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And the President Droned On: Just War Theory and Targeted Killings

Matthew Strebe

When conducting war in the modern age, it is incumbent on the belligerent powers to follow established rules of conduct as enumerated in just war theory and its offspring, international humanitarian law. However, these doctrines have come under attack by, or are woefully inadequate in the face of, modern paradigms in warfare, specifically the US government's drone-mediated targeted killing program.

Before explaining the implications of targeted killings to just war theory, it is necessary to clarify what drones, or unmanned aerial vehicles (UAVs), and targeted killings are. A drone or UAV is defined by the Department of Defense as a "powered aerial vehicle that does not carry a human operator...[and] can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload."¹ In recent years, they have increasingly been used for targeted killings, defined as "extra-judicial, premeditated killings by a state

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of specifically identified persons not in its custody.”² The US military, the CIA, or both may carry out strikes, but the available evidence mainly implicates the CIA. Targeted killings are different from drone warfare, which is simply conventional war operations that happen to use drones.³ This paper will focus solely on targeted killings, and will use the terms “targeted killing” and “drone strike” interchangeably.

Just war theory is composed of two sets of principles, *jus ad bellum* governing what war is and reasons to wage it, and *jus in bello* concerning proper conduct during war. Thomas Aquinas and later theologians codified the standards for *jus ad bellum* by establishing six conditions for the just prosecution of war: the legitimate sovereign power must decide on war; war must be waged justly; the legitimate sovereign must have the correct intentions for waging war; any loss of life must be proportional to, or exceed the injustice prevented by that loss; a peaceful solution must be tried first and found wanting, before waging war; and a just war must have a “reasonable hope of success.”⁴ Only the principle of legitimacy, which governs who is and is not a legitimate sovereign power, will be treated in depth in this paper.

Jus in bello principles come into effect when war has already been declared, and act to constrain the power of a sovereign to conduct wanton violence. It is defined by three principles: non-combatant immunity, stipulating that civilians may not be the direct objects of attack and belligerents must discriminate between civilians and combatants; proportionality, mandating that all military objectives must be achieved without excessive force or damage to civilians and property; and right intention towards peace with justice being maintained at all times, even in the heat of war.⁵ Only the principles of discrimination and proportionality will be dealt with here.

Throughout this paper I will argue from a Kantian perspective, showing that these principles are dependent on recognizing human beings as *ends in themselves*, which entails that we must always treat humanity, whether in ourselves or in others, never solely as a means but always simultaneously as an end.⁶ Indeed,

by continuing with the utilitarian calculus that underlies most of the practical *jus in bello* rules of just war theory, we fail to properly account for human moral worth. By humanity is meant the faculty of reason, which endows us with the “power to set ends,”⁷– the “ability to foresee future consequences, adopt long range goals, resist immediate temptation, and even to commit oneself to ends for which one has no sensuous desire,”⁸. If humanity is the ultimate end in itself, and this end is based in reason, then all other ends are contingent on reason and subordinate to it. This basic trait inheres in people regardless of their use of it, and mandates that they be treated with respect.

When humanity is considered as an end, it has the following characteristics: it is objective because it implies certain principles which any rational beings should accept, namely a respect for the humanity that inheres in all people and is valuable beyond mere material worth. It is independent of all contingent reasons, and instead creates reasons for action and supervenes upon lesser contingent reasons. It is a moral “ground for self-determination,” a locus of action where moral actors must choose to do or not do certain things. It is an end that we may not molest, but that we must actively promote. When we do use human beings as means, we must also simultaneously be able to treat them as ends in themselves, by respecting their rational ability to set their own, contingent ends.⁹ In the context of just war theory, we treat people as merely means “whenever we use violence against them to achieve our purposes.”¹⁰

If we accept these premises, the interlocking principles of autonomy and dignity naturally follow. Autonomy asserts that, if humans are ends in themselves because they are rational and able to set their own ends, then this rationality forms the cornerstone of moral value, the “value to which everything else [is] subordinated.”¹¹ Further, because autonomy is the highest moral value, and all other values are contingent upon the exercise of this autonomy, autonomy is incomparable with all other contingent values. This is the concept of dignity, that the autonomy of one human being can never justifiably be bartered *in exchange* for

something else of greater or lesser value, because this is an evaluation of mere price.¹² Human beings are absolutely priceless and beyond any mere appraisal of their value. In the context of just war theory, this endows them with a palladium against being harmed unjustly, whether they are civilians or combatants. They cannot be reduced to discrete quanta of value, commensurate with other things of value or price, because this would violate their autonomy by attempting to place it within the purview of a value-laden calculus – yet their autonomy is axiomatic, inherent to their worth as people, and incommensurate with any value conditioned by this rationality.

Having defined human beings as ends in themselves, and having established criteria for how to treat them, it is now my responsibility to attempt to justify the use of force in war. We need to make a crucial distinction here between combatants and civilians. A combatant is defined as someone who engages directly in attempting to harm, and the use of force is justified against him. A civilian is defined as someone who is neither directly nor indirectly engaged in harm, and so the use of force against him is not justified. This distinction is important for all of just war theory, but especially in *jus in bello*, where discriminating between civilian and combatant is the basis for justifying the use of force.

We must also make a distinction between defending normative maxims on one hand, and descriptive states of being on the other. Justifying the use of force cannot be based on whether human life is at stake or not, for human life is a descriptive value and has no moral content *as such* – it falls to normative principles to define the moral value of life and then to prescribe proper action in relation to it. To ignore this distinction is to open the door to rather morbid possibilities, for to defend one life or many lives, if life is the highest value, may entail the destruction of others in a moral calculus that is inimical to the idea of autonomy. For example, if I am being shot at and my life is at stake, I would be justified in using someone else as a human shield to save myself. This is obviously unacceptable in a rigorous system

of morality. Rather, force is justified on the basis of whether the normative principle of autonomy, the idea that human beings have inherent worth, is violated or not. When the aggressor acts, he acts to universalize a maxim that devalues my autonomy. He thus adopts a moral maxim – that my autonomy and life is worthless and he has the right to end it – that I cannot accept. I cannot respond in kind by devaluing his autonomy, but I can respond by defending the sanctity of my own autonomy.¹³ By respecting myself, I am also required to respect my aggressor as well, and my use of force is constrained when it more closely resembles “a violation of principles generated by autonomy than a respect for a value, when we deliberately threaten the capacity to will of those who are not deliberately or directly harming us.”¹⁴

I will now argue that just war theory faces two main challenges to its legitimacy in this regard. The first problem is that modern warfare cannot be adequately captured in the theoretical framework of just war theory, and because the theory is unable to describe and label the actions that take place, it is concomitantly unable to regulate them. The second is that autonomy, which grounds these principles, is ignored specifically because of the new paradigms in warfare exemplified by the US targeted killing program.

States of War and *Jus ad bellum*

These considerations aside, the first question to ask in relation to targeted killing and just war theory is: can an entire war be considered just? In 2010, Harold Koh, a legal advisor for the Obama administration, outlined his executive’s justification for drone strikes in a keynote address given at the American Society of International Law. Koh argued that the administration’s foreign policy is based on what he calls the “law of 9/11,” the legal and practical considerations that have surfaced in response to the terror attacks on September 11, 2001: detention operations, targeted killings, and the legal treatment of suspected terrorists. Koh characterized these operations as acts of war, arguing that the legal basis for the law of 9/11 is to be found in the inherent

right of self-defense of a victim nation from an aggressor.¹⁵ By virtue of being in an “armed conflict” with al-Qaeda and the Taliban – defined by the International Law Association Committee as a conflict with the “existence of organized armed groups... engaged in fighting of some intensity,”¹⁶ – the US government is justified in the use of force that it argues is “conducted consistently with just war principles.”¹⁷

The term “armed conflict” is notable here, for international humanitarian law defines three different legal frameworks for various types of armed conflict: international armed conflict between sovereign states; non-international armed conflict conducted between a sovereign state and a group (usually within its own territory); and the more nebulous, and largely experimental, category of the *internationalized* non-international armed conflict, which entails one or more sovereign states waging war on groups, which operate in multiple countries and may or may not have the support of those countries, and which requires legal frameworks derived from the first two categories.¹⁸ Traditional just war theory only considers the first category to be just warfare, a seemingly arbitrary distinction that certainly requires revision, as I will show.

It should be clear that war with al-Qaeda and the Taliban couldn’t be considered under the rubric of international armed conflict between sovereign states. Al-Qaeda and the Taliban are certainly armed groups, possessing military command structures which facilitate “operations that are proper within the scope of war,” the ability to initiate or cease hostilities at will, and the ability to defer to diplomats upon the cessation of hostilities.¹⁹ However, they lack other necessary components of a legitimate military power. They do not observe conventions of war, they engage in acts of terrorism on illegitimate targets in order to further their political goals, and their conflict is neither fought fairly in terms of legal restrictions, nor humanely with respect to human lives.²⁰

More importantly, they cannot be considered as “representative of a viable political grouping of people.”²¹

Properly, a legitimate power has *de jure* authority, justified by a legal or moral sanction from the people it purports to govern. This is a natural outgrowth of a “common life” shared by this people, characterized by individual membership within a larger group, each member’s contention that the group is worthwhile to be in, and the members’ shared view of the state as the protector of this common life.²² The state, as representative of this common life, has rights to territorial integrity and political sovereignty, which are either violated when a nation is attacked, or forfeited partially or wholly when that nation acts as an aggressor against another. Whether rights are violated or not is therefore dependent on who possesses these rights – and whether they do so legitimately. Only a state that has a rightful sanction from the people, in whatever form that may take, can be considered as a legitimate state.²³

Under these criteria, just war principles are incapable of legitimating the armed conflict between al Qaeda and its affiliates, and the United States, as a just war. According to the first *jus ad bellum* principle, only legitimate sovereigns can engage in war with each other, and the basis for being considered a legitimate sovereign is the “common life” enumerated previously. Terrorist groups, despite having *de facto* power in the areas in which they operate, never have *de jure* power deriving from the consent of the people, and cannot properly be considered legitimate sovereigns because they do not foster a common life – “absent common territory, groups are simply that: mere groups.”²⁴ Because they lack this basic pre-requisite to sovereign rights, the rights of territorial sovereignty and political autonomy are not granted to them. When one legitimate sovereign attacks another, the aggressor gives up its own rights partially or in total, while the victim is granted the right to revenge itself on the aggressor. This does not take place at all between groups and states, because there can be no trade off of rights. Although the terrorists can forfeit their own rights, they cannot be considered to constitute a state and thus acts against them are not acts of war.²⁵

An instructive example would be the current situation in Afghanistan. In 2001, the Bush administration launched a war against the semi-established government of Afghanistan led by the Taliban, but after toppling that regime, the “war” became merely an armed conflict *in* Afghanistan, with substantial fighting bleeding over into Pakistan as well as the Arabian peninsula, the Islamic Maghreb, and sub-Saharan Africa. Seemingly, the conflict would have to be characterized as either a non-international or an internationalized non-international armed conflict. The conflict shares traits of both international and non-international armed conflict, making it a good candidate for being considered an *internationalized* non-international armed conflict. However, this brings up multiple problems, for although the original Authorization for the Use of Force, granted by Congress in 2001, legitimize force against al-Qaeda, its affiliates, and the Taliban, does it also legitimize acts of war in countries outside of its geographical purview? Or against splinter groups that are only tangentially related to al-Qaeda or the Taliban? If these cannot be considered acts of war, should they be considered as criminal justice proceedings? Until a concrete definition for this form of combat can be furnished, it remains in a non-legal limbo.

The Drone Dilemma and the Principle of Discrimination and Proportionality in *Jus in bello*

When the belligerents lack legitimacy, it calls into question whether the entire war itself may be considered just. If the entire war cannot be considered just according to *jus ad bellum* considerations, it may still be possible to consider certain specific actions just if they accord with *jus in bello* principles, for it is certainly possible to wage a just war unjustly, and an unjust war justly.²⁶

In regards to targeted killings, the administration’s spokesman Daniel Koh stated that “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”²⁷ Koh justified his position by referring to two principles

in just war theory, discrimination and proportionality.²⁸ The principle of discrimination is defined by the Geneva Convention, which stipulates that signatory nations distinguish “between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”²⁹ This is justified by the rationale that the forces of an enemy nation are actively harming a victim nation, irrespective of their own conception of whether they are doing good or ill, and this justifies the right of the victim nation to target them. Conversely, civilians are not involved in any military activities and are committing no wrongs against the victim nation; ergo they cannot be targeted.³⁰ This puts the onus of action on the perpetrator of violence, who must only engage with those directly involved in hostilities, defined as individuals who are:

1. Being commanded by a person responsible for his subordinates
2. Having a fixed distinctive emblem recognizable at a distance
3. Carrying arms openly
4. Conducting operations in accordance with the laws and customs of war³¹

Although killing “high-level terrorists,” those involved in plotting, fomenting, and/or carrying out terrorists attacks, is the explicit goal of the targeted killing program, the failure of this idea may be observed in the number of collateral civilian casualties from drone strikes. Estimates of civilian deaths from the American targeted killing program range from 4.95%³² to 33%, depending on the figures and the method of reckoning³³ – the proper figure probably lies somewhere in the middle. The New America Foundation deduced from various news articles and reports that, of the 82 drone strikes conducted in Pakistan between 2006 and 2009, which resulted in between 750 and 1000 casualties, 25-33% of casualties were civilian.³⁴ Of the estimated

67-75% of casualties that were combatants, only 20 were considered “high-level targets” and thus worthy of special targeting – if you judge success based on the stated aims of the program, that leaves you with an adjusted ratio of 2-2.67% high-level terrorists *vis a vis* civilians and low level militants. And this is to say nothing of the personal stories obscured by the data. For example, the targeted killing of Anwar al-Awlaki, a cleric and propagandist for al-Qaeda working in the English language, on September 30, 2011 took place despite dubious evidence of his own militancy – he was targeted, rather, for his propaganda value, for which there is no legitimation in the just war tradition.³⁵ The death of his 16-year-old son Abdulrahman two weeks later is even more mordant – he was killed for the crime of looking for his father in the desert.³⁶ It is perhaps notable that agents in the CIA, who are neither trained in the laws of war nor bound by them, eliminated both al-Awlakis in targeted killings, rather than the US military. The lack of accurate information on who is targeting militants, whether the CIA or the US military, makes further discussions of just war theory even more convoluted.

In targeting high-level terrorists, the US government is failing to respect the autonomy of the people it inadvertently kills in the process. Because the value of autonomy is based on the notion that human beings have a dignity that puts them beyond any sort of valuation, infringing on the autonomy of these non-combatants for the sake of some greater goal is inadmissible – it is patently absurd to discard the greater good of humanity for the lesser good of a putatively worthy military goal.³⁷ It is certainly possible to target legitimate military targets while simultaneously respecting their autonomy, for if they act in violence towards a legitimate power, it is the prerogative of that power to respond *in kind* to their action and neutralize the threat that they pose.³⁸ However, it is not possible to legitimately target civilians, whether they are in the vicinity of combatants or for some putatively greater goal.

The failure of discrimination is not due to the drones alone. In defining combatants as uniformed, carrying arms, and com-

manded by superior officers, just war theory circumscribes its own authority to archaic forms of warfare. In the current climate of fighting non-state actors, without uniforms or emblems, and who often embed themselves amongst a civilian population, discrimination is difficult if not impossible to follow. Al-Qaeda and the Taliban are never consistently in accordance with any of the stipulations above, especially in the case of suicide attacks dependent on the concealment of their combatant status, when civilian clothing is used as a “ruse and disguise.”³⁹ When civilians and combatants frequently intermingle in the same space, as in much of modern warfare, fluidity between what defines a combatant and a civilian arises. The International Committee of the Red Cross attempted to resolve this issue by stating that civilians who engage in “spontaneous, sporadic, or unorganized”⁴⁰ hostilities are targetable only under such conditions, making them legitimate targets intermittently. What constitutes the threshold between civilian and combatant is what the ICRC calls “direct participation,” which must be a “specific hostile act carried out as part of the conduct of hostilities between parties to an armed conflict,” and must be a simple causative relationship; indirect aid to the combatants, such as moral or propaganda support, cannot then be counted towards a civilian to combatant transition.⁴¹

However, when the inability to properly discriminate is contingent on external factors, and these factors are exacerbated by technological deficiencies such as improving but still deficient technology, bad weather, pilot “mood,” overreliance on computer algorithms, a lack of even basic training in the laws of war, and a lack of accurate intelligence to cross-reference, it is necessary to reevaluate the methods in which we prosecute war.⁴² Simply leaving the status quo unchanged is in itself a violation of autonomy, for it amounts to acknowledging that the current practices are sufficient for the prosecution of the war effort, including the unacceptable civilian casualties.

The inability to properly discriminate between combatant and civilian necessarily bleeds into the principle of proportional-

ity, for it is impossible to calculate the threat to civilian lives when the transition from combatant to civilian, and civilian to combatant, is so nebulous.⁴³ According to the Geneva Convention, the principle of proportionality proscribes “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.”⁴⁴ The basis for proportionality lies in the realization that, although the principle of discrimination already mandates that civilians remain unharmed, in the normal course of warfare this is an often-unrealizable goal. The principle of proportionality operates under the doctrine of double effect, which states that in certain instances, it may be permissible to bring about something that is foreseen but indirectly intended as a consequence of a strictly direct intention, if the foreseen effects are neither the end aimed at nor the means to the end.⁴⁵ Michael Walzer adds further stipulations, that the intended military action must be narrow, the intention of the moral actor must be good, and in acting he is “aware of the evil involved, seeks to minimize it, [and accepts] costs to himself.”⁴⁶ All of these specific principles depend on the assumption that a moral actor is capable of making a “sharp distinction between legitimate targets and protected civilians” on the one hand, and that that moral actor is capable of identifying a “clear, uncontroversial threshold at which anticipated military advantage exceeds anticipated civilian damage”⁴⁷ on the other.

It is important to note how this doctrine, which on its face contradicts the principle of autonomy, in fact complements it. First, we must accept a maxim to not harm civilians in the course of war – if the intention is to maintain the autonomy of these civilians, and their harm is not a means to the legitimate military goal, then we cannot be blamed morally for that harm as the intentional maxim is upheld. This simultaneously enjoins us to take on a certain level of risk when we intentionally put civilians in harm’s way.⁴⁸ If we do not accept this, we merely pay lip service to the maxim of not harming combatants, for recognizing that this harm is wrong concurrently enjoins us to work to minimize this harm – in the case of war, this becomes the sanction to

take on some risk ourselves.

By using drones, we are not obeying the injunction to equalize risk between the civilians and ourselves. Drones are inherently dangerous to the idea of balanced risk: they are piloted remotely, often from thousands of miles away, by detached operators working in climate-controlled rooms, raining “death from the skies” at no personal risk to themselves, and then going home to eat dinner with their families while their victims lie smoldering, their families afraid to gather the remains for fear of being targeted themselves.⁴⁹ The risk to US forces is minimal in this case, in fact nonexistent, creating an incentive to the use of force by removing the disincentive of human troops.⁵⁰ It must be stated here that there is no presumption of an equalization of force, that because one side has superior firepower it should not be allowed to use it. Rather, the possession of this superior firepower entails greater reticence in its use, for we cannot simply unleash the full panoply of our forces without considering how it will affect the civilian population, and what responsibility that places on us. To not do so is to violate proportionality.

Potentially, targeted killings are more humane in practice, because they do not involve a direct invasion of an area, which reduces the risk to both soldiers and civilians alike of becoming victims of violence.⁵¹ Not only is this contradicted by the statistics for drone-related deaths, it is also contradicted by public policy polls conducted in places such as Pakistan. There has been an incipient blowback resulting from the large number of civilian casualties in Pakistan, as well as the increasingly large number of drone strikes, which has created a “siege mentality” amongst ordinary Pakistanis.⁵² In a Pew survey, “97% of respondents viewed [the drone program] negatively,”⁵³ and this broad ill will translates into vociferous opposition on the ground – “every one of those dead civilians represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.”⁵⁴ Not only do civilian casualties inflame the populace, militant groups have ramped up their attacks in response to the attacks.

The Pakistani Taliban attacked a police academy in Lahore, Pakistan in March of 2009, with their spokesman declaring that it was “in retaliation for the continued drone strikes by the US in collaboration with Pakistan on our people.”⁵⁵ If drone strikes are exacerbating rather than helping the US war effort, this is an obvious violation of proportionality.⁵⁶

Putting excessive faith into our technical capacities distorts the moral reasons for going to war, and as such should not be viewed with unguarded enthusiasm, but with suspicion. For as “silver bullet solutions” such as drones are increasingly dominating the battlefield, their use is creating new objectives that then guide the course of the war – rather than the ends guiding the means, as is provided for in the principle of proportionality, the means are now guiding the ends. This is exemplified in a new doctrine of warfare in the US military called the “Overseas Contingency Operation,” (OCO), which necessitates targeting “potential threats to national security [that] have not yet been actualized,” hinging on the assumption that said threats will proliferate if they are not immediately contained.⁵⁷ According to this new theory of warfare, not only can and should militants be targeted everywhere, but by doing so there are second, third, and n-level effects that can be accurately predicted to “ensure maximum success.”⁵⁸ This undermines any sort of moral calculus, for if the myriad effects of a strike can be accurately calculated, any moral judgments we may have will increasingly become contingent on military considerations alone. The result is such a broad overlap between military and non-military targets that nearly anything can and will be defined as having a direct military purpose, including civilians.⁵⁹

Conclusions

Throughout this paper, I have argued that drone strikes cannot be justified in the current system of international humanitarian law, for the principles of just war theory are clearly and consistently violated at every level of policy examined. In regards to

the *jus ad bellum*, although the Afghanistan War was based on the criterion of self-defense and thus just, the additional use of force against stateless groups and terrorists fails on the criterion of legitimacy and is not just. This had the effect of rendering the entire war, after the conclusion of its original purpose, unjust. However, it remained to be seen whether any of the actions within this unjust war could be considered just by examining the *jus in bello* principles of discrimination and proportionality. Both of these principles, invoked by the Obama administration as the just war sanction for its targeted killing program, were not upheld, due to various factors either intrinsic to the targeted killing program itself, or tangential to it in terms of a loss of autonomy related to the program.

In addition, the concept of autonomy was shown to be necessary to understanding the moral import of just war theory. When autonomy is lost, the premises for just war theory are lost as well. War becomes a simple calculation, where the military end alone is important. If civilians are killed, it does not matter whether their deaths are proportional to a military goal, whether they have died for a just cause, whether they are a part of collateral damage or were directly targeted. The inherent dignity and autonomy of the individual is seemingly at odds with the wanton destruction of life in war, but it behooves us to reconcile the necessity of maintaining dignity and autonomy on the one hand, and the equal necessity of legislating war on the other. For it is surely better to have a war that minimizes the loss of life than one conducted solely according to human rapaciousness - assuming that the choice truly is a binary. I have explored, in some small way, what this means when applied on the ground. It is now necessary to determine how the law, or the practices governed by the law, ought to change in response.

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