

**A Tension Between Efficiencies of Jus in Bello and Jus Ad Bellum  
In the Practice of Targeted Killing Through Drone Warfare**

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**I  
Introduction**

Suppose that targeted killing using drone technologies actually does lower civilian casualties and increase discrimination in targeting, as CIA director Leon Panetta and others have claimed. If this claim were true, it has the effect of both improving the economy of force in conducting military operations and in reducing civilian harm – a win-win for jus in bello. Yet it has also been claimed that if this improvement in jus in bello conduct is true, the result is a corresponding reduction in the disincentive for a technologically sophisticated state such as the United States to resort to force which, on this argument, is loss for jus ad bellum. It invites the “too-easy” resort to force.

I think this argument is mistaken, and with regard to the idea of “too-easy” resort to force, incoherent – at bottom, because it assumes a common criterion for determining the “just right” amount of resort to force that can’t actually be given. In finally working around to this abstract and conceptual argument, however, the paper walks in a practical way through my admittedly uncorroborated sense of where targeted killing through drone warfare stand today, as a matter of operational uses and legal and moral framing. If my understandings are correct, some parts of the anxiety in the international law community over targeted killing is misplaced.

The discussion disaggregates targeted killing from drone technology, and argues that the former has a particular conceptual relationship to jus in bello and the latter to jus ad bellum. It locates targeted killing in a normative frame that calls for a separate body of law and regulation to govern what is (clumsily) called “intelligence-driven uses of force” that is neither law enforcement nor conventional armed conflict. The normative emphasis in this body of regulation, in both law and morals, is less “proportionality” (insofar as it is genuinely more discriminating) and instead “necessity,” the individuated justification for targeting *this* person. But it is finally a paper about whether there can be such a thing as the “efficient” level of the resort to force in jus ad bellum.

**II  
Disaggregating Targeted Killing and Drone Warfare**

Although targeted killing and drone warfare are often closely connected, they are not the same and are not always associated with each other. In order to allow the moral inquiry

to focus on targeted killing using drones, we need first to disaggregate the practices of targeted killing from the technologies of drone warfare.

Targeted killing consists of using deadly force, characterized by the identification of and then strike against an individual marked to be killed. It is distinguished, among other things, by making an individualized determination of a person to be killed, rather than simply identifying, for example, a mass of enemy combatants to attack as a whole. Since it is a practice that involves the determination of an identified person, rather than a mass of armed and obvious combatants, it is a use of force that is by its function integrated with intelligence work, whether the intelligence actors involved are uniformed military or a civilian agency such as the CIA.

Targeted killing might (and does) take place in the course of conventional warfare, through special operations or other mechanisms that narrowly focus operations through intelligence. But it might also take place outside of a conventional conflict, or perhaps far from the conventional battlefields of that conflict, sufficiently so operationally to best be understood as its own operational category of the use of force – “intelligence-driven,” often covert, and sometimes non-military intelligence agency use of force, typically aimed at “high value” targets in global counterterrorism operations. It might be covert or it might not – but it will be driven by intelligence, because of necessity it must identify and justify the choice of target (on operational, because resources are limited; or legal grounds; or, in practice, both).

Targeted killing might use a variety of tactical methods by which to carry out the attack. The method might be by drones firing missiles – the focus of discussion here. But targeted killing – assassination, generically – is a very old method for using force and drones are new. Targeted killing in current military and CIA doctrine might, and often does, take place with covert civilian intelligence agents or military special operations forces – a human team carrying out the attack, rather than a drone aircraft operated from a distance. In today’s tactical environment, according to informal reports, the US often uses combined operations that have available both human teams and drones, to be deployed according to circumstances.

Weaponized drone aircraft might or might not be used in an instance of targeted killing. But still more important is that UAVs have roles to play in an ever-increasing range of military operations that frequently have no connection to “targeted killing.” If targeted killing actually means a variety of ways, not necessarily the same from the standpoint of law, of undertaking an attack – the same is equally and even more true of “drone warfare.” For many reasons ranging from cost-effectiveness to mission-effectiveness, UAVs are becoming more ramified in their uses in military operations, and will certainly become more so. This is true starting with their fundamental use in surveillance, but is also true when used as weapons platforms.

From the standpoint of conventional military operations and ordinary battlefields, drones are seen by the military as simply an alternative air weapons platform. One might use an over-the-horizon manned aircraft – or, depending on circumstances, one might instead

use a drone as the weapons platform. It might be a missile launched from a drone by an operator, whether sitting in a vehicle near the fighting or farther away; it might be a weapon fired from a helicopter twenty miles away, but invisible to the fighters; it might be a missile fired from a US Navy vessel hundreds of miles away by personnel sitting at a console deep inside the ship. Fired from a standoff platform, the legal issues with respect to the weapons system are fundamentally the same – the law of war categories of necessity and proportionality in targeting. To military professionals, the emphasis placed on the “remoteness” from violence of drone weapons operators is misplaced. Navy personnel firing missiles are typically just as remote from the fighting, and yet one does not hear complaints about their indifference to violence and their “Playstation,” push-button approach to war.

This is an important point given that UAVs today are being used for tasks that involve much greater uses of force than individualized targeted killing. This is most easily framed in terms of the abstract strategic division of counterinsurgency from counterterrorism, though in practice these two are not so distinct as all that. In particular, drones are being deployed in the AfPak conflict as a counterinsurgency means of going after Taliban in their safe haven camps on the Pakistan side of the border. A fundamental tenet of counterinsurgency is that the safe havens have to be ended, and this has meant targeting much larger contingents of Taliban fighters than previously understood in the “targeted killing” deployment. This could be – and in some circumstances today is – being done by the military; it is also done by the CIA under orders of the President partly because of purely political concerns; much of it today seems to be a combined operation of military and CIA.

Whoever conducts it and whatever legal issues it might raise, the point is that this activity is fundamentally counterinsurgency. The fighters are targeted in much larger numbers in the camps than would be the case in “targeted killing,” and this is a good instance of how targeted killing and drone warfare need to be differentiated. The targets are not individuated, either in the act of targeting or in the decision of who and where to target: this is simply an alternative air platform for doing what might otherwise be done with helicopters, fixed wing aircraft, or ground attack, in the course of conventional counterinsurgency operations. But it also means that the numbers killed in such operations are much larger, and consist often of ordinary fighters who would otherwise pile into trucks and cross back into Afghanistan, rather than individualized “high value” targets, whether Taliban or Al Qaeda.

### **III**

#### **An Assumption About Casualties and Collateral Damage**

The higher numbers of killings of ordinary fighters that are intended in these attacks are often not distinguished in media reporting on drones, and do not take into account that it is not targeted killing as such. Targeted killing in the sense meant in this discussion would be better illustrated by an attack upon an Al Qaeda commander in the Pakistan border areas, not necessarily connected to Afghanistan Taliban operations or the safe haven camps for fighters but instead, for example, a person with a planning role for

operations to be carried out abroad. But with respect to counting casualties, that person is more likely to be surrounded with civilians, whether explicitly as human shields, than the fighters in the camps. The ratio of civilians to Al Qaeda target killed might be high, even though the total number of people is small in absolute terms; by contrast, an attack upon a camp might easily have no genuine civilian killed, but kill large numbers of fighters in absolute terms. Add to that a third dimension of the value of the target – high value taken as an individual in the targeted killing of the Al Qaeda commander in counterterrorism; low value taken individually in the case of any individual Taliban fighter, but high value taken altogether as a fighting force in counterinsurgency.

These considerations indicate that the aggregate numbers of killed, civilians or targeted persons, for drone operations sometimes reported in the press and by monitors such as Long War Journal or the New America Foundation, do not give a very useful account as the uses of drones ramify. The differentiations matter. Reporting on casualties from drone warfare is not the same as reporting on casualties from targeted killing as such – something the monitors readily acknowledge. This is so even if the aggregate reporting were accurate – something which the monitors readily agree is problematic, and that partly because of the stubbornness of the CIA to give its view of casualty figures, save by indirect leaks to the press.

The undefended assumption of this paper is that targeted killing using drone technologies is significantly more discriminating and sparing of collateral damage to civilians and their property than alternative uses of force to the same end would be. That is so whether the actor is the military in conventional operations, military special forces, the CIA, or combined special operations. That said, let me also say that I will not defend that sweeping statement here or, really, anywhere, but will take it as assumption for this discussion. On the basis of a lot of informal conversations within the security community in the last several years, I happen to think it is true; I believe CIA Director Panetta is far more right than wrong when he says that targeted killing using drones is the most discriminating method in the history of warfare. Moreover, I think that this perception is increasing even among skeptics of targeted killing using drones, including some of the human rights monitors, who appear to be hanging back from full-on criticism of the technology and its possibilities.

That said, I do not have any firm evidence for this assumption about casualties and collateral damage, and will not seek to defend it here. It could conceivably turn out to be wrong, if the evidence were fully revealed. I fully accept that “your results may differ,” so to speak. However, without at least a weak version of this factual assumption, the remainder of my discussion – turning to ethics and conceptual (rather than narrowly doctrinal) law – will not have much point.

Speaking to the broad future of the technology, given the direction of technology and cost, it appears inevitable that drones will take on many more operational roles over time, whether in conventional war, special operations, and what has here been called generically “intelligence-driven uses of force.” Drones will likely evolve – as aircraft, as well as in the weapons and sensor systems they bear – into many specialized types. They

will get both bigger and smaller than they are now, for example, and they will surely evolve into those specialized for surveillance and those specialized to fire weapons. And they will also surely evolve into those specialized in high-value, “intelligence-driven” targeted killing of individuals and those that are suited to conventional operations. Bearing in mind these increasingly varied uses is essential to understanding, when it comes to targeted killing and/or drone warfare, that one-size-fits-all legal analysis is not sufficient.

#### IV **Jus in bello and Jus ad bellum**

The question for this paper is what it means normatively if the factual assumption of greater discrimination is correct. The normative objection to targeted killing using drone technologies at issue here starts from the factual assumption of greater discrimination, but then turns that into an objection to the practice itself. In legal or ethical terms, it is an objection that takes an apparent improvement in the means and methods of war under *jus in bello*, and then converts it into an objection based in *jus ad bellum*. The move is an ironic one, and why it is ironic is part of what makes it important.

To start with, however, targeted killing and drone technologies have a loose and peculiar parallel with the categories of *jus in bello* and *jus ad bellum*. Targeted killing is far more normatively centered in *jus in bello*, whereas drone technology is far more normatively centered in *jus ad bellum*. Why would this be so and why does it matter? Targeted killing is a means of using force, an operational method that might use any number of technologies, from a knife to a drone, along with an equally wide range of ways of setting up the final act of killing the target. It is far more about the ethics of using force in particular ways than about the ethics of resorting to force at all.

This is not entirely true, hence the “loose” qualification. Assassination can also be a peculiarly motivating force as an initiator of conflict, as the assassination of Archduke Ferdinand might show (but then again it might not, depending on one’s view of what set off the Great War). Historical and cultural perceptions of honorable or dishonorable ways of fighting – poisons, chemical weapons, genocide and ethnic cleansing as illegitimate tools of war, etc. – can play roles in motivating someone’s resort to force. But within a conflict, targeted killing – and how targeted the killing is – is mostly a question of means and methods of conflict, not a question of the ethics of resorting to force.

One can think the same of drone warfare, since it is fully a “method” in the sense of technologies of conflict. Loosely, of course, that is so. Drone technology can be just another battlefield air platform, as earlier noted. But alternatively, it might be the tool by which assassination is carried out someplace far away. Even if the target is a legitimate target (a terrorist leader in hiding, for example), the fact that the attack takes place in another sovereign state can have implications for the resort to force, perhaps triggering wider conflict. We should not try to make that a specially defining characteristic of drone technology – “looseness” once again – since the problem of pursuing an adversary across

sovereign borders and so triggering a wider conflict is a very old issue. Air power from at least the Second World War on, and for that matter naval warfare long before that, created that ability well beyond geographically contiguous states in conflict – no need for drones to create the capability.

Nevertheless, it is true that the geographical reach of drones and other features of their technology make it easier to do this as a matter of triggering resort to force specifically with respect to crossing sovereign borders. Although we now address geographical reach of drones, however, I want to bracket and set aside the specific question of whether drones raise important (if not necessarily historically unique) questions about *sovereign* territory and *sovereign* states intruded upon by pursuit of an adversary, whether terrorists or any other party.

The reason for setting it aside is this. The crossing of sovereign borders *as such*, made easier by drones, might or might not increase conflict in the world, but in any case the United States has long had a settled view in international law regarding terrorist safe havens: They are not safe. Taking that as the long asserted, and not-infrequently acted upon, view of the United States as to the meaning of sovereignty and control of territory regarding terrorists, drones might make that an easier policy to carry out, but they do not alter the US's fundamental view, at least. Whether the US view is correct or incorrect, as law, policy, or ethics, drones are enabling, but not altering, specifically with respect to sovereignty and borders as such.

So in what sense are drones more than just a “means and methods” question and, with respect to resort to force, particularly connected with it? In what sense altering, rather than merely enabling? It is geographic reach, but not just that. The traditional condition of geographic reach, particularly of air power, was that its reach was accompanied by high levels of kinetic firepower. Not as a logical necessity, but as a practical matter of technology. The limitations of the technology were not flight, but instead weaponry and, more important than anything else, the sensor and control technologies involved in aiming and precision delivery.

Those technologies are very far from perfect (as military personnel, concerned that the world might think them better than they are, emphasize because of their concern that people will think there can be such a thing as zero collateral damage), quite apart from intelligence error or anything else prior to a drone attack. Operational precision and minimization of kinetic force in attack, combined with the ability to attack from distances, connect drones as technology to *jus ad bellum* because they make it less costly than the previous alternative. True, fighters have been hurling things at each other from a safe distance since, well, perhaps before homo sapiens. Drones offer not only greater reach, but the ability of the operator to be remote from the weapon platform itself, while controlling it in real time. Again, none of these are as radical as one might imagine them to be – a Navy officer firing a missile from aboard ship is just as remote from its target, and realistically at no greater risk. But it nonetheless reflects a considerable shift in the management of materiel and targeting in conflict.

## V The Age of Techno-War Anxiety

The awareness of these technological capabilities is an important factor in the anxiety that the technologies have produced. Among the human rights monitors, some academics, some journalists, some in the “international community,” a fear that the battlefield has potentially been widened – without a sense of exactly what law applies where to these admittedly far more discrete uses of force. To put it at its starkest, and most caricatured, one could say that the anxiety is over a new weapon system that seems to simultaneously incorporate several seemingly paradoxical features, thanks to technology:

- geographically-unconstrained, aerial birds of prey with global reach;
- global birds of prey able to strike individual targets, without (oddly, but a source of anxiety) the fear of overwhelming outcry that might accompany a weapon that would be likely to kill a thousand people rather than five;
- global birds of prey that seem almost like unconstrained *ronin*, subject to no will other than their own, but where that “will” sits in a cubicle in Nevada; and yet also
- machines of ubiquitous surveillance, like 1984’s black helicopters, always present, always watching, and occasionally striking without warning.

This anxious vision is owed mostly to the ahead-of-the-curve book by the Brookings Institution fellow PW Singer, *Wired for War*; it was cemented as a meme by the widely-noted October 2009 New Yorker article by Jane Mayer. Whatever the future might hold far down the road, however, the technological reality is vastly more constrained. Singer’s book, path-breaking in 2007, is inevitably out of date particularly in its speculations. Mayer’s article, to be blunt, was never taken seriously by military or CIA professionals, so far as I have ever been able to tell, partly because it seemed to them quite unaware of how much of war today is by its very nature “pushbutton,” and because she really seemed to believe that there is a deep psychological truth about a “Playstation,” video-game sensibility of war, conducted by day-job bureaucrats at best and gamer kids at worst in cubicles.

I will not try to defend the claim here, but that depiction is simply not in line with how the intelligence community uses weapons, so far as I have been able to gather. “Kill TV” has a real basis – and seen within the intelligence agencies and DOD as part of the mechanism by which many lawyers and targeting professionals otherwise uninvolved with that particular operation are watching what their colleagues do and the decisions they make. That’s a good thing, because it means that, even within the secrecy of national security agencies, more regulatory eyes are watching the process. As to the affect, well, why military or national security professionals engaged in killing enemies bent on killing Americans, and in particular the men and women under their command, should necessarily exude a personal attitude of dutiful sorrow rather than “hooray” eludes them, as it eludes me.

There are several other important reasons why the anxiety described above is partly misplaced. The first is that this technology is far, far less global than the shared meme would suggest. It is one thing to have the ability to pilot or fire a weapon from a continent away, and another to have the ability to have the drone there in the first place. The relevant constraints are not communications, although communications will get much more difficult over transcontinental distances once jamming countermeasures become available and are made relatively cheap, even to non-state terrorist groups. They are the sheer operational difficulties in basing, fueling, re-fueling, maintaining, and servicing a complex and expensive airplane, even if it lacks a human pilot. For every “global” aspect of the technology, there are multiple local logistical requirements of vastly great impact. Indeed, those realities mean that much of the piloting and targeting takes place within the Afghanistan and Pakistan theatres, even for counterterrorism. Drone aircraft is less a global technology than a technological wonder just as tethered to local operations as a jet aircraft is to its aircraft carrier.

Second, the fundamental reason why the drone campaign in Afghanistan and Pakistan, in both counterterrorism and counterinsurgency, has been ramped up under President Obama with such operational success is not about drones. Success is mostly owed to a long-developing, and only in recent years succeeding, program to gather intelligence on the ground in-theatre. This includes both the military and the CIA, and touches on counterinsurgency as well as counterterrorism. It has meant, after many years, that US forces are able to act on information gained not solely from signals intelligence and questionable information from Pakistan’s ISI, but from direct US sources on the ground in both countries.

From an operational standpoint, drone warfare is only as effective as the intelligence operation underlying it – and it has taken the US many years to finally develop some level of capability in the region. Human intelligence is crucial, but so too is the sheer level of geographic information available after a decade of war, political and physical geography, the natural and built environment. There is not a lot of cover in Afghanistan and the border areas of Pakistan, and by now aerial mapping has been able to assess virtually all of it. That intelligence infrastructure cannot be ramped up except locally, and requires time and immense investment of resources. Some part of the signals intelligence is global, but most of the rest is not.

## **VI**

### **A Technological Response to a Behavioral Violation**

The sensor abilities carried aboard the drone itself, while remarkable and improving rapidly, are essentially tactical in the sense of seeing the specific target, civilians, terrain, etc. But the weaponized drone is the thin tactical tip of a strategic spear that consists mostly of intelligence infrastructure. If one focuses on that as the mass of the iceberg below the waterline, the vision of a geography-busting weapon of paradoxically fantastic discretion disappears. To be sure, it *is* what is sought. One might say that the vision that so discomfits some outside observers is the latest iteration of the dream of strategic air



power – the dream of an air weapon system, in this case without even a human pilot, able to win a war from the skies and over transcontinental distances and, finally, with individualized targeting. But strategic airpower has never succeeded on its own so far, and this particular attempt is still more dream than reality. I do not suppose that will allay the anxieties – but what exists today is a very long way from that.

Yet drone technology did not emerge out of nowhere; neither is it simply a way of projecting force at less cost and less risk. It is also partly a response to the special risks posed to troops and civilians by an enemy that freely and deliberately commingles itself with the civilian population. The sense sometimes conveyed in arguments over drones, that it is the overweening response of the technological superpower that sends machines, not men, to fight, actually has it backwards. It is, far more than evidence of overwhelming military superiority, an indication of the anxious concern of the materially stronger party to find a way to overcome unlawful, but highly effective behavior by the enemy – highly effective, at least, insofar as US forces take seriously the need to minimize civilian casualties.

Drones are mostly a response, a fix and a counter – the usual attempt by the US to find a technological solution to a behavioral problem on the other side, one that is illegal but to which the US will not respond, for example, by engaging in reciprocal behavior. It is reactive – and one of the difficulties of all such technologies is that it is far easier for an adversary willing to violate the laws of war to find new ways to engage in new behavioral violations than it is for the US to come up with new technological counters.

Witness, for example, the current problems that NATO is having in Libya as this is written. Entirely predictably, Gaddafi's forces have abandoned their death-trap tanks for pickup trucks, "technicals," and other means of fighting by which they blend into the civilian population, making it difficult for NATO to distinguish them. They did so within a week or so. Surveillance and weaponized drones allow long periods of watching and waiting that allow far more exacting determinations of targets – but they respond to the enemy's inevitable decision to abandon conventional war and move to a form of guerrilla and irregular war and finally to lawfare. They will search for the weaknesses of drone technology – perhaps to be able to foil or counterattack them, but far more likely by figuring out still better ways to use the civilian population as shields. Drones are as much an indication of weakness in fending off illegal tactics as they are a sign of strength. That does not make them any less useful or vital – but it shows just how difficult the US finds responding to lawfare-driven tactics. Drone warfare, far from being a way of reaching to find new ways to undermine the laws of war, is actually an attempt to find a technological way to maintain our moral and legal scruples.

## **VII**

### **Drone Technology for Humanitarian Intervention?**

These factual realities, as I understand them, operate as serious constraints about what drones are able to do. Nonetheless, in the remaining discussion, I will take by assumption that these factual realities are *not* a constraint upon the *jus ad bellum*

connection, contrary to what I have just said. We will assume simply that technology that obviates geography and allows more discrete and discriminating targeting does indeed alter the calculation of when, where, and why to resort to force. After all, if this weapon system had been genuinely available, on this idealized basis, to President Obama in the run-up to the Libya engagement, does anyone doubt that it would have altered US calculations about the resort to force?

It would surely not surprise anyone at this point if the disposition of US forces in Libya turned out to be the CIA on the ground, running drones in the air – very much akin to what it does now in Afghanistan and Pakistan, provided it can get the intelligence gathering sufficiently up to speed. Indeed, it might well turn out that this is the only real way of effectuating the Samantha Power Doctrine, wars of humanitarian altruism. Technology and (sort of) covert operations by the CIA allow the US to project force in ways that are not necessarily counted as war for domestic law purposes or even in every single instance necessarily armed conflict under international law.

If I were CIA Director Panetta, I might think that the CIA, alone on the ground and holding the US position in Libya at the behest of a Democratic president and in pursuit of humanitarian intervention urged by his liberal internationalist wing – well, what’s not to like? It certainly makes it harder for the US architects of that conflict to go after the CIA in other situations or demand that it be relentlessly pursued for its Bush-era activities, and that is probably so even if the CIA is unable to win Libya for the administration. *It* acted when the military could not. *It* illustrated the importance to US foreign policy of having less-than-conventional war options for projecting force, and underlined, in a war of purity of intentions, no less, that the erstwhile wicked CIA has an honorable place in using force.

This is no doubt overly-cynical, but we should understand that what looks like a too-easy way of the US using force because it is low on personnel risk suddenly looks like a great thing in humanitarian intervention. And although humanitarian interventionists for whom the only acceptable wars are ones with no concrete US interests at stake might not think so, most of us would think, if these technologies and methods are acceptable in humanitarian wars, they are also acceptable in situations in which the national security interest is at stake: lawful for one, lawful for the other.

So, if the President had such technology available, of course it would alter calculations about how easily to resort to force – and, I think practically anyone in the US government or the public would say, of course it *should*. More projection of power, yet with less damage, greater discrimination, and greater discretion: surely this defines a form of efficiency.

## **VIII**

### **From Proportionality to Necessity?**

We turn in a moment to point out that, for the critics, even if this is a form of “efficiency” in international relations, this efficiency is actually embedded within another measure of efficiency, in which the more “efficient” this becomes, the less efficient the measure in

which it is embedded. But I get ahead of myself. We need to add a further comment on the *jus in bello* assumption already made – viz., that in fact targeted killing through drone technology is more discriminating. What is the legal and ethical corollary of that claim, if factually true?

Perhaps the most important is that the focus of ethical and legal debate tends to shift from the question of “proportionality” to “necessity” in debating its fundamental *jus in bello* aspects. Proportionality in this context refers to the balance between military necessity and collateral civilian harm. Necessity, by contrast, refers to the justification for targeting in the first place, irrespective of any harm to civilians. If the technology is more discriminating, and if the aim is targeted killing, then the question of necessity looms larger. Likewise the *category* of the use of force for which targeted killing is most suited – “intelligence-driven” uses of force (whether covertly or not). In conventional war, masses of combatants are identified by uniforms, by weapons, etc., and may be targeted as such, on the basis of status alone, not by any situational criterion such as threat posed.

The same is true in principle in targeted killing using drones, insofar as the legal frame is an armed conflict. But the reality is that targeting requires, if not evidence of a situational threat, a showing of individuated necessity for why this person is not a protected civilian, but instead is something else. Not proof, nor evidence beyond a reasonable doubt (I don’t want to discuss the technical issue of standards here) but conceptually, the point of targeted killing is that it strives to be individuated. So something turns legally and morally, and not just operationally, on the intelligence underlying the decision to target.

To these two, proportionality and necessity, we can add the third of the fundamental customary law categories governing the conduct of uses of force, distinction. That is usually taken as an obligation to distinguish the target from the civilians who might be harmed in the attack, leading to the calculation of proportionality. In the case of targeted killing, however, it means that, but also an additional feature: is the person you have in your drone video sights the person you mean to target? Or is the person in your sights actually a civilian – not just some civilian around the target who might be collaterally injured, but the person you are targeting? None of this is special to drone warfare – it arises in ordinary combat, attacks by snipers, and other settings. But in the context of intelligence-driven uses of force as a category, it takes on special salience.

This corollary is raised here because it seems to me that most of the attention of ethicists has been upon the questions of civilian harm and proportionality, whereas the attention should perhaps be far more on the questions of necessity.

## **IX**

### **Imagining**

#### **Efficiency *Jus in Bello* as Undermining Efficiency *Jus Ad Bellum*?**

Section IV ended by noting that if the claim of greater discrimination in targeting were true, it implied that targeted killing using drone technology would be more “efficient.”

Efficient in the military sense of conservation of materiel, but also efficient in the ethical and legal sense of more effective use of military resources to military ends, while reducing civilian harm. Combining these two happy states of affairs, if true, into one – we could say that this describes “efficiency *jus in bello*” – and, it goes without saying, we are unlikely to reach it.

Note in passing that the assumption that the technology in question contributes both to more effective military resource use and civilian protection – rather than setting them against each other – removes the primary difficulty in proportionality generally. That difficulty is, how does one set these radically different values, military necessity and civilian harm, against each other so as to find the efficient value? There is no common currency in which to undertake Coasean bargaining to the efficient position, to put it in the brutalist language of law and economics. Yet in this special case (and it is a very special case), the tradeoff problem goes away, because both values gain.

It is much harder, though perhaps possible in principle, to imagine “efficiency *jus ad bellum*.” It would mean something like the “right” amount, kind, type, and reasons for resorting to force. The qualitatively different dimensions of that description give an idea of why, if one could conceive of it in bare principle, it would have to founder not just on the harsh imprecisions of measuring such things in the real world, but more fundamentally because the dimensions are not really measurable against each other. Moreover – and curiously unlike, or at least not precisely parallel to, efficiency in the conduct of operations as against civilian harm – the very idea of efficiency *jus ad bellum* appears to wrap itself up in considerations of justice. It is difficult to imagine the “just right” amount of resort to force in international affairs without also postulating the just conditions of the resort to force. Indeed, it looks a little bit as though it were a mistaken attempt to rewrite just cause as efficient resort. Why? Because it is inevitably a judgment about sides, without w

Why does not efficiency *jus in bello* create the same problem? Perhaps it does, if one goes beyond military necessity as merely means to prior ends and treats the problem as Walzer’s “importance of winning.” But the part that might seem most connected to justice, civilian harm, turns out to be the least difficult as a category. Why? Because it is not so much about “justice” as it is about, well, what it says, “harm” – for which, all things equal, less is better. Harm to civilians might be about justice *simpliciter*, but it might equally well be regarded as “superior non-moral consequences”: and they come to the same thing in this case. But that *cannot* be said of winning or losing the war as such because, well, one side *wins* and the other side *loses*. Even the imagined notion of efficiency *jus ad bellum* appears to be merely a way of putting a new label on the ordinary question of just cause. The concepts of “efficiency” *jus in bello* and “efficiency” *jus ad bellum* are fundamentally different.

Despite the difficulties of locating the “efficient level (amount? kind?)” of resort to force, however, one might still say that the more efficient targeted killing through drone warfare is in the *jus in bello* sense, the more difficulty it poses for efficiency in the resort to force in slightly different way. Let me put the proposition as I have had it put to me in a

variety of different academic settings by some very smart interlocutors. It is an argument found not infrequently in journalism, academic accounts, and elsewhere, but let me take two examples of its formulation:

- The problem with targeted killing with drones, said the human rights lawyer, is that it allows the US to overcome the constraints of geography and makes it too easy for it to resort to force. It no longer, he added, has to fight its way across the ground to attack people it regards as terrorists; it can simply fly over and fire missiles at them.

Now, it will be evident I do not believe this is an accurate assessment of what one can do with targeted killing using drones. (I was somewhat surprised in the event that a human rights lawyer would be concerned about whether the US would resort to force, rather than how it conducted itself if it did.) It is also unclear why this is so different from other advances in technology in war starting with the airplane, but again we have discussed this above. Finally, it is also unclear why it is that it is bad if the US (assuming that it will indeed reach its enemies one way or another) does not fight its way through hostile terrain, both for its sake and for the sake of civilians who might well be caught up in ground fighting. The general theory of counterinsurgency says that one must control territory and population to win in the long run; drones are highly useful in this setting as are special operations, as part of the effort to gain terrain and population. Counterterrorism theories counter that this is not necessarily so where the terrorist group is not indigenous to the area but merely taking safe haven; all the better if drones can skip over the geography.

So, consider a second formulation that does not rely on geography as such:

- The problem with targeted killing using drones (said the law student at one of the finest schools) is that the lack of overall material cost, elimination of personal risk to US personnel, and perception of lessened harm to civilians, reduces the US disincentive to resort to force, below its efficient level.

This question at an academic conference left me nonplussed, mostly for the almost entirely removed and abstract way in which the question treated personal risk to US forces, even though their behavior was assumed to be within the laws of war. It was as though the questioner were a combination of an alien arrived from Orion, equipped to understand human behavior entirely through the Coase Theorem and danger were simply another input. Another law student in the audience saved me from having to respond, however, because, visibly shaking with anger, she asked how it was that he could treat personal risk to US soldiers, who were acting in compliance with the laws of war, as merely an amount to be ramped up or ramped down on the margin to reach some hypothesized efficient point. Markets in everything? Please. He seemed puzzled at her anger.

## **X**

### **Morality and the Alienation of Affection**

The young woman raised a crucial question, of course – the morally permitted and perhaps even required role, extent, and limitation upon affection and loyalty. The young man spoke from some removed and alien – “angelic” is more precise – moral position, a position of absolute neutrality, impartiality, and universality. The young woman said, in effect, God help you if you actually live there.

In many ways, this seems to me the deepest ethical question raised by all of this discussion around targeted killing using drones that does, indeed, reduce the personal risk to American personnel. In our example, we have postulated that we are not only within the acceptable legal standards of care in war but even have reduced the harm in ways not mandated by the law. It might not always be so, and in that case, the question of affection becomes even more fraught, even if one does act within the standard of care of the laws of war. But having raised it, I want to set aside the problem of affection and sides. There are many in this audience doubtless more learned than me on the problem of morality and the alienation or denial of affection.

## **XI**

### **Wanting and Not Wanting**

Let me return instead to the peculiar nature of the efficiency claim that comes out of these two formulations. The claim is distinguished in that the conditions that make for the most efficient *jus in bello* behavior are precisely those that drive what we hypothesize, for the moment, is an inefficient level of resort to force. Or at least incentives and disincentives to resort to force. This is ironic, of course, because it means that what we want, we also (by hypothesis) don’t want.

There are fundamental factual problems with the premises, in my view. Among many other things, few military or national security professionals would be likely to agree that the decision to resort to force, now or in the future, really revolves around these incentives and disincentives; or at a minimum, they are swamped in real life by other considerations of much greater moment. Moreover, personal risk does not play the quite the role assigned it here; a more realistic possibility is that a human team might be inserted and find itself under great pressure to act, whether in ideal conditions or not, because of the risk involved but more likely because of the perception of the difficulty in being able to insert another team another day; lack of personal risk usually reduces the pressure to strike under less than ideal conditions.

Additionally, it is not obvious that the right amount of resort to force should be measured by the number of times one undertakes it. That seems to me so, particularly if each of those instances is vastly smaller in its quantum of force and, even more importantly, if there is some reason to think on an opportunity cost basis that vastly greater conflict and harms have been averted. In practical terms today, we might evolve through targeted killing and drone warfare to less conventional war on a large scale, and more small-scale interventions through these new technologies, conducted by special operations forces of military, or CIA, or both – consisting of highly individuated targeting operations. These

small-scale operations might backfire and produce bigger conflict, blowback and many bad things. But maybe they will spare us many immense miseries of large-scale war.

It is an empirical question, not a philosophical one. If that is the direction, however, it points to both a rising category of this “intelligence-driven uses of force” – and the need for new kinds of regulation of it, based, I have elsewhere argued, around the law of self-defense, and focusing strongly on the criterion of “necessity.”

## **XII**

### **Conclusion**

But leaving aside problems with the premise, what of the argument itself?

It is incoherent, it seems to me, and for the reasons that were adduced earlier for a supposed “efficiency *jus ad bellum*.” I said that the problem was that efficiency requires a common currency – in order to establish the point of net social welfare. Efficiency reached by bargaining (hypothetical or real) between two parties requires that there be some common frame against which to weigh costs and benefits – and then to find the point of clearance in the circumstances between the two parties. That’s what it means to have a “right” level of resort to force, around which drone warfare and its special features might shift to “wrong” levels. But in conflict, we do not have such a common criterion as regards the reasons for fighting – leaving aside humanitarian concerns that are really about *jus in bello*, winning matters to one side for reasons that are wrong to the other side.

If that is so, then the search for an efficient level of the resort to force founders from the beginning. It turns out not to be about some neutral criterion of efficiency, but instead about justice, and the partial and contested notions of just cause that caused the sides to be “sides” in a conflict in the first place. Which is to say, efficiency turns into a claim about justice and just cause in war, and that turns out to be contested as between the sides. The result of this lengthy chain of argument, however, is that improvements occasioned by targeted killing and drone technology particularly sparing civilians do not create subpar optimality in the resort to force, because there is no coherent sense of “optimal” in this case. Every resort to force has to be measured against a quite different criterion – viz., just cause.

So long as we do not have recourse to the mind of God – and the angelic point of view – we are vested in a side. I suppose then we must determine by the exercise of our moral imagination whether our cause is just or not. We can take our propensities to violence or non-violence, our incentives or disincentives to use force according to its ease and risks, into account in trying to weigh up our own objectivity in judging whether our cause is just. But that is not the same as determining an efficient point, because so long as the sides differ as to the merits of each side’s cause, we are caught, so to speak, between earth and the angels. The supposed determination of efficiency turns out to masquerade as judgment as to justice.

In heaven, I suppose, the efficient and the just are the same thing. Here on earth, when it comes to sides and reasons to resort to force, I further suppose we must content ourselves that if the two sides see just cause differently, there will be no common ground to establish “efficient” resort to force. In that case, however, it seems to me that we should set aside an intriguing, but ultimately incorrect, argument about efficient levels of resort to force. We should instead pursue that, which if our assumptions prove correct, will improve our conduct in reducing civilian harm, at no cost to military effectiveness.

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