights the opportunities built into IHL to subject violence’s regulation to

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<sup>444</sup> International Law Association Study Group, “The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare,” *International Law Studies* 93 (2017): 327–28; “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977,” art. 52, para. 2.

<sup>445</sup> International Law Association Study Group, “The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare,” 331.

<sup>446</sup> Customary IHL Database, “Israel: Practice Relating to Rule 10. Civilian Objects’ Loss of Protection from Attack,” International Committee of the Red Cross, n.d., [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_il\\_rule10](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule10). cite the primary source where possible

its ends. It is similarly apparent that determining the degree of acceptable collateral damage resulting from a strike is of the utmost importance, and what gives meaning and content to the distinction principle. This determination is the proportionality principle's purpose.

### **Proportionality**

A proportionality assessment must be made prior to carrying out an attack even if the target is identified as a military objective. Proportionality demands that the collateral damage associated with an attack not exceed the anticipated military advantage gained by carrying it out. An attack that is not proportionate is definitionally indiscriminate under customary IHL and therefore a legal violation. The principle resembles a mathematical equation when framed in this manner, and is emblematic of the Enlightenment thought's turn towards 'scientific' reasoning. Analogizing what is necessarily a subjective determination to an objective calculation falsely suggests it follows a singular, immutable logic.<sup>447</sup> IHL provides no specific 'formula' with which combatants can make proportionality calculations—resulting in as many different proportionality 'equations' as there are calculators. In fact, proportionality assessments are so varied that there are material differences between even close military allies like the U.K. and U.S.<sup>448</sup> The reason for these discrepancies is that values must be assigned to 'collateral damage' and 'military advantage' as part of the proportionality equation. Yet the outcome of a combatant to non-combatant death calculation will vary person to person. This is because the 'value' assigned to

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<sup>447</sup> Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules," *Yearbook of International Humanitarian Law* 8 (2005): 4, <https://doi.org/10.1017/S1389135905000036>.

<sup>448</sup> Casey-Maslen, "Pandora's Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law," 612–13.

each variable reflects subjective value judgements and their probabilities cannot be gauged with complete accuracy.<sup>449</sup>

As David True observes, it is apparent that the proportionality principle “is not an objective or clinical analysis, but is instead a value-laden interpretation.”<sup>450</sup> In the absence of a pre-given and objective formula it is values that animate proportionality decisions. IHL’s overriding value is ostensibly civilian immunity. However, like any value, civilian immunity is an *idea* that represents a material condition or temporal reality. The idea is not self-executing, nor does it exist in a value vacuum. A proportionality assessment is carried out by an attack planner whose decision will also be informed by other competing values. The historical constellation of these other values is defined by a fundamental commitment to ‘us’ over ‘them’—including ‘their’ civilians. This is aggravated by the fact that enemy civilians may not even be recognized as such, especially if they are the military aged males of an occupied or colonized population, e.g. the aforementioned case of American signature strikes with drones in Afghanistan. The malleability of the term’s meaning is highlighted by the fact that its first ever use was in the mid/late twentieth century during the Vietnam War, rather than existing as a longstanding strategic or legal concept. Its origin in an American imperial conflict where it was introduced for political reasons demonstrates how the term is more of an expression of governmental public relations than a genuine concern for civilian lives.<sup>451</sup>

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<sup>449</sup> Sassòli, Bouvier, and Quintin, “How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,” 9.

<sup>450</sup> David True, “Disciplining Drone Strikes: Just War in the Context of Counterterrorism,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 293, <https://doi.org/10.1029/2003JD004173>.Aires.

<sup>451</sup> Alison Adey, Peter; Whitehead, Mark; Williams, ed., *From Above: War, Violence, and Verticality* (Oxford: Oxford University Press, 2014), 64.

Proportionality assessments' inconsistencies go beyond their uneven application. Intuitively, a proportionality assessment should be made *a posteriori* an attack as part of standard damage assessment procedure. In reality, an attack is assessed for its legality *a priori* the decision to carry it out. State Parties to the AP I drafting process "rejected the idea that the prohibition on disproportional attacks would mean that the *actual results* of the attack would be evaluated against the anticipated military advantage."<sup>452</sup> Attendant declarations to AP I make clear that these assessments will instead consider the damage that a reasonable military commander could anticipate given the reasonable available evidence prior to the attack taking place.<sup>453</sup> This left the proverbial door open for states to retroactively justify a host of otherwise indefensible attacks by way of a revisionist inductive logical reasoning. It is this reason, among others, that authors like Valerie Epps have argued "collateral damage has become simply an organized deceit" in which permitting enemy combatant deaths perpetuates the empirically false narrative that civilian deaths are only permitted "incidentally," rather than deliberately.<sup>454</sup>

Proportionality has both tactical and strategic implications. When the principle is operationalized, it should aid in determining the appropriate means and method by which an attack may be carried out.<sup>455</sup> A drone may be considered either a weapon or a weapons platform depending on the type under consideration. As a loitering munition, a drone is integrated with the

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<sup>452</sup> Amichai Cohen, "Protection by Process: Implementing the Principle of Proportionality in Contemporary Armed Conflicts," in *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, ed. Mark Lattimer and Philippe Sands (Oxford: Hardt Publishing, 2018), 76, <https://doi.org/10.1155/2010/706872>.

<sup>453</sup> Cohen, para. 76. The actual results of an attack cannot be used as evidence in a trial, See: ICTY Trial Chamber I, "Prosecutor v Stanislav Galić," *Case No. IT-98-29-T*, 2003, para. 37.

<sup>454</sup> Valerie Epps, "Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule," *Georgia Journal of International and Comparative Law* 41 (2013): 309.

<sup>455</sup> McNab and Matthews, "Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law," para. 689.

munition such that the drone becomes the weapon. As a platform, a drone can deliver payloads with a variety of destructive potential, ranging from a machine gun rifle to five-hundred-pound bombs. However, the mere existence of a machine gun-armed drone does not mean that such a weapon is practical or likely to be used, nor is it necessarily as ‘precise’ or ‘proportionate’ as the same weapon wielded by a human. Existing drone use in armed conflict situations indicates they are more likely to mimic attack helicopters and fighter jet strike capabilities than a firearm-carrying soldier. It is consequently more apt to compare drones to these similar aerial weapons platforms for the purpose of proportionality evaluations. It is likewise appropriate to interpret current drone use with an understanding of the historical use of aerial bombardment.

### **Aerial bombardment**

In an article from 2011, author Derek Gregory explains drones’ history in global borderlands and their intersection with the established colonial governing modality of air power. “The British,” he explains, “invented aerial counterinsurgency on the North West Frontier with Afghanistan and in Iraq (Mesopotamia) in the 1920s.”<sup>456</sup> From its outset, aerial war has been overwhelmingly defined by its use in counterinsurgency operations in lieu of territorial occupations. Surveys of aerial war’s history also bring IHL’s history into focus. Early air power was primarily a policing measure against occupied non-European populations, leading Thomas Hippler to argue that aviation “harmoniously combines cosmopolitanism and racism.”<sup>457</sup> Post-WWI British Air Force staff intentionally (and falsely) emphasized aerial bombardment’s miraculous effectiveness in pacifying the otherworldly deserts of ‘Arabia’ to “avoid emphasizing

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<sup>456</sup> Derek Gregory, “From a View to a Kill: Drones and Late Modern War,” *Theory, Culture & Society* 28, no. 8 (2011): 189, <https://doi.org/10.1177/0263276411423027>.

<sup>457</sup> Thomas Hippler, *Governing from the Skies: A Global History of Aerial Bombing* (London: Verso, 2017), 60.

the truth that air warfare has made [distinctions between military and non-military targets] obsolete and impossible.”<sup>458</sup> The following section explores early experiments in aerial bombardment and introduces authors Lewis and Crawford’s proposition that IHL ushered in the era of the drone through its regulation of asymmetric warfare.<sup>459</sup>

Modern war without airplanes was “unimaginable” by the time the post-WWII Geneva Conventions were signed.<sup>460</sup> This is evidenced by the fact that there were no attempts in the following few decades of IHL development to limit air war as such. Author Zsuzsanna Csapo suggests that more than anything it was the WWII’s intense destruction that prompted the regulatory framework reconsideration that resulted in the Geneva Conventions. This reconsideration consisted of shifting concern towards humanitarian (i.e., victim) interests that would protect combatants and non-combatants across all types of battlegrounds. Despite airpower playing a crucial role in some of the War’s most dramatic battles, aerial warfare is not specifically addressed in the Conventions. Although the subject of aircrafts is introduced it is not for the purposes of circumscribing their use in aerial bombardments.<sup>461</sup> Aerial bombardment was effectively absorbed into the newly developing legal framework and the Conventions applied the same principles to artillery and aircrafts alike. Gregory posits that their conspicuous silence on air war was due to the fact that WWII’s victors were also those states with the most experience in aerial bombing.<sup>462</sup> This conclusion is taken even further<sup>462</sup> by author Martin Coward, who contends

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<sup>458</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 240.

<sup>459</sup> Michael W. Lewis and Emily Crawford, “Drones and Distinction: How IHL Encouraged the Rise of Drones,” *Georgetown Journal of International Law* 44 (2013): 1127–66, <https://doi.org/10.3868/s050-004-015-0003-8>.

<sup>460</sup> Zsuzsanna Csapó, “World War I and the Appearance of Aerial Warfare: A Lacuna in the Texture of International Law?,” *Hungarian Yearbook of International Law and European Law* 3, no. 1 (2020): 218, <https://doi.org/10.5553/hyiel/266627012015003001010>.

<sup>461</sup> Medical aircraft Csapó, 218–19.

<sup>462</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 65.

that Allied bombing strategies identified the enemy with the nation such that victory required annihilating the enemy's society and its war machine.<sup>463</sup> These two propositions point to an intentional avoidance by the War's victors to develop behavioural or targeting standards unique to aerial war. This dissertation builds off these two explanations by proposing that European states' experiences in earlier imperial conflicts is the prevailing reason aerial war was never expressly regulated by IHL. Previous wars taught these states powers that the overwhelming use of force against civilian populations can be a temporarily effective means for managing imperial modes of governance, and that post-War colonial administration would require the continued use of air power in this manner. This explains why unlike other *wartime* measures such as naval bombardment and blockades, aerial bombardment in Mandate and colonial territories was considered a *peacetime* measure that was *always* permissible.<sup>464</sup> This precedent was set during the previous World War.

The military successes and failures of aerial bombing in WWI foreshadowed future elements of drone war—none more so than their paradoxical legal standing. The early twentieth century strategy of terrorizing entire populations by “heaving a weapon of destruction overboard and hoping for the best” has remained in place despite the huge leaps in technology achieved in the First and Second World War interregnum and beyond.<sup>465</sup> As Gregory puts it, despite these advances “there are numerous dispiriting parallels between then and now,” most consistently is “the repeated insistence that air attacks are counterproductive.”<sup>466</sup> This was apparent as early as 1921, when British Field Marshall Henry Wilson, the Chief of Imperial General Staff, expressed

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<sup>463</sup> Adey, Peter; Whitehead, Mark; Williams, 99.

<sup>464</sup> Adey, Peter; Whitehead, Mark; Williams, 233.

<sup>465</sup> Adey, Peter; Whitehead, Mark; Williams, 20.

<sup>466</sup> Gregory, “From a View to a Kill: Drones and Late Modern War,” 189.

concern that using airpower as a form of “control without occupation” was a policy doomed to failure.<sup>467</sup> Former French President Charles de Gaulle introduced a more explicitly political angle to this observation in his defence of ground occupations, stating: “aircraft can destroy, but cannot compel, cannot conquer, cannot occupy.”<sup>468</sup>

Drones’ growing popularity amongst states engaging in neocolonialism and/or imperial conflict suggests these states have not learned from past failures to replicate the effectiveness of ground-based military occupations and/or operations with aerial alternatives. Why, then, do states continue to rely heavily on a uniquely destructive and strategically dubious type of bombing? This dissertation proposes two, interrelated answers that also constitute the basic premises of its thesis. The first is that airpower’s anticipated efficacy is intertwined with a desire to lower the human costs of territorial occupation, and related assumptions that visual perception is an epistemically reliable source of knowledge. These assumptions are maximized by the aerial perspective, which possesses an “omniscient power that becomes naturalized by its own teleology.”<sup>469</sup> Mediating aerial technology’s teleological meaning through hegemonic Enlightenment liberal thought clarifies why aerial perspectives are presumed to enable a totalizing knowledge that allows more accurate and therefore more *legal* attack capabilities. The second answer is that aerial bombing was and continues to be used *because* of—not *despite*—the disproportionate harm it wreaks on civilian populations experiencing and/or resisting imperialism. While inaccurately attacking enemy targets is not tactical in the plain sense, it is strategic if the ultimate goal is to terrorize entire populations—as was often the case when

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<sup>467</sup> As quoted in Afxentis Afxentiou, “A History of Drones: Moral(e) Bombing and State Terrorism,” *Critical Studies on Terrorism* 11, no. 2 (2018): 301, <https://doi.org/10.1080/17539153.2018.1456719>.

<sup>468</sup> As quoted in Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 76.

<sup>469</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 21–22.

defending and/or expanding imperial boundaries. To this end, Field Marshal Wilson's observation that air power "provides only a means of propaganda or an instrument of terrorism" remains true a century past.<sup>470</sup>

Post-WWI British aerial experiments are the historical precedent for contemporary concerns over the productivity of drone-based military strategies. In a 2013 *Foreign Affairs* article, author Audrey Cronin bemoans what she considers American counterterrorism failures resulting from a drone tactics driving strategy. Cronin argues that American targeted killing and signature strikes failed to defeat al Qaeda and affiliated groups, contain conflicts, or advance American national security. Such tactics have instead become a form of "remote control repression."<sup>471</sup>

This and other earlier discussed shortcomings of the U.S. drone program are not without merit. However, many of these criticisms are premised on false beliefs about U.S. counterterrorism and foreign policy more generally. These beliefs include an expectation that American foreign policy is informed by a liberal ideology pursuing fundamentally humanitarian and coherent goals. However, direct American financial and military support for terrorism-sponsoring states like Saudi Arabia as well as terrorist organizations fighting in proxy wars across the globe tells a different story.<sup>472</sup> Like its imperial predecessors, American foreign policy

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<sup>470</sup> Afxentiou, "A History of Drones: Moral(e) Bombing and State Terrorism," 301.

<sup>471</sup> Audrey Kurth Cronin, "Why Drones Fail: When Tactics Drive Strategy," *Foreign Affairs*, 2013, 44, 47.

<sup>472</sup> Saudi Arabia's support of al-Qaeda in particular is widely known, see: William C. Banks, "Regulating Drones Are Targeted Killings by Drones Outside Traditional Battlefields Legal?," in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 145, <https://doi.org/10.1017/CBO9780511491757.014>. For information on American direct and indirect support of terrorist organizations and militias, see: Mark Mazzetti and Matt Apuzzo, "U.S. Relies Heavily on Saudi Money to Support Syrian Rebels," *The New York Times*, January 23, 2016; Mark Mazzetti, Adam Goldman, and Michael S. Schmidt, "Behind the Sudden Death of a \$1 Billion Secret C.I.A. War in Syria," *The New York Times*, August 2, 2017; Maggie Michael, Trish Wilson, and Lee Keath, "AP Investigation: US Allies, Al-Aqida Battle Rebels in

claims to advance liberal internationalist goals while actually undermining global peace and stability. Such incoherent and self-defeating policies are not historically unique to the U.S. and serve imperial states' long term power goals despite these apparent tensions. Seeking peace by waging liberal wars leads to longed and protracted conflicts that provide a flexible justification for the ongoing military invasions, occupations, and assassinations required to sustain imperial power relations. Contemporary imperialism has diminishing interest in on-the-ground occupations and forms of governing, instead relying on dispersed war machines to assert hegemony over foreign state actors and sow fear and distrust among their populations.

Drones are the ideal weapons platform for states currently pursuing different postcolonial and neoimperial governing modalities. These policies include direct colonialism (e.g. Israel in Palestine), neocolonialism (e.g. the United States across the MENA and Latin America), former imperial powers maintaining post-decolonization economic and political relations (e.g. France in Mali), and post-independence settler colonialism (e.g. Canada and its indigenous population). As empires changed over the centuries so too did how they are sought and sustained. Newly initiated full scale territorial occupations are no longer legally or practically feasible, with empires instead looking to govern from above. There are several reasons drones have emerged as perfect tool for empire's different forms. Firstly, they eliminate the bodily risk retained by traditionally piloted aircrafts, however significantly reduced it became over time. Imperial metropolises loathe to put their own populations in harm's way in order to manage the administration of colonial territories can now use a drone and greatly reduces the domestic human and political costs. Drones have taken over the function of both imperial administrators and soldiers. Secondly, they are a form of

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Yemen," *Associated Press*, August 6, 2018; Jonah Shepp, "While Condemning Iran, the U.S. Contributes to Terrorism in the Middle East, Too," *New York Magazine*, August 2018.

air power that is praised by the West's liberal democracies as the most humane and legal weapon to date while simultaneously disciplining entire populations through policing and state terrorism. Drones' integration of continual surveillance and lethal attack capabilities has removed conflict's most visible signifiers (e.g. infantry, artillery, navy vessels) and highlighted the false distinction between 'wartime' and 'peacetime' in postcolonial and neoimperial locations. By deconstructing IHL into its constituent rules, animating logics, and goals, it becomes evident that drones best satisfy its rules in both theory (as an expression of Enlightenment thought) and practice (as enabling war's violences). This dissertation places drones along a long line of aerial practices in peripheral and postcolonial territories to argue that war's regulation, and thus IHL, is inextricably tied to political purpose and empire building. Analyses of drones show that they are, much like pre-existing aerial power, a weapon *of* and *for* imperial conflict and governance. What makes drones unique is how well they appear to adhere to IHL's vision of a legal and humane weapon, and in doing so, expose its fundamental logics, assumptions, and contradictions to a degree never before seen.

### **Regulating war's means**

Advancing the argument that drones were devised to adhere to IHL requires revisiting previous efforts to regulate different classes of weapons. The innovation, use, and regulation of weapons across time and place reflects a pattern in which the intersection of power and interest appears to directly determine which are regulated and in what manner. Hegemonic European powers have consistently circumscribed where, when, and how so-called advanced weapons may be used, as well as who is permitted use them. Historically, there was shared understanding amongst Europe's imperial powers that only We can be trusted to have access to certain destructive capabilities, and that they must only be used *by Us against Them*. In this respect, the

arrival of air power on the battlefield established a clear weapons technology gap that was widened by the arrival of drones. The absence of a current drone regulatory scheme—or even the slightest indication of interest in developing one—fits lock step with previous approaches to managing weapons technology developments. These approaches are defined by two parallel features, each of which should be understood as a kind of technology that supports former and current forms of colonialism—firstly, the historical legalization of imperial conquest, occupation, and policing (i.e., IHL) and secondly, developing the most efficient means by which imperial conquest, occupation, and policing may be materially carried out (i.e., drones).

Before the appearance of airplanes in WWI, declarations made during the 1899 and 1907 Hague Peace Conferences attempted to regulate aerial warfare by placing a moratorium on discharging projectiles and explosives from balloons. However, these declarations were ‘half-baked’ in the sense that they would *only* apply to interactions between contracting parties and were intentionally drafted to be *temporary* measures.<sup>473</sup> Rothe and Collins explain that early aircraft programs in Germany, Russia, and the U.S. were the reason a ban on aerially delivered weapons was rejected. The competitive advantage of the emerging technology’s military application outweighed other considering factors. The Hague Conferences are attributed with legitimating unrestrained and indiscriminate aerial bombing for this reason.<sup>474</sup> Accepting balloon

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<sup>473</sup> Csapó, “World War I and the Appearance of Aerial Warfare: A Lacuna in the Texture of International Law?,” 10; Marco Sassòli, Yuval Shany, and René Provost, “Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality between Armed Groups and States?,” *International Review of the Red Cross* 93, no. 882 (2011): 426–31, <https://doi.org/10.1017/S1816383111000403>.

<sup>474</sup> Dawn L. Rothe and Victoria E. Collins, “The Normality of Political Administration and State Violence: Casuistry, Law, and Drones,” *Critical Criminology* 22, no. 3 (2014): 377, <https://doi.org/10.1007/s10612-014-9234-7>.

war was a conscientious acceptance of the different types of air power to come and the different types of populations against whom they could be used.

Earlier chapters explored how imperial narratives intentionally emphasize the ‘dynamic of difference’ between the colonized and colonizer as part of a larger effort to transform this difference into what author Ritu Mathur describes as “irrefutable standards of fact that correspond with concrete realities to the benefit of colonial powers.”<sup>475</sup> Racist colonial practices look to sustain this difference by deliberately cultivating ‘technical inadequacy’ to reverse the technological innovation that already existed in colonies and to advance the colonial power’s weapons advantage necessary to govern its empire. The aforementioned civilizational standard criterion of capacity to organize for ‘self-defence’ is demonstrative of how the laws of war reward colonial violence.<sup>476</sup> Accordingly, the mere presence of a colonial power—following the effective use of violence against an indigenous population—becomes evidence of colonialism’s righteousness. This narrative is compounded by the Enlightenment thinking embraced by colonial powers that imperial conquest and governance, however violent, has a civilizing effect on its recipients. These two ideological commitments are the frame through which early arms proliferation and control regimes should be understood.

## **2. DRONE LEGAL PERCEPTIONS**

### **Ideas of drone discrimination**

This second section builds off the first by applying its observations about IHL and aerial bombardment histories to present day drone use and regulation in war. It considers how

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<sup>475</sup> Mathur, “‘The West and the Rest’: A Civilizational Mantra in Arms Control and Disarmament?,” 340.

<sup>476</sup> Mathur, 340–41.

historically rooted assumptions about technology, race, and the East have influenced the anticipated and actual results of using drones. These assumptions provide a framing within which the weapons' situation under IHL can be understood in greater depth. Drones capture the imagination of policymakers by appearing to seamlessly integrate into pre-existing myths of wars' locations and combatants. The *idea* of the drone is particularly seductive for its promise of complete situational awareness and invulnerability. Drones' high degree of operational controls compounds the illusion of their discriminate use. Put differently, their 'precise' remote control input is presumed to deliver a similarly precise destructive output.<sup>477</sup> Drone proponents' desire for the weapons to be better able to discriminate between il/legitimate military targets is responsible for passive and active prejudices. A passively or subconsciously held belief in drone strike precision can lead operators and analysts to explain attack outcomes away as 'reasonable' given the circumstances and not constituting legal breaches. For example, the suspicious 'pattern of life' behaviour analyses that trigger signature drone strikes in Pakistan's FATA's region were created *for* and *by* the unique types of prolonged surveillance operations drones conduct. Assumptions or misunderstandings about the populations over which drones operate can prejudice operators to perceive civilians and their behaviours as suspicious. Such was the case in a 2002 Predator drone strike in Afghanistan that killed three young men wearing traditional garb while collecting scrap metal in a mountainous area in which the American military suspected Al Qaeda operatives were hiding.<sup>478</sup> In more extreme cases of attacks against

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<sup>477</sup> The word 'precise' is put in single quotation marks to indicate that the term is not actually accurate. The technology that allows drones to fly, operates their sensors, and launches their munitions are imprecise and error prone.

<sup>478</sup> Peter Singer, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century* (New York: Penguin, 2009), 397.

persons not traditionally understood as military targets, a deeply held belief in drones' discriminatory potential has altered existing legal categories to *make* drone strikes legal, such as the aforementioned targets of American signature strikes in which military-aged males are not considered civilian casualties.<sup>479</sup> In this instance the weapons technology itself generates a legal category using IHL's pliability and effectively will a desirable legal outcome into being.

As explained in chapter 2, many scholarly attempts to engage the question of drones' legality confuse their form with their function. This confusion includes their airplane-like appearance and extends to their futuristic-looking design that implies similarly futuristic capabilities. Conflating their unmanned aerial vehicle form with their function as a lethal force delivery system leads to the erroneous conclusion that drones' discriminatory potential will produce discriminatory outcomes. This is a fiction rooted in an imagined idea of war as an event between two states' armies on an open and delineated battlefield waged exclusively between combatants. In his consideration of drones and IHL, Frédéric Mégret engages with hypothetical arguments rooted in these types of historically constructed imaginaries. He emphasizes that what makes drones innately unique is how their pilot's complete protection maximizes their potential discriminate use. It follows from this premise that attempts to determine drones' adherence to the discrimination principle should consider "how they are used in relation to their *potential* for discrimination."<sup>480</sup> Put differently, it is not appropriate to compare the discriminatory targeting outcome of a drone-launched attack to that of a traditionally piloted aircraft. Rather, the standard for assessing how well a drone strike satisfied the discrimination principle should be higher than

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<sup>479</sup> Casey-Maslen, "Pandora's Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law," 612.

<sup>480</sup> Frederic Megret, "The Humanitarian Problem With Drones," *Utah Law Review* 5 (2013): 1300. Emphasis added.

the standard for any other weapons system. Shifting focus to actual strikes, Mégret points out the similarly inadequate tendency to limit analyses of drones' discrimination to discrete instances of their use. In an effort to transcend this analytical trap, he explains that the appropriate starting point from which analyses of drones' adherence to the discrimination principle should recognize that "in the real world, weapons are not just inert objects that can be understood independently of context, history, ideology, economy, or politics."<sup>481</sup> Rather, assessments of targeting and attack decisions should factor the broader social context in which a strike occurs. While this may seem obvious to some, actual weapons' discrimination assessments do not expressly bring these factors to bear. They instead envision conditions that more closely resemble sterile scientific research labs than the chaos and calamity of actual armed conflict.

Cold War nuclear war strategy development took this logical, scientific approach to strike assessments to a new extreme by imagining hypothetical scenarios in which aerial weapons delivery "clean, painless, and uncarinate" attacks.<sup>482</sup> The nuclear defence analyst idea of 'surgical strikes' taken with 'clean bombs' persisted beyond the Cold War and into Western air-based wars, e.g. the 1991 Gulf War and 1999 NATO bombing campaign in Yugoslavia. This logic has since expanded to include drone strikes because they have so far carried arms definitionally more discriminate than nuclear or chemical weapons, i.e., inherently indiscriminately weapons. The treaty regimes that emerged to control the use and proliferation of such weapons reflects their basically objectionable qualities. Yet these regimes are rife with loopholes and qualified statements that allow for their continued legal and (in the case of chemical weapons) routine

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<sup>481</sup> Mégret, 1294.

<sup>482</sup> Graham, *Cities, War, and Terrorism: Towards an Urban Geopolitics*, 61.

use.<sup>483</sup> Despite decades-long efforts by governmental and non-governmental actors to reduce the likelihood of conflicts involving nuclear or chemical weapons, drones are desirable to those actors possessing nuclear and/or chemical weapons *because* of their ability to be delivered via drone. From the B-29 Superfortress bombers of WWII to miniaturized nuclear warheads of intercontinental ballistic missiles, drones are the most recent example of a technological development enabling the use of weapons that are unconscionable but not *per se* illegal.<sup>484</sup> Ideals and imaginaries of ‘good’ wars fought with ‘efficient’ and ‘humane’ weapons continue to resonate with war strategists despite their misalignment with material realities. Drones make it easier than ever to *imagine* and manage conflicts in which *unimaginable* weapons are used, and are once again found to facilitate the very violences IHL ostensibly proscribes.

The potential for nuclear bomb-carrying drones is a microcosm of the larger drone paradox in which they were developed to enable increasingly destructive forms of violence in the name of pursuing a more legal and humanitarian means of waging war. This paradox runs through drone development and use irrespective of the level of analysis. The simultaneous existence of these two opposing goals is most fully accounted for by understanding IHL and weapons’ histories as the history of political and legal structural development built on the foundation of empires.

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<sup>483</sup> The 1993 Chemical Weapons Convention (CWC) is the authoritative international document proscribing the use of all chemical weapons and requires the destruction of existing stocks. Previously, the use of gas and chemical weapons were initially regulated in 1899, 1907, and 1923. See: Rothe and Collins, “The Normality of Political Administration and State Violence: Casuistry, Law, and Drones,” 376–77. The CWC reaffirms the principles, objectives, and obligations of the Geneva Protocol of 1924 as well as the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. See: “Chemical Weapons Convention,” Preamble, 1993, <https://doi.org/10.4324/9780429043321-4>.

<sup>484</sup> The Court found that although nuclear weapons possess the “capacity to cause untold human suffering, and the ability to cause damage to generations to come, it could not rule that their use would be illegal in any and all circumstances, particularly in relation to self-defence. However, it did find that “the threat or use of nuclear weapons would be generally contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”, see: International Court of Justice, “Advisory Opinion on the Legality of Nuclear Weapons,” 1996, paras. 36, 103, <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

## Drone double standards

There is a certain prestige assumed by states when they come into possession of ‘elite’ military capabilities, e.g. nuclear weapons development and delivery. As with nuclear weapons, advanced armed drones are a global political signifier of military strength that is conventionally understood as translating into greater political power. The foreign policy possibilities associated with this power positions a state, regardless of geographic location, to potentially receive recognition from the Anglo-American security matrix as one of ‘Us’ and fully participate in global political activities as an ‘equal’. This bizarre myth of meritocracy is a circular reasoning that presumes a requisite degree of civilizational advancement precedes the acquisition of advanced means of destruction. Put differently, there is an unspoken assumption that a state must have done something right to earn such destructive capabilities, and that this ‘something right’ will guarantee these capabilities are used in a similarly correct manner. A revealing anecdote from the origins of the gatling machine gun helps unpack the post-Enlightenment attitude towards violence, technology, and progress. The gun’s namesake, Richard Jordan Gatling, wrote in a letter reflecting upon its use in the U.S. Civil War that he hoped its immense destructive capability would “supersede the necessity of large armies, and consequently exposure to battle and disease would be greatly diminished.”<sup>485</sup> This belief in civilizational progress through technology is what author Howard Segal describes as ‘technical utopianism.’<sup>486</sup> Those arguing that drones are a ‘moral’ weapon engender a similar commitment to pursuing an ethical goal with technological advancement. The unspoken premise of such aspirational violence is that

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<sup>485</sup> Carvin, “Getting Drones Wrong,” n. 9.

<sup>486</sup> As quoted in Carvin, n. 10.

these weapons require a moral soldier to wield them—placing great import on the question of *who* possesses them.

Richard Price explains with the example of the chemical weapons taboo in international law how the “low cost and efficient weapons” used by states in the periphery and non-state actors are insufficient for joining the “civilized” warfare club and met with derision by powerful states.<sup>487</sup> Loitering munitions and modified consumer drones are good examples of this phenomenon. Hundreds of millions of dollars invested in the research and development of high-tech drones that bear little resemblance to a grenade carrying quadcopter, and yet both are categorized under the broad banner of ‘drones’ and are both extremely tactical when used in the right context. The effectiveness of inexpensive and relatively straightforward drones is denied by the world’s military powers for both ideological and economic reasons. These drones’ unsophisticated and accessible aspects are both over and underemphasized to adhere to Western supremacy narratives. Such drones are simultaneously presented as rudimentary or unserious and still a significant threat to a state’s national security. Drones’ paradoxical features again reveal the tensions latent in hegemonic international relations and legal discourses. Drone proliferation in the so-called East exemplifies contemporary ‘strategic orientalism’ that believes it is the West’s role to guarantee global security in the face of non-Western rogue states that threaten peace and security by refusing to adhere to international norms.<sup>488</sup> Growing drone proliferation and sovereignty-related concerns in the West are consistent with a belief that the technology cannot be trusted in the ‘irresponsible’ and ‘unpredictable’ hands of non-allied state or non-state

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<sup>487</sup> Richard M. Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997), 142–43.

<sup>488</sup> Mathur, “‘The West and the Rest’: A Civilizational Mantra in Arms Control and Disarmament?,” 348. These norms need not be war or weapons related, e.g. the ‘free market’.

actors. This is also consistent with Enlightenment attitudes towards temporality and science that correlate technological, civilizational, and moral advancement. According to this line of thought, the barbaric and backward states in the East are not *yet* capable of responsibly owning and operating this weapons class.

Recent media reports and statements by high-ranking members of the U.S. military illustrate these percolating anxieties. Head of U.S. Central Command Marine General Kenneth McKenzie Jr. has repeatedly referred to inexpensive and commercially available drones as the greatest tactical threat facing U.S. troops in the Middle East.<sup>489</sup> Similarly, news commentators have expressed concerns over the “havoc” inflicted by groups like Hezbollah and Hamas possessing drones, and frame increasing drone use in the MENA as creating “an arms race that increasingly pits countries like Iran and armed groups it supports against the U.S. and its allies.” Advancements in drone technology by states like Iran and Turkey are described as “alarming” and as giving non-state actors like the Houthis and Hezbollah “an edge over their more heavily armed adversaries.”<sup>490</sup> Both the ongoing Hezbollah-Israel and Yemeni Civil War pit the U.S. and its allies against state and non-state actors that counter American policy in the region. Thus, the context in which drones are used and by whom are key determining factors in how drone use and proliferation is framed by voices in contemporary Anglo-American security discourses.

American concern over early drone proliferation in the MENA goes back decades. The 1986 CIA report referred to in chapter 1 emphasizes the potential threat posed by terrorist

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<sup>489</sup> Jeff Schogol, “Drones Pose the Biggest Threat to US Troops in the Middle East since IEDs, Top General Says,” *Task & Purpose*, 2021, <https://taskandpurpose.com/news/drone-threat-ieds-middle-east-mckenzie/>.

<sup>490</sup> Paul Iddon, “Turkey, Israel And Iran Have Built Some Very Lethal Loitering Munitions,” *Forbes*, July 19, 2020, <https://www.forbes.com/sites/pauliddon/2020/07/19/turkey-israel-and-iran-have-built-some-very-lethal-loitering-munitions/?sh=75fd1d7259de>.

organizations attacking U.S. targets with loitering munitions. The report identifies a terrorist attack carried out by drone as a ‘major finding’ although it does not provide any evidence to support the claim. The report refashions bomb-laden remotely piloted vehicle use in the ‘Third World’ as a terrorist method—pointing to what author Katherine Chandler describes as a shift in understanding the enemy as foreign soldiers to the image of ‘suicide-bomber-as-terrorist’.<sup>491</sup> With this shift the periphery’s “weak and powerless” states were transformed in traditional security studies analytic frameworks as “the site of good liberal intentions or at worst a potential source of threats.”<sup>492</sup> However, it is hypocrisy that poses the actual threat to advancing the Anglo-American security matrix’s self-defined interests. There is little to no condemnation from Western government and security officials of current state drone use against various non-state actors. For example, Turkish-state assassinations of Kurdish activists and militia-members by drone does not receive public rebuke due to the country’s strategic location and NATO membership.<sup>493</sup> The expanding state use of armed drones within and without official armed conflict contexts creates a potential challenge for political and military leadership in states that formerly possessed a monopoly on the weapons. The U.S. drone program’s ethical and legal justifications are particularly vulnerable to being mimicked by states that do not support the drone policies of America and its allies. The realities of ‘American exceptionalism’ will be reduced to a mere idea once the technology and the justifications for drone use are sufficiently proliferated.

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<sup>491</sup> Katherine Fehr Chandler, *Unmanning: How Humans, Machines and Media Perform Drone Warfare* (New Brunswick: Rutgers University Press, 2020), 105.

<sup>492</sup> Tarek Barkawi and Mark Laffey, as quoted in Mathur, “‘The West and the Rest’: A Civilizational Mantra in Arms Control and Disarmament?,” 339.

<sup>493</sup> One such example is the 23 June 2020 Turkish drone strike that killed three Kurdish women’s rights activists. See: “Political Femicide: Systematized State Assassination of Politically Organised Women,” 2020, 3–5.

Liberal international relations and legal scholarship indicates a general awareness of the potential universalization of drone technology and use-rationale. Such a prospect gives further urgency to normatively connecting advanced *technology* with advanced *civilization* and advanced *moral purpose* in war's conduct. Chandler highlights how the CIA report goes beyond demonstrating the longstanding incongruity between American condemnation and use of particular tactics to reveal "a pattern whereby identification of possible threat becomes a strategy."<sup>494</sup> In this formulation, small drones are emblematic of the "perpetual insecurity on the margins of the international order."<sup>495</sup> Because of the ease with which basic drone technology is achieved and weaponized, drones are poised to become both the problem and solution to maintaining the prevailing world order. In contrast to the CIA's confidential report, today's American military seems much more comfortable publicly sharing its drone-related anxieties. During interviews conducted in June 2020 and April 2021, former head of U.S. CENTCOM General Kenneth McKenzie was asked 'what keeps you up at night?' and both times he answered the proliferation of small unmanned aerial platforms.<sup>496</sup>

### 3. IL/LEGAL SUBJECTS IN TIME

Preceding chapters explored how European powers' colonial encounters created powerful narratives for imperial ambition and violence that directly shaped early international relations and international legal theorizing and provided the content of future legal regimes. This section

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<sup>494</sup> Chandler, *Unmanning: How Humans, Machines and Media Perform Drone Warfare*, 105.

<sup>495</sup> Chandler, 106.

<sup>496</sup> "General Kenneth F. McKenzie Jr. AEI Transcript, April 28th, 2021," U.S. Central Command, 2021, <https://www.centcom.mil/MEDIA/Transcripts/Article/2589847/general-kenneth-f-mckenzie-jr-aei-transcript-april-28th-2021/>; "CENTCOM and the Shifting Sands of the Middle East: A Conversation with CENTCOM Commander Gen. Kenneth F. McKenzie Jr.," Middle East Institute, 2020.

builds on that analysis by investigating how IHL's embedded dichotomies appear in drone operations and the norms that guide them. It begins by reintroducing aspects of Western drone discourse, particularly those illustrating the geographic and political ideological matrix that predates and informs their contemporary use. It then discusses the relationships between state and non-state actors implicated in drone strikes, including how time mediates these relationships, as well as the unique temporalities drones create and their intersection with IHL. Particular attention is given to how Orientalist conceptualizations of peripheral and postcolonial territories make their populations appear *less* human and *more* targetable. This differentiation is offered as evidence of IHL's earlier discussed repressive inclusion of its non-European Other.

Scholar Anne Orford states that “the authority and legitimacy of modern international law rests on its claim to have transcended its European heritage and to operate today as a universal law capable of representing humanity.”<sup>497</sup> She goes on explain that this claim is undermined by “the continuity between imperial and multilateral systems of exploitation and control” that reproduces historical patterns of domination.<sup>498</sup> Anghie similarly argues the ‘universality’ of European culture continues to rely on the ‘particularity’ of the non-European world by way of the continued reassertion of a cultural gap between the two—also referred to as a ‘dynamic of difference’. This dichotomy is reified by the continued dominance of imperial states in international legal institutions and processes following formal decolonization.<sup>499</sup> State drone use and its international legal regulation demonstrates how these relations recur in the arena of armed conflict.

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<sup>497</sup> Orford, “The Past as Law or History? The Relevance of Imperialism for Modern International Law,” 1.

<sup>498</sup> Orford, 1.

<sup>499</sup> Markus Gunneflo, “Drones and the Decolonization of International Law,” *Middle East Institute Insight*, no. 191 (2018): 5.

Hugh Gusterson, quoting Chamayou, explains that drones challenge our understanding of legal authority and political legitimacy because they are “an unconventional form of state violence that combines the disparate characteristics of warfare and policing without really corresponding to either.”<sup>500</sup> This lack of correspondence is a defining feature of the drone ‘paradox’: it is, all at once, a futuristic weapon brought forward from the past. This synthesis is the reassertion of imperial war waging and modes of governing that have worked in lockstep with international law for centuries. In this respect, drones are a distinctly postcolonial *and* post-decolonization weapon. Author Markus Gunneflo explains how assassinations by foreign agents in postcolonial states previously objected to on sovereignty violation grounds have since shifted to the language of humanitarianism and victims’ individual rights. He argues that this shift degrades hard-fought successes in postcolonial state sovereignty and that are accelerated by using drones to conduct such assassinations. Authors Dawn L. Rothe and Victoria E. Collins likewise argue that U.S. assassinations are a “regular exercise” in bolstering the social geopolitical order status quo that is normatively and discursively legitimated by IHL.<sup>501</sup> More broadly, drones’ introduction has deterritorialized imperial occupation and shown in the starkest possible terms how the assault on postcolonial state sovereignty never actually subsided. The reasons for these military assaults have changed over time, including ‘national interest’, ‘humanitarian intervention’, and ‘counterterrorism’, but they all share a commitment to reasserting geopolitical dominance and pursuing civilizing progress as understood in the liberal

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<sup>500</sup> Hugh Gusterson, *Drones: Remote Control Warfare* (Cambridge: The MIT Press, 2016), 7; Chamayou, *A Theory of the Drone*, 32.

<sup>501</sup> Rothe and Collins, “The Normality of Political Administration and State Violence: Casuistry, Law, and Drones,” 374.

Enlightenment tradition. It is this uneasy positionality that allows drones to shift the discursive—and thus the legal—terrain upon which their strikes are arbitrated.

### **Deus ex machina**

Chapter 3 examined how imperial violence previously bound up with ideas of divine (eternal) time and divine (righteous) violence and was subsequently repackaged for the secularized Enlightenment era and liberal theory which followed. Because aerial war first emerged as a form (and largely remains the domain) of state violence, it is also bestowed a presumed legal and moral legitimacy that the ‘state’ conceptually assumed from divinely anointed sovereign monarchs. The European states that first experimented with aerial war kept with the practices of their sixteenth century imperial predecessors and used it in their civilizing mission against “barbaric” and “backwards” peoples for whom the violence would be a cleansing time machine to the present (and future).<sup>502</sup> For air powers, waging war from the skies conjured images of God carrying out divine retribution from the heavens that bestowed a sense of inherent righteousness and justice to the actions.<sup>503</sup> And like God, these aerial powers saw themselves as distinct from the savages they bombarded below. The states that carried out bombings in colonial territories have since become drone powers whose self-conception remains largely unchanged. This is evidenced by a dominant political discourse that betrays an Orientalist worldview and actions that continue to deny postcolonial states full sovereignty.

Contemporary drone use manifests Edward Said’s argument of “a direct and material relation between the political processes and structures of (neo-)colonialism on the one hand and,

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<sup>502</sup> Sean Rupka and Bianca Baggiarini, “The (Non) Event of State Terror: Drones and Divine Violence,” *Critical Studies on Terrorism* 11, no. 2 (2018): 346, <https://doi.org/10.1080/17539153.2018.1456735>.

<sup>503</sup> Johnson, *Modern Times: The World from the Twenties to the Nineties*, 402.

on the other, Western regimes of knowledge and modes of cultural representation.”<sup>504</sup> This observation is made explicitly by Hippler, who says “a colonial and racist imaginary” has “long been attached to aviation,”<sup>505</sup> and in doing so has illustrated the self-reinforcing relationship between knowledge and material power.<sup>506</sup> Simply put, air power “brought peace to white people and bombs to the colonized.”<sup>507</sup> Quoting Rudyard Kipling’s ‘white man’s burden’, Hippler explains how empire’s ‘savage war of peace’ in the periphery precluded applying traditional European conceptions of distinguishing between combatants and non-combatants.<sup>508</sup> Post-WWI British air war in its Mandate territories was referred to as ‘police bombing’ and was openly acknowledged to be a terror-based practice that targeted subversive villages and tribes.<sup>509</sup> These wars’ aerial bombing campaigns were not waged against a sovereign state, but an entire population—a population that, lacking a recognizable sovereignty or European-style state, were a racialized, Orientalist representation. It was *because* British military intelligence in Iraq considered ‘Arabia’ to be an “inscrutable, delightful and otherworldly space” that the Royal Air Force used airpower “in these ways, at this time, in this region.”<sup>510</sup>

According to this post-Enlightenment worldview that remains hegemonic in the West today, such divine violence against savages is not an end in itself. Rather, it is a step forward on a linear trajectory towards a final and lasting peace. This peace is approached progressively and once achieved, will not resemble the unrestrained violence associated with human-waged war.

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<sup>504</sup> Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (New York: Verso, 1997), 22.

<sup>505</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 179.

<sup>506</sup> Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics*, 40.

<sup>507</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 62.

<sup>508</sup> Hippler, 62.

<sup>509</sup> Hippler, 70–72; Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 230.

<sup>510</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 229.

Drones' futuristic appearance and capabilities are well situated in this transcendent imaginary. An important contributor to drone form/function confusion is their relatively compact, minimalist exterior and high-tech operation—both of which conjure ideas of a *clean* weapon capable of waging a *clean* war that better adheres to IHL. This idea is present in author Brad Allenby's consideration of conflict in the age of drones. Allenby says that transformative technology systems "can be understood as the next evolutionary step in an ongoing process through which humans have sought to gain mastery of Earth and its natural, human, and built environments."<sup>511</sup> This mastery calls on varying degrees and intensity of violence that use technology to transcend human limitations and become divine in the process. In this formulation, IHL plays an important role in facilitating this advancement by similarly developing and improving over time to enable the use of civilized technologies by civilized states.

### **Targeting time**

IHL's time and temporality-based features determine those of drones. Having already established when IHL *begins* being applied, this section turns to consider those aspects that apply particularly to drones' use. This analysis begins with a brief explanation of IHL's relationship to IHRL, then moving to examine time's function in IHL, as well as the implicit and explicit temporalities evoked in assessing IHL's application. It demonstrates that time's oft-unacknowledged operations in IHL are a function of its development to permit excessive destruction of the very civilian subjects and objects it purports to protect.

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<sup>511</sup> Brad Allenby, "How to Manage Drones: Transformative Technologies, the Evolving Nature of Conflict, and the Inadequacy of Current Systems of Law," in *Drone Wars*, ed. Peter L. Bergen and David Rothenberg (Cambridge: Cambridge University Press, 2014), 426.

Drone use and proliferation grew in tandem with state efforts to redefine and recreate categories of legal subjects that expanded the scope of persons who may be legally targeted in situations of armed conflict. The relationship between IHL and IHRL is such that the latter is considered to always apply everywhere, whereas IHL applies only during armed conflict. Importantly, IHL reflects war's innate and excessive violence that would otherwise be considered an arbitrary deprivation of life. In conflict situations, IHL is referred to as the *lex specialis*, also known as 'special law.'<sup>512</sup> Although the relationship between the two regimes is often presented as straightforward, the *lex specialis* doctrine lacks conceptual clarity because it is not supported by existing rules governing the relationship between domestic and international legal regimes nor state practice. The doctrine's recent development exemplifies IHL's dynamism writ large and has bearing on drone use. The War on Terror's prolonged, asymmetric, counterinsurgency conflicts across the MENA demonstrate that the category applied to a conflict and its participants is a matter of life and death. Such categories include war's status as IAC or NIAC; the combatants' status as regular soldiers, civilians DPH, or the hitherto undefined under IHL 'unlawful combatants' (i.e., irregular combatants or 'terrorists'); whether the threat posed is imminent or not; and whether DPH is narrowly defined or extended to include CCF. The particularities of these statuses are less relevant to the purposes here than their contestation and malleability. Of greater significance is how these categories are assigned as part of the positive feedback processes between IHL and drones that make it *easier* to carry out strikes in previously inaccessible locations against *more* targets than ever before.

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<sup>512</sup> Sassòli, Bouvier, and Quintin, "How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law," 3.

When the variable of time is introduced to the existing, mutually reinforcing relationship between law and violence it affects both abstract legal categories (e.g. sustained armed conflict) as well as individual identities in particular situations (e.g. civilians DPH). Drones compound these effects by encouraging the flexible application of IHL's dichotomous categories. This means that drones have enabled their operators to better respond to the inherently conceptually unstable identities involved in conflicts, such as a civilian acting as a human shield for a combatant. The scope and speed of information that drones collect widens the net of potential attack targets by providing potential evidence of hostilities planning, preparation, and/or participation relevant to a DPH finding that would not have been captured without sustained aerial surveillance video. Compared to a traditional infantry soldier operating on foot, a drone can more quickly (even instantaneously) capture and respond to the moment a civilian *appears* to DPH. The drone mediates between its operators and the individuals below by representing them through the different types of data captured by drone sensors. This data is used by the operator to determine which categorical identity is most appropriately applied to the data source. The drone's mediation is not a neutral process but an active intervention in individual subject formation: "As the troops identify targets, they become targets."<sup>513</sup> This formation determines two temporally specific subjectivities: whether or not someone is targeted for attack, *and* whether they are counted as a civilian or combatant death after being targeted. As discussed above, the civilian to combatant death ratio depends on who 'counts' as a combatant and who does not. The expanding definition of DPH affords military commanders and/or lawyers leeway to tweak the 'necrometrics' (death related measurements) in favour of a lower civilian to

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<sup>513</sup> Alan W. Dowd, "Drone Wars: Risks and Warnings," *Parameters* 42, no. 4 (2013): 11.

combatant death ratio.<sup>514</sup> These necrometrics are an example of war-building discourse through which support is enlisted.<sup>515</sup> Drone strikes taken with ‘eyes’ on the target provide a record of the event, and the platform’s consolidation of optical and munitions payloads has qualitatively changed post-strike damage assessments by shifting it to ‘real time’. Drones continue to hover above the strike location following its execution and begin the damage assessment immediately following the attack, instead of the hours or days after. Drones uniquely shorten the time between target identification, execution, and battle damage assessment when compared to strikes carried out by artillery or traditionally piloted aircrafts.<sup>516</sup> It is necessary to revisit *jus in bello*’s underlying proportionality and discrimination principles, and related concepts, to fully appreciate how the time and temporality-related aspects involved in drone strikes determine their il/legality under IHL.

### **Tempus fugit in bello**

Authors Frédéric Mégret and Judith Butler provide independent and complementary accounts of collateral damage’s logic and practice from within and without. Proportionality’s implicit logic follows from an acknowledgement that mistakes will necessarily occur in armed conflicts and that not all collateral casualties are illegal. Mégret’s account from within explains the principle’s moral logic as an obligation to reduce the risk to both enemy non-combatants (as per the discrimination principle) as well as one’s own soldiers. It is in negotiating these two competing aims that proportionality is ostensibly calculated. However, the calculation’s flexibility opens it to being exploited in two ways that can ethically and legally permit extensive

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<sup>514</sup> Epps, “Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule,” 328.

<sup>515</sup> Judith Butler, *Frames of War: When Is Life Grievable* (London: Verso, 2016), xix–xx.

<sup>516</sup> Katharine Hall Kindervater, “The Emergence of Lethal Surveillance: Watching and Killing in the History of Drone Technology,” *Security Dialogue* 47, no. 3 (2016): 232, <https://doi.org/10.1177/0967010615616011>.

amounts of collateral damage. The first is that there is a clear military advantage to be had in sparing one's own soldiers and weapons. The second is that the strength and scope of this advantage *qua* justification is expanded by the imperfect knowledge associated with the so-called 'fog of war'.<sup>517</sup> Each of these two exploitations must be subjected to deeper examination to better understand the significance of their function in IHL.

Proportionality is the ostensible negotiation between the security of one's own soldiers and enemy non-combatants. It follows that when one's own soldier is located thousands of miles from the battlefield, as can be the case with armed drones, the expected amount of collateral damage calculated are very low. However, a generalized unwillingness by state militaries to actively avoid civilian casualties during aerial bombardments shows that this low amount is purely theoretical. Years of states' failure to appreciate or adhere to this collateral damage formula leads to the conclusion that the fundamental logic of prioritizing non-combatant immunity has never been meaningfully integrated into target decision-making, and/or it is consistently ascribed a lower importance than a higher overarching goal. This goal may be as simple as winning a given battle (at any cost), or as complex as enshrining the degree of discipline, death, and destruction required to maintain direct or indirect colonial power relations. Such goals are not mutually exclusive, and the consistent, disproportionate burdening of war's violences by civilian populations points to the conclusion made by authors Jochenick and Normand some twenty-five years ago that the proportionality principle and "the laws of war have

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<sup>517</sup> Frederic Mégret, "The Humanitarian Problem With Drones," *Utah Law Review* 5 (2013): 1303, 1307.

facilitated rather than restricted wartime violence.”<sup>518</sup> ‘Time’ is also enlisted in legal assessments of wartime violence in support of their overriding goal(s).

Proportionality assessments make implicit and explicit use of temporal metaphors implicating the past, present, and future. These moments respectively refer to the ‘past’ situation leading up to the moment the strike in question occurred, the retroactive assessment of the strike that takes place in the ‘present’, and whether the strike ultimately achieved the ‘future’ military advantage it was anticipated to have.<sup>519</sup> Unofficially, these assessments almost certainly take into consideration of the reputational and resource costs associated with the prospective prosecution of those involved in authorizing and/or taking the strike should it be found disproportionate. The usually state parties that conduct these assessments have a vested interest in avoiding findings of disproportionate collateral damage resulting from a strike carried out by their agents and can draw on different temporal metaphors to find a strike legally proportionate. Drone operating states like the U.S. employ Collateral Damage Mitigation assessments *prior* to pre-planned strikes to minimize the probability and amount of collateral damage from a strike. These assessments are based on empirical data and computer analyses and are designed to help strike planners meet the desired less than 10 percent probability that a pre-planned strike produces collateral damage. These assessments take place prior to the legal analysis of a strike’s proportionality.<sup>520</sup> However, as Eyal Weizman explains, “It is the very act of calculation – the

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<sup>518</sup> As quoted in Chris Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War,” *Harvard International Law Journal* 35, no. 1 (1994): 50.

<sup>519</sup> ICTY Trial Chamber I, “Prosecutor v Stanislav Galić,” para. 37.

<sup>520</sup> Samuel Issacharoff and Richards Pildes, “Drones and the Dilemma of Modern Warfare,” in *Drone Wars*, ed. and Daniel Rothenberg Bergen, Peter L. (Cambridge: Cambridge University Press, 2014), 407–8.

very fact that calculation took place – that justifies their action.”<sup>521</sup> Like proportionality analyses, this reduces fundamentally ethical dilemmas to mathematical equation and activates a “calculative instrumentality” that both justifies and operationalizes the attack to the extent that it “legislates” violence.<sup>522</sup>

A proportionality assessment calls on its analyst(s) to isolate a past event in both space and time. The attack is plucked out of the unstable and indeterminate temporal conditions in which it occurred and placed into the realm of divine temporality. This temporality belongs to the analyst tasked with passing righteous judgement on issues of life and death. In keeping with secularized post-Enlightenment temporality, this divine temporality is singular, objective, reason-based, omniscient, and decisive. By contrast, the analyst’s *conclusions* might emphasize the multiple temporalities, uncertainties, and ‘fog of war’ in play at the time of the strike. The ‘fog of war’ is shorthand for real-time epistemological uncertainty in the armed conflict and can be identified as the cause for a variety of event outcomes. This ‘fog’ may be invoked for preventing situational awareness at the time of/leading up to a strike, as well as the unfairness of applying what is known *ex post facto* to what was known *ante rem*. When Germany ratified API, it stated that “the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.”<sup>523</sup> Thus, the reasonably

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<sup>521</sup> Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (New York: Verso, 2012), 12.

<sup>522</sup> Derek Gregory, “Drone Geographies,” *Radical Philosophy* 183 (2014): 10.

<sup>523</sup> International Committee of the Red Cross, “Germany Reservation Declaration (14 February 1991) on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,” *Treaties, States Parties and Commentaries*, n.d., <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=3F4D8706B6B7EA40C1256402003FB3C7>.

foreseeable harm varies dramatically based on what information was made available at the time of the attack.<sup>524</sup> This quote is evidence of how IHL uses ‘time’ to absorb war’s violences.

A preoccupation with intention rather than outcome is one of Thomas Aquinas’ most enduring legacies in IHL’s foundational Just War tradition and its current articulation. Aquinas believed that God’s eternal law is revealed to humans through reason such that the righteousness of a soldier’s actions could be interpreted and adjudicated as being in accordance with divine justice.<sup>525</sup> In addition to Aquinas’ earlier-discussed concern with sin and soldiers’ souls, the ‘doctrine of double effect’ is an overriding principle of moral behaviour in war. According to the doctrine even *foreseen* collateral damage is acceptable as long as it is not *intentional*.<sup>526</sup> The doctrine’s application to proportionality assessments is particularly complicated given that its early development in the writings of Augustine and Aquinas predated the distinction principle from which the proportionality principle emerges. It is proportionality’s shared and singular concern with soldiers’ moral status that allows an unaltered thirteenth century understanding of acceptable combat conduct to retain persuasiveness today. Author James Eastwood explains how contemporary proportionality assessments draw directly on Aquinas’ doctrine by way of an analytic move that depoliticizes, isolates, and decontextualizes the incident.<sup>527</sup> Contemporary proportionality assessments determine moral (and thus legal) culpability using concepts like ‘reasonability’ and ‘foreseeability’ instead of the ‘purity of arms’ and in unity of faith, intellect,

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<sup>524</sup> ICTY Trial Chamber I, “Prosecutor v Stanislav Galić,” para. 58.

<sup>525</sup> Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford, 1999), 19.

<sup>526</sup> Rothe and Collins, “The Normality of Political Administration and State Violence: Casuistry, Law, and Drones,” 377.

<sup>527</sup> James Eastwood, *Ethics as a Weapon of War: Militarism and Morality in Israel* (Cambridge: Cambridge University Press, 2017), 69, <https://doi.org/10.1017/9781108231671>.

and the will in ‘man’s nature’ with which Aquinas concerned himself.<sup>528</sup> Such a move demonstrates the logical continuity between medieval Christian and post-Enlightenment liberal modes of thought and reasoning. The assemblage of temporal reference points is even more pronounced if the strike in question is taken by drone, since drone technology changes the way time and space generally operate in conflicts: compressing time and expanding space. These changes have implications for subjects under JWT that are considered below.

The doctrine of double effect as applied to drone strikes is a particularly exaggerated example of the absurdity of IHL’s foundational moral principles concerning the sovereign’s authority to declare and wage war, and the souls of the soldiers who kill at their command. Drone technologies enhance the visual information available to pilots and in doing so theoretically limit the opportunity for pilots to claim that they did not know striking a target would lead to collateral damage.<sup>529</sup> However, no amount of situational awareness and weapons targeting capabilities can compromise the potential ‘good intention’ and therefore moral (i.e., legal) acceptability of a strike that causes even high amounts collateral damage. As Mégret explains, collateral damage calculations are likely to reflect the means by which an attack is carried out. In the case of the sophisticated drones operated by states like the U.S., U.K., and Israel, there is an expectation that their technological capacity will reduce the collateral damage associated with their use. Yet this deeper consideration of collateral damage recalibrates the standard by which it should be measured. “The problem”, Mégret explains, “is not necessarily that drones create considerable collateral casualty, but that they cause *more than they should*,

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<sup>528</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 97.

<sup>529</sup> Mégret, “The Humanitarian Problem With Drones,” 1298–99.

*given their characteristics.*”<sup>530</sup> The standard against which drone strike collateral damage should be measured is therefore heightened by the fact that the drone operator personally experiences no risk. It is this promise or *idea* of drone proportionality that makes their use in disproportionate or indiscriminate violence especially egregious. It is thus essential to understand time and temporality’s function in IHL’s logics and applications alongside that of its relevant subjects.

### **Subjective piloting**

Drone strikes are where temporalities and epistemologies intersect to generate several of war and IHL’s paradoxes. IHL’s doctrine of double effect can justify even the most extreme collateral damage, illustrating a *theoretical* absurdity so extreme that it approaches paradoxical. Drones similarly illustrate a *material* paradox of unrealized potential by failing to deliver the minimized collateral damage their proponents promise. Together, the doctrine of double effect and drone’s anticipated discriminate targeting generate legal analytical conditions that can account for high amounts of collateral damage. Drone advocates press the point that the weapon’s sensors, pilot safety, and laser guided missiles jointly create ideal conditions for proportionate (and discriminate) strikes. This logic calls on unstated premises assuming that machine mediated knowledge is reliable and complete, physical distance from the battlefield is accompanied by an unclouded and unbiased decision-making capacity, and that precision ordnances are less likely to cause unintended collateral damage. Yet the realities of drone targeting do not follow these assumptions. Drone sensors, especially optical sensors, are useful at gathering large amounts of information from large landscapes, but not the detailed imaging necessary to verify a target identity, e.g. facial features or handheld objects.

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<sup>530</sup> Mégret, 1301.

Drone pilots are prone to misinterpreting the sensor data used to make strike decisions because preconceived of their notions about potential targets. In the case of the Western military drones operating in the MENA, perceptions of the populations over which they fly are filtered through an Orientalist lens that assumes their unpredictability, irrationality, and violence. These existing attitudinal perceptions are mediated by the drone's visual perceptions. The drone camera feed literally and figuratively 'frames' the lives of those beneath, and in doing so differentiates whose lives are *perceived* as capable of being lost or not. This visual organizing process generates ontologies for subjects that perceive using the drone and subjects perceived by it. Judith Butler explains that for a life ended by a drone strike to be recognized as such it must first be made intelligible and recognizable—only then is it considered lost and 'grievable'.<sup>531</sup> According to Butler, optical technology in war generates visual and conceptual (i.e., ontological) frames that are embedded with norms and "ways of building and destroying populations as objects of knowledge and targets of war."<sup>532</sup> States that report the collateral damage associated with their drone strikes are likewise empowered to define whose death constitutes an operational success or a war casualty. The ambiguities of calculating collateral damage demonstrate that counting war's costs is a value-laden processes relying on an unacknowledged logic of assigning degrees of worth to the lives of some but not others.

Butler goes on to explain proportionality's logic and practice from 'without', specifically identifying collateral damages' false assumptions alongside the unacknowledged assumptions which substitute. Accounting for the proportionality of collateral damage resulting from an attack presupposes the entirely fictitious idea of a perfect war in which no collateral damage

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<sup>531</sup> Butler, *Frames of War: When Is Life Grievable*, 3–6.

<sup>532</sup> Butler, xix.

occurs. This is the reference point from which collateral damage is conceptually postulated and upon the related and implicit assumption that the war machine's destructiveness can be controlled. Yet as Butler plainly observes, war's violences cannot be restricted and invariably exceed their targets. Thus, the myth of a controllable and "clean" war is embedded in this fictitious assumption of IHL, and it is reproduced in the discourses around its application—nowhere more so than in drone discourse.<sup>533</sup>

#### **4. IL/LEGAL OBJECTS IN SPACE**

This final section spatializes the previous section's time and temporality-related conclusions, including how contemporary IHL developed its core concepts to expand who and what constitutes military targets. Legal concepts like 'sustained hostilities', 'direct participation', 'combatants', and 'foreseeable harm' have been reimagined and redefined to maximize attack opportunities. This chapter builds on the previous analysis by locating IHL's intended spatial parameters and their interactions with drones. Specifically, it examines how war's spatial planes are accounted for and categorized under IHL, and how drone perspective(s) challenge and change their operation. The analysis begins with the horizontal/topographical dimensions of war, followed by its vertical/aerial aspects, and concludes by considering how drones intervene in each plane to generate legal subjects and statuses. It first considers the changing idea of a battlefield as it relates to territorial sovereignty and who can be targeted because of their location there. It next considers the aerial perspective's impact on drone pilot perception, and how both physical and emotional distance affect who is targeted and why. It concludes by arguing that

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<sup>533</sup> Butler, xviii.

drones facilitate the expanding of conflict battlefields—irrespective of state governments’ goals—and how drones’ aerial, crosshair vision works with racial and cultural prejudice to render everyone it perceives a potential target.

### **Battle-fields**

Place and space are of immense importance to the idea of war, especially its idea as an anomalous or temporary condition. Early IHL theorizing understood historical progress as time’s linear movement towards a perpetual peace *on earth*. A ‘battlefield’ is consequentially both a physical and normative space,<sup>534</sup> and can assume a sacred quality by virtue of being a territorially bounded site where a sovereign pursues justice with divinely authorized violence. Accordingly, conflicts unfold sequentially and produces temporalities on a *battlefield* that are conceptually and literally distinct from *places* of peace that reside outside the conflict zone. Traditional IHL presents the battlefield concept as “an area, limited in space and time, upon which a battle occurs.”<sup>535</sup> It follows that subjects existing within the confines of the battlefield perimeter should be organized armies both normatively and physically separated from the civilian population removed from the vicinity.<sup>536</sup> However, as this dissertation has argued, imperial wars outside Europe intentionally inflicted violence upon civilian populations that was justified first in the name of God and then in the name of civilizational progress. IHL, as an extension of divine law, was (and continues to be) developed to reinforce these imaginaries and the legitimate, excessive violence against the Other that they endorse.

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<sup>534</sup> Gregory, “Drone Geographies,” 11.

<sup>535</sup> Frederic Megret, “War and the Vanishing Battlefield,” *Loy. U. Chi. Int’l L. Rev.* 9, no. 1 (2011): 132, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/intnlwrv9&section=10](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/intnlwrv9&section=10).

<sup>536</sup> Megret, 138.

This trend is described by Mégret as “a deliberate attempt to manipulate what constitutes the battlefield and to transcend it in ways that liberate rather than constrain violence.”<sup>537</sup> Drone strikes further enable and reproduce this excessive violence but do so under the guise of legal restraint and technologically guaranteed precision. It is imagined that the drone’s *form*—discrete and accurate missiles—will mean that its violent *function* is constrained. It is likewise imagined that where the drone carries out violence is constrained because it is machine that can be made to operate only within a defined perimeter. Contrary to this logic, a terrestrial battlefield is more limited by material constraints like walls and border crossings. These limits do not exist in a three-dimensional battlefield that extends into the skies. Drone violence is spatially liberated by the fact that the geographical area over which it operates can be changed on a whim. All that is required to expand a drone’s battlefield is a legal pretense—a pretense that this dissertation has shown is easily provided for by IHL.

Under a classic conception of war as an IAC, who is a combatant is generally easy to discern by their belonging to an official armed force. Such armed forces members may be targeted at *any time*. By contrast, civilians may only be targeted *for such time* that they DPH. Gusterson points to American drone use as threatening to collapse this longstanding distinction between civilians and combatants by removing its geographical limits.<sup>538</sup> According to UN Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions Agnès Callamard, the IHL *les specialis* does not allow for the targeted killing of persons DPH if they are in a non-belligerent states’ territory, because “otherwise the whole world would potentially be a

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<sup>537</sup> Mégret, 148.

<sup>538</sup> Gusterson, *Drones: Remote Control Warfare*, 8.

battlefield.”<sup>539</sup> Callamard’s clarification was a response to the targeted killing practices of drone-operating states like the U.S. and Israel. Specifically, the way these states have attempted to apply the concept of imminency as it exists in IHRL and domestic criminal justice systems to their counterterrorism operations. In IHRL, lethal force may only be used if there is an imminent threat to life and no other means of capture or incapacitation is available.<sup>540</sup> Former U.S. Attorney General Eric Holder and State Department legal advisor Harold Koh both used the concept of imminency in their arguments for using lethal force against American citizens in a foreign country that pose an imminent threat of violent attack against Americans. They argued that the U.S. can invoke a right to self-defence and the pre-emptively use of force because the threat is posed to *Americans*, i.e., the state. The U.S. previously used this justification to claim its legal authority extends beyond Afghanistan’s battlefields “in a manner consistent with the applicable law of war principles”—giving the false impression that IHL is the applicable body of law in dealing with foreign nations suspected of supporting, with words or deeds, the ideology of groups like Al Qaeda.<sup>541</sup> This argument attempts to collapse the distinction between IHRL and IHL by drawing on aspects of both. The juncture of time (as imminency) and space (as the battlefield) produces new, expands targeting possibilities such that any person that the U.S. military or C.I.A deem an imminent threat could be attacked with a drone strike regardless of where they are in the world.<sup>542</sup> As long as imperial policies are pursued, they will generate perceived threats—and drones make using lethal force against these so-called threats easier than ever.

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<sup>539</sup> Agnès Callamard, “A/HRC/44/38 Use of Armed Drones for Targeted Killings,” 2020, paras. 35–9, <https://doi.org/10.1017/s0020818300024334>.

<sup>540</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” 617.

<sup>541</sup> Casey-Maslen, 614–15.

<sup>542</sup> Casey-Maslen, 615, 619.

The killing of individuals (combatant or civilian) by imperial and neocolonial states in postcolonial and peripheral territories is not unique to drones. What *is* unique to drones is the ease with which these attacks can now be carried out. Drones' appearance and use should be understood as a catalyst of IHL's past and present tendency to expand the scale and scope of legal state violence in support of postcolonial and neocolonial modes of governance, exploitation, and discipline. Various state actors, including the U.K., France, Israel, Turkey, and Pakistan, have gradually expanded the temporal (when) and spatial (where) dimensions of drone strikes and the legal statuses of their targets. These collective (if not coordinated) efforts have unintentionally exposed the fragility of IHL's fundamental and false dichotomies, including the distinction between civilian and military targets, hostilities and peacetime, battlefields and spaces of amnesty. Drone strikes blur the line between police actions in an ongoing imperial occupation and hostilities during a discrete armed conflict. Expanding drones' operational territory and targets accelerates the collapse of these categories into one another, e.g. a drone attack against an illegitimate combatant deprived of conventional protections and privileges residing somewhere that does not resemble a traditional battlefield. The proliferation of drone technology has also witnessed the proliferation of drone strategies and tactics, making more visible the latent incongruencies and tensions that the international legal order had previously papered over—most notably aerial bombardments against civilian populations.

Drones' 'expansionary' effects can also be understood as having 'shrinking' effects as well. As former F.B.I. Director James Comey explained in comments on American drone use in counterterrorism strategy, "[t]he message is that we will shrink the world to find you, we will

shrink the world to bring you to justice.”<sup>543</sup> This expansion of American sovereign autonomy to assassinate individuals anywhere in the world comes at the expense of shrinking other states’ sovereignty. More significantly, these extraterritorial actions ultimately undermine the very *idea* of state sovereignty.

Previous chapters explored how the concept of sovereignty functioned as the most fundamental feature of the prevailing international order. Sovereignty as an earthly, temporal condition is traditionally bound to the concept of territory such that they are conceptually codependent, and one cannot be thought to meaningfully exist without the other. Drones’ visible chipping away of territorial sovereignty in postcolonial states like Pakistan, Yemen, and Somalia has made obvious how contingent and continually undermined their so-called sovereignty has been since colonial contact. The continual surveillance and lethal force offered by drones replicates the strategies of a colonial occupation, rather than a discrete conflict. However, because aerial bombing is an inadequate substitute for on-the-ground colonial administration and policing, it functions primarily as an excessive and terrorizing form of violence that is ultimately ineffective at upholding strict colonial rule. Contemporary drone strikes that exceed the “traditional” battlefield limits highlight how these limits were never universally extended or materially honoured in all places and spaces, despite being consistently imagined and reproduced in legal documents and discourse.<sup>544</sup> The extent to which a people—and, by extension, their territory—can enjoy the full benefits of ‘sovereignty’ reflects imperial disciplinary measures and their countervailing efforts.

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<sup>543</sup> Katharine Hall Kindervater, “Drone Strikes, Ephemeral Sovereignty, and Changing Conceptions of Territory,” *Territory, Politics, Governance* 5, no. 2 (2017): 208, <https://doi.org/10.1080/21622671.2016.1260493>.

<sup>544</sup> Kindervater, 208.

## Vertical space

Eyal Weizman writes that “[g]eo-politics is a flat discourse”<sup>545</sup> and the same is often true of war. Battle plans are conceived and played out on maps, and although cartography adopts the aerial perspective it is a flat geographical tradition that emerged from empire.<sup>546</sup> The modern state that is most simply expressed as lines on a map is an articulation of imperial modalities of thought and governance. Stephen Graham explains how colonial expansion between the fifteenth and nineteenth centuries sought control of the earth’s surface, producing new ideas of property, law, and territory. Spatial metaphors were used to assert and reproduce social power, naturalize Eurocentric dominance, and further bifurcate the civilized West from the barbaric Rest. Waves of European colonialism were preoccupied with the territorial and horizontal ideas of sovereignty and control. Sovereignty’s vertical dimension was neglected in these traditionally flat formulations with the aerial perspective being identified with God and divine imperium. The ability to survey and later attack from the air offered those states with these capacities a sense of God-like powers—thrusting the vertical plane into imperial European consciousness. The varied and uneven proliferation of drones across the globe has disrupted the international order by lowering the bar of entry as an aerial power. States no longer require numerous, expensive fighter jets flown by specially trained pilots to possess an air force *per se*. Yet the concentration of the most powerful drones in the hands of the most powerful states reproduces and even expands modalities of colonial discipline. Drones attempt to maintain hegemonic positionalities and unilaterally asserting sovereignty over any territory over which they operate by waging war

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<sup>545</sup> Eyal Weizman, “Introduction to The Politics of Verticality,” *Open Democracy*, 2002, sec. 2, [https://www.opendemocracy.net/en/article\\_801jsp/](https://www.opendemocracy.net/en/article_801jsp/).

<sup>546</sup> For a discussion of this history, see Denis Cosgrove, *Apollo’s Eye: A Cartographic Genealogy of the Earth in the Western Imagination* (Baltimore: John Hopkins, 2001).

from above to raze what is below. In operating above the ground, the drone de-territorializes conflict only to re-territorialize it in its own image.<sup>547</sup>

If the battlefield is defined as a two-dimensional battleground, drones (alongside ground-based complementary operations) reassert war's terrain as a three-dimensional battlespace. A unique feature of drones is their effect on the space between their operator and what they observe. One of the several paradoxes drone technology generates is the maximization or expansion of *actual* space and minimization or compression of *perceived* space. Prolonged surveillance with a high-quality video image can lead drone operators to develop a sense of familiarity and closeness to the individuals they observe, even if they are on the other side of the globe. This dynamic and its ethical and legal implications require that space be taken up as its own analytical category by assessments of drones' status under IHL. John Williams refers to the drone operator-target relationship's asymmetry as a "distant intimacy" and Chamayou and Gusterson each describe it as a kind of "proximity."<sup>548</sup> However, as Pryia Satia observes of imperial British police bombing and its agents' professed "love" for Arabs, "intimacy is no guarantee of humanity, or even true empathy."<sup>549</sup> The ability to attack a target from a distance using more technologically advanced weapons is not a new feature of conflicts. What *is* new is the effective invulnerability of the drone operator, the type of information they can collect about their target and surroundings, and the means by which this information is collected. U.S. General David Deptula offered this observation with a strategic framing, explaining that "[t]he real advantage of unmanned aerial systems is that they allow you to project power without projecting

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<sup>547</sup> Stephen Graham, *Vertical: The City from Satellites to Bunkers* (Brooklyn: Verso, 2016), 3–13.

<sup>548</sup> Gusterson, *Drones: Remote Control Warfare*, 60; John Williams, "Distant Intimacy: Space, Drones, and Just War," *Ethics & International Affairs* 29, no. 1 (2015): 93–94; Chamayou, *A Theory of the Drone*, 116.

<sup>549</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 238, 242.

vulnerability.”<sup>550</sup> It is ambiguous whether “projecting power” and “vulnerability” refers to literal bombing by a far-removed pilot, or the figurative, affective projection of a drone operator’s personified power and invulnerability. This ambiguity is reflected in the way drone operators and those they fly above perceive each other. The following section considers this positionality and relationality as mediated by machine.

### **Weaponized gaze**

Space is generally negatively correlated to intimacy—the greater the distance between two subjects, the less connection they feel. This produced a discourse around the use of air power that assumed the further a human target is from a weapons operator the less the operator would perceive the target *as* human—supposedly making the act of killing psychologically easier.<sup>551</sup> Kaplan explains that it is a truism of airpower critiques to note that viewing the earth from above dehumanizes its terrestrial subjects, noting that the inverse can sometimes be true for manned aerostatic flights (such as hot air balloons) where the perspective can actually “mediate a closer relationship between the individual, specific locations and connections to the global.”<sup>552</sup> It is evident from these interventions that what determines whether a distant Other is recognized as a human is the direction of the distance, namely, vertical or horizontal, and the relationship that mediates the Other’s contemplation, e.g. sightseeing, photography, bombing, etc. The ‘greater distance leads to greater dehumanization’ truism tends to hold true in war because a soldier’s understanding of the Other is usually mediated through the category of ‘enemy’. This operation is best explained by way of comparing a traditional infantry soldier armed with a melee weapon,

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<sup>550</sup> Gusterson, *Drones: Remote Control Warfare*, 22.

<sup>551</sup> Chamayou, *A Theory of the Drone*, 115–16.

<sup>552</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 38–39.

a WWII bomber pilot, and a contemporary drone operator. The degree to which an infantry soldier perceives their enemy as evil is tempered by recognizing them as a real and proximate being they are ordered to attack, while a contemporary bomber pilot is unlikely to perceive the physical figures of people they are bombing as ‘human’. Unlike these other two, drone pilots can perceive the details of bombing targets without physical proximity, thus disrupting rather than inverting the traditional understanding of the space/intimacy relationship. Instead, drones create an entirely new form of intimacy in conflict.

The radical asymmetry of drone intimacy more closely resembles the relationship between an immortal deity and a mortal human than that of two soldiers meeting on the battlefield. Former drone pilots testify to the figurative proximity and familiarity they feel with the individuals they survey and attack. These pilots likewise explain the effects of using video monitors that display drone camera feeds and how this can lead them to identify with the drones they operate. The monitors can give operators the “feeling of being inside the drones,”<sup>553</sup> with one operator recounting how flying drones made them dream in infrared for months.<sup>554</sup> While some pilots report experiencing an intimacy with the peoples and places over which they fly despite the sometimes thousands of miles that separate them, it is not a universal experience.<sup>555</sup> Pilots who embrace their situation as a “voyeur in the sky” have conversely described a sensation of feeling “like an omnipotent god with a god’s seat above it all.”<sup>556</sup> Like a god, the drone can

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<sup>553</sup> Marcus Schulzke, “Robots as Weapons in Just Wars,” *Philosophy and Technology* 24, no. 3 (2011): 296, <https://doi.org/10.1007/s13347-011-0028-5>.

<sup>554</sup> Gusterson, *Drones: Remote Control Warfare*, 62.

<sup>555</sup> Gusterson, 59–81.

<sup>556</sup> Gusterson, 62.

soar through the clouds, travel great distances at tremendous speeds, and extinguish life below at will; all while never experiencing boredom, distraction, or fear.

The drone transcends human, earth-bound existence to enjoy a divine temporality wherein its actions, however violent, are imbued with a similarly divine rationality and presumed just outcome. The sense of moral righteousness that can accompany possessing god-like power is the same fatalistic thinking embraced by IHL's early theorists who considered their sovereign violence to be doing (the Christian) God's work on earth. After all, there must be a *good* reason for coming into possession of such destructive potential. This effect is recognized within some drone-operating militaries, with one American Predator drone pilot trainer explaining, "We have to impress upon them that they are not just shooting electrons, they're killing people."<sup>557</sup> The assumed connection between technological advantage, vertical high ground, and moral high ground extends from war's regulatory landscape down its individual actors.

The individuation of war phenomenon applies to *all* its participants, and not merely drone strike targets. A drone pilot is part of a squadron in name only. Although conventional aircraft pilots are somewhat separated from armed forces members, it is not to the same degree as drone pilots who, unlike the fighter jet pilot, are not physically connected to the battlefield. However much a drone pilot may feel *like* a god, when seated in a chair firmly situated on the earth's surface, they are no more god-like than the drone they operate. Like a human, the drone can be damaged, run out of energy, and malfunction. And like a human, drones (in their current form) are limited in the type of information they can collect. For all their sensors, the drone only possesses the sense of sight. The amount of visual and other data drones collect is far greater

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<sup>557</sup> Ray Acheson, Matthew Bolton, and Elizabeth Minor, "The Humanitarian Impact of Drones," 2017, 53, <https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian-impact-of-drones.pdf>.

than the humans interpreting it can process or make effective use of. Drone operators become creative writers by inventing narratives to fill in the information gaps left by the absence of other types of relevant information, such as audio.<sup>558</sup> Operators engaging in these narrativizing processes construct a reality over which they reign supreme and assume a greater epistemic certainty than they actually possess.<sup>559</sup> These reality-constructing narratives draw on content that reflects their operational space and place. Orientalist, prejudice, and racist understandings of the enemy Other in the global periphery inform targeting decisions that are then evaluated by a legal regime based in similar modes of thought. The people and behaviours drones observe are assigned an either/or category, such as ‘normal’ and ‘abnormal’ activity, that are then followed by similarly binary legal categories, such as ‘combatant’ or ‘non-combatant’.<sup>560</sup> Persons below must be *seen* by operators to be assigned a status, and when perceived through literal crosshairs they all *appear* as potential targets. The fabricated and uncertain information upon which such strike decisions are made has disastrous outcomes.

### **Conclusion**

In his discussion of precision, Chamayou observes that in circumstances where there are no troops on the ground or traditional sustained hostilities—as is the case in War on Terror as fought in Yemen or Pakistan’s FATA—a drone operator cannot rely on conventional indicators like a uniform to identify a legitimate combatant or civilian DPH.<sup>561</sup> This is an accurate and legally significant observation for situations of protracted counterterror campaigns where drones are used for targeted killing or signature strikes, and where the distance between drone and pilot

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<sup>558</sup> Graham, *Vertical: The City from Satellites to Bunkers*, 78.

<sup>559</sup> Gusterson, *Drones: Remote Control Warfare*, 66.

<sup>560</sup> Graham, *Vertical: The City from Satellites to Bunkers*, 80.

<sup>561</sup> Chamayou, *A Theory of the Drone*, 144.

is thousands of kilometres. However, this distance is not necessary when drones are used inside or bordering the drone operating state's boundaries in ongoing conflicts. In the context of Israel's use of drones in Gaza, the distance between a pilot and their drone is significantly smaller than that between an American pilot operating a drone in Pakistan from the continental U.S. Moreover, there is an existing situation of armed conflict in Palestine and Israel in which the combatants range from conventional (i.e., members of a state armed forces) to unconventional (i.e., non-state organized militias). When drones are used in pre-existing armed conflict, there may but need not always be a situation akin to that described by Chamayou, whereby "ruling out the possibility of combat, the drone destroys the very possibility of any clear differentiation between combatants and non-combatants" to the point that there is "no longer any combat."<sup>562</sup> In addition to the obvious fact that drones are not difficult to shoot down with the appropriate air-defence systems, the narrowly defined scenario Chamayou describes is not generalizable. Rarely do drones operate in complete and total isolation from other parallel coordinated military activities. For example, the situation is significantly more complex in Palestine, where members of uniform-wearing organized militaries will sometimes fight alongside non-uniformed militias operating amongst civilians not DPH. Chamayou's treatment of drones' informational limitations and isolated use fails to capture the full breadth of scenarios in which drones are flown.

Chamayou follows this claim with one less contestable: that expanded drone use facilitates expanding definitions of DPH and the use of signature strikes.<sup>563</sup> It is easy to suggest that these sort of hitherto illegal and (according to the Just War tradition) unethical targeting practices were made possible only through the introduction of armed drones, or that such

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<sup>562</sup> Chamayou, 145.

<sup>563</sup> Chamayou, 145.

practices were the result of new tactics keeping pace with technological capabilities. However, neither of these claims is fully accurate. It is indeed correct to assert that drones have enabled the greater use and frequency of these targeting practices, as well as a greater reliance upon drone-based strategies. However, the causal relationship borne between a weapon, the laws disciplining it, and the strategies for which it is useful is not unidirectional. Rather, drone use has intensified and made visible the ‘where’ and ‘when’ of strategies that it pioneered as well as inherited from earlier eras of aerial war. Thus, Chamayou’s statement that drones theoretically preclude the possibility of a combatant, while not entirely inaccurate, somewhat overstates the technology’s particular impact on war.

The general impulse to attribute changes in behaviour to technological advancement is consistent with European Enlightenment Era modes of thinking that apply to and, to a certain degree, explain why political and military institutions have embraced drones. The drone promises a panoptic watching machine that projects the absolute knowing and destructive potential of the state as envisioned by traditional theories of international relations and international law. Drones observe “the nation state’s population from on high, [as] a ‘supreme controller’ transforming optical surveillance ‘into a common practice’ of reason.”<sup>564</sup> The drone pilot becomes their own Hobbesian Leviathan that is both a projection and microcosm of the post-Enlightenment state. This same Enlightenment logic regards advanced technologies as engendering advanced civilizations that engage in more rational, humane activities. A strong faith in the power and virtues of technology informs the belief that drones will midwife a future of more humane and carefully waged wars. This is the same attitude that presents automated

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<sup>564</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 22.

weapons as an inevitable future of war-waging.<sup>565</sup> Resistance appears futile according to this fatalistic Enlightenment fatalistic temporality, and the normative question of whether the ongoing mechanization and automation of war *ought* to continue very quickly becomes a technical question of *how* it is best done.

Armed drone use has the potential to become an ‘is-ought’ problem of war-waging. The benefits of drones for those who possess them are seemingly endless, and it is not difficult to understand why their use in conflicts of varying intensity is expanding. Add to these practical incentives the fact that the legal regime applicable to drone use is not only permissive of such weapons but *encourages* their use, and drones’ foreseeable future begins to take shape. However, one does not need to resort to imagination to predict what the future of sustained conflicts fought with drones will resemble. Armed drones entered the Israeli-Palestinian Conflict years before they appeared on the radars of the general public in the West, and their use in sustaining the Israeli state’s Occupation of Palestinian Territories provides insight into how the weapons may be used in future conflicts around the globe.

The following chapter takes up Israeli state drone use as a case study of drones’ unliteral use by a state actor in an ongoing situation of armed conflict in which IHL and related international law is prominently featured. Although the Israeli-Palestinian Conflict’s is exceptional for several reasons, it also bears important similarities to other past and present imperial conflicts that are thoroughly considered in chapter 5. The chapter analyzes IHL and drones as weaponized technologies deployed in a prolonged military occupation and colonial project. This analysis concentrates on how aerial war—especially as waged via drone—has been

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<sup>565</sup> Chamayou, *A Theory of the Drone*, 212–13.

integrated into the conflict and thus its overlapping governing legal regimes. In this case, the drone paradox comes into its clearest manifestation for their use as a discrete weapon *and* a component of the occupation's governing matrix. The chapter demonstrates how drones remain legally regulated and rationalized by IHL all while being used in a manner that violates IHL's ostensibly humanitarian mission.

## CHAPTER 5: DRONES OVER PALESTINE

*“If you do something for long enough, the world will accept it.”*

Daniel Reisner,  
Former Head of the International Law Branch of the  
Israel Defense Forces Legal Division

*“[O]ver Gaza [...] the air is mainly filled with Golems [...] any army without soldiers.”*

Shimon Naveh,  
Director of the Operational Theory Research Institute,  
National Defence College, Israel

This penultimate chapter brings previous chapters’ abstract and historical discussions into the material and contemporary moment by taking up the case of Israeli drone use over the OPT. There is relatively little English-language scholarship on Israeli drone use despite the great public and academic interest in the Occupation of Palestine (hereafter ‘Occupation’), its legal dimensions, and associated crimes. The who, when, where, why, and how of the Israeli-Palestinian Conflict (hereafter ‘Conflict’) establish it as the strongest case against which the explanations of international legal history, colonialism, and weapons technology offered here can be tested. Conversely, the conflict is also heuristic device from which a deeper understanding of each of these subjects can be gleaned. The Occupation’s defining features for the analysis here are the unique rules of engagement developed by the Israeli state to govern its annexation and colonization of Palestine, continued belligerent military occupation of the West Bank and Gaza, and Israel’s development and use of high tech, weaponized drones. Taken collectively, these features show the continuity in IHL’s imperial formations across time and space, including its adaptation for a post-Enlightenment liberal international order.

The Israeli state has followed in the footsteps of its European predecessors and pushed IHL’s twin imperial and humanitarian goals to their theoretical and practical limits. IHL’s

paradox and burgeoning crisis of legitimacy is exemplified by Israeli state drone use and policy. Drone use by the ‘only democracy in the Middle East’ is bending the already-pliable regulation of war to its breaking point. Decades of interpreting and applying IHL to the Conflict established a political and legal rationale that has met its match in drones. The Israeli’s state’s expanding use of drones has taken much of the Occupation and Conflict vertical, and in doing so, let slip IHL’s ‘mask’ of Enlightenment.

The chapter proceeds in three sections. The first section establishes the historical context in which the Conflict began, the theoretical and legal traditions that shaped and defined it, and the applicable international legal regimes. This section explains how the Zionist state-building project was an offshoot of earlier European colonial endeavours and their theoretical scaffolding. In the contemporary expression of the historical ‘Us’ and ‘Them’ formulation, ‘the Israeli’ is conscientiously identified with the European West/Self while Palestinians and ‘the Arab’ populations in surrounding states are identified with the East/Other. This section’s analysis situates IHL’s application in the OPT within the historical account provided in previous chapters and demonstrates the account’s continuity. The second section introduces the history of Israel’s researching, manufacturing, and use of drones. It highlights how drones were and continue to be enlisted in the Israeli state’s material destruction and management of the OPT by looking at drones’ daily use as well as their deployment in the perennial wars on Gaza. The third section concludes by exploring the theoretical dimensions of drone use in the OPT and their relationship to terrorism, time, and divine violence. The section narrows the scope to a subject level of analysis by referring to documented instances of drone use, as well as individual perspectives collected by author-conducted interviews with former Israeli Defence Forces members. This

final section considers how drones change the operation of space in the Conflict and the populations therein.

## 1. LAW AND WAR IN PALESTINE

### Racialized neocolonial imaginaries

The Israeli state is firmly located in the Western geopolitical security matrix in spite of being geographically located in the Middle East and founded by a ‘people’ historically (and currently) excluded from membership within the ‘Aryan’ Christian West. Despite centuries of marginalization in Christian-dominated European societies—with Jews still considered ‘nonwhite’ at the turn of the twentieth century<sup>566</sup>—the state of Israel was founded in the image of the *European Jew*. This Jewish subject retains a Jewish identity but also makes claim to the European tent-identity and a cosmopolitan ‘Judeo-Christian’ ancestry. Inhabitants of Israel and the OPT embody a myriad of overlapping and unstable identities that are continually narrowed, stretched, and altogether reimagined depending on their function within a given situation. Before more closely examining the differences—real and imagined—between Israelis and Palestinians, it is worth noting how their similarities and shared histories contribute to the ways in which each is understood and discussed in the West. Said offers a helpful explanation as to how the West’s perceptions of Eastern peoples manage to incorporate capricious and even contradictory elements. The shifting *modern* identities of the Orient’s *ancient* populations, Said explains, enabled Western stereotypes about one Semitic people, the Jews, to be easily transferred to another, the Arabs. Post-1948, the Jew is reconstructed as an “adventurer pioneer-Orientalist”

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<sup>566</sup> Mandela Santos, “Relations of Ruling in the Colonial Present: An Intersection View of the Israeli Imaginary,” *Canadian Journal of Sociology* 38, no. 4 (2013): 513.

with the Arab as his dogged shadow who is ascribed “whatever traditional, latent mistrust a Westerner feels towards the Oriental.”<sup>567</sup> It is beyond the scope of this dissertation to take up each self-identified community constituting the geographically relevant population, and the following discussion is limited to the broad sweeping categories deployed in hegemonic discourses about the Conflict. These categories are Arab Palestinians, who are generally imagined to monolithically Muslim, and Jewish Israelis, who are generally imagined to be monolithically of European background. Jewish Israelis are presented in the West as possessing Occidental qualities and cultural sensibilities that exist in diametric opposition to the Oriental Arab Palestinian. These categories are narratively useful to political actors within and without Israel and the OPT, however inaccurately they may describe the populations in question. The status of domestic Jewish populations in the West inconsistently oscillates between inclusion and exclusion depending on time and place. What has been consistent for decades is that these Jewish communities always *more* closely resembled the Western ‘Us’ than the ‘Other’ in the East. This resemblance implicates the various signifiers of liberal European civilization and is invoked by leadership in the Anglo-American security matrix to justify policies and actions taken in support of their own self-defined economic and military interests. As with earlier liberal Enlightenment theory, support for ‘the only democracy in the Middle East’ serves the dual purpose of advancing ‘progressive’ civilizational development in an otherwise ‘backwards’ region *and* reproducing the unequal relations of power between MENA states. Western states’ alliance with the Israeli state and its Jewish population exists only to the degree that it fits into this broader liberal world order. Although some Western governments are becoming increasingly uneasy about Israel’s situation

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<sup>567</sup> Edward Said, *Orientalism* (New York: Vintage, 1979), 285–87.

as a settler colonial state—with growing calls from political leadership to slow settlement expansion—Israel was and remains well integrated into European imperial global governance from its conception.<sup>568</sup>

Theodor Herzl, the secular and assimilated Austro-Hungarian so-called Father of the State of Israel, consciously and explicitly situated Zionism within contemporaneous European colonialism projects. He believed that establishing a Jewish state in Palestine would constitute “part of a rampart for Europe against Asia,” acting as “an outpost of civilization as opposed to barbarism.”<sup>569</sup> Herzl’s vision was neither the first nor only variety of Zionism, but was distinguished by its political ambitions that aimed to create a formal, territorial state. Eager to relocate domestic Jewish populations outside of Europe,<sup>570</sup> the British government shared Herzl’s vision and included in its Mandate text the 1917 Balfour Declaration commitment to establishing a “Jewish national home” in Palestine.<sup>571</sup> The Jewish population in Palestine more than tripled by the time the British turned the Mandate over to the UN in 1947, at which point the General Assembly passed Resolution 181 to partition the territory into a Jewish and Arab state.<sup>572</sup> The UN’s Special Committee on Palestine recognized that the principle of self-determination did not apply to Palestine because of the intention to create a Jewish National Homeland there. This potential violation of the self-determination principle was justified by way

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<sup>568</sup> Youssef Ambassador Hesham, “10 Things to Know: Biden’s Approach to the Israeli-Palestinian Conflict,” United States Institute of Peace, 2021.

<sup>569</sup> As quoted in Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden: Blackwell Publishing Ltd, 2004), 79, <https://doi.org/10.1145/2505515.2507827>.

<sup>570</sup> Santos, “Relations of Ruling in the Colonial Present: An Intersection View of the Israeli Imaginary,” 513.

<sup>571</sup> “Thus, any discussion of the nature and dynamic of the Zionist colonization of Palestine must be anchored in the triple dynamics that constituted the essence of nineteenth-century Europe: nationalism, colonialism, and anti-Semitism’. For a deeper discussion of this topic, see: Tariq Dana and Ali Jarbawi, “A Century of Settler Colonialism in Palestine: Zionism’s Entangled Project,” *Brown Journal of World Affairs* xxiv, no. 1 (2017): 2.

<sup>572</sup> Noura Erakat, “The Sovereign Right to Kill: A Critical Appraisal of Israel’s Shoot-to-Kill Policy in Gaza,” *International Criminal Law Review* 19, no. 5 (2019): 791–92, <https://doi.org/10.1163/15718123-01905002>.

of reference to the League of Nation's Covenant, which permitted but did not require former Ottoman communities be recognized as independent nations.<sup>573</sup> The partition plan granted the thirty-five percent Jewish population in Mandatory Palestine fifty-six percent of the territory with much of the Arab population's allotted territory located in the Gaza Strip and West Bank. With neither the Jewish nor the Arab populations in Palestine finding the plan satisfactory, a civil war broke out that culminated in the proclamation of the Israeli state's founding by its first president, the Polish socialist David Ben Gurion. Like Herzl's, Ben Gurion's Zionism was not religiously inspired and drew on European intellectual and political ideologies—a sentiment well captured in Ben Gurion's statement that Israel was “part of the middle east only in geography.”<sup>574</sup> This and similar statements made by national leaders since Israel's founding indicated that the state would be built in the imagine of a European-style nation-state and its accompanying political, legal, and normative commitments.

Israel institutionalizes its ‘Jewish’ national identity in its policies and structures, implicating questions of *who* is considered Jewish and *what* makes them so. The state continues to determine whether a person is Jewish on mainly genealogical grounds despite a progressively greater emphasis on religion in its post-1948 national identity formation. In accordance with the national Law of Return, any Jewish person across the globe is entitled to claim Israeli citizenship.<sup>575</sup> This policy was compounded by the controversial 2018 *Basic Law: Israel – The Nation State of the Jewish People*, which affirmed the state as “the nation state of the Jewish

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<sup>573</sup> Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Palo Alto: Stanford University Press, 2019), 45.

<sup>574</sup> Erakat, “The Sovereign Right to Kill: A Critical Appraisal of Israel's Shoot-to-Kill Policy in Gaza,” 791.

<sup>575</sup> Robert Wintemute, “Israel-Palestine Through the Lens of Racial Discrimination Law: Is the South African Apartheid Analogy Accurate, and What If the European Convention Applied?,” *King's Law Journal* 28, no. 1 (2017): 103, <https://doi.org/10.1080/09615768.2017.1298943>.

people” for whom the “right to national self-determination in the State of Israel is unique.”<sup>576</sup> Unlike regular members of a religious community who are identified in terms of a shared faith, Jewish identity is complicated by Israel’s use of the term ‘nation’ and inclusion of ancestry. A nation is a *political* community traditionally associated with a territory over which sovereignty is exercised. Defining Jews as a nation consequently establishes the grounds upon which claims to self-determination as expressed through an autonomously governed state could be made. The ancestral component of the nation is unofficially racialized with Jews emigrating from ‘the West’ accepted in greater numbers than those from ‘the Rest’.<sup>577</sup> Mizrahi, Ethiopian, and Russian Jews in Israel are part of its ‘socio-economic periphery’ and hierarchically situated beneath Ashkenazim Israelis.<sup>578</sup> This situation is as old as the state itself, as documented in thousands of recently published letters from the Israeli Defence Forces and Defence Establishment Archive. One such letter written by a Moroccan Jewish soldier who immigrated to Israel in 1948 describes how “[t]he European Jews, who suffered tremendously from Nazism, see themselves as a superior race and the Sephardi [Mizrahi] Jews as belonging to an inferior one.”<sup>579</sup> This informal racial discrimination is complemented by state institutionalized racial discrimination that limits

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<sup>576</sup> Knesset of Israel and Dr. Susan (Unofficial Translation) Hattis Rolef, “Basic Law: Israel - The Nation State of the Jewish People” (Jerusalem: Knesset National Legislative Database, 2018), paras. 1 (a), (c), <https://main.knesset.gov.il/Activity/Legislation/Laws/pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=5659> 13. The law’s constitutionality was upheld by the Israeli Supreme Court on July 8<sup>th</sup>, 2021, see: “Israel: Supreme Court Affirms Constitutionality of Basic Law: Israel – Nation State of the Jewish People,” Library of Congress, 2021, <https://www.loc.gov/item/global-legal-monitor/2021-07-27/israel-supreme-court-affirms-constitutionality-of-basic-law-israel-nation-state-of-the-jewish-people/>.

<sup>577</sup> Adam Ragson, “Israel Accepts Ethiopians of Jewish Descent, but Fewer Than Promised,” *The New York Times*, October 12, 2020, <https://www.nytimes.com/2020/10/12/world/israel-ethiopia-jews-immigration.html>.

<sup>578</sup> James Eastwood, *Ethics as a Weapon of War: Militarism and Morality in Israel* (Cambridge: Cambridge University Press, 2017), 13–14, <https://doi.org/10.1017/9781108231671>; Guilia Daniele, “Political and Social Protests from the Margins: The Role of Mizrahi Jews in Israeli Grassroots Activism,” *Etnográfica* 22, no. 3 (2018): 619–42, <https://doi.org/10.4000/etnogra>.

<sup>579</sup> Ofer Aderet, “‘We Saw Jews With Hearts Like Germans’: Moroccan Immigrants in Israel Warned Families Not to Follow,” *Haaretz*, July 8, 2021, <https://www.haaretz.com/israel-news/.premium.MAGAZINE-horrified-by-racism-moroccan-immigrants-in-israel-warned-families-not-to-follow-1.9982152>.

being hereditarily “Jewish” to someone with a Jewish parent or grandparent.<sup>580</sup> Yet the policy goal of maintaining a Jewish majority in Israel proper is increasingly at odd with its parallel goal of *appearing* ethnically European. The state employs various population management and immigration policies to stack the demographic odds in favour of attracting North American and European migrants to the country by working with organizations like Nefesh B’Nefesh to provide support to encourage North American Jews to make Aliyah to Israel.<sup>581</sup> However, the state’s desire to maintain an officially Jewish demographic majority regardless of race appears to be the prevailing concern, as evidenced by recent policy changes that opened up immigration to thousands of Ethiopian Jews previously denied the Right of Return.<sup>582583</sup> Jewish immigrants to Israel are also essential for populating the aggressive expansion of illegal settlements in the West Bank, with immigrants accounting for up to half of some West Bank settlement populations.<sup>584</sup>

### **Settler colonialism**

This dissertation has so far not dealt in detail with the differences between colonialism and settler colonialism for expediency and research scope reasons. However, it is necessary to distinguish key areas of distinction for the purposes of this case study analysis. Unlike exploitation-based colonialism, such as that which occurred in India under imperial Britain,

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<sup>580</sup> Wintemute, “Israel-Palestine Through the Lens of Racial Discrimination Law: Is the South African Apartheid Analogy Accurate, and What If the European Convention Applied?,” 103.

<sup>581</sup> “NBN Partners,” Nefesh B’Nefesh, n.d., <https://www.nbn.org.il/nbn-partners/>.

<sup>582</sup> “Israel Unblocks Big Immigration of Ethiopian Jews,” *BBC*, October 12, 2020.

<sup>583</sup> Jewish Ethiopian migration to Israel has been generally dealt with on a case-by-case basis, creating a backlog of those looking to immigrate. The state’s reluctance to admit these migrants was an expression of doubt over their Jewishness that appears across other areas of Israeli society as well, including a ban on Ethiopian Jews’ donating blood, and the administering of birth control shots to Ethiopian women absent adequate prior and informed consent. See: Neshet, T. (2013, January 27). Israel Admits Ethiopian Women Were Given Birth Control Shots. *Haaretz*.; Surkes, S. (2016, December 8). Ministry lifts ban on Ethiopian blood donations. *The Times of Israel*.

<sup>584</sup> Judy Maltz, “The Immigrants Fueling the Population Growth of West Bank Settlements,” *Haaretz*, June 7, 2017, <https://www.haaretz.com/israel-news/immigrants-fuel-population-growth-of-west-bank-settlements-1.5480936>.

settler colonialism attempts to eliminate and replace the indigenous inhabitants with a different population, generally from the metropole, such as that which occurred in Canada. The Israeli settler colonial project is ideologically grounded in Zionism and its aim is to create an ethnically distinct Jewish nation in an area populated by a non-Jewish majority. This goal stood at odds with early twentieth century demographic realities in which non-Jewish Arabs accounted for ninety percent of the population in Palestine when the British Mandate began in 1917. Although Britain did not settle Palestine it encouraged Jewish immigration and settlement while denying and undermining Palestinian claims for greater autonomy.<sup>585</sup> The Mandate replicated the Balfour Declaration's language and required Britain to "facilitate Jewish immigration" and "settlement on the land."<sup>586</sup> Securing support from the Mandate power in Palestine was a crucial victory for the Zionist movement's future.<sup>587</sup> Reynolds characterizes the historical legacy, describing how:

"a spiral of colonialisms curls through the Israeli self-determination project, connecting early Zionist settlement with British colonial foreign policy, the League of Nations Mandate, the role of the United Nations in legitimising Zionist claims to sovereignty via settlement (in the 1947 partition plan and subsequent recognition of Israel's independence), and Israel's continued colonisation of the West Bank today."<sup>588</sup>

### **'A land without a people for a people without a land'**

Pre-1948 Jewish settlers in Palestine knew the local Arab population would not willingly relinquish their land claims and autonomy goals. British blessing to settle the land built on earlier efforts by European Jews who began purchasing Palestinian agricultural land from the Ottoman empire as early as 1878. These early procurements were the first steps of a future 'population transfer' to Palestine to displace the local inhabitants—a process also known as ethnic cleansing.

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<sup>585</sup> Erakat, "The Sovereign Right to Kill: A Critical Appraisal of Israel's Shoot-to-Kill Policy in Gaza," 790.

<sup>586</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, 80.

<sup>587</sup> Gregory, 78.

<sup>588</sup> John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017), 214–15.

Herzl euphemistically advocated for this in 1895 in his call for the “gentle expropriation” and “removal” of the native population that should “be carried out discretely and circumspectly.”<sup>589</sup> It was necessary that this process be ‘discrete’ to avoid undermining the Zionist narrative that a Jewish state would be built on ‘a land without a people for a people without a land’. This phrase is a “familiar colonial tale” that directly mirrors the *terra nullius* legal claims of earlier imperial powers. However, this was as much a fiction in Palestine as in the Americas where it was first invoked. Such settler colonial societies will use violence, dispossession, and genocide against indigenous populations to bring the on-the-ground reality more closely in line with nationalist foundational narratives of uninhabited lands ripe for ‘exploration’ and ‘civilization-building’. In Israel, the “mythology of uninterrupted Jewish temporal and spatial presence in historic Palestine has demanded the erasure of markers of native Palestinian belonging.”<sup>590</sup>

A degree of armed conflict marks the ‘origins’ of many states, be it the foundational and ongoing violence of settler colonialism in states like Canada or revolutionary wars of independence in states like French colonial Algeria. Israel is not unique in this respect. What sets the Israeli state-building project apart from other settler colonial states is the frequency of inter and intrastate wars throughout its nearly seventy-five-year history. Examples of such major interstate conflicts include the 1948, 1967, 1973 Arab-Israeli Wars, and the 1982 and 2006 Lebanon Wars, as well as lower level military engagements, such as air strikes in Tunisia and Iraq in the 1980s and Syria throughout its civil war.<sup>591</sup> However, the Israeli-Palestinian

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<sup>589</sup> John Reynolds, “Anti-Colonial Legalities: Paradigms, Tactics & Strategy,” *The Palestine Yearbook of International Law* 18 (2015): 14–15.

<sup>590</sup> Erakat, “The Sovereign Right to Kill: A Critical Appraisal of Israel’s Shoot-to-Kill Policy in Gaza,” 793.

<sup>591</sup> John Reynolds, “The Use of Force in a Colonial Present, and the Goldstone Report’s Blind Spot,” *The Palestine Yearbook of International Law* 16 (XVI) (2010): 58; Michael Schmitt and Jelena Pejic, “International Law and

Conflict's most defining violence predates these larger, interstate conflicts. Between 1947 and 1949, the organized Jewish militias that would go on to form the core of the Israeli military fought local Palestinian and later national Arab armies. Much of the Arab population fled during this time as a consequence of massacres, forced expulsions, and intimidation in Palestinian cities and villages. An estimated 750 000 Palestinians were displaced by the end of the 1948 War, constituting more than half the domestic Arab population. These displaced populations fled to Gaza, the West Bank, Transjordan, Syria, Lebanon, and Egypt, while those who ended up inside the so-called 'Green Line' borders of the future Israeli state became (second-class) citizens.<sup>592</sup> Following the 1967 War, Israel began its occupation of Jerusalem, Gaza, the Jordanian West Bank, and the Syrian Golan Heights and adopted an aggressive annexation-oriented approach to these illegal expropriations.<sup>593</sup>

### **Competing legal regimes**

Arab Palestinians' ongoing dispossession and relocation are carried out in tandem with legal processes oriented towards land ownership transfer, annexation, and the rejection of a Palestinian right to return. These processes directly mirror empire-building strategies developed centuries prior that formed legal regimes to support the violent acquisition of land and the exercising of sovereignty over it. The post-1948 Israeli state fabricated a "legal geography of power" that relies on a similarly fabricated differentiation of Jewish Israelis from "radically

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Armed Conflict: Exploring the Faultlines," *Martinus Nijhoff Publishers*, vol. 15 (Leiden, 2007), 37; Judah Ari Gross, "Drone Strikes Iran-Backed Militias in Eastern Syria - Report," *Times of Israel*, November 10, 2021.

<sup>592</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, 84–86.

<sup>593</sup> Erakat, "The Sovereign Right to Kill: A Critical Appraisal of Israel's Shoot-to-Kill Policy in Gaza," 815; Larbi Sadiki, ed., *Routledge Handbook of Middle East Politics*, *Routledge Handbook of Middle East Politics* (Oxon: Routledge, 2020), 606, <https://doi.org/10.4324/9781315170688>.

other, fundamentally and constitutively different” non-Jewish populations.<sup>594</sup> This dynamic of difference is legally and institutionally articulated in the overlapping domestic and international legal regimes applicable to Israel and the OPT. The remainder of this section discusses the Occupation’s relevant domestic legal systems before moving to examine the current state of IHRL and IHL in the OPT and accompanying legal debates.

The broader Conflict implicates aspects of every major treaty pertaining to interstate relations, IHRL, and IHL, and is thus subject to their regulation. Earlier chapters demonstrated that pre-WWII IHL was a patchwork of principles and treaties that gelled into the Geneva Conventions and their AP. Much of these treaties’ contents were considered customary international law by 1948 and already applicable to situations of IAC. The Geneva Conventions’ coalescence was contemporaneous with the first Arab-Israeli War and all those that followed, including the Israeli-Palestinian Conflict. For this reason, the Conflict’s various dimensions constitute an exceptional case study in contemporary IHL, which has been central to its surrounding political discourse and debate. Additionally, IHL has been publicly invoked by the Conflict’s various parties as well as international organizations investigating alleged violations throughout.

The Conflict implicates many of IHL’s most disputed aspects, running the gambit of contesting applicable treaty regimes to the minutiae of targeting policies. Israel is a ‘persistent rejector’ of API on three grounds: firstly, its application to wars of national liberation; secondly, its flexible rules as they relate to entitling guerilla fighters to receive prisoners of war status; and thirdly, the means by which national liberation organizations can join the AP, which Israel

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<sup>594</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, 86, 88.

believes derogates from a duty to obey the laws of war and encourages guerilla organizations to use terror as a combat tactic.<sup>595</sup> Israel has instead preferred a more straightforward interpretation of the Conflict, arguing that the state has been in a continuous IAC since the September 2000 Intifada, according to which it is permitted to respond with military force pursuant to the right to self-defence as located in article 51 of the UN Charter.<sup>596</sup>

One reason for the Israeli government's insistence that the Conflict is international and ongoing is these features' connection to the state's legal rationale for its targeted killing policy.<sup>597</sup> The majority of targeted killing occurs in Gaza and 'Area A' in the West Bank, which together with East Jerusalem constitute the OPT.<sup>598</sup> Without a situation of ongoing IAC a targeted killing policy is on its face an IHRL violation, since IHRL does not allow for the preventative use of lethal force. The policy's legality was challenged by the Israeli Public Committee Against Torture, which argued the state is a belligerent occupying power that is obligated to apply a domestic law enforcement model and its accompanying IHRL framework. Israel's High Court of Justice ('Court') rejected that argument and endorsed the government's position that attacks by terrorist organizations constitute an armed attack as understood in the UN Charter. The Court found the appropriate legal framework for application is customary IHL, concluding that a targeted killing policy is permissible and should be assessed on a case-by-case

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<sup>595</sup> Ruth Lapidot, Yuval Shany, and Ido Rosenzweig, "Israel and the Two Protocols Additional to the Geneva Conventions" (Jerusalem, 2011), iv. The US has made similar objections, criticizing the API as "law in the service of terror." See: Schmitt and Pejic, "International Law and Armed Conflict: Exploring the Faultlines," 15:253.

<sup>596</sup> Israel Law Reports, HCJ 201/09 Physicians for Human Rights v. Prime Minister (2009), para. 10.

<sup>597</sup> Philip Alston, "A/HRC/14/24/Add.6 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings," 2010, para. 13.

<sup>598</sup> "Area A" is an area the West Bank assigned to the Palestinian Authority for control. Alston, para. 14; Claire Finkelstein, Jens David Ohlin, and Andrew Altman, eds., *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford Scholarship Online, 2012), 100, <https://doi.org/10.1093/acprof:oso/9780199646470.001.0001>; David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?," *European Journal of International Law* 16, no. 2 (2005): n. 6, <https://doi.org/10.1093/ejil/chi114>.

basis.<sup>599</sup> This finding is significant for two reasons. The first is that the Court relied heavily on international law (in this instance and others) for a domestic court ruling on a domestic policy. The second is that the finding diverged from the traditional understanding of IAC as being between two states, and NIAC as being between a state and non-state actor(s).<sup>600</sup> In contrast to the more limited use of military state force allowed in NIAC, defining the Conflict as being of an international character allows legitimate attacks for the entire duration of hostilities (*i.e.*, from 1987 onwards).<sup>601</sup> The Conflict is exceptional for its state efforts to build an edifice of diversely sourced and legally tested policies to support its use of specific military tactics.

Israel's military occupation of the West Bank and Gaza is described as "the most legalized occupation in world history" for its variety of deliberately entangled legal regimes, including administrative, constitutional, international humanitarian, and international human rights law.<sup>602</sup> However, the number of applicable legal regimes theoretically applicable to the Occupation does not appear to have limited the Israeli state's actual use of force. Rather, the state's interpretation and application of relevant law is used to "sustain and deepen the occupation with a mantle of legitimacy."<sup>603</sup> The Occupation's extensive legal regulation is like that of contemporary counterinsurgency and warfare more generally, in that it creates a complex legal basis upon

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<sup>599</sup> HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* (2005), paras. 10-11, 31-40.

<sup>600</sup> Michelle Lesh, "The Public Committee against Torture in Israel V. the Government of Israel: The Israeli High Court of Justice Targeted Killing Decision," *Melbourne Journal of International Law* 8, no. 2 (2007): 380.

<sup>601</sup> HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel*; Lesh, "The Public Committee against Torture in Israel V. the Government of Israel: The Israeli High Court of Justice Targeted Killing Decision."

<sup>602</sup> Orna Ben-Naftali, "PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies," in *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali (Oxford University Press, 2011), 129-30, <https://doi.org/10.1093/acprof:oso/9780191001604.003.0005>.

<sup>603</sup> Ben-Naftali, 130.

which certain policy-driven objectives can be pursued.<sup>604</sup> States like the U.S. and Israel are institutionally invested in being *perceived* as law abiding, as evidenced by their attempts to argue that practices that international consensus considers to be international legal violations are, in fact, permissible, e.g. targeted killing. Rather than simply ignoring the law, Israel's ongoing illegal occupation is bolstered by crafting alternative legal bases to which military lawyers make a significant contribution.<sup>605</sup> This form of "legal work" to produce a particular effect or desired outcome is made possible by law's contingency.<sup>606</sup> While military lawyers' active role in constituting law's content, possibilities, and limitations is neither new nor unique to the Conflict, current Israeli military legal practices are nonetheless accelerating the collapse of IHL's bifurcated legal concepts and categories.

The legal landscape of the Conflict and Israel's settler colonial project presents a substantial challenge to the discursive coherence of key international legal concepts related to armed conflict—most significantly DPH and belligerent occupation. The aforementioned 2005 'targeted killings' case is the example par excellence of how these two concepts are legislated and litigated. The already discussed changing parameters for defining DPH are further complicated by the Israeli state's more expansive interpretation of DPH and what is referred to as 'continuous combatant function' (CCF). The Court found in the 2005 targeted killing case that Palestinian armed groups operating within the Occupation context are civilians unlawfully participating in hostilities. Such unlawful combatants enjoy neither the protections of non-combatant civilians nor the privileges of

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<sup>604</sup> Samuel Moyn, "Drones and Imagination: A Response to Paul Kahn," *European Journal of International Law* 24, no. 1 (2013): 231, <https://doi.org/10.1093/ejil/cht011>; Eitan Diamond, "Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power," *Israel Law Review* 43 (2010): 414–56.

<sup>605</sup> Maayan Geva, "Military Lawyers Making Law: Israel's Governance of the West Bank and Gaza," *Law and Social Inquiry* 00, no. 0 (2019): 2, <https://doi.org/10.1017/lsi.2018.31>.

<sup>606</sup> Erakat, *Justice for Some: Law and the Question of Palestine*, 7.

regular combatants.<sup>607</sup> The decision expanded activities constituting ‘hostilities’ for the purposes of DPH to involve the planning (including intelligence gathering), launching, and commanding of hostilities—none of which require the use of a weapon and all of which require their own working definitions for adjudication. Thus, an individual may be attacked for engaging in hostile acts and not merely armed hostilities.<sup>608</sup> And those likely to be targeted have limited options for recourse, since the power to determine whether an attack against someone engaging in hostile acts is consistent with IHL in NIAC is vested with the state in question.<sup>609</sup>

The Israeli government further argued in the 2005 targeted killing case that API was not binding on the state, and that a civilian DPH could be targeted for the duration of the armed conflict and not merely ‘for such time’ that they are directly partaking.<sup>610</sup> The Court ruling avoids making determinations on the Israeli government’s longstanding rejection of API. Instead, the Court recognizes that the state “honours the humanitarian provisions of that convention” and that this is “sufficient for the purpose of the petition before us, especially since the customary provisions of API are part of Israeli law.”<sup>611</sup> The Court laid out four conditions that must be met for a targeted killing to be legal, which drew directly from domestic Israeli law and IHRL. However uneasy in appearance the arrangement between the Israeli government and judiciary may seem—especially as it concerns API and what constitutes customary international law—it produces legal and political conditions sufficient to maintain the Conflict and

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<sup>607</sup> HCJ 769/02, para. 26.

<sup>608</sup> HCJ 769/02, para. 33.

<sup>609</sup> An example is situations in which third party actors provide military support to non-state parties to a conflict. However, the state generally retains an absolute military advantage in these situations. Additionally, a third-party state intervention would internationalize the conflict such that it would lose its ‘non-international’ character, e.g. the 2011 Libyan war intervention by NATO.

<sup>610</sup> HCJ 769/02, para. 11.

<sup>611</sup> *Ibid.*, para. 20.

Occupation status quo. Indeed, the Court is clear that any aspect of international law lacking customary force is not part of Israeli domestic law.<sup>612</sup>

In the targeted killing ruling the Court deals with the question of belligerent occupation in a similar manner to that which it deals with API. The Court discusses in abstract terms the applicability of the laws of belligerent occupation—as located in the Fourth Geneva Convention—to the Conflict and does not find these laws applicable to the OPT.<sup>613</sup> It instead considers the Fourth Hague Convention to be the primary source of applicable international law.<sup>614</sup> Petitions claiming that Israeli government activities and policies violate the Fourth Geneva Convention have been consistently rejected by the Court going back to 1988 and continue beyond the 2005 targeted killing case.<sup>615</sup> The Court’s recognition that the government applies the Fourth Geneva Convention’s ‘humanitarian provisions’ at its discretion allows the government to exclude the remainder of occupation law, including the application of national rights.<sup>616</sup> Unlike the Fourth Geneva Convention, the Hague Conventions are regarded as customary international law by both the government and judiciary, and do not address the issue of civilian settlements. The Hague Conventions’ silence on the matter opens legal avenues for continued expansion in the OPT.

Military occupations are definitionally temporary (until such time civilian authority is restored) and are an example of international law’s explicitly temporal features. The Israeli government has maintained for years that the absence of a sovereign (*i.e.*, state) in the Palestinian

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<sup>612</sup> *Ibid.*, para. 19.

<sup>613</sup> *Ibid.*, para. 19.

<sup>614</sup> *Ibid.*, para. 20.

<sup>615</sup> Diamond, “Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power,” 415.

<sup>616</sup> Erakat, *Justice for Some: Law and the Question of Palestine*, 63.

Territories in 1967 means they cannot be considered ‘occupied’. The state instead applies a “modified legal framework” that reflects law’s contestation rather than its absence.<sup>617</sup> According to this framework, Palestinians living in the Occupied Territories are neither Israeli citizens nor a sovereign nation under occupation. These Palestinians are instead “suspended in a legal vacuum with only attenuated legal claims to humanitarian relief.”<sup>618</sup> Were Palestinians in the Occupied Territories to be regarded by the state as a nation under occupation, they would be considered ‘protected persons’ according to the Fourth Geneva Convention. By contrast, the Court found that Israeli settlers in the OPT, and not Palestinians, must be protected by the state military. The state has subsequently used this requirement to protect settlers to successfully justify before the Court extensive infrastructure building, resource extraction, and Palestinian deportations from the Occupied Territories.<sup>619</sup>

The Israeli state’s denial of Palestinian sovereignty *and* the applicability of the Fourth Geneva Convention’s occupation laws has resulted in a situation of indefinite military administration of the West Bank. This martial law regime represents “a colonial continuity” that creatively deploys certain features of international law that were initially used to support British imperial governing modalities and later to support Israeli colonial expansion.<sup>620</sup> Thus, it is not a question of law’s wholesale suspension or absence in the OPT. Rather, the existing legal regime represents international law’s repressive inclusion and unequal integration of postcolonial, peripheral territories. The continuity in Palestine’s situation from early twentieth century

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<sup>617</sup> Erakat, 10, 83–84.

<sup>618</sup> This legal argument relies on the false assumption that Palestinian’s rejection of the 1947 UN Partition Plan was a forfeiture of a right to self-determination. Erakat, 63, 80.

<sup>619</sup> Erakat, 86.

<sup>620</sup> Erakat, 63.

onwards also extends to the types of violences used to enforce the legal order and means by which it is carried out. Previous chapters considered how drone technology is being used in a manner that accelerates IHL's collapse and pulls back its liberal curtain to reveal its empire-abetting function. This chapter expands on this analysis by examining the different intersections between IHL and drones in the OPT.

## **2. DRONE DEVELOPMENT AND OCCUPYING SPACE**

The following section provides a general history of Israeli use, research and development, manufacturing, and sale of drones. It highlights how the state continues to use drones to destroy Palestinian urban environments—also referred to as ‘urbicide’—and manage Palestinian communities in the OPT through colonial policing and terrorism. It concludes by considering how aspects of Israeli drone use in the OPT incorporates features of the divine violence and temporalities earlier chapters linked to sixteenth century imperial theorizing and its post-Enlightenment Era intellectual progeny.

### **Drone R&D and mainstreaming**

The past two decades of drone discussion in Western academic scholarship, media, politics was, with a few noteworthy exceptions,<sup>621</sup> so fixated on American drones that it largely

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<sup>621</sup> Daniel Byman, *A High Price: The Triumphs and Failures of Israeli Counterterrorism* (New York: Oxford University Press, 2011); David Rodman, “Unmanned Aerial Vehicles in the Service of the Israeli Air Force: ‘They Will Soar On Wings Like Eagles,’” *Middle East Review of International Affairs* 14, no. 3 (2010): 77–85; Dr. Atef Abu Saif, “Sleepless in Gaza: Israeli Drone War on the Gaza Strip” (Ramallah, 2014), <http://www.rosa-luxemburg.com/wp-content/uploads/2014/02/Sleepless-in-Gaza-by-Atef-Abu-Saif-RLS-Palestine.pdf>; War on Want, “Killer Drones: UK Complicity in Israel’s Crimes against the Palestinian People,” 2013; Mary Dobbing and Chris Cole, “Israel and the Drone Wars: Examining Israel’s Production, Use and Proliferation of UAVs,” 2014; Ann Rogers, “Investigating the Relationship Between Drone Warfare and Civilian Casualties in Gaza,” *Journal of Strategic Security* 7, no. 4 (2014): 94–107, <https://doi.org/10.5038/1944-0472.7.4.7>; Marina Espinoza, “State Terrorism: Orientalism and the Drone Programme,” *Critical Studies on Terrorism* 11, no. 2 (2018): 376–93, <https://doi.org/10.1080/17539153.2018.1456725>.

overlooked the weapon's use by other actors.<sup>622</sup> This American-centric approach is so profound it led to patently untrue observations, such as that by authors Kreps and Zenko who state as a matter of fact that the U.S. is “the only country to have used drones extensively.”<sup>623</sup> There are numerous potential reasons for the simultaneous overemphasis on American drones and underemphasis on Israeli drones—however, two stand out as the most likely explanations. The first is a gradual acknowledgement in public discourse of the catastrophic failures and compulsive human rights violations that defined the American War on Terror, and the increased attention of global U.S. military operations that followed. This resulted in greater media reporting of American drone strikes that produced substantial amounts of civilian casualties. While this at least partially accounts for the question of overemphasis, it offers little explanation of the correlated underemphasis on Israeli drones. There is ample international media attention of Israeli military conduct, but it is counterbalanced by state *hasbara* (‘public diplomacy’) that attempts to minimize coverage of the Occupation’s police and military violence.<sup>624</sup> This effect is compounded by the state’s refusal to confirm its use of armed drones as a matter of policy.<sup>625</sup> This policy’s efficacy was demonstrated during a 2017 diplomatic controversy in which Germany’s Social Democratic Party blocked a 580 million euro drone leasing deal with Israel when it was made aware that the Heron TP drones could be armed.<sup>626</sup>

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<sup>622</sup> Beyond the populations over which the drones fly, Israeli military allies have long known of Israel’s drone manufacturing and operating.

<sup>623</sup> Sarah Kreps and Micah Zenko, “The Next Drone Wars: Preparing for Proliferation,” *Foreign Affairs* 2, no. April (2014): 1–7, <https://doi.org/10.1525/sp.2007.54.1.23>.

<sup>624</sup> The effect of this public relations strategy has reduced in recent years thanks to Palestinian journalism, activism, and scholarship documenting the full extent of the occupation, as well as the Israeli state’s reduced capacity to impose a media blackout in the OPT—most especially during its wars on Gaza.

<sup>625</sup> Rodman, “Unmanned Aerial Vehicles in the Service of the Israeli Air Force: ‘They Will Soar On Wings Like Eagles,’” n. 6.

<sup>626</sup> Gili Cohen, “German Lawmakers Block Israeli Drone Deal After Discovering They’re Armed,” *Haaretz*, June 29, 2017. This deal would later go through.

Israel was one of the earliest states to identify the revolutionary potential of drones and embrace unmanned aerial surveillance technology. Israel made its first drone purchase in 1971 and was flying American-made decoy and intelligence gathering drones in the Golan Heights against the Syrian army by 1973.<sup>627</sup> From these early experiments Israel would go on to become a leader in drone research and development. During the 1990s the Israeli state began manufacturing its own advanced armed drones, i.e., those that can carry and launch munitions for runway retrieval and reuse. These include the state-owned Israeli Aerospace Industries' Heron drone—the more advanced version of which is known as the Eitan or Heron TP—as well as the Elbit Systems' Hermes 450 and Hermes 900. All these drones are MALE UAVs capable of being armed with Spike missiles manufactured by the state-owned Rafael Advanced Defense Systems Ltd. The largest of these drones is the Heron TP that can supposedly be armed with a one-ton bomb.<sup>628</sup>

Precise data is difficult to obtain because the state does not officially recognize its use of armed drones despite widespread confirmation from firsthand witness accounts and video recordings of the practice. Additionally, Israeli drones do not generally carry markers or transponders that allow for easily identifiable national allegiance—a requirement under IHL. Israeli drones of various shapes and sizes have since been integrated into the state's larger intelligence and remote operating system. From a strictly military standpoint, their use is divided into two operational norms: firstly, conducting interdiction and close air-support strikes as part of wider long-endurance ISR overwatch in counterinsurgency campaigns, and secondly, targeted

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<sup>627</sup> Dobbing and Cole, "Israel and the Drone Wars: Examining Israel's Production, Use and Proliferation of UAVs," 9.

<sup>628</sup> Rodman, "Unmanned Aerial Vehicles in the Service of the Israeli Air Force: 'They Will Soar On Wings Like Eagles,'" 79.

strikes against (suspected) high-value personnel targets and weapons shipments and depots.<sup>629</sup> Simply put, drones are among the most effective tools of the Occupation because of their dual reconnaissance/monitoring function and munition strike/delivery function. Armed drones have been used against Palestinians in the Occupied Territories since 2000, during which time they have been used “intensify” the occupation all while reducing its costs and boosting profits.<sup>630</sup>

The aforementioned 1986 CIA report’s unique focus on Israel’s position as a leading drone developer and exporter indicates the state’s drone ascendance was closely monitored by the U.S. This preoccupation appeared to go beyond the actual scale of Israel’s domestic drone industry to contemplate the implications of its drone use in the “Third World” for America’s own hegemonic ambitions during the Cold War.<sup>631</sup> The two countries charted distinct but parallel paths of drone use in the MENA. While both states exchange weapons technologies and are engaged prolonged occupations and conflicts, their broadly similar drone tactics belie important differences as well. Israel and America’s distinct geographical and national security situations limits the utility of attempts to superimpose analyses of the American drone programme onto Israel’s own. The following section takes a closer look at the features unique to Israeli drone use by considering drones’ role in intensifying the Occupation’s colonization of Palestinian Territories and day to day governing modalities.

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<sup>629</sup> “Armed Drones in the Middle East: Israel,” Royal United Service Institute, n.d., <https://drones.rusi.org/countries/israel/>.

<sup>630</sup> Saif, “Sleepless in Gaza: Israeli Drone War on the Gaza Strip,” 6–7.

<sup>631</sup> Katherine Fehr Chandler, *Unmanning: How Humans, Machines and Media Perform Drone Warfare* (New Brunswick: Rutgers University Press, 2020), 105–6.

## **‘Disengagement’, drones, and sovereignty**

Israeli drones are used for both ISR and attack operations, with the bulk of drone activity falling under the former category. Though surveillance is a feature of all modern state security apparatuses, it takes on a unique function in the context of a decades long military occupation. Armed and unarmed drone use in Gaza dramatically increased following the state’s 2005 unilateral disengagement from the territory and implementation of a blockade against it in 2007.<sup>632</sup> The Israeli government and High Court of Justice agree that the territory ceased to be occupied once the state’s permanent, on the ground military presence in Gaza was removed. This position contradicts that held by most states and the International Court of Justice, the latter of which ruled that East Jerusalem, Gaza, and the West Bank remain under Israeli military occupation.<sup>633</sup> Israel’s removal of a *ground* military presence was offset by a greater aerial presence—mostly in the form of drones. Drones continually fly in Gaza’s skies and work in coordination with the Israeli army stationed on the other side of the territory’s barrier to collect, convey, and analyze the goings-on of the population living below. Drones constitute an important component of this “new form of occupation” that includes control of the territory’s six crossing, air and sea space, and the movement of goods and services.<sup>634</sup> These activities collectively deny Palestinian sovereignty and reassert Israel’s.

Sovereignty is a recurring theme in international law. Sovereignty recognitions are strategically withheld and extended by the most powerful international actors for ideological and

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<sup>632</sup> Author interview with Israeli weapons expert, May 2021.

<sup>633</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004); John Reynolds, “Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory” (Ramallah, 2010), 31–32.

<sup>634</sup> Saif, “Sleepless in Gaza: Israeli Drone War on the Gaza Strip,” 18.

interest-based reasons. The denial of Palestinian sovereignty is also recurring, with each denial building upon the claims of those prior. This denial is made possible by the concept's presentation in international legal text, where it is generally discussed in abstract terms that give the impression that sovereignty is a condition which spontaneously comes into full and permanent effect following a formal recognition by a powerful third party. In reality, sovereignty is a reproduced set of practices that reflect its contingency and the need to constantly reassert it against those who might seek to challenge it. This is why the Israeli government attempts to draw a continuous line of incomplete (and therefore non-existent) Palestinian sovereignty, beginning with the Ottoman Empire, through the 1948 and 1967 Arab-Israeli Wars, and continuing into the present moment. Sovereignty in its current articulation belongs to a territory's 'sovereign', which chapter 3 explained as being defined by a necropolitical power handed down from God and His heavenly imperium to the secular 'state' and its terrestrial domain. The creation of air power reintroduced three-dimensional sovereignty from above and in the image of the divine. Such a three-dimensional idea of sovereignty is operational in the Conflict. Successive Israeli government attempts to assert sovereignty across the horizontal and vertical planes have taken a variety of forms that are currently best encapsulated by the drone. Even nominal Palestinian sovereignty in Area A is denied by the presence of Israeli military checkpoints scattered across the West Bank territory and the flying of drones overhead. This *partial* Palestinian sovereignty in Area A and Gaza is illustrative of IL's unequal integration, and reminiscent of Vitoria's overture towards indigenous sovereignty in the Americas that he then endorsed *complete* Spanish sovereignty over. These sovereignties were not equivalent or coterminous. Israel likewise does not deny occupied Palestinians *any* autonomy—as evidenced by government claims that Hamas and the Palestinian Authority are accountable for any actions

taken within their respective purview—and instead denies them *enough* sovereignty to meet the conditions necessary for statehood.<sup>635</sup> This is also the reason the Israeli government asserts that its conflict is with Hamas (an non-state entity) and not Palestine (a would-be state entity), and that Israel’s actions taken in this context are therefore in accordance with IL.

### **Blockading**

Gaza’s geographical and security situations are mirror images of one another; both are compressed in time and space. In geographical terms, the narrow strip of territory is one of the most densely populated areas in the world and is frequently referred to as an ‘open air prison’ on account of the controlled movement of people in and out of the area.<sup>636</sup> Gaza’s population controls neither its territorial waters nor airspace, which compacts it along two axes. Apartment block towers constituting some of Gaza’s tallest structures are frequently razed by Israeli aerial bombardments to reassert this downward pressure.<sup>637</sup> Palestinian-constructed underground tunnel networks stretching across Gaza’s border with Egypt and through which goods and persons are transported are an example of resistance that subverts Israel’s otherwise totalizing control. In security terms, Israel maintains a strict control on the flow of everything from fresh water and electricity to construction and medical supplies. These control efforts attempt to reach every aspect of Gazans’ daily existence, including telecommunications and even caloric intake,<sup>638</sup> with

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<sup>635</sup> United Nations General Assembly, “Gaza Children Living in ‘Hell on Earth’ Secretary-General Tells General Assembly, as Calls for End to Violence Crescendo, News of Israel-Hamas Ceasefire Breaks” (New York: United Nations Meeting Coverage and Press Releases, n.d.), <https://www.un.org/press/en/2021/ga12325.doc.htm>.

<sup>636</sup> Dobbing and Cole, “Israel and the Drone Wars: Examining Israel’s Production, Use and Proliferation of UAVs,” 15; Reynolds, *Empire, Emergency and International Law*, 200.

<sup>637</sup> Linah Alsaafin and Maram Humaid, “‘Everything Lost in an Eye Blink’: Gaza Towers Targeted by Israel,” *Al Jazeera*, May 13, 2021, <https://www.aljazeera.com/news/2021/5/13/lost-in-blink-of-an-eye-gaza-high-rise-towers-targeted-by-israel>.

<sup>638</sup> Sharon Weill and Valentina Azarova, “The 2014 Gaza War: Reflections on Jus Ad Bellum, Jus in Bello, and Accountability,” in *The War Report: Armed Conflict in 2014*, ed. Annyssa Bellal (Oxford University Press, 2015), 369, <https://books.google.com/books?id=pj3KBQAAQBAJ&pgis=1>.

one Israeli government official once describing the blockading of aid to Gaza as ‘put[ting] the Palestinians on a diet’.<sup>639</sup> Environmental, nutritional, medical, and psychological security are compromised by an unrelenting pressure being applied from all sides. The territory is further compressed by being prevented from reflecting demographical growth with geographical growth.

Gaza’s blockade officially aims to guarantee Israeli security while (unofficially) pursuing the further reaching goal of precluding the organization of full scale, coordinated Palestinian non/violent resistance in the territory. Strict limits on importing concrete and medical equipment into Gaza is justified in the name of preventing the manufacturing of rockets and bombs that could be used against Israel proper. The tunnel networks connecting Gaza to Egypt have at times provided various supplies that would otherwise not find their way across Israeli checkpoints.<sup>640</sup> However, even at their most active—prior to their destruction through coordinated Egyptian-Israeli efforts beginning in 2013—these tunnels were not capable of sufficiently blunting the blockade’s severity.<sup>641</sup> More significantly, the blockade ensures that critical infrastructure required to support centralized service provisioning, such as potable water or reliable electricity, are never fully functional. The blockade’s intensity suggests that it is less concerned with preventing access to weapons and more concerned with enacting discipline and broad repression. Israeli state policies towards Gaza indicate a strategy intended to limit reliable access to basic life necessities to prevent Gazans from mobilizing to the degree necessary to carry out a mass insurrection. During Israeli ground invasions and bombardments, the blockade further intensifies and resembles a siege. Sieges have been used in armed conflict for thousands of years. Similar to

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<sup>639</sup> Reynolds, *Empire, Emergency and International Law*, 199.

<sup>640</sup> Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012), 196.

<sup>641</sup> FRANCE 24, “Gaza under Two Blockades as Egypt Destroys Tunnels,” *FRANCE24.Com*, October 29, 2013.

their more modern counterpart of sanctions, sieges are first and foremost a punishing cruelty to civilian populations; and like occupations, sieges do not require total encirclement, but merely effective control over the movement of people and supplies in and out of a territory.<sup>642</sup> The International Committee of the Red Cross consequently regards the blockade as amounting to collective punishment—a prohibited practice under IHL.<sup>643</sup>

Blockade-related exercises like estimating the daily minimum calories necessary for each person in Gaza to survive requires aggregating copious amounts of information. Drones are a crucial means by which the data required for such calculations can be collected without a ground troop presence. Shaw explains drones' emergence as one of several modes of aerial warfare that have “sought to enclose, police, and pacify hostile forms of life.”<sup>644</sup> He locates drones in a broader war-waging approach that he terms “atmospheric warfare” wherein states attempt to destroy and rework the biological and technology environment of a space.<sup>645</sup> This horizontally and vertically-waged warfare is illustrated in Gaza, where drones are a key part of the Israeli security matrix attempting to quell insurrectionary activities by depriving the territory of necessary raw materials and social stability.

The ostensible reason for the blockade is suppressing Palestinian militant activities, however, its purpose appears to extend beyond this more limited goal to include creating an environment that is inhospitable to broad societal flourishing. Appreciating the scale and scope

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<sup>642</sup> “Urban Warfare,” in *Proceedings of the Bruges Colloquium* (Bruges: College of Europe, 2016), 91.

<sup>643</sup> “The Geneva Conventions Relative to the Protection of Civilian Persons in Time of War of 12 August 1949,” Art. 33; Susan Power and Nada Kiswanson van Hooydonk, “Divide and Conquer: A Legal Analysis of Israel’s 2014 Military Offensive Against the Gaza Strip” (Ramallah, 2015), 19.

<sup>644</sup> Ian G.R. Shaw, “Scorched Atmospheres: The Violent Geographies of the Vietnam War and the Rise of Drone Warfare,” *Annals of the American Association of Geographers* 106, no. 3 (2016): 689, <https://doi.org/10.1080/00045608.2015.1115333>.

<sup>645</sup> Shaw, 694.

of Gaza's continued occupation requires considering the deindustrialization qua infrastructure destruction that, alongside the blockade itself, defines the territory's post-disengagement political economy. Mathur reminds readers that late eighteenth century Western powers' approach to laissez faire trade was qualified in the case of arms transfer to limit the spread of the weapons' technological innovations. The reason for this exception was the assumed threat posed by arms proliferation were the weapons to find their way into colonized populations' hands. This fear is an expression of the inherent sense of insecurity experienced imperial powers, particularly those with colonial possessions.<sup>646</sup> A sense of vulnerability and looming threat has similarly thrived in Israel since the 1948 declaration and war through which the state was constituted. The state's sophisticated arsenal of weapons accounts for its declared concern about the potential transfer of arms to Palestinians, especially those in Gaza. This sense of anxiety demonstrates the continuity in colonial governing relations over time: a fear that someday the empire's own weapons will be turned against it.

The official narrative used to justify continuing to apply punishing restrictions on Gaza relies on cultivating fear of a zealous and spontaneous enemy in possession of unknown and constantly changing weapons capabilities. This language blends apocryphal and apocalyptic themes, and describes Hamas as a "highly organized" and "well-armed" organisation "avowedly dedicated to the destruction of Israel" that "expand[s] its terrorist arsenal with increasingly deadly weapons and a vast network of cross-border assault tunnels with concealed exists in

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<sup>646</sup> Ritu Mathur, "'The West and the Rest': A Civilizational Mantra in Arms Control and Disarmament?," *Contemporary Security Policy* 35, no. 3 (2014): 340, <https://doi.org/10.1080/13523260.2014.960164>.

Israeli territory.”<sup>647</sup> In reality, Hamas’ arms capabilities are dwarfed by Israel’s and do not pose an existential threat to the state. However, Palestinian violent resistance using small and medium-size ballistic missiles produced domestically and/or smuggled in piecemeal by regional allies pose just *enough* of a threat for the Israeli government to sustain a discourse calling for the Gaza’s demilitarization at all costs. This includes the massive destruction of Gaza’s built environment to prevent improved military capabilities in the future. Such warnings weaponize time and uncertainty to assert a universal temporality that misrepresent Hamas’ means, motive, and opportunity. These narratives fabricate an imaginary of the *future* by way of fears from the *past*, e.g. Cold War anxieties over Soviet nuclear weapons and concerns about Iraqi chemical weapons in the First Gulf War. Drone myths and misrepresentations in mainstream discourses directly lends the weapon to this type of fearmongering—as does their accessibility. The proliferation of relatively straight-forward and inexpensive drones saw Hamas fly a rudimentary armed drone into Israel in 2014. The organization’s drone capabilities later expanded to include a whole host of “suicide drones” used in the most recent war on Gaza in May 2021.<sup>648</sup> The term ‘suicide drone’ is no doubt used in Western media to invoke memories of past Palestinian militant suiciding bombings and the way in which those responsible could be described as ‘loitering’ in an area prior to detonation. Extensive drone use by Hamas, however rudimentary, is a prospect so alarming that in 2021 the IDF bombed the ‘operational apartment’ of Hamas’ head of drone operations the same day the organization launched “many” of these loitering munitions

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<sup>647</sup> State of Israel, “The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects,” 2009, [http://www.mfa.gov.il/MFA\\_Graphics/MFA\\_Gallery/Documents/GazaOperation w Links.pdf](http://www.mfa.gov.il/MFA_Graphics/MFA_Gallery/Documents/GazaOperation%20w%20Links.pdf); State of Israel, “The 2014 Gaza Conflict: Factual and Legal Aspects (Executive Summary),” 2015.

<sup>648</sup> Staff, “IDF Targets ‘Operational Apartment’ of Hamas Drone Chief,” *Times of Israel*, May 13, 2021, [https://www.timesofisrael.com/liveblog\\_entry/idf-targets-operational-apartment-of-hamas-drone-chief/](https://www.timesofisrael.com/liveblog_entry/idf-targets-operational-apartment-of-hamas-drone-chief/).

towards Israel.<sup>649</sup> The possibility of a symmetrical conflict where all parties possess weapons of approximate capabilities is unimaginable for drone-operating states. Much of the weapon's tactical effectiveness is reliant on their unilateral use. For drones to be the conflict panacea its operators hope and expect the weapons to be, there can only ever be 'drones for me, but not for thee'.

Drones are a democratizing weapon in that they allow non-state actors and small or poor states with relatively humble militaries to develop air power. This equalizing effect breaks from historical trends where there was an almost exclusively unilateral use of air power and unsettles the related conventional wisdom that advanced air power is decisive in war. Fighter jets have long been a signifier of a state's power writ large. The prestige associated with a robust air force reinforces the false notion that air power can win wars and subdue civilian populations. However, postcolonial wars in the global periphery in which there were massive capabilities gaps repeatedly demonstrated that air power alone—while an effective means of indiscriminately terrorizing large civilian populations—is insufficient to win a war, e.g. neocolonial Afghanistan and Vietnam wars. Drones, by contrast, have proved immensely useful for otherwise militarily underequipped belligerents. Take, for example, their decisive role in the 2020 Azerbaijan-Armenia war and effective use by Yemeni Houthis in the country's ongoing civil war.<sup>650</sup> Potentially widespread remotely piloted or GPS-guided drone use by Hamas would prove a more tactical alternative to rockets and disrupt the status quo security situation for the Israeli state by making previously unreachable targets deep inside Israeli territory vulnerable to attack. This

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<sup>649</sup> Staff.

<sup>650</sup> Håvard Haugstvedt and Jan Otto Jacobsen, "Taking Fourth-Generation Warfare to the Skies? An Empirical Exploration of Non-State Actors' Use of Weaponized Unmanned Aerial Vehicles (UAVs-'Drones')," *Perspectives on Terrorism* 14, no. 5 (2020): 26, 28.

possible future is almost certainly entertained by Israeli state defence and military strategists and will likely entrench their existing approach to managing Palestinian militant activity: assassinations and extensive infrastructure demolition.

## **Urbicide**

Israeli war strategy incorporates a policy of ‘urbicide’: the destruction of urban environments and, more crucially in the Palestinian case, the availability of life-supporting natural resources. The systemic ‘demodernization’ of Palestinian cities reduces the cultural, political, and economic opportunities they engender, as well as access to arable land, coastal fishing, and fresh water.<sup>651</sup> This demodernization policy follows from an Orientalist conceptualization of Palestinian inhabited spaces as intrinsically unknowable, ‘unclean’, and requiring ‘sanitization’ with “the latest Western technoscience in acts of purification, unveiling, and (attempted) control.”<sup>652</sup> This policy is pursued in the OPT during both so-called wartime and peacetime, and takes different forms in different territories. In the West Bank, armoured D-9 Caterpillar bulldozers raze Palestinian buildings, whereas Gaza’s buildings have been leveled using air strikes since Israeli ‘disengagement’. The recurring wars in Gaza also provide social and legal opportunity for the accelerated application of urbicide policies under the pretense of regular military objectives.

The UN fact-finding mission on the 2008-9 Operation Cast Lead, sometimes referred to as the ‘Goldstone Report’, observed that the war signaled a shift in Israel’s strategic thinking. While most tactics remained the same, the state’s strategic goals shifted away from focused operations

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<sup>651</sup> Stephen Graham, *Cities under Siege: The New Military Urbanism* (London: Verso, 2011), xxiv, <https://doi.org/10.1080/13623699.2012.678756>.

<sup>652</sup> Stephen Graham, *Cities, War, and Terrorism: Towards an Urban Geopolitics* (Malden: Blackwell Publishing Ltd, 2004), 206; Graham, *Cities under Siege: The New Military Urbanism*, 176.

and towards “massive and deliberate destruction.”<sup>653</sup> Israeli drones facilitated this destruction by identifying and marking targets for attack by fighter jets—a trend that continues to this date.<sup>654</sup> A former IDF member described how during Operation Protective Edge (the 2014 war on Gaza) “almost no fighter jet bombings were carried out without a drone beforehand looking at the target for a moment.”<sup>655</sup> These targets were sometimes buildings constituting what the Goldstone Report refers to as “the foundations of civilian life in Gaza”, including hospitals, schools, electricity stations, and water treatment plants.<sup>656</sup> These attacks compounded the effects of the blockade’s existing electricity and water supply restrictions.<sup>657</sup> A coalition of Palestinian human rights organizations recorded the partial and total destruction of public buildings in Gaza during Protective Edge. Amongst those destroyed included thirty-four health facilities (including hospitals), four banks, sixty-four schools, and six colleges/universities.<sup>658</sup>

Drone-launched air strikes in which the drone is visually and audibly recognizable allows for straight-forward identification, as is often the case in assassinations or attacks not taken during a discrete war.<sup>659</sup> However, drone attacks during larger scale conflicts, such as the recurring Gaza wars, are sometimes only identifiable through on the ground post-strike analysis at the bombsite. Israeli drones can carry a variety of munitions, but the small, domestically

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<sup>653</sup> United Nations Human Rights Council, “A/HRC/12/48 Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” 2009, para. 1193, <https://doi.org/10.1093/oxfordhb/9780199560103.003.0005>.

<sup>654</sup> “Author Interview with Israeli Weapons Expert.”

<sup>655</sup> Breaking the Silence, “This Is How We Fought in Gaza: Soldiers Testimonies and Photographs from Operation ‘Protective Edge,’” 2014, 203.

<sup>656</sup> Council, “A/HRC/12/48 Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” paras. XIII, 962–1027.

<sup>657</sup> Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, 193.

<sup>658</sup> Susan Power and Nada Kiswanson van Hooydonk, “Divide and Conquer: A Legal Analysis of Israel’s 2014 Military Offensive Against the Gaza Strip” (Ramallah, 2015), 8, ‘Public Buildings destroyed between 7 July and 26 august 2014’.

<sup>659</sup> Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*, 2009, 6.

manufactured Spike missiles appeared to be exclusively carried by drones during Cast Lead, while attack helicopters carried the larger Hellfire missiles.<sup>660</sup> Drones, especially the Hermes 450, appear to be the only IDF aircrafts that carry a modified anti-tank missile used for ‘roof knocking’ known as a ‘Mikholit.’<sup>661</sup> The ‘roof knocking’ method involves striking the roof of a building that is marked for larger attack in the following five to ten minutes. The Israeli state claims that ‘knocking’ is intended to warn civilians inside the building that they should immediately evacuate and is thus “highly effective [at] preventing many civilian injuries and deaths.”<sup>662</sup> While the small missiles do not cause significant damage to buildings, former IDF soldiers testify the practice is not always effective at preventing harm to civilians.<sup>663</sup> The missiles themselves pose a risk to persons near the ‘knock’ location. Although the Israeli military insists that these missiles are non-lethal, they produce shrapnel that killed Palestinians in the past.<sup>664</sup>

In some instances, drones are reported to have launched missiles directly at civilians and civilian objects. For example, during Operation Pillar of Defense in 2012, children and other civilian Palestinians in Gaza were killed by drone-launched missiles.<sup>665</sup> Similar accounts from Operation Protective Edge describe how families fleeing areas experiencing greater military

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<sup>660</sup> Human Rights Watch, 12.

<sup>661</sup> “Author Interview with Israeli Weapons Expert.”

<sup>662</sup> State of Israel, “The 2014 Gaza Conflict: Factual and Legal Aspects,” 2015, 313, <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

<sup>663</sup> Breaking the Silence, “This Is How We Fought in Gaza: Soldiers Testimonies and Photographs from Operation ‘Protective Edge,’” 13.

<sup>664</sup> “Author Interview with Israeli Weapons Expert.”

<sup>665</sup> UN High Commissioner for Human Rights, “A/HRC/22/35/Add.1 Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S 12/1,” 2013, paras. 13, 15.

activity were targeted by drone strikes causing multiple fatalities, in addition to strikes against schools and apartment buildings.<sup>666</sup>

The sheer scale and scope of destruction in Gaza during its wars suggests that the ‘enemy’ the Israeli state believes it is fighting is not merely Hamas, but the entire society from which the organization operates. Retired IDF Major General Giora Eiland published a piece on the subject of a future Israeli war against Lebanon that explained how this approach is itself a military strategy. According to Eiland, the only way to influence Hezbollah’s future behaviour requires “the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people.”<sup>667</sup> While this strategy is neither new nor unique to Israel, its use is especially pronounced in Gaza. Authors Adey, Whitehead, and Williams explain how aerial bombing campaigns against enemy cities require re-imagining an enemy’s supporting infrastructure as the entire enemy nation. Accordingly, an enemy’s complete destruction requires attacking both the political and logistical infrastructure that “(re)produce the materiel and discourse of war” as well as the undergirding social infrastructure of the physical bodies that allow total war to exist.<sup>668</sup> In Gaza, the entire geography is implicated in hostilities and every subject and object is imagined as possessing a certain threat potential or tactical opportunity. Experiences in city-street fighting during the 1987 Intifada lead the IDF to adopt a new urban fighting strategy wherein soldiers move *through* walls and not around them. Doing so requires soldiers to blast holes in enough

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<sup>666</sup> BADIL Resource Center, “No Safe Place: Crimes against Humanity and War Crimes Perpetrated by High-Level Israeli Officials in the Course of ‘Operation Protective Edge,’” no. February (2016): paras. 72–3, 167.

<sup>667</sup> Michael G Kearney, “Lawfare, Legitimacy and Resistance: The Weak and the Law,” *The Palestine Yearbook of International Law* 16 (XVI) (2010): 106, <http://sro.sussex.ac.uk/43271/>.

<sup>668</sup> Alison Adey, Peter; Whitehead, Mark; Williams, ed., *From Above: War, Violence, and Verticality* (Oxford: Oxford University Press, 2014), 99–100.

walls to create a new pathway in cities using aerial images captured by drones.<sup>669</sup> This type of inside-out destruction is carried out alongside aerial bombardments and hollows out Palestinian infrastructure, making it temporally and spatially precarious.

### **Drone occupation**

Historical imperial modes of governing used air power to bring populations in line with colonial administration. The relationship between air power and the population below is described by authors Adey *et al.* as one of “enmity,” and is replicated in present-day imperially occupied cities whose subjects are available to have a variety of forces enacted upon them, ranging from observation to death.<sup>670</sup> These relations of ruling in the MENA historically occurred in an imperial context that sought to conquer the exotic ‘Orient’ and its expansive desert vista. The advent of air power continued this horizontal expansion by enlisting verticality. Locations like Gaza are no longer “beyond the horizon” and are instead beneath a “geography of occupation” that rotated a full ninety degrees.<sup>671</sup> Consolidating ISR and attack capabilities makes drones appear to be the most effective means for defeating insurrectionist movements—which organizations like Hamas are considered by the Israeli state to be. Based on the experiences of earlier colonial powers, Israeli military theorist Martin van Creveld believes there are only two ways to fight an insurgency: the first is with on the ground, intelligence gathering that minimizes civilian casualties in order to avoid alienating the civilian population, and the second is through unprecedented, indiscriminate, and highly destructive violence. Hippler explains that both counterinsurgency strategies are ideologically and materially difficult for contemporary

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<sup>669</sup> Eyal Weizman, *Hollow Land: Israel’s Architecture of Occupation, Political Geography* (New York: Verso, 2007), 196, <https://doi.org/10.1016/j.polgeo.2008.10.001>.

<sup>670</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 2–3.

<sup>671</sup> Weizman, *Hollow Land: Israel’s Architecture of Occupation*, 237.

neocolonial democracies to openly pursue. To appease domestic population's modern and liberal sensibilities, these conflicts are instead scaled back to mostly aerial operations and are not labeled 'wars'. Thus, counterinsurgencies are mainly waged in peripheral locations that are officially 'at peace.'<sup>672</sup>

This new approach "implies a deliberate blurring of the border dividing war from peace" so much so that "it is even tempting to say that imperial perpetual peace now coincides with a perpetual low-intensity war."<sup>673</sup> Hippler specifically identifies drones as the most obvious example of this new approach's air power dimension.<sup>674</sup> Gaza is one such location that experiences sporadic air attacks during times of 'peace' and intense, sustained bombardments during declared wartime.<sup>675</sup> Drones accelerate the collapse of 'war' and 'peace' categories into one another by being used extensively in both situations. Even if there is variation in *how* a drone is used from one situation to another, state armed forces fly them during periods of war just as periods of ostensible peace. The drone is no less a weapon while conducting reconnaissance over Gaza than when it is dropping bombs. The weapon's overall function in the Occupation and its violence remains the same even when it is not delivering missile attacks. The fluidity between peaceful and hostile on-the-ground activities is reflected in drones' wide array of functions and tactical applications. The same drone function is used to execute a targeted killing during a long ceasefire and a strike against an enemy combatant during a discrete war. Identical strikes take on different names and legal implications depending on their temporal context: 'peacetime' or 'wartime'.

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<sup>672</sup> Thomas Hippler, *Governing from the Skies: A Global History of Aerial Bombing* (London: Verso, 2017), 198.

<sup>673</sup> Hippler, 199–200.

<sup>674</sup> Hippler, 200.

<sup>675</sup> Hippler, 200.

Drones have a legally contradictory function in the prolonged Occupation. Air strikes are an activity that abstractly distinguishes between peacetime and wartime under IL. Israeli drone use in both contexts effectively flattens this distinction, yet the government discursively maintains the distinction for its legal usefulness. However, *peacetime* and *wartime* in Gaza bear a resemblance that undermines any assertion of their legal distinction. This situational homogenizing coincides with the loss of meaning for what constitutes *territorial* occupation. Despite material realities that suggest otherwise, the state insists that Gaza cannot be considered occupied in the absence of on-the-ground soldiers. Occupation via drone offers the Israeli state plausible deniability—however implausible and widely rejected it might be. Here, the drone again accelerates an existing tension between war’s self-proclaimed means and ends under IHL.

The classical conception of an intra-European conflict proceeds in stages: attack, invasion, occupation, and the cessation of violence. However, this was never the order of operation in colonial wars, which required *continual* violent policing and *ongoing* occupation. In his discussion of how air power undid the traditional connection between occupation and an end to military action, Hippler explains:

“Occupation of the ground is no longer an objective, since bombing is precisely designed as a substitute for occupation. By the same token, occupation no longer means an end to war. The air force is the favoured arm of the ‘endless’ wars we know today, wars that do not speak their name, but are presented simply as police operations on the world scale.”<sup>676</sup>

Traditional interstate conflicts have all but disappeared in the twenty-first century, and in their place are neocolonial conflicts in the global periphery that bear little resemblance to the wars described in the mainstream international law tradition.<sup>677</sup> Governments faced with this new

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<sup>676</sup> Hippler, xv.

<sup>677</sup> To be clear, this contradiction in war’s theory and praxis is not new. What is changed is the means by which contemporary conflicts are waged, and how they have let slip the mask of liberalism’s supposedly humane and

reality have had mixed reactions. The conventional weapons that fill the arsenals of the West's hegemonic states reflect a commitment to preparing for military confrontation with another state's armed forces. This is despite decades of neocolonial interventions in NIAC fought in the global periphery without the likes of a battleship. The orthodox scholarship supporting these hegemonic states likewise reflect a generalized unwillingness to seriously grapple with the question of IHL's undergirding canon, much less entertain the possibility of doing away with it altogether. Yet the growing gap between war's canonical theorizing and contemporary praxis makes it increasingly challenging to argue *for* the continued persuasiveness of IHL and *against* its admonishment. This situation is generating an intellectual crisis that this dissertation has termed a 'paradox' that manifests most fully in drones and their use. States reacting to this paradox have bent, contorted, and reimagined IHL to support their policy goals. Drones' clear function in undertaking and managing neoimperial and neo/colonial projects of all sorts is forcing states like Israel to construct legal workarounds and innovations to ensure a liberal and superficially coherent account for their continued use. International lawyers are purveyors of such accounts.

The ascendancy of drone warfare catalyzed the growth of warfare that is facilitated by way of legal expertise, also referred to as "lawfare".<sup>678</sup> The law as an expertise to be used against the marginalized to advance the interests of the powerful is an essential feature of liberal modes of

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democratizing wars to reveal their imperial nature. This process began prior to drones' mainstreaming but has been accelerated by their extensive use and proliferation. Drones embody liberalism's technological and ideological objectives, namely, minimal financial and human resource investments to maximal governing effect. Using air power to terrorize and police civilian populations experiencing (and resisting) colonial occupation, such as Gaza, is efficiently managed by drones, while the long term goals of continued neocolonial relations of power are unsustainable.

<sup>678</sup> Ruth Blakeley, "Drones, State Terrorism and International Law," *Critical Studies on Terrorism* 11, no. 2 (2018): 323, <https://doi.org/10.1080/17539153.2018.1456722>.

governance. However, it is especially pronounced in violence-managing legal regimes like IHL. Drone warfare as a concept and practice is, as Kyle Grayson has argued, made possible through liberalism's logic.<sup>679</sup> Grayson and Mawdsley explain how this logic is embodied in the drone operator, whose "gaze enabled by the drone relies on the spatial-ordering aspects of Cartesian perspectivalism for the production of truth claims that can then be mobilised within the kill chain to unleash kinetic force."<sup>680</sup> Cartesian persepectivalism is one dimension of Western modernity's privileging of visually obtained sources of information and its reliability. It is the definitive positivist approach for its "disembodied, objective and quantitatively inclined" gaze.<sup>681</sup> Moreover, this perspective is monocular and God-like—both of which are features associated with the aerial view. Drone cameras mimic the Divine perspective and its singularity, encouraging its observer(s) to assume the technology's—and therefore their own—omniscience.<sup>682</sup>

This omniscience is reaffirmed by the Enlightenment era's embrace of epistemolgoical positivism that was embedded in liberal theorizing and regards empirically ascertained information as the most reliable. The natural sciences' intellectual embrace of technology was subsequently embraced by the social sciences and integrated into its different disciplines' theoretical traditions. This explains why the information that drones collect and mediate is expected to be veracious. However, practical experience with drones suggests that the large

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<sup>679</sup> Kyle Grayson, *Cultural Politics of Targeted Killing: On Drones, Count-Insurgency and Violence* (Abingdon: Routledge, 2016).

<sup>680</sup> Kyle Grayson and Jocelyn Mawdsley, "Scopic Regimes and the Visual Turn in International Relations: Seeing World Politics through the Drone," *European Journal of International Relations* 25, no. 2 (2019): 444, <https://doi.org/10.1177/1354066118781955>.

<sup>681</sup> Grayson and Mawdsley, 436.

<sup>682</sup> Grayson and Mawdsley, 444.

amounts of information they collect can sometimes lead to diminishing returns— “[t]he more accurate the intel, the less effective it is.”<sup>683</sup> This is another example of contemporary conflicts’ paradoxes that are accelerated and intensified by drones. Drones can gather a greater quantity and variety of data than any preceding technology, but high quantity is not necessarily high quality. As author Eyal Weizman explains, the “growing capacity of technological means the incalculability of their consequences also grow.”<sup>684</sup> The questionable reliability of drone-collected information is compounded by the fact that drones are limited in the types of analyses they can perform and the usefulness of their conclusions. For example, some Israeli drone sensor systems can detect and analyze a human heartbeat or voice using an algorithm, but it cannot validate the source’s identity.<sup>685</sup> These types of analyses work together with those conducted by collateral damage software that use physics to generate likely strike outcomes. The ability to collect and kinetically act on information without assuming any risk—combined with the amount and variety of data about potential strike targets made available—can nudge drone operators towards a military target finding. Weizman identifies the aerial bombing decision-making process as facilitating a certain outcome, such that “the very act of calculation [...] justifies their action.”<sup>686</sup>

The drone is the confluence of technological fetishism, vertical positionality, and an intellectual devotion to empiricism that, when taken together, support ambitions to exercise power and control. As Whitehead *et al.* explain, “the aerial position as an imagined rational,

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<sup>683</sup> “Author Interview with Israeli Weapons Expert.”

<sup>684</sup> Weizman, *Hollow Land: Israel’s Architecture of Occupation*.

<sup>685</sup> “Author Interview with Israeli Weapons Expert.”

<sup>686</sup> Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (New York: Verso, 2012), 12.

scientific and epistemological space” is in “complex conjunction between science and militarism, especially their truth claims.”<sup>687</sup> The authors describe how “techniques of government flown from the skies have brought populations into the terrain of state legibility and security so that they might become governable subjects,” such that “the view from the air is complicit in producing, sustaining and eroding territorial sovereignty on the ground below.”<sup>688</sup> This has been the situation since Italy first used air power in Ethiopia and Britain in Mesopotamia.

The assumed disciplining effects of historical instances of aerial bombardment informs the current use of drones against Palestinians. This attitude imagines that eroding Palestinian sovereignty will be easily accomplished, not because of their status as an occupied population, but because they are Arab and thus in possession of incomplete or unfulfilled sovereignty. Israeli bombing of Gaza can be understood as embodying an Orientalist governing logic like that which guided British bombing in Mandate Iraq. The prejudicial belief that Arab culture is chaotic and impossible to ever understand fully contributed to lower standards for the British Armed Forces regarding their adherence to IHL. Specifically, the Royal Air Force in Iraq was insulated from criticism and accusations of disproportionate use of force and failure to discriminate between combatants or non-combatants because of the region’s “timeless mystery” and unwieldy geography (e.g. mirages) that defied its absolute comprehension.<sup>689</sup> According to this logic bombs are a democratic *and* democratizing force. They are democratic because they are dropped by a so-called democracy against a ‘primitive democracy’ of Arabs in which “each individual

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<sup>687</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 3.

<sup>688</sup> Adey, Peter; Whitehead, Mark; Williams, 3.

<sup>689</sup> Adey, Peter; Whitehead, Mark; Williams, 231–32.

naturally assumed responsibility for the whole community.”<sup>690, 691</sup> Bombs are likewise democratizing insofar as they are one aspect of imperialism’s ostensibly civilizing violence. Western political discourses of Palestinian culture consider it to be in arrested development—frozen in time and unable to ‘catch up’ through the natural progress that the West (and Israel) experienced. Without formally recognized sovereignty Palestinians are likewise denied rights and/or political personality that could be invoked in global political and legal forums to inhibit Israeli military attacks. In this sense, the act of being targeted indicates that one is a political object, rather than subject.<sup>692</sup>

### **3. DRONES THROUGH TIME: PAST AND FUTURE**

#### **Eschatology and disappearing casualties**

Israeli use of drones to destroy Palestinian spaces also destroys Palestinian temporality—specifically, the temporality associated with everyday living and its reproduction. Denying Gazans stable and reliable access to life-sustaining systems like electricity and clean water also denies them the ability to fully participate in regular daily affairs.<sup>693</sup> Drones, through their operators, participate in this denial by discouraging Palestinians from engaging in certain types of routine activities that would be visible to the drone for fear of an attack, e.g. public worship. The dynamic of difference that distinguishes worshipping at a mosque from worshipping at a synagogue can appear symbolically significant to a drone operator. Being *seen* by a drone while

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<sup>690</sup> 1920s Britain did not feature complete adult enfranchisement, nor does Israel currently, despite frequently being referred to as ‘only democracy in the Middle East’.

<sup>691</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 86.

<sup>692</sup> John Williams, “Distant Intimacy: Space, Drones, and Just War,” *Ethics & International Affairs* 29, no. 1 (2015): 97–98; Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, xvii.

<sup>693</sup> For examples of how this was experienced during Operation Protective Edge, see: Dr. Atef Abu Saif, *The Drone Eats With Me* (Boston: Beacon Press, 2014).

entering or existing a mosque can be *perceived* by its human operator (or the human programmer responsible for writing the software the drone is operating) as somehow suspicious and posing a potential security threat. Such benign activities are pathologized by the Israeli state and consequently must be replaced by those the state deems not threatening to the ‘national security’.

Israeli drones betray the state’s insecurity and the disconnect between its ideal and actual temporality. Drones project a temporality in which the state seems to function as an all-powerful and all-knowing sovereign. Yet the state’s use of drones reveals that its colonial project is defined by a different temporality. The Israeli government’s actual temporal situation is incomplete and perpetually recurring—perpetual state-building, perpetual occupation, perpetual conflict management, and perpetual existential insecurity. In the face of this reality, the drone is used to pursue and assert a more desirable temporality; that of secularized Medieval European thought. This formerly divine temporality was repackaged for earthly manifestation through sovereigns and their territorial empires. During the Enlightenment it was naturalized and rearticulated as a progressive and humane passage of time carried out by liberal nation-states that alone could “guarantee the harmonization of society.”<sup>694</sup> This ideological approach understands global politics as a steady march of civilization, realized through the expansion of Western capital, forms of government, and related technologies. Drones are a chosen vehicle of this temporality for their surveillance capabilities that obscure and ignore the passage of time as experienced by those beneath it. Instead, the drone segments time to mirror how it is envisioned

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<sup>694</sup> John A. Agnew, “Timeless Space and State-Centrism: The Geographical Assumptions of International Relations Theory,” in *The Global Economy as Political Space*, ed. Stephen J. Rosow, Naem Inayatullah, and Mark Rupert (Boulder: Lynne Rienner Publishers, 1994), 98.

by the drone's motivating logic. Specifically, IHL and the related temporal situations it imagines, e.g. CCF.

The CCF concept works in conjunction with the drone to allow for the legal targeting of Palestinians under IHL. The Israeli state pioneered the temporal status of CCF and explained it in terms of a “‘revolving door’ phenomenon by which each terrorist has ‘horns of the alter’ (1 Kings 1:50) to grasp or a ‘city of refuge’ (Numbers 35:11) to flee to.”<sup>695</sup> This metaphor is an explicit example of how terrorist (read: Palestinian) time is presented as cyclical and fixed, rather than advancing linearly and progressively. According to the CCF concept a terrorist is *always* a terrorist and never meaningfully disengages from this function.<sup>696</sup> The state ascribes to Palestinians it considers to be engaging in armed hostilities a temporality that denies them the opportunity ontological change. Different IHL implications and targeting decisions follow from this fixed temporal and ontological situation. The states’ Torah reference reaffirms its God-like self-understanding in which it carries out divine justice. Unlike terrorist violence, the state’s violence is legitimate, clean, and logical.<sup>697</sup> The drone is an auxiliary of the state that allows it to see and act. Drone ISR functions offer unprecedented views and assists the state in carrying out sovereign actions like determining who lives and who dies within its dominion. Centralizing these functions in the drone means that “the acts of seeing and killing become effectively one and the same.”<sup>698</sup> In this context, drones not only enable state violence, but also create new and

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<sup>695</sup> HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel paragraph 40.

<sup>696</sup> Stuart Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law,” *International Review of the Red Cross* 94, no. 886 (2012): 610, <https://doi.org/10.1017/S1816383113000118>.

<sup>697</sup> Sean Rupka and Bianca Baggiarini, “The (Non) Event of State Terror: Drones and Divine Violence,” *Critical Studies on Terrorism* 11, no. 2 (2018): 346, <https://doi.org/10.1080/17539153.2018.1456735>.

<sup>698</sup> Stephen Graham, *Vertical: The City from Satellites to Bunkers* (Brooklyn: Verso, 2016), 68.

(potentially) legal attack opportunities using the ISR information they collect with sustained aerial surveillance capabilities not previously available. As compared to a drone, an occupation soldier operating on foot would not be (as easily able) able to locate, identify, track, and attack a civilian DPH, e.g. driving a truck carrying ammunition to a location where it will be used for the purposes of hostilities.<sup>699</sup> The drone creates new situations for the state to see and therefore kill.

Testimony from a former IDF member on how drones are used to ‘verify’ targets as military objectives implies that drones simultaneously function as a preemptory *and* perfunctory technology.<sup>700</sup> The drone is assumed to provide the best available intelligence, so if those interpreting that intelligence find it ‘implicates’ a person or object then they become a ‘verified’ target and may be legally attacked. Verification provides the aforementioned “truth claims that can then be mobilised within the kill chain to unleash kinetic force”<sup>701</sup> as well as plausible deniability (as precautionary steps taken) if a strike causes collateral damage. The former IDF member explains that “the threshold of implication is very low” and includes a variety of behaviours, such as walking quickly, speaking on a cell phone, or being on the streets at unusual hours.<sup>702</sup> This testimony gives insight into the West’s military imaginary, including its constitutive institutions, norms, and symbols. The Israeli state participates in this imaginary and consequently targets for destruction both an enemy’s war waging capabilities *and* the society that materially and discursively enables it. In this imaginary, the enemy becomes an entire ‘nation’—eliminating a need to distinguish between combatant and non-combatant. Everyone is morally

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<sup>699</sup> HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel paragraph 35.

<sup>700</sup> Text testimonies, “‘Why Should He Be on the Street at 5 A.M.’, plus He’s Walking Fast, so He’s a Terrorist,” Breaking the Silence, n.d., <https://www.breakingthesilence.org.il/testimonies/database/227821>.

<sup>701</sup> Grayson and Mawdsley, “Scopic Regimes and the Visual Turn in International Relations: Seeing World Politics through the Drone,” 444.

<sup>702</sup> Text testimonies, “‘Why Should He Be on the Street at 5 A.M.’, plus He’s Walking Fast, so He’s a Terrorist.”

and legally ‘implicated’ for their participation in society and therefore a legitimate target. In Western and Israeli public discourse, ‘Gaza’ is conceptually representative of both the territory *and* its inhabitants; this is no accidental slippage. In the context of the Conflict, Palestinians, particularly Gazans, are both the “objects of knowledge and targets of war.”<sup>703</sup> Palestinian civilians are ontologically defined in relation to combatants and are legally caught up in the wide range of activities that the Israeli state considers DPH. This is illustrated in the testimony provided by a former IDF member who described how several Palestinians walking in single file can encourage observing soldiers to “fantasize that [the Palestinians are] walking up against walls” and use this fantasy as a pretense to attack.<sup>704</sup> Author Atef Abu Saif demonstrates how this knowledge is inverted and internalized by Gazans, who adjust their own behaviour to avoid raising suspicions: “I am surrounded by a squadron of drones [...] If I run, I will look more like a reasonable target, a dangerous threat in motion.”<sup>705</sup> The drone is a mediating technology of the Occupation that encourages its operators to perceive as violent and act violently against those living below—those whose subjectivities it frames and whose activities it disciplines.

This testimony is but one account of how the *idea* of Palestinian civilians is disappearing in the military imaginary and its regulatory regime—concretely expressed by CCF status and its creep towards non-material and non-military support. This disappearance is made possible by the longstanding negative definition of civilians in IHL. Civilians are *non*-combatants who are understood with reference to the primary combatant identity. Depriving civilians of a positive identity discourages a deeper consideration of the *idea* of a civilian and narrows what constitutes

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<sup>703</sup> Judith Butler, *Frames of War: When Is Life Grievable* (London: Verso, 2016), xix.

<sup>704</sup> Text testimonies, “‘Why Should He Be on the Street at 5 A.M.’, plus He’s Walking Fast, so He’s a Terrorist.”

<sup>705</sup> Saif, *The Drone Eats With Me*, 227.

protecting them by reducing it to refraining from targeting. Civilian perception as mediated through the weapon is a feature of all conflict—described by Hellen Kinsella as “the image before the weapon.”<sup>706</sup> The civilian image is never accounted for by civilians themselves nor the case they would make for their own protection. This inability to self-advocate is exaggerated by the drone because civilians cannot see, much less converse with the soldier who is operating the weapon. A civilian’s immunity is instead dependent upon the soldier’s own calculus, which is conditioned by war’s prejudices and pathologies and determined by the threat (or lack thereof) that a civilian appears to pose.<sup>707</sup> Special Rapporteur Alston notes a trend in expanding who can be targeted and under what circumstances, which conversely narrows or at the very least creates ambivalence in the protections available to civilians.<sup>708</sup>

The erasure of the Palestinian civilian idea was bluntly expressed by retired IDF Major General Giora Eiland, who declared in the midst of Operation Protective Edge that, “In Gaza, there is no such thing as ‘innocent civilians’.”<sup>709</sup> Employing this discourse conceptualizes Palestinians as being ‘guilty by association’ and thus morally and legally acceptable targets of violence. With this quote Gaza’s population is assimilated, stripped of its civilian status, and reimagined as an instrument of war.<sup>710</sup> The images produced by drones and other camera-equipped aircrafts engaged in attacking Gaza are equally engaged in producing knowledge about the images they visually capture. This knowledge production is authoritative and defines what

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<sup>706</sup> Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian* (Ithaca: Cornell University Press, 2011).

<sup>707</sup> Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian* (Ithaca: Cornell University Press, 2011).

<sup>708</sup> Alston, “A/HRC/14/24/Add.6 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings,” para. 3.

<sup>709</sup> Giora Eiland, “Opinion: In Gaza, There Is No Such Thing as ‘Innocent Civilians,’” *Ynetnews*, August 5, 2014, <http://www.ynetnews.com/articles/0A0,7340,L-4554583,00.html>.

<sup>710</sup> Espinoza, “State Terrorism: Orientalism and the Drone Programme,” 377.

life in Gaza resembles. Reproduced images of an aerially bombarded Gaza normalizes the destruction and the permissibility of Palestinians as targets for such destruction. Gaza's population is ontologically restructured as ungrievable in this framing because the lives of those inhabiting destroyed areas are already considered 'lost'. It is not readily apparent to a drone operator which subjects are members of Hamas and which are not. Yet this distinction ceases to be important when Palestinians in Gaza "are already deprived of life before they are killed."<sup>711</sup> This mode of thought has significant consequences for how collateral damage in the OPT is legally understood to occur. As Major-General Eiland's comment suggests, only the loss of civilian subjects and objects can produce 'collateral damage'. It follows from this that because there are no civilians in the territory there cannot be any collateral damage. Israeli military lawyers replicate these modes of thought in their operational areas, creating an international legal rationale to bolster this ideological position and strategy.

### **'The most moral army in the world'**

Official Israeli government and military narratives are remarkable for their ability to satisfy both the practical goals of a given policy as well as the theoretical values of liberal internationalist governance. These values include state sovereignty, national interest, national self-determination and related political rights (e.g. democratic elections), property (as territory), and individual autonomy. The state's claim to being both Jewish *and* democratic generates occasional tension that, like the Occupation, is managed by increasingly complex political and legal efforts. However, these papered over paradoxes and intensifying violations of IL and IHL are pushing the state's identity to its ideological breaking point. Public statements by Israeli

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<sup>711</sup> Butler, *Frames of War: When Is Life Grievable*, x, xiii, xvi, xxiii, xxix.

government officials chip away at the state's self-styled image as a liberal, tolerant society. For example, the leader of the far-right religious Zionist party, Bezalel Smotrich, stated during a Knesset debate that the only reason Arabs remain in Israel is "by mistake—because Ben-Gurion didn't finish the job."<sup>712</sup> This quote is not anomalous and articulates what has been *de facto* state policy since 1948—namely, Palestinians' dislocation and expulsion from Israeli territory. Current and former IDF members have made similarly revealing, publicly attributable statements and anonymously provided testimonies. These accounts make evident that the IDF follows policies that are *de facto* violations of IHL. For example, 'open fire' orders to "attack anyone suspicious" in Gaza and targeting journalists and paramedics at its security barrier.<sup>713</sup> The inconsistencies between a European-style democracy national image and neocolonial military policies are not unique to Israel, but they are exaggerated by the state's hasbara goals and commitment to asserting moral and legal high ground.

In an interview with the Israeli news organization Ha'aretz, Daniel Reisner, the former head of the IDF international law division, said: "If you do something for long enough, the world will accept it [...] International law progresses through violations."<sup>714</sup> This quote's implications vary depending upon the theoretical perspective from which it is contemplated. While the idea of law evolving through its own violation is paradoxical and scandalous to a liberal internationalist, it little more than a benign truism to a realist. It is worth unpacking the quote in light of earlier

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<sup>712</sup> Noa Shipgel, "Arabs 'Are Here by Mistake, Because Ben-Gurion Didn't Finish the Job,' Far-Right Leader Tells Lawmakers," *Haaretz*, October 13, 2021, [https://www.haaretz.com/israel-news/.premium.HIGHLIGHT-arabs-are-here-by-mistake-ben-gurion-didn-t-finish-the-job-far-right-leader-says-1.10292149?utm\\_source=traffic.outbrain.com&utm\\_medium=referrer&utm\\_campaign=outbrain\\_organic](https://www.haaretz.com/israel-news/.premium.HIGHLIGHT-arabs-are-here-by-mistake-ben-gurion-didn-t-finish-the-job-far-right-leader-says-1.10292149?utm_source=traffic.outbrain.com&utm_medium=referrer&utm_campaign=outbrain_organic).

<sup>713</sup> Erakat, "The Sovereign Right to Kill: A Critical Appraisal of Israel's Shoot-to-Kill Policy in Gaza," 813–14; "Author Interview with Breaking the Silence Member I P 1," 2021.

<sup>714</sup> Yotam Feldman and Uri Blau, "Consent and Advise," *Haaretz*, January 29, 2009.

discussions here about IL's development and the importance of the *idea* of 'progress' in shaping this development. Reisner's statement implicitly recognizes IHL's innate tensions, their indeterminacy, and the opportunities they present for creatively advancing a particular agenda. In this case, Reisner was referring to who and what constitute legitimate targets for attack and the "untapped potential" within international law to push the boundaries of these and related concepts. However reductive this 'justice is the interest of the stronger' approximation of IL might be,<sup>715</sup> Reisner correctly observes that the regime is a technology that can endure dramatic revision, and that the dominant narrative of its historical development is one of progress. Statements like Reisner's suggest that the IDF pursues lawfare and understands that IHL provides states with the tools to justify almost any policy. A standout illustration of how this is accomplished is the IDF's proclamation that drone technology "saved lives on both sides" during Operation Protective Edge.<sup>716</sup>

The Israeli state frequently asserts that its military saves lives by carefully wielding or withholding lethal force.<sup>717</sup> The origin of the concept of self-restraint ('havlagah') can be traced back to pre-state Zionist settlements in Palestine. It is a core concept within the IDF's main doctrine and a feature of its 'moral army mythology' public relations strategy.<sup>718</sup> IDF hasbara is a coordinated three-pronged offensive. The first prong is dismissing and discouraging negative

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<sup>715</sup> This expression is a popular paraphrasing of a quote attributed to the Ancient Greek sophist Thrasymachus—a figure who, like Thucydides, is a darling of realist international relations theory.

<sup>716</sup> Several days after the Operation's conclusion the official IDF blog published a piece titled 'How the IDF's UAVs saved lives on both sides in Gaza'. The piece has since been deleted but was initially tweeted by the official IDF twitter account on 31 August 2014: <http://www.idfblog.com/blog/2014/08/31/special-interview-how-idf-uavs-saved-lives-in-gaza/>.

<sup>717</sup> Military Advocate General's Corps, "Operation 'Pillar of Defense' 14-21 November 2012," 2012, 8–10. For additional examples, see: IDF YouTube Channel, 'How Israel Defense Forces Protect Gaza Civilians', November, 19, 2012, available at <http://www.youtube.com/watch?v=glRHdFc2GtQ>;

<sup>718</sup> Eastwood, *Ethics as a Weapon of War: Militarism and Morality in Israel*, 5.

reports about the Occupation, its violences, and the situation in Gaza. This mainly involves exercising soft power, the most visible example being spokesperson appearances on foreign news media. The second prong is claiming a moral *and* legal high ground that narratively integrates the IDF's ethics and actions with the larger Zionist project in which Israel is a 'light unto the nations'.<sup>719</sup> This involves repeatedly claiming that the IDF goes to "extraordinary efforts" to ensure incidental collateral damage is minimal and that "[c]ompliance with applicable international law norms is a cornerstone in the IDF rules and policies."<sup>720</sup> The final prong is the demonization of organized armed Palestinian resistance, primarily that which is carried out under the direction of Hamas' military wing. Hamas is painted as irrational and IHL-violating organization that bears responsibility for any Palestinian suffering and death in Gaza that results from Israeli use of force.<sup>721</sup>

Israeli state discourse strongly contrasts its actions with those of Palestinian militant organizations to assert a stable 'good' versus 'evil' dichotomy. Speaking during a plenary session of the UN General Assembly held during the May 2021 Israeli operation against Gaza, Israel's representative juxtaposed its moral standing, adherence to IHL, and role in maintaining global peace to that of Hamas, ultimately comparing the organization to Germany's Nazi government:

Today's debate should be about differentiating between those who are on the side of moderation and dialogue, and those who are on the side of extremism and hate. Every speaker who fails to condemn Hamas, who does not distinguish between its war crimes and Israel's legitimate right to defend itself is emboldening terrorist organizations all over the world to use human shields and undermine peace and security.<sup>722</sup>

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<sup>719</sup> Eastwood, para. 5.

<sup>720</sup> State of Israel, "The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects," paras. 6, 19.

<sup>721</sup> State of Israel, paras. 7, 207.

<sup>722</sup> United Nations General Assembly, "Gaza Children Living in 'Hell on Earth' Secretary-General Tells General Assembly, as Calls for End to Violence Crescendo, News of Israel-Hamas Ceasefire Breaks."

The Palestinian Other is not part of the Jewish-Israeli community in relation to which the state's universal standards and values were developed.<sup>723</sup> The inherent righteousness of the Israeli state's foundation and goals are an important feature of nationalist narratives that cut across both secular and religious Zionism. The historical distinctions among Zionism's variants flattened post-1948, and for the first Zionist historians "the Bible ceased to be an impressive theological text and became a book of secular history."<sup>724</sup> Building on the earlier analysis of secular Zionism's colonial history, this section turns to examine how Zionist mythology and official state discourse invokes religious themes and divine purpose in its political and war-waging policies. Special consideration is given to considering drones function(s) in this assemblage.

Israeli government statements presenting Palestinian resistance as "radical jihadi" activities akin to those undertaken by ISIS and al-Qaeda engage in the broader War on Terror discourses. These discourses argue that the outcome of an impending civilizational clash between the West the Rest will determine the future of 'international peace and security'.<sup>725</sup> This global conflict is described in terms that resemble an Armageddon of Biblical proportion and significance, e.g. former U.S. President George W. Bush referred to the War on Terror as a "crusade" that Anghie notes takes on even greater significance given that many of the War on Terror's conflicts are against Muslim societies in the MENA.<sup>726</sup> The War on Terror rhetoric expanded and mainstreamed the Islamophobic and racialized framing of conflicts in the region, including the

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<sup>723</sup> Agnew, "Timeless Space and State-Centrism: The Geographical Assumptions of International Relations Theory," 99.

<sup>724</sup> Dana and Jarbawi, "A Century of Settler Colonialism in Palestine: Zionism's Entangled Project," 3.

<sup>725</sup> State of Israel, "The 2014 Gaza Conflict: Factual and Legal Aspects," paras. 39–41.

<sup>726</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 275.

Israeli-Palestinian Conflict. Successive post-9/11 Israeli governments capitalized on growing anti-Arab and anti-Muslim sentiments in the West by drawing connections between the War on Terror's primary antagonists and organized Palestinian resistance. For example, an Israeli representative to the UN described Hamas as a "jihadi terrorist organization [...] committed to the genocide of the *Jewish* people."<sup>727</sup> This quote directly links Israel to the rest of the West by way of an imagined 'Judeo-Christian' shared history in constant conflict with Islam.

Invoking religious language and images reintroduces divine temporality into the Zionist state-building project and informs the reception of its various policies—from Palestinian home evictions and demolitions to target killings and 'shoot-to-kill' rules. Related efforts to connect the Israeli state to the Bible and/or religious tradition "presents a 'fictional but functional' origin myth" for Zionism that resonates with religious communities globally.<sup>728</sup> The state receives support from some adherents of Judaism for apparently reclaiming the biblical vision of a Jewish kingdom, and support from evangelical Christians for its role in fulfilling biblical prophecy and ushering in the Second Coming of Jesus Christ. For these supporters, the clear religious associations suggest the actions of God's 'chosen people' are an expression of divine will manifest through the nation-state. The Israeli state understands this, and various national leaders have creatively leveraged this association to enlist religious organizations' support for its colonial project.<sup>729</sup> Jewish and Christian Zionist backing for Israeli colonialism bears resemblance to Spain and Portugal's religiously imbued sixteenth century imperialism

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<sup>727</sup> United Nations General Assembly, "Gaza Children Living in 'Hell on Earth' Secretary-General Tells General Assembly, as Calls for End to Violence Crescendo, News of Israel-Hamas Ceasefire Breaks." Emphasis added.

<sup>728</sup> Dana and Jarbawi, "A Century of Settler Colonialism in Palestine: Zionism's Entangled Project," 3.

<sup>729</sup> TOI Staff, "Top Evangelical Leader Warns: Israel Could Lose Our Support If Netanyahu Ousted," *Times of Israel*, June 8, 2021, <https://www.timesofisrael.com/top-evangelical-leader-warns-israel-could-lose-our-support-if-netanyahu-ousted/>.

undertaken in the name of Catholicism. However, even non-Christian millenarian support for Zionism is connected to Islamophobia, racism, and Orientalist assumptions about the East and its cultures, and converse assumptions about the Israeli state based on its self-presentation as a European-style liberal democracy. Such Western sympathy is in states where the general populations' "knowledge of anti-Semitism is intimate and whose Christian majorities [are] prone to view the whole Zionist project in biblical soft-focus."<sup>730</sup> The state's integration in the Anglo-American security matrix similarly implicates governments across the West that frame the conflict in a manner which obscures and distorts the Occupation's history and practices. These accounts likewise emphasize the 'ethnic' and 'religious' elements of the conflict to reproduce a narrative in which Jews in Israel face an existential threat from Islamic zealots who are motivated by a religiously grounded hatred of Israeli Jews *as Jews*.<sup>731</sup>

Author Virginia Tilley explains the Israeli government's claim that its chief concern is a potential "Arab attack."<sup>732</sup> This claim presumes the parties' "mutual 'hatreds'" and presents a flawed understanding of the conflict that washes over the reality of Israeli colonialism.<sup>733</sup> Framing the Occupation as a religious and/or ethnic conflict prioritizes Israeli territorial integrity over Palestinian self-determination and provides justification for colonialism and its requisite violence. The Israeli state considers it important to appear righteous in its purpose and deeds, and for this reason continues to insist that the IDF is 'the most moral army in the world'.<sup>734</sup> The same

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<sup>730</sup> Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, xiv–xv.

<sup>731</sup> State of Israel, "The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects," para. 37; State of Israel, "The 2014 Gaza Conflict: Factual and Legal Aspects (Executive Summary)," para. 36.

<sup>732</sup> Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, xiii.

<sup>733</sup> Tilley, xiv.

<sup>734</sup> Eastwood, *Ethics as a Weapon of War: Militarism and Morality in Israel*, 4.

reasons for which state violence (generally and in armed conflict) is considered legally legitimate also afford it a moral legitimacy. This conversely denies non-state actors a comparable pre-given moral legitimacy. A similar logic motivates repeated Israeli government insistence that the state has a ‘right to exist’—a concept with no grounding in international law—and that the Palestinian organizations’ (militant or otherwise) refusal to recognize this right is tantamount to refusing to recognize the Jewish people’s right to exist.<sup>735</sup> This logic is the reason former Israeli Prime Minister Benjamin Netanyahu compared “the Arab states to Nazi Germany, the Palestinians to the Sudeten Germans, and Israel to Czechoslovakia.”<sup>736</sup> Identifying the state with the ‘Jewish People’ is not merely a rhetorically useful framing for a given policy position, but a belief enshrined in Israeli constitutional law. Its constitutional status includes associated commitments that are legally invoked to justify a variety of policies, e.g. expanding Jewish settlements in the OPT.<sup>737</sup> The imperative to maintain a Jewish democratic majority in the state tacitly endorses a complex legal schema that aims to reduce the size of the Palestinian population—an aim to which the IDF’s ‘open fire’ (also known as ‘shoot-to-kill’) policy has been connected.<sup>738</sup>

Israel and other so-called liberal democratic states engaging in imperialism and neocolonialism do not take their assumed moral high ground for granted, and intentionally reproduce it using specific discursive frameworks that follow liberalism’s established rationalizations for this violence. In *Ethics as a Weapon of War: Militarism and Morality in Israel*, author James Eastwood describes how specific concepts in asymmetric war, such as

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<sup>735</sup> State of Israel, “The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects,” para. 37.

<sup>736</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, 299 (note 5).

<sup>737</sup> Knesset of Israel and Hattis Rolef, “Basic Law: Israel - The Nation State of the Jewish People,” paras. 1, 7.

<sup>738</sup> Erakat, “The Sovereign Right to Kill: A Critical Appraisal of Israel’s Shoot-to-Kill Policy in Gaza.”

swarming tactics, are generalizable to other areas. Eastwood gives the example of ethical swarming in support of maintaining the state's moral legitimacy. Historically, a state derives its moral legitimacy from God. This established but rarely acknowledged concept is a helpful tool for the government and IDF to use *against* criticisms of their policies, and *for* arguing that such policies are in fact morally upstanding.<sup>739</sup>

Post-Enlightenment liberal forms of government rely on a long history of multifaceted and interconnected developments in European religious, legal, and political thought to establish a moral basis for the unrestrained use of violence. This dissertation already discussed Aquinas' doctrine of double effect and its concern for the moral situation of the soldier, as opposed to a concern for the moral situation produced by soldiers' actions. The doctrine's core commitment to soldiers over civilians retains an analytical purchase in the rulebooks of contemporary state armed forces. The IDF Code of Ethics "emphasises paramount values of 'Human Life' and 'Purity of Arms'," the latter of which it defines as soldiers using their "weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat."<sup>740</sup> The moral edifice the Israeli state constructed for institutionally enforcing Palestine's Occupation and colonization is conceptually dependent upon the continued existence of a Palestinian moral foil against which it is defined and against whom it can justify any action.

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<sup>739</sup> Eastwood, *Ethics as a Weapon of War: Militarism and Morality in Israel*, 68.

<sup>740</sup> State of Israel, "The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects," para. 213. For a selection of actions that violate the 'Purity of Arms' value, see: Breaking the Silence, "This Is How We Fought in Gaza: Soldiers Testimonies and Photographs from Operation 'Protective Edge,'" testimonies: 10, 14, 27, 38, 44, 50, 54, 61, 71, 76, 79.

Designating a wide breadth of Palestinian organizations as ‘terrorists’ is legally and politically essential to the Israeli state in continuing the Occupation.<sup>741</sup> The Israeli government, judiciary, and military routinely refer to the term and its designation to Palestinian organizations engaging in armed resistance.<sup>742</sup> Above considerations of the term ‘terrorism’ explained how it functions as a “conceptual mechanism” that distinguishes state from non-state violence and, in the process, reaffirms the legitimacy of one while denouncing the illegitimacy of the other.<sup>743</sup> This distinction is conceptually necessary because the ideological and normative security threat posed by terrorism far exceeds its material threat to a state. Recalling chapter 3’s discussion of pirates and terrorists, autonomous or violent actions taken without a ‘state’ are destabilizing threats to a global order and challenge international law from the margins. In this formulation, the stateless other is not only immoral but embodies a chaotic force that undermines the cosmic order. Terrorists are accordingly cast as barbaric murders by virtue of not being state-sanctioned and operating “without reason” in an “indiscriminate” manner that is “beyond the scope of the political.”<sup>744</sup> The persistence of these characterizations across international legal history created new social conditions that made possible the unequal integration of non-state violence that conversely sanctioned forms of state terrorism, e.g. drone programmes.<sup>745</sup> The *idea* of the terrorist and their associated means, motives, and moral standing sit at the core of Israel’s drone use and its rationalization under IHL.

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<sup>741</sup> United Nations Office of the High Commissioner of Human Rights, “Israel’s ‘Terrorism’ Designation an Unjustified Attack on Palestinian Civil Society – Bachelet,” United Nations, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27708&LangID=E>.

<sup>742</sup> Israel Law Reports, HCJ 201/09 Physicians for Human Rights v. Prime Minister paragraph 2; Corps, “Operation ‘Pillar of Defense’ 14-21 November 2012,” 2; State of Israel, “The 2014 Gaza Conflict: Factual and Legal Aspects (Executive Summary),” para. 1.

<sup>743</sup> Rupka and Baggiarini, “The (Non) Event of State Terror: Drones and Divine Violence,” 346.

<sup>744</sup> Rupka and Baggiarini, 345–46.

<sup>745</sup> Rupka and Baggiarini, 346–47.

## Barbarians at the security barrier

The word ‘barbaric’ appeared in early international legal theorizing and remains a discursive constant that is most often invoked with reference to so-called terrorist behaviour in the MENA. The term is highly racialized and recurringly used in reference to decolonial and anti-occupation actions (peaceful and/or violent), as well as civil society organizations and political parties, e.g. Hamas. Most relevant to the discussion here is how the word ‘barbarian’ is attached to certain techniques and technologies of conflict—namely, insurgency and/or guerilla war and low-tech weapons. Early twentieth century British imperial air force operations in contemporary Iraq conscientiously adapted wartime strategies, like aerial bombardment, to form new imperial policing methods against anti-colonial action. As Adey et al. explain, “What was permissible only in wartime in advanced countries turned out to be *always* permissible in Iraq.”<sup>746</sup> Britain’s ‘Arabist’ experts provided its air force with a culturally grounded argument as to why such military permissiveness was acceptable. War’s production of “tragedies, bereavements, widows and orphans” was, the Arabists explained, “a normal way of life” there that was “natural and inevitable.”<sup>747</sup> Orientalist beliefs about the region’s environment meant unprecedented forms of fighting could be ethically undertaken because “[l]ife in the desert is a continuous guerilla warfare.”<sup>748</sup>

Similar characterizations are implied about Palestinians living Gaza, and members of Hamas, specifically. The organization is consistently accused as using Palestinian civilians as ‘human shields’, which serves the dual purpose of undermining both Hamas’ legal and moral

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<sup>746</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 233.

<sup>747</sup> Adey, Peter; Whitehead, Mark; Williams, 233.

<sup>748</sup> Quotation from British Royal Air Force intelligence officer, John Glubb. Adey, Peter; Whitehead, Mark; Williams, 233.

standing. Legally, placing civilians in harm's way by positioning them near armed combatants and hostilities operations is a violation of IHL.<sup>749</sup> Morally, the accusations implies that Hamas "exacerbate[s] the suffering of the Palestinian population of Gaza."<sup>750</sup> This discourse directly mirrors that of British imperial police about "Iraqi sheikhs" who the British believed considered the collateral damage deaths of women and children resulting from conflict with British "negligible" and less significant than "really important men."<sup>751</sup> The import of protecting civilians—most frequently imagined to be women and children—from war's violences informs the fundamental principle of distinction in JWT and IHL. This contention implies that Iraqi sheikhs possess values which are diametrically opposed to British values. It also describes the inverse application of terrorism's indiscriminate attacks against the opposing sides' civilian population, thus amplifying the moral perversion associated with violating the distinction principle. This allegation against Hamas is particularly significant given the multiple recorded incidences of IDF soldiers using Palestinian civilians as human shields. The legal rationale for these incidences were indirectly explained by scholar and IDF ethical code author, Asa Kasher, whose interpretation of the distinction principle "can be used to justify the use of noncombatant human shields."<sup>752</sup>

Contemporary Western academics writing about the Conflict and Occupation continue producing Orientalist knowledge in the tradition of their colonial and post-Enlightenment predecessors. However, this tradition has not proceeded monolithically and developed an

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<sup>749</sup> State of Israel, "The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects," para. 23.

<sup>750</sup> State of Israel, para. 195.

<sup>751</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 234.

<sup>752</sup> Muhammad Ali Khalidi, "'The Most Moral Army in the World': The New 'Ethical Code' of the Israeli Military and the War on Gaza," *Journal of Palestine Studies* XXXIX, no. 3 (2010): n. 25.

immanent critique that disproportionately inflates the stakes of its internal disagreements. The intellectual shift that followed the War on Terror's commencement introduced ideological divisions amongst international relations' 'liberal' and 'realist' camps, with the former decrying the legal bases of the War's most high-profile conflicts and tactics, e.g. the preventive use of force, bypassing supranational institutional sanction, extraordinary rendition, etc.<sup>753</sup> However pronounced these theoretical disagreements may appear, their shared intellectual history maintains a shared support for the Anglo-American security matrix and its overarching goals. These overarching goals preclude asking *whether* peripheral states should continue being subjected to the array of violences associated with this security matrix and its War on Terror. Debates are instead limited to questions of *how* these violences are best executed, i.e., with/out violating the relevant IL. Chapter 2 demonstrated how mainstream international relations and IL theories preserve many of the implicit values and ideological commitments generated by waves of European imperial activities. The Orientalist character of this academic discourse is acutely pronounced in drone scholarship because the weapon is disproportionately used in the MENA and counterinsurgency conflicts. The Occupation's location, participants, and weapons situate it at the nexus of these discourses and has generated some of the most innovative and Orientalist IHL scholarship.

The work of Israeli international legal scholar Yoram Dinstein exemplifies the legacy of Enlightenment liberal thought as it pertains to the those who fall within and without the ordered

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<sup>753</sup> Kreps and Zenko, "The Next Drone Wars: Preparing for Proliferation"; Eric Patterson, "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11," *International Politics* 42 (2005): 116–34, <https://doi.org/10.1057/palgrave.ip.8800100>; Audrey Kurth Cronin, "Why Drones Fail: When Tactics Drive Strategy," *Foreign Affairs*, 2013; John F. Murphy, "Mission Impossible: International Law and the Changing Character of War," *Israel Yearbook on Human Rights* 41 (2011): 1–30; Mary Ellen O'Connell, "Remarks: The Resort to Drones Under International Law," *Denver Journal of International Law & Policy* 39, no. 4 (2011).

space of the nation-state,<sup>754</sup> as well as the situation of drones under IHL. Dinstein presents himself as a defender of IHL and Israel as a leader in war-waging practices compliant with the regime. By contrast, Israel's enemies engage in "attempts to abuse or subvert" IHL using a form of lawfare that perverts and misrepresents the laws of armed conflict to serve a political purpose. Such attempts, Dinstein argues, are nothing less than a "weapon of mass destruction" with which "modern barbarians" may foil the military successes of "civilized nations."<sup>755</sup> These comments directly echo those of European officials during the aforementioned treaty and conventions negotiations in which the alleged savagery of non-European civilizations constituted the grounds for their *legal* exclusion from protection against particular tactics and classes of weapons.<sup>756</sup> Such Manichaeic representations of morally superior armed forces wielding sophisticated weapons and operating in full accordance with the laws of armed conflict against an 'uncivilized' non-state entity engaging in similarly 'uncivilized' and immoral war waging practices have remained a common refrain across international legal history and manifest clearly in Dinstein's writings. The possibility of "modern barbarians" arming themselves with claims under the very legal regime that they "trample underfoot" by committing the "mass murder of civilians" threatens a potentially burgeoning crisis for IL's future legitimacy and application.<sup>757</sup> Dinstein's contempt for these so-called barbarians "who dare accuse *us* [civilized nations]" of violating IHL extends also to the "human rights-niks" that abet them and wield "weapons of mass

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<sup>754</sup> Agnew, "Timeless Space and State-Centrism: The Geographical Assumptions of International Relations Theory," 98.

<sup>755</sup> Yoram Dinstein, "Concluding Remarks: LOAC and Attempts to Abuse or Subvert It," *International Law Studies* 87 (2011): 484, <https://doi.org/10.16194/j.cnki.31-1059/g4.2011.07.016>.

<sup>756</sup> Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" in *International Law and Its Others*, ed. Anne Orford (Cambridge, 2006), 268, <https://doi.org/10.1017/CBO9780511494284.011>.

<sup>757</sup> Dinstein, "Concluding Remarks: LOAC and Attempts to Abuse or Subvert It," 485, 486.

disinformation” and complain about the “unlawful” collateral damage resulting from Israeli military activities.<sup>758</sup> For Dinstein and his ideological contemporaries, it is absurd to think that the IDF, a “civilized” military which “bend[s] over backwards in the application of LOAC,” could be accused of anything other than “incidental” civilian casualties resulting from attacks against “lawful enemy targets”—enemies whose recourse is “methods of barbarism that contravene every cardinal principle of LOAC.”<sup>759</sup> It is a deep irony of this lawfare that IHL violation allegations would be made against an army that invests great logistical efforts in warning enemy civilians of impending air strikes.<sup>760</sup> Criticisms of the so-called lawfare against Israel intensified in 2019 when the International Criminal Court (‘ICC’) set out to determine the territorial scope of its criminal jurisdiction in the Situation in Palestine, and again in reaction to the March 2021 decision to open an investigation into possible war crimes committed in the OPT.<sup>761</sup> The ICC’s decision elicited negative responses from across the Anglo-American security matrix, with reactions ranging from “concerning” to expressions against “cases used to politicize before the court” and allegations that it was “pure anti-Semitism.”<sup>762</sup> According to Dinstein, “Putting Israelis on trial is so manifestly outside the jurisdiction of the ICC that it’s clearly politicized in connection to [the court’s Africa] problem.”<sup>763</sup> The ‘Africa problem’ refers to the ICC’s disproportionate focus on African-based conflicts—a longstanding criticism of the

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<sup>758</sup> Dinstein, 486, 485. Emphasis added.

<sup>759</sup> Dinstein, 485.

<sup>760</sup> Dinstein, 486.

<sup>761</sup> Office of the Prosecutor, “Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine,” International Criminal Court, 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>.

<sup>762</sup> Liphshiz, Cnaan, “Some think the International Criminal Court is biased against Africans. Prosecuting Israel could lend it credibility,” *Jewish Telegraphic Agency*, December 30, 2019, <https://www.jta.org/2019/12/30/global/whats-behind-the-iccs-push-to-try-israelis-for-war-crimes>.

<sup>763</sup> Liphshiz.

institution—which Dinstein suggests was used as a pretence for opening up an investigation that would otherwise never occur. Contending that the ICC would only take up the Situation in Palestine to redress unrelated image-concerns demonstrates the degree to which supporters of the Occupation’s enforcement are committed to (re)asserting the Israeli state’s interpretation of IHL and the hegemonic perspectives that both inform and enable it.

Dinstein’s use of civilizational discourse establishes a direct relationship between a weapon’s sophistication, those who wield it, and its anticipated adherence to IHL. He takes up the example of weapons technology and air strikes to make this point; characterizing drones as the epitome of “technological superiority” used by “civilized armed forces” that has increased the attention to the rules of engagement.<sup>764</sup> This argument and its underlying assumptions almost identically reproduce those made by European states arguing for using air power in asymmetric conflicts against the populations they occupied. This logic assumes that aerial bombardment will have a civilizing effect on the targeted populations and ultimately produce more humane (and legal) conflict outcomes. This contemporary adaptation of Enlightenment logic also incorporates elements of its latent religious thought—namely, its fatalistic understanding of time and its passing, which plots the catastrophic destruction wrought by aerial bombardments along a predetermined series of events leading towards a just, unified outcome. The police bombing of Palestinians takes on a divine-like representation, appearing as a vengeful act of God from the heavens, and takes place within a divine temporal backdrop in which each bombing campaign is one in a series of progressive steps.<sup>765</sup> In Palestine, as with early twentieth century imperial policing strategies, bombing is not intended to bring about the immediate cessation of hostilities.

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<sup>764</sup> Dinstein, “Concluding Remarks: LOAC and Attempts to Abuse or Subvert It,” 486.

<sup>765</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 74.

It is instead a type of ‘coercive bombing’: a threat of greater violence, rather than the violence being an end in itself.<sup>766</sup> Aerial bombing campaigns are both regularized and successively leading to an eventual peace some indeterminate time in the future.

Spatial and temporal destruction are a necessary component of the violence constituting Palestine’s eschatological trajectory.<sup>767</sup> Intermittent air strikes and regular “mowing the grass”<sup>768</sup> in Gaza attempts to deny and subsume day to day life in the territory, and instead replace it with a temporal reality dictated by drones and fighter jets. Drones’ high technology sharply contrasts with that of militant rockets and civilians carrying rocks and slingshots inside Gaza. It is *because* drones are aerial and more technologically advanced that they are also assumed to midwife other advancements on the ground, e.g. universal Western culture. The uneasy dialectic of achieving progress *through* destruction is synthesized by the science according to which drones were designed and with which they survey, acquire, and strike targets. Eli Yishai, Israeli Interior Minister during the 2012 Gaza Operation Pillar of Defense, articulated this logic when he publicly urged the IDF to “send Gaza back to the Middle Ages.”<sup>769</sup>

Palestine’s current religious associations are enhanced by its historical religious significance. This significance includes wars on and about the land that implicitly justify the Conflict’s continued existence by forming a narrative of constant war-waging. This is amplified by Orientalist assumptions about the lifestyles of those who inhabit the land and their tolerance for excessive violence. These assumptions also create a potential secondary effect pertaining to

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<sup>766</sup> Hippler, 174–75.

<sup>767</sup> Hippler, 174.

<sup>768</sup> The phrase is used by Israeli military strategists in reference to the routine Operations against Gaza. See: Thomas W. Smith, *Human Rights and War Through Civilian Eyes*, University of Pennsylvania Press (Philadelphia, 2016), 108–9, <https://doi.org/10.9783/9780812293616>.

<sup>769</sup> Haaretz Editorial, “Israel’s Minister of Incitement,” November 20, 2012.

IHL's interpretation and application. If the *imagined* acceptable levels of violence in a location are higher, so too raises the threshold for *perceived* violations of the distinction and/or proportionality principle. As a "biblical place" its occupants expect calamity and embrace a fatalistic attitude that enables them to endure and accept aerial bombing as the "will of God."<sup>770</sup> In this formulation, drones constantly occupy the skies like an all-knowing, all-seeing God who subjects everyone to spectacular acts of justice. The presence of British airpower in historical Iraq was assumed to have a panopticon effect that would lead every individual below to assume they were personally being watched—causing them to be "awed into submission."<sup>771</sup> The drone attempts to fulfil this promise in Palestine by allowing its operators, now Israeli military and police, to personally watch entire populations in the OPT. New types of subjectivities and relationalities have emerged alongside this new capability.

### **Combatant relationality**

Relations between Jewish Israelis and Arab Palestinians in the Occupation context are dynamic, varying within and between different locations, including Gaza, East Jerusalem, the West Bank, and Israeli state territory. The subjects and relations considered here are limited to those between Gaza's residents and the IDF because of the disproportionate use of drones in Gaza, and the belligerent military occupation that frames and shapes their interactions. The unique legal situation in Gaza illustrates the contradictions embedded in IHL that put pressure on its application at the legal and geopolitical margins—pressure that is exacerbated by the addition of drones. Drone use in Gaza and other areas in the global periphery are accelerating the collapse of IHL's conceptual distinctions and stretching its fundamental categories to their material and imaginary

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<sup>770</sup> Adey, Peter; Whitehead, Mark; Williams, *From Above: War, Violence, and Verticality*, 235.

<sup>771</sup> Adey, Peter; Whitehead, Mark; Williams, 236.

limits. It is not yet clear whether these tensions will lead to a critical breakdown or collapse in the legal regime's discursive integrity. What *is* clear is that the intensifying use of drones to project imperial violence is creating new confrontations of weapons, subjectivities, and legal identities inside and outside Gaza that are changing the future of conflict as we know it.

Israeli and Palestinian interactions inside, above, and around Gaza are defined by the inequitable distribution of risk amongst the Occupation and Conflict parties. This dynamic is typical of imperial conflicts and therefore accounted for in IHL through the unequal integration of the non-European Other. The dramatic imbalance in their respective fighting capabilities shifts the risk of loss, injury, and death disproportionately onto Gazans, who are subjected to spontaneous and prolonged aerial assaults resembling past imperial police bombings and wars. The riskless warfare that drones offer to Israeli operators mirrors the capabilities gap present in most imperial conflicts throughout history. This gap precludes the existence of the classical interstate war scenario envisioned in IHL, wherein there is a “relationship of mutual risks” and “requirement of reciprocity” that cannot exist in an asymmetrical war in which one side possesses drones and the other does not.<sup>772</sup> Chamayou explains how IL and IHL are superficially bound up in ideas of justice and the passing of judgement, appearing to replicate the formal equality thought to exist in domestic legal regimes. Assassinations are ostensibly prohibited because of combatants' equal right to participate in hostilities and mutual assumption of risk.<sup>773</sup> Equity is an essential component of the “gentlemen's' agreements” that form interstate war's general behavioural norms.<sup>774</sup>

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<sup>772</sup> Grégoire Chamayou, *A Theory of the Drone* (New York: The New Press, 2015), 165.

<sup>773</sup> Grégoire Chamayou, 60.

<sup>774</sup> Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford, 1999), 23, 50–51.

By contrast, colonial policing lacks any veneer of equal contest and always reflects a formal *inequality* before the law, including war's means and methods. Mégret makes use of a sports analogy in his accounts of drones and the exaggerated inequality between those with and without access to the weapons. He explains how sporting rules presume the comparability of *professional* athletes' abilities, much in the same way IHL presumes conflict parties are state actors in possession of approximate military strength—at least to the degree that there exists some amount of competition (as opposed to domination). Drones, by contrast, exaggerate the inequality of imperial conflicts and are analogous to an amateur joining a championship-winning professional athlete in contest.<sup>775</sup> This analogy makes evident IHL's ineffectiveness to constrain war's violences in asymmetric conflicts in which drones are not universally possessed. Drones draw attention to two IHL features that together enable the regime to create new relations in conflict. Firstly, aerial bombardment is regulated to allow for its unrestrained and indiscriminate use against civilian populations; and secondly, the goal of this violence is to terrorize and discipline populations into submission to an occupying imperial power. From these conclusions follow another: the drone is a weapon for “[m]aking and unmaking a people”<sup>776</sup>

### **Weapon subjectivities**

Analyses of American and Israeli drone use produce different insights that reflect, among other things, the two states' different relationship with the populations over which their drones fly. For example, American drone operations in Pakistan's FATA region and Somalia are not accompanied by a large troop deployment, as compared to similar operations in Iraq and Afghanistan. Likewise, the American public are likely to perceive these locations as remote

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<sup>775</sup> Frederic Mégret, “The Humanitarian Problem With Drones,” *Utah Law Review* 5 (2013): 1314.

<sup>776</sup> Hippler, *Governing from the Skies: A Global History of Aerial Bombing*, 155.

because of their geographical distance from the United States. By contrast, Israeli drone use in occupying and colonizing Palestine sheds light on the weapon's use in an ongoing situation of armed conflict in which the metropole is adjacent to the periphery, rather than the other side of the globe. Drone-launched air strikes in the Palestinian periphery delineate proximate colonial spaces and produce peripheries *within* the periphery.<sup>777</sup> Such is the case in Gaza, where the Israeli state's sovereign power is most clearly expressed by the continual presence of drones over the territory. Both American and Israeli drone use privileges "the security of the liberal state over that of the undetermined others who pose a risk to it."<sup>778</sup> However, decades of Israeli-state expulsion and dispossession of Palestinians, coupled with the intensifying bombardment and colonization of Palestinian territory, indicate discrete differences in the context and goals for the two states' respective operations.<sup>779</sup> Unlike American drone use in postcolonial state territories like Pakistan, Palestinian sovereignty is not merely chipped away at by drone strikes. Rather, Palestinian proto-state institutions and claims to legal personality for participation in international organizations are pre-emptively attacked by way of drone surveillance and attacks. In this regard, the Occupation and Conflict more closely reflect the settler-colonial policies of European imperial powers from previous centuries that sought to permanently sustain imperial governing modalities.

Earlier chapters introduced and discussed drones' paradoxical effects on their operators' perception of subjects below, the move to targeting individual terrorist combatants, and the distant intimacy of a 'hunter' and their 'prey'. This includes drones' accelerating effect on the

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<sup>777</sup> Majed Akhter, "The Proliferation of Peripheries: Militarized Drones and the Reconfiguration of Global Space," *Progress in Human Geography* 43, no. 1 (2019): 65–66, <https://doi.org/10.1177/0309132517735697>.

<sup>778</sup> Christine Agius, "Ordering without Bordering: Drones, the Unbordering of Late Modern Warfare and Ontological Insecurity," *Postcolonial Studies* 20, no. 3 (2017): 376, <https://doi.org/10.1080/13688790.2017.1378084>.

<sup>779</sup> Agius, 376–79.

‘individuation of responsibility’ and ‘nanowars’ trends that are collapsing IHRL into IHL.<sup>780</sup> It is likewise argued that the drones’ remote and algorithmic operation conveys an apparent striving for objective observation and surgical violence. Drones’ physical qualities challenge their operators’ ability to perceive drone victims *as* victims to an even greater extent than previous decades of defence and martial discourse.<sup>781</sup> According to Gregory, “vision is always partial and provisional, culturally produced and performed, and it depends on spaces of constructed visibility that – even as they claim to render the opacities of ‘other spaces’ transparent – are always also spaces of constructed invisibility.”<sup>782</sup> Chamayou describes a similar phenomenon in his account of the legal debates around American drone use, suggesting that the lack of transparency around when and where they are used has produced a conversation fixated on statistics and procedures. The result is the continued objectification and disembodiment of drone strike victims, and the reduction of humans to numbers.<sup>783</sup> The remainder of this chapter considers how these war-waging and war-regulating tendencies are expressed by Israeli drone use in Palestine. Israeli drone operations display how the weapon’s pursuit of invisibility (owing to the altitude at which it flies) is a function of its epistemological authority, the high visibility of the world below that it interprets and constitutes, and the erasure of Palestinian casualties to the point of invisibility.

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<sup>780</sup> Casey-Maslen, “Pandora’s Box? Drone Strikes under Jus Ad Bellum, Jus in Bello, and International Human Rights Law”; Ian Shaw and Majed Akhter, “The Dronification of State Violence,” *Critical Asian Studies* 46, no. 2 (2014): 211–34, <https://doi.org/10.1080/14672715.2014.898452>.

<sup>781</sup> Jamie Allinson, “The Necropolitics of Drones,” *International Political Sociology* 9, no. 2 (2015): 117, <https://doi.org/10.1111/ips.12086>.

<sup>782</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, 12.

<sup>783</sup> Chamayou, *A Theory of the Drone*, 147.

The erasure of Palestinian life lost to drones correlates with state efforts to preserve the lives of its own military combatants by using the weapons. These efforts include ‘disengaging’ from Gaza, expanding the West Bank barrier, and fortifying the Iron Dome system. Beyond cost efficiency and technological expediency, there are two possible explanations for this increased reliance on drones. The first is that military establishments are invested in reducing their own losses as a matter of perception and reputation. The second flirts with aspects of Kant’s hypothesis and suggests that the IDF’s conscription-based enlistment transforms its relationship with broader Israeli society in such a way that its legitimacy—and by extension, the state’s legitimacy—requires it to minimize the risk to IDF members. Liberal international relations theory suggests that foreign and domestic reputational considerations factor into state’s decision-making to the effect of reducing its use of armed force. However, the clear moral hazard of riskless drone war produces the opposite outcome. Even the weapon’s most gentle critics have expressed a concern that the lower costs (measured as financial and human resources) associated with using drones may effectively *encourage* governments to enter conflicts more easily than previous eras. These concerns are valid, but they fail to appreciate how the drone, as a weapon, necessarily privileges its operator’s perceived life and power over that of its targets—regardless of the context or pretence for their use.

A regular practice of state foreign policy is prioritizing the domestic national population over that of a foreign state. While this priority generally functions a general and abstract policy-making guideline, the Israeli state demonstrates that this qualitative value can be quantified. The state pioneered the *official* valuation of one’s own combatants over enemy civilians and adapted

its code of conduct to justify the policy.<sup>784</sup> The living and dead bodies of Israeli soldiers held captive by Palestinian militants organizations are routinely exchanged for the release of Palestinian prisoners and detainees held in Israeli custody. In some cases, the body of a single soldier has garnered the release of dozens or even hundreds of Palestinians, including those being held for alleged terrorist-related offences. The highest profile of such abductions was the 2006 kidnapping of IDF Corp. Gilad Shalit, who was exchanged for 1027 Palestinian prisoners.<sup>785</sup> The IDF is so motivated to prevent the kidnapping of Israeli soldiers that it developed a protocol, known as the ‘Hannibal Directive’, in which the basic principles of armed conduct are disregarded in favour of avoiding capture.<sup>786</sup> The Hannibal Directive fire procedure calls for an overwhelming use of force to evacuate IDF soldiers, including “fir[ing] at every suspicious place that merges with a central route” and attacking “all the targets that you’ve prepared in advance, all optional targets,” i.e., those not yet individually determined to be military targets and/or assessed for proportionality.<sup>787</sup>

An IDF drone pilot cannot be kidnapped from the battlefield, unlike an infantry member or Francis Gary Powers. Yet pilots remain a very real and critical presence for drone operations. The acronyms UAV (‘unmanned aerial vehicle’) and RPA (‘remotely piloted aircraft’) are often used interchangeably with the word ‘drone’, however, only the latter accurately describes their operation. The term pilot is colloquially used to refer to the person inside an aircraft, rather than the individual(s) piloting an aircraft. Referring to drones as ‘unmanned’ is as misleading as it is

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<sup>784</sup> Chamayou, 130–31.

<sup>785</sup> Byman, *A High Price: The Triumphs and Failures of Israeli Counterterrorism*, 184–85.

<sup>786</sup> United Nations General Assembly, “A/HRC/29/52 Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1,” 2015, para. 57.

<sup>787</sup> Breaking the Silence, “This Is How We Fought in Gaza: Soldiers Testimonies and Photographs from Operation ‘Protective Edge,’” testimony 60, 103.

rhetorically useful. The term is misleading because MALE/HALE drone take off, flight, and landing requires the coordinate efforts of dozens of individuals.<sup>788</sup> The term is rhetorically useful because it attempts to erase the drone operator by unlinking them (and their decisions) from the drone's actions. There are several reasons why a drone-operating state may want to make drone pilots invisible, some of which have implications under IHL.

The further removed an operator is from their weapon and target, the further removed they are from being perceived as responsible for the outcome of its use. The weapon's mediation blurs personal legal accountability, as does the number of individuals technically involved in a strike decision. For example, a drone strike on a Gaza beach that killed four playing children prompted a rarely issued military investigation that concluded with no finding of individual wrongdoing. This outcome was described by one former IDF member as a situation in which "none of them are accountable because *everyone* is accountable."<sup>789</sup> Such collective intelligence failures highlight the epistemological limits of drones, the incriminating effect on those viewed through its crosshairs, and IHL's toleration of blatant and clear violations of the discrimination principle. However, this logic is not universal and only applies to the high-tech weapons employed by Us and not Them. Assumptions about the reliability of information collected by technology like drones is so strongly embedded in IHL's foundational thinking that from this logic also follows that actions taken in accordance with this information, however patently they might violate its basic principles, are both morally and legally justifiable.

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<sup>788</sup> Charles Blanchard, "This Is Not War by Machine," in *Drone Wars*, ed. Peter L. Bergen and Daniel Rothenberg (Cambridge, 2014), 118–28.

<sup>789</sup> "Secret Israeli Report 'Reveals Armed Drone Killed' Four Children Playing on Gaza Beach in 2014," *Haaretz*, August 12, 2018, <https://www.haaretz.com/israel-news/israel-used-drone-to-kill-4-children-playing-on-gaza-beach-in-2014-1.6365860>; "Author Interview with Breaking the Silence Member I\_P\_1."

Weapons produce and destroy categories of persons and subjectivities in war and the relations borne between them under IHL. A combatant's status is determined by their participation (or lack thereof) in armed hostilities—participation most often marked by the open carrying and/or use of a weapon. The weapon mediates between the person who wields it and the subjects and objects around them. The weapon is responsible for their transformation from an individual citizen to a soldier who is part of a collective fighting force. Earlier discussions here demonstrated how unstable IHL's core categorical distinctions are, and how these dichotomies are pushed to their conceptual limit when applied to conflicts that do not embody traditional ideas of war. Drone proliferation further challenges IHL's theoretical and practical application by developing a weapon that is directly informed by the regime's proclaimed means and methods for waging a humanitarian war. The misalignment between war's myths and imaginaries and the actual conflicts in which drones are deployed yields apparently paradoxical outcomes.

## **Conclusion**

The aspirational use of drones by states committed to IHL cannot remain internally coherent when the weapon is reduced to the unyielding logic its designers intended it to follow. Drones finally bridge the ideational-material gap that centuries of weapons development attempted construct—but it is a pyrrhic victory. Drones resolve the very paradox they produce: the consummate weapon for pursuing the lofty, humane, and universalist goals of IHL's texts is contradicted by the unrestrained imperial violence IHL seeks to sanction and drones seek to execute. This purpose is evident in IHL's discursive and theoretical foundations and made manifest through the weapon. The features that make drones the ideal vehicle for liberalism's civilizing wars are the same features that betray its repressive results, namely, its remote operation and video imaging. In Palestine, this repression is reaching levels so extreme that it

threatens to expose not only the undeniably inhumane use of drones around the world today but the fundamental injustices of the entire legal regime under which the drone operates.

## CONCLUSION

“More willing to lose is more willing to use.”<sup>790</sup>

*Daniel Haulman, US Air Force Research Agency*

Recent world events indicate that drone proliferation is quickly becoming a top national security issue for the states comprising the Anglo-American security matrix. Concern for this issue coincides with the weapon’s increasing popularity and a heightened awareness of its ability to carry an abundance of ordnances. At the time of writing, various global state representatives are meeting in Vienna in an effort to resuscitate the lapsed Joint Comprehensive Plan of Action (JCPOA) regulating Iran’s nuclear technology research and development. Colloquially known as the ‘Iran Nuclear Deal’, the agreement signed under U.S. President Barack Obama and withdrawn from by President Donald Trump is being rehabilitated by Iran, Russia, China, France, Britain, and the European Union. Amid these talks the U.S. Congress passed the Stop Iranian Drones Act, prohibiting the supply, sale, and transfer of military drones to or from Iran.<sup>791</sup>

This bill’s passage follows the November 2021 Iranian interception of two U.S. drones over Iranian airspace and Israeli shoot down of an Iranian Shahed 141 allegedly flying explosives from Syria to the West Bank. The latter incident was seized upon by Israeli state officials who expressed consistent and adamant opposition to the JCPOA since its inception.

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<sup>790</sup> As quoted in Alan W. Dowd, “Drone Wars: Risks and Warnings,” *Parameters* 42, no. 4 (2013): 11.

<sup>791</sup> “US Passes Bill to Ban Iran Military Drones amid Vienna Talks,” *Mehr News Agency*, December 12, 2021, <https://en.mehrnews.com/news/181693/US-passes-bill-to-ban-iran-military-drones-amid-vienna-talks>.

Israeli Defence Minister Benny Gantz described the strategy animating Iran’s drone use as: “First we take Damascus, then we take Berlin.”<sup>792</sup> According to Gantz, this drone trajectory will position Iran as a hegemon capable of threatening not only Israel but the entire globe. The specific threat posed is Iran taking control over weak states and imposing upon them its inherently illiberal and “extremist ideology” that tramples over human rights.<sup>793</sup> Crucially, it is *drones* that enable this creeping threat to continue growing. These intensifying antagonisms suggest that Western states are beginning to see their drone technology accomplishments as bittersweet exploits through which they share a Promethean fate of equal parts heroism and tragedy.

To better appreciate drones’ past, present, and future, this dissertation introduced a new methodology by which the problematic should be analyzed. Drones are the progenitor and progeny of centuries of imperial pathologies—reflecting both empire’s ruthless ambition and concomitant sense of insecurity. These imperial ambitions called for the use of weapons that could deliver punishing violence against resistant civilian populations in the name of civilization. Yet the larger and more diffuse an empire becomes the more resources and violence its maintenance requires. The international legal order that emerged to support imperial endeavours and governing relations is most clearly expressed in IHL and most powerfully illustrated by the use of armed drones under this regime. This overarching hypothesis was described here as the drone ‘paradox’ wherein drones promise clean, civilized, and law-abiding war waging and deliver the contrary. The paradox is a result of IHL’s contradictory goal of simultaneously

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<sup>792</sup> Yaniv Kubovich, “Gantz: Iran Tried to Smuggle Explosives From Syria to West Bank With Drones,” *Haaretz*, November 23, 2021.

<sup>793</sup> Kubovich.

regulating/limiting and sanctioning/permitting war's violences. This required fabricating elaborate theories that peddled myths asserting the need for European powers to civilize non-European populations by way of advanced governing modalities and weaponry. Drones reflect these tensions and are best understood as IHL's paradoxical goals manifest as a weapon.

The dissertation's key findings constitute the arguments motivating its chapters, with each subsequent chapter building on the analytical conclusions of those previous:

- Chapter 1 provided a historical survey of the drone, its antecedents, where it is flown, and for what purpose(s). The chapter began developing the project's hypothesis by offering an image of the drone as the latest in a series of developments by global political actors to consolidate and proliferate power (as political, economic, and/or military control) over foreign populations. It demonstrated how the earliest uses of air power were enlisted in these efforts—providing crucial context for understanding a debate that is too often presented as a *sui generis* problem of drones.
- Chapter 2 reviewed the existing body of scholarly work debating the political, legal, and military implications of using drones. It grouped these interventions according to their shared or differing implicit theoretical starting points to better comprehend how the drone paradox is (re)produced in dominant discourses. The chapter introduced the literature landscape using an analysis-driven means of organizing its various dimensions. It argued that the different positions advanced in debates over drone use have much more in common than they acknowledge. Namely, their shared epistemological and ontological commitments informed by the liberal European Enlightenment theoretical tradition.
- Chapter 3 deepened the preceding chapter's argument by examining the moments in time and positions in space out of which contemporary international relations and international law

developed. It contrasted the conjunctures as they appear in traditional accounts with those identified by postcolonial critiques and TWAIL historiographies. The chapter found that colonial encounters by and rivalries among future European imperial states shaped how fundamental international legal concepts like sovereignty took form. It drew an ideological through-line connecting medieval Christian thought to key Enlightenment ideals and their international legal institutional expression.

- Chapter 4 argued the dissertation's overarching hypothesis that proposes to resolve the drone 'paradox'. It brought previous chapters' largely historical analyses into the twentieth century by examining the who, what, when, where, and why of aerial bombardment and armed conflict regulation. The chapter proposed that the Eurocentric liberal international order that codified around air power was formulated to allow for strategic bombing and massive injury to civilians in colonial conflicts. The situation of drones under contemporary IHL reflects longstanding wartime practices and Western states' political projects recast as noble civilizing missions.
- Chapter 5 returned readers to the material present day by way of a case study. Israeli state drone use in the OPT was analyzed using a methodological approach that expanded upon that of preceding chapters. Palestinian and Israeli discourses about the Conflict—including the role of air power and drones—are analyzed following an introduction to the Conflict's origins and legal regulation. It argued that Israeli colonization of Palestine mirrors the strategies of preceding European imperial states, and that the state-building project has been deliberately undertaken to satisfy the discursive (*i.e.*, humanitarian) and policy (*i.e.* imperial governance) goals of liberal war-waging. In Palestine, drones represent the vertical continuity of pre-existing modes of governance and discipline by occupying powers. By the chapter's conclusion, the drone is found to be an ideal weapon for carrying out collective punishment

and liberal lawfare against Palestinians in the Occupied Territories—the result of which indicates a burgeoning crisis in IHL’s legitimacy and longevity.

The coinciding of drones’ ascension and IHL’s disjointed attempts to respond to the weapon’s popularity creates a new opportunity to reopen and re-examine international law more broadly. Meeting the challenge of drones head on will require future collaborative research with a wide range of research institutions, nongovernmental organizations, and individuals from across the globe. The explosion in drones’ popularity has a global reach and global implications from which there is no going back. For those disproportionately affected by drones’ operation, the stakes associated with limiting their use are already high. However, as this dissertation suggested, domestic counterterrorism and national security policies in states around the world are already integrating drones into their surveillance strategies—the implications of which are a sinister but not foregone conclusion. Just as the understanding the future of drones required looking into the past, so too does managing their impact. Creating opportunities for conceiving new forms of legally regulating state violence in conflict such that it can be meaningfully limited or redressed requires coordinated, global solidarity. Like many of the sovereign actions taken by postcolonial and peripheral states across time, the significance of the Non-Aligned Movement during the Cold War is downplayed in orthodox international relations. However, such efforts may provide a blueprint for organizing counterhegemonic and anticolonial pacific international legal initiatives that articulate genuinely humanitarian values. It is essential that international law’s past be reckoned with so new futures may take its place. This sentiment is perhaps best captured by Branwen Gruffydd Jones in the introduction to her 2006 edited collection,

*Decolonizing International Relations:*

“To diminish the significance of colonialism to the study of international relations—for understanding international relations both past and present—is nothing less than to diminish the

significance and worth of all peoples who have suffered colonialism. This, truly, is the massive ‘collateral damage’ of modern IR.”<sup>794</sup>

Earlier chapters’ discussion of drones’ strategic shortcomings must be appreciated within the wider matrix of geopolitical governance and disciplinary regimes in the service of which they are enlisted. They are not simply a function of their being aerial vehicles. Although drones occupy the atmosphere rather than the ground, their unfulfilled promises would be no better met by terrestrial equivalents. Empires are costly to build and maintain, and the vast network of police, administrators, infiltrators, and soldiers they require cannot be replaced by overwhelming airpower. Early twentieth century attempts to remove the soldier from a battlefield suggest that drones will produce results equally dissatisfying to the states operating them. Parallel attempts to evacuate the basic humanity of one’s enemy are bumping up against the unpredictable, irrational, and uncontrollable features of drone pilots who remain ‘in the loop’. The continuing trend to arm drones with increasingly high-quality sensors, accurate targeting systems, and controlled munitions may make them more ‘legal’, but no amount of ‘precision’ will make them more ethical. Liberal political theory and its attendant legal regimes retain many of the same contradictions of their unabashedly imperial predecessors. Drones are the ideal weapons to support former and neo-colonial states’ geopolitical goals, and with this comes the uncomfortable conclusion that their use will never lead to just outcomes for the global majority who live beneath.

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<sup>794</sup> Branwen Gruffydd Jones, *Decolonizing International Relations*, ed. Branwen Gruffydd Jones (Lanham: Rowman & Littlefield, 2006), 4.

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