

The Morality of Remotely Piloted Aircraft Strikes

by

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The Morality of Remotely Piloted Aircraft Strikes

The mournful work of sustaining relative goods in the face of greater evils.

—St. Augustine¹
354 – 430 C. E.

Since September 11, 2001, the United States has been engaged in an armed conflict—a “war” as stated in the 2011 National Strategy for Counterterrorism—with al-Qa’ida.² This is a war of a global nature, not against a nation state but rather an organization which employs terrorist tactics, without regard for human life, in an attempt to challenge the current world order. The U.S. strategy over the past 13 years has included all elements of national power: diplomatic, informational, military and economic, and these efforts continue today. Arguably the most visible and widely discussed components of this strategy are the military aspects of the campaign. Within the military component, the use of remotely piloted aircraft (RPA) to conduct lethal strikes both on the “hot” battlefields of Afghanistan and beyond is a topic often debated.³

The use of armed RPAs to target individuals raises legal questions, but more acutely, moral ones. Bradley Strawser, Assistant Professor of Philosophy at the United States Naval Postgraduate School and leading philosopher on the ethical considerations of RPA use, states that it “raises ethical questions requiring serious moral reflection and analysis.”⁴

This paper explores the moral implications of the use of RPAs to conduct lethal strikes as a tactic in the U.S. counterterrorism campaign. In doing so, and at the unclassified level, this paper first presents a factual overview of RPAs by outlining their capabilities and characteristics. It then provides a synopsis of just war theory as the basis for moral analysis. Next, the paper applies the just war construct to considerations

and challenges of RPA use in principle as well as in current operations. The paper concludes with a moral assessment of the use of RPAs to conduct lethal strikes, with a few cautions on their use going forward. As President Obama laid out in his 2009 Nobel Prize acceptance speech, the “United States of America must remain a standard bearer in the conduct of war.”⁵ As the primary user of RPAs, the U.S. “has a unique opportunity and responsibility to engage relevant international actors and shape development of a normative framework for acceptable use of drones.”⁶

Background: Remotely Piloted Aircraft

The terms “drone,” “unmanned aerial vehicle,” “unmanned aerial system” (UAS) and “RPA” are often used interchangeably in the media and discussions. While all generally relate to the same concept, this paper will use RPA throughout (except when quoting directly from other sources). The RPAs fall under the U.S. Air Force umbrella term UAS, which describes a system that includes, “A control station, one or more unmanned aircraft, control and payload data links, and mission payloads.”⁷ The U.S. Air Force (USAF) further delineates two types of unmanned aircraft: Small Unmanned Aircraft Systems (SUAS) and RPA.⁸ The RPAs are flown by “rated pilots,” which differentiates them from SUAS. The MQ-1 Predator and MQ-9 Reaper are the two types of RPAs most commonly used in armed strikes.⁹

According to unclassified U.S. Air Force fact sheets, the MQ-1 Predator and MQ-9 Reaper are both “armed, multi-mission, medium-altitude, long-endurance” RPAs that are “employed primarily as an intelligence-collection asset and secondarily against dynamic execution of targets.”¹⁰ Both aircraft carry a “Multi-Spectral Targeting System, which integrates an infrared sensor, color/monochrome daylight TV camera, image-intensified TV camera, laser designator and laser illuminator,” and are capable of

carrying precision munitions.¹¹ The primary difference between the two aircraft is that the MQ-9, as the designated replacement for the MQ-1, is larger and more powerful.¹² As of May 2014, the Air Force was expected to be capable of providing 65 combat air patrols (CAP) with 33 MQ-1 CAPs and 32 MQ-9 CAPs.¹³

The RPAs utilize a concept known as Remote Split Operations (RSO), which enables the launch and recovery cockpit and crew to be geographically separated from the mission crew, or pilots.¹⁴ This capability allows for the RPA pilots to be in one location, often times in the U.S., while the aircraft and launch crew are typically closer to or in the area where operations are being conducted. RSO reduces the number of personnel in proximity to the operating area, which minimizes the force protection concerns and reduces logistical requirements.¹⁵ Based on these characteristics, RPAs offer more flexibility for employment in a more efficient manner and at a lesser cost when compared with manned aircraft of equivalent capability.¹⁶

The RPAs are capable of performing many of the same tasks as manned aircraft to include intelligence, surveillance and reconnaissance, close air support, targeting, communications relay and combat search and rescue. In addition to generally being less expensive, they have several other advantages over manned aircraft.¹⁷ According to a Congressional Research Service report, military commanders advocate two of these advantages in particular: “They eliminate the risk to a pilot’s life, and their aeronautical capabilities, such as endurance, are not bound by human limitations.”¹⁸ As a result of their utility, in recent years there has been a significant increase in the demand for RPAs, and according to the USAF, “During fiscal year (FY) 2012, more aircrew went through initial qualification training for RPA than for fighters or bombers

combined.”¹⁹ Additionally, the number of platforms in the RPA category is scheduled to grow from approximately 340 in FY 2012 to approximately 650 in FY 2021.²⁰

Just War Theory

In general, there are three theories that influence thinking on the morality and ethics of war and peace: Realism; Pacifism; and Just War Theory.²¹ Absolute pacifists do not concern themselves with the moral implications of when or how to conduct war. As Brian Orend, Director of International Studies and Professor of Philosophy at the University of Waterloo, writes, “For a pacifist, war is always wrong; there’s always some better resolution to the problem than fighting.”²² Realists also do not concern themselves with the moral implications of war, but for the exact opposite reason. Realism does not believe morality applies with regard to actions of a state and thus does not apply in war.²³ If considered on a spectrum, realism occupies one end, pacifism the other, with just war theory floating between the two.²⁴ In his book *Arguing about War*, renowned theorist Michael Walzer describes the theory of just war as “an argument about the moral standing of warfare as a human activity.”²⁵ Walzer goes on to say that “the argument is twofold: that war is sometimes justifiable and that the conduct of war is always subject to moral criticism.”²⁶

Just war theory is the dominant theory when discussing the morality and conduct of war, and its tradition has a deep and rich history that has been derived over thousands of years and extends back to Greek and Roman philosophers’ writings.²⁷ Dating back to about 400 BC, Aristotle, Cicero and Augustine began the early development of just war theory. In the thirteenth century, Saint Thomas Aquinas provided the general guideline for today’s just war theory in his *Summa Theologica*.²⁸ Aquinas’ thoughts served as the basis for scholars and theorists in the later centuries, to

include Vitoria and Grotius, as well modern day theorists such as Walzer and others.²⁹ Today, many components of the just war tradition have been codified into international law and international humanitarian law (IHL), taking the forms of the United Nations Charter, The Hague and Geneva Conventions. As Steven P. Lee states in his book *Ethics and War*, “Institutionalization of just war theory through IHL has made moral obligations in war enforceable.”³⁰

While some components of just war theory are codified into domestic and IHL, just war theory is much more intricate than a simple checklist and to think of it as such misses its complexity.³¹ Just war theory serves as a framework on how to discuss wars, and is applicable at the start, duration, and end of a particular war.³² In this context, the theory helps inform the debate on what is and what is not morally sufficient in war, and as Walzer states, “The ongoing critique of war-making is a centrally important democratic activity.”³³ Through this framework, and through analytical debate, just war theory serves as a means to accumulate a moral consensus on the making of war, which in turn can create, modify or rescind domestic, customary and IHL.

Speaking broadly, Dr. Jeffrey Whitman, Professor of Philosophy at Susquehanna University, notes, “The principles of just war have three core goals: (1) limit the frequency of war, (2) limit the brutality and suffering of war, and (3) limit the possibility of war recurring once an ongoing war is concluded by securing the peace.”³⁴ More specifically, just war theory is divided into three elements. *Jus ad bellum* governs the justice of going to war. *Jus in bello* governs the conduct of participants during war. The most recent addition to the just war tradition, *jus post bellum*, posits a possible moral responsibility to rebuild and restore aspects of a society once a war has concluded.³⁵

The following section examines the specific principles for *jus ad bellum* and *jus in bello* before applying them to the U.S. use of RPAs to conduct lethal strikes.

Jus ad Bellum

There are six *jus ad bellum* principles commonly recognized within just war theory. They are: just cause, right intention, proper authority, probability of success, proportionality and last resort. Of these six principles, just cause is widely recognized as the most important criterion because, as Orend relates, “It sets the tone for everything that follows.”³⁶ That said, all six conditions must first be met if the decision to go to war is to be considered “just.”

Just Cause

As the most important *jus ad bellum* principle, just cause addresses the overall reason for going to war. In this regard, a nation’s right to self-defense is the one commonly recognized, legitimate reason for waging war.³⁷ Other justifications may include defending or liberating others from an attack, or protecting individuals from atrocities, although the common theme for a war to be just remains defense from aggression or self-defense.³⁸ This principle recognizes security as the central necessity for a civil world order and accounts for the moral and practical obligation of a state to protect its citizens.³⁹

An often debated concept tied to the just cause principle is whether one must first wait for an aggressive action to take place prior to responding or whether it is morally permissible to act first in order to pre-empt a perceived or actual threat. Critics contend that preemptive strikes violate the just cause principle because of an agent’s presumption of innocence; that is, preparing or posturing for war is not sufficient to establish aggression.⁴⁰ The alternate belief asserts the right to pre-empt an aggressive

act prior to it occurring. In *Just and Unjust Wars*, Michael Walzer sides with the latter: “States may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence.”⁴¹ The U.S. supports this latter interpretation of just cause. Its position, as articulated in the 2015 National Security Strategy, is that “the United States will use military force, unilaterally if necessary, when our enduring interests demand it: when our people are threatened; when our livelihoods are at stake; and when the security of our allies is in danger.”⁴²

Right Intention

The second *jus ad bellum* principle, and one that is closely tied to just cause, is right intention. Right intention addresses the motivations for going to war, and dictates that the intent be morally appropriate.⁴³ The intent must be aligned with the just cause to remedy the wrong, and not for some underlying alternative motive, such as a land annexation or demonstration of power.⁴⁴ Likely because of its subjective nature, right intention is not included in international law, but it remains a fundamentally important consideration prior to engaging in conflict.⁴⁵

Proper Authority

The *jus ad bellum* principle of proper authority addresses who may make a declaration of war. For most theorists, this authority resides in the power of sovereign states.⁴⁶ Here, “sovereignty” must be considered as the relationship between the government and its people, with an implicit level of legitimacy.⁴⁷ As a cumulative body of states, the United Nations is widely recognized as a decisive proper authority as described in this principle. Sometimes considered as a separate *jus ad bellum* principle, but something that can only be issued by a proper authority, is public declaration. That

is, just war theory calls for a statement from the proper authority notifying the one responsible for the initial grievance of the intent to wage war.

Probability of Success

A reasonable expectation of success is necessary prior to waging war. Orend cautions, “A state may not resort to war if it can foresee that doing so will have no measurable impact on the situation.”⁴⁸ While this principle would seem to prevent smaller or weaker states from responding to aggression, interpretation of a reasonable probability of success is difficult to calculate or quantify. As such, Orend points out, “It thus seems reasonable to judge that, given an act of aggression and given that the other *jus ad bellum* criteria are met, there is a presumption in favor of permitting some kind of armed response, even when the odds of military success (however defined) seem long.”⁴⁹

Proportionality

Proportionality addresses the means used and the fact that they must be morally appropriate for the desired ends.⁵⁰ While also included as a principle of *jus in bello* (see below), proportionality within *jus ad bellum* speaks to the broader conflict and the fact that the means used must not be disproportionate to the incurred aggression.⁵¹ For Orend, proportionality “mandates that a state considering a just war must weigh the expected *universal* (not just selfish national) benefits of doing so against the expected *universal* costs.”⁵² Only if the universal good in pursuit of the just cause outweighs the overall costs can the criterion be met.⁵³

Last Resort

The final principle of *jus ad bellum* is that of last resort. Last resort implies that all other conceivable options have been exhausted and resorting to war is the only

remaining choice. As Walzer contends, if taken literally, last resort” makes going to war “morally impossible.”⁵⁴ As a result, there is inherently some subjectivity that enters into the moral calculus of determining last resort, since “there is always something else to do.”⁵⁵ That being the case, the intent of this principle is to ensure a deliberate debate has taken place on all other reasonable alternatives before declaring war.

When combined, and recognizing all six principles must be met before resorting to war, *jus ad bellum* principles provide useful moral guidelines for going to war. While not a prescriptive set of rules, they are a set of guiding principles that serve as a basis for ethical examination when discussing and debating the merits and necessity of going to war.⁵⁶ As previously mentioned, if just war theory sits on a spectrum between realism and pacifism, the different interpretations of the *jus ad bellum* principles allow for moral reasoning that never reaches either end, but aligns somewhere in the middle.

Jus in Bello

While *jus ad bellum* considers whether resorting to war is morally acceptable, the principles of *jus in bello* address the justice in war and provide moral context during a conflict. Whereas *jus ad bellum* pertains to political leaders deciding justly to go to war, *jus in bello* concerns military members prosecuting that war justly, as they execute operations.⁵⁷ Jus in bello consists of two primary principles: discrimination and proportionality.

Discrimination

The principle of discrimination refers to the delineation of who are, and as importantly who are not, legitimate targets during the conduct of war. Under this principle only combatants, those of the opposing military force or those engaged in hostilities, may be targets of direct attack, and due diligence must be taken to ensure

that non-combatants are not struck.⁵⁸ In addition to being a key principle in just war theory, the principle of discrimination is well documented in IHL. While this principle restricts the direct targeting of non-combatants, it does take into account the unintentional consequences that may lead to non-combatants deaths—a concept known as “double-effect.”

As explained by Walzer, double-effect allows for a balance between the “absolute prohibition” against attacking non-combatants and the “legitimate conduct of military activity.”⁵⁹ With the rule of double-effect it is therefore permissible to conduct military action that results in non-combatant harm as a foreseeable, yet *unintended* side effect of an intended military action that is aimed at resulting in a good end.⁶⁰ These unintentional consequences in military parlance are known as collateral damage. The doctrine of double-effect is closely tied to the second principle of *jus in bello*, proportionality.

Proportionality

While discrimination concerns defining legitimate targets in war, proportionality addresses the types of force that are morally acceptable.⁶¹ This principle aims at minimizing destruction and casualties by mitigating the scope and scale of force used.⁶² As a *jus ad bellum* principle, proportionality relates to the entire conduct of war; within *jus in bello*, proportionality relates to specific acts of war.⁶³ With this distinction, as described by Steven Lee, “proportionality requires that the evil created by a particular military attack or engagement not be disproportionate when compared with the contribution of the attack to victory in the overall war.”⁶⁴

In combination, the six principles of *jus ad bellum* are designed to control the act of going to war, while the two principles of *jus in bello* are designed to regulate the

conduct of war. As Walzer relates, the elements are “logically independent,” and “it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”⁶⁵ The separation between the elements of *jus ad bellum* and *jus in bello* is a cornerstone of traditional just war theory, and allows for the actions of combatants to be separated from the political decisions for going to war.⁶⁶ Finally, while just war theory is a framework for discussing the moral implications of war, the details of a specific situation must be analyzed before rendering a moral judgment.⁶⁷

Just War Theory and RPAs in Principle

Having reviewed the foundational elements of just war theory and RPAs, we must consider whether the advent of RPAs in principle affects the application of just war theory. First, can the possession of RPAs by a state affect *jus ad bellum* determinations? If so, in what way? Second, can the use of RPAs to conduct lethal strikes call into question *jus in bello* analysis? Do RPAs meet the principles of discrimination and proportionality and, even if they do, does their use end up stirring greater moral problems in the aggregate?

In general, weapons systems have much less to do with *jus ad bellum* than they do with *jus in bello*. That said, because of their unique nature, having RPAs as a tool in one’s arsenal can impact certain principles of *jus ad bellum*. Because they are less expensive and are able to be employed with minimal risk to force, RPAs may make it easier to reach the required threshold with respect to the principles of proportionality and last resort. This can be an advantage in some cases and a disadvantage in others. For example, the low cost and minimal risk to personnel may lead to a decision to employ force in a non-just case where, without RPAs, the same decision would not be made.⁶⁸ On the other hand, equally possible is a situation where the decreased cost and

lower risk of RPAs may lead a state to take action in support of a just cause, where without RPAs the risk and cost associated with taking action would be prohibitively high.⁶⁹ Further, RPAs may positively skew the probability of success principle by increasing the likelihood of achieving desired goals in an armed conflict due to the overall advantageous capabilities of RPAs.⁷⁰ This discussion is not to make the case for or against RPAs, but only to highlight how possession of RPAs can influence *jus ad bellum* determinations in principle. That said, *jus ad bellum* as a whole requires complex analysis of all six principles. While possessing RPAs can influence certain principles, it is only through a holistic analysis that one can reach a morally justified decision to resort to war.

The crux of an assessment of the morality of RPA use in the context of war is a *jus in bello* analysis. In 2012, John O. Brennan, then Assistant to the President for Homeland Security and Counterterrorism, stated with respect to RPAs that “never before has there been a weapon that allows us to distinguish more effectively between an al-Qa’ida terrorist and innocent civilians.”⁷¹ This leads to the question of whether RPAs are, in fact, more capable of satisfying the *jus in bello* principles of discrimination and proportionality.

When compared to other weapons systems and methods, RPAs do have the ability to be employed in a more discriminating and proportionate manner; however, this ability depends on several variables. The two primary reasons RPAs are able to be employed in such a manner is due to their increased situational awareness through extended loiter time and the use of precision munitions. Despite these advantages, using RPAs to conduct lethal strikes still requires quality intelligence and moral human

decision-making in their employment. Moreover, like any weapons system, if used recklessly and without careful deliberation before each strike, RPAs can violate both the discrimination and proportionality principles.

The RPAs carry precision-guided munitions (PGM) that are capable of striking targets with a high level of accuracy. This accuracy inherently leads to a greater ability to practice both discrimination and proportionality when employing the weapon system by limiting the weapon's effects to a very precise location. While these PGMs are not unique to RPAs (other U.S. aircraft carry the same weapons), the flight duration of RPAs is unique and is a key contributor to their ability to be used in a more discriminate and proportionate manner. As one of their key advantages, the endurance of RPAs allows them to loiter above a target area for extended periods of time.⁷² This leads to a greater situational awareness of what is occurring in and around a potential target area. Often prior to a strike RPAs are used for several days, which allows operators and analysts to develop an accurate pattern of life for a potential target. From a proportionality standpoint, the long endurance of RPAs extends the window for a strike opportunity, which enables their use when the risk of collateral damage is lowest.

While PGMs and increased loiter time are two ways in which RPAs are able to be used in a more discriminate and proportionate manner, this ability is directly tied to the accuracy of the intelligence provided about a specific target. The U.S. maintains a robust intelligence enterprise that is leveraged to provide this information. The various forms of intelligence—Human Intelligence (HUMINT), Signals Intelligence (SIGINT), Imagery Intelligence (IMINT)—are fused together to provide a detailed and complete picture. RPAs are capable of organically conducting both IMINT and SIGINT, which

contributes to the volume of intelligence about a specific target. The IMINT full-motion video provides a view of what is occurring on the ground at a potential strike site, while the combination of HUMINT and SIGINT helps to provide context about who is on the ground and what is occurring. When combined, the resulting all-source intelligence is capable of enabling a comprehensive understanding of what is occurring in a target area.⁷³

While the technology of RPAs sets the stage for them to be used more discriminately and proportionally, it is important to remember that RPAs are only discriminate and proportionate to the degree their operators choose to employ them in such a manner.⁷⁴ This highlights the oft-debated fact that RPAs are not autonomous weapons. In all cases, there is a human making a moral decision prior to the employment of the weapon system. The RPAs better enable individuals employing these assets to make these decisions. Strawser states it this way:

The best empirical evidence suggests that drones are more precise, result in fewer unintended deaths of civilian bystanders, and better protect their operators from risk than other weapons, such as manned aircraft, carrying out similar missions. Other things being equal, then, drones should be used in place of other less accurate and riskier weapons. *But they should be used only for morally justified missions, in pursuit of a just cause.*⁷⁵

The most important portion of Strawser's statement is the conditional clause at the end.

While we have established that, when used properly, RPAs are in fact more capable of meeting the principles of *jus in bello* than other systems, their use in principle is not without challenge. Two key criticisms concern asymmetry and moral hazards. Opponents often object to the asymmetry associated with RPAs, chiefly because pilots are not at risk.⁷⁶ Although this objection reflects the tradition of the idealized warrior,

where each combatant assumes risk on the field of battle, the advent of long-range weapons has long changed this construct.⁷⁷ Advances in technology have always been an important component of military success, and the use of RPAs follows a continuing trend of developing and using superior technology during military operations.⁷⁸ Further, as Michael Walzer points out, “there is no principle of just war theory that bars this kind of warfare.”⁷⁹ That said, the fact that a pilot in the U.S. now becomes a legitimate target for the opposing force should be addressed. While not an immediate concern during the current counterterrorism fight, this issue may come to the forefront in the context of a state-on-state war where the “battlefield” is now expanded to include wherever a pilot is located, including inside the U.S..

Another concern expressed about the use of RPAs in principle is the potential for disassociation of the operators from the consequences of their actions on the ground. This disassociation may create what philosophers refer to as a “moral hazard,” where individuals are increasingly willing to engage in potentially hazardous behavior if not immediately faced with the repercussions of that behavior.⁸⁰ This is a serious concern and one that should not be minimized. Similar to the analysis of ranged weapons, however, this distance from an actual target is not necessarily new and can be mitigated through the continued teaching of ethics to those who employ these assets. The key principles of *jus in bello* remain applicable and operators must not confuse practicality with moral rationalization.⁸¹

In their book *Drone Warfare*, John Kaag and Sarah Kreps see a positive side: the “leisure of drone pilots” may in fact improve the conditions for making moral decisions.⁸² Operators “will have unprecedented opportunities to exercise reflection and moral

judgment in their once-dangerous jobs.”⁸³ This separation inherently creates time and space to think through the consequences of taking action, and in most cases this can be done with multiple individuals contributing to the decision-making process. In this sense, separation becomes an advantage if operators “engage in even more rigorous ethical and legal analyses concerning the status of military action.”⁸⁴

Just War Theory and The Current Use of RPAs

Having provided certain considerations for RPA use in principle, we now turn to address RPAs and just war theory as currently practiced by the U.S. The 2011 National Strategy for Counterterrorism indicates that the U.S. is at war with al-Qa’ida.⁸⁵ The strategy as outlined calls for “a broad, sustained, and integrated campaign that harnesses every tool of American power—military, civilian, and the power of our values—together with the concerted efforts of allies, partners, and multilateral institutions.”⁸⁶ As with all wars, the military component of this strategy is subject to scrutiny using the just war theory. This raises the question of how well the U.S. military component of the broader counterterrorism strategy complies with *jus ad bellum*, and more specifically how RPA strikes comply with *jus in bello*, requirements.

All U.S. military actions must be grounded in the principles of *jus ad bellum* and guided by the principles of *jus in bello*. From a *jus ad bellum* perspective, and as Brennan outlined in September 2011, the “ongoing armed conflict with al-Qa’ida stems from our right—recognized under international law—to self-defense,” and is a result of the al-Qa’ida attacks on the U.S. homeland on September 11, 2001.⁸⁷ In the language of just war theory and from a moral perspective this complies with just cause, proper authority and right intention. More specifically, the just cause falls under self-defense,

the proper authority is inherent to the U.S., and the right intention is to prevent al-Qa'ida from conducting further attacks and establishing an extremist Islamic caliphate.

The criteria of proportionality, probability of success and last resort have also been met. Based on the severity of the attack by al-Qa'ida, their desire to conduct additional attacks, and their ultimate goal of establishing an extremist Islamic caliphate, declaring war is a proportionate response to their aggression; the universal good would seem to justify the overall cost in blood and treasure. While fighting an organization driven by a strong ideology is a daunting task, membership in that organization represents the vast minority of people. That being the case, and acknowledging it may take decades to reshape the ideological drivers of the conflict, the probability of success against al-Qa'ida is high. Finally, with regard to al-Qa'ida and last resort, there is very little that can be done outside of the use of force. As leading just war theorist Jean Bethke Elshtain states, "They are not parties to any structure of diplomacy and thus cannot be negotiated with; in any event, because what they seek is our destruction, there is nothing to negotiate about."⁸⁸ It is because these criteria have been met that President Obama, during remarks at the National Defense University (NDU) on May 23, 2013, was justified in saying:

We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al-Qa'ida, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort, and in self-defense.⁸⁹

While this paper argues the considerations of *jus ad bellum* are met from a just war theory perspective, the U.S. assertion that it is engaged in a just war is not without challenge from a legal perspective. In this regard, some individuals fundamentally

disagree with the U.S. interpretation of International Law to justify the use force, particularly when looking outside the declared theaters of active armed conflict.⁹⁰ While recognizing the debate, the current administration has consistently posited that the use of force is not “restricted solely to ‘hot’ battlefields like Afghanistan,” and that it retains “the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time,” regardless of the geographic location.⁹¹ The well-defended legal basis for this claim is outside the scope of this paper, but from the perspective of just war theory the U.S. position is morally acceptable and defensible based on the wrong al-Qa’ida committed against the U.S., its continued intent to commit additional wrongs, and the inherent right of the state to protect its people in accordance with *jus ad bellum*.

This argument suggests that the U.S. has met the requirements for *jus ad bellum* and is therefore conducting a just war of a global nature against al-Qa’ida. However, as Walzer states, “It is perfectly possible for a just war to be fought unjustly.”⁹² This raises the *jus in bello* question. In particular, is the current use of RPAs to conduct lethal strikes outside of declared theaters of active armed conflict in keeping with the *jus in bello* principles of discrimination and proportionality?

Critics of the current use of RPAs for lethal strikes often cite civilian casualty statistics as a means to question the discriminatory nature of RPA use.⁹³ These critics carry this argument further to contend that RPA use violates the proportionality principle of *jus in bello*. While any non-combatant death is regrettable, under the doctrine of double-effect it is not the case that all non-combatant deaths lead to a violation of the discrimination and proportionality principles. The civilian casualty topic alone has been

the subject of numerous articles, papers and books of late, and supporters and critics vehemently stake their claim.⁹⁴ A key challenge in this regard is that any analysis is hampered by the secrecy under which these operations occur and the inherent unreliability in the statistics being used. As Daniel Brunstetter, Professor of Political Science at the University of California-Irvine, states, “Without transparency, there is no way to know why a specific strike was undertaken, if it was undertaken with discrimination and proportionality in mind, or even whether it reflected military necessity.”⁹⁵ The current inability to reconcile these analyses is because classification levels do not allow for open discussion. While it is not possible to accurately assess the use of RPAs without specific knowledge of the conditions at the time and mindset of the individuals during a strike, the U.S. has outlined specific procedures to guide their use and those procedures serve as the basis for how operations are conducted.

In May 2013 the Obama Administration issued a fact sheet titled, “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.”⁹⁶ This policy document outlines the basis for how the United States applies the *jus in bello* principles of discrimination and proportionality within the global war against al-Qa’ida. Broadly, the policy outlines three “preconditions” that must be met before resorting to lethal force.⁹⁷ First, “a legal basis for using lethal force,” second, that lethal force will only be used “against a target that poses a continuing, imminent threat to U.S. persons,” and third, that each of the following requirements be met:

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants will not be injured or killed;
3. An assessment that capture is not feasible at the time of the operation;

4. An assessment that the relevant government authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and

5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.⁹⁸

Remarkably, the policy outlines guidance that exceeds *jus in bello* criteria. Within the third precondition, the first requirement of near certainty that the terrorist target is present addresses the principle of discrimination, while the remaining requirements address proportionality. While “near certainty” is a subjective term, its use in the first requirement clearly addresses the criteria of the discrimination principle to positively identify a target prior to engaging. Within the second requirement, the use of “near certainty” exceeds the typical *jus in bello* proportionality determination; that is, it goes above and beyond, and appears to significantly limit the double-effect doctrine. The remaining three requirements all pertain to proportionality and apply a graduating scale to address the continuing and imminent threat.⁹⁹

In his address at NDU, President Obama expanded on his conception of the principle of proportionality. First, he addressed the difficulty associated with making decisions that may harm non-combatants, but related it to the fact that “to do nothing in the face of terrorist networks would invite far more civilian casualties.”¹⁰⁰ He also addressed the risk associated with capture operations and the fact that “it is false to assert that putting boots on the ground is less likely to result in civilian deaths or less likely to create enemies in the Muslim world.”¹⁰¹ Both these points speak to the desire to ensure that proportionality is adhered to during RPA lethal strikes.

Also tied to proportionality, an oft-cited criticism of RPA lethal strikes is that the process of killing one target actually creates more extremists. This analysis is primarily

based on anecdotal evidence, which is difficult to quantify. What remains certain, however, is the fact al-Qa'ida had hostile intent to attack the U.S. long before the first RPA strike. Consider the World Trade Center bombing in 1993, the attacks against the U.S. Embassies in Kenya and Tanzania in 1998, the attack against the USS Cole in 2000 and finally the attacks of 9/11. This highlights the fact that Islamic extremists do not dislike the U.S. for what it does; they aggress against the U.S. for who it is and what it represents. As Avery Plaw, Associate Professor of Political Science at the University of Massachusetts-Dartmouth, suggests, "I doubt ending drone strikes would substantially reduce anti-Americanism in the Islamic world or put a dent in radical recruitment."¹⁰²

A final criticism, and one that was initially discussed under the section concerning RPA use in principle, is that RPA strikes may be a moral hazard because of the relative ease with which they can be conducted. President Obama has recognized this fact and has "insisted on strong oversight of all lethal action," to include ensuring that all RPA strikes outside of Iraq and Afghanistan are briefed to "the appropriate members of Congress."¹⁰³ This oversight serves as a means to mitigate the moral hazard, balancing the competing requirements of transparency and secrecy while ensuring national security.

The current policy and procedures for the use of RPAs to conduct lethal strikes recognize the inherent moral challenges associated with such action and prescribe requirements consistent with *just in bello*. When conducted in accordance with the current policy guidance, the use of RPAs to conduct lethal strikes does comply with the principles of discrimination and proportionality. While a policy outlines how force should

be used, the critical component of how any force is actually used is dependent upon human decision-making. This decision-making is inherent in the responsibility of our professional force, whether that is a Private First Class conducting on-the-ground counterinsurgency operations and firing a rifle, or an operator conducting a lethal strike from an RPA. The decisional process that builds in the principles of discrimination and proportionality leads to moral action.

Conclusion

Just war theory is neither a checklist for going to war nor an excuse in fighting war. Just war theory does, however, serve as a means to talk about the moral implications of resorting to war and the manner in which it is conducted. As Walzer states, “We still have to insist that war is a morally dubious and difficult activity,” and it should never be undertaken without careful consideration.¹⁰⁴ There are, however, times when “justice still needs to be defended; decisions about when and how to fight require constant scrutiny, exactly as they always have.”¹⁰⁵

This paper has sought to make the case that the current global war against al-Qa’ida is morally acceptable and defensible under the *jus ad bellum* construct, and that the use of RPAs to conduct lethal strikes is consistent with *jus in bello* when employed in accordance with currently stated U.S. policy and procedures. Based on an examination of RPAs and just war theory, this paper has shown how the use of RPAs in principle can affect *jus ad bellum* determinations and impact *jus in bello* analysis. Despite criticisms of asymmetry and moral hazards, this paper has found that in principle RPAs can be employed in a more discriminating and proportionate manner, compared to other systems. Moreover, this paper has concluded that when RPAs are employed according to currently stated U.S. policy and procedures, the U.S. meets *jus*

in bello requirements, making the use of RPAs morally acceptable and defensible. Finally, this paper has acknowledged that the use of RPAs is always subject to the manner in which the individuals employing them choose to adhere to just war principles. If the individuals employing these assets are not adhering to the published policy and procedures, or are unjustly employing them, then they must be held accountable.

Since 2012 the Obama Administration has increased the public visibility on how RPAs are being used to conduct lethal strikes as a component of the broader counterterrorism strategy. As Walzer states, “The ongoing critique of war-making is a centrally important democratic activity,” and this increased visibility from the administration allows for better-informed discussions and debates about the morality of RPA employment.¹⁰⁶ The U.S. must encourage this debate and analysis on the ethical and moral implications of RPA strikes, not only in the U.S. but within the international community as well. In addition, the U.S. must ensure its practices for RPA employment remain aligned with the stated policy. By doing so, the U.S. will remain the standard-bearer in the conduct of war while still preserving this critical counterterrorism capability.

Endnotes

¹ This quote is attributed to Augustine as a summation of his discussion on just war in his Letter to Boniface (Letter 189). Augustine *Letter to Boniface (Letter 189)*, circa 418 C. E.

² Barack H. Obama, *National Strategy for Counterterrorism* (Washington, DC: The White House, June 2011), 2.

³ John O. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” public speech, Woodrow Wilson International Center for Scholars, Washington, DC, April 30, 2012, <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (accessed February 19, 2015).

⁴ Bradley Strawser, ed., *Killing By Remote Control – The Ethics of an Unmanned Military* (New York: Oxford University Press, 2013), 4.

⁵ Office of the Press Secretary, *Remarks by the President at the Acceptance of the Nobel Peace Prize*, (Washington, DC: The White House, December 10, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> (accessed March 7, 2015).

⁶ Micah Zenko, *Reforming U.S. Drone Strike Policies*, (Washington, DC: Council on Foreign Relations, Council Special Report No. 65, January 2013), <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736> (accessed March 7, 2015).

⁷ U.S. Department of the Air Force, *RPA Vector: Vision and Enabling Concepts 2013-2038* (Washington, DC: U.S. Department of the Air Force, February 17, 2014), 13, <http://www.af.mil/Portals/1/documents/news/USAFRPAVectorVisionandEnablingConcepts2013-2038.pdf> (accessed March 7, 2015).

⁸ Ibid.

⁹ Ibid.

¹⁰ U.S. Department of the Air Force Fact Sheet, MQ-9 Reaper, August 18, 2010, <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx> (accessed March 7, 2015).

¹¹ Ibid.

¹² Ibid.

¹³ Air Force, *RPA Vector*, 18.

¹⁴ Ibid., 20.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid., 14.

¹⁸ Jeremiah Gertler, *U.S. Unmanned Aerial Systems* (Washington, DC: U.S. Library of Congress, Congressional Research Service, January 3, 2012), 1, <https://www.fas.org/sqp/crs/natsec/R42136.pdf> (accessed March 7, 2015).

¹⁹ Air Force, *RPA Vector*, 18.

²⁰ Department of Defense, *Aircraft Procurement Plan, Fiscal Years (FY) 2012-2041* (March 2011), 14, http://www.airforcemag.com/SiteCollectionDocuments/Reports/2011/May%202011/Day25/AircraftProctPlan2012-2041_052511.pdf (accessed March 7, 2015).

²¹ Brian Orend, "War," *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta, ed., <http://plato.stanford.edu/entries/war/> (accessed February 19, 2015).

²² Ibid.

²³ Steven P. Lee, *Ethics and War* (Cambridge: Cambridge University Press, 2012), 30.

²⁴ Ibid.

²⁵ Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), ix.

²⁶ Ibid.

²⁷ Lee, *Ethics and War*, 31.

²⁸ Alexander Moseley, "Just War Theory," *The Internet Encyclopedia of Philosophy*, <http://www.iep.utm.edu/justwar/> (accessed February 19, 2015).

²⁹ Moseley, "Just War Theory."

³⁰ Lee, *Ethics and War*, 33.

³¹ Neta C. Crawford, *Just War Theory and the U.S. Counterterrorism War*, March 2003, 7, http://journals.cambridge.org.ezproxy.usawcpubs.org/download.php?file=%2FPPS%2FPPS1_01%2FS1537592703000021a.pdf&code=3d73ddeadb78ab179ea5704c1f57a0b3 (accessed March 7, 2015).

³² Anthony F. Lang, Jr., Cian O'Driscoll, and John Williams, eds., *Just War Authority, Tradition, and Practice* (Washington, DC: Georgetown University Press, 2013), 277.

³³ Michael Walzer, "The Triumph of Just War Theory (And the Dangers of Success)" in *Arguing About War* (New Haven, CT: Yale University Press, 2004), 15.

³⁴ Jeffrey P. Whitman, "Just War Theory and the War on Terrorism," *Public Integrity Online* 9, no. 1 (Winter 2006-7): 26.

³⁵ Omitted within the just war tradition has been discussion of the individual combatant who takes life and who must justify such acts to himself. This discussion could become a fourth component within just war theory: *jus incurvatus se* (justice curved in on the self).

³⁶ Orend, "War."

³⁷ Moseley, "Just War Theory."

³⁸ Orend, "War."

³⁹ Eric Patterson, "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11," *International Politics Online*, no. 42 (2005): 124, <http://www.u3asunshine.org.au/sc/wp-content/uploads/2012/08/sep11.pdf> (accessed March 7, 2015).

⁴⁰ Moseley, "Just War Theory."

⁴¹ Michael Walzer, *Just and Unjust Wars* (New York: Perseus Books Group, 1997), 85.

⁴² Barack H. Obama, *National Security Strategy* (Washington, DC: The White House, February 2015), 8.

⁴³ Moseley, "Just War Theory."

⁴⁴ Orend, "War."

⁴⁵ Ibid.

⁴⁶ Moseley, "Just War Theory."

⁴⁷ Ibid.

⁴⁸ Orend, "War."

⁴⁹ Brian Orend, *The Morality of War* (Peterborough, Ontario: Broadview Press, 2006), 59. This criterion is usually interpreted to allow for wars of existential threats, and the memory of resistance passed to future generations.

⁵⁰ Moseley, "Just War Theory."

⁵¹ Ibid.

⁵² Orend, *The Morality of War*, 59; emphasis original.

⁵³ Ibid.

⁵⁴ Walzer, *Arguing About War*, 88.

⁵⁵ Ibid.

⁵⁶ Moseley, "Just War Theory."

⁵⁷ Orend, "War."

⁵⁸ Lee, *Ethics and War*, 165.

⁵⁹ Walzer, *Just and Unjust Wars*, 153.

⁶⁰ Alison McIntyre, "Doctrine of Double Effect," *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta, ed., <http://plato.stanford.edu/entries/double-effect/> (accessed February 19, 2015). For an act with a foreseeable bad effect to be justified the following four requirements must be met: The nature of the act must be morally good or neutral; the good effect and not the harmful effect must be intended; the good effect must not be produced by the bad effect; and the good effect must outweigh the bad effect.

⁶¹ Moseley, "Just War Theory."

⁶² Ibid.

⁶³ Whitman, "Just War Theory and the War on Terrorism," 29.

⁶⁴ Lee, *Ethics and War*, 156.

⁶⁵ Walzer, *Just and Unjust Wars*, 21.

⁶⁶ Moseley, "Just War Theory."

⁶⁷ Crawford, *Just War Theory and the U.S. Counterterrorism War*.

⁶⁸ Matthew W. Hallgarth, "Just War Theory and Remote Military Technology: A Primer," in *Killing By Remote Control – The Ethics of an Unmanned Military*, ed. Bradley Strawser (New York: Oxford University Press, 2013), 36.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy."

⁷² Rebecca J. Johnson, "The Wizard of Oz Goes to War: Unmanned Systems in Counterinsurgency," in *Killing By Remote Control – The Ethics of an Unmanned Military*, ed. Bradley Strawser (New York: Oxford University Press, 2013), 177.

⁷³ This analysis is informed by the author's ten years of experience in using intelligence to drive RPA targeting operations.

⁷⁴ Daniel Brunstetter and Megan Braun. "The Implications of Drones on the just War Tradition." *Ethics & International Affairs* 25, no. 3 (Fall 2011): 351, <http://search.proquest.com.ezproxy.usawcpubs.org/docview/900868439> (accessed March 7, 2015).

⁷⁵ Bradley Strawser, "The Morality of Drone Warfare Revisited," *The Guardian*, August 6, 2012, <http://www.theguardian.com/commentisfree/2012/aug/06/morality-drone-warfare-revisited> (accessed March 7, 2015); my emphasis.

⁷⁶ Bradley Strawser, ed., *Killing By Remote Control – The Ethics of an Unmanned Military* (New York: Oxford University Press, 2013), 13.

⁷⁷ Ibid.

⁷⁸ Hallgarth, "Just War Theory and Remote Military Technology: A Primer," 26.

⁷⁹ Walzer, "The Triumph of Just War Theory (And the Dangers of Success)," 15.

⁸⁰ John Kaag and Sarah Kreps, *Drone Warfare* (Malden, MA: Polity Press, 2014), 107.

⁸¹ Ibid., 112.

⁸² Ibid., 115.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Obama, *National Strategy for Counterterrorism*, 2.

⁸⁶ Ibid.

⁸⁷ John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," public speech, Harvard Law School, Cambridge, MA, September 16, 2011, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed March 7, 2015).

⁸⁸ Jean Bethke Elshtain, *Just War Against Terror* (New York: Basic Books, 2003), 61.

⁸⁹ Office of the Press Secretary, *Remarks by the President at the National Defense University* (Washington, DC: The White House, May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed March 7, 2015).

⁹⁰ Philip Alston, the former UN special rapporteur on extrajudicial, summary, or arbitrary executions, is one who asserts the U.S.'s claims of self-defense are overly expansive when conducting RPA strikes outside of declared theaters of active armed conflict. Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, (New York: United Nations, Human Rights Council, 28 May 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (accessed March 18, 2015).

⁹¹ Brennan, "Strengthening our Security by Adhering to our Values and Laws."

⁹² Walzer, *Just and Unjust Wars*, 21.

⁹³ See, for example, Mary Ellen O'Connell, "Unlawful Killing with Combat Drones – A Case Study of Pakistan, 2004-2009," *Notre Dame Law School, Legal Studies Research Paper No. 09-43*, July 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (accessed March 18, 2015).

⁹⁴ For a defense of the discriminate and proportionate nature of RPAs, see Avery Plaw, "Counting the Dead: The Proportionality of Predation in Pakistan," in *Killing By Remote Control – The Ethics of an Unmanned Military*, ed. Bradley Strawser (New York: Oxford University Press, 2013), 126-153. For a criticism, see O'Connell, "Unlawful Killing with Combat Drones – A Case Study of Pakistan, 2004-2009."

⁹⁵ Brunstetter and Braun. "The Implications of Drones on the just War Tradition," 351.

⁹⁶ Office of the Press Secretary, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (Washington, DC: The White House, May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (accessed February 19, 2015).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Press Secretary, *Remarks by the President at the National Defense University*.

¹⁰¹ Ibid.

¹⁰² Avery Plaw, "Drone Strikes Save Lives, American and Other," *The New York Times Online* (November 14, 2012), <http://www.nytimes.com/roomfordebate/2012/09/25/do-drone-attacks-do-more-harm-than-good/drone-strikes-save-lives-american-and-other> (accessed March 7, 2015).

¹⁰³ Press Secretary, *Remarks by the President at the National Defense University*. Although not specifically detailed in the remarks, it is reasonable to assume "appropriate members of Congress" refers more specifically to members of the Emerging Threats and Capabilities Subcommittees, in both the House and Senate Armed Services Committees.

¹⁰⁴ Walzer, "The Triumph of Just War Theory (And the Dangers of Success)," 15.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

