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Of Drones and Justice

A Just War Theory Analysis of the United States' Drone Campaigns

By Ethan A. Wright

Introduction

Drones are at the forefront of high-tech warfare. New technology always calls into question how we ought to make judgments, especially with regards to war. Unmanned aerial vehicles (UAVs), typically called “drones”, have revolutionized warfare, allowing aerial surveillance and armed attacks to reach farther than ever contemplated with manned aircraft. This has not only opened up new strategic and tactical frontiers, but also has borne foggy questions about law, diplomacy, and especially ethics. As technology grants us new capabilities, it may be tempting to adopt new moral rules. It will be shown that the use of drones does not require us to retreat from conventional wartime ethics, usually called Just War theory. A primary question raised, which this paper seeks to answer, is whether or not the United States’ recent use of drone strikes has been ethical in accordance with Just War theory. Under traditional Just War principles, drone strikes outside of active combat zones, without knowledge of the target’s identity, should be condemned as immoral and unjust.

Literature Review

There is a wealth of scholarship on Just War theory. Generally accepted tenets include: Enemy soldiers may be killed, while civilians may not; the intent of a war, and subsequent military action, is relevant to its moral evaluation; proportionality is a significant factor in judging the morality of a military response; and international law has deep roots in the Just War tradition, and tends to reflect it. The history of drones is also widely documented. Though few sources have taken the trouble to establish a thorough

timeline of all drone strikes, details are available on some of the earliest strikes, their targets, and their frequency over time leading up to the present.

In addition, many authors have taken up the challenge of considering the problems that drone technologies pose for traditional Just War principles. Many authors have been quick to point out how drones force us to adopt new perspective. A frequently noted problem that remains largely unanswered in the literature is that of determining whether or not drone operators are combatants. On this topic, no consensus appears in the literature. Other common concerns include the necessity and proportionality of drone tactics.

Conspicuously absent in the literature on drones and Just War theory is simplest combination of the two subjects: has the United States' use of drones been consistent with Just War principles? It should be noted that many have written thoughtful analyses on the problems that are presented by drones with respect to Just War theory. Few scholars, however, take a definitive stance as to whether or not the U.S. policy of drone warfare has been just. Most scholars who have taken up that torch hold that American drone warfare is unwise, but the bulk of that literature regards cost-benefit analysis, and still avoids questions of justice.

A Summary of Just War Theory

Just War theory formalizes the moral justifications for war. It is a lens fixed in the Western philosophical tradition.¹ It primarily seeks to answer two questions of justice²: Whether or not the decision to go to war is moral, i.e. if the cause is just; and whether or not actions in wartime are moral. The first is typically referred to as *jus ad bellum*, while

¹ Nääf, 13

² Leahy, 7

the second is known as *jus in bello*. There is a third category – *jus post bellum* – which refers to questions of justice after the conflict has ended. However, most scholarship on Just War concerns only the first two, and this essay follows suit.

Historically, self-defense has been advanced as the only just cause for going to war, though some scholars also contend that humanitarian intervention is compatible with Just War principles.³ At the outset of conflict, this question can often be easy to answer – all it typically requires is knowledge of which actor became violent first. However, as conflict continues, this question remains pertinent. Continual reflection is necessary to determine whether or not it is moral to expand a war beyond its original scope, and whether or not its original cause has disintegrated.

Because Just War theory specifically deals with the violent conflict of war, most of *jus in bello* analysis is with reference to whom one is allowed to kill, and who is off limits. The typical distinction is between “combatants”, who may be the targets of wartime operations, and “non-combatants”, who are exempt from being targets of such attacks.⁴ This is known as the principle of discrimination. Put simply, only those engaged in the conflict are legitimate targets. “Combatant” traditionally refers to a soldier, but over the twentieth century, as the face of war has changed, that definition has become more complicated. The original conceptions of Just War theory, first formulated centuries ago, were designed for “total warfare, for conventional wars fought between the armies of two states.”⁵ War in the twentieth century has been a radical departure from war throughout most of history, though. Since World War II, we have seen the rise of

³ Fixdal, 307

⁴ Leahy, 2

⁵ Nääf, 14

guerrilla warfare, international terrorist cells, nuclear weapons, and paramilitary groups. The changing nature of war has required reflection on the principles behind the distinctions of Just War theory. As such, contemporary definitions tend to focus more on whether or not a target is a military threat, as opposed to whether or not he or she is a soldier in uniform, which was the traditional distinction. “Non-combatant” refers to someone not engaged in the conflict, or at least not enough to warrant attacking them on sight. In contrast to the diminishing certainty in deciding exactly who is a combatant, the definition of non-combatant, or civilian, remains much the same as it did a century ago.

Two other principles drive *jus in bello* analysis: proportionality and necessity.⁶ Proportionality is the notion that damage inflicted should be commensurate with the military value of the target, including any collateral damage. Targets that pose more extreme threats may justify a greater response. If the terrorist attacks on September 11th had only killed ten people, the American retaliation against Al-Qaeda would have been so grossly disproportionate to the damage caused. Proportionality should not be interpreted in a strictly quantitative sense. Proportional responses should take into account two factors: how much damage was caused, and how that figure informs the future potential to deal damage. The first is a retributive factor, while the second is a determination of threat. All military responses must take these factors into account before action, and disproportionate responses are unethical under Just War.

Necessity is the idea that the target must present a great enough threat that attack is necessary for the security of a nation. If the objectives can be accomplished without resorting to violence, then to use violent means would be unethical. The threat must be of

⁶ May, 92

such a nature that only military force can adequately meet it. These can mean that other forms of dispute resolution, such as diplomacy, have failed, or perhaps were never feasible to begin with. If an objective is not necessary for the defeat of the enemy or securing one's nation, that objective is unethical.

Just War theory grows out of a philosophical tradition that holds individuals as having intrinsic moral value. This means every individual is an end in and of herself.⁷ As such, people are not obstacles to a greater goal, such as winning a war. People are not means to an end. Targets are only legitimate under Just War theory by virtue of who they are and what they are doing, not group identifiers such as nationality. For example, deliberately targeting German civilians in World War II, who were not component to the German war machine, would have been a violation of Just War principles without contention.

Questions of legality, material cost, and political consequence might guide a military decision-making process, and their answers may decide whether or not an action is *permissible*; however, these questions have no influence in deciding whether or not an action is *ethical*, and should thus be ignored in such a determination. International law regarding warfare is heavily informed by Just War principles, though.⁸ As such, looking for adherence to international law can actually be a good place to start in evaluating whether something is ethical under Just War theory. If a group is acting in violation of international law in war, its activity is likely in conflict with Just War principles, and deserves scrutiny.

A Survey of Drone Warfare

⁷ Picsek, 5

⁸ Leahy, 1

Two drone programs are operated by the United States at present. The first is operated by the Department of Defense (DoD), and the second by the Central Intelligence Agency (CIA).⁹ The DoD program operates semi-publicly and complies with the Laws of International Armed Conflict, International Humanitarian Laws, and the Standard Operating Procedures of the DoD.¹⁰ The CIA program, in contrast, is not considered a military program, is not operated as one, and is not governed “by the same international protocols on the conduct of war” as the DoD.¹¹ The clandestine and largely unaccountable nature of the CIA program creates the most problems for Just War. As stated earlier, a strong adherence to international law and accepted principles is often the headwater for taking ethical action under Just War theory. Because the CIA program is far more clandestine and is not necessarily governed by such principles, its activities are of graver concern.

The CIA’s criteria for selecting drone strike targets are kept largely classified.¹² However, many scholars have been able to discern useful distinctions used by the CIA. There are two types of strikes – “signature strikes” and “personality strikes.”¹³ Personality strikes are attacks against specific, known individuals. They require a high degree of confidence that the target is present. Signature strikes, on the other hand, are made against individuals or groups whose identities have not been discerned. Instead, they match a “signature”, or behavior that the United States believes links them to

⁹ Schiel, 6

¹⁰ *Ibid*, 6

¹¹ *Ibid*, 6

¹² Miller, Washington Post

¹³ Shah et al., 8

“military activity or association.”¹⁴ What constitutes signature behavior remains unknown to the public, as the United States has not yet declassified the documents outlining the standards. Signature strikes are the most common. For example, the majority of strikes in Pakistan fall into this strike category.¹⁵

The modern use of drones has been almost entirely defined by strikes against terrorist targets overseas. As such, when plotting a timeline of U.S. drone strikes, an appropriate place to begin is the first strike against a terrorist target. One of the earliest such recorded strikes was made in Yemen in 2002, against Al Qaeda.¹⁶ Since that first strike, the three theaters of covert drone strike operations by the United States have been in Yemen, Pakistan, and Somalia. The following estimates come from the Bureau of Investigative Journalism (BoI), regarding the deaths and injuries from the drone campaigns in these three theaters:¹⁷

Pakistan (2004 – 2014)

- Total killed: 2,400-3,888
- Civilians killed: 416-959
- Children killed: 168-204
- Injured: 1,133-1,706

Yemen (2002 – 2014)

- Total killed: 371-541
- Civilians killed: 64-83
- Children killed: 7

¹⁴ *Ibid*, 8

¹⁵ *Ibid*, 9

¹⁶ Currier, ProPublica

¹⁷ Bureau of Investigative Journalism

- Injured: 81-199

Somalia (2007 – 2014)

- Total killed: 6-9
- Civilians killed: 0-1
- Children killed: 0
- Injured: 2-3

The numbers reported paint one of the few pictures of the scale of these operations and their casualties. Children are of interest in these statistics because while it can sometimes be difficult to distinguish between combatants and noncombatants after their demise, children can safely be assumed to be innocent bystanders. Pakistan is the most extreme example, so let's break it down to show just the kind of scenario the drone campaign there creates. Assuming that all of the reported non-civilian deaths are enemy militants, what follows shows why these operations are worth scrutinizing under the lens of Just War theory.¹⁸ Under the most generous estimates (maximum militant deaths and minimum civilian deaths), the portion of civilian casualties is just under 11%. Under the most pessimistic estimates (minimum militant deaths and maximum civilian deaths), the portion of civilian casualties rises to 40%. These numbers raise the issue of proportionality. Conventional wisdom is that some civilian casualties may be justified in war, but only up to a point. A few such casualties may be accidental, but too many

¹⁸ The Bureau of Investigative Journalism estimates that the bulk of those killed fall into the category of "alleged militants". The Bureau is reasonably certain that those it classifies as civilians are indeed not combatants, but because there is no evidence available to prove the militant status of the dead, they are only able to report total deaths, and are unable to confirm whether or not the targets were in fact terrorists. For more on their methodology, see: <http://www.thebureauinvestigates.com/2011/08/10/pakistan-drone-strikes-the-methodology2/>

constitutes reckless behavior. Such negligent destruction of innocent life is reprehensible, and killing civilians calls into question just how proportional a military response is.

This picture is relevant to the Just War analysis primarily for more reasons. First, knowing that there are civilian casualties of these operations, and that such casualties potentially make up a disturbingly high proportion of those killed, immediately raises ethical questions. Second, not all combatants are created equal, so we must be sure that they are worth the loss of innocent life. Some targets have a much higher military value than others, and pose greater threats. Not all targets merit the sacrifice of noncombatants. In fact, it should go without saying that few do.

Before properly delving into the problems that drones create for a Just War analysis, it is important to first understand the distinct advantages that drones offer. Drones are legitimate weapons of war: they are not indiscriminate, nor do they cause unnecessary suffering.¹⁹ They ought not be dismissed outright as unethical weaponry. Drones eliminate many of the human costs on for the forces using them, perhaps the clearest and most attractive justification for their use. Through the use of drone technology, we are able to accrue intelligence and engage military targets without risking life or limb to our soldiers. Some scholars also contend that removing pilots from harm's way allows drone operators to more "carefully evaluate a situation without combat fears and anxiety."²⁰ Some even argue that recording technology used by drones makes it easier to hold operators accountable for their actions than traditional pilots, and better gauge the military's adherence to the laws of war and the principles of Just War.²¹

¹⁹ Blank, 701

²⁰ Picek, 5

²¹ *Ibid*, 5

Problems Drones Create in Just War Theory

There are two pertinent questions that drone strikes raise under Just War theory:

(1) Are drone operators combatants?

(2) Have the United States' drone strike targets in the War on Terror been ethical?

The first is raised because technology such as drones has never existed before, and a new analysis is necessary. The second is the direct application of the ethical principles that have been previously discussed.

The fact that drone operators are not physically in a theater of war blurs traditional distinctions. Drone operators are in civilian population centers, leading civilian lives outside of their occupation. Unlike regular soldiers, drone operators retire at the end of the day. A drone operator's duties are not constant like those of a soldier. They are more akin to stereotypical employment where you come in to work each day, gathering intelligence, and executing strikes when required.

The situation described closely mirrors the targeted drone strikes by the United States to eliminate terror suspects. If you remain a combatant even when you re-enter civilian life and cease to be an active threat, then an attack on our drone operators – again, leading civilian lives in civilian homes – would be legitimate. On the other hand, if we find that you become a civilian when you return to civilian life and cease to be an active threat, the American drone strikes against terrorist suspects who are not active military threats would be immoral.

In order to answer question (2), we must first evaluate if the targets of U.S. drone strikes are so valuable as to justify the deaths of noncombatants, since we know we are inflicting civilian casualties. Had we needed to annihilate a small home of five or ten

innocents to kill Osama bin Laden, it would not have been difficult to justify under Just War. The amount of collateral damage needs to incorporate how much of a threat is being posed. Given his crimes, and the significant threat he posed, some civilian deaths likely would be justifiable, however regrettable. A hundred innocent deaths, though, would be far more difficult to justify. A thousand would be even more challenging. Loss of innocent life is a timeless fact of war. Harming innocents cannot be an end in itself, but may be held permissible as a foreseeable but unintended consequence of an otherwise just action.²² Civilian casualties *can* be justified under Just War theory; however, there are situations in which the civilian sacrifice is so disproportionate that it is impossible to validate.

Consider a target that is not as great a threat as Osama bin Laden. If our target is a low-level Taliban operative, who has killed American soldiers and plots to do so again, we ought to establish if he is worth risking civilian lives? What if our target only supplies intelligence to Al Qaeda, has never pointed a gun at an American, and never intends to? Given that we know the drone operations have resulted in sizable civilian casualties, it is of utmost importance that the military value – and identity – of our targets be properly evaluated.

Ethics of American Drone Policy

In answering question (1), the only reachable conclusion under Just War theory is that drone operators ought to be considered combatants. Among the most important considerations in evaluating combatant status is the threat that one carries; arguably, this consideration is paramount. If an actor were not a threat, justifying his or her death under

²² *Ibid*, 14

Just War theory would appear impossible, as such a person would by definition to fall into the category of non-combatant. This can be broken down into two parts: What *kind* of threat is posed, and *when* the threat is posed. The only threat that can merit killing is one of physical violence. Other threats, such as those of a psychological nature, might merit military action, but in order to justify execution, a threat must be extreme and potentially irreparable. Before we engage in killing another human being we must be sure that to leave that person alive means leaving other lives in danger. In other words, the threat creates the ultimate us-or-them scenario: either we will die, or they will die. Perfect certainty is always too much to ask for in war, but to even begin to satisfy Just War principles, we must at least be reasonably sure of the threat posed.

Under Just War theory, drone operators threaten human life. So long as they are at the controls, the armed drones under their command pose a direct and deadly threat to their enemies. In order to justify killing over other means of neutralization, a threat must be active. An active threat is one in which the actor is in the process of endangering lives. Drone operators clearly present an active threat to their enemies while at the controls, but when they leave to go home, are they an imminent threat that merits elimination? To answer this, let's set up a hypothetical.

Consider a scenario in which you know someone is about to enlist in an enemy military force. You have reasonable certainty that she will soon be a soldier in the enemy army. However, she is not yet a soldier. Killing her in order to prevent her from becoming a soldier, and therefore a threat, seems immediately unethical. Until she becomes a soldier, is trained, armed, and ready to obey orders, there is nothing about her that is threatening. The reason for this is that the requirements for killing her haven't yet

manifested. What justifies taking a life in wartime is the reasonable expectation that the target's presence threatens the lives of others. Until that threat manifests, by definition, those lives are not in danger. The us-or-them situation hasn't yet come to pass, and therefore taking another human life cannot be justified.

When they finish their day, drone operators cease to be active threats, as they no longer have the capacity to do harm. The thing that made them an active threat – control over a military drone – is stripped away. Without that kind of force available, they become identical to civilians in all but their intentions, which are insufficient to justify their deaths. In sum, drone operators must be considered combatants while at the controls due to the active threat they present to their adversaries, but afterwards, upon returning to their civilian lives, their disconnect must be respected and they must be considered non-combatants during that time.

This conclusion, however, produces difficulties in answering question (2). Especially with the signature strikes of the CIA, the magnitude of the threat presented by a drone target is often uncertain. Using the principles that establish an actor as a legitimate target (i.e., a combatant), we can craft two scenarios that will further illustrate the circumstances under which a killing is just.

First is a scenario akin to a personality strike, in which the target is known and has a history. Suppose this target has previously attacked our country, threatened our people, and continues to plot against us. Based upon what we know about the target, we can reasonably conclude that his dangerous activities in the past will continue into the future, and he is therefore a threat. This can be summed up as the assassin's justification: the target has proven to be dangerous, and based upon past behavior we know with

reasonable certainty that this target will continue to be so. There is a caveat to this, however. As was previously stated, killing requires that there be no other feasible option. Therefore, it must first be shown that the threat cannot be neutralized by anything short of killing.

The second scenario concerns a target whose identity is not known; we know only his context: his current activities, location, etc. Based upon a target's context, we can reasonably infer whether or not he will threaten us in the foreseeable future. Consider a soldier in the enemy's camp, and that we can discern from our knowledge of the enemy that their soldiers are deployed to kill us. As such, any one of their soldiers qualifies as a threat, even if they are not in that moment firing upon us. Let this be called the warzone justification: all enemy soldiers are threats; the target is an enemy soldier; ergo the target is a threat. As a result, taking a first strike would be just, knowing that the target's continued existence threatens our wellbeing. The warzone justification is rarely so clean-cut in modern warfare, of course. Terrorists rarely fly colors or wear uniforms. They often dress as civilians and organize themselves in civilian population centers. However, even factoring these facts in, there are still criteria that would allow us to reasonably discern a target is in fact an enemy combatant.

The United States' targeted personality strikes by drones definitely fall within the purview of the assassin's justification. There are arguments for whether or not such tactics are prudent, but they seem to qualify as just under the lens of Just War theory. Signature strikes, unsurprisingly, are where the problems manifest. It's conceivable that signature strikes could be validated using the warzone justification. However, the

warzone justification only suffices when one has met a certain threshold of contextual information. Therefore, it is a question of facts independent of the target.

There are two reasons that the official justifications for signature strikes sound suspect at best. First, the processes by which signatures are established and assigned are kept classified. We have absolutely no official insights, therefore, into why the United States sees fit to kill these individuals. We only know that they are suspected terrorists. So our options are to either trust the government entirely when it claims that it has found terrorists, or remain skeptical and demand more evidence.

Second, many of the strikes occur in civilian centers, often isolated from the general population. The majority of strikes in Pakistan, for example, happen in villages in North and South Waziristan, rural areas for which outsider access is difficult.²³ If we had more detailed information as to how signature targets are chosen, then attacking bombing small villages would be easier to comprehend. Conversely, if the attacks were being carried out on more obvious military centers, rather than rural villages, it would be easier to believe that the justification was rational. However, missing these crucial data means that the most prudent option is skepticism until more information is found. As a result, we cannot declare the signature strikes as just.

This same problem – lack of public information – means that signature strikes continue to fail on two more fronts, too: necessity and proportionality. Without public information on what constitutes a signature – to use CIA parlance – for militancy, we have no way of gauging the nature and magnitude of a threat being posed, and whether or not the use of military force is necessary to neutralize that threat. Similarly, without the

²³ Shah et al., 19

criteria for such a signature it's impossible to estimate proportionality; we are missing an understanding of the target's past actions that merit retribution, and we cannot understand how those actions indicate a future threat. So ultimately, the signature strikes fail to uphold all three *jus in bello* principles necessary for just warfare.

But even if the signature strikes met all three *jus in bello* criteria, there is considerable reason to question the legitimacy of the war on terror in the first place. The movement to avenge the United States for the September 11th attacks has long since evolved into a global war on radical Islamic terrorism. The justification for this war has been that of pre-emptive self-defense. Law professor Mary O'Connell asserts that this justification runs counter to international laws of self-defense: "The law of self-defense does not permit states to attack before they possess evidence of armed attack occurring – evidence of plots does not suffice."²⁴ Even if the self-defense was considered legitimate, however, the logic that the United States may kill terrorist threats at will, regardless of national boundaries, leads to unsettling conclusions. If we can kill terrorists in Pakistan and Yemen, why not in Germany, the United Kingdom, or even the United States itself?²⁵ The calculus of the argument does not change simply because the target is an American citizen. Yet to treat citizens the way we have treated terrorists overseas would completely contradict due process, which itself is a cornerstone of the liberal democracy we claim to defend.

The United States government has taken such concerns to their logical extreme already. In late 2011, Anwar al Awlaki, a Yemeni imam and Islamic militant, and his 17-year old son Abdulrahman were both killed in separate drone attacks. Both were

²⁴ O'Connell, 7

²⁵ Ibid, 7

American citizens.²⁶ In the memo outlining the legal justification for such action, the Justice Department claimed that joining the “forces of the enemy” overrode the protections offered by domestic law, made that person an enemy of the state, and a legitimate military target.²⁷ Such a precedent is exceptionally dangerous; allowing a state to selectively execute its own citizens unilaterally and without due process of law is grossly unethical. Those precedents that lead to such an outcome would be by extension unethical, and thus unjust. And if the war itself is not just, then the *jus in bello* concerns are moot.

Conclusion

There is little evidence that the signature strikes carried out by the United States at all adhere to the Just War principles of discrimination, necessity, and proportionality, and what evidence we do have should encourage skepticism, not optimism. These concerns stand even if the government is given the benefit of the doubt and we assume that the war is only *jus ad bellum*, though there is reason not to give that luxury. The burden of proof is on the government of the United States to show that it has not been engaging in unjust, unethical warfare. Lacking that information, it is nigh impossible to condone the signature strikes as just. The government has failed to meet that burden, and the only remaining conclusion is that our campaign of signature strikes in the War on Terror is largely, if not wholly, immoral under the theory of Just War.

²⁶ Nääf, 20

²⁷ Lauter & Phelps, Los Angeles Times

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