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Nonstate Actors and International Law: Just War Theory or the Universal Declaration of Human Rights?

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NONSTATE ACTORS AND INTERNATIONAL LAW: JUST WAR THEORY OR THE UNIVERSAL DECLARATION OF HUMAN RIGHTS?

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Abstract

There is a debate taking place within the global war on terror (GWT), and its legal and moral parameters are established by two basic arguments. The first is that "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war" (*Ex parte Quirin*, 37). The second is that an "Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants. The conclusion as it currently stands is that under international law only lawful combatants receive POW status and the protections of the Third Geneva Convention. Unlawful combatants, on the other hand, do not receive POW status and do not receive the full protections of the Third Geneva Convention (Haynes 2002, 2). Within the context and legal framework of the GWT nonstate actors may be treated differently from state actors when captured and interrogated (Haynes 2002, 2). The legal framework finds its basis in international law, which in turn finds its moral basis in part on conditions of just war theory (JWT). JWT requires combatants to possess legitimacy; to possess legitimacy a combatant must be a state actor; therefore, nonstate actors "do not receive Prisoner Of War status and do not receive the full protections of the Third Geneva Convention" (Haynes 2002, 2).

My research question asks if JWT should be modified or abandoned in order to accommodate greater fairness toward armed nonstate actors, those individuals to whom we commonly refer, and legally define as terrorists? For two reasons the answer to this question is yes: (i) man has an inherent value that is not recognized under JWT, and (ii) the utility of criminal

prosecutions for those engaged in political violence is higher relative to the desirability of the goal of greater peace, security, and stability.

To arrive at my conclusion I traced the evolution of the school of thought that makes up JWT and I analyzed its applicability to modern international relations – specifically international relations in the context of nonstate actors. My analysis found that JWT is *both* still relevant in the twenty-first century and applicable to nonstate actors who challenge the modern state and international institutions with the use of force *and* JWT is not relevant in the twenty-first century and is thus inapplicable to nonstate actors who challenge both the modern state and international institutions with respect to the use of force. Nevertheless, given the supposed goals of international law, the international community and specifically the U.S. ought to treat nonstate actors as criminals and prosecute them accordingly. To engage in an ideological war like the GWT is to litigate anew the competing ideas of justice. Finally, in critically thinking through the substance of the logical syllogisms that make up both JWT and the Universal Declaration of Human Rights I find JWT is simply not universally valid as it is neither a metaphysical truth nor a transcendental one; therefore, JWT is important only insofar as it is understood to be but one way of seeing the world, not the universally correct way.

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Dedication

To all of the men and women – throughout history – who looked at their world anew and dared to ask questions that challenged the accepted wisdom of their day, and in so doing risked being marginalized as a "gadfly." You, great thinkers, have forced me to engage with ideas and thoughts that challenged me in ways that could not be easily dismissed. To engage with you I had to accept your challenge and at least make the intellectual effort to rise to your level – even if unsuccessfully.

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Chapter One:

Introduction

> An "enemy combatant" is an individual who, under the laws and customs of war, may be detained for the d
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> uration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, the United States government has acted consistently with the observation of the Supreme Court of the United States in *Ex parte Quirin* (1942): "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."
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> "Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants. Lawful combatants receive prisoner of war (POW) status and the protections of the Third Geneva Convention. Unlawful combatants do not receive POW status and do not receive the full protections of the Third Geneva Convention (Haynes 2002, 1).

The foregoing argument, made by William Haynes, General Counsel of the Department of Defense, under President George W. Bush, in a widely disseminated memorandum, provides both the legal and intellectual justification for why nonstate actors, in the context of the global war on terror (GWT), may be treated differently from state actors when captured and interrogated.[1] In

[1] If they are state actors they are entitled to the protection of both the laws of war and the international legal system. If they are nonstate actors a series of federal court cases have rendered those nonstate actors being held in Guantanamo Bay, Cuba (GTMO) subject to indefinite detention with little recourse. In *Boumediene* v. *Bush*, the Supreme Court of the United States (SCOTUS) held the writ of habeas corpus was applicable at GTMO (*Boumediene* v. *Bush* 2008). The writ of habeas corpus, as guaranteed by the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, holds "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (*Boumediene* v. *Bush* 2008). However, Boumediene made no mention of the Due Process Clause, which reads "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Consequently, the D.C. Circuit Court of Appeals, after Boumediene, held the writ of habeas corpus had limited application with respect to detention, (See, e.g., *Maqaleh* v. *Hagel* 2013 and *Kiyemba* v. *Obama* 2009). The D.C. Circuit refused to extend due process rights to extraterritorial challenges based on habeas petitions by holding "[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." (*Kiyemba* v. *Obama* 2009). The D.C. Circuit also enforced the distinction articulated in the Military Commissions Act (MCA). While the MCA restored federal habeas jurisdiction it revoked jurisdiction over "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of detainees (Military Commission Act 2012 and 28 U.S.C. § 2241(e)(2) (2012)). In effect, argues Stephen Vladeck in *The DC Circuit After Boumediene*, the DC Circuit rendered the Boumediene decision meaningless (2011).

short, the argument is as follows: International law is based in part on the conditions of just war theory; just war theory requires combatants to possess legitimacy; to possess legitimacy a combatant must be a state actor; therefore, nonstate actors "do not receive Prisoner Of War status and do not receive the full protections of the Third Geneva Convention" (Haynes 2002, 1).

This basic argument gives rise to my research question: to what extent should just war theory (JWT) be modified in order to accommodate greater fairness toward armed nonstate actors, those individuals commonly, and legally, defined as terrorists? This is important because the twenty-first century sees mankind facing not only challenges at an accelerated pace relative to times past, but also challenges that were simply inconceivable in centuries past. I believe we are in the midst of what Samuel Huntington referred to as a clash of civilizations (Huntington 1993, 22). Also, modern weapons of mass destruction (WMD) render the potentiality of massive destruction increasingly probable given the ever-present possibility that individuals not acting on behalf of a state will come to possess WMD and use them against a state, which could lead to a retaliatory response and a full-scale[2] military conflict. In an attempt to deal with these individual nonstate actors, states have responded in ways that range from imprisoning individuals suspected of engaging in terrorism to holding them indefinitely without charge or trial to torturing prisoners and killing *suspects*.[3] Moreover, those individuals who have been tortured, assassinated, or both

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Nevertheless, in *Aamer* v. *Obama* (2014), a case brought in an attempt to enjoin force-feeding of detainees engaging in hunger strikes, the D.C. Circuit held a habeas suit is permissible if challenging the conditions in which detainees are confined. Ultimately the detainees' claim, argued on the merits, was unsuccessful. This has created a situation whereby noncitizen detainees may challenge their detention if they argue a violation of the due process clause, rather than an outright habeas corpus violation.

[2] The current president of the U.S. has actually advocated that the U.S. "wipe out" certain countries, and kill the entire families of individuals suspected of terrorism. It should be noted that either course of action would constitute a war crime.

[3] I emphasize the word *suspects* as in several well known cases governments have not proven the guilt of those assassinated and have instead expected the public to accept their pronouncements.

are deemed to be outside the protection of law as they are deemed to lack proper political authority. It is this reality that provides the backdrop for my research question: to what extent should JWT be modified in order to accommodate greater fairness toward armed nonstate actors, those individuals commonly, and legally, defined as terrorists? In answering this question I examine whether JWT is relevant in the modern world as a moral guideline for states wishing to engage in military conflict either with other states or with nonstate actors.

In answering these questions I trace the evolution of JWT, as well as analyze its applicability to states generally, and nonstate actors specifically. Ultimately, my analysis finds three answers to the question of whether JWT is applicable to nonstate actors who challenge both the modern state and international institutions with respect to the use of force. The first answer is yes: JWT is relevant in the twenty-first century. The second answer is no: JWT is not relevant in the twenty-first century. The third answer is JWT is not universally valid; therefore, it is important only insofar as it is understood to be but one way of seeing the world, not the universally correct way. My conclusion that there are three answers does not belie an attempt to equivocate or a reticence on my part to reach a definitive conclusion. Instead, my three answers are a response to the fundamental problem with JWT's underlying conceptual and philosophical foundation.

Importance of Research Question

Understanding the extent to which JWT should be either modified, or abandoned entirely, in order to accommodate greater fairness toward armed nonstate actors, or terrorists is both a practically important topic and a theoretically important topic. It is the exploration of ideas, which is crucial because practically the implementation of an international law based on JWT is resulting in cruel and inhumane treatment of individuals and the continued fracturing of an increasingly

culturally divided global community. Several examples of this are widely known: the indefinite, incommunicado detainment of individuals at the U.S. military base at Guantanamo Bay, Cuba; the degrading and inhumane treatment of individuals at Abu Ghraib prison; the kidnapping, rendering to CIA-affiliated black sites, and torturing of persons like Khaled El-Masri for interrogation purposes; and the U.S. targeted assassination program, which has already resulted in the deaths of many foreign nationals and at least three U.S. citizens, most notably Anwar al-Awlaki and his 16-year-old son.[4] All of this, and more, is possible because the U.S. has decided anyone designated an enemy combatant is "not entitled to the protections of the Geneva Conventions, the Torture Convention and other laws against cruel, inhumane or degrading treatment, or even torture" (Martin and Onek 2004, 15). Although such treatment is deemed permissible because unlawful enemy combatants are not entitled to POW status under the Geneva Conventions and therefore not entitled to any of the legal protections of the Geneva Conventions against torture or cruel, inhumane, or degrading treatment (Haynes 2002, 2; Martin and Onek 2004, 15), the legal conclusions that support such treatment actually stem from unilateral determination by the U.S. that unlawful enemy combatants are illegitimate, nonstate actors (Haynes 2002, 2; Martin and Onek 2004, 15). As I will demonstrate below, the question of legitimacy is directly tied to an element of JWT, namely, proper political authority. One who possesses proper political authority is deemed to be a legitimate actor under JWT. On the other hand, one who does not is not.

[4] The GWT now effects U.S. domestic law in that American citizens may now be targeted for assassination in clear violation of the constitutional protections afforded all American citizens by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution. Attorney General Eric Holder, at Northwestern University School of Law, on Monday, March 5, 2012, argued "[w]hether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question… In that case, our government has the clear authority to defend the United States with lethal force." To that end, according to the American Civil Liberties Union (ACLU), it is impossible to know how many Americans have been targeted for assassination because the list is secret. While speaking to the *Washington Times*, in response to a question about the procedures used to order lethal strikes against U.S. citizens abroad, White House Terrorism advisor John Brennan, on Thursday, June 24, 2010, suggested that "dozens of U.S. persons who are in different parts of the world" were "very concerning." Again, because of the secret nature of the so-called kill list it is unclear how many American citizens are on the kill list or have been killed.

This is problematic given the largely subjective nature of an individual country's foreign policy. The application of a JWT-based foreign policy is problematic because JWT is ultimately vague, incoherent, and suspect given the power dynamics within international relations. This leads to divergence at the international level. For example, the decision that unlawful enemy combatants are illegitimate nonstate actors, as determined by the United States, is consistent with JWT but contravenes international opinion insofar as the international community believes that the meaning and requirements of international law are different from that understood by the U.S. This is problematic for if every country were to engage in similar behavior, it would undermine the explicit purposes of the United Nations Charter as set forth in the Charter's preamble, and arguably international law itself. Functionally, on one side of the debate is the U.S., initially in the form of individuals such as Jay Bybee,[5] John Yoo,[6] and Alberto Gonzales.[7] On the other side is the international community in the form of organizations such as the International Committee of the Red Cross (ICRC), ad hoc tribunals, and the International Criminal Court (ICC). Assuming the goals of greater global unity and less violence, the world in the twenty-first century is now too interconnected to leave 195 sovereign countries to determine for themselves whether individuals

[5] Jay Bybee is a federal judge currently serving on the United States Court of Appeals for the Ninth Circuit, and a Senior Fellow in Constitutional Law at the University of Nevada, Las Vegas. While serving in the Bush administration as the Assistant Attorney General for the Office of Legal Counsel, United States Department of Justice, he signed the controversial "Torture Memos" in August 2002.

[6] John Yoo is currently a law professor at the University of California, Berkeley. He is best known for his opinions concerning the Geneva Conventions that attempted to legitimize the United States' GWT. He also authored the "Torture Memos," which concerned the use of what the Central Intelligence Agency euphemistically called enhanced interrogation techniques, which included waterboarding (simulated drowning). Mr. Yoo also advised the Central Intelligence Agency, the United States Department of Defense, and the president on the use of enhanced interrogation techniques: mental and physical torment and coercion such as prolonged sleep deprivation, binding in stress positions, and waterboarding. The memos stated that such acts, widely regarded as torture, which were used in the systematic torture of detainees at Guantanamo Bay detention camp beginning in 2002 and at the Abu Ghraib facility following the United States' invasion of Iraq in 2003, might be legally permissible under an expansive interpretation of presidential authority during the "War on Terror".

[7] Alberto Gonzales is presently Dean of Belmont University College of Law. His tenure as U.S. Attorney General was marked by controversy regarding warrantless surveillance of U.S. citizens and the legal authorization of "enhanced interrogation techniques" (i.e., generally acknowledged as constituting torture), in the U.S. government's post-9/11 "war on terrorism."

are entitled to the protection of law. Instead, what is needed is greater adherence to a more uniform perspective that governs the behavior of states and individuals alike. This unifying perspective is being developed and increasingly provided by a more universal *ideological* standard, which is increasingly becoming a universal *legal* standard: the Universal Declaration of Human Rights (UDHR). While presently largely aspirational, which is to say it is not legally binding, at its core the UDHR sets forth and rearticulates procedural requirements that act as safeguards for individuals accused of committing a crime at the international level. In a sense the UDHR supplements the mandate of the UN's charter, "sav[ing] succeeding generations from the scourge of war" (United Nations Charter 1945, 2).

As a result of the GWT and the manner in which it is being carried out with respect to nonstate actors, the last few years have witnessed a reconsideration regarding how individuals may be treated under international law. Among other places we see this playing out in the judicial branch of the U.S., the various judicial arms of the international community, and quasi-legal organizations such as the ICRC, etc. On one side are those who do not see as problematic the ways in which nonstate enemy combatants are being treated. They adhere to the state actor vs. nonstate actor distinction of JWT (i.e., proper political authority) and by implication all that follows. On the other side are those who embrace the ongoing change in international law – a change toward what they see as a more humane treatment of individuals in general, regardless of their status within the JWT framework. In evaluating both arguments I undertake a jurisprudential analysis,[8] a theoretical analysis, of the interconnectedness of JWT and international law in a very narrow sense as products of both moral and political philosophy. Lastly, I ultimately argue in favor of a

[8] I undertake an analytical jurisprudence as defined by Black's Law Dictionary (7th edition): A method of legal study that concentrates on the logical structure of law, the meanings and uses of its concepts, and the terms and the modes of its operation.

practical, less subjective development of an international law toward a procedurally sound[9] perspective and against any future adherence to the JWT with respect to fighting terrorism.

Approach

My approach is qualitative in nature. I trace the theoretical lineage of JWT and examine international law in order to better understand the implications of the integration of JWT and international law as well as their respective impact on the treatment of nonstate actors. The examination of law is within the context of law as written and understood by national legislative bodies[10] and international institutions,[11] practiced by national and international lawyers, and adjudicated by national courts, international courts, and ad hoc tribunals. With respect to JWT, I demonstrate that it leads to what I argue is "inhumane"[12] treatment of nonstate actors. To arrive at this conclusion, I describe the predominant JWT, as followed by the West, mainly the U.S., and I explore its provenance as predominantly, if not originally, a Christian ideology in order to better understand the origin of and justification for both the theory as a whole and its individual elements. Finally, I examine the consequences of JWT within the ongoing GWT given that the Bush Doctrine is now the ideological cornerstone of U.S. foreign policy, unchanged by President Barack Obama (Obama) through two terms and thus far unchanged by Donald Trump (Trump) who has given no indication that he will change it given that (i) he has largely turned over tactical decision making to his military commanders, and (ii) he gave a speech at the UN that indicates a willingness to

[9] "Procedurally sound" in the sense of procedural fairness. I advocate adhering to a system that ensures all accused are provided with an opportunity to air their grievances. The current system, which essentially focuses on the "outcome" of the matter, as a war, is problematic as it requires an exploration of right and wrong within both a historical and a philosophical (natural law) context.

[10] E.g., the Laws of Armed Conflict.

[11] The ICRC, for example, as a quasi-legal institution that oversees the implementation of international law supervises the maintenance of legal standards.

[12] It is important to note that what is and is not considered inhumane is a fluid concept subject to change over time.

wantonly violate international law should Trump believe it necessary to do so.[13] Trump recently released his National Security Strategy Memorandum, which makes clear that he will in no way reverse the "America First" policy initiated by President George W. Bush.[14] I then examine the relevant international law (i.e., international humanitarian law, international human rights law, and international criminal law), juxtaposing and comparing my examination and analysis of JWT to my examination and analysis of international law as procedural due process. In the final analysis I argue in favor of rejecting the former and embracing the latter.

Just War Theory

In attempting to both limit aggression and protect innocent men and women, JWT sets forth six elements that must be satisfied before war is deemed morally permissible. These elements are (i) just cause, (ii) right intent, (iii) proper authority, (iv) political proportionality, (v) chance of success, and (vi) last resort. Once undertaken, JWT's *jus in bello* contains two additional elements: (i) military proportionality and (ii) military discrimination. The basic idea is that the decision to engage in warfare will be inextricably and demonstrably tied to the ultimate goals of peace and security, and not mere subterfuge, pretext, or pretense to achieve one's own personal goals. And, once undertaken, military force will be applied surgically and not indiscriminately in order to use just enough force required to attain peace and security, minimizing the amount of damage to

[13] Speech given by Donald Trump to the UN General Assembly on September 19, 2017.

[14] Donald Trump recently gave speech at the United Nations on September 25, 2018 in which he said, "As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy." If one looks at this from the standpoint of the United States, it makes perfect sense as America already claims for itself universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process while perhaps not subjecting the world to a global bureaucracy but an American one.

property and loss of life in pursuing those goals. In short, JWT is used when protecting and preserving a state.

In examining the GWT, as constrained or governed by JWT, considering the fact that the ideological motivations that make up the Bush Doctrine are the motivating forces driving U.S. foreign policy, I not only call into question the U.S.'s motivation as just cause, but also reexamine the utility of the theory as a theoretical model given the increasingly globalized nature of international relations and the inevitable clash of different cultures. The desirability of the consequences of its implementation is being reconsidered. This reconsideration can be seen as an attempt to clarify the legal and philosophical difficulties involved in conducting any operations to end terrorism, as the GWT is purported to be.

As stated above, the main factor giving rise to this reconsideration has been the American-led response to the attacks on September 11, 2001 (9/11) in the forms of the Bush Doctrine and the GWT, and its treatment of individuals captured on the "battlefield."[15] This military action brought to the surface the legal distinctions between state and nonstate actors; however, and I believe more importantly, the manner in which this military action is being conducted brings to the surface the subjective nature of JWT and therefore many of its theoretical problems. The very fact that this reconsideration is taking place, and seems to be gaining momentum within the national and international judiciary, is in itself proof that there is disagreement as to what rules should be brought to bear on such legal and moral considerations. Nevertheless, equally true is

[15] The U.S. now argues that the battlefield is global, which includes the domestic homeland of the U.S. An argument has been made that depending on the circumstances the U.S. military can be used to fight terrorism on the continental U.S. and not simply overseas in direct contravention of the Posse Comitatus Act of 1878.

that while this debate is not necessarily evidence of the desire for greater theoretical and legal coherence, it is certainly evidence of a *lack* of theoretical and legal coherence.

At present, the U.S., in the form of Jay Bybee, John Yoo, and Alberto Gonzales, is arguing that the requirement of legitimacy, proper political authority, as a function of JWT, provides a sufficient standard with respect to whether a captured individual is entitled to various protections under the law. This is problematic for two reasons: (i) the consequences of the implementation of this standard are widely condemned as unacceptable as this antiquated tradition of thought is being used to justify the absence of legal protections under the law, which in turn allows for almost anything with respect to the treatment of nonstate actors; and, as stated, (ii) JWT as understood by the U.S. is not the only version of just war, which means that the practice of allowing, or simply tolerating, individual countries to implement their own conception of JWT will likely undermine the international legal order itself. JWT, as understood in the U.S., was first articulated by St. Augustine. It was later elaborated by St. Thomas Aquinas and other Western Christian philosophers. But the theory was developed into its modern form after both Francisco de Vitoria and Hugo Grotius began to remove it from under the auspices of a Christian God and secularized it. Since Grotius, while there have been many more philosophers of JWT, there has been relatively little change to the basic structure of JWT – especially with respect to the notion of legitimacy of state actors and the illegitimacy of nonstate actors, vis-à-vis proper political authority, and the element of just cause. For this reason, my tracing of the lineage of JWT largely concludes with Grotius.

As to the theory itself, JWT covers two aspects of war: (i) *jus ad bellum*, the initiation of war, and (ii) *jus in bello*, the permissibility of the actions one may undertake during it (Grotius [1625] 2005). I address both but focus primarily on the former. Although JWT has remained

largely unchanged since Grotius, what is deemed morally permissible regarding the treatment of human beings seems to have changed and continues to change. As a result of 9/11 and the GWT, new questions are arising, and I believe old questions must be considered anew as I do not believe they have been satisfactorily answered, or, rather, what were once deemed satisfactory answers are no longer deemed as such. For example, who has the right to wage war, and when?[16] What targets are legitimate? What is a state in the context of war? May only states wage war, or do oppressed groups and individuals have that right? If they do, are they bound by the same rules of noncombatant immunity as limit the behavior of state military? In one form or another these questions, and a great many more, are being addressed with a sense of urgency as policy-makers try to adapt to the seemingly rapidly changing international legal, political, and moral environment.

From a practical perspective, because of the growing interconnectedness of international relations, at a minimum a cursory acknowledgment, if not an in-depth examination and consideration of the various just war traditions, is in order.[17] To the extent that this century will witness greater conflict, and I believe that it will, it will likely witness it between groups of people whose understandings differ with respect to *what* constitutes a just cause for going to war, and *who* may in fact engage in armed conflict, among other issues of cultural and societal importance. This is precisely the situation in the GWT. For example, Osama bin Laden, as the founder, and now executed leader of al Qaeda, in his "Letter to America," citing the Qur'ān, claims to have divine permission from Allah to initiate war because the Qur'ān says "[p]ermission to fight (against

[16] International law already applies to individuals in allowing them to rebel under certain instances. In other words, the international community acknowledges that individuals are absolved of their "legal" allegiances to their state under certain conditions. Even if the state itself disagrees, once absolved, however, they must comport their behavior to certain international legal standards.

[17] I do not endeavor to undertake an in-depth examination of the many different traditions as such an examination is not the purpose of this dissertation. Instead I simply acknowledge that the literature is replete with precisely such examinations.

disbelievers) is given to those (believers) who are fought against, because they have been wronged and surely, Allah is able to give them (believers) victory" (Qur'ān 22:39 – parentheses addded). This one statement frames their struggle as one of both self-defense and defense of others. Also, the concept of victory is altered in that victory need not be military victory. It may be spiritual and religious, a victory to be enjoyed in the hereafter. Bin Laden continued, stating the Qur'ān says "[t]hose who believe, fight in the Cause of Allah, and those who disbelieve, fight in the cause of Taghut (anything worshipped other than Allah, e.g. Satan). So fight you against the friends of Satan; ever feeble is indeed the plot of Satan" (Qur'ān 4:76 – parenthesis added). This one statement renders al Qaeda's "resistance" squarely in the context of a religious war, and ultimately a battle between God and Satan, or good and evil. When one considers that St. Augustine also cited a religious text, the Bible, when justifying his arguments we see that the disparity between texts, or rather the disparity between the interpretations of religious texts, can, and will, lead to problems. More recently, but along a similar line of thought, the Islamic State of Iraq and Syria (ISIS), or the Islamic State of Iraq and the Levant (ISIL), wishes to return to the Caliph and return to the time of the Rashidun, a time when it believes Islam existed in its purest form. ISIS follows the writings of Sayyid Qutb, who believes a return to the Caliph is necessary for there to be correct adherence to Allah and his word the Qur'ān. While this is not self-defense there are similarities to be drawn with respect to bringing forth a city of God. These are examples of religious *casus belli*. Moreover, when President Bush declared the GWT to be a battle between "good and evil"[18] we can see that at a *minimum* he too was invoking the ideas of a transcendent morality of right and

[18] Remarks made by President George W. Bush at the commencement ceremony at West Point, United States Military Academy, June 1, 2002 (https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html)

wrong, and, at *most* he was framing this as a battle of the respective followers of God and Satan, similarly to bin Laden's framing of the battle.

At the broader level, differing *casus belli* are argued by China and Russia, each of which has its own societal, political, cultural, and military traditions, any of which can provide the impetus for going to war. If this is the case, then my research question is not simply one of academic concern. It is of practical importance. A greater understanding of the inadequacies and the limitations of JWT will demonstrate the preferable nature of the current development of international law.

State of International Law

With respect to international law, the main focus of my research will be the current state of international law as defined and contained within international treaties and applied in practice by international lawyers, which is ultimately open to interpretation, point, counterpoint, argument, and counterargument, and adjudicated by justices of their respective institutions. Because the purely theoretical, or academic, aspects of international law are ultimately of little value when standing before a state court judge, a federal court justice, a nation's highest court, and a court or tribunal of international jurisdiction, I examine not only the philosophical aspects of law but, more importantly, the black-letter procedural questions of law. To that end, it must be noted at the outset that the term "international law" is inherently vague. International law includes everything from the law governing the delivery of mail to the laws governing war. Again, for purposes of my dissertation international law is defined narrowly as that aspect of law that is practiced by international lawyers and interpreted by judges (themselves lawyers), and includes three main areas: (i) international humanitarian law (IHL), (ii) international human rights law (IHRL), and

(iii) international criminal law (ICL), as argued before a court or tribunal with the requisite legal jurisdiction. These three areas constitute the relevant laws of war.[19] A modern understanding of customary international law sees all three areas of international law moving in a direction where nonstate actors are both viewed and treated differently from the traditional approach required by JWT.

As for the philosophical questions, for the limited purpose of distinguishing international law from JWT, I am calling for a rethinking of questions such as: What is law? What is the purpose of law? Does the law consist of little more than procedure and rules? Can anything at all be law? What, if anything, does law have to do with justice? What, if anything, has the law to do with morality, or democracy? What makes a law valid? Does one have an unequivocal duty to obey the law, or may one be justified in breaking the law, if not morally obligated to break the law? And how far may one go if they are morally obligated to break the law? I touch upon these questions in chapters 3 and 4 because I demonstrate that if the answers to these largely philosophical questions provide the foundational bases for whether someone is entitled to the protection of international law, one should fully expect discord and violence to follow as different philosophical and religious traditions *have* answered, *do* answer, and *will* answer these questions in different ways.

For example, while the GWT can be looked at as a response to 9/11, 9/11 can itself be partially viewed as a response to U.S. foreign policy (bin Laden 2002; DABIQ Issue 15, 30). Determining whether nonstate actors are entitled to legal protections under the framework of JWT

[19] The laws of war should not be confused with the law of armed conflict. The laws of war are the body of law that exists at the international level, while the law of armed conflict is American law, both used within and enforced by the U.S. legal structure.

requires a preliminary assessment of the reasons for both parties engaging in their respective behavior. In other words, a basic concern is whether a party is engaging in an act of aggression[20] while the other party is engaging in self-defense. More to the point, these largely philosophic questions require that a determination be made with respect to who is right, which is at once a legal and a moral concern. Making this determination necessarily requires an assessment of natural law, which is admittedly far beyond the scope of this dissertation. Nevertheless, I do raise many questions to demonstrate that any belief in a transcendent natural law is incorrect and inherently unjustifiable.

These questions are important because while theoretical questions are at the very heart of jurisprudence and legal theory, an almost blind adherence to the traditional answers to these questions has resulted in both conceptual incoherence and a misguided pursuit of justice, mistakenly believed to be universal in its existence. I firmly believe the answers to philosophical questions must be defended rationally, not speculatively. With respect to rights, protections, and their corresponding duties and legal vulnerabilities, in the limited context of the law, humanity is better served by the international law shifting its focus from the state as its main unit of analysis toward the individual as the main focal point. If we acknowledge that the international community, in the form of both courts and tribunals, and international non-profit non-governmental organizations, now accept, almost without question, that individuals have internationally legally recognizable individual rights by virtue of their humanity, not by virtue of their being citizens of a state, then we see that the predicate groundwork already exists. We need only go a step farther.

[20] The International Criminal Court took jurisdiction over the crime of "aggression" on December 7, 2017. The U.S. recognizes neither the crime of aggression nor the International Criminal Court.

While the nation-state is the main actor at the level of international relations, I begin with an understanding that individual nonstate actors nevertheless have both rights and responsibilities under international law. Consequently, the international community no longer balks at the idea that individuals are entitled to international rights under customary international law. The corollary to this is also true. Individuals are increasingly seen to have obligations to the international community that cannot be violated with legal impunity.[21] This is so even when the law recognizes an individual as having broken away from a state. This is quite clear under international law. For example, international crimes such as genocide, crimes against humanity, or war crimes will result in legal liability and legal accountability directly upon the individual.[22] And legal liability is not at all contingent upon whether individuals act through states or act as nonstate actors. Legal liability attaches because of the nature of the act, not the character or the legal or political status of the actor. In this way individuals are already bound by both customary and codified international law. Evidence that this is so is a status of forces agreement (SOFA). A SOFA is entered into between two states where one state promises to immunize from legal liability the military personnel of the other state. These are required when the state providing the military personnel wishes not to have its personnel subject to prosecution under either national or international law.[23] This is but one way of ensuring that American military personnel are not subject to prosecution under international criminal law. A more drastic way is the American

[21] It should be noted that in some instances a party of the first part can be contractually absolved of having to abide by these obligations. The party of the second part can sign what is known as Status of Forces Agreement (SOFA), which provides legal immunity to military personnel of the party of the first part.

[22] For example, Spanish judge Baltasar Garzon issued an order that asked British authorities to allow Henry Kissinger to be questioned while in London. Judge Garzon wanted to interview Dr. Kissinger, who served as President Nixon's Secretary of State, for his involvement in "Operation Condor." Operation Condor was a scheme by the dictatorships of Argentina, Brazil, Chile, Paraguay, and Uruguay that saw the persecution and execution of their respective political opponents.

[23] Status of Forces Agreements (SOFA) are back in the news because National Security Advisor John Bolton has made it clear that no American citizen (soldiers) will ever be subject to arrest and prosecution at the ICC. To make certain of this Mr. Bolton has said that he will seek additional SOFAs wherever American forces are located.

Service-Members' Protection Act, which was voted into law on August 2, 2002. This law has been dubbed the Hague Invasion Act due to the fact that the law calls for the use of force, up to and including invasion of The Hague, Netherlands, which it should be pointed out is a NATO country, a supposed steadfast ally in NATO.[24]

This development of the applicability of international law to nonstate actors has been rapid and sophisticated (Fassbender and Peters 2012). A complex catalogue of crimes, as well as rules concerning individual responsibility and joint criminal enterprise, has developed under the international criminal tribunals for the former Yugoslavia (1993), Rwanda (1994), Sierra Leone (2002), and Cambodia (2006). As an example of the expanding nature of international law, individual criminal responsibility now clearly applies beyond the context of armed conflicts. Individual criminal responsibility now extends to crimes against humanity or genocide. Moreover, in some cases, international criminal law has been used to prosecute the members of armed nonstate groups for treaty crimes such as torture and hostage-taking.

A deeper philosophical and legal question arises here. Should nonstate actors be bound by international law? And if so how? International law has begun to deal with these issues. In some sense nonstate actors already fall under jurisdiction of the International Criminal Court; national jurisdictions, therefore, may very well have to evaluate legal liability under international legal norms. Some recent U.S. judicial decisions have set down some parameters for what sort of violations by nonstate actors might result in international liability. U.S. courts do not seem to demand a link to state action for war crimes, genocide, and crimes against humanity to be considered justiciable violations of international law. A recent court of appeals decision reviewed

[24] Human Rights Watch, "U.S.: 'Hague Invasion Act' Becomes Law". 3 August 2002.

the case law and recalled the jurisprudence that sees violations of Common Article 3 to the Geneva Conventions as war crimes and mentions that "this standard applies to all 'parties' to a conflict … which includes military groups" (*The Presbyterian Church of Sudan et al.* v. *Talisman Energy et al*. 2008, 35).

It seems that the position argued by the Appeals Chamber of the Sierra Leone Special Court is gaining traction. In 2004 the Special Court argued, "it is well settled that all parties to an armed conflict, whether states or nonstate actors, are bound by international humanitarian law, even though only states may become parties to international treaties" (*Prosecutor* v. *Sam Hinga Norma* 2004, 14). If nonstate actors can be deemed to have obligations under international law, they ought to be deemed to have the protections afforded state actors under international law. To do otherwise is not only inconsistent with the current progress and understanding of international law, but also quite simply counterproductive given our stated goals for the GWT.

Conclusion

Finally, I conclude in chapter 5 that international law grounded by JWT, especially in the context of the GWT, is untenable insofar as it always requires an assessment of the philosophical merits of *casus belli*. In other words JWT requires one to engage in an assessment of the deductive soundness of what are little more than appeals to natural law and religious argumentation seeking validation in and of God and thus justification for killing one's enemies. Lastly, I suggest that JWT applied to the American GWT is a confused endeavor, philosophically problematic because it essentially relies on the Bush Doctrine and therefore is destined to fail, certainly destined to neither halt nor prevent either further acts of terror or political violence. Instead of the *preventive* posture of current U.S. foreign policy, driven by a desire for hegemony or global domination,

enforced by the military, the U.S. would be better served by simply acknowledging that the current fight against terrorism is simply a criminal matter and not a war. Therefore, the time has come for JWT to be abandoned and replaced by the aspirational components of the UDHR, which is already delineated in various international legal institutions, where proper political authority is of no consequence and one's *humanity*, not their political status, is recognized and protected.

Chapter Two:

Just War Theory & Natural Law

Introduction

JWT is widely acknowledged as having originated with St. Augustine, bishop of Hippo. In many respects, it is accurate to say his political writings are indeed the intellectual foundation of JWT. However, while he may be credited with founding JWT, Augustine is but a part of the just war tradition.[25] Michael Walzer's *Just and Unjust Wars* is considered the best modern explanation of JWT. In this work Walzer makes clear that JWT is not simply a European theory, nor is it a European tradition. Walzer writes, "As long as men and women have talked about war, they have talked about it in terms of right and wrong"[26] (Walzer 1977, 36). This can be taken, in some sense, as an indication of a universal component of JWT. That is to say, because we know that men and women throughout time have discussed, or at least considered, just war, it must be something inherent to the human condition. In the chapters that follow I will demonstrate that it is universal in its subjectivity. That is to say, the intuition appealed to by scholars since time immemorial hinted at a simple truth with respect to morality, it is universal in its existence and validity. Ultimately that intuition was largely misunderstood by the great moral, political, and legal philosophers of the world.

I focus on the Western version of the theory within that tradition. Also, given the role JWT plays with respect to international law I will trace its provenance in an attempt to better understand

[25] A JWT is a specific theory of what constitutes a just war while a just war tradition speaks to the notion that multiple theories can be created within a tradition of thinking and writing about what constitutes a just war.

[26] The full quote is, "for as long as men and women have talked about war, they have talked about it in terms of right and wrong. And for almost as long, some among them have derided such talk, called a charade, insisted that war lies beyond (or beneath) moral judgment. War is a world apart, where life itself is at stake, where human nature is reduced to its elemental forms, where self-interest and necessity prevail. Here men and women do what they must to save themselves and their communities, and morality and law have no place" (Walzer 1977, 36).

both the how and the why we came to have the system we have. I will show that historically the very nature of warfare changes over time. To that end it is important that we temporarily suspend our knowledge of JWT in the twenty-first century and read these writers on their own terms. For example, JWT and international law in the twenty-first century have as their main goal the achievement and maintenance of peace – the cessation of violence. War is supposedly thought of as an evil to be avoided if at all possible.[27] This was not always the case with war. For example, Augustine argued that a just war includes using the power of the state to kill heretics, thereby eliminating heresy, at least insofar as heretics refused to convert to Christianity.[28] Nevertheless, before moving on to the theology, and the JWT of Augustine I address Cicero to demonstrate that Augustine's JWT is based, at least in part, on Cicero's conception of just war.

Cicero and Augustine

Cicero

In tracing the provenance of the Western version of JWT we begin with Cicero's *De Officiis*. The relevant sections of this work are Book 1, 1.33 - 40. Cicero argues:

> 11.33 Ultimately, our actions are limited. We do not have carte blanche to do what we like to those who have wronged us.
>
> 11.34 When it comes to a state in its external relations the state must strictly observe the rights of war and only then turn to the use of force as a last resort.
>
> 11.35 Living in peace, unharmed, is the only justification for going to war. Once war is commenced the state must conduct itself mercifully and with restraint.[29]

[27] See the preamble to the Charter of the United Nations, which states, "We the people of the United Nations determined to save succeeding generations from the scourge of war, …have resolved to combine our efforts to accomplish these aims."
[28] I demonstrate that ISIS/ISIL are doing/arguing precisely the same thing today.
[29] This clearly foreshadows the argument that comes later in history that both the reason for going to war, and the manner in which the war is carried out, once undertaken, must be just.

11.36 The reasons for both going to war and conducting one's behavior are strictly defined and must be strictly adhered to.

11.37 Cicero speaks to the legal status of soldiers.

12. One may treat their adversaries with some form of respect.

12.38 Even wars of supremacy and glory must be initiated pursuant to the same just reasons set forth earlier.

13.39 Individuals, even during the stresses of war, must behave with what today we would call integrity. One must keep one's word.

13.40 One must keep one's oath, keep one's word.

What can be extrapolated from the foregoing is the following: (i) there are in fact certain duties that we owe even to those who have wronged us, (ii) there is a limit to retribution and to punishment, (iii) the only excuse for going to war is that we may live in peace unharmed, (iv) we should spare those who have not been blood-thirsty and barbarous in their warfare, (v) we should always try to secure a peace that shall not admit of guile, (vi) we must show consideration for those conquered by force and those who have laid down their arms and pleaded for mercy,[30] (vii) the man who is not legally a soldier has no right to be fighting the foe,[31] and (viii) one must always keep his promise to an enemy for it is the spirit of the promise that must be honored, not simply the words. In his *Republic* Cicero also writes, "Unjust wars are those that have been undertaken without cause. That is to say, no just war can be waged except for the sake of avenging oneself or driving back enemies…. No war is held to be just unless it has been proclaimed, unless it has been declared, unless it concerns recovering property" (Cicero, *On The Republic* 3.25).

Along similar lines Augustine, writing in the fourth and fifth century, citing the Bible, Romans 13:4, argues that God permits the government the use of the sword. Therefore, a Christian,

[30] This argument foreshadows the concept of a Prisoner of War, and their treatment while in captivity.
[31] This argument foreshadows the modern argument that nonstate actors are unlawful by definition as they are not soldiers, do not represent the state, and therefore are not entitled to legal protections.

if he is serving God and country, may be a soldier, take up arms and engage in violence when need be. Romans 13:4 states, in relevant part:

> For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil.

This notwithstanding, Augustine's rationale for his position is best described, and understood, by turning to many of his works.

Augustine

As demonstrated in what follows, Cicero's influence on Augustine is revealed by looking at Augustine's explanation of JWT. For example, there are three basic concepts used by Augustine in grounding his theory: (i) justice, (ii) eternal and temporal law, and (iii) the commonwealth. Augustine relies rather heavily on his conception of a commonwealth. Moreover, there are two reasons upon which war can be initiated by a commonwealth: (i) to right a wrong, and (ii) to defend itself from attack. Eternal law and temporal law are both instrumental here, as well.

Beginning with justice we see that this is a very broad concept. It affects both someone's internal makeup as well as someone's environment. That is to say, civic justice. I believe that Augustine modeled his concept of justice on the example provided by Cicero. Justice, for Cicero, in essence, is service to others. It is basically a civic duty. In *De Officiis* Cicero writes:

> The first office of justice is to keep one man from doing harm to another, unless provoked by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own…. But since, as Plato has admirably expressed it, we are not born for ourselves alone, but our country claims a share of our being, and our friends a share; and since, as the Stoics hold, everything that the earth produces is created for man's use; and as men, too, are born for the sake of men, that they be able mutually to help one another; in this direction we ought to follow Nature as our guide, to contribute to the general good by an interchange of

> acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together, man to man. (Cicero, *De Officiis* 1.7).

Something between selflessness and selfishness in the performance of one's civic duties, for Cicero, seems to be a close approximation of justice. For a person to act justly, he must be operating for the well-being of others. This behavior, this just behavior, is what fosters, and promotes, a healthy society. In short, justice's sole function is a social one.

In *The City of God,* Augustine defines justice as "… that virtue which gives to each his due" (Augustine, *The City of God,* XIX.21). For Augustine, justice is reflected in how others are treated. In other words, given civic duty, civic justice, justice is intimately connected to the treatment of others. This, for Augustine, is false justice. The only true justice is found in the city of God. To state it plainly, for Cicero justice is found on Earth, but not for Augustine.

Augustine added something to his formulation of justice. Because Augustine was a Christian, it is perfectly reasonable to expect his Christianity to influence his thinking. According to Marcia Colish, Augustine's belief that the moral value of a given act is largely derived from one's internal disposition is entirely consistent with the notion that virtue is tied to an individual's undertaking an act with proper moral intention, a view argued by Cicero (Colish 1989, 209). Augustine, we see, agrees with Cicero that virtue is internal to human beings and comes from right moral intentionality. Augustine believes that God made human nature good. Despite original sin, human nature is still good insofar as it exists. It is simply less good than before. After all, human beings are born with original sin. Augustine writes:

> For it cannot give itself the justice which it has lost and no longer has, because the man received it when he was made, and by sinning has certainly lost it. He receives justice, therefore, and on account of it he may merit to receive blessedness. Wherefore the Apostle truly says to him who begins to boast as though it were from his own good: 'For what has thou that thou

> has not received? And if thou hast received, why doest thou boast as though thou has not received it?' (Augustine, *On the Trinity* XV.xv.21).

What this means for Augustine is that humans fell from grace due to their original sin, disobeying God, and in so doing lost their innate capacity for perfect justice. Therefore, to the extent that human beings have justice it is only due to God giving it to them. By extension, Christians, the true and honest worshippers of God, are capable of exercising justice.[32] Augustine writes:

> For if these are true virtues – and such cannot exist save in those who have true piety – they do not profess to be able to deliver the men who possess them from all miseries; for true virtues tell no such lies, but they profess that by the hope of the future world this life, which is miserably involved in the many and great evils of this world, is happy as it is also safe (Augustine, *The City of God*, XIX.iv).

Augustine also writes, "For though the soul may seem to rule the body admirably, and the reason the vices, if the soul and reason do not themselves obey God, as God has commanded them to serve Him, they have no proper authority over the body and the vices" (Augustine, *The City of God* XIX.xxv). At their core these passages stand for the proposition that one cannot expect to find true virtue in those who do not have true piety. Therefore, true virtue can be found in those who have true piety. For Augustine this means one thing, Christian piety. *On The Republic* 3.27).

Despite this definitional difference, Augustine, like Cicero, asserts that justice is useful for social cohesion. According to them both, however, justice is the external manifestation of internal virtue. To remain consistent with his Christian beliefs Augustine simply substituted God for reason as internal virtue's source. Nevertheless, Cicero and Augustine seem to be in complete agreement in so far as the commonwealth has the right to either defend or avenge itself, and punish the offending party. It should be noted that for Cicero and Augustine it matters not whether the

[32] This is an idea that plays an important role in Vitoria's conception of international law even when Vitoria is purportedly secularizing justice, natural law, and creating international law.

offending party is from without or within the commonwealth. An enemy of the commonwealth is subject to punishment, and when the commonwealth does punish the offending party the commonwealth is acting justly.

The temporal law can contain punishments for unjust acts, assuming the temporal law is based on, and consistent with, the eternal law. Cicero and Augustine agree with the fact that for temporal law to be valid in this way it must be consistent with natural law.[33] If it is, the temporal law is just. If it is not, the temporal law is not. Despite the agreement between the two men Augustine modified Cicero's articulation of natural law in order to fit his Christian beliefs. Cicero writes

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or an interpreter of it. an there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and rule, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment (Cicero, *The Republic* 3.25).[34]

In the final analysis reason is what is used to govern one's actions. Humans use reason to suppress vice, and in so doing humans produce virtue.

[33] It should be noted that Cicero is a skeptic about natural law.

[34] This idea is of paramount importance when Vitoria, and later, his student, Grotius, argue in favor of an international law based on Reason. A similar notion is argued by John Locke with respect to the state of nature being governed by the law of nature, which is to say reason. Nevertheless, despite the idea's popularity it is ultimately wrong.

From this passage, part of which was quoted earlier, we can clearly see some of the more important characteristics of natural law: (i) natural law is basically reason, (ii) it is universal in its application, for it applies to all human beings, (iii) reason, used correctly, is able to control vice and thus produce virtue, (iv) temporal law can, but should not, abrogate natural law, (v) it is accessible to all and needs no interpreters, and (vi) god created it.[35] The sole focus of Cicero's god is ensuring the universe remains in order. This is markedly different from Augustine's Christian God. Cicero's god has no need for worship from individuals, nor does he seek to maintain a personal relationship with each individual alive in the way that Augustine's Christian God requires. Augustine writes:

> I did not know that true interior justice, which judges not according to custom but by the most righteous law of almighty God. By this law the customs of various regions and times were adapted to times and places. But the law itself is everywhere and always the same; it is never one thing in one place and different in another (Augustine, *Confessions* III.vii.13)

However, Augustine does not believe that humans have access to the natural law on their own. That is to say, human beings cannot discover natural law. Augustine believes for one to gain knowledge of the eternal law they must first receive divine illumination. To put it simply, in so far as natural law is concerned, humans cannot understand it unless God wants them to. Nevertheless, both Cicero and Augustine agree that the natural law emanates from God and thus requires human beings to submit to natural law, and by extension, to God. They disagree, however, on what submission meant. While the nuances of the definitions of submission are not necessarily relevant to my dissertation, for Augustine, submission to the natural law has spiritual implications. That is to say, submission, or obedience, to the natural law, and thus to God, benefited a person in so far as it brought them ever closer to the ultimate spiritual goal. Moreover, before one can

[35] It should be noted that God, for Cicero, is not the Judeo-Christian God. Cicero died prior to Christianity's emergence.

understand the relationship between justice and natural law one must first understand the relationship between justice and temporal law – laws created by humans. Ideally, the temporal law ought to be based on the natural law.

Augustine believes that while the temporal law ought to reflect the natural law, the two are not equivalent. In *On Free Will* Augustine argues, "There is nothing just or legitimate in temporal law save what men have derived from the eternal law" (2006 [387-395], 121) The extent that the temporal law is valid at all depends entirely on the extent to which it is consistent with the eternal law. In other words, temporal laws are subject to the space and time of their creation while the natural law is immutable and transcends space and time. In short, the natural law is the same everywhere, and always. Therefore, to reiterate, to the extent the temporal laws are consistent with the natural law they are valid. When the temporal law is at variance with the natural law it is invalid.[36]

In Augustine's JWT, the idea of the commonwealth plays an important role as well. In fact, for both Cicero and Augustine the concept of a commonwealth rests on natural law, temporal law, and justice. Here also Augustine looks to Cicero for his conception of the commonwealth. As with the ideas already discussed, Augustine seems to have simply modified Cicero's concept to fit Christianity.

In *The Republic*, Cicero writes (through Africanus):

> So then, a republic is a "thing" of a people. A people, however, is not every assemblage of human beings herded together in whatever way, but an assemblage of a multitude united in an agreement about right and in the sharing of advantage. The first cause of this assembling, however, is not so much weakness as a certain natural herding together, so to speak, of human

[36] These ideas, essentially shared by Cicero and Augustine, foreshadow the argument to come, namely that of St. Thomas Aquinas.

> beings. For this species is not solitary, nor does it wander alone, but it has been begotten so that not even with an abundance of all things (Book I, 39)

I believe Cicero's implication is clear. He is arguing that commonwealth needs justice. Essentially, Cicero believes that a commonwealth cannot exist without justice. In fact, for Cicero, the viability of a commonwealth is predicated on two important characteristics without which the commonwealth perishes: (i) a just temporal law under which people agree to live, and (ii) the reciprocal nature of justice – that is to say, people behave justly toward one another.

In *The City of God* Augustine, along the same line as Cicero, writes that nothing is more injurious to a republic than injustice, or the lack of justice. In fact injustice places the very existence of the republic at risk. Essentially, Augustine agrees with Cicero. For Augustine, like Cicero, a commonwealth is, at its foundation, but a group of people living under a temporal law for the benefit of all. To do otherwise is to live under a form of government that is anything but a commonwealth as both he, and Cicero, agreed that a commonwealth requires justice. Without justice it is not a commonwealth but something else. To this point, Augustine, in one of his most famous lines in Book IV of *The City of God*, asks rhetorically, "Justice being taken away, then, what are kingdoms but great robberies?" (Book 4.4)

Augustine Christianizes Cicero's idea of a commonwealth so that it may fit Christianity, implying that a function of a just commonwealth is the punishment of vice. A just commonwealth assists humans in curbing their propensity toward sin – a propensity that is partly due to original sin and humanity's fall from grace. Augustine believes that God provides humans with at least the ability to produce virtue.

God, argues Augustine, has endowed humanity with political systems so as to help humanity keep the peace. In other words, through the use of laws and punishment, government

guides humans. Therefore, the main purpose of a commonwealth, according to Augustine, is to restrain humans and indirectly guide them toward salvation in the hereafter where humans can then enjoy eternal life.[37]

Augustine, while accepting the notion that a commonwealth affords humans with a way of achieving the common good, ultimately believes that these are but means to an end. Eternal life, not peace is the end to be sought. Having explained the concepts of justice, the natural law, the temporal law, and the commonwealth, and connections of those concepts to one another, we can now look to their connections to JWT. With respect to preserving the state, Cicero argues that a just war is permissible in order to defend the commonwealth and to achieve its goal of establishing a peace that benefits all. Moreover, the commonwealth could undertake a just war in order to preserve its honor and to protect its citizens. Essentially, a commonwealth could punish a wrongdoer. Moreover, the commonwealth could undertake a just war for no other reason than to ensure its own survival, for how can a commonwealth that no longer exists perform the aforementioned functions?

Augustine makes clear that the war is a means to an end, the end being securing peace so as to allow for the welfare of the humans living in the commonwealth. JWT, for Augustine, begins with a variation of justice that was different from that of Cicero. Where Cicero sees justice as a civic virtue that ultimately serves the interests of the people in a given commonwealth to be treated honestly and fairly, Augustine adds the concepts of God's grace and divine illumination. Because of the special nature of Christians it is their responsibility to afford the opportunity to others to be

[37] For Augustine a commonwealth without a Christian God may be possible; however, only a commonwealth with a Christian God, which God has blessed with divine illumination, can ever understand natural law, and thus reach its full potential.

virtuous in a manner consistent with Christianity. This is achieved by either one of two ways: conversion or compulsion. Here, though the ends may differ, for Cicero and Augustine the means are similar. That is to say, both men believe that it is permissible for men in positions of political power to compel individuals to live virtuously. For Cicero that means in the humanistic sense. For Augustine it means Christian beliefs.[38]

Because Augustine believes the purpose of a commonwealth is the spiritual health of its people he believes that a commonwealth can justly engage in war so as to ensure its own survival. Augustine extends the similar argument made by Cicero to serve a Christian purpose. That is to say, Augustine sees threats to a commonwealth existing in two possible forms: an external threat, and an internal threat. The external threat is obvious. The internal threat is more interesting for my purpose. As we have already seen, a commonwealth is incapable of survival if it is devoid of justice. Therefore, any citizen who is allowed to live without God, or Christianity, which is necessary to live justly, is by definition living unjustly. Such a citizen poses a threat to the commonwealth itself, for the unjust citizen may come to corrupt virtuous citizens. That is to say, the unjust citizen may exert an unjust influence on just citizens. This is how Augustine viewed non-Christians.[39]

Both Cicero and Augustine seem to be in agreement on this score. Consequently, Cicero and Augustine seem to agree that a course of action is required when the commonwealth is dealing with internal threats. Once exposed, the internal threat has the two options mentioned earlier: (i)

[38] This is an interesting point because the only way Augustine can claim this is permissible for Christianity but not for Islam, or Judaism, or any other religion is if Augustine, in fact, believes Christianity is the one true religion holding a monopoly on truth, which he does. The problem is when scholars from the other faiths claim precisely the same monopoly for their faiths how does one determine who is right?

[39] This, in some respects, is how some followers of Islam view non-Muslims.

voluntarily live according to justice, or (ii) be forced to live according to justice. For Augustine, this means compelling an individual to live pursuant to and consistent with Christianity.

Augustine's argument for religious coercion is absolutely important to his JWT. As I will explore below, Augustine took Cicero's ideas of a commonwealth and a just war and reconfigured them so as to serve as justification for religious coercion against Donatists. This is a crucial difference with Cicero despite seeming similar to Cicero's allowance for a commonwealth to compel citizens to live justly. Cicero, however, is arguing for justice in the context of social justice. Augustine took what was an end for Cicero, namely social justice, and converted it into a means to a different end altogether, the commonwealth's temporal welfare, which serves the end of spiritual well-being.

As mentioned above, Augustine believes that a Christian commonwealth should be willing to not only defend itself, but to punish sinners. For a Christian to be in compliance with Romans 13:4 Augustine believes an inward disposition is required. *Why* someone engages in specific behavior is crucial. In other words a given act done for the wrong reasons can be an unjust act. To that end, a Christian who remains passive when confronted with a grave wrong, a wrong that threatens the commonwealth, and its function, as described above, is committing a sin. In *The City of God* Augustine writes:

> They who have waged war in obedience to the divine command, or in conformity with His laws, have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, "Thou shalt not kill." (Book 1, 21).

Aquinas

In discussing Thomas Aquinas we see that while, in a sense, he largely continued the Augustinian tradition, he increased its precision, and, in so doing, according to Alexander Moseley, in the Internet Encyclopedia of Philosophy (IEP), Aquinas ultimately became the model upon which "later Scholastics and Jurists … expand[ed] … and gradually … universalize[d] beyond Christendom – notably, for instance, in relations with the peoples of America following European incursions into the continent" (http://www.iep.utm.edu/justwar/). Moseley continues, "[t]he most important of these writers are: Francisco de Vitoria (1486-1546), Francisco Suarez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emerich de Vattel (1714-1767)" (http://www.iep.utm.edu/justwar/). Aquinas seems to ask one central question with regard to JWT: Is waging war always sinful? In the *Summa Theologiae*, specifically in questions 40 and 41, he sets out to answer the question (IIa IIae Q40-41).

To begin with, in question 40 Aquinas sets forth the criteria that must be satisfied for a war to be considered just. Aquinas writes, "There are three requisites for a war to be just. The first thing is the authority of the prince by whose command the war is to be waged" (Question 40, Article 1). This is to say that private individuals are not free to wage war, because they have recourse to a state's judicial system when they have a grievance that needs addressing. The second requisite is a just cause, so that they who are assailed should deserve to be assailed for some fault that they have committed (Question 40, Article 1). Aquinas believes that there must be culpability on the part of those who are being targeted with aggression. They must have injured the assailing party in some way, thereby making the actions of the assailing party just. In other words, according to John Finnis (Finnis), in the Stanford Encyclopedia of Philosophy (SEP), "[o]nly public authority

can punish or rightly engage in war …" (https://plato.stanford.edu/entries/aquinas-moral-political/ , 22). Finnis continues, "[p]rivate persons can never rightly intend precisely to harm or kill, though they can knowingly bring about harm or death as a proportionate side-effect of intending to block an attack," as in the case of defending oneself from an attack or potential homicide (https://plato.stanford.edu/entries/aquinas-moral-political/ , 22). This is an important distinction for Aquinas as he believes that proper intention is of paramount importance and only he, the prince, who is charged with protecting the public welfare can "rightly intend to kill (or injure) in the exercise of their duty to suppress the attacks of criminals, pirates, and other public or private enemies" (https://plato.stanford.edu/entries/aquinas-moral-political/ , 22). This segues to the third requirement: a right intention of promoting good or avoiding evil (Question 40, Article 1). Here the intention behind the decision to go to war must be a good intention in itself. Moseley explains, "[w]hether the act be good or evil depends on the end. The 'human reason' pronounces judgment concerning the character of the end. It is, therefore, the law for action. Human acts, however, are meritorious in so far as they promote the purpose of God and his honor" (http://www.iep.utm.edu/aquinas-iep/#SH2b , 4).

Aquinas seems to find that waging war is not only *not* sinful, it is permitted, if not sanctioned by Christianity. In support of his conclusion Aquinas cites Augustine, who argues:

> If the Christian Religion forbade war altogether, those who sought salutary advice in the Gospel would rather have been counselled to cast aside their arms, and to give up soldiering altogether. On the contrary, they were told: 'Do violence to no man … and be content with your pay' (LK. 3.14). If he commanded them to be content with their pay, he did not forbid soldiering" (Question 40, Article 1).

Interestingly, this is not Aquinas' only reference to Augustine. Given his constant references to Augustine it is quite clear from whom Aquinas drew his inspiration for his conception

of JWT. But here Aquinas enhances Augustine's original formulation. Aquinas argues that if warfare satisfies three conditions it will not be sinful: (i) proper authority, (ii) just cause, and (iii) right intention. If we look at each in turn we see that Aquinas is the first to formalize the three main principles of JWT and give them important philosophical explanation. Moreover, these three elements have been addressed and developed over the years.

Proper Authority

Proper authority, at its essence, speaks to the underlying issue of *who* may engage in armed conflict (Hensel 2008, 42). Historically, during the time in which Cicero was alive and writing, Rome had rather comprehensive laws governing war. A formal declaration was required by the College of Fetials. This formal declaration set forth the specific grievances underlying the possibility of war; moreover, the declaration had to be responded to within a specific timeframe, 30-33 days. In the event that the opponent failed to respond to the declaration Rome was legally permitted to initiate war (Bellamy 2006, 19). Importantly, anyone participating in war, under Roman law, required proper credentials (Reichberg, et al. 2006)[40]. While early Christianity allowed for self-defense, Christians believed that only God's handpicked few to whom power was entrusted were endowed with the authority to initiate war. In other words, anything beyond self-defense must be initiated by God's chosen few, or their designees. To this end Augustine argues that a king is inherently vested with the authority to decide to go to war. More importantly, once the king makes the decision his subjects are obligated to obey the king's decision. This is because the king, not the people, is appointed by God. The king not the people has the proper authority.

[40] In many respects the institutional mechanisms for going to war under Roman law can be seen in modern institutional checks and balances, modern constitutional structures, and modern international charters and treaties that serve to control abuses of authority with respect to war.

The only exception to this seemingly unchecked power is when the king's actions are contrary to God's law (Mattox 2006). This one exception notwithstanding, the king's decision bound the subjects to act. Refusal to act pursuant to the king's decision was not permissible (Bellamy 2006). Moreover, according to Augustine, individuals were only permitted to engage in violence when they were acting as actual soldiers on behalf of the king (Coppieters & Fotion 2008). For Augustine it is as simple as God reigns supreme; God's chosen few, the monarchs, are the manifestation of God's will (Mattox 2006). To be the proper manifestation of God's will, that is to say, to be a godly ruler the king must merely act consistently with God's will, God's purpose. Assuming the king does this then war is rightly seen as simply the manifestation of God's will (Mattox 2006). Functionally, provided the proper authority makes the decision of going to war, Augustine connects two of the elements of JWT: proper authority and right intention (Reichberg, et al. 2006).

Aquinas argues that war must be undertaken by "the authority of a sovereign by whose command the war is to be waged…" (Question 40, Article 1). This is crucial for Aquinas as he acknowledges that war provides a forum within which one may succumb to "private feelings of anger or hatred" (Question 41, Article 1). This is problematic for Aquinas because ultimately war must serve the public good, not an individual one. Therefore, only the proper political leadership whose job it is to serve the public good may endeavor to find the measured good and the measured action needed to serve the public good. It is part of the function of the proper political authority to formally consider the common good and act accordingly. Private individuals are not permitted to act on behalf of the state, but only on behalf of their own individual or partial goods.[41]

[41] This is an idea to which I will return later. I do not believe this issue of Proper Authority speaks to a legalistic consideration, although the requirement surely serves a legal requirement. Instead, I argue that this issue has more to do with the question of political legitimacy in so far as I argue that the political precedes the legal.

Ultimately, for Aquinas the proper authority must meet the need of serving the state. While this may take many forms it is predominantly the maintenance of security that is the proper purpose of the proper authority (Patterson 2009, 117). This is an important premise as it delineates the narrow circumstances under which individuals may revolt against their king. In other words, Aquinas acknowledges that threats may come from both without and within a given state. When looking inward for internal threats Aquinas concerns himself with sedition. Aquinas generally considers sedition to be obviously wrong. The common good within a community is disrupted when individuals engage in sedition. His reasoning is simple: individuals may justifiably fight for the common good; sedition threatens, if not outright destroys, the common good. Consequently, sedition is unjust. On the other hand, individuals are permitted to fight against a truly tyrannical ruler. This is because a truly tyrannical ruler has himself abandoned the common good. As the tyrant has placed his personal needs before that of the commonwealth the commonwealth itself is justified in fighting back against the tyrant (Dyson 2007).

This is a critical development in the evolution of JWT as here Aquinas breaks from Augustine. For Augustine all kings whether tyrannical or not are divinely chosen by God. As the ruler is chosen by God resisting the ruler is to engage in civil disobedience against God and is therefore wrong. Aquinas, on the other hand, believes that a king must serve the common good. A king who fails to serve the common good has functionally abdicated his moral authority and his subjects are thereby absolved of having to obey (Dyson 2007).

Francisco de Vitoria (Vitoria) argues that anyone may use violence. Anyone may use violence in defense of oneself, but contrary to Augustine, in defense of one's personal property. Most importantly for Vitoria's work, he argues that an individual need appeal to no authority other than his own when dealing with an immediate threat. Where Vitoria draws his line, however, is

in the *use* of force. In other words, while an individual may engage in violence to stop an immediate threat there are limits in just how much force may be used; moreover, once the immediate threat ceases the use of force must also cease (Reichberg, et al. 2006). Also, the minimum force must always be used. Gratuitous violence is simply impermissible (Pagden, et al. 2010). Vitoria argues that the commonwealth is in many respects similar to the individual. That is to say, a commonwealth may exercise the same self-defense available to an individual. The only difference between the commonwealth and the individual is that the king is the commonwealth's proper authority. It is the proper authority's prerogative to decide whether to go to war. Vitoria restricts the decision to go to war to the highest-level authority (Reichberg et al. 2006).

In the final analysis the element of proper authority speaks to who, or what, has the political power to determine when someone may engage in armed conflict (Hensel 2010). Grotius believes armed conflict is just when the proper authority, which is the person or entity who holds the supreme political power, sanctions armed engagement (Reichberg, et al. 2006). Grotius believes that, at the international level, an entity that supersedes the state should be the final arbiter of engaging in armed conflict outside its own borders.

These ideas are important because it is quite clear that they have had a profound impact in shaping the modern ideal that for an armed conflict a proper authority must sanction it. Often it is the founding document of a given state, whether a charter or a constitution of some sort, that sets forth the procedural mechanisms by which one may identify the proper authority and the proper process by which armed conflict is itself sanctioned (Raymond 2010, 12). In this regard the UN serves as the modern institutional authority that – at least on paper if not in practice – supersedes the states and creates the mechanism by which the decision to undertake armed conflict is

undertaken and sanctioned.[42] Also, the option to go to war is not the only option available to the community of nations. The UN also exercises the power of economic sanctions and inspections.[43] These various mechanisms are tools used by the UN to visit discipline upon those members of the international community who violate or disregard international law or norms. These laws and norms lead to the next element of JWT, *just cause*.

Just Cause

In developing the concept of a just cause Aquinas does not make a distinction between a just offensive cause and a just defensive cause. While I do not explore this in great detail I believe it has to do with the fact that for Aquinas warfare is undertaken when the party to be attacked is morally culpable. Therefore, to some extent all warfare is defensive in that presumably a war is commenced for right or wrong reasons. If the war was started for right reasons the entity fighting back is wrong. If on the other hand the war was commenced for wrong reasons then the entity fighting back is in the right. Either way, the war itself is just in the strict spirit of the word (i.e. one of the parties is fighting for the right reason). In other words, provided that community A is living in a morally righteous[44] manner it is defending justice when community B behaves in a way that is morally suspect. We get a sense of this argument when Aquinas argues, "There is much more reason for guarding the common weal (whereby many are saved from being slain, and innumerable evils both temporal and spiritual prevented), than the bodily safety of an individual" (Question 40, Article 4).

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[42] The UN Charter restricts the decision of whether to undertake armed conflict to the Security Council pursuant to Article 51.

[43] The UN Charter allows for economic sanctions pursuant to Chapter VII, Article 41.

[44] The idea of moral righteousness is an issue to which I return as it necessitates answering inconvenient questions as, how does one know whether *their* morality is in fact righteous? In some sense this is a question asked and addressed by Vitoria.

A concern for what is a just cause is crucial in the context of the GWT as it either validates or absolves. Interestingly, we see that what has been considered a just cause has changed. Understanding that the definition of a just cause has changed is important when we consider applying this element to non-state actors. Cicero argues that the preservation of the state and the pursuit of justice justify the use of force (Mattox 2006). We know that for Cicero these two reasons were not the only reasons justifying the use of force; nevertheless I focus on these two as they are the most relevant to my research question. Augustine, referring to Cicero, argues that justice must, among other things, be coercive and based on power (Elshtain 1995). Despite understanding the need for coercion, Augustine understood the limits of coercive power. His understanding, I would argue, can be seen in the modern world in so far as there exists an understanding that violence often results in greater violence, not peace.

Augustine is also suspicious of man's motive for fighting wars. During his time he was very critical of the idea of a man having a right of self-defense that could be exercised with deadly force (Augustine, *On Free Choice of the Will* 9). Killing to protect that which could not be taken into the next life was impermissible for Augustine. He did, however, allow for killing in the defense of others, or when ordered by a legitimate political authority (Bellamy 2006). It should be noted that Augustine's notion of not being able to kill in self-defense has been rejected in its entirety by modern society. In all 51 jurisdictions here in the U.S., for example, one may kill another if, and when, acting in self-defense. Augustine also believes that one may kill if God commands it, or to enforce proper religiosity (Bellamy 2006). In short, both Cicero and Augustine believe that force may be used when preserving the state, and the state may punish individuals who threaten its existence.

Aquinas, on the other hand, argues that cooperation between and among men is the key, and that the common good ought to be the focus. Therefore, leaders must have as their primary concern the pursuit of common good within a given community (Dyson 2007). It is in contradistinction with this idea that Aquinas focuses on civil disobedience. While Aquinas does not generally allow for internal strife as it threatens the state from within, he does allow for resisting a tyrannical ruler. This distinction for Aquinas hinges on one presumption: the tyrant pursues self-interest at the expense of the community (Dyson 2007).

Vitoria developed just cause still further. He argues that restoration of a state's rights may be pursued with the use of force. These types of campaigns are defined as defensive by Vitoria. Moreover, these defensive wars can be used for a multitude of reasons. For example, an enemy can be attacked on their grounds if it is deemed doing so would ultimately prevent an attack at home (Hensel 2010). A key difference for Vitoria, however, is that he allows for something that his predecessors did not: the warring parties could both believe they are acting justly. He attempts to prevent this problem by delineating the circumstances in which he does not believe that a valid argument can be made as to the justness of a given motive. Among these circumstances are religion, imperialist pursuits, personal whim of the ruler, or personal aggrandizement. At the other end of the spectrum is defense of the state, which Vitoria thought was patently just (Pagden 2010). Grotius argues along the same line as Vitoria but allows for self-defense to include defense against the mere potential of an attack (Coppieters & Fotion 2008).

A truly modern account of a just cause is argued by Walzer in *Just and Unjust Wars*. Walzer believes that a just cause is both necessary and sufficient for the use of force. That is to say that Walzer allows for debate around the idea of whether a just cause exists; however, once a consensus has been reached it is the only element on which the state need be focused (Walzer

1997). In short, Walzer believes the state's rights are derivative of individual rights. A state may protect its sovereignty in much the same way an individual may protect his own. Walzer does allow for the idea that when living within the structure of the state the individual, by necessity, sacrifices some of his individuality for the benefit of the collective. That is to say, the individuals precede the state in existence and ultimately consent to the state's existence in so far as they choose their form of government (Walzer 1977). Walzer's conception of a just cause is largely consistent with Aquinas in that one party will be acting justly while the other party is acting unjustly (Walzer 1977). Modern scholars of just war largely agree with Walzer. These scholars include Thomas Nagel, Jeffrie Murphy, Robert K. Fullinwider, Philip Devine, Anthony Kenny, John Finnis, Joseph M. Boyle, Jr, Germain Grisez, and Ingrid Detter, who will be discussed in greater detail below.[45] I state at the outset that my research stands in stark contrast to theirs. In other words, I reject the works and ideas of these scholars. Importantly, I do so not out of hand but only have careful consideration of JWT itself. In that way, my research is part of a developing school of thought that rejects not only JWT but to an increasing extent the very idea of natural law that underpins JWT. I count among this number scholars such as Alexander Wendt, Aleksander Jokic, and Andrew Fiala.[46]

In the final analysis we see that just cause has morphed. It no longer means what it did when Cicero and Augustine addressed it. What was once narrowly construed as protecting the self and the group now encompasses protecting states in various contexts and for varying reasons. For the most part, modern scholars look to defensive reasons as being just and offensive reasons being

[45] For representative works of their views see Thomas Nagel's *War and Massacre*; Jeffrie Murphy's *The Killing of the Innocent*; Robert K. Fullinwider's *War and Innocence*; Philip Devine's *The Ethics of Homicide*; Anthony Kenny's *The Logic of Deterrence*; and John Finnis' *Nuclear Deterrence, Morality, and Realism*; and Ingrid Detter's *Law of War*.

[46] For representative works of their views see Alexander Wendt's *Quantum Mind*; Aleksander Jokic's *What's a Just War Theorist?*; and Andrew Fiala's *Just War Myth*.

invalid. The one exception, along the lines argued by Grotius, is preemption. The potential for attack may justify the use of force and therefore provides a just cause. Closely related to just cause, however, is right intention, which I look at now.

Proper Intention

Aquinas argues that "military prudence may be an art, insofar as it has certain rules for the right use of certain external things, such as arms and horses, but insofar as it is directed to the common good, it belongs rather to prudence" (Question 50, Article 1). This speaks to proper intention, which is predicated on prudence. Prudence is heavily dependent upon an actor's internal disposition. Therefore, we can conclude that warfare, for Aquinas, is largely about the characters of the actors and the participants. To this end, Aquinas argues that right intention is dependent upon the pursuit and attainment of peace. An emphasis upon proper intention is an attempt to prevent warfare from devolving into gratuitous cruelty and violence. Aquinas specifically argues, "The passion for inflicting harm, the cruel thirst for vengeance, and an unpacific and relentless spirit, lust of power" are "rightly condemned in war." (Question 40, Article 1). Finally, a closer reading of the three conditions demonstrates that proper intention must be present in the first two. Only a just peace, pursued by the proper authority for a just cause, renders a war just.

As was argued by Thucydides, wars are often claimed to be fought for idealistic reasons, but are actually fought for reasons vastly different from those professed (I.1.23). In the context of JWT, the problem is how does one determine the true intention of a state? Coppieters and Fotion speak of discerning the true intentions of a given state's leaders (Coppieters & Fotion 2008). I believe this is problematic in the modern context as most states are not governed by dictators. Rather, most developed states are governed by democratic forms of government. Therefore,

instead of looking to a "leader's" intentions one can deduce the intention of the state by looking to not only its rhetoric but its actions when going to war. Nevertheless, the concept of right intention is still important in the modern world, or at least in the GWT, because the intention behind a given act of violence can change it from homicide to terrorism. For this reason I must, and do, consider right intention a still important part of JWT.

Historically, the motives for war have been met with skepticism. Consequently, scholars have attempted to articulate ways of identifying the true intentions of an individual when the choice to go to war is made. Cicero believes that right intent is known if a ruler abides by the rules in place for such a decision, makes a clear demand for remedying the problem and also places the other party on notice of the possibility of war, and, finally, allows the other party sufficient time to respond.

Augustine argues in *Contra Faustum* "the real evils of war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and lust for power and such like" (book 22, chapter 74). For reasons similar to those cited above as problematic Augustine looks to the legitimate authority of a regime or a state to determine whether the intention behind going to war is proper. This is convenient for Augustine considering that, as demonstrated above, he believes that as God's chosen man his choices are a reflection of God's will.[47] This is crucial because for Augustine the fact that a leader is God's choice demonstrates a presumptively valid intention.

Aquinas, more so than his predecessors, connects the three elements of proper authority, just cause, and right intention. He nevertheless argues that war is acceptable if it is fought in the

[47] This is important because Augustine acknowledges that acting on God's behalf provides not only a *Just Cause*, but is also evidence of acting with *Proper Intention*.

service of the good over the evil.[48] Aquinas ultimately sees that proper intention must, and does, underpin the other two elements. In other words, adhering to the elements of legitimate authority and a just cause, but doing so without proper intention, renders the entire endeavor unjust in the context of JWT (Dyson 2007).

Vitoria, like Aquinas before him, moves JWT in a new direction. He argues that morality need not rely exclusively on religion. Preceding Grotius' argument regarding the secularization of morality and natural law, Vitoria believes that force may be used if the intention is to defend oneself, defend others, and punish evil. This, he believes, is universally valid. That is to say, Vitoria's argument is essentially that morality transcends culture and religious differences. To this end, Vitoria advocates a somewhat detached way of analyzing one's intentions for going to war. First, war should be avoided for as long as absolutely possible. Second, once undertaken, the only goal of war should be peace. Third, once concluded, assistance should be provided to the vanquished (Pagden & Lawrence 2010). Given the importance of Vitoria I explore him more closely.

Francisco de Vitoria
(School of Salamanca)

As mentioned above Vitoria's version of JWT goes in a different direction from those who preceded him. Vitoria is regarded as the leader of that which is commonly referred to as the School of Salamanca.[49] Moreover, Vitoria's conception of an international legal order, universally valid, stems from the idea that the family of peoples consists of both a community of states and a

[48] This is important in that we see President George W. Bush make the similar argument in 2001 when initiating the GWT. For my purposes, however, it is ultimately a meaningless statement both when made by Pres. Bush, and Aquinas before him.

[49] The School of Salamanca is a label applied to scholars of natural law and of morality who attempted to reconcile the works of Thomas Aquinas with the political economy of Europe in the sixteenth century.

community of men. Carolina Kenny of the Department of Defense and Strategic Studies at Missouri State University argues that Vitoria was working at a time when "looting, pillage, exploitation and conquest were common in the territories discovered by Spain…" (Kenny 2015, 2). In that context Vitoria used the theology of ethics as a starting point from which to create a "universal system of laws ruling all mankind" (http://www.classicsofstrategy.com/2015/07/relectiones-by-francisco-de-vitoria-1538-1539.html #3r ,1). Nevertheless, despite his affinity for Aquinas and Augustine, Vitoria's conclusions differ profoundly from those of Aquinas. Vitoria argues that right, in itself, and justice, in itself, take precedence over any concern for either the proportional use of force or the consequences thereof. To this end we see that Vitoria, like the thinkers before him, begins with the ideas of his predecessors and changes them in a manner more consistent with his times. Moseley argues that in applying the "just war tradition to the contemporary world, Vitoria offers a systematic account of just war. In doing so he offers the world what is now a very modern view of rights and responsibilities in war" (http://www.alexander-moseley.me.uk/Articles/just%20war%20theory /philosophers/Vitoria.htm). It must be noted, however, that Vitoria, in his lecture, *De Indis*, argues Christian norms and mores are both universal and endorsed by *jus gentium*. Moreover, evangelizing, or spreading the law, is not a function of the divine law. Instead, under Vitoria's logic, it is authorized by the law of nations (*De Indis*). In this way Vitoria is largely considered by many in the field of international law as the founder of modern international law.

As already stated, Vitoria was writing in part as a response to Spain's activities and propensity for war in the "New World." He attempted, therefore, to offer a structural understanding of JWT universally applicable. First, breaking markedly from Aquinas and Augustine, Vitoria rejects religious differences as legitimate for *just cause* (*De Jure Belli*). Despite

this rejection of religious difference as a just cause, Vitoria is nevertheless a Christian and argues that a war ought ultimately to be fought consistently with Christian virtues (*De Jure Belli*). Understanding how Vitoria can argue against religion in one respect yet embrace it in another requires, at minimum, a superficial understanding of his political theory. His political theory is largely predicated upon an understanding of natural rights that presupposes that social existence, and not individualistic self-interest, is the driving force behind human nature, morality, political community, and law.[50] According to Vitoria, if one begins with this different assumption one finds that government's purpose is the promotion of the common good. It is important to note that within Vitoria's understanding of the common good is the idea of a virtuous life.[51] Namely citizens must live a virtuous life, as defined by Christianity, and one of the government's main functions is to promote this endeavor. Moseley writes, Vitoria believed the best form of government to accomplish this virtuous life is a monarchy because a monarchy is presumably beyond the reach of the common ailments of democracy: political dissension, special interests, and factions (http://www.alexander-moseley.me.uk/Articles/just%20war%20theory/philosophers/Vitoria.htm).

With respect to JWT, Vitoria clearly begins with many of the assumptions made by Aquinas, the most important of which is the notion that warfare may be undertaken to combat a wrong committed, provided that peace is the ultimate purpose of engaging in war. Similarly to Aquinas, Vitoria argues that only the proper political authority for a given political community may declare war. This proper authority is found in the sovereign of a given state. As for reasons,

[50] This is similar to an argument I will make later in Chapter 4 of this work. Vitoria is essentially claiming that social-contractarians, such as John Locke, Thomas Hobbes, and Jean Jacques Rousseau, are wrong in the their foundational assumptions of human beings living as largely isolated individuals in the state of nature who come together out of individual self-interest temporarily aligned. Instead, human beings are social animals.
[51] During the defense of my dissertation I will argue that Vitoria and his ilk get this entirely wrong.

or just causes, for going to war, as stated above, Vitoria rejects religious differences as a just cause. Instead, he seems to argue that aggression, and aggression only, constitutes just cause.

In this way we see that Vitoria's understanding of just cause is a categorical one. That is to say, whether a cause is just stems from the intent with which an action is taken, and not from its consequences. An interesting facet of Vitoria's JWT with regard to an intrinsic value of justice is the idea that both sides of a conflict can argue in earnest that it is the one and not the other who is fighting for justice.[52] He understands that human beings can quite simply get it wrong. That is to say, people can be mistaken when it comes to identifying just cause. In which case both sides to a conflict may, in good faith, believe that they are justly combatting an aggressor and yet they can both be honestly mistaken in their belief as compared to *the* transcendent truth as understood by God. This is a fundamental difference from the thinkers who came before him and in a sense a turning point in international law.

Lastly, Vitoria, in *On the Law of War*, addresses the issue of combatant status. He argues, "it is lawful to kill indiscriminately all those who fight against us" (Vitoria, *Law of War*, 315). Presumably the fact that individuals are engaging in threatening behavior renders them subject to killing. Interestingly, however, Vitoria also argues that all adult males, when innocents are indistinguishable from the guilty, may be killed indiscriminately. This is so because the *intent* is a proper one. That is to say the intent in such a situation is to kill the guilty. The innocent are essentially collateral damage.

[52] This is not Vitoria engaging in an argument for cultural relativism and non-universality. Vitoria certainly believes in a universal truth and consequently a universal justice that transcends time and space, but allows for the possibility that both sides to a conflict are wrong regarding their understanding of what that justice actually is.

Before moving on to Grotius a concise summary is helpful to see where we are in the chronology. Vitoria's analysis of JWT is a foundational component of the laws of war. A sovereign, a proper political authority, may go to war under certain circumstances. While Cicero first described a theory of what would make a war just, not necessarily a just war theory, Augustine and Aquinas "picked up" Cicero's idea and developed JWT further. Augustine begins to lay the foundational ideas for a theory for the use of force that is consistent with morality and thus morally legitimate. Nevertheless, Augustine did not articulate the condition precedents, or the antecedents, required to render a war just. Because Augustine was writing at a time of increasing violence and disorder within the Roman Empire, the concept of defense[53] was central in Augustine's work.

Aquinas, writing in the thirteenth century, took Augustine's arguments as authoritative. In an attempt to clarify and thus render JWT more succinct, Aquinas, in effect, fine-tunes, or refines, Augustine's arguments with respect to JWT. Aquinas enumerates conditions, or criteria, that must first be satisfied before a war is deemed just. First, "the authority of the sovereign by whose command the war is to be waged" (Question 40, Article 1) must be proper. Second, the causes leading to the war must be just (Question 40, Article 1). Third, a proper, or rightful intention, is required during hostilities as the only intent that is proper is the "advancement of good, or the avoidance of evil" (Question 40, Article 1).

Vitoria takes the work of Cicero, Augustine, and Aquinas and applies it to the conditions of the sixteenth century. Where JWT, as created and developed by Cicero, Augustine, and Aquinas falls short in the sixteenth century, Vitoria undertakes to adapt JWT to the then existing conditions. Specifically, we see in *De Indis*, Vitoria pushes the boundaries of Aquinas' understanding of JWT.

[53] Defense included both self-defense and defense of others.

Vitoria argues war itself must be subject to rules: it should be used only to prevent greater evil; legitimacy of war must be predicated upon proportionality and the fighting of the war must comply with certain moral limitations. When viewed from this perspective, acknowledging that Vitoria is the founder of international law, and that his goals were to create a non-religious basis for a universally applicable international law, and that his thinking was clearly affected by the times in which he was writing, we see that the foundations of international law, as largely understood today, are grounded in a Dominican Friar's moral critique of the Spanish empire as it existed in the sixteenth century. Nevertheless, despite historians tracing the origins of international law to Vitoria, Hugo Grotius is generally considered the father of international law and I address him next.

Grotius

For all intents and purposes, it is proper to begin a discussion of Grotius' work in 1604 when, according to the IEP, "Grotius was drawn into the sensational controversy over privateering in the Southeast Asian trade" (http://www.iep.utm.edu/grotius/ , 2). This is important because in an attempt to justify the seizure of Spanish cargo, Grotius thought extensively about the "deep principles of law that connected those separated by nation and culture" (http://www.iep.utm.edu/grotius/ , 2). Out of this endeavor comes the notion that there exists a basic law of nature whereby one may at once engage in self-preservation and participate in social life; these ideas are pivotal in his later life and later work. After decades spent in various high-level diplomatic posts either actively shaping, or participating in shaping, the major political events of his day, Grotius, while in prison, began to think about and write *De iure belli ac pacis*. In writing this, his most famous work, he returned to his earlier ideas and simply both expounded and developed them.

To that end, Grotius, unlike the scholars who came before him, depends heavily on the authority of other writers. Why this is the case is a bit of a mystery. According to the Stanford Encyclopedia of Philosophy (SEP), there are three plausible explanations for why Grotius places such emphasis on the works of others: (i) Grotius believes in a universal cause, or a universal truth that transcends time and place, (ii) Grotius is interested in refuting skepticism with respect to international law, and (iii) Grotius seeks to identify first principles "… which lie at the basis of *all* normativity, not just a portion thereof." (http://plato.stanford.edu/entries/grotius/ , 4). It is my opinion that these three different explanations are actually distinctions without differences. That is to say, in so far as Grotius is looking to demonstrate that political, legal, and moral "… norms are all based on laws derived from or supplied by nature" (http://plato.stanford.edu/entries/grotius/ , 4), then there is fundamentally no difference to be found in the three reasons set forth above because each of the three is predicated on the assumption that there *is* a definitive transcendent right and wrong, a transcendent natural law, which governs politics, the law, and morality. Therefore, Grotius focuses more on natural law than any other topic, thereby earning the title, rightly or wrongly, the father of natural law (http://plato.stanford.edu/entries/grotius/).

Grotius' treatment of natural law depends upon his answering two questions: (i) what is the source of natural law, and (ii) how do we determine the content of natural law? He answers the first question by proclaiming that the source of normative values "arises from the nature of the action itself, so that it is right *per se* to worship God and it is right *per se* not to lie" (http://plato.stanford.edu/entries/grotius/ , 5). This differs markedly from his previous view that God chooses the normative content of natural law and we are thereby bound by his decisions. It should be noted that this is similar to Socrates in the *Euthyphro* in so far as Socrates enquires into whether something is pious because it is in fact right or because the gods say it is right. If it is the

former, then why does one need the gods to understand right and wrong? If it is the latter, by what standard does one determine who is right when the gods disagree? Here, Grotius changed his mind from the latter to the former. Arguably, his most famous or oft-quoted statement demonstrates Grotius' final position and the fundamental basis for his natural law theory. In *The Rights of War and Peace* Grotius argues, "… all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs" (Grotius, *The Rights of War and Peace*, I.XI). With this one statement Grotius effectively removed natural law from under the auspices of God and functionally secularized it so that right and wrong were right and wrong regardless of God. Foreshadowing John Locke, perhaps following Cicero, Grotius now argues that right reason and nothing else is solely necessary to answer both questions. In other words, right reason is the source of natural law and is both necessary and sufficient to identify the content of natural law. Grotius argues, "the law of nature[54] is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined" (Grotius, *The Rights of War and Peace*, I.1.10.1). What this means is that only behavior that is consistent with both right reason and the need for social cohesion is permissible under natural law. Behavior that is inconsistent with these aspects of human nature is impermissible under natural law. Here is the fallacy in their thinking. Right reason is not separate and distinct from social cohesion. Right reason is entirely dependent on social cohesion. The merit of the former is determined by its utility in achieving the latter.

[54] A phrase similarly invoked by John Locke who claimed the state of nature is governed by the law of nature, namely reason.

As to the second question set forth at the outset, "how do we determine the content of the natural law?", Grotius answers by stating that human nature itself reveals, and thus teaches, the content of natural law. If one studies human nature, according to Grotius, one finds that humans are governed by two fundamental characteristics: (i) the desire for self-preservation[55] and (ii) the need for society[56] (http://plato.stanford.edu/entries/grotius/ , 6). Interestingly, the two not only act upon each other, but they are crucial for humans to survive. For Grotius this follows from the simple premise that human nature clearly renders humans both emotional and rational creatures. We have a natural instinct for self-preservation, but not self-preservation at any cost. Our desire for society seems to affect our instinct while simultaneously being affected by it. In this way Grotius not only changed the natural law but also international law in so far as international law is grounded on the idea that there is an inherent right and wrong, irrespective of a deity.[57]

To that end, John Fabian Witt (Witt) argues, in *Lincoln's Code*, "… war in America is … the story of an idea about war, an idea that Americans have sometimes nurtured and often scorned" (Witt 2012, 1). Witt continues, "[t]he idea is that the conduct of war can be constrained by law" (Witt 2012, 1). This is important because given America's prominence at the international level and its unrivaled military dominance, America's attitude toward any attempt to constrain its behavior in the context of war is critical because, as Witt asserts "… the idea of a law of war has contained inside itself two powerful but competing ideals for armed conflict. One is humanitarianism. The other is justice" (Witt 2012, 9). Interestingly, the American statesman, Henry Kissinger, contrary to Witt's contention famously said, foreign policy "should not be

[55] I return to this idea and discuss it in greater detail in Chapter 4.
[56] I return to this idea and discuss it in greater detail in Chapter 4.

[57] In Chapter 4 I briefly demonstrate that Grotius, and others, began with correct premises but ultimately arrived at incorrect conclusions; therefore, he was ultimately wrong.

confused with missionary work." This would seem to imply that to an extent neither humanitarianism nor justice plays a major role in U.S. foreign policy. Nevertheless, Witt's work will be explored in Chapter 4.

Chapter Three:

International Law

Argument Against Extending Rights to Nonstate Actors

Answering my research question requires an answer to an equally basic question: Under the legal system, as it currently exists, are nonstate actors, or terrorists, legally protected in any way by international law? Determining whether a terrorist is covered under the law of war is a relatively straightforward endeavor as what is required is little more than a legal and contextual analysis of the various relevant primary documents that speak to who is and who is not covered under the law of war. Any analysis undertaken to determine the protected status of individuals begins with the four relevant international treaties commonly known and referred to as the 1949 Geneva Conventions (Geneva Conventions).[58]

The first question to ask is, Are there any qualifying conditions upon which protection is predicated? The answer to this question is found in understanding the *purpose* behind the Geneva Conventions. The conventions were, and are, meant to protect the men and women fighting on behalf of duly, legally constituted states.[59] In other words, the Geneva Conventions are meant to protect *soldiers* when fighting.[60] Soldiers wounded on the field of battle are protected under Convention I. Soldiers wounded in the sea, air, or shipwrecked are protected under Convention

[58] The four Geneva Conventions are: (i) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter Convention I), (ii) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Convention II), (iii) Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter Convention III), and (iv) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter Convention IV).

[59] The international law expresses the ideas expressed by Cicero, Augustine, Aquinas, and others with respect to war being undertaken by a proper authority and carried out by the state's lawful, and legitimate, representatives, namely soldiers, not private citizens.

[60] See note 37.

II. Soldiers captured by their enemy under Convention III are protected and afforded prisoner of war (POW) status. And, finally, civilians are protected under Convention IV.[61]

Taken in the aggregate the Geneva Conventions constitute the law of war, which is to say international law as it pertains to war. As such these conventions delineate and articulate the individuals who *are* protected and the individuals who are *not* protected by, and under, the law of war. To be protected under the law of war, an individual must first satisfy certain conditions. Under the law of war, the treatment to be received by a captured individual depends entirely upon their status pursuant to, and consistent with, the Conventions. In other words, a soldier that satisfies the conditions of the Conventions, if captured, will be legally classified as a POW and will enjoy all of the benefits and legal protections such a classification affords him. On the other hand, an individual engaging in armed conflict who does not satisfy the conditions of the Conventions finds himself outside the law, classified an unlawful combatant,[62] and thus designated a detainee as opposed to a POW. Detainees, pursuant to Convention III, do not enjoy POW status and are therefore not entitled to legal protection.

Geneva Convention III: Protection of Law

Pursuant to Convention III an individual qualifies for protection under the law of war if he adheres to concepts that derive from one of the tenets of JWT, proper authority.[63] Under international law one must be in possession of proper authority to wage a just war. Therefore, a combatant must wear a uniform, carry arms openly, be subject to a proper command structure, and affirmatively adhere to the tenets long embraced by the international law and now set forth in the

[61] There are two additional Protocols to the Geneva Conventions, both adopted in 1977. Protocol I speaks to the rights of liberation movements in international conflicts. Protocol II addresses the specifics of internal wars.
[62] "Unlawful combatants" are also referred to as "nonstate" actors, "unlawful enemy combatants," or "terrorists."
[63] See note 37.

law of war. These fundamental principles serve to identify and separate civilians from combatants. These principles make up the principle of distinction, the core of the law of war.[64] Therefore, any attempt to place terrorists on equal footing with soldiers, or to provide terrorists with greater legal rights than they are already afforded, or to which they are legally entitled under international law, is a violation of the law of war itself. In other words, treating "terrorists" and soldiers equally is illegal under the law of war. Therefore, in a sense, treating them equally serves to undermine international law. It is important that we remember that Convention III stands for the proposition that the international legal system will protect soldiers and *only* soldiers who take great pains to respect civilian life and distinguish themselves accordingly. As stated above, failure to distinguish themselves renders a combatant unlawful and thus, by definition, outside the law. For some, it is perhaps intuitive to say these nonstate actors, if not soldiers who are protected under the law, must therefore be citizens and protected accordingly under Convention IV. Unfortunately for those who make this argument, *civilians* are in fact protected by Convention IV, but if, and only if they *do not* take up arms or otherwise participate in hostilities. Taking up arms, or participating in hostilities, results in one's loss of the designation "civilian." As a concept this is important because anyone at any time can behave in such a way so as to effectively remove themselves from under the auspices of international law and render themselves a nonstate actor, an unlawful combatant, or a terrorist subject to detainment and punishment. More specifically, the law of war speaks to three classes of people who are protected under international law. The class distinction depends entirely on the legal status of those captured *during* a conflict. These classes are (i) regular

[64] While these conditions are contained within Convention III, these conditions also existed and applied under the Geneva Convention Relative to the Treatment of Prisoners of War.

soldiers, (ii) uniformed freedom fighters, and (iii) citizens. Taking each in turn, as stated, regular soldiers are entitled under the law to be treated as POWs.

Regular Soldiers

The third Convention contains the principle that this entitlement and all of the privileges afforded POWs under international law are contingent on soldiers engaging in combat while wearing regular combat uniforms, bearing their weapons openly, only while under a proper and responsible command structure, and themselves following the laws of war. Moreover, providing these criteria are satisfied, a captured soldier, a POW, will be held, but will not be put to trial and will be released immediately upon the cessation of hostilities.[65] Nevertheless, the protection afforded POWs is limited in one legal respect. Under Common Article 3[66] POW status does not protect the soldier who may have undertaken, or in fact committed, war crimes. If such a soldier committed such acts and was captured, he would have *presumptive* protection under the POW classification, but if it were discovered that he committed war crimes, he, while still classified a POW, would be legally triable under the law of war. He would likely be tried in a military court or tribunal, and, if adjudicated guilty, would be subject to punishment.[67]

Uniformed Freedom Fighters

Uniformed freedom fighters, the second class of protected individuals, while neither representing a duly constituted state nor necessarily regular soldiers, behave similarly to, if not exactly like, regular soldiers. They wear uniforms, answer to a proper chain of command, bear

[65] Convention III, article 118: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."
[66] Common Article 3 refers to the identical Article 3 in each Geneva Convention.
[67] It should be noted that this is simply not true for Americans as it is the stated policy of the U.S. under several administrations that no American will be subject to the jurisdiction of international law.

arms openly, and adhere to the law of war. Because they are not members of a state-sanctioned military, however, they are irregular belligerents and freedom fighters. The law presumes that their motives are independence from, of, or in some instances affiliation with, a country. Conceptually, an example would be any group who rises up within their own state and fights for their own independence.[68]

Admittedly, if these freedom fighters fail in their attempt to gain their independence they are subject to the severest of punishments under their respective domestic law. They will likely be treated as insurgents, rebels, or traitors, and at minimum will be presumptively triable for, and likely be guilty of, treason. Although domestically a given country is free to impose its own domestic laws on such citizens under international law, the international community, through the United Nations and the International Court of Justice, and even the International Criminal Court, can treat these same individuals as traitors or criminals who betrayed their country and, depending on how they conducted themselves, triable at the international level. They *may* be entitled to protection under Protocol I.[69] This can happen for one of two reasons: (i) the state in which the revolution was attempted was a signatory to Protocol I, or (ii) the state in which the revolution was attempted actively applies, or adheres to, Protocol I despite not being under any formal obligation to do so. Moreover, uniformed freedom fighters are protected under the language of Common Article 3. In short, uniformed freedom fighters, as long as they are fighting for independence from, or within, a nation that is a party to the Conventions, are protected under the law of war.[70] If these freedom fighters succeed in their revolution, they will be a step closer to acceptance of their new

[68] E.g., The American Revolution, the American Civil War, but not the civil war currently underway in Syria.
[69] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter Protocol I).
[70] They are protected under the international law of war insofar as they are protected under Common Article 3.

state at the international level. If, on the other hand, they are unsuccessful, they will likely be prosecuted by the state in which they fought despite having a recognizable legal status under the law of war. Victory brings validation; defeat, condemnation.

Civilians

Civilians, the third group who receive protected status under international law, are protected pursuant to the language in Convention IV as it was adopted specifically to protect them. Insofar as it was understood that civilians, where and when possible, were excluded from attack, general international law has long protected civilians. Codifying this in explicit language in a treaty is relatively new. To that end, civilians were, and are, afforded special protection and privileges if captured during an armed conflict. However, as stated, under international law, in the event that a civilian takes up arms and fights, which is to say a civilian willingly inserts himself into an armed conflict, he loses the protection of Convention IV.[71] In other words, there is an extent to which the Fourth Geneva Convention simply expanded, enhanced, and specified the rights afforded civilians during conflict even though many of those rights were, at least in principle, already understood under international law. For the purposes of this analysis one of the more relevant rules, if not the most important, is that terrorists claiming to be civilians are not designated POW when captured. Instead, as stated, terrorists are detainees, unlawful combatants, and thus not afforded any of the rights of POWs. They are, however, still subject to release upon the

[71] *See* Convention IV, art. 5, which specifically states: "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State."

conclusion of hostilities[72] – whatever that means in the context of the GWT, which could conceivably continue in perpetuity.

This segues into the next section, which states that those who are *excluded* from protection under the law of war: (i) unlawful combatants, (ii) mercenaries, and (iii) spies. The exclusion of these groups of individuals is well established in international law. On its face, any movement or argument to include terrorists within the group of protected individuals, without first changing existing international law, is to behave, by definition, illegally. Taking each in turn I begin with unlawful combatants, or terrorists. For my purposes here I look to the United States Supreme Court (USSC) and its definition as it is the intellectual backbone for the legal artifice created by the United States post-9/11.

Unlawful Combatants

In *Ex parte Quirin* the Court stated,

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. (*Ex Parte Quirin* 1942, 31)

Essentially, anyone fighting in a conflict must distinguish themselves from civilians. If they fail to do so, they run the very real risk of altering their legal status, thereby losing their protection under the law. It is important to note that the requirement for combatants to distinguish themselves from civilians is quite old. This includes those combatants who affirmatively attempt to appear to

[72] *See* Convention IV, art. 45, which specifically states: "This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities."

be part of the civilian population by way of disguise. Warfare has always had an implicit understanding that those who do not participate in combat are excluded from the war itself.[73] That is to say, the civilians are protected by the law of war.[74] There is a fundamental reason why such emphasis is placed on the requirement for distinction. Without it, neither side would know whom they are fighting; neither side would know who the enemy is. Therefore, the law of war simply takes as a given that those who fail to distinguish themselves accordingly are undeserving of legal protection. Moreover, the law of war will assume those combatants to be unlawful terrorists. Therefore, taken as a whole, under the current structure of the law of war, terrorists qualify for neither soldier status nor civilian status.

Because of this distinction, a captured soldier will be treated differently under the law from a terrorist. As has been stated, a terrorist is not protected under the law of war. He will not be entitled to the legal protections POW designation would otherwise provide him. In terms of proving the elements of these criminal acts, if he is caught during the commission of a crime, the *intent* component of international law will be assumed based on the nature of his behavior. If caught during the commission of an *act* of terrorism, depending on whether or not others were involved, the terrorist would be charged with conspiracy or, depending on the circumstances, possibly espionage as a spy. If in addition to his attempting to commit an *act* of terrorism he participates, illegally, in a given conflict, he is in further breach of the international law of war. If this is the case, he is subject to a trial, and, if tried, he is to be tried by a military tribunal, not the civilian courts; if convicted, he is subject to punishment deemed adequate by the convicting entity

[73] I believe that this is due to cultures sufficiently similar recognizing something of themselves in the other and not wanting to destroy them indiscriminately. On the other hand, the same does not hold when cultures engaging in conflict recognize nothing deemed worthy of preservation in each other.
[74] *See* Convention III, art. 4.

within the parameters of the law. Moreover, terrorists, as detainees, are legally subject to potentially indefinite detention until such time as the hostilities are concluded.

Mercenaries

The second group of unprotected individuals is mercenaries. Despite at times wearing uniforms, thereby indicating they are perhaps members of an organized unit, mercenaries are actually excluded from protected groups under the international law of war. An attempt has been made to codify this idea in the 1989 United Nations Convention Against the Recruitment, Use, Financing and Training of Mercenaries.[75] Article 3 of the Convention Against Mercenaries specifically attempted to prohibit the use of mercenaries in armed conflicts. Admittedly, this Convention has not been adopted by many states.[76] I would argue that the main problem with this classification of individuals is that it is conceptually difficult to differentiate between mercenaries and "security forces,"[77] let alone concisely define mercenaries. In other words, the legal or definitional parameters for mercenary status are narrow to the point of being all *ex*clusive.[78] The legal definition of mercenaries is so amorphous that terrorists could qualify for inclusion, because an argument can be made that terrorists fall under the heading of mercenaries. Moreover, I can easily make an argument that the overwhelming majority of American service members are mercenaries as they are not joining the military for patriotic reasons but for purposes of advancing themselves financially and socioeconomically.[79] By definition a mercenary is one who joins a

[75] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries Dec. 4, 1989 (hereinafter Convention Against Mercenaries).
[76] To date forty-three states have ratified this Convention. The U.S., UK, France, Russia, and China have not signed this treaty.
[77] As defined, and increasingly used by the U.S., security forces can also mean private contractors/military companies.
[78] Given the legal language used in many Status of Forces Agreements (SOFAs), security companies are often excluded from this convention.
[79] Under the definition of mercenary in the Convention Against Mercenaries I was a mercenary as I enlisted in the United States Coast Guard for no other reason than to draw a steady salary and derive certain educational benefits

fighting force for private gain.[80] While determining the motivation of another is difficult, in the case of terrorists *private gain* may include the desire for religious reward and not simply financial.[81]

Spies

The third group of individuals not covered under the law of war is spies. Here the analysis is a rather straightforward affair insofar as spies make themselves as *indistinguishable* as possible from a given civilian population. In carrying out their work their sole purpose is to blend in entirely with the surrounding civilian population. A terrorist, it can be argued, falls into this category in that an individual is blending in among the civilian population in an attempt to garner information, ascertain a state's or a population's weakness, and then attack. This, by definition, renders them as having violated the law of war and thus excludes them from the law's protection.

Terrorists

This brings me to my analysis of the legal status of terrorists. Terrorists, by definition, use terrorist *tactics*. It is their very modus operandi to use nonconventional methods at unexpected intervals to attack their targets – more often than not the civilian population of a given country. In recent history we have witnessed terrorists using bombs, planes, automatic weapons, and even cyber-attacks as means to terrorize their targets. Soldiers, similarly, can commit acts of terror. Even when they are focusing on targets of military importance, it is possible to commit acts of terror. Therefore, the legal status of the soldiers involved in conflict requires that certain

upon the successful completion of my four-year enlistment, specifically the Montgomery GI Bill – Active Duty (MGIB-AD).

[80] Convention Against Mercenaries, art. 1; *see* supra note 18.

[81] For example, salvation, eternal life, martyrdom, etc.

protections be afforded and a case-by-case evaluation be undertaken to determine whether an act of terror has occurred. Terrorists, on the other hand, are entitled to no such courtesy under the law of war, as they are by definition unprotected and not deserving of such protections.

If we look at the goals of terrorism within a historical context, we can differentiate between *political* and *social* goals.[82] In the American experience political goals, or terrorism, pre-9/11, can be loosely defined as pursuing "political objectives." Again, this definition of terrorism is more readily applicable to pre-9/11. In the post-9/11 world of the GWT one can claim that the acts undertaken by the likes of al Qaeda and ISIS are qualitatively outside the scope of the concept of "political objectives" insofar as they are attempting to kill for social reasons, which is tantamount to genocide.

It should be noted, however, for quite some time, civilized society has seen individuals, who on some level would qualify as terrorists, pursuing traditional political goals, taking deliberate action to blend in with the civilian population, and using methods of terrorism that would be considered beyond the pale to coerce a non-conflicting third party. Such acts can include, for example, mass rape, random killings, beheadings, and forced participation of children in armed conflict. This type of terrorism is somewhat unfortunate from a political perspective as the immediately affected third party is usually in no position to capitulate to the demands of terrorists. Instead, the terrorists rely on the suffering of the civilian population to place pressure upon the political leaders to do something about their goals in order to stop the attacks. These goals could, and do, vary widely. They can include, for example, creating their own state, merging two existing states, or even seeking the release of men they deem political prisoners. It must always be

[82] By *social* I mean killing for ethnic, national, racial, or religious reasons. In other words, one social group, for purposes that do not go much further than simple hatred of the *other*, kills another social group.

remembered, however, that to the extent to which combatants, regardless of their motives, fail to wear uniforms, fail to carry arms openly, and fail to operate within a proper chain of command, under article 4 of Convention III they will be outside the protection of the law of war.

Terrorists pursuing social goals, on the other hand, can be said to be engaging in genocide insofar as they are specifically targeting a national, ethnic, racial, or religious group for its own sake. According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), genocide is defined as

> … any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Imposing transferring children of the group to another group.

Article 3 defines the punishable crimes according to the CPPCG:

> (a) Genocide
>
> (b) Conspiracy to commit genocide
>
> (c) Direct and public incitement to commit genocide
>
> (d) Attempt to commit genocide
>
> (e) Complicity in genocide

The goals of terrorism, it is being argued, transitioned from political to social in the 1990s when al Qaeda, and most recently ISIS, began targeting the U.S., Europe, and even Islamic countries seemingly due entirely to hatred of the West and its values – as both embodied and manifested in the U.S. (bin Laden 2002; DABIQ Issue 15, 30). While these groups may have started out pursuing political goals, as they professed to have a political motive, they can now be

classified as social, or genocidal, in that what seems to drive terrorism is a hatred of the U.S. and a purported desire to kill Americans (bin Laden).

Here a *prima facie* argument can be made that under the law the elements of both genocide and attempted genocide are satisfied insofar as a specific group is being targeted for extermination. Moreover, because members of both al Qaeda and ISIS neither wear proper uniforms – traditionally understood – nor bear arms openly they are excluded from the law of war; furthermore, because of this legal status states are permitted under law to hold nonstate actors incommunicado for an indefinite period of time, kidnap nonstate actors and deliver them to various CIA black sites, where we know they will be tortured and subjected to degrading and inhumane treatment, and in the case of Anwar al-Awlaki and his sixteen-year-old son, summarily assassinated in violation of the due process rights afforded all American citizens if and when they are captured because they are neither afforded, nor entitled to, POW status. They are merely detainees[83] with no legal protection. Consequently, given their actions, groups such as al Qaeda and ISIS are triable for, if not guilty of, genocide to the extent that they specifically target identifiable groups with little if any discrimination.

Terrorists who pursue genocidal goals are not afforded protection of the law of war for several reasons. Most obviously members of al Qaeda and ISIS are illegal combatants to the extent that they deliberately choose to blend in with non-combatant civilians by choosing not to wear a uniform. Moreover, an argument can be made that they should be considered, and classified, as mercenaries, as they are recruited in one country, or volunteer in one country, ultimately serving on the military force of another country for their own "private gain," however one defines private

[83] See Convention III, art. 17.

gain – even if that private gain is religious in nature. Lastly, terrorists who pursue social or genocidal goals may be excluded if they are spies. Once captured they are detainees, considered terrorists, and have little to no rights.[84] In other words, the national security of the state they attack, along with the international law, warrants that their normal rights be disregarded in so far as they are detained, however long they may be detained, whether or not they have the right to appeal their detention, whether or not they receive legal counsel, and even whether or not they have a right to a trial.

An illegal combatant is a legal distinction that is attached to any individual who engages in the behavior set forth above. That means that even a citizen of a given state could qualify as an illegal combatant if, for example, he attacks his own country. Interestingly, however, if captured he is not entitled to POW status because (i) he is not a lawful combatant, and (ii) he is a citizen, a national, of the country he attacked. Under the law of war the only legal status to which he is entitled is that of detainee; they can, however, be dealt with under the country's domestic law.

It should be noted that an individual who is both an illegal combatant and a citizen of the state in which he carries out a terrorist act may be held and treated as a detainee within his home country pursuant to normal legal structure. The law of war allows for precisely such treatment. The *intent* necessary for such treatment under international law can be inferred from the *act* itself.[85] Essentially, a terrorist attack is a general intent crime in that the requisite criminal *intent* is inferred from the *actus reus* itself.

[84] Convention III
[85] *Padilla* v. *Rumsfeld* 2003.

Assuming arguendo that members of al Qaeda and ISIS are in fact guilty of genocide, those who advocate both the rights of these terrorists and their protection under either the international law of war or international human rights law are undermining the legal system itself by affording these illegal combatants legal protection to which they are not entitled nor which they deserve. Indiscriminate attacks carried out in the manner in which they are conducted quite simply violate the law of war. It must be remembered that the purported reason for the GWT is the U.S. defending itself from terrorist members of al Qaeda and ISIS who are determined to harm the U.S., its citizens, and its interests anywhere in the world they are located.[86] When al Qaeda pronounced that it is the duty of all Muslims to seek out and kill both U.S. citizens and allies of the U.S.,[87] it called for what amounts to genocide – the targeting of a specific group due to their nationality – a crime under both U.S. law[88] and international law (Convention on the Prevention and Punishment of the Crime of Genocide 1948).[89]

Under U.S. Code, Title 18, Part I, Chapter 50A, sec. 1091, genocide is defined as

> (a) Basic offense – whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such –
>
> (1) kills members of that group;
>
> (2) causes serious bodily injury to members of that group;
>
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
>
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
>
> (5) imposes measures intended to prevent births within the group; or
>
> (6) transfers by force children of the group to another group;

[86] NSSM 2002.
[87] bin Laden 2002.
[88] 18 U.S.C. § 1091(c) (2006).
[89] Art. III(c).

Here al Qaeda and ISIS are both explicitly calling for the killing of U.S. citizens. To the extent that they are actually targeting and killing U.S. citizens for no other reason than they are Americans, they are presumptively guilty of (a)(1), which renders them presumptively guilty of genocide.

Under international law the Genocide Convention of 1948[90] is applicable in peace time as well as in war, which renders the actors liable under the law. In the context of the GWT the Genocide Convention is a treaty to which the U.S., Iraq, and Afghanistan are bound. Despite the nonstate actor status of al Qaeda and ISIS members, a legal precedent has been established at the international level as a result of the Nuremberg and Tokyo trials, that individuals cannot escape responsibility for committing genocide or acts of genocide. The Nuremberg Tribunal and the Tokyo war trials made clear that individuals can be, and are, both bound and liable under the Genocide Convention. Moreover, the tribunals, insofar as they adjudicated their cases prior to the 1949 Convention, demonstrated that relevant rules, functionally operating as part of the customary international law, are operative independent of the Convention.

> Article II (a), (b), and (c) of the Genocide Convention provide:
>
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part …

Furthermore, article III provides:

[90] Art. III(c).

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.[91]

Here, under international law, just as with the analysis within U.S. law, al Qaeda and ISIS, to the extent that they are calling for the murder of U.S. citizens, *because* they are U.S. citizens, are presumptively guilty of inciting genocide, or acts of genocide, against U.S. citizens. [92]

Article IV makes clear that individuals can be personally liable under international law as it states, "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals" (CPPCG 1948, Art. IV). Consequently, members of al Qaeda and ISIS, and any other terrorist group who advocate, incite, or otherwise adopt similar goals, "shall" be punished under international law. The word "shall" renders the obligation to seek out and punish nonstate illegal combatants engaging in genocide compulsory. Article V of the Genocide Convention sets forth the manner in which this is to be completed. Specifically, the Convention requires the "Contracting States," which include the U.S., to "undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III" (UCCPG 1948, Art. V). Under the language of the Convention, the U.S. is legally obligated to tailor its internal domestic legal structure in such a

[91] Genocide Convention, art. III. Notably, conspiracy is classified as a crime. *Id*. art. III(b).
[92] *See* Genocide Convention, arts. II(a), III(c).

way that U.S. law allows for the punishment of any and all individuals guilty of genocide or acts of genocide. Article VI of the Genocide Convention (1948) states,

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

In short, a cursory analysis of the relevant law renders terrorists engaging in genocidal terrorism excluded from POW status and the corresponding legal and political privileges (Geneva Convention 1949, Art. 17). As stated above, however, POW status is not the only legal protection available to nonstate actors. We must then ask whether genocidal terrorists are entitled to other forms of protection under the law of *war*. To answer this we must establish that a war, in fact, exists. In other words, can a war, under current international law, not in the philosophic sense, actually exist between duly constituted states and terrorists?

A New War

Under a legal analysis, the GWT is a new war, a different type of war from the many wars fought by the U.S. in the past. Legally speaking, the U.S. is not at war with Iraq. The U.S. has a peace-keeping force in Iraq attempting to assist in establishing and maintaining order. The U.S. is also playing a police function in that ground troops are also assisting with apprehending insurgents or individuals considered terrorists. Similarly, in Afghanistan the U.S. is not at war with Afghanistan as it only has peace-keeping troops in that country. The U.S. is looking to apprehend members of al Qaeda in Afghanistan. Presently in Syria the U.S. is not officially involved, although some reports claim it is siding with the rebels by arming them in their fight against the Assad regime, which is itself backed by the Russian Federation and Russian President

Vladimir Putin. Al Qaeda and ISIS are responding to these interventions by attacking the U.S. and its allies on a global scale. We must, therefore, ask whether this situation results in a legal "war" between the U.S. and its allies on one side and al Qaeda, ISIS, and others on the other side.

Because of the continuous references to the GWT, many seem to believe that a traditional war is underway. Certainly an armed conflict is underway between the U.S. and multiple entities, but armed conflicts are not necessarily legal war. Consequently, it is possible that many individuals are under the impression that the international law of war is applicable. To the extent that terrorists, or illegal combatants, are participating in the conflict, as has been stated above, the law of war is simply inapplicable to them as they do not qualify for protection under international law. Nevertheless, the USSC, in opposition to the international law, has decided that detainees, illegal combatants, are in fact protected by the Geneva Conventions. The U.S. Congress has responded by passing laws to undermine the USSC's ruling. That said, in undertaking a legal analysis of the decision within the context of international law, we can determine whether or not the USSC was correct in its decision. Under one way of viewing international law, which is to say strictly adhering to the black-letter of the law, the court was incorrect.

The rationale is that the ongoing situation in Iraq, Afghanistan, and Syria is essentially a conflict with illegal combatants and insurgents, not a war. It is to some extent a global armed conflict with its locus of tension in fact in Iraq, Afghanistan, and Syria; however, these individuals are willing to fight and actually are fighting their ideological battle anywhere they find Americans. And as stated, they are doing so contrary to the law of war. Despite efforts by the U.S. and its allies to locate and destroy terrorist facilities and to either capture or kill any members of al Qaeda and ISIS they find, or perhaps because of efforts, the increased frequency and level of severity of terrorist attacks around the globe seem to indicate an armed conflict is in fact underway, albeit of

a different form from a *traditional* war. In other words, what the terrorists have done, and have promised to do, if undertaken by a duly constituted state, would be enough to trigger the War Powers Act, the act of allowing the Executive (the President) to claim the U.S. has been visited by war and thus defend the U.S. accordingly. While only the Congress can legally declare war, [93] the War Powers Act[94] allows the President to act unilaterally.[95] Here, however, the actors are not duly constituted states but unlawful nonstate actors.

Those who argue for favorable treatment of unlawful combatants, and for the exclusion of nonstate actors from international law, are arguing in favor of an untenable legal position given the existing legal structure. These arguably fatuous positions have at minimum confused the conceptual clarity that war can exist between states and nonstate actors. In other words, war, legally understood, requires two states. What is different, and dispositive in its difference, is that this type of war, which is to say a war on terror, is not being fought by lawful combatants. On one side of the conflict are duly constituted states, the U.S. and its allies. On the other side of the conflict are al Qaeda and ISIS, who are by definition illegal combatants and thus not entitled to any of the protections of the law, or so goes the argument. I simply disagree.

[93] Under Article I, Section 8 of the U.S. Constitution, Congress has the sole power "to declare war…"
[94] The War Powers Act was passed in 1973 and gives the President of the United States the ability to initiate hostilities for a period of 90 days without consulting Congress.
[95] It should be noted that many Presidents act unilaterally pursuant to the authority granted them by neither the Congress nor the 1973 War Powers Act but rather by relying on Article II, Section 2, which clearly states "The president shall be Commander-in-Chief of the Army and Navy of the United States." This, presidents have argued, grants them the authority to send soldiers into combat without a formal declaration of war by Congress.

Chapter Four:

International Law

Argument *For* Extending Rights to Non-state Actors:
(The Universal Declaration of Human Rights)

Philosophical Problem with JWT and the GWT

If we accept the assertions of these just war philosophers we have to accept fundamentally that self-defense is permissible. We also have to accept that a war initiated without just cause vests in the attacked party the indisputable right of self-defense. In this context the current U.S. foreign policy position as set forth in the 2002 National Security Strategy memorandum (NSSM 2002) is unbelievably problematic. 9/11 witnessed violence being visited upon the U.S. This violence resulted in the GWT. But while some believe that 9/11 fundamentally redefined both American foreign policy and America's national security strategy, I am of the opinion that it did no such thing. Instead, 9/11 simply emboldened America to state outright that which it has believed and pursued for a great many decades: America First! This foreign policy position and national security strategy are served by what is commonly referred to as the Bush Doctrine. Understanding the Bush Doctrine is important because its motivation is critical under both JWT and international law. JWT and international law require that the motivation for using violence be examined. When used legitimately and correctly by the state, violence is used justly. When used illegitimately and incorrectly, violence is used unjustly. This is why understanding the doctrine's motivation is important. There exists no blanket prohibition against the use of violence in either JWT or international law. One of the requirements is that if used it must be used for the *right* reasons. Moreover, the motivation behind the initiation of violence will help us determine whether those nonstate actors who resist can be treated the way they are currently treated, which is at the heart

of my research question. Consequently, the question before us now is whether or not the Bush Doctrine is itself just within the context of JWT.

The Bush Doctrine

The Bush Doctrine, to state it plainly, is the idea that the U.S. will proactively attack any and all countries or entities the U.S. deems to be a threat to its national security and national interest anywhere in the world. As will be demonstrated below, the GWT is actually less a war on terrorism and more a strategy for both hegemony and dominance at the global level. The Bush Doctrine combines supposed principles of justice with a national security strategy that is grounded in a show of force and a use of power. The GWT has two parts: (i) a purported war on terror, and (ii) a grand strategy of global leadership.[96] Problematically, the Bush Doctrine, which is argued to be preemptive in nature, is actually *preventive* in nature. This is not a distinction without a difference. A preemptive attack, as articulated by the Hon. Daniel Webster in a letter he wrote on August 6th, 1842, addressed to Lord Ashburton, is one in which "…the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." A *preventive* attack, on the other hand, allows for, in fact requires the proactive seeking, identifying, and destroying of any potential threat to the U.S. It is now more apt to say the U.S. follows less the advice of Daniel Webster and more the advice of Niccolò Machiavelli who argues

> [one must] not only have to have regard for present troubles but also for future ones, and they have to avoid these with all their industry because, when one foresees from afar, one can easily find a remedy for them but when you wait until they come close to you, the medicine is not in time because the disease has become incurable. And it happens with this as the physicians say of consumption, that in the beginning of the illness it is easy to cure and difficult to recognize, but in the progress of time, when it has

[96] This grand strategy includes the elimination, preclusion, and prevention of any and all rivals either regional or global.

> not been recognized and treated in the beginning, it becomes easy to recognize and difficult to cure. So it happens in affairs of state, because when one recognizes from afar the evils that arise in a state (which is not given but to one who is prudent), they are soon healed; but when they are left to grow because they were not recognized, to the point that everyone recognizes them, there is no longer any remedy for them (Machiavelli, *The Prince* 1998 [1532], 12).

Again, this is not a distinction without a difference for the change from Webster to Machiavelli renders the Bush Doctrine morally unjustifiable under JWT.

The historical record shows that almost immediately after 9/11 President Bush framed the events of 9/11 as an act of war. President Bush, in a meeting with his national security team, on September 12, 2001, said, "[t]he deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." The U.S. responded by initiating the GWT. He also said, in the form of the NSSM (2002), "The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism – premeditated, politically motivated violence perpetrated against innocents."[97] Despite this fiery rhetoric it is important to note that a war on terrorism is a conceptual non sequitur as the hallmark of terrorism is opportunistic asymmetrical violence, rendering it functionally nothing more than a tactic. Moreover, the label terrorism is attached based on what is little more than a feeling engendered within those attacked. As for the '*why*?' terrorists attack, they are not monolithic. They are not necessarily all fighting for precisely the same reasons. In fact, what the U.S. is at war with are organizations and individuals who seem to vehemently, and violently, disagree with aspects of the western way of life and America's political economy goals as manifesting and pursued in U.S. foreign policy. ISIL openly proclaims in their magazine *Dabiq* that they hate the West for its

[97] Remarks made by President George W. Bush at the National Cathedral in Washington DC on September 14, 2001.

refusal to accept Allah, and for the way we live our lives, and mock and persecute those who live under Islam.[98] On the other hand, while bin Laden regularly invokes the language of Islam, if the expression that "we can know all we need to know about a person and their motives" is true then we can infer based on many of the books found on bin Laden's book shelf[99] that he was motivated by political economy considerations just as much as he was motivated by religious ones. More specifically, the political economy as furthered and pursued by U.S. foreign policy is but one thing that these organizations and individuals are fighting against. The GWT can therefore be placed in a larger context, a context of an ongoing geopolitical and economic strategic conflict rather than, as it is framed by the U.S., some rogue individuals who "hate [our] freedoms,"[100] a contention that is as laughable as it is uninformed. Therefore, when properly framed and understood, I argue (later in this chapter) the GWT was and continues to be a colossal mistake. 9/11 could have and should have been seen and treated as nothing more than a criminal act under both domestic and international law. Those responsible for 9/11 should have been dealt with accordingly.

In practical and theoretical terms the GWT purports to attempt to curtail the proliferation and use of weapons of mass destruction (WMD) and to rid the world of evil, an ambitious goal if

[98] There is an interesting argument to be made here that ISIL is invoking the natural law of God as justification for killing anyone who does not believe in *their* God and who will not convert to *their* religion in order to worship *their* God. This is interesting because it is precisely the same argument made by Christians who killed those who did not believe in *their* God and who did not convert to *their* religion in order to worship *their* God.

[99] The Office of the Director of National Intelligence released a full reading list of items found in OBL's compound. Some of these works are John Perkins' *Confessions of an Economic Hitman*, Anthony Sutton's *The Best Enemy Money Can Buy*, Greg Palast's *The Best Decomcracy Money Can Buy*, Noam Chomsky's *Hegemony or Survival: America's Quest for Global Dominance*, and *Necessary Illusions: Thought Control in Democratic Societies*, Michael Scheuer's *Imperial Hubris*, Paul Kennedy's *The Rise and Fall of the Great Powers*, Eustace Mullins' *Secrets of the Federal Reserve*, Colin Mason's *The 2030 Spike*, Michael O'Hanlon's *Unfinished Business, U.S. Overseas Military Presence in the 21st Century*, Robert Hopkins Miller's *The U.S. and Vietnam 1787-1941*, and Anthony Aust's *Handbook of International Law*.

[100] President Bush made this comment during a speech on September 20, 2001 to a joint session of Congress. President Bush framed 9/11 by claiming "our fellow citizens, our way of life, our freedom came under attack in a series of deliberate and deadly terrorist attacks." President Bush went on to say, "America was targeted for attack because we are the brightest beacon for freedom and opportunity in the world."

ever there was one. Rhetorically, President Bush framed the GWT as a struggle between "good and evil." At the Military Academy at West Point in June, President Bush stated,

> The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology – when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends – and we will oppose them with all our power.
>
> Targeting innocent civilians for murder is always and everywhere wrong. Brutality against women is always and everywhere wrong. There can be no neutrality between justice and cruelty between the innocent and the guilty. **We are in a conflict between good and evil**, and America will call evil by its name. By confronting evil and lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it.[101]

This position led the Bush administration to see the need for what it termed preemptive action.[102] Actually, as described above when analyzed we see that what it calls for is actually a *preventive* action. To be fair, despite the name attached to the doctrine it is not the brainchild of President Bush. The idea of prevention as applied to U.S. foreign policy was first articulated by Albert Wohlstetter, in a paper he wrote for the Rand Corporation, the *Delicate Balance of Terror* (DBT 1958). The central tenets of the DBT are essentially as follows: the nature of the new threat confronting the U.S. is both hidden and unpredictable. The only way to ensure true safety is to eliminate the threat *before* it manifests. A purely defensive posture wherein the U.S. waits to be

[101] Remarks made by President George W. Bush at the commencement ceremony at the Military Academy at West Point on June 1, 2002. It must also be pointed out that leading the world is not exactly what we are doing when one considers the fact that the U.S. is willing to go it alone. The U.S. is not at all concerned with whether the world, the international community, follows the U.S. in its foreign policy endeavors.

[102] What the U.S. calls preemptive is actually preventive and the implementation of an idea that ostensibly began in 1958 with Albert Wohlstetter. Despite his contention to the contrary, his idea is tantamount to prevention and not preemption. Placed in this historical context one can plausibly argue that the "Bush Doctrine" is less an ad hoc response to 9/11 and more the opportunistic seizing of a moment to implement a policy initiative long desired by neo-conservatives. The central idea is that the U.S. must take proactive steps to prevent any potential rival from emerging anywhere in the world.

attacked or waits for an attack to be imminent as required by both U.S. law and customary international law (*Caroline Affair* 1837) and international law before using force is now unsatisfactory. Article 51 of the UN Charter envisions and speaks to self-defense only. In the event of a preemptive military strike the Caroline Affair allows for a permissive legal posture. That is to say Article 51 of the UN Charter does not actually apply because no actual attack has yet occurred. The proponents of the Bush Doctrine, and Wohlstetter before them, argue the U.S. must now act first so as to *prevent* any and all threats. In so doing they will have created a situation in which they *prevent* any and all rivals from emerging and challenging the U.S. in the future. This new foreign policy posture is explicitly for the purpose of ensuring that no nation on Earth will be in a position to challenge American access to key resources, human or otherwise, anywhere in the world.

Failure to prevent an attack is deemed to be the very definition of irresponsible in the eyes of the Bush Doctrine. As Machiavelli argued centuries ago, today the U.S. argues

> History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action (NSSM 2002, 2).[103]
>
> … defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country (NSSM 2002, 6)

[103] Once we realize that "path of action" means *war* we see this statement for precisely what it is, one-third of the slogan of the Ministry of Truth as observed by Winston in George Orwell's *1984*, "War is Peace; Freedom is Slavery; Ignorance is Strength."

President Bush, in a speech to the nation on the evening of September 11, 2001, also articulated the position that the U.S. would make "… no distinction between the terrorists who committed these acts and those who harbor them." This is best summarized by the idea of giving aid and comfort to the enemy. This is a radical policy because the U.S. is functionally claiming the right to unilaterally invade a sovereign country if the U.S. believes it is necessary *before* an attack has taken place. In the context of broader American goals it will be deemed necessary if it is in America's economic interests. This violates the principles of sovereignty and nonintervention, both of which are central to the conception and integrity of the nation-state system. Moreover, the U.S. would be hard-pressed to claim such motivation constitutes a just cause, and would be loathed to accept if any other country claimed a similar right for themselves at the expense of U.S. sovereignty.

The Bush Doctrine marks a shift in the American government's rhetoric away from "containment," as articulated and practiced during the Cold War, toward *prevention* under the guise of *preemptive* self-defense during the new GWT. To those of us who study international relations the Bush Doctrine is the ideological cornerstone of America's new global strategy that pursues U.S. global hegemony. It is difficult, if not impossible, for the U.S. to argue otherwise. President Bush, in the commencement speech at the West Point Military Academy stated,

> For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence – the promise of massive retaliation against nations – means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.

The NSSM 2002 states:

> It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first (NSSM 2002, 15).
>
> In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations (NSSM 2002, 15).
>
> Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action (NSSM 2002, 15)
>
> It is time to reaffirm the essential role of American military strength. We must build and maintain our defenses beyond challenge. Our military's highest priority is to defend the United States (NSSM 2002, 15).

This idea of "defending" the U.S., or more specifically, this *particular* way of defending the U.S., according to Andrew Bacevich, can be traced through several documents.[104] The *Defense Strategy for the 1990s: The Regional Defense Strategy*, written by then-Secretary of Defense Cheney, sets out a new philosophy of international relations, a global strategy for American leadership. Secretary Cheney argues that because the U.S. was victorious over the Soviet Union it is now the world's only superpower; therefore, a new global strategy with respect to U.S. foreign policy is needed. That new global strategy, Secretary Cheney argues, is the elimination and preclusion of rivals, whether regional or global, that would challenge, and thus threaten, U.S.

[104] We can trace the development of the Bush Doctrine through (i) The Delicate Balance of Terror (1958), the Defense Strategy for the 1990s (1993), From Containment to Global Leadership (1989), the Joint Vision 2010 (1996), Rebuilding America's Defenses (2000), and, finally, the National Security Strategy Memorandum (2002).

dominance in economically and geopolitically strategically critical regions of the world. Secretary Cheney writes,

> … [the] goal is to preclude any hostile power from dominating a region critical to our interests, and also thereby to strengthen the barriers against the reemergence of a global threat to the interests of the United States and our allies. These regions include Europe, the Middle East/Persian gulf, and Latin America. Consolidated, nondemocratic control of the resources of such a critical region could generate a significant threat to our security (1993, 4).[105]

A Rand Corporation study, From Containment to Global Leadership (FCGL) (1989) written at the behest of the U.S. Air Force, argues,

> … the United States needs a new "grand strategy" for pursuing national security, economic, and foreign policy interests (FCGL 1989, vii)
>
> … the United States has been operating without a grand strategy since the end of the Cold War (FCGL 1989, vii)
>
> … the central strategic objective for the United States could be to consolidate its global leadership and preclude the rise of a global rival (FCGL 1989, 13).
>
> The balance of power system failed in the past … it might not work any better in the future; and war among major powers in the nuclear age would surely be devastating (FCGL 1989, 21).
>
> … [the] global environment will be more open and more receptive to American values: democracy, free markets, and the rule of law. Second, such a world has a better chance of dealing cooperatively with its major problems, such as nuclear proliferation, threat of regional hegemony by renegade states, and low-level conflicts. Finally, U.S. leadership will help preclude the rise of another hostile global rival, enabling the United States

[105] While perhaps believable to the average American, this argument is somewhat laughable as the U.S. could not care less about the form of a given government. Examples of this are the overthrow of the democratically elected Iranian government in 1953, the overthrow of the democratically elected Chilean government in 1973, and the military and economic support of authoritarian governments such as the Shah in Iran, the Taliban in Afghanistan, Pinochet in Chile, et. That is to say, democratic control of needed resources could be just as problematic for America as an Authoritarian government. The issue is not the form of government, but rather the extent to which a government is willing to conduct itself in a manner that is in our best interest. In other words, the main issue is whether a given government is an unfriendly government not whether it is a democratic government.

> and the world to avoid another global cold or hot war and all its dangers, including a global nuclear exchange (FCGL 1989, 21).
>
> Precluding the rise of a hostile global rival is a good guide for defining what interest the United States should regard as vital. It is a prism for identifying threats and setting priorities for U.S. policy toward various regions and states, for military capabilities and modernization, and for intelligence operations (FCGL 1989, 21).
>
> A global rival could emerge if a hostile power or coalition gained hegemony over a critical region. Therefore, it is a vital U.S. interest to preclude such a development – i.e., to be willing to use force if necessary for the purpose. A region can be defined as critical if it contains sufficient economic, technical, and human resources so that a hostile power that gained control over it could pose a global challenge (FCGL 1989, 25).

Given its explicit goals of pursuing global hegemony, despite using the label "global leadership," the legitimacy of the Bush Doctrine is refuted. The U.S. does not have a *just cause* or a *right intent* behind its act. The GWT was simply integrated into the new global strategy of global hegemony, which is itself *prima facie* neither a just cause nor a right intent. Because prevention is part of global hegemony, in the context of global dominance, the U.S. identifies as "rogue" states any state that does little more than present a challenge – whether actual, potential, or simply imaginary – to the U.S. This metric, and nothing more, will determine whether such a state must have its regime destabilized, undermined, or outright changed.[106]

I believe that JWT served the purposes of dealing with the conceptual implications of the anarchic reality of international relations defined as the interactions among separate sovereign nations. Historically, relations between nations have been described as anarchic because of the absence of a global power capable of enforcing either a universal conception of morality or a universally applicable law. The international context is rhetorically a Lockean state of nature

[106] "Changed" refers to regime change, which is the euphemism of choice of the American foreign policy establishment when they mean an invasion, an overthrow, a destabilization, or a U.S. backed coup d'etat of a government.

where reason wills out; *functionally* it is analogous to a Hobbesian state of nature. At its core a Hobbesian state of nature is the pursuit of self-interest under no unified moral code, "a war of all against all" (Hobbes, *Leviathan*, 189). In this Hobbesian context morality and law are nonexistent. The default position is fear and power. "Dominate or be dominated" is the modus operandi.

The logical consequence of this position is that in a Hobbesian state of nature there is no terrorism, either as a moral concept or a legal prohibition. For Hobbes, these standards do not emerge until the establishment of a strong central authority. Terror is the constituent reality. Terror is the order of the day. It is a fundamentally integral part of the system. In a system such as this, one is free to pursue one's self-interest by any means necessary. This includes targeting, attacking, and even killing *innocent* civilians. No central legal or moral authority exists to dictate otherwise; as there is no legitimate universal moral order or any universally applicable legal principles to prohibit such violence, "terror" is a valid means to an acceptable end. In short, within a Hobbesian state of nature *anything* goes; that includes *terrorism*. Any assertion to the contrary, that is to say, any assertion that terrorism is immoral or illegal, as Locke would argue, logically depends on a presupposition of the existence of a universal morality or illegality grounded in either natural law, natural justice, universal reason as argued by Cicero, Augustine, Aquinas, Vitoria, Grotius and others, or some combination thereof.[107] It is my contention that absent any such universal moral code terms such as "innocent" are in themselves meaningless outside the moral code of the groups engaged in the act of terror. In this way, terror, it may be said, is in the eye of the beholder. These groups will decide for themselves who is or is not innocent. Subjective context matters.

[107] John Locke argues that the state of nature is not the free-for-all described by Hobbes because Locke believes that reason is the law of nature and thus checks human behavior.

International law holds – at least on paper – that states are functionally equal. States have the right to self-determination, and consequently are to refrain from intervening in one another's affairs. In this way, justice at the international level is largely procedural. For states to behave in a just manner toward one another is to respect one another. So long as state X is not invading, or otherwise threatening state Y, or vice versa, neither state X nor state Y is justified in attacking the other. In the context of this limited understanding of justice, violating a nation's sovereignty is a crime of aggression and the attacked state would be ethically and legally justified in fighting back. At the international level this philosophical idea, an idea that exists as customary international law, has recently been codified. The use of violence without justification is now the international law; it is the crime of aggression. Such a crime is deemed a crime against the state, a crime against the rights of the individual, as well as their individual sense of security. For context, this is why the use of force requires both a legal and a moral justification. In other words, legal justification is provided under the UN Charter. Moral justification is provided under JWT.

As stated above JWT provides several elements grounded in a moral calculus for assessing the moral justifiability of the use of military force. Just cause is but one. *Jus ad bellum* also speaks to (i) right authority and (ii) right intention. As demonstrated, these three elements, when used to assess both the Bush Doctrine and the GWT demonstrate that the GWT, is a crime of aggression and therefore unjustifiable in the context of JWT.

Taking these elements in turn, we highlight the problematic nature of the Bush Doctrine. In addition to the scholars already cited, the U.S. Catholic Bishops, in *The Challenge of Peace: God's Promise and Our Response* (1983), described just cause as follows: "War is permissible only to confront 'a real and certain danger,' i.e., to protect innocent life, to preserve conditions necessary for decent human existence and to secure basic human rights" (TCP 1983, 18). This can

include responding to the unwarranted aggression of another country, or responding to a country violating the principle of nonintervention. Pursuant to the UN Charter aggression can be immediately met with military force until the international community decides on an official, sanctioned, course of action.[108] In large part this is because at present there is no global police force, or global military force, standing ever-ready to uphold international law. Individual nation-states must pursue and punish transgressors. Therefore, self-defense and the defense of others is a just cause.

The obvious next question is, does the Bush Doctrine itself qualify as a just cause? In a word, no. It does not. America's use of military force for the purpose of securing its dominance and protecting its own interests is not an adequate justification under JWT. Therefore, it is immoral under JWT. If America's use of force is unjustified, it is a crime of aggression under international law and JWT. The question then becomes, Are those who are acting in self-defense behaving in a way that is consistent with JWT? While I would be among the first to argue it would appear that they are not an argument can be made that they very much are. Jus in bello illustrates this concept insofar as it embraces a principle of discrimination. This means that noncombatants enjoy, at least theoretically, a certain level of immunity from violence. Noncombatants are not supposed to be targeted for intentional killing for either military or political gain. While I concede this point as both a practical matter and a legal rule I do not concede this point as either a transcendent or an existential one. It is precisely and merely *tradition*. It is meaningless beyond the idea of tradition. If a group has now decided to draw upon their tradition, reinterpret the meaning and redefine the dictates of their tradition, it is free to do so. What's more, if it *truly* believes *its* God sanctions

[108] Article 51 of the UN Charter speaks to self-defense by a state.

their behavior, in fact mandates it, then in some sense, in a very real way, they are acting perfectly consistently with natural law as it is religiously understood by them.

The fact that this group has simply proclaimed divine authority for themselves with nothing more by way of actual evidence to support their seemingly absurd claim is not at all disqualifying philosophically speaking, for the conclusory statements of St. Augustine and St. Thomas Aquinas are on their face no more or less absurd than the conclusory statements of Seyyid Qutb and Osama bin Laden who now argue, without any evidence at all, that their God justifies their behavior. In the foreign policy arena it is no different from the U.S. turning its back on tradition when it deems the tradition to no longer be in its best interest. It would seem to me to be the very height of hypocrisy to claim that tradition must be followed by one but may be simply disregarded by the other. The U.S. calls it "American Exceptionalism." The international community calls it "duplicitous" and "hypocritical" and reacts accordingly.

Legally speaking, to target innocent noncombatants is by definition to engage in what is defined under the law as terrorism. This is why under the law *nonstate* actors and not *state* actors are capable of committing acts of terrorism. Under domestic law terrorism is considered a crime (USC 18.1.113B sec. 2331). Under international law terrorism is considered a crime and possibly a war crime. Therefore, even under international law a military strategy that includes terror is always unjustifiable. Other than collateral damage, provided no criminal negligence was exhibited, killing innocent noncombatants violates the notion of fundamental human rights. That said, America is justified under both international law and JWT if it sticks to the well-established

legal norms of "preemption"[109] or self-defense traditionally understood. The NSSM 2002 speaks to this when it states,

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack… (NSSM 2002, 9).

Nevertheless, as demonstrated this is not what America is doing. In one respect terrorism can be defined as the intentional and indiscriminate use of violence, aimed toward innocent civilians for political purposes – generating fear, disorder, and instability within a society. If we borrow a concept from von Clausewitz, terrorists are essentially engaging in "politics by other means" (Clausewitz, *On War*, 23). That said, the legal definition of terrorism is drafted in such a way as to ensure that nonstate actors are, or at least may be, accused of terrorism, while states are not. This is despite the reality that terrorism in the context of international relations is functionally a political strategy used by both states and nonstate actors alike. Existentially, a people will decide for themselves when they are victims of a terror attack. A right, I point out, the U.S. has reserved for itself.

It is my contention that *terrorism* is *essentially* an absolutely meaningless term in the context of philosophical examination, and it is of limited value in the context of legal analysis. It serves to simply help in the treatment of a given act under the law based upon a frowned-upon motive. For example, in the U.S. precisely the same act will be treated differently based on different motives (i.e. hate crimes). In fact, a given act is devoid of any special meaning until the motive for the act is determined. If a gunman kills 100 people with a high-powered rifle the

[109] The Caroline Affair is permissive when Article 51 of the UN Charter does not apply.

immediate question asked is *why* did he do it. If the answer is God told him to do it or that he did it for political reasons media will call it terrorism, the public will be outraged, and the law will respond accordingly. On the other hand, if the answer is the voices in the gunman's head told him to do it – a distinction without a difference – the conversation will shift away from terrorism and toward a disturbed individual who simply undertook a 'mass shooting' and the 2nd Amendment will inevitably become the focus of the ensuing discussion.

To the extent that the world shares *one* transcendent moral code terrorism is essentially an attack on *that* moral. However, as I have argued no such transcendent moral code exists. Instead, what the global community is in the process of developing is a universally recognized legal code that ultimately speaks to due process. In other words, trying to determine a philosophic basis for judging acts or tactics of violence is by its very nature a problematic endeavor. Increasingly, *terror* is being seen as simply criminal. Regardless of whether terror is being used within or without a national government, it is seen as something to be prosecuted under the law. While I know that this does not yet translate to an established global moral code, I believe it does translate to a budding global legal order.

The Bush Doctrine was conceived as a "response" to the reality that terrorism, by its very nature, is a danger that is neither clear nor present. Terrorism, as is the notion of violence specifically, is always a potentiality. Consequently, we are left with what *seems* to be a binary choice. JWT with its amorphous, vague, and ambiguous elements is either (i) outdated insofar as it does not account for the motivations of modern terrorism, or (ii) still relevant, and the motivations of the Bush Doctrine and the GWT are simply an unjust cause. A nuanced analysis reveals it is not binary, it is both. The Bush Doctrine, with respect to preventive attacks against those the U.S. perceives to be a potential threat, is simply unjust. JWT, as an ethical system that

is largely a Judeo-Christian system, fails to see the motives of those acting as legitimate. The only major problem with this idea is that in the final analysis both terrorism and the Bush Doctrine are explicitly linked to political ends, which renders both actors, state and nonstate alike, to the extent that they are both using violence in the service of political ends, guilty of engaging in terrorism. The only thing that separates the two is the legal definition written by states, and it should come as absolutely no surprise that the legal definition is written so as to ensure the exclusion of states and the inclusion of nonstate actors. Therefore, the threat of terrorism ultimately cannot be resolved militarily. Any good-faith attempt to resolve terrorism has to consider the legitimacy of motives and political conflict that drives the perceived need to engage in politically motivated violence.

In terms of international relations the Bush Doctrine goes a step further. It links terrorists and states together. The Bush Doctrine claims that terrorists and those who harbor them, or give aid and comfort to the enemy, are essentially one and the same. They are equivalent. Beginning from this position the Bush Doctrine is actually advocating the violation of the principle of nonintervention. If so, it is presumptively legally, if not morally, circumspect. This is problematic for the U.S. when one considers that if a people comes to view the U.S. military as a terrorist organization as many do, if they apply precisely the same standard to the U.S., those individuals would be justified in attacking civilian targets when we consider that modern military bases look like shopping malls and less like military establishments. The civilians and private companies operating thereon are there to keep the morale of the soldiers high and to provide them with comfort. By America's own standards those American civilians are subject to attack.

A more nuanced approach sees us dealing with two issues: (i) what is the degree of separation between the terrorists and the State? and (ii) is the State actually providing *material*

support to the terrorists? In other words, are the State and the terrorist so aligned politically that one is essentially indistinguishable from the other? If so, conceptually, it is easy to see why there would be no need for differentiating between the two. Under both JWT and international law invading a sovereign country under the claim that the sovereign country is engaging in terrorism (both engaging in it and harboring those who do) requires both a moral and a legal justification. Such justification would require substantial, clear, and conclusive, if not definitive evidence of a State's support for terrorists. In the absence of such evidence any invasion, despite the rhetoric, can be considered a crime of aggression, ultimately unjustifiable. For example, the invasion of Iraq, predicated on toppling Saddam Hussein and eliminating its WMD, did not justify the U.S. invading Iraq. Neither reason justified the U.S. invasion because (i) toppling a foreign government is permissible neither under international law nor under JWT, and (ii) Iraq never had WMDs. The U.S. has done the former several times and knew the latter was not true when it knowingly lied claiming that Iraq had WMD. We know the U.S. lied because we know that on October 7, 2002 when President Bush, in his remarks at the Cincinnati Museum Center claimed that Iraq had a "massive stockpile" of WMD, specifically biological weapons there was no intelligence to support such a claim. Condoleezza Rice said as much when speaking to Tim Russert on CNN. In 2004 George Tenet, CIA Director in 2004, noted that the CIA had "no specific information on the types or quantities of weapons agent or stockpiles at Baghdad's disposal" and had made this clear to policymakers. On December 31, 2002, when speaking from a coffee shop in Crawford, Texas, President Bush claimed, "We do not know whether or not [Iraq] has a nuclear weapon." Here again, George Tenet made clear that the CIA stated unequivocally, "… Saddam did not have a nuclear weapon and probably would have been unable to make one until 2007 to 2009." In other words, President Bush, while speaking from a coffee shop in Crawford lied. In September of 2002,

while on CNN, Condoleeza Rice proclaimed that the aluminum tubes possessed by Iraq were "only really suited for nuclear weapons programs." Once again, this was directly contradicted. On October 3, 2004, The New York Times ran an article *The Nuclear Card: The Aluminum Tube Story – A Special report.; How White House Embraced Suspect Iraq Arms Intelligence*. The article made clear that the Energy Department informed the White House that it was not only possible that the tubes were for nonnuclear purposes, but that in their opinion the tubes were probably being used for nonnuclear purposes. Finally, while on *Meet The Press* Condoleeza Rice admitted that then CIA Director George Tenet asked that all language pertaining to Iraq attempting to buy yellow cake uranium from Africa be removed from the Cincinnati speech because there existed no intelligence sufficient to support such a claim. It should be noted that Ambassador Wilson made this absolutely clear to the White House over a year prior to the State of the Union. The White House complied; however, three months later the offending and unsupported language was reinserted once again into the narrative and President Bush asserted this claim at the State of the Union. Vice President Dick Cheney on more than one occasion claimed that Mohammed Atta – one of the conspirators of 9/11 – met with an Iraqi intelligence officer. This claim was made so as to connect Iraq with 9/11. According to both the FBI and the CIA, quite simply, this meeting never took place. In August 2002 Vice President Dick Cheney, gave a talk at the Veterans of Foreign Wars (VFW) national convention in Nashville, Tennessee. In that speech Dick Cheney said, "… there's no doubt that Saddam Hussein now has weapons of mass destruction." Dick Cheney made this statement at a time when there was precisely zero confirmation of this from the intelligence community. In fact, Gen. Anthony Zinni, who was in attendance at Dick Cheney's speech, in a documentary called *Hubris: Selling the Iraq War* actually said about Dick Cheney's comments, "It was a total shock. I couldn't believe the vice president was saying this, you know?

In doing work with the CIA on Iraq WMD, through all the briefings I heard at Langley, I never saw one piece of credible evidence that there was an ongoing program." My last example is the most obvious – perhaps a harbinger of what was to come in the form of Donald Trump. President Bush, during a press conference at the White House, is asked "What did Iraq have to do with 9/11?" President Bush answered, "Nothing." President Bush literally said, "Nothing" (https://www.youtube.com/watch?v=f_A77N5WKWM). Iraq had "Nothing" to do with 9/11. He said this after he and his administration spent months claiming that Iraq was somehow connected to 9/11 and that Iraq had WMD, which was known to not be the case.

It should be pointed out that this was not the first time a lie was used in order to justify an invasion of Iraq. The first invasion of Iraq was predicated entirely predicated on a lie. During a hearing held in October 1990, before the Congressional Human Rights Caucus a young woman name Nayira gave sworn testimony. She testified that she was a volunteer at a hospital in Kuwait. While volunteering in al-Adan hospital, she testified that she personally witnessed Iraqi troops ripping babies out of incubators and leaving them for dead on "the cold floor." She wept, and sobbed, claiming how "horrifying" of a spectacle it was. Nayira's testimony was cited by no less than seven U.S. senators when they tried to get Americans to do what Americans were otherwise unwilling to do, support the invasion of Iraq. President George H.W. Bush used Nayira's testimony on as many as ten occasions to convince Americans they ought to support the invasion of Iraq. There was only one problem with Nayira's testimony: it was a lie from start to finish. Amnesty International along with independent journalists proved that the entire story was a work of fiction. John MacArthur, in 1992, revealed that the young woman who testified on that die was the daughter of the Kuwaiti ambassador to the U.S. In fact, her testimony was organized by Citizens for a Free Kuwait, a front for the Kuwaiti regime. Evidently, Citizens for a Free Kuwait

retained the services of New York public relations firm Hill & Knowlton in order to secure American support for the invasion of Iraq. The ultimately successful campaign cost $10.7 million dollars and was the result of focus groups that helped the firm identify just what it would take Americans to support an invasion of Iraq. Evidently, an atrocity laden campaign would do the trick, and it did. As a result of a brilliant public relations campaign meant to manipulate the American people, stories about Iraqi baby-murderers were on pretty much every news outlet. That the story was not true was, I suppose, an irrelevant detail. Interestingly, Craig Fuller, President and COO of Hill & Knowlton was President George H.W. Bush's COS when President Bush was Vice President under President Ronald Reagan. The people living in Iraq are now justified under both international law and JWT to fight back against the U.S. In fighting back they would not be terrorists as the U.S. would have the world believe. They would be people fighting to free *their* homeland from an illegal occupying force, the U.S.

In the same press conference referenced above in addition to admitting that Iraq had "Nothing" to do with 9/11, President Bush goes on to say that the lesson of 9/11 is "take care of threats before they fully materialize." For all intents and purposes this idea is the Bush Doctrine, and it would make Machiavelli proud. This claim notwithstanding, under JWT, the idea of regime change based on a "preventive" mindset is also problematic when one considers that a just cause, or a proper act, must be accompanied by a right intention. That is to say the *intention* behind the decision to use force must *itself* be *right*. The intention must itself be in accordance with a just cause. In other words, when engaging in self-defense, one's intention must be to engage in self-defense and nothing else. When engaging in protection, or defense of others, one's intention must be to engage in protection, or defense of others, and nothing else. When engaging in the establishment of a just peace, one's intention must be to engage in the establishment of a just peace,

and nothing else. These examples may not be mere pretexts for the annexation of territory, pecuniary gain, population or resource control, increasing one's power, establishing hegemony, or any other ultimately self-interested motivation.

Obviously attempting to ascertain an actor's actual intention, despite an actor's pretense to intention, is difficult. We may look to the historical record in this regard and from the historical record we may speculate as to an actor's intentions. In other words, we can look to an actor's behavior over time and draw certain conclusions with respect to what an actor actually intended despite its political rhetoric. Take, for example, the issue of peace. If history demonstrates that an actor has not been committed to peace then we need not take the actor seriously when it states that it undertakes an action with the intention of exercising self-defense, defense of others, or establishing peace. The actor's claim is simply not credible, and can be viewed with suspicion. In other words, if an actor invokes JWT in an attempt to justify its actions, despite a long history of violating precisely those principles it now claims to uphold, the international community is free to not believe the actor's rhetoric. This is precisely the position in which the U.S. now finds itself. For example, without creating an exhaustive list the U.S. has undertaken both overt and covert actions around the world. While the 19th century saw the U.S. engaging in regime change throughout Latin America, the 20th century saw the U.S. overthrowing or supporting the governments of Afghanistan, Chile, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Iran, Iraq, Mexico, Nicaragua, Panama, etc. If we expand our definition of interfering with foreign sovereignty to include tampering with another country's elections we see that the U.S. has undertaken approximately 81 interventions between 1946 and 2000 – that we know about.

This being said, both the historical record and the modern record give much needed context to the Bush Doctrine. That the historical record is replete with examples[110] of illegal U.S. intervention in the domestic affairs of foreign countries. Moreover foreign countries can ignore the historical record and simply read the 2002 NSSM. It is obvious that the Bush Doctrine is linked to the new global strategy of political hegemony and full spectrum dominance. In other words, the U.S. has established, and is now availing itself of, a prohibitive and unchallengeable global *military* dominance so as to preserve the current status quo of U.S. *economic* dominance. Given that the new global strategy for the U.S. is domination both militarily and economically it finds neither support nor legitimacy under JWT as JWT neither allows, nor justifies, this course of action as this course of action is imperialistic. JWT simply does not justify imperialism. The wrong intention renders the justness of America's foreign policy as invalid.

Proper Authority

The next criterion under JWT is that of proper authority. As explained in chapter 2 of this dissertation the decision to use force and the actual use of force must be within the purview of a legitimate political sovereign, or its agent. Procedurally, right authority also requires that war be officially declared. For a war to be declared officially a bill of particulars needs to set forth both the moral justification and the aims, or the desired end, of war. Moreover, under the existing international legal order, pursuant to treaty agreements, under the auspices of the United Nations, consistent with the UN Charter, force must be legally authorized by the sovereign in question,

[110] Without creating an exhaustive list the U.S. has undertaken both overt and covert actions around the world. The 19th century saw the U.S. engaging in regime change throughout Latin America. The 20th century saw the U.S. overthrowing or supporting the governments of Afghanistan, Chile, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Iran, Iraq, Mexico, Nicaragua, Panama, etc. If we expand our definition of interfering with foreign sovereignty to include tampering with another country's elections we see that the U.S. has undertaken approximately 81 interventions between 1946 and 2000 – that we know about.

which is the United Nations in the form of the United Nations Security Council (UNSC).[111] Requiring right authority is an attempt to confer legal and political legitimacy upon the use of force. The Bush Doctrine, vis-a-vis the GWT, in the context of international law vis-à-vis UNSC is illegal. The Bush Doctrine puts the international community on notice that the U.S. will act unilaterally in pursuing its own goals, its own interests (NSSM 2002, 31). While one may argue that President Obama tried to bring the U.S. back in line with respect to a multi-lateral approach, Trump has made it abundantly clear that he has no such ambition and little if any concern for a multi-lateral international approach. Given the extent of international interconnectedness the goal of the UN charter is to render the use of force justified in the legal sense when international law is followed. This was not the case with respect to the invasion of Iraq and is not the case with respect to the GWT and other countries. International law does not support the unilateral decision by the U.S. to invade Iraq and fight terror anywhere in the world.

Security Dilemma

This is the problem with attaching a goal of global dominance to a foreign policy position that advocates actively preventing competition from emerging anywhere in the world with respect to resources of strategic and economic value. In practice, this position will result in restarting the arms race as the security dilemma will be triggered. Mutual cooperation is not necessarily the modus operandi of the U.S. Again, the U.S. has put the world on notice that it will pursue its own interests even if to do so is to the detriment of others. The international community knows all too well this is not an empty threat on the part of the U.S. for if history has taught the world anything it is that if they wish not to be invaded by the U.S. they ought to arm themselves, arm themselves

[111]The UN Charter makes allowances for the use of force when used in self-defense, but the Security Council is the final authority.

heavily, and convince the U.S. that they are prepared to *use* their armaments. To simply trust that the U.S. will sit idly by while a given country pursues its own interests to the detriment of the U.S. interests is to fail to have learned the lessons of history. Therefore, the Bush Doctrine's stated aim will likely result in an arms race as nations the world over increase their armaments in order to defend themselves from a perceived threat from the U.S.. Where countries are either unable or unwilling to spend their treasure on developing their military they are likely to pursue other means of defending themselves or attacking others, for example cyber capabilities. Ironically, this plausibly purely defensive posture on the part of members of the international community will cause fear, or trepidation, on the part of the U.S., which will likely see the increase in armaments or capabilities as a threatening move. As surely as night follows day the U.S. will call for increased military spending as it will likely claim that such moves on the part of its perceived adversaries are a potential destabilization of the status quo if not an outright provocation. The increased armaments and the increased fear have the possibility if not the probability to lead to conflict. The security dilemma, given the overwhelming military disparity between the U.S. and any other member of the international community, is likely to lead to proliferation of nuclear weapons, for nuclear weapons are the actual deterrent with respect to the U.S.. Where the attainment of nuclear weapons is difficult, if not impossible, the likely result of the security dilemma and the disparity of military power is an increase in asymmetrical initiatives given the near impossibility of conventional military confrontation and engagement. In short, the Bush Doctrine and the GWT are useless as the former is a predatory doctrine in the guise of a global initiative to eradicate evil in the form of the GWT but in reality is nothing more than an attempt to establish global hegemony. The GWT will instead continue to destabilize regions around the world and will increase international terrorism as the predatory and subversive policy initiative that is the Bush Doctrine

will do more to reinforce the anarchic nature of international relations, and little if anything to create greater unity, safety, and security. Unlike the Melians and the Athenians of old the modern day Melians are in a position to fight back and visit death and destruction upon the modern day Athenians.[112]

Last Resort

With respect to last resort the Bush Administration used the Bush Doctrine as a means of justifying the invasion of Iraq as simultaneously a way of protecting against a potential terrorist threat and a way of removing a potential rival in control of a critical country in a critical region of the world in control of vital resources necessary to the U.S. political economy. We know that the Bush Administration exhibited hostility toward any and all inspections of the Iraqi regime, opting instead for an invasion and ultimately a regime change. Practically speaking the U.S. need not have acted when (or how) it did. The U.S. could have waited. Instead, the U.S. was more interested in putting into effect its strategy for global domination. JWT's requirement of last resort was unequivocally violated with respect to the invasion of Iraq. Moreover, as the Administration knew that Iraq possessed no WMD and did not thus present an imminent threat, the threat itself was not a threat at all but rather a lie pure and simple.[113]

In short, the Bush Doctrine, vis-à-vis the GWT, is woefully problematic with respect to both international law and JWT. A power-driven, hegemonic-focused foreign policy undermines

[112] President Bush acknowledged as much in his speech at West Point when he said, "…even weak states and small groups could attain a catastrophic power to strike great nations."

[113] In the documentary Uncovered: The Whole Truth About the Iraq War, in the lead up to the invasion of Iraq, Scott Ritter, a UN Weapons Inspector, made clear that the administration's claims regarding aluminum tubes were false; Ambassador Joseph Wilson stated Iraq did not purchase, let alone possess yellow cake uranium; David Albright, a UN Weapons Inspector, made clear that the administration was putting out one-sided and skewed information about Iraqi WMD.

the moral credibility of the Bush Doctrine. By extension, the moral credibility of the U.S. is also undermined. This renders the U.S. the aggressor and bestows upon those invaded the right of self-defense.

As is often the case, there exist arguments on both side of the debate regarding the validity of the Bush Doctrine. Robert J. Delahunty, John Yoo, Michael Doyle, and Nguyen Manh Hung are indicative of modern scholars who think the Bush Doctrine is a good idea. For reasons that do not only fail to differ a great deal but actually overlap substantially these scholars tend to believe that modern-day threats render traditional countermeasures obsolete. In *The Bush Doctrine: Can Preventive War Be Justified*, Delahunty and Woo argue preventive war is not a radical idea; it has been a longstanding cornerstone of U.S. foreign policy; the UN is not necessarily relevant in modern times; the Caroline Affair, which gave rise to the principle of preemption, is antiquated; and a new standard for the use of force "… should, and eventually will, supplant the U.N. Charter's use-of-force rules in this area" (865). In other words, the threat of terrorism looms large like a modern-day sword of Damocles. As advised by Machiavelli, waiting for a threat to materialize, they argue, is folly and inadvisable. What is needed in the twenty-first century, given the nature of the threats faced, is proactive and not reactive foreign policy measures. On the other side of the debate are scholars such as Philip Bobbit, Jeffrey Record, Dan Reiter, and Robert Jervis, who for the most part all seem to agree with the conclusion drawn by Reiter in his work, *Preventive War and Its Alternatives: The Lessons of History*: "preventive attacks are generally ineffective, costly, unnecessary, and potentially even counterproductive tools for use in behalf of nonproliferation and counterterrorism" (2006, 2). In his article, "Why the Bush Doctrine Cannot Be Sustained," Robert Jervis writes, "Although evidence, let alone proof, is of course elusive, it is hard to avoid the inference that the war has created more terrorists than it has killed, has weakened the resolve of

others to combat them, and has increased the chance of major attacks on the west" (353). Jervis writes

> Just as the means employed by the Bush Doctrine contradict its ends, so also the latter, by being so ambitious, invite failure. Not only is it extremely unlikely that terror can ever be eradicated, let alone the world be rid of evil, but the fact that Saddam lost the war in Iraq does not mean that the United States won it. Ousting his regime was less important in itself than as a means to other objectives: reducing terrorism, bringing democracy to Iraq, transforming the Middle East, and establishing the correctness and the legitimacy of the Bush Doctrine (355).

As my conclusions are in greater agreement with the scholars in the latter group I reject the former.

Jus in bello

It is at this point that we must confront the question of whether those who may otherwise have the right of self-defense are behaving in a manner that is consistent with jus in bello. This is an interesting question, not because of the answer, but because of the implicit assumption involving JWT and its constituent elements in general. It is presumed that JWT and its elements are a reflection of some transcendent truth that speaks to, or articulates, a universally valid moral code. If this presumption is true then yes, insofar as these nonstate actors violate jus in bello, they are deserving of punishment under the dictates of JWT. If, on the other hand, JWT is not a universally valid moral code then it simply does not matter that the precepts of JWT are violated as they are nothing more than a set of rules that are as seemingly arbitrary as a speeding limit. This would mean that JWT is nothing more than the moral code of a specific group created at a specific time reflecting a specific, which is to say a subjective, view of the world and of absolutely no value or force to those who do not subscribe to it!

To put it simply it is the equivalent of paganism in Egypt being challenged by Judaism and Christianity, and the Muslims challenging, if not overthrowing, the Christians. Functionally, this question speaks to the age-old debate between natural law and legal positivism. For me this is less a debate than a reflection of a myopic and incorrect way of seeing morality and the law on both sides of the issue. In any conflict the victor, once victorious, gets to posit a new law, a new morality. Once established they simply sidestep the obvious arbitrariness of supplanting the old and positing the new by claiming that their new way is not legal and moral positivism at all but rather the one true and valid natural law. It helps to be willing to kill anyone who challenges these assertions. After a few generations it becomes the norm, not because it was or is valid but because it is the given society's new culture, its new *tradition*. At this point in my analysis suffice it to say that given the parameters of JWT nonstate actors are not justified in their behavior. To the extent that the law is then interpreted consistently with the ideals set forth by and in JWT, nonstate actors are not entitled to any legal protections. The possibility that humans may be treated inhumanely, however, is increasingly and loudly deemed unacceptable to many countries, peoples, and institutions, the ICRC and the USSC among them. I argue we are in the middle of a paradigm shift, one in which rights are now extended to individuals because they are human beings, not because they behave in a manner consistent with the dictates of a 9th century moral code largely based upon one of three Abrahamic faiths interpreting the stories of ancient peoples collected, edited, passed down verbally at first and through the written word eventually. These traditions, once collected, eventually became the respective holy books, revered by some, understood by few, misused by many, and authenticated by precisely zero people, not a one.

It is my contention that the only way to prevent and combat terrorism is to look past the intent component of terrorism and instead treat any act of politically motivated violence as what it

is, a simple act of violence (e.g. attempted or actual murder). It is my contention that we disregard JWT and embrace the dictates of the UDHR. Nevertheless, I will both readily point out and concede that the assumptions and dictates of the UDHR are as unfounded, unsubstantiated, and ultimately unproven as the assumptions of JWT; while a consequentialist assessment is better than a categorical one on this issue, to borrow an idea from Socrates, the "noble lie" is perhaps preferable to a harsh, uncomforting truth. To that end, the international legal order must be strengthened. In many ways, the Bush Doctrine in the context of the GWT is undermining the international legal order. By undermining the international legal order the U.S. is undermining the very infrastructure needed for sustainable security against runaway political violence.

Legal Argument

I now look beyond the philosophical and toward the legal. More specifically, I look toward the existing legal structure and find justification in it for treating nonstate actors no differently from state actors. The foregoing chapters demonstrated how any argument in favor of extending rights to nonstate actors supposedly undercuts the foundational principles of natural law in the form of JWT, which grounds international law. In other words, those who believe the arguments in the previous chapter believe that if the law treats nonstate actors, or terrorists, similarly to soldiers it will subvert international law. Those who argue in favor of *not* extending rights and protections to nonstate actors say that perhaps emotions are leading the charge. This is insufficient, they argue. According to them nonstate actors are not entitled to those rights and protections. Finally, according to them, ignoring this reality hurts those men and women who actually deserve the protection of natural law.

There is a conceptual problem at play here. The conflict between those who argue in favor of extending the rights and those who argue for limiting them hinges on fundamentally different conceptualizations of law. For the former group, the problem stems from what international lawyers such as Ingrid Detter refer to as the positivist problem (Detter 2007, 1052). Ms. Detter argues that misunderstandings of international law are due to a reticence, if not an outright resistance, by the legal community, both academics and practitioners alike, to engage in the messiness of debating natural law and its implications. Instead, she believes, the focus is placed on legal positivism, especially at the level of international law. Legal positivism, or jus positum, she argues, has been the predominant school of thought with respect to the practice of law for the last century and a half. In part, she is correct on this point. One need only look at the landscape of international law to see what is patently obvious: by and large treaties must be clearly, and expressly, agreed to by contracting states before they are considered legally binding. Implicit in the positivist school according to Ms. Detter and those of like mind is the idea that natural law is of little to no importance to positivists. She passionately espouses the all-too-often assumed, but ultimately mistaken, contention that the law must be grounded in a universal morality. Quite simply, Ms. Detter, and those who argue this, are wrong. A universally applicable law can never be based upon a universally applicable morality as the latter does not exist. Consequently, international treaties, according to legal positivism, are binding on states only when assented to by consenting signatories to treaties or based on the behavior, or custom, of states. Consent gives rise to the law's binding power. To claim the law is binding based on anything other than consent is to invoke natural law, which is just wrong.

I disagree with Ms. Detter because she fails to grasp the role public opinion plays in formulating the law. Because people's emotions have changed with respect to what is acceptable

behavior we are once again witnessing a change in the guiding paradigm. A shift is underway once again with respect to what constitutes natural law itself. Ms. Detter essentially looks to a snapshot of a space and a time and believes that is it. That is the *truth*. No change is either possible or desirable. The mere fact that there is now an increasing call for human beings to be viewed differently provides evidence for the fact that today we are seeing a greater increase for humanity and by extension when human beings are entitled to protection, legal or otherwise. In other words, today human beings are increasingly seen as entitled to protection by virtue of being members of the species homo sapiens, properly constituted, and not by virtue of being members of a state's armed forces, properly attired. To be fair, Detter's argument extends beyond the presumption of categorical truths. She also argues from a consequentialist perspective the same conclusion that nonstate actors should not receive full legal protections, a position shared by other scholars such as John Yoo and Robert Chesney. In her book *The Law of War*, Detter argues that "The debate surrounding permissible interrogation techniques must carefully balance the rights of the detainee against the interest and duty of the State to safeguard its citizens" (2013, 373). I, and the evolving international law, disagree with Detter. I disagree with her and others like her who believe this is answered at the categorical level by appealing to natural law, and I disagree with her on the consequential level in that I do not believe her proposed course of action will lead to greater safety or security for either the state or the individual.

Human rights protections are now seen as applicable in all wars and conflicts. For example, genocide, slavery, and torture are prohibited by the law of war due to an assumption of an inherent dignity of humanity. The prohibition against genocide, slavery, and torture is a minimum standard, a foundational and organizing principle of the international community. Today it is quite clear that individuals enjoy both rights and obligations under the law of war. At both the international

level and the individual state level the governments of a given state must apply these minimum standards, as well as acknowledge and protect minimum standards with respect to court processes. Any claim that nonstate actors have essentially forfeited these rights is a non sequitur under international law. The reasoning is simple. These minimum standards guarantee that human beings will be treated humanely. Despite the self-serving claims of the U.S., the international community stands at the ready, supposedly, to enforce these protections in the event a given nation-state fails to protect individuals. In practice we see that these protections fall into one of two categories: (i) procedural and (ii) substantive. Procedurally, while a given nation-state may decide for itself what rights and remedies nonstate actors are entitled to, a nation-state may not grant less than the minimum rights required under international law.

Under international law any nonstate actor that is captured during the GWT is protected in that the U.S. may not engage in torture, or otherwise degrading and inhuman behavior. This prohibition is considered to be part of the jus cogens of international law and has nothing to do with whether or not a nation-state is a party to the Torture Convention. Evidently the international community now thinks that human dignity necessitates humane treatment. To the extent that states grant protective privileges and legal due process rights they are doing so based on an evolving conception of what constitutes a minimum threshold of civilized behavior.

There is an increasing body of law that now demonstrates this reconceptualization of a minimum standard of civilized behavior. When one looks to international human rights law we see, for example, that the Appeals Chamber of the Sierra Leone Special Court (2004) held that all parties to armed conflicts are bound by international humanitarian law.[114] Under both international

[114] The court held: "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties."

relations and international law it is now a matter of course to make the political and legal claim that nonstate actors are themselves bound to the dictates of international humanitarian law. It is important to note that the law is evolving largely separately and distinctly from any underlying clear, philosophical, theoretical framework. The driving force seems to be a shift toward the assumptions grounding the Universal Declaration of Human Rights (UDHR). The UDHR simply takes as a starting point that man is sacred in and of himself. No political affiliation is required under the UDHR. One's status as a human being is sufficient. Treaties reflect precisely this movement toward the UDHR. Most importantly judicial decisions are now increasingly reflecting this viewpoint.

The Law of Treaties

My legal argument begins where all analyses of international law begin, with the law of treaties. We first look to Common Article 3 of the Geneva Conventions of 1949. Common Article 3 addresses "each party to the conflict." Moreover, Common Article 3 is applicable to all conflicts "not of an international character." This indicates that nonstate actors are bound to the Geneva Conventions despite the fact that nonstate actors are not signatories to a given treaty. In fact, although under international law treaties are technically only binding on the parties who signed on to the terms of the treaties, we see exceptions such as when states that have not signed on to treaties accept both the responsibility and the liability under the treaty. In this situation the third party is deemed to be bound by acquiescence. This exception is found in Article 96(3) of the 1977 Additional Protocol I to the Geneva Convention. Article 96(3) allows for nonstate actors to accept the legal obligations and thus be bound by the treaty language covering their conflict.

The international legal system itself is now acknowledging that the treaty language itself is creating not only rights to be enjoyed by individuals but also obligations to be observed and honored by individuals. Take, for example, the UN Charter. It is clear that the UN Charter is but a treaty signed on to by members of the international community and seemingly binding only on member states; nevertheless, the UN Charter has a shroud of morality covering its corpus of jurisprudence. That is to say, while clearly the UN Charter is *legally* binding on its member states the international community writ large seems to agree that the purpose of the UN experiment, "saving succeeding generations from the scourge of war," was, and is, of such importance that even non-signatories, non-member states, and even nonstate actors are bound by the decisions of the UN Security Council. In a sense, therefore, the UN Charter is seen as binding on nonstate actors. Another way of describing this is that the principles contained within both the four corners of the UN Charter and the spirit of the same is now part of customary international law. Common Article 3 seems to have reached a similar status of customary international law and is thus binding on all.[115] We can conclude that international law seems to now accept Common Article 3 as binding on nonstate actors.

When one attempts to distill a coherent meaning we find that with respect to the applicability of international law to nonstate actors, treaty language, like most, if not all, legal documents is open to interpretation and thus inherently, if only minimally, ambiguous. Instead, increasingly the question of customary international law is proving dispositive and being found to apply to nonstate actors by judges throughout the world. Therefore, if we accept the dispositive

[115] The United Kingdom's Ministry of Defense believes that Common Article 3 "... purports to bind all parties, both states and insurgents, whether or not the latter have made any declaration of intent to apply the principles." The International Court of Justice seems to have argued the Contras in Nicaragua were bound by the terms of Common Article 3 when it held "the United States is … under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."

nature of customary international law we must question how customary international law is applied to nonstate actors.

Contemporary Customary International Law

In large part the interpretation and status of customary international law are largely a euphemism for a finding and interpretation of natural law equivalent, or substitute. It is the international community's attempt to ground the evolving international law with something seemingly less arbitrary and therefore not subject to the power dynamics of international relations. In a sense just as philosophers of old understood the need to demonstrate a bedrock principle – not arbitrarily subject to change – so too do modern scholars, lawyers, and judges. What constitutes customary international law therefore provides the foundational principles for legal prosecutions of individuals accused of committing a crime by breaking international law. Without this validity the judicial process itself will be seen as little more than victor's justice, the strong exacting punishment on the weak, and a victor exacting revenge on a vanquished. Along the same line of inquiry, when undertaking a case, the International Criminal Court (ICC), to which the U.S. is not a member and which the U.S. actively attempts to undermine, looks to see whether the focus of its legal inquiry is covered by customary international law. In short, customary international law is important for purposes of prosecution and determining the standards that are binding on nonstate actors. For example, in the Report of the International Commission of Inquiry on Darfur to the UN Secretary-General (RICID) (2004) the Darfur Commission found that rebel groups, armed nonstate actors, can be bound under customary international law if they "… have reached a certain threshold or organization, stability and effective control of territory…" (RICID 2004, paragraph 172). If armed nonstate actors satisfy this threshold they are both entitled to the rights and protections of, and bound by the obligations of, customary international law.

I suspect that given sufficient time the international legal apparatus will concern itself less with international customary law and will simply take as a given the notion that seminal treaties, such as the Geneva Conventions, the Hague Conventions, the UN Charter, and the Rome Statute, will themselves be sufficient for assessing the standards of international law. I believe this to be the case because at present customary international law as a source of obligations and rights is limited, at least with respect to nonstate actors and their relationship to international humanitarian law. This has to do with the reality of customary international law and the way in which it comes into being. Essentially states by way of behavior agree to precepts being classified as customary international law, and thus binding on them – despite the absence of a treaty – because states come to believe it is in their best interest to do so. By implication the customary international law creates norms that a number of states have come to be ready to be bound by. Insofar as international humanitarian law is developing norms that can be seen to infringe upon or restrict a given state's ability to behave as it sees fit, that state will likely resist. Nevertheless the very nature of customary international law is that given time a critical mass is reached and those individual states that do not behave accordingly are seen as the outliers, the rogues who are operating on the outside of the international community. What this does is create a situation like what we have now with regard to the GWT. Try though it may, a state can hardly argue that a new norm exists under customary international law, applicable to states and nonstate actors alike, while simultaneously arguing that the state itself does not recognize the new norm and is therefore not bound by it. This is precisely what is happening with the U.S. when it argues that nonstate actors are violating international law while simultaneously claiming the U.S. itself is not bound to international law.

Rebellion, Sedition, Insurrection, Civil War, and Belligerency

Despite being a legal argument the main issue is how one determines whether the cause for conflict is valid legally because the critical legal terms require philosophical assessments. The need for these philosophical judgments, and the want of a standard by which to assess competing claims, take us back to the problems articulated earlier in this chapter. In other words, how do we differentiate and determine whether the nonstate actors are in fact freedom fighters, belligerents, insurgents, terrorists, etc.? This is crucial because legal analyses and thus legal consequences, under the law of war, are predicated upon an assessment and determination of the causes of those fighting. So it is believed that when one is fighting on behalf of a sovereign state the presumption of justness exists; one need only look at the behavior of the U.S. to know this is not true. Nevertheless, one must still assess the *why* of the conflict. Therein can be found the philosophical conundrum. For example, in the nation-state itself, at the micro level, rebellion may be little more than a criminal act. At the macro level, the international level, rebellion may be a cry for independence. This is important because if viewed as criminal the rebels are subject to arrest and prosecution for endangering the life of the state and the non-rebellious citizens living therein. On the other hand, if viewed as a struggle for independence the conflict will be considered a civil war in which case the laws of war, and all of the obligations and rights and privileges contained within the laws of war, would apply to the conflict, as both sides of the conflict will be bound to the applicable international law.[116]

Moreover, humanitarian law seems to reject the idea that international humanitarian law is only applicable when both sides are recognized legal entities, such as nation-states. Lastly,

[116] Just as if two nation-states were warring.

because the international community increasingly acknowledges that nation-states have a vested interest in dealing with nonstate actors, an independent assessment is required with respect to classifying the nonstate actors. In other words, nation-states will likely see nonstate actors as little more than criminals and will wish to treat them accordingly, while on an abstract level the international community can possibly view the nonstate actors as something more and thus entitled to protection under the law. Therefore, the essentially historical approach of JWT is of little to no importance with respect to nonstate actors.[117] Nevertheless, the terminology, which is to say the distinction between *jus in bello* and *jus ad bellum*, is still spoken of and considered by judicial bodies. This seems to be a movement centuries in the making.

The Swiss jurist Emer de Vattel, in *Le droit des gens* (1758), addressed this question when he wrote, "It is a question very much debated, whether a sovereign is bound to observe the common laws of war towards rebellious subjects who have openly taken up arms against him?" For my purposes here how he answered this question is not terribly important. Rather I am demonstrating that the question itself is not new. Today it seems as though while states will easily use terms such as good and evil, just and unjust, which implicitly speak to the issue of just cause, the international legal system is becoming increasingly reluctant to engage in such assessments as good and evil. Instead, what is developing is a strong push for the reinterpretation of those terms. While still important on some level, classifying individuals as rebels, insurgents, belligerents, or terrorists, does not matter as much as recognizing that the nonstate actors have engaged in a way that is either lawful or unlawful. Individuals are seen as entitled to certain minimal legal protections, namely

[117] When I say of little importance I mean with respect to the philosophical discussion regarding the classification of nonstate actors. It is as if the international community recognizes the difficulty and subjectivity involved in making these determinations. The international community is therefore supplanting one standard and replacing it with another, a Kantian categorical imperative of sorts.

due process. It is to this point, my final point, that I now turn, the existing legal structure already in place with respect to affording captured nonstate actors with legal procedural safeguards.

Modern International Law

When taken together the laws of war and the Geneva Conventions provide the regulatory framework for dealing with those captured during conflicts. They also provide the legal framework analyzed and used by lawyers when arguing a legal matter before an international tribunal. This is important because these laws are supposed to provide the standard by which actions are measured. Moreover, I contend the law on an international level can serve this function in a way that natural law never could. Nevertheless, as it stands now lawyers are using their considerable skill to exploit the imprecisions and latent ambiguities contained within the black-letter law. It is this skill that allows governments to overreach and underperform. In other words, the ability to interpret so as to find meaning within the law that was not meant to be there results in individuals not being protected under the law, or not being protected well. Governments have proven themselves willing to interpret the law in ways that they deem in the state's best interests rather than in the best interests of the individuals. The consequence of this behavior is that the law is ultimately divorced from its original spirit, which is to say its original purpose.

Despite the reality of politically motivated violence existing for millennia, 9/11 was seen by the U.S. as a game-changer. As demonstrated above, the argument is that the supposedly unique nature of the participants renders this situation squarely outside the applicability of the laws of war; moreover, the treaties which speak to the treatment of individuals engaged in armed conflict are supposedly inapplicable as well. That is to say the Geneva Conventions are deemed not to apply. Also, as demonstrated above, lawyers in the field are able to make plausible, if not

convincing, arguments on either side of this issue. We see well-respected lawyers and scholars disagreeing on al Qaeda, ISIS, the Taliban and others and whether they are entitled to certain legal protections based on the answers to questions such as "Are they wearing uniforms?" and "Do they have a command structure?" Also, there exists fundamental disagreement over whether these men are entitled to legal protection as civilians under one treaty if not as combatants under another. This is because, as I have tried to demonstrate, the laws of war, and the corresponding treaties, can be looked at in one of two ways with respect to this conflict: (i) international or (ii) internal. Yet what we have here is a situation in which nonstate actors are fighting states anywhere in the world they deem tactically advantageous. Therefore, these nonstate actors are outside the law, not entitled to its protection, and they may be treated accordingly.

It is my contention that those who make this argument are disingenuous. I also contend that those who make this argument have not taken the full breath of the philosophical and legal arguments underpinning the creation of the laws of war and the Geneva Conventions into account. Instead, they are doing what lawyers do. They are starting with a position and looking for evidence to support their position. While I certainly understand I absolutely disagree. The Geneva Conventions, and the laws of war, have always recognized the reality of nontraditional combatants. More to the point, the laws of war have always had to deal with the reality of changing and adapting to meet the needs of the times. The laws are flexible in that they contain within them the means to do precisely that, change and adapt with the needs of the times. It matters not that a particular set of circumstances were not explicitly addressed by the laws of war. Now, while I could say that lawyers ought to behave more humanely within the context of applying international law to non-state actors, having attended law school and worked as a criminal defense lawyer I will make no such Pollyannaish claim. Instead, I say that the system should be recognized as affording to those

suspected of crimes due process protections that are not themselves subject to the vagaries of interpretation. James Madison was correct when he wrote, "[i]f men were angels, no government would be necessary."[118] Anyone suspected of having committed an act of violence should be afforded an attorney, an opportunity to confront his accuser, and a fair trial. In doing this the needs of humanity will be served as humanity itself will have deemed it necessary and ultimately the law will have served humanity rather than the other way around.

In this chapter I demonstrate what I believe to be true that the modern international laws are predicated on precisely this idea: the law serves humanity; it does not supplant it. History bears this out. More specifically, history of the development of international law bears this out. I look at some of the work of Francis Lieber, who dealt with this exact issue during the American Civil War. I also examine how the Geneva Conventions have evolved to address (i) international and (ii) internal conflicts. I also reiterate how the executive and legislative branches of the U.S. government misconstrued both the laws of war and the Geneva Conventions immediately after 9/11 in order to pursue what the U.S. deemed to be in its best interest, and how the judicial branch is interpreting the law differently finding broader applicability of the law. Nevertheless, I will demonstrate how at the core of the laws of war and the Geneva Conventions is an assumption under the guise of a recognition, a philosophic first principle that grounds the law in a categorical idea that human beings are entitled to legal protections. Finally, I conclude by arguing that the current interpretation of international law is not only not appropriate, it is counterproductive from a consequentialist perspective, given America's stated aims.

[118] See Federalist 51. Also, James Madison wrote these famous words on February 6, 1788 in the *Independent Journal*. It was contained in a piece titled *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*.

Beginning by way of conclusion, nontraditional combatants engaging in armed conflict are not a new phenomenon (Kossoy 1976). The laws of war have always contended with this issue. Lieber, who wrote *Instructions for the Government of the Armies of the United States in the Field* (1863) in response to General Henry Halleck, gave thoughtful consideration to the issue, to the reality that there are times when individuals engage in combat despite not being part of regularly constituted armies. Lieber wrote an essay in which he argued,

> It is universally understood in this country at the present time that a guerilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerilla party, to carry on what the law terms a regular war. (Francis Lieber, *Guerilla Parties Considered with Reference to the Law and Usages of War*, 1861, 7)

I believe one is hard-pressed to argue that this assessment, written in 1861, is not precisely on point with respect to the Taliban, al Qaeda, ISIS, AQAP, etc. It is obvious to even the most casual of observers that these groups can, and do, visit violence upon their perceived enemies in ways that mirror military strikes. The death, destruction, and remnants of a U.S. led drone strike in Yemen is absolutely no different than the death, destruction, and remnants a car bombing or suicide bomber in a square or market. The only distinction is the *who* not the *what*.

At the international level the law has come to reflect the issue of the nontraditional combatant. For example, militia and volunteer corps came to be recognized under the law as combatants entitled to legal protections (Regulations Respecting the Laws and Customs of War on Land, articles 1-2). Organized resistance movements received combatant status after World War II (Geneva Convention III 1949, article 4A(2)). America's ill-advised GWT now requires that combatant status be extended to the Taliban, al Qaeda, ISIS and others.

As mentioned above, the Geneva Conventions are concerned, for the most part, with international conflicts. Under the Geneva Conventions civilians are explicitly protected. Despite this predominant focus, the Geneva Conventions are also concerned with internal conflicts. Common Article 3 articulates minimum legal standards that must be applied in internal conflicts (Geneva Convention IV, article 3). Specifically, common Article 3 makes clear that combatants "shall in all circumstances be treated humanely." To this end

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [are prohibited];
>
> (b) taking of hostages [is prohibited];
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment [are prohibited];
>
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples [are prohibited] (Geneva Convention IV, article 3).

If we behave according, to the dictates of the 1969 Vienna Convention on Treaties, which is to say that we read common Article 3 consistently with its original intent, we see that common Article 3 was meant to deal with combatants engaging in internal armed conflict. Because common Article 3 speaks to armed conflict between a state and a nonstate actor, it is understood that if a combatant does not present a threat, they must be treated humanely. This idea was followed up in 1977 when two protocols were added: (i) Protocol I (Protocol I 1977) and (ii) Protocol II (Protocol II 1977). Protocol I speaks to international conflict by addressing the Hague Regulations. Protocol I, Article 75, makes clear that those engaged in conflict are entitled, under law, to protections. Protocol I has been acknowledged under international law by 174 states.[119]

[119] As of the writing of this dissertation the U.S. is not among the state parties which have ratified, adopted, or ascended to Protocol I.

Protocol II, on the other hand, speaks to internal conflicts. It specifically speaks to conflicts "which take place between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Protocol II, Article 1). A total of 168 states have acknowledged Protocol II under international law. Unfortunately, the U.S. has acknowledged neither.

It must be noted that the scope of Protocol I, Article 1(4), extends legal protections to individuals engaged in armed conflict when, and if, those individuals are "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination …" (Protocol I 1977, Article 1(4)). In this regard non-state actors are protected under the entirety of the Geneva Conventions, not simply the common Article 3 or Protocol I (Protocol I 1977, Article 44(3)).

The reciprocal is also true. If they fail to behave in a manner consistent with the Geneva Conventions they are then subject to criminal prosecution for having violated international law (Protocol I 1977, Article 44(3) & Article 44(4)). Interestingly, I should point out that when envisioning this manner of combatant the international law does not require that the nonstate actor control territory, or be based out of a specific territory. This means that they may operate out of any location they wish, anywhere in the world. In precisely the same fashion that the U.S. does not acknowledge international law when international law is seen to run counter to America's interests, the U.S. does not acknowledge this aspect of international law.

It is obvious that the mores of war are evolving. For example, it was once permissible to summarily execute those with whom one was at war. Today, however, that is no longer the case.

Indefinite detention is now increasingly seen as legally and morally objectionable as well. That this is the case even with respect to the most reprehensible among us is obvious. While I personally believe the Taliban, al Qaeda, and ISIS are reprehensible, even when considering the many horrifically abominable acts undertaken by them they are entitled to a full and fair public trial. The Nuremberg Trials demonstrate this as they are seen to be of paramount importance in the annals of international law precisely because it is a moment in history where rather than seek revenge the victors put the vanquished to the law and afforded them the opportunity to argue their case. It should be noted that in more than a few instances some Nazi defendants were not executed but imprisoned while others were either acquitted and set free, or sentenced to prison terms ranging from ten to twenty years.[120] Similarly in Japan the Tokyo trials afforded those who were captured the opportunity to plead their case before the law. Consequently, the Nuremberg and Tokyo trials have ushered in the next phase of international law, the holding to account, under the law, those who violate the law.

In very recent memory international criminal tribunals have been initiated so as to deal with various crimes under international law. The atrocities committed in Cambodia, Darfur, East Timor, Sierra Leone, Yugoslavia, etc. are but a few instances in which individuals were brought before a court of law to answer for their actions. For my purposes here in this dissertation I want to be as clear as I can possibly be. I am thoroughly uninterested in whether particular trials are successful in winning convictions. As far as I am concerned the trial itself is the success. Not torturing, not holding suspects indefinitely is the success. I am not so naïve to believe that due process protections will put an end to international violence, nor do I believe the U.S. will have

[120] Three defendants were acquitted: Hjalmar Schacht, Franz von Papen, and Hans Fritzsche. Four defendants received prison sentences: Karl Dönitz, Baldur von Schirach, Albert Speer, and Konstantin von Neurath.

any success in ridding the world of evil. That would be an absurd belief. After all, as Napoleon Bonaparte said at the peace of Amiens, "[i]n the present state of affairs every peace treaty means no more than a brief armistice." Said another way, as quoted in Plato's *Laws*, attributed to Clinias of Scambonidae, "'peace,' as the term is commonly employed, is nothing more than a name, the truth being that every State is, by a law of nature, engaged perpetually in an informal war with every other State." Instead, I believe that the trial itself is a way of dealing with the ongoing clash of civilizations and reframing the discussion surrounding the fall out of the ongoing culture clash. In dealing with it consistently with, and pursuant to, a legal code the world will be brought a little closer together.

We must acknowledge also that human rights law, as stated at the outset of this dissertation, has developed in such a way that human beings, whatever their behavior, are deemed valuable in their own right and are thus protected under the law. This brings me full circle to the UDHR (General Assembly Resolution 217 1948). The UDHR proclaims that there exist crucially important human rights that are enjoyed by individuals to the limitation of government power. For example, Article 1 speaks to the idea that individuals are born free. Article 3 speaks to the notion that every human being on the planet is entitled, under the law, to a protection of life, liberty, and security. Article 5 holds that no one may be tortured, and Articles 6, 7, and 9 speak to both equal protection under the law and a prohibition against arbitrary arrest and detention. Finally, in relevant part, Articles 10, 11, and 8 hold that everyone is entitled to a fair trial, and that if any of these rights are violated an individual may sue for redress under the law. It is not lost upon me that these ideals, radical though they may have been when proclaimed at the international level, are commonplace to the point of being self-evident within the U.S. These very ideas are spoken to by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution, a document supposedly

revered by the American people. Therefore, to watch the U.S. now disavow these ideals at the international level is perplexing if one assumes that America actually believes in them. On the other hand, America's behavior is understandable once one acknowledges the lessons of history, which is to say America believes in these ideals some of the time and for some of the people but never has America believed in these ideals all of the time for all of the people.

Regarding those who claim 9/11 created a unique scenario, while the UDHR is not binding law, interestingly the International Covenant on Civil and Political Rights (ICCPR) sets forth certain protections that are deemed of such fundamental importance that not even a national emergency allows for their abdication and these protections mirror those contained in the UDHR. Unlike Protocols I and II the ICCPR has been acknowledged under international law by the U.S. and 167 other nations. On the other hand, the ICCPR is deemed by the U.S. not to apply to the U.S. behavior conducted outside the continental U.S. It is only a matter of time before this will change. It appears to me that common Article 3 embodies the ideals of a minimum level of humanity that must be afforded to anyone engaged in conflict once they are caught. It will be increasingly difficult for the U.S. to ignore this reality.

It requires neither a stretch of the imagination nor an incongruous intellectual leap to see that the existing corpus of international law is already moving toward my contention. Implicit within the Hague conferences and the Geneva Conventions is the idea that the times change faster than the law. Consequently, there exists language in the Hague Convention that speaks to the inevitability of a situation arising that the black letter of international law fails to address. That language states,

> Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations

> adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples from the laws of humanity, and the dictates of the public conscience. (Hague Convention 1907, Preamble)

It must be noted that because this language is contained within a binding treaty, the idea itself is binding on any and all nations that have executed this treaty. When taken together we see that this language, the evolution of HRL, the principles emanating from the Nuremberg and Tokyo trials, the creation of permanently standing international courts of law lend evidence to my contention that even in a post-9/11 world human beings are entitled to certain due process protections. I do not mean to give the impression that I am appealing to what President Abraham Lincoln in his First Inaugural Address described as the "better angels of our nature." I am making a more rational and concrete argument by appealing instead to the law. Article 75, as described above, also makes clear that anyone captured in a conflict has the right to challenge evidence brought against them. The combatant not only has the right to present his own case, but he enjoys a presumption of innocence while he does so. He may not be compelled to give testimony in his own trial, and he may challenge by way of rigorous cross-examination any witness who testifies against him. And, in the event that he wins, he may not be held to account twice for the same crime (Protocol I, article 75(4)). Article 75 is important as it provides a backstop that prevents someone from arguing there exists a category of individuals who are not entitled to protection under the law. While I acknowledge that Protocol I, Article 75, is not binding law on the U.S., as the U.S. has failed to acknowledge it, I would argue that the proverbial ship has sailed for Article 75 has slipped into the annals of customary international law. Given the level of recognition received by Protocol I, and because the U.S. has not claimed that Protocol I is either unlawful, or abhorrent to international law, Protocol I and Article 75 are now part of the customary international law (Henckaerts and Doswald-Beck eds. 2005). In fact, while the U.S. initially embraced Protocols I and II in spirit if

not in practice, the judicial branch is changing that. The USSC, the highest court in the land, has acknowledged as much in *Hamdan* v. *Rumsfeld* when the court found that common Article 3 and Article 75 are "indisputably part of … customary international law" (*Hamdan* v. *Rumsfeld* 2006, 2749), and, therefore, binding on federal courts within the U.S.

Indefinite Detention

Lastly, we have to discuss a real consequence of the GWT, intended or otherwise. That is to say the indefinite detention of combatants without recourse to trials. The indefinite detention of individuals is an anathema and stands in stark opposition to everything the U.S. supposedly stands for, at least rhetorically. The U.S. argues, as I made clear at the very beginning of this dissertation, that combatants may be held so long as hostilities are taking place. The absurdity of this contention is that a boy of 7 (an age the U.S. believes is the age of a fighting male) could be captured after having been identified as an enemy combatant and held without trial for the duration of his life. If this young boy of 7 lives to the ripe old age of 100 he will have spent 93 years in prison without trial. While this statement may seem hyperbolic, I assure you it is not. The GWT, as I have tried to make clear, is functionally a war on a tactic, not a person, a group, or a state. The infliction of terror upon a population is undertaken in the service of an idea. Despite the silliness of many of the statements made by President Bush, the articulate musings of President Obama, and the absurdly nonsensical idiocies uttered by Donald Trump, while the U.S. can kill a man with bombs it cannot and will never kill an idea. Therefore, one attack per year deemed to be a terrorist attack will perpetuate the GWT. Because anyone at any time can undertake an attack for political reasons there is quite literally no end to be had to the GWT. This is an absurdity on its face. Nevertheless, the USSC has held it "is a clearly established principle of the law of war that

detention may last no longer than active hostilities" (*Hamdi* v. *Rumsfeld* 2004, 12). This too must be rectified.

In conclusion the Geneva Conventions are well-equipped to deal with the kind of armed conflicts currently being undertaken by the likes of the Taliban, al Qaeda, and ISIS. The HRL and the international criminal law, along with the laws of war and international law, have all been moving in the direction toward more legal protections for all peoples, not fewer protections for fewer people. As I have tried to demonstrate, this is an idea whose time has come and it is now increasingly enshrined in both customary and conventional international law. The U.S. should acknowledge the general trend of international law and bring its behavior into compliance therewith. At a minimum the U.S. should alter its official position and either begin to prosecute those it currently detains or release them from detention. I have argued that, under the law, detainees should be given the opportunity to confront their accusers, challenge the evidence against them, and enjoy the presumption of innocence while doing so. Also, detainees may be held only as long as they are deemed to be a threat but never indefinitely. They may not be held for the duration of hostilities, especially in an open-ended perpetual war being undertaken for predominantly, if not exclusively, financial reasons. For the U.S. to continue behaving as it has behaved for the last 17 years is not only counterproductive, it is unconscionable. I believe my recommendation will be a large step in the right direction.

Chapter Five:

Conclusion

Just War Theory should be replaced by The Universal Declaration of Human Rights with respect to the treatment of nonstate actors.

By way of a brief review, the legal and moral parameters of the ongoing debate are established by the arguments that "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war" (*Ex parte Quirin*, 37) and that an "Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants. Under international law lawful combatants receive POW status and the protections of the Third Geneva Convention. Unlawful combatants, on the other hand, do not receive POW status and do not receive the full protections of the Third Geneva Convention (Haynes 2002, 2).

Haynes argued that within the context and legal framework of the GWT nonstate actors may be treated differently from state actors when captured and interrogated (Haynes 2002, 2). The legal framework finds its basis in international law, which in turn finds its moral basis in part on conditions of JWT. JWT requires combatants to possess legitimacy; to possess legitimacy a combatant must be a state actor; therefore, nonstate actors "do not receive Prisoner Of War status and do not receive the full protections of the Third Geneva Convention" (Haynes 2002, 2).

I now begin this chapter by restating my research question: should JWT be modified or abandoned in order to accommodate greater fairness[121] toward armed nonstate actors, those

[121] I use the word "fairness" as defined by us. I do not mean fairness in some categorical sense.

individuals to whom we commonly refer, and legally define as terrorists? The answer to this question is *yes*. The answer is *yes* for two reasons: (i) man has an inherent value that is not recognized under JWT, and (ii) the utility of criminal prosecutions for those engaged in political violence is higher relative to the desirability of the goal of greater peace, security, and stability.

To arrive at my conclusion I traced the evolution of the school of thought that makes up JWT and I analyzed its applicability to modern international relations – specifically international relations in the context of nonstate actors. More to the point, my analysis found that JWT *is* both still relevant in the twenty-first century and applicable to nonstate actors who challenge the modern state and international institutions with the use of force and JWT *is not* relevant in the twenty-first century and is thus inapplicable to nonstate actors who challenge both the modern state and international institutions with respect to the use of force. Nevertheless, given the supposed goals of international law,[122] the international community, and specifically the U.S. ought to treat nonstate actors as criminals and prosecute them accordingly.[123] To engage in an ideological war like the GWT is to functionally litigate anew the competing ideas of justice. Finally, in critically thinking through the substance of the logical syllogisms that make up both JWT and the UDHR I find JWT is simply not universally valid as it is neither a metaphysical truth nor a transcendental one; therefore, JWT is important only insofar as it is understood to be but one way of seeing the world, *not* the *universally* correct way. I would be remiss if I do not point out that precisely the same thing can be said about the UDHR. The UDHR is neither metaphysically true nor transcendentally true; however, it is socially true given its utility with respect to the desired goal of less violence. The UDHR better allows or affords individuals the opportunity to believe that

[122] The goals are articulated in the Preamble of the UN Charter, the ICRC, the ICC, the U.S. Proclamations of greater peace, etc.
[123] Individuals may be prosecuted domestically or at the ICC.

they have a unique value and an inherent dignity in or vis-à-vis creation. As I stated in Chapter 1 my conclusions should in no way be seen as either an attempt on my part to equivocate or a reticence on my part to reach a definitive conclusion. Instead, my answers are a response to the fundamental problems with the presuppositions and assumptions underlying the conceptual and philosophical foundations of both JWT and the UDHR. To that end, I now explain each answer in turn.

No.

JWT is relevant in the twenty-first century and nonstate actors *can* be treated as they are currently treated.

Of the two answers, the "no" answer is actually the easiest to reach. It requires absolutely nothing of us other than to adhere somewhat unreflexively to the claims of Cicero, St. Augustine, St. Aquinas, Francisco de Vitoria, Grotius, Walzer, Finnis, Witt, and others. That is to say, if we simply accept their pronouncements, their dictates, which are little more than conclusory statements, with little to no evidence, or at least unconvincing evidence, then we are locked into their conclusion: nonstate actors do not have proper authority and therefore are simply not entitled to certain legal protections in so far as those legal protections are predicated on satisfying certain preconditions.[124] Why? The philosophers have created a logical syllogism equivalent, a simple way of arguing that either locks one into a given conclusion or fails to do so based solely on the *validity* of the *logical* structure of the argument. Consequently, once one accepts the premises of a given *valid* argument one is logically tied into a *structurally* inescapable conclusion.

That is what we have here. All of the philosophers discussed in this dissertation have claimed that proper authority is required due in varying degrees to either natural law based either

[124] I use the word logic in the sense of reasoning in a specific way pursuant to a specific *valid* structure.

on proper reasoning or based on God's will as only God could properly justify going to war or provide the proper reasons, the proper individuals who can decide whether justifications exist for going to war. Therefore, accept this premise and the conclusion is inescapable. Because the conclusion is inescapable, to the extent that international law is predicated on JWT, nonstate actors may be treated the way they are treated. They are simply not entitled to certain protections as they have not satisfied the precondition of proper political authority.

Yes.

Nonstate actors may not be treated the way they are currently being treated.

The "yes" answer is actually also quite easy to reach. It calls for little more than a rejection of the premises argued by the philosophers discussed throughout this dissertation, or at least a rejection of both their presuppositions and their assumptions regarding proper authority. Once rejected, we need only substitute in its place, and then embrace, the dictates of the UDHR, namely that man enjoys an inherent dignity.[125] It must be pointed out, however, that the UDHR, exactly as does JWT, simply proclaims as a given certain premises[126] for which it does not provide any evidence; just like the proponents of JWT, any evidence that is provided is woefully unconvincing.[127] That said, we need only look at the premises of this modern version of the logical argument. Here too, if we simply accept the premises as true, follow the argument through to its logical conclusion the result is inescapable: nonstate actors because of their inherent dignity may

[125] The preamble to the UDHR specifically states, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people…"
[126] An example is contained in Article 1, which states "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."
[127] We should note that nothing is said nor provided by way of proof to support the contention that man has an inherent dignity.

not be treated the way they are being treated today. Why? Because treating someone fairly and giving them certain legal protections is required because of their humanity. Let us remember, the UDHR unequivocally states that man possesses an inherent dignity that has absolutely nothing to do with a God and it is that inherent dignity that entitles man to a certain level of protection under the law.[128] I do not at all mean to be flippant. I am simply attempting to illustrate that at present we are in the middle of what Thomas Kuhn calls a paradigm shift. One longstanding way of seeing the social and natural worlds is being supplanted by a new way of seeing the social and natural worlds.

In the field of law, philosophically speaking, we are witnessing the jettisoning in some situations and the shedding in other situations of no longer widely held ideas. The intellectual artifacts of a bygone era are being replaced by an emerging and still developing way of viewing the world and man's place in it. As described above, some institutions have embraced this shift and are now moving in this direction. On the other hand, some institutions are a little slower to engage and are remaining steadfast. The point is that the underlying issue, the underlying reality of an almost blind non-critical adherence to JWT and its moral presuppositions – at least with respect to proper authority – is increasingly being called into question.

We should abandon JWT and embrace UDHR

This brings me back to my initial two answers. I ultimately argue in favor of a practical, less subjective development of an international law toward a more procedurally sound perspective and against any future adherence to the JWT with respect to fighting terrorism. In attempting to

[128] Article 11 of the UDHR specifically states, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he
has had all the guarantees necessary for his defence."

both limit aggression and protect innocent men and women JWT should be discarded and the UDHR should be embraced. The GWT has demonstrated one thing definitively: military force cannot be applied surgically or discriminately. The idea that we can engage in warfare over ideas in order to bring about peace, or that we can use just enough military force to obtain peace and security, and minimize the amount of damage done to property and loss of life while we pursue in pursuing those goals is now evidently and demonstrably silly. As we make mistakes and miss our marks we will create greater hatred and greater antipathy toward the U.S. That should be obvious to all.

From a practical perspective, because of the growing interconnectedness of international relations, to the extent that this century will witness greater conflict, and I believe that it will, it will likely witness it between groups of people whose understandings differ with respect to what constitutes a just cause for going to war, and who may in fact engage in armed conflict, among other issues of cultural and societal importance.[129] These reasons are often unique to them. As stated above, this is precisely the situation in the GWT. For example, Osama bin Laden, as the founder, and now executed leader of al Qaeda, cited *his* holy book, the Qur'ān, when he claimed to have divine permission from Allah to initiate war because the Qur'ān says "[p]ermission to fight (against disbelievers) is given to those (believers) who are fought against, because they have been wronged and surely, Allah is able to give them (believers) victory" (Qur'ān 22:39 – parentheses added). This one statement frames their struggle as one of both self-defense and defense of others. Also, the very concept of victory is altered in that victory need not be military victory. It may be a spiritual and religious victory, which is to say a victory to be enjoyed in the hereafter. Bin Laden

[129] This is a similar argument to that of Samuel Huntington; however, Huntington prescribes greater control whereas I argue for greater deference be given to the law and the legal system.

continued, arguing the Qur'ān says "[t]hose who believe, fight in the Cause of Allah, and those who disbelieve, fight in the cause of Taghut (anything worshipped other than Allah, e.g. Satan). So fight you against the friends of Satan; ever feeble is indeed the plot of Satan" (Qur'ān 4:76 – parenthesis added). This one statement renders al Qaeda's "resistance" squarely in the context of a religious war, and ultimately a battle between God and Satan, or good and evil. This and nothing more justifies al Qaeda, and now ISIS, to kill any person that they believe serves Taghut. Lest we think that this is behavior unique to Islam, the captains of the active conquest of Latin America were *required* by law and by faith to read to the natives living in Latin America a *Requerimiento*, an exhortation that they adopt Catholicism. This *Requerimiento* was

> If you do not, or if you maliciously delay in so doing, I certify that with God's help I will advance powerfully against you and make war on you wherever and however I am able, and will subject you to the yoke and obedience of the Church and of their majesties and take your women and children to be slaves, and as such I will sell and dispose of them as their majesties may order, and I will take your possessions and do you all the harm and damage that I can (Galeano 1997, 13).[130]

How is this claim to natural law or God's will in any meaningful way different from the prerogative claimed by ISIS to kill nonbelievers?[131] It is not! I am not engaging in what is commonly referred to today as *what-aboutism*, which is to say the attempt to draw moral equivalencies. I am, however, attempting to demonstrate that perhaps there is at least a fundamental if not an uncomfortable truth in the observation of Alf Ross, the Scandinavian realist, who argued in his *On Law and Justice* "like a harlot, natural law is at the disposal of everyone" (1958, 261)

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[130] *Requerimiento* cited in Eduardo Galeano, *Open Veins of Latin America*: *Five Centuries of the Pillage of a Continent*, trans. Cedric Belfrage (New York: Monthly Review Press, 1997) 13.

[131] On January 27th, 2019 ISIS took credit for bombing a Catholic church during a Sunday mass in the Jolo Province of the Philippines. Seventeen individuals were killed in the bombing and dozens more were wounded. ISIS took credit for a second bombing that targeted soldiers nearby. There is functionally no difference between what ISIS claims to be permitted to do to nonbelievers and what Catholics claimed to be permitted to do to nonbelievers.

Interestingly, while we already know that Augustine cited *his* religious text, the Bible, when justifying his arguments we see that the disparity between texts, or rather the disparity between the interpretations of religious texts, can, and will, lead to problems. More recently, but along a similar line of thought, ISIS wishes to return to the Caliph and return to the time of the Rashidun, a time when it believes Islam existed in its purest form. In following the writings of Sayyid Qutb, specifically Qutb's *Milestones*, ISIS believes a return to the Caliph is necessary for there to be correct adherence to Allah and his word, the Qur'ān. Qutb, and those who subscribe to either his work or a similar way of thinking, believes that one must live this way in order to live righteously and in accordance with God. We cannot be entirely dismissive of these ideas. Afterall, the GWT has been declared by President Bush to be a battle between "good and evil." At a minimum he too has invoked the ideas of a transcendent morality of right and wrong. At most he framed this as a battle of the respective followers of God and Taghut (Christianity calls him Satan), similarly to the way in which bin Laden and Qutb have framed this battle. This rhetoric continues until this very day. The current Secretary of State, Mike Pompeo, has openly said that we will fight until the *rapture*, the biblical rapture.[132] Presenting his views on U.S. National Security, Mike Pompeo, addressing a church group in Wichita, Kansas, in 2014, said of terrorists and terrorism "they abhor Christians and will continue to press against us until we make sure that we pray and stand and fight and make sure that we know that Jesus Christ our savior is truly the only solution for our world." In this same speech he characterized the ongoing wars in Iraq and Afghanistan, the GWT, as being "between the Christian West and the Islamic East." Former Attorney General, Jefferson Beauregard Sessions, III, has said, "I would cite you to the Apostle Paul and his clear and wise command in Romans 13, to obey the laws of the government because

[132] Mike Pompeo said this in 2015 during a speech in which he was essentially arguing against various policies originating from the progressive left.

God has ordained the government for his purposes." These are grown men, presumably rational men, modern-day politicians wielding unimaginable power and they are literally referencing ancient biblical language and citing to biblical passages as justification for their behavior and their policies in the twenty-first century. As it turns out al Qaeda and ISIS's presumptively irrational behavior, and supposed inability or unwillingness to reason clearly is not at all unique to Muslims in positions of leadership within al Qaeda and ISIS. Americans, Christians, in positions of leadership within the U.S. government are pretty bad at it too.

At the broader international level, differing casus belli are argued by China and Russia, each of which has its own societal, political, cultural, and military traditions, any of which can provide the impetus for going to war. If this is the case, then my research question is not simply one of academic concern. It is of practical importance. A greater understanding of the inadequacies and the limitations of JWT should lead to the conclusion that current development of international law is preferable to continuing down our current path.

For example, while the GWT can be looked at as a response to 9/11, 9/11 can itself be *legitimately* viewed as a response to U.S. foreign policy (bin Laden 2002; DABIQ Issue 15, 30). As I have attempted to make clear, determining whether nonstate actors are entitled to legal protections under the framework of JWT requires a preliminary assessment of the reasons for both parties engaging in their respective behavior. In other words, a basic concern is whether a party is engaging in an act of aggression while the other party is engaging in self-defense. More to the point, these largely philosophic questions require that a determination be made with respect to who is *right*, which is at once a legal and a moral concern.

Speaking historically, at this point in time, any such undertaking which is to say any attempt to find a moral basis or a legal one will ultimately prove problematic for the West in general, and the U.S. specifically. While the West, particularly Americans – especially considering that Americans have a poor understanding of history relative to the rest of the developed world – may no longer remember how it is that approximately five-percent of the global population came to control and consume approximately fifty-percent of global resources it is a pretty safe bet that the rest of the world remembers all too well. At present, the U.S. is involved in what can accurately be called a forever war, which we now know was launched based entirely on lies. The GWT is a war against an idea, against a tactic. There is no traditional "front."[133] Nor are there traditional combatants. To this point, in response to the question "How long can people be held?", Donald Rumsfeld said "as long as the global war on terror lasts." The follow up question was "How will we know when the war is over?" Rumsfeld said, "When there are no longer terrorist organizations of global reach left in the world." The U.S. repeatedly proclaims the factual absurdity that this is a war that can be won, and that combatants may be held until the cessation of hostilities if not outright victory. With respect to the treatment of individuals detained in the GWT this is the entire point of my dissertation. Eighteen years into this war, there is simply no end in sight. To be fair, and to be clear, none of this began with Trump.

We need only go back to our founding as a republic. The U.S. in a very real way owes its entire existence to colonization of indigenous people, the theft of land from those who already lived here, genocide of those indigenous people to allow for our expansion inward, and the enslavement of yet another people whose labor was then exploited without mercy to develop what

[133] In military parlance the "front" is where armed force – based on an unintentional boundary – is engaged in conflict with another armed force.

would be the U.S.. If I am to be completely honest, much of this is not taught in American schools, at least not in the form of a historical narrative predicated upon critical thought or inquiry. Rather, *facts* are taught, largely isolated and seemingly unimportant, definitely without any moral judgments attached to said facts. This is problematic for Americans because it does not allow them to understand *why* we find ourselves where we are. The lack of this basic information makes it impossible for Americans to answer with any great sophistication the question put to us by our own government, "why do they hate us?"[134] As early as 1958 we see ulterior motives at play in the Middle East. Essentially setting the stage of what is to come that document indicates that Secretary of State John Foster Dulles and the United Nations Secretary General, Dag Hammarskjold, discussed over lunch the question of economic development in the Middle East. Mr. Dulles, the very next day, called Chairman of Chase Manhattan Bank, John J. McCloy, to inform him of his discussion with Mr. Hammarskjöld the day before. In the conversation between the Secretary of State Dulles, a representative of the U.S., and Mr. McCloy, a representative of private banking, Secretary of State Dulles said "Arab unity may make it more difficult for the oil companies to maintain a decent position there…" (1958, 1). This dearth of information in American schools results in the silliness of Americans answering with an uninformed response of "they hate us for our freedoms." This silliness of thought, or lack of thought, means Americans can neither appreciate nor understand how the events of the past shapes the world of today. This

[134] This question was asked somewhat rhetorically by President Bush in the aftermath of 9/11; however, it was asked in earnest by President Eisenhower. President Eisenhower had his administration put together a study that would answer this question by giving an account of U.S. involvement overseas. The result was document titled "Near East Region: January – July 1958: The United States and Radical Arab Nationalism; long-range U.S. Policy; the Crises of July 1958."

is what Chalmers Johnson calls "blowback."[135] Consequently, as I have attempted to demonstrate, it is simply wrong to say things such as "well that is the past," or "*they* think that way but not *us*."

If we look internationally we are often told – as was argued many a time by many a professor in this very program – the U.S. is *not* an empire. It should be noted that this is not limited to academics. Donald Rumsfeld, in 2003, immediately after the U.S. launched the Iraq war, was asked if the war in Iraq was an action of imperialism. Rumsfeld answered by rejecting the very premise of the question. The U.S. "has never been an empire. I don't even know why you would ask the question" was his answer. For the then Secretary of Defense to answer in such a way is tantamount to the sanctioning of American ignorance.

At the close of the nineteenth century, its conquest of this country complete, the U.S. moved into both the Caribbean and the pacific. The U.S. took control of Puerto Rico and attempted to take control of Cuba. In the Philippines the U.S. fought a colonial counterinsurgency. If we jump ahead to WWII we see that what follows is a veritable master class in international relations duplicity if not outright hypocrisy. WWII, Americans are taught, was fought in the name of democracy. WWII, Americans are taught, was to usher into existence new norms of behavior. It is out of this period of time that some of the documents to which I refer in this dissertation were

[135] "Blowback" is a term that was invented by the CIA. It does not mean revenge. "Blowback" refers to the unintended results of American actions abroad. Chalmers Johnson goes further in explaining and contextualizing the reality of "Blowback" on the American public, which is to say Americans cannot put into context why a foreign power will be at all desirous of attacking the U.S.. One example of this is 9/11. A second example of this is the ongoing conflict with Iran. A not insignificant number of Americans have absolutely no idea the role the CIA played in the overthrow of the democratically elected Iranian government and the propping up of the brutal Iranian dictator, the Shah.

created. As a result of WWII the world gets the Atlantic Charter,[136] the UDHR, and even a "good neighbor" policy[137] with respect to our interactions with Latin America.

Well, as is often the case, words written on paper wound up not being worth the paper on which they were written for some peoples. Winston Churchill, that great savior of the West, wrote in the margins of the Atlantic Charter – the document that supposedly guarantees self-determination – viewed this "as a guide not a rule."[138] More to the point, the Atlantic Charter, in addition to self-determination, guarantees that all nations will have access to all of the world's resources (1941, Art. 4). In many ways, this lays the predicate groundwork for powerful countries to get what they need from wherever the resources are located. In other words, at precisely the moment in history when an end to colonialism is being promised we see the U.S. seizing new territories, and the enforcing of U.S. law and interests over foreign peoples.

Taken a step further, George Kennan, the arguable progenitor of the policy of containment in the cold war, writes a memo in 1948 that makes clear the rationale for U.S. foreign policy going forward. He writes

> … we have about 50% of the world's wealth but only 6.3% of its population. This disparity is particularly great as between ourselves and the peoples of Asia. In this situation, we cannot fail to be the object of envy and resentment. Our real task in the coming period is to devise a pattern of relationships which will permit us to maintain this position of disparity without positive detriment to our national security. To do so, we will have to dispense with all sentimentality and day-dreaming; and our attention will have to be concentrated everywhere on our immediate national objectives. We need not deceive ourselves that we can afford today the luxury of altruism and world-benefaction (1948, 10).

[136] The Atlantic Charter was a policy statement issued during WWII on August 14, 1941. It defined the allied goals for the post-war world.
[137] The Good Neighbor policy was created by Franklin Roosevelt's administration toward Latin America. The policy stood for the principle of both non-intervention and non-interference in Latin America.
[138] See House of Commons Debate, Vol. 408 c.794, 21 February 1945.

This is a clear precursor to the identical idea contained in the 2002 NSS.[139] To the point being made here, this colonial behavior leads to anti-colonial insurgencies. Arguably one such anti-colonial insurgency is the Vietnam War. Ho Chi Minh, President of the Vietnam Democratic Republic, essentially invoking the Atlantic Charter, sent a telegram to the Truman administration wherein he wrote, "I respectfully request you to interfere for an immediate solution of the Vietnamese issue. The people of Vietnam earnestly hopes that the great American Republic would help us to conquer full independence and support us in our reconstruction work" (1946, 3). Historically speaking, we know that was not the case. In fact, unbeknownst to Ho Chi Minh the U.S. was already assisting French combat troops in Vietnam. Understandably, in the absence of assistance from the West the Vietnamese fought for self-determination for the next twenty years.

Unfortunately, the Vietnam War was not the first time the U.S. endeavored to intervene, or undermine, a foreign government – democratic or otherwise – for its own interests. A *non*-exhaustive list evidences the following interventions

1948:	Elections in France & Italy
1951 – 54:	Regime change in Iran & Guatemala
1957:	Attempted regime change/bribes Syria & Indonesia
1958 – 63:	Destabilization / Assassination plot in Iraq
1960 – 61:	Regime change / Assassination plots in Congo & DR
1959 – 63:	Failed regime change in Cuba
1962:	Elections in Brazil
1962:	Regime change in British Guiana & Haiti
1954 – 63:	Installed, propped up, removed President of South Vietnam
1955 – 70s:	Propped up Government in Japan
1970 – 73:	Assassination of Salvador Allende & regime change in Chile
1967 – 74:	Support provided to "the Colonels" junta in Greece
1980 – 85:	Attempted regime change in Nicaragua
1991 – 03:	Attempted / Failed "covert" regime change in Iraq
2002 – Prsnt:	Afghanistan & Iraq / Venezuela / Iran, etc.

[139] The 2002 NSSM specifically states, "This is also a time of opportunity for America. We will work to translate this moment of influence into decades of peace, prosperity, and liberty. The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests" (2002, 1).

The Harvard academic and political scientist referenced above, Samuel Huntington, beyond writing a profoundly poignant and prophetic academic paper, authored a report, *The Crisis of Democracy*, for the Trilateral Commission[140] in the 1970s. In this report Huntington argued that the world was undergoing an "excess of democracy" (1975, 13). Huntington believed that "people no longer felt the same compulsion to obey those they previously considered - superior to themselves in age, rank, status, expertise, character, or talents" (1975, 75). This same attitude it seems extends to foreign countries. Peoples cannot be left to decide for themselves their own future, their own destinies. When it comes to self-determination, the Moirai are alive and well in the form of the U.S.

I bring up these many historical examples to provide evidence for the fact that American unilateralism in the context of U.S. foreign policy did not begin with Trump. Nor did it begin with President George W. Bush. This conceptualization of U.S. foreign policy spans many decades and witnesses American Presidents from both sides of the ideological spectrum continuing its implementation. On June 27, 1970, when speaking to the Forty Committee, the secret operations group that he led, Henry Kissinger was correct it seems when he stated rhetorically of the Chilean elections that ushered Salvador Allende into power

> I don't see why we need to stand by and watch a country go communist due to the irresponsibility of its people. The issues are much too important for the Chilean voter to be left to decide for themselves (1970).

This idea seems to really come together under President Reagan's administration. Under President Reagan we see a renaissance of covert military operations and interventions in *our* hemisphere.

[140] According to the Trilateral Commission website, it is "… a non-governmental, policy-oriented forum that brings together leaders in their individual capacity from the worlds of business, government, academia, press and media, as well as civil society" that supposedly shares "… a firm belief in the values of rule of law, democratic government, human rights, freedom of speech and free enterprise that underpin human progress."

The Atlantic Charter, it seems, is dead. The good neighbor policy, it seems, is dead. What is now standard operating procedure are the wars taking place in Iraq, Afghanistan, Yemen, Syria, Cuba, Venezuela,[141] etc.

In this historical context the questions I ask are important precisely because they are not entirely simply theoretical questions at the very heart of jurisprudence and legal theory. The qualifications set by JWT, qualifications such as "is an act just?" are problematic. For example, if an otherwise nonstate actor lives in a country that sees its democratic leader overthrown and a dictator installed – as in the case of Salvador Allende in Chile, Mohammad Mosaddegh in Iran, Arbenz in Guatemala – are the individuals living therein terrorists when *they* decide to bring the fight to the U.S.? On the other hand, I am perfectly comfortable saying unequivocally that they are not terrorists when they decide to fight back against (i) their illegitimate government at home, and (ii) the country that in his speech *Beyond Vietnam* the Reverend Dr. Martin Luther King once called "the greatest purveyor of violence in the world today" (1967). To the extent that they are nonstate actors they can argue – rather convincingly – that their state no longer exists. On the other hand, it can be a very simple, rather straightforward analysis. If only states can go to war, then these individual nonstate actors are simply violating the criminal law of the state in which they attack. If they conspired with someone outside of the U.S. they can seek out these individuals

[141] As of January 30, 2019, the U.S. is openly discussing overthrowing President Maduro in Venezuela. Despite receiving precisely zero votes in any election whatsoever, ever, Donald Trump has decided to recognize Juan Gerardo Guaidó Márquez, President of the National Assembly of Venezuela, as the "legitimate" President of Venezuela. John Bolton is regularly on Fox News spouting off foreign policy non-sequiturs. For example, most recently, Bolton referred to President Maduro as a "dictator." President Maduro won an election and received a substantial number of votes in doing so. Bolton, on Fox News, has also said "I think we're trying to get to the same end result here. Venezuela is one of the three countries I call the troika of tyranny. It'll make a big difference to the United States economically if we could have American oil companies invested in and produce the oil capabilities in Venezuela." The U.S., it seems, no longer feels the need to even bother with pretense. It is openly discussed on the news that the CIA is speaking to members of the Venezuelan military to organize and orchestrate a coup d' etat. Venezuela has the largest proven oil reserve in the world. The U.S. wants it. The U.S. will take it. U.S. foreign policy really is that simple. Now, if a Venezuelan individual suffers as a result of the U.S. backed overthrow of his government, and he decides to visit pain and suffering to America or Americans, he is not a terrorist.

and try them in either an international or a domestic court of law. To do otherwise is to engage in a *philosophical* dispute regarding the relative justness or unjustness of a given side's cause. To engage in this type of behavior is to engage in folly, a fool's errand. Instead let us turn them over to jurists who sit in judgment based on the rule of law. The procedural protections afforded individuals accused of violating international criminal law, on the other hand, has been established and largely agreed to by almost every state in the world.[142] We must note that to the extent that resentment against the U.S. builds because the U.S. is views itself above the law it will not be alleviated by the U.S. proclaiming itself above the law.

Insofar as answers to these questions govern our foreign policy decisions they have real-world consequences. Therefore, an almost blind adherence to the traditional answers to these questions result in both conceptual incoherence and a misguided pursuit of justice. With respect to rights, protections, and their corresponding duties and legal vulnerabilities, in the limited context of the law, humanity is better served by the international law shifting its focus from the state as its main unit of analysis toward the individual as the main focal point as advocated by the UDHR. If we acknowledge that the international community, in the form of both courts and tribunals, and international non-profit non-governmental organizations, now accept, almost without question, that individuals have internationally legally recognizable individual rights by virtue of their humanity, not by virtue of their being citizens of a state, then we see that the predicate groundwork already exists. We need only go a step farther.

While the nation-state is the main actor at the level of international relations, I take it as a given that individual nonstate actors nevertheless have both rights and responsibilities under

[142] The United States actively undermines the ICC wherever and whenever it can despite proclaiming to any who will listen that it is both the one indispensable nation, a nation of laws, and the greatest county in the world.

international law. Because the international community no longer balks at the idea that individuals are entitled to international rights under customary international law individuals are increasingly seen to have obligations to the international community that cannot be violated with legal impunity. This is so even when the law recognizes an individual as having broken away from a state. This is supposedly so even in the case of a head-of-state. I readily admit that not everyone agrees with the notion of universal legal jurisdiction. In *The Pitfalls of Universal Jurisdiction*, published in Foreign Affairs, Henry Kissinger argued very much against the notion of universal jurisdiction (2001). This is quite clear under international law. For example, under Article 25 of the Rome Statute, international crimes such as genocide, crimes against humanity, or war crimes will result in legal liability and legal accountability directly upon any individual. And legal liability is not at all contingent upon whether individuals act through states or act as nonstate actors (2002, 1-3). Under the Rome Statute legal liability attaches because of the nature of the act, not the legal or political status of the actor (2002, 1-3). In this way individuals are already bound by both customary and codified international law.

As stated above, this development of the applicability of international law to nonstate actors has been rapid and sophisticated (Fassbender and Peters 2012). By way of review, a complex catalogue of crimes, as well as rules concerning individual responsibility and joint criminal enterprise, has developed under the international criminal tribunals for the former Yugoslavia (1993), Rwanda (1994), Sierra Leone (2002), and Cambodia (2006). As an example of the expanding nature of international law, individual criminal responsibility now clearly applies beyond the context of armed conflicts. Article 25 of the Rome Statute makes it clear that individual criminal responsibility now extends to crimes against humanity or genocide. Moreover, in some

cases, international criminal law has been used to prosecute various individuals for various crimes under international law.[143]

Finally, for reasons I have argued, I believe that international law grounded by JWT, especially in the context of the GWT, is simply untenable insofar as it always requires an assessment of the philosophical merits of casus belli. JWT requires one to engage in an assessment of the deductive soundness of what are little more than appeals to natural law and religious argumentation seeking validation in and of God and thus justification for killing one's enemies. Lastly, I suggest that JWT applied to the American GWT is a confused endeavor, philosophically problematic because it essentially relies on the Bush Doctrine and therefore is destined to fail, certainly destined to neither halt nor prevent either further acts of terror or political violence. Instead of the *preventive* posture of current U.S. foreign policy, driven by a desire for hegemony or global domination, enforced by the military, the U.S. would be better served by simply acknowledging that the current fight against terrorism is best conceptualized as a criminal matter and not as a war. Therefore, the time has come for JWT to be abandoned and replaced by the aspirational components of the UDHR, which is already delineated in various international legal institutions, where proper political authority is of no consequence and one's humanity, not his political status, is recognized and protected.

A more prudent course of action would be to lead by example, ascend the Rome Statute, which creates the ICC, and play by the same rules as everyone else. Acts of violence will never stop. Rumsfeld's definition of when the GWT will end is the very height of idiocy. The U.S. could nevertheless recapture the proverbial *moral* high-ground and come to be seen as acting justly

[143] The website for the ICC indicates that it has 28 current cases that it is prosecuting.

once again. On the other hand if the U.S. chooses to continue down its current course of action it can, and rightfully should expect more of the same with respect to violent responses. Someone once famously said that "insanity is doing the same thing over and over again and expecting a different outcome."[144] By this definition the behavior of the U.S. qualifies as insane for a multitude of reasons. Continuing to engage in a persistent, demonstrably counterproductive way that is at least as old as Thucydides undermines America's supposed goals. America's behavior runs counter to the shifting international public opinion and emerging interpretative understanding of the customary and codified international law. To do this and yet expect the geopolitical landscape to get better is at least wishful thinking, at most outright insanity. Add to this the fact that one group is sitting in judgment of another group's proclaimed divine authority with nothing by way of actual evidence beyond a verbal utterance to support their admittedly absurd claim is not at all disqualifying philosophically speaking, for the dictates of Islam are on their face no more or less patently absurd than the dictates of Christianity when argued as justifications for killing people and destroying countries. In the words of John Adams

> Power always sincerely, conscientiously, *de tres bon Foi*, believes itself Right. Power always thinks it has a great Soul, and vast Views, beyond the Comprehension of the Weak; and that it is doing God's Service, when it is violating all his Laws.[145]

[144] This quote is often credited to Albert Einstein; however, no proof exists to establish this.
[145] Adams to Jefferson, February 2,1816, in Lester Cappon, ed., *The Adams-Jefferson Letters*, vol. 2 (Chapel Hill: University of North Carolina Press, 1959), 463

Bibliography

Aquinas. Political Writings. Edited by R.W. Dyson. New York: Cambridge University Press, 2002.Atlantic Charter. Franklin Roosevelt-Winston Churchill, 1941.

Barstow, David, "The Aluminum Tube Story – A special report.; How White House Embraced Suspect Iraq Arms Intelligence," *New York Times*, 3 October, 2004.

Bellamy, Alex J. *Just Wars: From Cicero to Iraq*. Wiley, 2006.

Bin Laden, Osama. 2002. "Letter to the American People." *The Guardian.* https://www.theguardian.com/world/2002/nov/24/theobserver. Accessed February 12, 2019

Blom, Adnrew. "Hugo Grotius (1583-1645)." The Internet Encyclopedia of Philosophy, ISSN 2161-0002. https://www.iep.utm.edu/grotius/ . February 13, 2019.

Boumediene v. Bush, 553 US 723 (June 12, 2008).

Bush, George W. White House. *The National Security Strategy of the United States of America*. Washington, D.C.: White House. 2002.

Cicero, Marcus Tullius. *On The Republic and On The Laws*. Translated by David Fott. New York: Cornell University Press, 2014.

Clausewitz, Carl von. *On War*. Princeton: Princeton University Press, 1976.

Cheney, Dick. Defense Strategy for the 1990s: The Regional Defense Strategy. Washington, D.C.: Department of Defense, 1993.

Coppieters, Bruno, and Nick Fotion, eds. *Moral Constraints on War: Principles and Cases*. Lanham: Lexington Books, 2008.

Crozier, Michel, Samuel P. Huntington, and Joji Watanuki. *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission*. New York: New York University Press, 1975.

Delahunty, Robert J., and John Yoo. "The Bush Doctrine: Can Preventive War Be Justified." *Harvard Journal of Law & Public Policy*. no. 32, 2009.

Detter, Ingrid. *Law of War*. New York: Routledge, 2013.

Detter, Ingrid. "The Law of War and Illegal Combatants." *George Washington Law Review.* 75 (2007): 1049-1104

Elshtain, Jean B. *Augustine and the Limits of Politics: Catholic Ideas for a Secular World*. University of Notre Dame Press, 1996.

"Enemy Combatants." William J. Haynes, II to Members of the ASIL-CFR Roundtable. December 12, 2002.

Ex parte quirin, 317 US 1 (July 31, 1942).

Fassbender, Bardo, and Anne Peters, eds. 2012. *The Oxford Handbook of The History of International Law.* Oxford: Oxford University Press, 2012.

Galeano, Eduardo. *Open Veins of Latin America: Five Centuries of the Pillage of a Continent*. Translated by Cedric Belfrage. New York: Monthly Review Press, 1997.

Grotius, Hugo. *The Rights of War and Peace*. Edited by Richard Tuck. Indianapolis: Liberty Fund, 2005.

Hamdam v. Rumsfeld, 548 U.S. 557 (June 29, 2006).

Hamdi v. Rumsfeld, 542 U.S. 507 (June 28, 2004).

Henckaerts, Jean-Marie, and Louise Doswald -Beck, eds. *Customary International Law.* New York: Cambridge University Press, 2009.

Hensel, Howard M. *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict*. Burlington: Ashgate Publishing Company, 2008.

Ho Chi Minh. "Letter to President Harry Truman." February 16. http://www.historyisaweapon.com/defcon2/hochiminh/ , 1946

Hobbes, Thomas. *Leviathan*. Edited by C.B. Macpherson. New York, NY: Penguin Classics, 1985.

Holy Bible: King James Version. Philadelphia: National Publishing Company - 1978

Hubris: Selling the Iraq War. [DVD] Directed by S. Stept. USA: MSNBC Films – 2013.

Huntington, Samuel. "The Clash of Civilizations?" *Foreign Affairs,* no. 72 (1993): 22-49

International Committee of the Red Cross (ICRC): Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) - 1949

International Conferences (The Hague): *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* - 1907

International Conferences (The Hague): *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* - 1907

Islamic State of Iraq and the Levant. "Dabiq: Break The Cross." *Online magazine used by ISIL for recruitment* no. 15 (2016).

Jervis, Robert. "Why the Bush Doctrine Cannot Be Sustained." *Political Science Quarterly*. 120 (2005): 351-377.

Johnson, Chalmers. *Blowback: The Costs and Consequences of American Empire*. New York: Holt Paperbacks, 2004.

Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny." *Foreign Affairs,* no. 4 (2001): 86-96.

Kossoy, Edward. *Living With Guerilla: Guerilla as a Legal Problem and a Political Fact*. Genève: Librairie Droz, 1976.

Kenny, Carolina. "Francisco de Vitoria, Relectiones (1538-1539)." July 3. https://www.classicsofstrategy.com/2015/07/relectiones-by-francisco-de-vitoria-1538-1539.html#3r (February 13, 2019), 2015

King, Martin Luther, Jr. "Beyond Vietnam: A Time to Break the Silence." April 4. https://www.crmvet.org/info/mlk_viet.pdf (February 17, 2019), 1967.

Lewis, Anthony, "The Kissinger Doctrine," *New York Times*, 27 February, 1975.

Lieber, Francis. *Guerilla Parties Considered with Reference to the Law and Usages of War*. New York: The Department of the Army, 1862.

Lieber, Francis. *Instructions for the Government of Armies of the United States in the Field*. Washington: Government Printing Office, 1898.

Machiavelli, Niccolò. *The Prince*. Translated by Harvey C. Mansfield. Chicago: The University of Chicago Press, 1998.

Martin, Kate, and Joe Onek. 2004. *"Enemy Combatants," The Constitution and the Administration's "War on Terror"* http://constitutionproject.org/pdf/enemy_combatants_onek_martin1.pdf (February 11, 2019), 2004.

Mattox, John M. *Saint Augustine and the Theory of Just War*. New York: Continuum, 2006

Miller, Jon. 2014. "Hugo Grotius." The Stanford Encyclopedia of Philosophy (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2014/entries/grotius/> , 2014

Vitoria. *Political Writings*. Edited by Anthony Pagden, and Jeremy Lawrence. New York: Cambridge University Press, 1992.

Pagden, Anthony (contributor webpage), Benedict Kingsbury and Benjamin Straumann. (2010) *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford Scholarship Online.

Patterson, Eric. 2009. *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats*. Lanham: Lexington Books, 2009.

Plato. *Laws*. Translated by Thomas L. Pangle. : Basic Books, 1980

Presbyterian Church of Sudan, et al. v. Talisman Energy, et al. 582 F.3d 244, 251 (October 2, 2008)

Prosecutor v. Sam Hinga Norman. SCSL:-2004-14-AR72(E) (May 31, 2004)

Qur'ān: Translated by S. Abul A'la Maududi. Pakistan: Islamic Publications, Ltd.

Qutb, Sayed. *Milestones*. Dar al-Ilm, Damascus, Syria, 2006

Reichberg, Gregory M., Hendrik Syse and Endre Begby, eds. *The Ethics of War: Classic and Contemporary Readings*. Oxford: Blackwell Publishing, 2006.

Reiter, Dan. Preventive War and Its Alternatives: The Lessons of History. U.S. Army War College. Strategic Studies Institute, 2016.

Ross, Alf. *On Law and Justice*. Los Angeles: University of California Press, 2007

Un General Assembly: Rome Statute of the International Criminal Court - 1998

Un Charter: San Francisco Conference - 1945

Un General Assembly: Convention on the Prevention and Punishment of the Crime of Genocide - 1948

Un General Assembly: International Covenant on Civil and Political Rights - 1966

Un General Assembly: Universal Declaration of Human Rights - 1948

Un Security Council: International Commission of Inquiry on Darfur Report to the Secretary-General - 2005

Un General Assembly: Vienna Convention on the Law of Treaties - 1969

Us Code. Title 18. Part I. Chapter 113B. Section 2331.

Us Conference of Catholic Bishops. "The Challenge of Peace: God's Promise and Our Response" - 1983

Us Department of State. Kennan, George. *Review of Current Trends, U.S. Foreign Policy, Policy Planning Staff, PPS No. 23. Top Secret*. Washington, D.C.: Department of State, 1948.

Vattel, Emer de. *Le droit des gens*. Translated by Joseph Chitty, Esq. Philadelphia: T. & J.W. Johnson & Co., Law Booksellers, 1867

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, Inc., 1977.

Witt, John F. *Lincoln's Code: The Laws of War in American History*. New York: Free Press, 2012.

Wohlstetter, Albert. 1958 *The Delicate Balance of Terror*. Rand Corporation, 1958.

Zalmay, Khalilzad. *From Containment to Global Leadership? America and the World After the Cold War*. Santa Monica: RAND Corporation, 1989.

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"Political Theory vs. Political Reality: The State of Nature and the Development of International Law and an International Community" – UNLV/CCSD Professional Development and Education; a lecture on The Historical Influence of Ideas at the Northwest Career and Technical Academy.

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International Law: A Legal and Philosophical Primer.

Political Theory vs. Political Reality: The Unintended Consequences and Real World Implications of U.S. Foreign Policy and Political and Legal Theory.

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PROFESSIONAL MEMBERSHIPS

Pi Sigma Alpha – National Political Science Honor Society
Phi Kappa Phi – National All-Disciplines Honor Society
American Political Science Association
International Studies Association
British International Studies Association

MILITARY TRAINING

United States Coast Guard (Honorably Discharged: 1994) - *Seaman, Onboard Primary Rescue Swimmer, Secondary Fire Fighter, and Rescue Team Secondary Leader – U.S. Coast Guard Cutter Assateague*. Advanced Training: Rescue Swimmer; Drug Enforcement Officer; and Special Weapons Operations. Stationed at U.S. Coast Guard base Honolulu, Hawaii.

SKILLS & CERTIFICATIONS

Fluent in Spanish

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