

THE MORALITY OF DRONES

Targeted Killing

BRIAN V. JOHNSTONE, C.SS.R.

The Facts of the Case.

The main areas where armed drones are being employed are in Afghanistan and Pakistan. Afghanistan is a declared war zone; Pakistan is not. This makes a difference with respect to international law as will be explained later. The NATO Forces have been using drones in Afghanistan, and it is planned that these facilities will remain after the withdrawal of the coalition's troops.¹ Drones are being also being used in Yemen and Somalia. The U.S. has recently opened drone bases in Saudi Arabia, Djibouti and Niger.²

What is the Australian situation with regard to drones? On Sunday July 21st Fairfax Media reported that the spy base at Pine Gap in Central Australia has had a key role in the United States' drone strikes directed at the 'targeted killing' of the leaders of al-Qaeda and Taliban.³ Australian forces are reported to have used drones in Afghanistan; for years the US military launched spy drones from an air force base near Adelaide.⁴ On August 3rd *The Age* carried a report that U.S. Secretary of State, John Kerry has said that President Obama hopes to end US drone strikes aimed at terrorists in Pakistan.⁵ However, this would mean the cessation of strikes in one area, not a renunciation of the use of drones elsewhere. Before the Australian government goes further down this path, Australian citizens should have the opportunity to debate the matter.⁶

There is much controversy on the topic in the United States, but as yet little debate in Australia. Mark Mazzetti, author of *The Way of the Knife: The CIA at the Ends of the Earth*, a book on Drones,⁷ was interviewed by Tony Jones on Lateline on July 27th. The Melbourne *Age* of August 1, 2003 carried a two page re-

port by Andrew Purcell of Jeremy Scahill's *Dirty Wars* which is very critical. These books, especially Scahill's, provide revealing accounts of how the policies were formulated and carried out are most revealing. However, while Scahill in particular deals with issues of U.S. law, these authors do not deal specifically with the moral issues. These will be the focus of this article. My thesis of this article is that the lethal use of drones is arguably against international law and against the moral law as expressed in the traditional just war doctrine.

The relevant international law has been outlined by the Notre Dame University professor of international law Mary Ellen O'Connell. 'Under the UN Charter the use of major military force, such as the kind of force that drones deploy (missiles and bombs weighing up to 500 pounds), is lawful only in three situations: First, where a country has been the victim of an armed attack—as provided for under Article 51 of the UN Charter; second, when authorized by the Security Council; and, third, where a state is assisting at the request of a government in an armed conflict zone, such as the civil war that's being fought in Afghanistan. The US and other countries, in particular NATO allies, are involved in an armed conflict, a civil war, at the invitation of the elected authorities of Afghanistan, in particular Mr. Karzai. There's no other situation in the world where the US is involved that meets those criteria—Article 51 self-defense, Security Council authorization, or express invitation from the legitimate authorities of a country to be involved in suppressing a civil war.'⁸

In international law, an incidental armed attack does not justify war as a response, but

calls for 'police action.' While the use of force in self-defense on the part of a nation is legally justifiable, every attack does not justify war. Counter-terrorism must be primarily a form of police action. To name an armed response to terrorism as war is a way of justifying the use of military weapons which would not be allowed in police action: drones are military weapons, as Professor O'Connell has argued and so ought not to be used in situations that do not qualify as war. Terrorists in Pakistan are non-state actors and their criminal acts should be dealt with by appropriate police actions.

The U.N. Rapporteur on Counter-Terrorism and Human Rights Ben Emmerson has written that the current use of armed drones in Pakistan does not have the consent of the legitimate government of that country and so is against intentional law.⁹ Whether the use of these weapons in the other countries mentioned is against international law would depend on the relevant circumstances and this question is beyond the limits of this article.

The ethical issues have been widely debated outside Australia. Michael Walzer, the author of *Just and Unjust Wars*¹⁰ has argued that drones as weapons were not unethical in themselves; he saw no ethical difference between the use of drone to kill an enemy and the use of a sniper. However, he expressed unease about them because they were so easy to use; a fact that could lead to excessive use.¹¹ He expressed reservations about the inevitable 'collateral damage;' the killing of civilians which comes with the use of these weapons despite the claims of their superior accuracy. Walzer also expressed raised concern about the process of selecting the candidates for execution. He suggested that a selected committee could function as a kind of jury, but this still leaves unanswered the question of the legitimacy of the 'jury,' the reliability of the information available to them and the criteria by which they would reach their judgment.

Robert George, a professor at Princeton University, noted for his pro-life writing, has



Fr Brian Johnstone has recently returned to Australia from his posting as Ordinary Professor of Moral Theology/Ethics at the Alphonsianum in Rome.

stated that the use of such weapons is not immoral in itself but would condemn their wholesale and indiscriminate use.¹² Brian Orend, a just-war theorist argues the use of drones is justifiable tools of warfare.¹³

The chairman of the U.S. Catholic bishops' Committee on International Justice and Peace, Bishop Richard E. Pates of Des Moines, has written calling for public discussion and raising several serious questions about the military use of drones. Bishop Pates, citing the *Compendium of the Social Doctrine of the Church*, urged that U.S. officials 'exercise leadership in advancing international norms, standards and restrictions' on the use of drones and called for greater scrutiny of their use. While he acknowledged that countries have a right to use force in self-defense, the bishop warned that not every attack by al-Qaida or other terrorist organizations justifies war as a response.

The bishop here is pressing an argument that has been made very cogently by professor Mary Ellen O'Connell. As an alternative, he proposed that the counter-terrorism tactics used by the U.S.A. should be non-military, that is they should adopt police action tactics. In particular, he urged that policy makers should work to foster peace through building up respect for human rights and working to remove the injustices that that terrorists can exploit. The bishop's letter focused on the just-war standards of discrimination, imminence of the threat, proportionality and probability of success and puts these forward as appropriate criteria for judging the morality of targeted killing.

I will now develop an ethical argument in more detail.

I begin with a summary of the requirements of the just war doctrine. Here an important distinction needs to be made: for some exponents of the doctrine the principles are ‘conventions’ or agreements between nations; thus when one party to the convention breaks the agreement that other is no longer held to it. For others, for example among ‘secular’ authors Michael Walzer and Brian Orend, the principles are moral requirements and not merely conventions; this is also, of course, the Catholic understanding of these principles. However, as a student of ethics would know there are disagreements regarding the ethical theory that supports the requirements. In this paper I will not enter in to this question; I will presume a theory of natural law as based on reasonable arguments.

Before listing the requirements of the just war, I note that there are two ways of regarding war. One is based on the assumption that considered human nature and human history we must presume that there are going to be wars until the end of human history; this we could call the Augustinian assumption. Thus, the doctrine of just war is an articulation of the ways of limiting the evils of war as far as possible. ‘As far as possible’ is the key phrase here. The tradition of just war represents the endeavours of ordinary people, canon lawyers, lawyers and theologians, to develop legal and moral structures to limit war. The second accepts that war itself can be an undertaking directed to a positive goal, for example, a crusade, or a secular version such as ‘a war to make democracy possible’ or a ‘war to end all wars.’ The problem with this ‘idealist’ notion of war is that the higher we elevate the goal of war, the higher becomes the acceptable level of the force that is ‘proportionate’ to that goal. I would argue that in the present case the goal of ‘keeping the U.S.A. safe from terrorism’ is being given such a high value by some of its proponents that it takes on the aura of an absolute: means are being considered as justi-

fied which contravene the international laws of war and the rationally defensible criteria of the just war doctrine.

The criteria of the just war doctrine apply first to the decision to initiate war (for which is used the Latin term *ius ad bellum*) and to the conduct of the war (*ius in bello*). I will now apply these criteria to the use of drones in targeted killing.

First of all, there must be a just cause. According to the contemporary understanding of the just war tradition, the only acceptable just cause is defense against aggression.¹⁴ On this international law and the teaching of the Catholic Church are agreed. Second, there must be a right intention; all actions must be guided by a will to achieve a just peace and not for example to the furthering of national hegemony or economic interests such as gaining access to oil. Intention means that attitude of the will that guides one’s actions; actions express intentions. I will adopt a strong intentional interpretation of the just war doctrine, by which I mean an interpretation according to which the other principles of the doctrine are reasoned specifications of the basic intention. This means that the criteria form a rationally coherent system; they are not simply an *ad hoc* list of rules. I will explain this point when I deal with these other requirements.

A further requirement is proper authority on the part of the initiator of the war; this means the person or group responsible for the political community. There can be two kinds of reasons for this requirement: one is the view that legitimate authority is somehow is an embodiment of a higher order or even in some sense an instrument of God. The second type of argument is prudential; thus the purpose of this limitation is to avoid sanctioning particular conflicts such as the inter-ethnic conflict that is now occurring in Syria. The relevant issue would be whether the initiator of the war has sufficient support in the community and the necessary resources to achieve a positive outcome as distinct from armed chaos.

There must be a proportionate reason for

initiating war. The concept of proportion is difficult to clarify; in general it means that a judgment must be reached that a war, with all the harms that it will produce does more good than harm.

Again, there are two distinct ways of interpreting proportion. For the first what is required is that the action, the war in its totality, be directed to or proportioned to achieving the purpose of self-defense. The second is pragmatic or consequential; it states that the positive results must be foreseen to outweigh the negative. In this interpretation the assessment of proportionality can come down to calculating the number killed as compared with the number saved; this simplistic calculation is not what was meant by proportionality. Numbers killed are not the only criteria of proportionality, nonetheless when many are killed those guiding the war would be ethically required to re-assess the judgments of the goal and the means they have adopted. The next criterion is last resort. In relation to the present case the question would be whether a police operation, involving counter-terrorist tactics would be sufficient to achieve the purpose of self-defense. These principles govern the decision to initiate war.

There are further principles that concern the conduct of war, (*Jus in Bello*). The first and most important of these is discrimination that is the requirement that those not engaged in the conduct of the war, or noncombatants not be attacked. This is the principle of non-combatant immunity. For the Catholic tradition this is a moral requirement based on the argument that since war may be directed only to self-defense against aggression, only those who are engaged in aggression may be targeted; those who is not so involved must be kept immune from attack. Some regard this as merely a convention. Others, such as Walzer, Orend and in particular the Catholic tradition of just war consider this a binding ethical rule. It has been argued in favor of targeted killing that this enables attacks to be much more discriminate than other means, for example high-level bombing. This argument by itself does

not justify drones. The use of high level bombing could be insufficiently discriminate and so immoral; the use of drones might be relatively less indiscriminate but still indiscriminate. We need to examine the relevant facts.

The criterion of discrimination has a two-fold application; first it applies to the process of selecting candidates for execution, second it applies to use of lethal weapons against the chosen candidates. I remind the reader that all the reports we receive of the killings carried out with drones are of 'suspected' terrorists. We are being asked by governments to accept the legal and moral justification of executing suspects. There is no judicial process open to public scrutiny by which the persons are designated for execution; nor is there any process by which these persons can be warned beforehand and given the opportunity to surrender. (However, Holder stated recently that when it is feasible to capture a target, targeted killing will not be carried out.¹⁵)

We can note the language; a person is reduced to a 'target.' Through a process of gathering information and making judgments that is not open to judicial review, certain person's names are added to a 'kill list.'¹⁶ It has been reported that in selecting 'targets' the presumption is that any male in certain regions is presumed to be a combatant, unless the contrary can be supported by evidence. A front page story in the New York Times, in Spring 2012 reported that Obama would often personally approve the names of terrorism 'suspects' to be added to a 'kill list' compiled by officials of various government agencies.¹⁷ This evoked the unwelcome image of the Roman emperor giving the thumbs down signal for the killing of a defeated gladiator in amphitheatre. As was noted earlier Michael Walzer is concerned about this process and proposes adding some kind of public accountability by requiring that a committee carry out the judgment on the victims. A secret committee however is hardly adequate to ensuring public accountability.

A further relevant requirement of the just war doctrine is that to justify the use of force

against aggression the attack must be actual or ‘imminent.’ To be justified in responding to aggression the defender is not required to wait until the attack actually begins, to hold back until the tanks are at the door for example. But the aggressor must be demonstrably in the process of preparing to attack: it is not sufficient that a presumed future aggressor is thought to be considering an attack or belongs to a group that has attacked in the past. The accounts of actual targeted killings provided by Scahill would indicate that this rule has often been violated.

The second argument is that, in practice, targeted killing is not sufficiently discriminate. Reports indicate that many civilians have been killed. While the ‘pilots’ of the drones can observe closely the targets at which they aim, it is pointed out by critics that since the focus of the cameras is narrow they may not be able to see what surrounds the targeted person; there may be family members or other non-involved persons, in the vicinity; this is known as ‘the soda straw effect.’ Their vision is limited as would be the vision of someone looking through a soda straw.

Critics also allege that after the initial attack, a second attack is sometimes made on the same target so as to kill by-standers who have come to inspect the damage. Especially

problematic are the so called ‘signature attacks.’ These are directed against persons or groups whom intelligence suggests may be involved in terrorist activity; these suspicions are not confirmed.¹⁸ More recent reports indicate that these may be more restricted. However, there is clear evidence that the criterion of discrimination is being violated by the killing of unknown persons.¹⁹

Proportionality

What is known about the numbers of those killed by drones in the conflicts going on in Afghanistan and Pakistan? In contrast to more conservative official U.S. statements, the accounts provided by the Stanford/New York University report—entitled ‘Living Under Drones’²⁰—offers higher figures published by The Bureau of Investigative Journalism, an independent organization based at City University in London. The Bureau of Investigative Journalism reports that from 2004 through 2013, available data indicate; total strikes 372, total reported killed 2,566-3,570; civilians reported killed 411-890; children reported killed, 167-197; total reported injured 1,182-1,485.²¹ On the basis of these killings it must be concluded that the drone attacks fail the criterion of proportionality.

NOTES

1 ‘US Combat Drones to Stay in Afghanistan Beyond 2014 — RT News,’ accessed June 16, 2013, <http://rt.com/news/us-drones-afghanistan-2014-360/>.

2 *Time*, April 1, 2013.

3 <http://www.theage.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html#ixzz2Zh8MvpsL>.

4 The United States flew highly classified Global Hawk spy drone missions from the Royal Australian Air Force base at Edinburgh in South Australia from late 2001 until at least 2006.

5 *The Age*, August 3rd, 2013, 20.

6 ‘Bishop Pates Urges Public Discussion of U.S. Use of Drones | US Catholic.org,’ accessed June 10, 2013, <http://www.uscatholic.org/news/201305/bishop-pates-urges-public-discussion-us-use>

[drones-27342](#).

7 ‘The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth: Mark Mazzetti: 9781594204807: Amazon.com: Books,’ accessed July 28, 2013, <http://www.amazon.com/The-Way-Knife-Secret-Earth/dp/1594204802>.

8 ‘Interview With Mary Ellen O’Connell, International Law Expert, on US Drone Policy / ISN,’ accessed June 9, 2013, <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=159629>.

9 ‘UN Says US Drone War in Pakistan Violates International Law—World Socialist Web Site,’ accessed July 23, 2013, <http://www.wsws.org/en/articles/2013/03/16/undr-m16.html>.

10 Michael Walzer, *Just and Unjust Wars*, 4th. ed. (New York: Basic Books, 1977).

11 ‘Why the Use of Drones Should Make Us Un-

easy LibArts London,' accessed July 28, 2013, <http://www.libartslondon.co.uk/7536/why-the-use-of-drones-should-make-us-uneasy/>.

12 'Catholics See Moral Complications in Drone Usage | Religion,' accessed July 28, 2013, <http://beforeitsnews.com/religion/2013/03/catholics-see-moral-complications-in-drone-usage-2449434.html>.

13 'Drones Are Justifiable Tools of Warfare,' accessed July 26, 2013, <http://www.e-ir.info/2013/06/26/drones-are-justifiable-tools-of-warfare/>.

14 Kenneth R. Himes, O.F.M. 'Intervention, Just War, and U.S. National Security,' *Theological Studies* 65 (2004) 142.

15 <http://www.bendbulletin.com/apps/pbcs.dll/article?AID=/20130120/NEWS0107/301200386/1159/1159&template=print>

16 'Drones, Kill Lists and Machiavelli -

NYTimes.com,' accessed June 14, 2013, http://www.nytimes.com/2013/02/13/opinion/drones-kill-lists-and-machiavelli.html?_r=0.

17 *Time*, 1 April, 2013.

18 'How Does the U.S. Mark Unidentified Men in Pakistan and Yemen as Drone Targets? - ProPublica,' accessed June 19, 2013, <http://www.propublica.org/article/how-does-the-u.s.-mark-unidentified-men-in-pakistan-and-yemen-as-drone-targ>.

19 'How Does the U.S. Mark Unidentified Men in Pakistan and Yemen as Drone Targets? - ProPublica.'

20 <http://www.livingunderdrones.org/>, accessed July 23, 2013.

21 <http://www.thebureauinvestigates.com/category/projects/drones/drones-pakistan/013>, accessed, July 23, 2013.

The strict conditions for legitimate defense by military force require rigorous consideration. The gravity of such a decision makes it subject to rigorous conditions of moral legitimacy. At one and the same time:

—the damage inflicted by the aggressor or the nation or community of nations must be lasting, grave and certain;

—all other means of putting an end to it must have been shown to be impractical or ineffective;

—there must be serious prospects of success;

—the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.

These are the traditional elements enumerated in what is called the 'just war' doctrine.

—Catechism of the Catholic Church, no. 2309.