

Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

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ERICH FREIBERGER, JUL 18 2013

Early in J.J. Abrams film *Star Trek Into Darkness* (Paramount 2013), Captain Kirk is faced with a moral dilemma. Should he follow his orders and fire a missile into enemy territory from afar to kill a known terrorist, or should he risk sending his men into foreign territory to try to capture him? This choice is no accident. It is an allegory about the morality of the drone war, and the dilemmas it poses are those we face today. As in *Star Trek*, we have this amazing technology that can apparently be employed with little risk to our own forces, but its improper use poses an enormous risk to our way of life. How can we be certain we have identified an appropriate target? Is it enough to simply trust high government officials? What is the right way to use such weapons? In what follows, I will consider how ethics and the just war tradition illuminate these questions in a way that clearly shows what is missing in the Obama administration's approach to the use of drones.

The Just War Tradition

Just war theory, like the very idea of ethics, is rooted in the concept of our common humanity. It stems from the notion that even in the most extreme situation of warfare, there are certain principles that ought to guide our conduct (Walzer 1991). Some date its origin to the Indian epic the Mahabharata, which proposes a number of rules for the conduct of war (Clooney 2003: 117). In the West, these principles have their roots in Homer's *Illiad* (Murray 1924), as well as the philosophy of Plato and Aristotle. In *the Republic*, 470a-b, Socrates proposes that Greeks should limit their ravages of the land for the sake of future peace (Plato 1992). While Aristotle's concerns are more oriented to whether a war is undertaken with just cause (Aristotle 1985: 1333a30 and 1333b37). Cicero treats both questions thematically in his *Republic*, written in 51BCE, but these principles became especially powerful and widely diffused after Christianity became the official religion of the Roman Empire in 380 (Salzman 120). No longer marginalized and persecuted, Christians were suddenly wielding power and serving in the army, and this raised a new problem: under what conditions is it appropriate for Christians to resort to violence when the Bible says to turn the other cheek to those who smite you? The first formulations by Augustine and his mentor, Ambrose, were an attempt to answer this question (Augustine, *City of God* I.21; Mattox 44-45). Although their approach to it is formulated in Cicero's terms (*City of God* XXII.6), the Christian context in which it is articulated occasionally suggests that force might be used to coercively enforce Catholic orthodoxy (Johnson 38, 79; *City of God* XIX.15; Ambrose 95-96), and this has caused some to mistake Just War theory for an exclusively Christian enterprise. The theory's roots in Cicero's stoic universalism, however, permitted the renaissance thinker, Hugo Grotius to purge it of this Christian bias and, phrase it in a more inclusive way, enabling him to incorporate many of its principles into international law (Grotius 2001:10).

The Core Principles of Just War Theory: jus ad bellum and jus in bello

From the start just war theorists have been occupied with two central questions: when it was appropriate to go to war (jus ad bellum) and how the war should be fought (jus in bello). There is already an emphasis on both these questions in Cicero (*On The Commonwealth* III.23; *De Officiis* I.xi,33-36), and the theory of jus ad bellum was already well developed early in the just war tradition. Augustine's theory seeks to justify the use of force by the state by delineating the proper role of the city of God in relation to the city of man. As these roles are conceived in the context of a perpetual war between virtue and vice (*City of God* XIX.4,5), his discussion is principally focused on analyzing the conditions under which war is morally justified. As such, it contains the germ of most of the jus ad bellum principles which the subsequent tradition will elaborate: To be just, a war must have a right cause (*City of God*

Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

XXII.6), it must be declared by an appropriate governmental authority acting within specific limits (City of God I.21; On The Commonwealth II.17, III.22), it must be a last resort after the opportunity to make reparations has been given (On The Commonwealth III.23; Mattox, 16-17, 78-79), it must have a future state of peace as its goal (City of God, XV.4) the violence it uses must be proportional to the harm it inflicts (Mattox, 17, 81; De Officiis I, xi, 33-36), it must have a right intention (City of God, IV.14), and it must have a reasonable chance of success (Mattox 79-81; On The Commonwealth III.18, III.23).

In the subsequent development of the Just War tradition normative rules limiting how wars should be fought have been elaborated with increasing precision, and in the nineteenth and twentieth centuries many *jus in bello* principles were incorporated into international compacts and agreements. Most notable among these are The Hague Conference creating “The Convention on Laws and Customs of War” 1899 and 1907, the Geneva conventions (1864, 1906, 1929, 1949), the UN charter (1945), the Nuremberg War Crimes Trials (1946), and the UN Convention on the Prevention and punishment of Genocide (1948) and the International War Crimes Tribunal for the former Yugoslavia (1993) and the International War Crimes Court in the Hague (1998). These accords and bodies have helped establish legal precedents about the proper conduct of war that address issues like the treatment of non-combatants and POW’s and the banning of chemical weapons, among others.

There are four broad principles of *jus in bello* which these international agreements have sought to codify: the principle of military necessity, the principle of distinction (between soldiers and civilians), the principle of proportionality, which says that the force must be proportional to the military objective to be achieved, and the principle of humanity, which proposes that military forces must avoid suffering and the unnecessary destruction of civilian property (Solis 2010: 250-286, Glover 2009). These are “the four fundamental principles of the laws of war governing the use of force” which the Justice department will refer to in its “white paper” justifying the use of Drones, which I discuss below.

Ethical Justification and the Concept of Reciprocity

As is no doubt clear from even this brief account, there is a wide latitude of interpretation for the application of both *jus ad bellum* and *jus in bello* principles, and they should be considered more as guidelines for ethical reflection than as positive law, for they are only binding to the degree we find them intuitively plausible, which is to say that they emerge out of a shared ethical intuition of what constitutes an adequate justification. Indeed, most of these principles are based on the intuitive notion of reciprocity, or the golden rule, which states that you should treat others as you wish to be treated. The language of moral justification is thoroughly saturated in this concept and it lies at the heart of the idea of justice and good conduct. The very idea of ethics implies that there can be no extra-ethical situation; there is no instance where ethical obligations do not apply, for if ethics is to mean anything at all, it has to apply even under the most extreme human situations— even in war—otherwise the violence that we undertake in war will have no legitimate foundation and will be no better than naked force. I am not saying, of course, that this does not happen—clearly people and nations behave unethically all the time (indeed Cicero himself said “laws are silent in times of war” 1896: IV.11). The focus of ethics, however, is what ought to happen. It is about what ought to be, not what is. Governments often do use naked force. But when they do so, the ethicist’s task is to remind them that they don’t get to call it legitimate by virtue of their power alone.

Even when it appears to be undertaken under the fig leaf of some legal justification, it remains true in principle violence without proper justification is unethical and therefore illegitimate. If we want to be able to call our use of force just, we have to restrain it within proper bounds indicated by the concept of reciprocity implicit in these principles. We don’t get to have it both ways. We cannot call the drone war just simply because it’s an expedient weapon in our arsenal and we are fighting bad people who scare us. That fact alone will never make it just. There has to be a reasonable justification for our acts that we would be willing to accept from others if the same were done to us.

So what are the proper bounds in the use of drone strikes? While I grant that it is possible to use them ethically, the bar for their just use is set fairly high. As I argue below, it is not clear that the administration is meeting its own criteria for their just use.

Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

The Justice Department White Paper as a Justification for the Use of Drones

On February 6, 2013, a 16 page “white paper” was “leaked” to NBC news (Isikoff 2013). This paper sketches out the administration’s legal justification for drone strikes under international and domestic law. It argues drone strikes are justifiable if they meet three criteria:

- 1) “A high government official determines there is an imminent threat,”
- 2) “Capture is not feasible,”
- 3) “The operation is undertaken in a manner consistent with law of war principles,” and four such principles are cited: Necessity, Distinction, Proportionality and Humanity. Were these actually adhered to in every strike, this would set a fairly high bar, but it’s not clear we are actually meeting these conditions. Otherwise, why would the administration be so reticent about actually publishing its justification?

Let us consider these three justifications:

1) Imminence

This is a *jus ad bellum* principle, which speaks to our right to attack in the first place, but this is something that is admittedly difficult to establish in the case of an asymmetrical warfare. Normally, imminence means you have specific evidence of when and where an attack is going to take place. The memo, however, proposes what it calls, “a broader concept of imminence” arguing that a terrorist war is not like a traditional war. Because we can’t know when the next incident will occur, it claims that attack is imminent, “even when there is no specific evidence of where such an attack will take place or of the precise nature of the attack”(“White Paper” 7). This is an abuse of language. It smacks of Bush denying that “enhanced interrogation” was torture and it is no less wrong to stretch the meaning of words to fit the desired outcome in a particular case.

If you doubt this, consider whether we would be willing to have this “expanded concept of imminence” employed against us. Imagine how outraged the US government would be if Mexico carried out a drone strike against a drug Lord in South Texas, and tried using similar reasoning to justify it. We can’t have it both ways—we cannot argue that a war is just and simultaneously redefine our terms to justify whatever it is we are doing to wage it. This is why the administration has concealed this justification. They are doing their best to find a legal support for what they are already doing, but they know the justification is shaky, and nothing said in Obama’s May 23 speech on drone policy makes it any less so. If the case were stronger they would have publicized the criteria for target selection sooner, and there would be no need for the shift in emphasis that the May 23 speech announces. Moreover, in spite of Obama’s claim that he will adopt more rigorous standards for the use of drones, the New York Times has reported that so-called “signature strikes,” in which any group of armed men deemed to be insurgents might be considered a target, will continue in the tribal areas of Pakistan (Rosenthal 2013). Such attacks clearly appear to violate all four of the *jus in bello* principles to which the administration has claimed it will adhere when it conducts these strikes.

2) Feasibility of capture

There is a very broad discretion here, who is to say it would not have been feasible to try to capture those we kill in these attacks, rather than targeting them from afar? As Daniel Brunstetter has argued, “Framing it this way makes other options, *de facto*, seem unreasonable, leaving drones the only option left on the table” (Brunstetter 2012). The government has a clear interest in arguing that capture is not feasible because the use of drones is so easy: drone strikes are cheaper, they don’t put US forces at risk, and though most US citizens are only dimly aware of them, a majority approve them, because who can object to the idea of killing terrorists? At minimum one can see that the government has a clear interest in determining capture isn’t feasible because the use of drones is so easy and they do not put our armed forces at risk.

3) Attacks are consistent with just war principles

Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

The “white paper” refers to the four *jus in bello* principles listed above: necessity, distinction, proportionality and humanity, but do drone attacks meet the criteria laid out in these four principles?

With regard to necessity we only have the government’s word that these targets are military objectives. As to distinction, we are killing civilians and this is why drones are so unpopular (Grut 2012). While some of these deaths might also be caused by other, more conventional forms of warfare, the idea that innocents are being targeted without affording them any opportunity to surrender appears especially problematic to some (Hussain 2012), although it is not clear how this differs from manned airstrikes or sniper or artillery attacks.

Surprisingly, of these four principles the most plausible case can be made for proportionality. In cases where the threat is truly imminent, a drone strike might be the most proportionate response to an imminent terrorist attack. Targeting an individual or group posing an imminent threat, would appear to be thoroughly justified. The problem, however, is the administration’s loose definition of imminence. If we simply redefine imminence to justify those we want target, without establishing that they truly constitute an imminent threat then we clearly are not meeting this condition.

The same problem applies to the application of the principle of humanity, which says one should avoid suffering and the unnecessary destruction of property. There are two ways to look at this question. On the one hand, if we are sure of the target, then drone attacks do minimize suffering, and some have advocated they are the ideal weapon of just war for this reason (Shane 2012). On the other hand, where there have been civilian deaths, they are deeply unpopular and absolutely terrifying. As even former commander of US forces in Afghanistan, Stanley McChrystal, has acknowledged: “The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates. They are hated on a visceral level, even by people who’ve never seen one or seen the effects of one” (Crilly 2013). This hatred is a key to what is wrong with these strikes. If they are so strongly resented in the areas where they are used, what does this do to the prospect of a future peace? As Daniel Brunstetter has stated:

“The problem is that accepting drones as a default strategy to be used almost anywhere relegates other alternatives to the backburner, and in turn, may undermine the prospects for a just peace in the long run.”

In other words, the drones threaten the prospect of a future peace (Brunstetter 2013).

What was left out of Obama’s 2009 Nobel Speech

The four just war principles cited by the Justice Department’s “white paper,” are close to those cited by Obama in his acceptance speech for the Nobel peace prize. In his 2009 speech Obama said:

“A war can only be considered just if it is waged as a last resort, in self defense, if the force used is proportional, and pains are made to spare civilians from violence wherever possible” (Obama 2009).

What neither Obama’s Nobel speech or the memo mentions, however, are four additional *jus ad bellum* principles from the Just War tradition that are well worth contemplating. To be just, a war must be waged:

- 1) By a competent authority (i.e., a legitimate regime based in reason and not a tyranny)
- 2) It must be for the sake of a future peace
- 3) For the right reasons, and
- 4) Have a reasonable chance of success.

It is in light of these principles that we can begin to see the problem with the administration’s justification of the use of drones. If we abuse language and redefine imminence to include anyone who might be a threat, how can we say our

Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

cause is either rational or legitimate? The indiscriminate use of language to legitimize our use of force will only perpetuate the cycle of violence. The problem is not that drone technology has introduced a new kind of weapon with which our traditional moral concepts cannot cope, the problem, rather, is that the apparent ease of deploying this new technology has seduced our leaders into thinking we can ignore and evade the traditional standards that justify force because of they are “effective” in this asymmetrical war against non-state actors. The traditional concepts, however, work just fine when they are correctly applied. The difficulty is only that they impose restraints that we would prefer to ignore. We might succeed in killing terrorists with our drone strikes, but even if we only killed terrorists and not the hundreds of innocents we have also killed, how could this, in itself, possibly be an appropriate justification? How can a policy of killing terrorists bring a lasting peace if for every terrorist we kill, we only inspire more to oppose us? How can such a war achieve a future peace? What chance of success can it have?

Measured by these *jus ad bellum* standards, the administration’s justification of the use of drones risks becoming an Orwellian recipe for a perpetual war, as Obama has, acknowledged in his May 23 speech. He is right to be uneasy about the way the war has been prosecuted, but without a great deal more transparency on the how the administration will interpret the question of imminence, it is not at all clear that his proposed changes will make any difference in the prosecution of the war. If the war neither has future peace as its goal, nor a reasonable chance of success, it is extremely difficult to argue that it is just. What the President’s speech marks is an intent to shift counter terrorism policy—from CIA to military control, from “signature strikes” towards a more rigorous process of vetting of targets, from force protection to focusing only on “high value Al-Qaeda” targets—but apart from signing a new “Presidential Policy Guidance,” on May 22, this shift has not yet been institutionalized in a way that will guarantee any real change. And it apparently will only happen after “we finish the work of defeating al Qaeda and its associated forces.” This shift in strategy does little more than announce an intent to think about the war in a new way, but he has yet to take any concrete action that changes how it will be waged that will bring greater transparency into the process of determining what constitutes an “imminent threat.” Without further detail on the mechanisms that will be employed in such a process it is impossible to say that the drone war is just as the president claims.

Obama has discarded Bush’s phrase, the “War on Terror” and has instead started calling these strikes a war against “al-Qaeda and associated forces.” But is there really any difference if the names are being twisted to suit the convenience of those who use them and the enemy they name is not at all clear? While it is true that our enemies lurk in the shadows, how can killing people ever result in a lasting peace when we aren’t even sure we have correctly identified who they are? As Steven Coll has remarked: “A war against a name is a war in name only” (Coll 2013).

Ethics, in contrast, insists that we hew to the meaning of words and treat them consistently. If our moral language is to have any meaning, reason and the Just War tradition both suggest that distorting the meaning of the word imminence is not enough to justify the use of drones. If we want to call their use just, the administration needs to either find a better justification, or make a more concerted effort to limit their use in a much more transparent way.

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Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

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Just War Theory and the Ethics of Drone Warfare

Written by Erich Freiberger

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