



# 9

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

War once was an institution of the society of states, a recognised method of conflict resolution between legal equals, and it was regulated (very imperfectly) by the Laws of War (International Humanitarian Law) which were in turn based in part on the principles of the Just War which were first established by Medieval Christian theologians. In the modern world many of the terms that appear in this sentence are no longer valid. War is no longer accepted as a legitimate conflict-resolving mechanism, and it is rarely engaged in by juridical equals; violence is still a feature of international politics but in the emerging global polity it only rarely takes the form of conventional inter-state war – instead we have the kind of ‘humanitarian’ wars discussed in the last two chapters, alongside asymmetric conflicts between states and national- or religious-based movements, conflicts which over the last decade and half have been summarised under the rubric of the ‘global war on terror’. Wars are no longer the international equivalent of a duel, a formalised conflict between legal equals, and the kind of regulations summarised in International Humanitarian Law are much more difficult to sustain. On the other hand, although Just War thinking has developed over the last 300 years in the context of inter-state conflict, as we have seen, the standard categories for analysis – proper authority, right intention, just cause – date back to a pre-Westphalian age, and may still be appropriate (Johnson, 2001; Bellamy, 2006; Brown, 2013a). In much of what follows in this chapter, such categories will be applied to such iconic modern issues as drone warfare, targeted killing and ‘enhanced interrogation techniques’, but first it may be useful to rehearse the conditions under which restraints in inter-state war emerged and were sustained – this may help to show why such restraint is more difficult to achieve in the modern world.

## INTERNATIONAL SOCIETY, GLOBAL POLITY

The laws of war have never been wholly effective; but when they have worked to restrain the behaviour of combatants it is because they have been underpinned by the interaction of four general principles; the 'golden rule', immediate reciprocity, the 'shadow of the future' and military necessity. The 'golden rule' refers to the widespread existence of common ideas about fairness and right and wrong conduct; this may seem rather insubstantial in the context of the systematic application of violence but there is a great deal of evidence to the effect that soldiers in conventional wars do have clear ideas of right and wrong which influence their behaviour. Soldiers do not want to think of themselves as killers, and adherence to a moral code is one way in which that label can be set aside; such a code may be taught via international humanitarian law, but ultimately it rests on the soldier's sense of common morality. Immediate reciprocity is connected to the golden rule – the latter is sometimes summarised as 'do as you would be done by', and soldiers are very conscious of the application of this principle to their situation. Soldiers are much more likely to obey the laws of war if they believe that the opposition will do likewise, and the moral economy of the soldier is far more sensitive to this principle than it is to lectures on what ought to happen. The 'shadow of the future' refers to the behaviour of leaders rather than individual soldiers, and points to the assumption that wars end, and that peaceful relations with the current enemy will someday be desirable – hence the need not to do anything now, such as ill-treatment of prisoners, that would damage the possibility of future peaceful relations. Finally, military necessity provides a counterpoint to each of these principles; this is tricky notion, because if military necessity is regarded as capable of trumping all the other principles then there would be no laws of war – on the other hand, clearly, the resort to force takes place because something important is at stake, the achievement of which is unlikely to be compromised by too nice an attitude towards the rules.

The influence of these features is never unambiguous or uncomplicated, but in the humanitarian wars and asymmetric conflicts of the modern era it has become particularly problematic. The shadow of the future is very short indeed when the aim is to eliminate the enemy, not simply to defeat them; although in the past peace has actually often been made with so-called terrorists, this tends to be forgotten in the current war on terror – and with some reason since a peaceful future with non-state groups like Al Qaeda is difficult to imagine. Nationalists who engage in terror such as the Irish Revolutionary Army may be brought to the table and a compromise struck, as has happened in Northern Ireland, but it is difficult to imagine what kind of bargain could be struck with Islamic radicals whose territorial claims are hazy at best. Again, common morality and the golden rule may not actually apply when one or both of the combatants believe themselves to be inspired by God and believe the enemy to be the devil incarnate. In such circumstances, even if one side believes itself bound by the rules of war, it may find it difficult to act accordingly if it knows

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

that the other side would not reciprocate. In a recent Court Martial in the UK where a British marine was convicted of shooting a prisoner, the marine was captured on tape acknowledging that he'd just broken the Geneva Convention, but also saying, correctly, that 'he'd have done the same to us' – the lack of reciprocity does not justify breaking the rules but it goes some way towards explaining why the rules are broken. In short, if wars are fought to bring about, or to prevent, ethnic cleansing, or against 'terrorists' or 'crusaders', neither of whom are seen as legitimate enemies, then many of the normal factors that produce some degree of restraint in war cannot be relied upon.

In addition, modern technologies of violence complicate things even further. In the first place, small groups of people can do very large amounts of damage, either by putting the technologies of peace to destructive ends, as was the case on 9/11 2001, or by weaponising such technologies, as is the case with chemical and biological weapons, or the use of malevolent computer software. Such threats are difficult to deal with and may produce counter-terrorism tactics that are as worrying as the threats that they are designed to combat. But, second, conventional militaries now increasingly employ technologies that undermine the possibility of restraint built on the notion of a 'warrior ethos'; the phenomenon of killing at a distance is obviously not new, but drone warfare takes it to a new level, making it possible to kill without any risk of being killed, a possibility which certainly undermines mutual respect between combatants.

All these factors make it difficult to produce a modern ethics of war and violence, which has even the limited effectiveness of older notions of international humanitarian law. In what follows in this chapter, the focus will be first on a number of specifically modern problems and then on some general considerations of contemporary Just War theory.

### Non-combatant immunity: Unlawful combatants

One of the main aims of International Humanitarian Law, as set out in the *Geneva Convention* of 1949 and Protocols I & II to the Convention of 1977 is to protect persons taking no direct part in hostilities (including prisoners of war) – i.e. non-combatant immunity – and to define the rights of combatants. Initially this referred to combatants in international conflicts, but one of the points of the Protocols to the Convention of 1977 was to extend the same kind of protection to combatants in non-international armed conflicts – thus, what used to be the 'laws of war' is now properly referred to as the 'law of armed conflict', and such requirements for combatant status as, for example, the wearing of a distinctive uniform, have now been relaxed somewhat. The legal notion of non-combatant immunity is a crude way of translating the moral principle that innocence should not be violated into something with practical application, and it has

sometimes been challenged because of this crudity, the argument being that some non-combatants are not in fact 'innocent' at all, but the general principle that it is important to discriminate between those who are, and those who are not legitimate targets in war has rarely been challenged. Unfortunately, this situation has now changed, and this principle is sometimes challenged, and its application has become increasingly difficult as the line between combatant and non-combatant has become more blurred even than in the past.

As to straightforward challenges to the principle of non-combatant immunity, a good starting point might be Al Qaeda's Second Fatwa of 23 February 1998, in effect declaring a holy war against America and its allies. After rehearsing the sins of the 'Crusader-Zionist Alliance', in particular the stationing of troops in the Arabian Peninsula, and declaring these sins a clear declaration of war on God, the statement continues:

On that basis, and in compliance with God's order, we issue the following fatwa to all Muslims: The ruling to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. ([www.pbs.org/newshour/updates/military-jan-june98-fatwa\\_1998/](http://www.pbs.org/newshour/updates/military-jan-june98-fatwa_1998/))

The thinking behind this is that the Americans and their allies are to be killed not on the basis of their status as combatants or potential combatants, but because they are American or allied to America; the distinction between civilian and military is explicitly ignored in the Fatwa – they are to be killed 'all together'. The most dramatic cashing out of this position came on 11th September 2001. Even if, by the exercise of a certain amount of mental gymnastics, the civilian and military workers who were attacked in the Pentagon could be regarded as combatants, that status clearly did not apply to the workers in the World Trade Center, or the passengers on American Airlines Flights 11 and 77, and United Airlines Flights 175 and 93. They were regarded as legitimate targets simply on the basis that they were American or working in America.

This was a clear breach of international law, a crime against humanity, and recognised as such by, for example, the UN Security Council and by nearly all governments, but most of the difficulties with non-combatant immunity are nowhere near as clear cut, and are created, not by a wilful refusal to recognise the status of non-combatant, but by the genuine difficulty there sometimes is in recognising practical applications of the principle. Consider, for example, the employment of civilians as so-called 'human shields' to protect military installations or to protect actual fighters. International humanitarian law is relatively clear on this matter; using civilians in this way is illegal, a war crime, and the responsibility for any harm that comes to them lies with those who placed them

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

in this situation. But although the use of force in such circumstances may be legal, modern armies, acting under the scrutiny of global media and world public opinion, and unwilling to deliver death to the innocent may well refrain from acting. In short, the employment of human shields is actually a very effective military tactic against an army that attempts to draw a distinction between combatants and non-combatants. But from the point of view of this discussion what is interesting is whether this is actually a case of the misuse of the principle of non-combatant immunity or whether the 'civilians' who make up the human shield are, actually, combatants.

To bring home the point, consider an actual example, reported by Michael Gross (Gross, 2009, 2013). During Operation Cast Lead, the Israeli response to shellfire from Gaza at the end of 2008, at one point the Israeli army identified a particular block of flats as being used as a command post by Hamas fighters – since it was also occupied by civilians, the Israelis telephoned the inhabitants to warn them to leave because the block was about to be attacked. Instead, the inhabitants poured on to the roof believing, correctly, that this would deter the Israelis from attacking. This could be read in one of two ways, posing two different questions: first, if we assume that this was a spontaneous action by the inhabitants of the block of flats, have they made themselves combatants thereby? Second, should we think about things differently if they were actually herded onto the roof by Hamas militants? Had the Israelis attacked civilians would have been killed and this would have generated a lot of bad publicity, but it is by no means clear that the civilians were actually innocent victims as opposed to active participants in a conflict. The moral of the story is that identifying those entitled to the protection of the norm of non-combatant immunity is difficult even for those who take the norm seriously.

This story will be continued later in in this chapter in the context of putative civilians killed by drone attacks, but here another blurring of the distinction between combatant and non-combatant will briefly be considered. During the wars in Afghanistan and Iraq, the United States initially declared that some of the prisoners they had taken were 'unlawful combatants' and therefore not entitled to the protection of the Geneva Conventions. In fact, under pressure from their own military lawyers who were afraid of the precedent they might be creating the US soon went back on this position and gave these combatants their Geneva rights, but it was not wholly unreasonable to draw attention to the difficulty of categorising some of those taken prisoner. Consider, for example, the standing of a British citizen, a Muslim who has travelled to Afghanistan in order to engage in combat against NATO forces in that country, forces he regards as Crusaders attacking his Muslim brethren (disregarding the inconvenient fact that many Muslims in Afghanistan are actually fighting for the Afghan Government, alongside NATO and against the Taliban). This foreign fighter is clearly not a bandit or criminal in any normal sense of the term, but neither is he a member of a recognised national force – 'unlawful combatant' is an unfortunate

description if it is meant to imply that he has no protection under the Geneva Convention, but then it is quite difficult to see how such a figure ought to be characterised. He is a prisoner of war, but even that anodyne description carries with it implications that may not apply in this case; normally, prisoners of war are released when the war is over, but what would count as the war being over in this case? The problem in all these cases is that the moral language we have doesn't quite fit the new circumstances of armed conflict in the twenty-first century, and although international humanitarian law can be made to apply in these anomalous cases the fit is very imperfect, and leads to a general sense of dissatisfaction.

## Torture and rendition

One of the most disturbing features of the Global War on Terror has been the way that prohibitions on torture have been violated by participants on both sides of the 'war'. This is an area of international law that until the last decade or so was regarded as relatively clear-cut and settled. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which entered into force on 26 June 1987 in Article 1 defines torture as follows:

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...

Two points should be made here: first, many lawyers would argue that there was already a peremptory norm against torture and that the Convention merely codifies this norm, but, second, in spite of this norm and the Convention many states have used torture more or less routinely and continue to do so – the fact that there is a strong international norm barring torture doesn't of itself prevent the practice. Still, torture has certainly been regarded as a blot on the international standing of the states that employ it, and the latter are usually very unwilling to admit that they actually do so.

The War on Terror changed the situation here quite dramatically. In the first place, groups such as Al Qaeda and the Taliban routinely tortured prisoners, and made no secret of the fact that they were doing so – witness the proliferation of videos showing the decapitation of their opponents. More disturbing, because more unexpected, during the first Bush Administration, the US openly acknowledged that it was using what it called 'enhanced interrogation techniques';

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

these included ‘waterboarding’ (inducing the sensation of drowning by immersing the victim), a technique that when it was employed by the Gestapo in the Second World War was certainly regarded as torture (Bowden, 2003). Moreover, some persons suspected of terrorist offences were subject to rendition to ‘black sites’ beyond the jurisdiction of the US Constitution or the European Convention on Human Rights, or to third parties, allies of America who were less prone to engage in euphemisms when employing torture.

These practices were, of course, intensely controversial. The US Administration for a time held that these practices did not amount to torture because they did not cause lasting physical damage, a very poor argument given the definition cited above. More to the point, the Administration argued that these practices extracted information that could not be achieved in any other way and that lives would be saved thereby. This was a position that did attract some support. A stock question in applied ethics is based on the ‘ticking bomb scenario’; suppose it were known with certainty that a bomb was planted in the city which would explode in a few hours and that the only way in which this bomb could be found would be by extracting the information from the person who placed it – would torture then be justified? Most writers either argue that the scenario is wholly artificial (how could one ‘know with certainty’ these things?), or that torture should not be employed even if the scenario is believable (Ginbar, 2008). However, some argue on consequentialist grounds that torture would be justified in such circumstances – famously, or perhaps infamously, the celebrity lawyer and Harvard Professor Alan Dershowitz argued that the practice should be regularised, and that judges should be able to issue ‘torture warrants’ which would prevent the unauthorised and excessive employment of torture, a proposal roundly condemned by most other commentators (2002).

In so far as it is possible at all to make a case for torture, it is the argument summarised by the term ‘dirty hands’ that best does the job. This position, which has a long history, has in recent times been articulated most clearly by Michael Walzer in an article by that name in *Philosophy and Public Affairs* in 1973. He argues that sometimes a person in a position of authority may find that the exercise of that authority requires them to get their hands dirty by doing something that they acknowledge breaks the moral code (Walzer, 1973). Paradoxically, doing something wrong might be the right thing to do, all things considered. A ‘ticking bomb’ scenario might be one such situation, and in *Just and Unjust Wars*, Walzer refers to a situation of ‘supreme emergency’ that might justify breaking the rules – the specific case he discusses is whether the deliberate bombing of German cities and civilians might have been justified had that been the only way to prevent the supreme disaster of a Nazi victory (which he acknowledges was not the case). Walzer is clear that a ‘dirty hands’ argument can only be made in extreme cases, but also that individuals who get their hands dirty in this way must be prepared to answer for what they have done in a court of law or if this is not feasible in the court of public opinion.

Is there actually any evidence that ‘enhanced interrogation techniques’ (EITs) have produced the goods, that is actually prevented terrorist attacks or led to the capture or killing of terrorists? The film *Zero Dark Thirty* sparked a debate along these lines by suggesting that the trail that led to Osama Bin Laden’s hideout in Abbottabad in Pakistan began with acts of torture. Interestingly, some ex-CIA officials who had operated interrogation programmes denied that such a direct link could be found, though they acknowledged that indirectly torture had been significant in intelligence collection. The aim of EITs was to break the will to resist of prisoners, to get them to co-operate in general terms rather than to extract specific nuggets of information. Specific pieces of information might actually emerge in this way as a by-product of the process rather than as its direct aim – and it seems that this is actually relevant to the Bin Laden case; it was casual references by prisoners to a ‘courier’ that put the CIA on the track of the person who handled messages for Bin Laden.

The discussion between the ex-CIA interrogators yielded one other insight. The use of EITs lessened under the second Bush Administration, partly because other methods of intelligence gathering were more effective, and was ended altogether by President Obama as one of the first acts of his Presidency in 2009. The interrogators argued that one by-product of this decision was to increase dramatically the programme of targeted killing that has been a trademark of the Obama Administration’s conduct of the War on Terror. In effect, once it was no longer possible to break the will of terrorists by the use of enhanced interrogation, the value of prisoners plummeted. The interrogators argued that the religious convictions of the terrorists meant that they were unlikely to co-operate unless they could tell themselves that they had been forced to do so and so taking them prisoner without that possibility was simply to store up a rod for one’s back, especially since it was also an ambition of the Obama Administration, as yet unfulfilled, to close the camp at Guantanamo where the prisoners would be held. Better to eliminate them altogether.

## Targeted killing and drone warfare

Drones (more properly, Unmanned Aerial Vehicles, UAVs) can be used for surveillance, and targeted assassinations can be carried out by manned warplanes or special forces, but still the association of this technology with that tactic does accurately summarise a distinctive feature of the Obama Administration’s conduct of the War on Terror. By the summer of 2013 President Obama had authorised over 400 drone strikes since he came into office, targeting high profile Al Qaeda and Taliban leaders or technical specialists such as bomb-makers or propaganda experts in Pakistan, Yemen and Somalia, with an estimated 3,000 operatives killed, including 50 high-level leaders (Byman,

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

2013). So-called 'signature strikes' have also been conducted, in which groups of individuals who are suspected of being Taliban or Al Qaeda operatives are targeted; these strikes are not technically targeted assassinations because they are not aimed at specific named targets, on the other hand, since the individuals concerned are identified as enemy combatants on the basis of their behaviour patterns rather than by such indicators as wearing a uniform, they are also difficult to classify as regular military operations. Drone strikes put a great deal of psychological stress on their operators, but do not put the lives of US servicemen at risk. By removing capable leaders and specialists they undoubtedly damage the capability of the groups that are targeted, but they may also act as recruiters for these groups – and, in any event, sometimes removing experienced leaders is not a good idea if an eventual negotiated settlement is sought. The legality of drone strikes in countries with which the US is not at war has been challenged, as has been the extra-judicial killing of at least one American citizen.

All of these issues are important in the context of the politico-strategic efficacy of the drone campaign but there is also a normative issue at stake here – can a policy of targeted assassination be seen as consistent with the just conduct of the War on Terror? And, does the pursuit of this policy via drone strikes affect our judgement in this case? Picking up the latter point first, the reliance on drones represents the latest version of the US desire to fight zero-casualty wars. We have come across this desire in the context of the Kosovo campaign, where the preferred tactic was bombing from altitude to avoid the possibility of allied casualties; the point was made there that if the decision to intervene in a conflict of that nature was the right decision, then it ought not to have been conditioned on political considerations that valued NATO lives so much more than the lives of the people who were being intervened on behalf of. In Kosovo, the argument was that there should have been boots on the ground as well as planes in the air – on the other hand, over the last decade there have been plenty of boots on the ground in Iraq, in Afghanistan, and occasionally in Pakistan (for example in the raid on Abbottabad that killed Bin Laden), and drones are for the most part used in places where there are local political (or geographical) reasons for not committing actual soldiers. And on the positive side, the capacity that drone pilots have for maintaining extended periods of surveillance before actually striking should mean that civilian casualties are easier to avoid.

In fact, it is difficult to tell whether this potential for increased discrimination is actually being met. Part of the problem is that it is difficult to tell who is, or is not, a civilian in many of the contexts in which drones are used. In the frontier zones of Pakistan, for example, virtually all adult males routinely carry weapons and therefore when they become the casualties of drone strikes it is difficult to know whether they are actually associates of the known target, as the US authorities tend to assume, or simply bystanders. This is particularly a consideration in the case of strikes which are not directed at specific individuals, but at groups of

people who are behaving in allegedly suspicious ways – what may be suspicious to a drone operator in the US may be routine behaviour in the area in question. However, there is another consideration here, which is that the training of at least the CIA drone pilots may not put as much stress on the laws of war as does that of regular air-force personnel – but still, for all these caveats, in principle, drones are weapons that make the discrimination that is central to Just War thinking easier to achieve.

In spite of these positives, it is still not too difficult to see why so many people worry about excessive reliance on drones. There is already something intuitively distasteful about the idea of killing without at least some risk of being killed, and this is somehow magnified when the ‘killer’ is sitting in a darkened room two continents away. It is important not to get too romantic about this – notions of chivalry and a warrior’s honour have very little purchase where Al Qaeda or the Taliban are concerned – but the impersonality of drone warfare and also of long-distance cruise missile strikes, is an issue, and not just because the sense that such killings are ‘unfair’ acts as a driver for recruitment to terrorist groups. And this will become an even more pressing issue in the not too distant future when drones are replaced or supplemented by ‘robots’ – Autonomous Unmanned Aerial Vehicles – that is to say when the machines themselves are programmed to make the decision to kill. However subtle and sophisticated the programming, the use of robots will increase exponentially the sense of revulsion that the use of drones already clearly generates. Still, it is clear that the use of drones will continue, and it is also clear that it will become more widespread – while the US drone programme is still by far the most significant, other countries are forging ahead with their own attempts to match it, and we can expect that drone warfare will in future be a normal part of the repertoire of war. If any event, it is perhaps the use to which drones have been put – the policy of targeted assassinations – that in a way poses more problems than the use of drones as such.

Historically, International Humanitarian Law has operated on the principle that combatants are essentially anonymous, defined by the uniforms they wear – and, of course, the very name uniform suggests anonymity – or by other symbols which distinguish them from civilians. The principle of anonymity is also tied up with the idea of the moral equality of combatants, the idea that whatever the rights and wrongs of a war, the individuals who wear a uniform are to have equal moral standing, assuming, of course, that their behaviour is not such that they lose this status by e.g. committing war crimes – but that is not a judgement that is usually made on the battlefield. Anonymity also has played a part in the informal code with which combatants of (at least Western) armies have equipped themselves, hence the well-documented distaste in the First and Second World Wars for the infantry sniper, who identifies and kills in a way that is disturbingly personal, even though he acts within the laws of war. By the same token, the assassination of heads of state and individual army

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

leaders in times of war is also regarded as morally ambiguous, perhaps justified in the case of a tyrant but generally undesirable; the basic principle that one should not carry out acts in time of war that make establishing peace at a later date more difficult is central. The key question is, how do these legal prohibitions and moral restraints play out in the war on terror?

In fact, they illustrate better than almost anything else the problems we have in coming to an intuitive moral understanding of how we should characterise the war on terror, at least in its present form. Obviously neither terrorists in general, nor their leaders in particular, wear distinctive uniforms or symbols that could convey anonymity; nor do they usually operate in the kind of context where direct contact between opposing forces is routine and where informal patterns of behaviour can thus emerge. On the other hand, they equally obviously carry out or order acts which are contrary to the laws of war, ignoring the requirement to discriminate amongst targets. In all three respects, they resemble members of a criminal gang rather than an army – although criminals often wear identifying marks such as gang colours and can operate within quite elaborate command structures – which is one of the reasons why critics of the War on Terror dislike the term and think it should be replaced by one that points towards the model of law enforcement rather than war fighting. But the law enforcement model only makes sense in those contexts where a judicial and police system exists which could identify and arrest members of a terrorist group, and this is a context which obviously doesn't exist in many parts of the world today, and, more specifically, certainly doesn't apply in parts of Yemen, Somalia and the frontier districts of Pakistan. These are regions where the writ of the central governments in question simply does not run, and, of course, there is the added complication that those governments in any event may not wish to exercise their legal powers when these groups are involved – had the US gone to the Pakistan authorities with the evidence they had on the probable presence of Bin Laden in Abbottabad, it is difficult to believe that this would have led to his capture. In short, the War on Terror is neither a 'war' in the conventional sense – which if it were, would tell against a systematic policy of targeted assassination – nor a police operation – where the targeting of criminals is a perfectly legitimate tactic, but where the aim is the arrest and conviction of the wrongdoers and their assassination would be a form of judicial murder. It is mostly fought not in a conventional war zone, nor in a zone of peace of the sort that might be found in relatively well-ordered societies adhering roughly to the rule of law, but rather in a kind of intermediate zone, neither of peace nor of war.

Perhaps what that suggests is that there is no big story to be told about targeted assassination; rather than trying to work out whether this is a morally acceptable policy in general terms we should instead focus on the specific. The moral demand should be that when killing takes place it should be on the basis of very good evidence as to the standing of the proposed victim, that civilian casualties should be avoided (difficult though that is when the status of non-combatant is

so difficult to define) and that the wider political context should be taken into account, in other words the benefit from the operation should exceed potential political costs in terms of local support. Such a position would not satisfy those critics for whom any use of the tactic of targeted killing is illegitimate, but it would represent the best fit with the principle that the War on Terror should be fought justly. It would also rule out so-called 'signature strikes' where there is no direct evidence that the individuals concerned are members of a terrorist group. Modern campaigns against terrorist groups take place in a grey area where it is unacceptable to regard the local inhabitants as enemies unless they explicitly act as such – being in the wrong place at the wrong time may be suggestive, but it shouldn't be enough on its own to warrant a death sentence.

It is clear that President Obama has become conscious of the downside of his administration's use of drones. In a major speech in May 2013 at the National Defence Academy he defended the policy, arguing that:

Under domestic law, and international law, the United States is at war with Al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a Just War — a war waged proportionally, in last resort, and in self-defense.

In his view the use of drones and targeted assassination has met those last requirements; however, he is clearly aware that this judgement is not as widely shared as he would like it to be. In the weeks before this speech a number of American and European commentators had begun to assess the scale of the use of these weapons and had come to the conclusion that Obama was, as they sometimes put it, every bit as bad as, or actually worse than Bush. In his National Defence Academy Speech, and in the State of the Union Address in January 2014, he acknowledged these criticisms, and promised to rein back the programme as far as was possible.

## Surveillance, security and civil liberty

Does terrorism pose an existential threat to Western societies? At the most obvious, material, level the answer to this question is, no. Whereas, for example, during the Cold War the possibility of nuclear war certainly did pose an existential threat in the most literal sense of the term, terrorist attacks are on an entirely different scale, less deadly than any number of threats to life produced by the terms of modern living – dying in an automobile accident being the case that is often cited by those who argue we take the risk posed by terrorism too seriously. Of course, there is an important moral difference between an accident

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

and a deliberate killing, but in terms simply of scale the former is indeed more of a threat to life than the latter, and neither constitutes an existential threat to our societies. On the other hand, existential threats are not necessarily to be defined quite so literally, as threats to one's physical existence; threats to a way of life as opposed to life itself are equally existential. Does terrorism pose this kind of threat? The operation of extremists within communities, the radicalisation of individuals, especially the young and impressionable, the 'capture' of mosques, the poisoning of inter-faith relations, these are all factors which impinge on everyone's lives in ways that actually constitute a more significant threat than the risk of dying in a terrorist attack. There is, however, a further point, well expressed by Philip Bobbitt who argues that the real existential threat posed by terrorism is that Western societies will find themselves obliged to change their nature in order to combat terrorism, that the very freedoms that define the West will be sacrificed as a result of the demands of an effective anti-terrorism policy, undermining the legitimacy of Western governments (Bobbitt, 2008). Followers of Carl Schmitt make a similar point arguing that the War on Terror forms the basis for a permanent 'state of exception' in which the normal processes of government are suspended, supposedly in the interests of national security, although, unlike Bobbitt, they do so from a position of general opposition to liberal, market states (Odysseos and Petito, 2007).

Responding to this danger, in his first Inaugural Address (2009) President Obama rejected as 'false the choice between our safety and our ideals' but for some critics the revelations about the level of surveillance conducted by the National Security Agency (NSA) and its foreign affiliates such as Britain's General Communications Headquarters (GCHQ) suggests that under his Administration our ideals have indeed been compromised putatively in the interests of our security, and Bobbitt's fears have come to pass. For these critics, Edward Snowden, the former analyst who has made it his mission to reveal the activities of the NSA, and his predecessor the serviceman Bradley (now Chelsea) Manning, who provided the vast quantities of diplomatic and military information disseminated by Wikileaks, are heroic 'whistle-blowers' acting in the public interest, rather than the criminals that the current Administration believes them to be. Interestingly, the critics on this occasion may be led by the usual suspects – Glenn Greenwald, the *Guardian* commentator who has never believed that terrorism constitutes any kind of threat independent of the behaviour of the US government, is Snowden's amanuensis – but they now include important figures on the libertarian right in the United States and realist IR scholars have also piled in to support Snowden (Walt, 2013). At the other end of the spectrum, Edward Jay Epstein has suggested in the *Wall Street Journal* that Snowden was a Russian agent (Epstein, 2014).

It is clear that the critique of US surveillance and data collection policy has struck a chord with public opinion in a way that earlier critiques of the conduct of the war on terror have not. How should this issue be assessed from the

perspective of a concern with the normative foundations of the War on Terror? The first point that needs to be said is that very little evidence of actual illegal activity has been uncovered. The various programmes of data collection exist within a legal framework established by the Obama Administration and under the oversight of the Senate Intelligence Committee, now chaired by the liberal Senator from California, Diane Feinstein. Collecting intelligence on foreign nationals based abroad does not constitute a breach of US law. Some Europeans have been apparently outraged by US activities in Europe but, as Secretary of State Kerry remarked, all governments conduct espionage against their friends as well as their enemies, a fact highlighted by the revelation in *Le Monde* that the French Government has its own data collection programme, and without the cover of legality. However, the legality of US (and British) programmes may actually be formal rather than real – it seems that permission for specific operations is almost always given, and the suspicion is that the Senate Intelligence Committee has, in effect, been ‘captured’ by the NSA. Moreover, the suspicion remains that the close relationship between NSA and Britain’s GCHQ allows the former to operate in the UK outside of British legal control and vice versa; in effect, the two organisations can work together to frustrate restrictions placed on each. This is denied by all concerned, but unfortunately there is no independent way of checking those denials.

Even if all the programmes run by the NSA are wholly within the law – and, to stress again, there is no evidence to the contrary – they still raise serious issues about the conduct of the War on Terror, and it is clear that the blanket assertion that such programmes are necessary to preserve our security will no longer pass unchallenged, and nor should it. Bobbitt’s argument that it is in such programmes that the existential threat posed by terrorism lies deserves to be taken very seriously. As with the use of drones and the policy of extrajudicial killing, there are complex choices to be made here, which in this case come down to quite basic issues about personal freedom and security. The internet security that allows us to manage our bank account online relies on encryption algorithms that can also be used by other people to organise paedophile rings and terrorist plots. The capacity to prevent such activities (or at least make them less likely) may actually involve the security services possessing powers that impinge on the privacy of ordinary citizens – and it is difficult to see any way out of this dilemma, except to hope that the constitutional guarantees that countries such as the US and the UK have built up over the centuries will actually hold, and that the authorities will not betray the trust placed in them. This is an area where, as with the issue of drones and targeted killing, the desire to see a grey world in black and white terms is very strong, but ultimately unsustainable. It seems probable that, as a result of Snowden’s revelations and shifts in public and congressional opinion, some elements of the surveillance and data-collection programmes run by NSA will be scaled back – but it is unlikely they will be eliminated altogether. A relatively small adjustment to the

programmes would probably be enough to regain wide public support, although, of course, without satisfying the critics.

## Just War thinking and modern warfare

The nature of war has changed almost beyond recognition over the last quarter century – of course, it is still the case that conventional inter-state wars are sometimes fought, but they have become the exception rather than the rule. Overall the incidence of war, however defined, has fallen, and most of those wars that do take place are either civil wars or asymmetric conflicts. As far as the latter are concerned, the French philosopher Jean Baudrillard wrote a book entitled *The Gulf War Did Not Take Place*, which attracted a certain amount of derision from literal-minded Anglo-Saxons, but the point he was making was actually valid; the 1991 Gulf War was so one-sided that to call it a war – with all the connotations of struggle that that term has – was misleading, and many modern wars have the same quality, Kosovo 1999 being a case in point (Baudrillard, 1995). In Iraq and Afghanistan things have looked rather different, and no one would suggest that these wars have not taken place, but still they bear very little relation to war as that term has been conventionally understood, at least in the Western world. Arguably, the kind of long-term frontier struggles between the civilised and the barbarian that characterised war for many centuries in Imperial China are rather more like the wars we see nowadays than the discrete conflicts that took place in Europe during the era of the society of states (Hanson, 1990).

Dramatic though these changes in the nature of war may have been, the Just War tradition set out in Chapter 3 of this book is well placed to cope with the shift in mind-set required to understand what is going on. Just War thinking crystallised in the middle ages at a time when the international order was not composed predominantly of clearly defined territorial states, when armies were rarely highly organised forces distinct from civil society and when many wars were low key and asymmetric (Johnson, 1985). The Scholastic philosophers who developed the notion of a Just War were concerned with the role of violence in preserving or regaining a just social order, and the categories they produced – just cause, last resort, proportionality and so on – were not tied to a system of nation states in the way that the international humanitarian law that developed in the nineteenth century was, or for that matter that the ‘legalist paradigm’ developed by Michael Walzer some forty years ago was (Walzer, 1977). Walzer, one of the most thoughtful of social critics, has recognised this point and has written on the ways in which his account of the legalist paradigm and the ‘war convention’ are difficult to apply when the zones of peace and war are not clearly defined, and so many activities, drone

attacks for example, take place in an intermediate zone where neither the laws of war nor the laws of peace apply. Other scholars of the Just War who are more comfortable with the theological underpinnings of the original notion have had little difficulty applying Just War categories to modern conflicts. Jean Bethke Elshtain, a social theorist whose religious convictions have always been central to her work, has understood the War on Terror through Augustinian lenses, and James Turner Johnson, the historian of the tradition, has explored the ethics of the 2003 Gulf War through the standard categories set out by Thomas Aquinas (Elshtain, 2003; Johnson, 2005). Non-theologically minded writers, such as the present author, have looked at the War on Terror and the conflicts of the last decade through Aristotelian thought, moving behind the work of Aquinas to the Classical Greek origins of at least some of his categories (Brown, 2013a).

Critics of the Just War tradition have not been satisfied by these moves. There have always been those who have argued that Just War thinking actually encourages violence. The most serious of such enemies is perhaps Carl Schmitt, whose position, expressed most clearly in his book *The Nomos of the Earth*, is that to describe a war as 'just' encourages a self-righteous fury which will demonise the enemy and stand in the way of establishing limits in warfare (Schmitt, 2003). Every war becomes a total war, because every war is a war between good and evil, and with evil there can be no compromise. This is strikingly similar to the argument put forward, in different terms, by some modern students of 'critical security studies' who write of Just War theory as delegitimising 'the Other', encouraging a Manichean world view and so on. The difference between these superficially similar critiques, is that Schmitt was hostile to the notion of a Just War because of his nostalgia for an era when (allegedly) interstate war was regarded as a kind of duel between legitimate enemies, whereas modern critics are unclear on what alternative to the Just War they propose. Schmitt wanted to clear the space for war as an act of state within a European states-system and understood, correctly, that Just War thinking is incompatible with the idea that war is *simply* a political act of this kind. Schmitt clearly cannot accept the notion that war can only be waged for a just cause, and for that reason he is right to see his approach as incompatible with the tradition, but he is wrong to think that Just War thinking automatically leads to the demonising of enemies and the end of restraint. He may be right that it sometimes has this effect on people who think of themselves as just warriors – not difficult to find contemporary examples from all points on the political compass – but this self-satisfied approach is, or ought to be, contrary to a good understanding of what using Just War criteria as a basis for political judgement ought to involve.

Modern critics of Just War thinking from a left perspective, such as Ken Booth, are rather less clear about what they want than Schmitt (Booth, 2000a).

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

They make the same critique of Just War thinking as Schmitt, but crucially without the endorsement of war as an act of policy. The result is either a pacifist stance or an attempt to distinguish between 'progressive' and 'reactionary' uses of violence. Pacifism is, of course, a very well-established position with a long and distinguished pedigree, from Jesus to Tolstoy and Gandhi, but it is open to the obvious objection that an absolute rejection of violence, whatever the circumstances, puts power in the hands of those who are not similarly disposed and can lead to the perpetuation of injustice. Belief in a God who will provide an ultimate guarantee that justice will prevail may make this position tenable for some, but this is an argument that cuts no ice with non-believers, or, for that matter, with a majority of believers. In practice, most 'pacifist' thinkers are, actually, 'pacifistic', to adopt a term of Martin Ceadel, that is they are predisposed against violence but prepared to countenance it in some circumstances, which, of course, opens the door to Just War thinking, properly understood (Ceadel, 1987). The alternative position is to distinguish between the progressive and the reactionary use of violence, supporting the former, opposing the latter. At one level, this is simply an instrumental, Clausewitzian approach to violence in which matters of justice are irrelevant or, perhaps, predetermined – one side in a conflict is, by definition, just and therefore no further questions need to be asked about its conduct.

In summary, although clearly some of the rhetoric of the War on Terror has encouraged the kind of Manichean thinking criticised by Schmitt and Booth, Just War thinking, properly understood, should tell against such extremism. However, over the last two decades or so, what it means to 'properly understand' Just War thinking has gone through something of a transformation, as a number of very distinguished analytical political philosophers have addressed the subject, somewhat marginalising more traditional thinkers such as Johnson and Elshtain in the process. These thinkers have approached the classical categories of Just War thinking from a different angle, subjecting them to close analysis, and often finding them wanting. A few examples may be helpful here to illustrate the impact of this new kind of Just War thinking.

A fundamental principle of modern Just War thinking is the moral equality of actual combatants; thus, Walzer in *Just and Unjust Wars* argues that the 'War Convention' governing what is permissible in wartime, his equivalent of *ius in bello*, applies to all combatants. The justice or otherwise of a war is of great importance, but not something that should govern our attitude to the rights of soldiers fighting the war – the same rules apply to both sides and the rights or wrongs of the conflict are a matter for the political leadership. In David Rodin and Henry Shue's collection *Just and Unjust Warriors*, and in Jeff McMahan's *Killing in War*, this principle is challenged; the argument is that the same moral principles govern killing in war and in peace; killing in self-defence may be justified, but those who are engaged in an unjust war cannot claim such a

defence (Rodin and Shue, 2008; McMahan, 2009). Thus, the rights of soldiers vary dramatically according to the justice of the war they are fighting – a soldier fighting for an unjust cause has no right to kill and cannot be regarded as the moral equal to a soldier fighting for a just cause.

McMahan's argument contradicts contemporary International Humanitarian Law but he could claim that his position on this matter is actually closer to Aquinas than is Walzer's notion of the moral equality of combatants, although Aquinas would be less sure than McMahan that anyone other than God could be sure which side in a conflict is actually just. More radical is the challenge to the principle of non-combatant immunity. Cecile Fabre has argued in *Cosmopolitan War* and elsewhere that the functional distinction between the military and civilians is irrelevant to their respective liability to be attacked; what matters is the extent to which particular individuals are responsible for wrongful deaths (Fabre, 2012a, 2012b). Matthew Bruenig takes the argument one step further; whereas in feudal and authoritarian regimes the sovereign who decides on war is not responsible to the people, in liberal democracies individuals have to be considered responsible for the decisions their governments make, and this means they cannot claim immunity from the consequences of those decisions (Bruenig, 2011). Perhaps slightly less controversial, many of the analytical political philosophers are very critical of the doctrine of 'double effect'; and therefore are much less willing than more conventional Just War theorists to accept that there is a clear moral distinction between so-called 'collateral damage' and the deliberate killing of civilians. This has considerable relevance for the moral assessment of terrorist attacks on civilians; conventional thinkers reject the idea that this is morally similar to the non-intentional deaths caused by, for example, drone attacks, but these thinkers are much less sure that such a distinction can be drawn.

There is no doubt that writers such as McMahan, Fabre, Rodin and Shue have revitalised Just War thinking by subjecting the traditional categories to a close analysis, but it may be that in the process they have changed the nature of the discourse in a way that is not particularly desirable. Part of the question here rests on what can be expected from Just War thinking. There is a distinction here that is best summarised by saying that whereas these writers look to Just War theory in the expectation that it will give them *answers*, more conventional Just War thinkers are more inclined to think of the tradition as a source of good *questions*. In the first case, the expectation is that Just War theory will tell us whether a particular war, or a particular action in a war, is just; in the second case, the hope is that Just War thinking will help us to make the wider judgement as to whether, in the particular circumstances of the case, a resort to force, or a particular forceful action, would be the right thing to do, all things considered. One of the features of contemporary analytical political philosophy is the belief that with the right amount of brainpower applied to

## THE ETHICS OF WAR AND VIOLENCE IN A POST-WESTPHALIAN AGE

any particular case, the right answer will emerge – the Scholastics who developed Just War theory also believed that the right answers could be found, but only by God's grace, while the Aristotelian roots of Just War thinking regard the discourse as an instance of *phronesis*, the opportunity to exercise political judgement and wisdom, without the kind of certainty that might be expected of the sciences.

An equally compelling critique is that the analytical Just War philosophers, in their search for a rigorous account of the Just War, have lost contact with the actual practices of war. This is what Michael Walzer had in mind in a recent interview when he remarked that for these writers 'the subject of just war theory is just war theory [whereas] I think the subject matter of Just War theory is war' (Interview with Nancy Rosenblum, see Further Reading in Chapter 3, p. 57), although it is worth pointing out that Walzer's emphasis on the *rights* of combatants was itself a step away from the tradition and in the direction of the writers he criticises. Refuting the notion of the moral equality of combatants, or challenging the principle of non-combatant immunity, may make sense in the seminar room, but neither position translates well to the battlefield – indeed, in practice, both positions could lead to disastrous consequences, as McMahan implicitly acknowledges by ending his book with a qualified endorsement of existing International Humanitarian Law, which contradicts the argument he has laid out in such detail. Of course, if one were to apply all the principles set out by McMahan et al. it would almost certainly be impossible to actually fight any war justly, and these philosophers would probably be happy with that result, concluding that therefore no war should be fought – but this is simply a back-door way of making Just War thinking the equivalent of pacifism, defeating the purpose of the exercise, which starts from the premise that violence is sometimes necessary.

## Conclusion

There have already been more changes to the nature and practice of war and violence during the twenty-first century even than were seen in the twentieth century, and thinking about these changes has barely caught up. We are only just now beginning to work out how to think about the ethics of unmanned aerial vehicles, yet already the latter are on the verge of being replaced by true robots. The age of information warfare and the use of computer viruses has only just begun, and remains largely untheorised. The Just War tradition provides us with one set of tools for thinking through these new problems; the decades ahead will decide whether these tools are actually up to the job – for the moment we can only work with what we have.

## Further Reading

Christopher Coker is an interesting guide to the changes in the nature of war in recent years – see Coker (2008) and (2013) among many other contributions. Michael Gross (2009) is an excellent introduction to the dilemmas generated by asymmetric warfare as is Anthony Lang and Amanda Beattie (2009). James Turner Johnson (2011) represents the traditional approach to Just War under modern conditions, as does Jean Bethke Elshtain (2003). Other useful overviews include Tim Dunne (2007), Wade Mansell (2004) and Stephanie Carvin and Michael John Williams (2014).

On specific issues, Stephanie Carvin (2010b) discusses judiciously issues such as the status of ‘unlawful combatants’; specifically on Guantanamo see Karen Greenberg (2009). On torture, a good starting point would be the essay by Seamus Miller in the *Stanford Encyclopaedia of Philosophy* <http://plato.stanford.edu/entries/torture/>. Sanford Levinson’s (2004) is a useful collection, as is Karen Greenberg (2006) and Greenberg and Joshua Dratel (2005). Alan Dershowitz’s ‘torture warrants’ paper appears in Levinson and his book (2002) adds little to the argument. Yuval Ginbar (2008) takes the ‘ticking bomb’ scenario apart at great length. Neither Michael Ignatieff (2004) nor Michael Walzer (1973) actually defend torture, but they do manage to talk about the issues it raise in a more nuanced way than most others.

The issues surrounding UAVs (drones) are among the hottest topics in contemporary IPT; there are some book-length studies – Akbar Ahmed (2013), Christian Enemark (2014) and a good collection edited by Bradley Jay Strawser (2013) – but for the most part things move so quickly that even the journal literature is hardly up to date. Useful articles include Hillel Ofek (2010), Derek Gregory (2011), Stephanie Carvin (2012), Michael Boyle (2013), Daniel Byman (2013) and most usefully, McCrisken (2013). The Stanford/NYU Report ‘Living Under Drones’ is a valuable document, and the associated website has useful links [www.livingunderdrones.org](http://www.livingunderdrones.org) – still, the blogosphere remains the best source of material, to be used cautiously as always; Charli Carpenter’s contributions to the *Duck of Minerva* are particularly worth looking out for.

The *Guardian* newspaper provides the ‘official’ version of the Wikileaks/Assange saga – David Leigh and Luke Harding (2010) – and of the Snowden Affair – Luke Harding (2014); Glen Greenwald (2014) is Snowden’s amanuensis. The Kindle Special by Edward Lucas (2013) takes a more jaundiced view, arguing that Snowden has done great harm to Western

