

## When Diplomacy Fails:

# *Consent, Risk and Modern Warfare*

**by M. Shane Riza**

***"...if war has changed, the underlying logic of settling political disputes by force of arms has not: war remains a costly last-resort means...when other means fail."*<sup>1</sup>**

**Michael Gross**

***"...some critics are concerned about the moral implications of weapons that put civilians—but not the weapons' operators—at risk."*<sup>2</sup>**

**Thomas J. Billitteri**

***"...we're talking to them in a way they can understand."*<sup>3</sup>**

**President George W. Bush**

## When Diplomacy Fails

I sat on troop seats in the back of a KC-135 Stratotanker crossing the Atlantic the week before Christmas 1998. My feet were experiencing negative temperatures, while my head felt like it was in the tropics. Such is the environmental control system in an aircraft whose very last design consideration is the comfort of passengers. I was assigned to a rapid deployment force to stand up an austere base somewhere in the Middle East. The intent was to commence combat operations against Saddam Hussein's Iraq in the wake of Operation Desert Fox, the latest coercive measure from the remaining members of the coalition still attempting to keep Hussein in compliance with various United Nations demarches. We spent over forty-eight hours in the heart of England waiting on diplomacy to win the day. Would he or would he not let the UN inspectors back in? I pondered these questions, among others, in an English pub over many a Black and Tan. My merry band

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ended up returning home before the holidays on that jaunt, but I was back in that troubled part of the world just three weeks later when, alas, the man the world had pressured to do the right thing for more than eight years had simply refused again.

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to run its course. Ever hopeful we will not have to commit military force to an international situation, the past two decades show us such hopes are often dashed, as the sea of international opinion crashes against the rocky shore of state self-interest. It is sometimes frustrating for military members waiting in the breach.

Often, as was the case during the run up to Desert Storm, military action simply waits on the expiration of an ultimatum. In these instances, the calculus for the use of military force has already been met. Whether in the vital national interests of the U.S., as in the Weinberger/Powell Doctrine, or for humanitarian reasons under the recently advocated “responsibility to protect,” some legitimate authority has deemed a military response to be warranted. In others, there is still room for important questions and discussion on the possible use of military force. Just after President Bill Clinton’s inauguration, former Chairman of the Joint Chiefs of Staff General Colin Powell repeatedly said the U.S. should not commit military forces in Bosnia until there were clear political objectives.

Secretary of State Madeline Albright once exclaimed, “What’s the point of having this superb military that you’re always talking about if we can’t use it?”<sup>4</sup> Her question, though said in exasperation over the reluctance of the nation’s ranking officer to go to war, is instructive in many subtle ways.

We often only think in terms of so-called “doctrines” for committing to military force. In the run up to Desert Storm, General Powell modified the Weinberger doctrine and laid out a clear decision matrix for war. This kind of doctrine gives criteria before committing military force. The “responsibility to protect” outlines events that ought to drive consideration of military action. These are “should” and “when” arguments. Rarely do we consider how we should commit military force in these ad bellum discussions, yet Albright’s exasperation is in part due to what Stephen Wrage highlights in *When War Isn’t Hell: a Cautionary Tale*, when he says “...if there are unusually useable weapons in the arsenal, there will be unusual pressures to use them.”<sup>5</sup>

The U.S. military’s use of unmanned and robotic warfare has grown exponentially over the last decade. P. W. Singer notes that though not a single robot made the run from Kuwait to Baghdad in 2003, by 2010, 12,000 unmanned ground systems roamed battlefields and training grounds and were joined by over 7,000 unmanned aircraft.<sup>6</sup> Unmanned aircraft seem now to be the weapon of choice in the fight against Al Qaeda strongmen in the lawless areas of the globe. According to *The Washington Post*, from November 2002 to the end of December 2012, the U.S. used drone strikes for targeted killings 386 times in Pakistan, Yemen, and Somalia.<sup>7</sup> These do not include the many armed unmanned aircraft strikes in conventional engagements in Iraq and Afghanistan. We have “unusually useable” weapons, and how to use them must become integrally linked to “should” and “when” questions in ad bellum decisions,

because determining justice in warfare becomes much murkier when an entity can decide to take lives without committing to risking its own. The current trajectory of modern unmanned and robotic warfare leaves our deeply held “just war” tradition in jeopardy.

This article argues for a restoration of consent to harm and risk in warfare. It argues consent to be killed in battle is the defining act giving a combatant his legal status, and risk in battle must be shared by combatants in order to set the conditions for a just and lasting peace. How we fight is just as important as winning; in fact, sometimes how we fight is the whole of winning in this age of persistent conflict. These are issues senior leaders and policymakers must begin to confront before the next time, despite our best efforts, diplomacy fails.

### **The Morality of Consent**

Once war begins, those responsible for conducting the war must seek moral justification in doing so, because they are engaged in a dark art. It is their job to achieve military objectives, and in doing so, they take human life. They seek justification “...in order to explain to themselves and others how the killing of human beings they do is distinguishable from the criminal act of murder.”<sup>8</sup> The concept of *jus in bello* provides this moral justification.

In war, combatants consent to the possibility of being killed in combat. Because the act of killing in war is less restrictive than in civil/criminal law—allowed unless prohibited—the status of combatants and noncombatants gives rise to certain rights. Combatants’ consent in battle grants rights on how and when they may be killed and protections against being killed when they are *hors de combat*, either unable or unwilling to continue fighting. Noncombatants, those who do not consent to the killing, are immune, though their immunity is not absolute.

Because it is wrong to kill those who have not granted their consent to the possibility of

death, how we fight is exceedingly important during war. The concept of noncombatant immunity distills into the familiar *jus in bello* principles of distinction or discrimination and proportionality. It also leads to the doctrine of double effect from which we draw the concept of “acceptable collateral damage.” The doctrine of double effect comes from a “principle of moral

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reasoning that argues the pursuit of a good end tends to be less acceptable when a resulting harm is directly intended rather than merely foreseen.”<sup>9</sup>

The argument goes as such: performing an act likely to have evil consequences—in this case the killing of innocents—is justified as long as four conditions hold: 1) The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war; 2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers; 3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends nor is it a means to his ends; and 4) The good effect is sufficiently good to compensate for allowing the evil effect [i.e., justifiable under proportionality].<sup>10</sup> In military terms, this means the killing of innocents is sometimes justifiable assuming legitimacy of previously-held *jus in bello* requirements, as long as the bearer of military force does not intend the deaths, and the deaths do not serve to further his aims. It is the concept of double effect that requires combatants be subjected to some form of risk in warfare. If they are not, there are serious concerns about justice when innocents die.

## The Morality of Risk

As they decide for war, the amount of risk legitimate authorities are willing to accept has moral implications for ad bellum criteria of probability of success and proportionality, the latter in a manner not usually discussed. In the conduct of war, the individual warrior's

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risk is integral to the rights of combatants. Much has been made in recent years about a perceived risk aversion in the U.S. military, its leaders, and the public they defend, especially following Operation Allied Force, the 78-day war in the Balkans. Its result was what Jeffery Record dubbed “force protection fetishism.”<sup>11</sup> In a venomous article over the impracticality of this perceived culture and its relationship to the desired end state, he said, “Effective use of force rests on recognition of the intimate relationship between military means and political ends. Obsession with keeping the former out of harm's way, even at the expense of aborting attainment of the latter, violates war's very essence as an act of policy.”<sup>12</sup>

The most common critique of risk aversion during the North Atlantic Treaty Organization campaign against Serbia—that pilots were not allowed to fly low enough to increase the accuracy of their weapons<sup>13</sup>—is actually irrelevant. The risk issue was much more basic. The plan was not suited to the stated objectives, particularly the goal of ending the ethnic cleansing of Kosovo. The moral issue surrounding the President's decision not to entertain the idea of ground troops is that the

probability of air power alone stopping the ethnic cleansing in Kosovo was virtually nil. More importantly, the converse was probable. Further and potentially morally incriminating, such a consequence was foreseeable.<sup>14</sup> Much to the U.S. and NATO's surprise, Milosevic lasted longer than the duration of the original plan and, knowing there would be no ground troops in Kosovo, used the aerial bombardment of Serbia as cover for redoubling his efforts at ousting Kosovar Albanians from what he saw as Serbian territory. Incidentally, sole aerial efforts at “controlling” (the word choice is important) populations or militaries on the ground have never worked. The British experience in Iraq in the 1920s and the U.S. and British experience again in Iraq from 1991–2003 are excellent examples.

Ethnic cleansing is a one-on-one, in-the-face, personal “conversation” between an oppressor and the oppressed. No fighter pilot—or unmanned aircraft operator for that matter—flying at any altitude has the means to stop or even enter that conversation unless he is willing to kill both. If it was avoidance of risk or aversion to casualties that kept ground forces out of the plan for Operation Allied Force, then it was the paradox Record speaks of—a military concept of force that has almost no chance of success. More subtlety, it is one “worth” doing, but not worth expending those who might have the only chance of achieving the goal. This leads to a concept of proportionality.

Proportionality in jus ad bellum requires the legitimate authority to ensure the cost to both sides is worth the objective. When an act of war is judged not to have met the proportionality requirement, it is often because too much force was used at too great a cost. Such a critique might lead one to question whether toppling a Middle Eastern dictator and throwing a country into chaos is worth the threat that dictator might pose. This is the too-much-force argument on proportionality, but it is not the only argument.

Assuming just cause and all other just war requirements are initially met, there is also an obligation under proportionality to use all necessary force to accomplish the mission. If risk aversion leads to ruling out certain military options to accomplish the task, then the problem is not committing enough force to meet the ends. Proportional force must be worth the cost, but the decision to use too little force and discounting the universal nature of proportionality cannot be justified either. In effect the decision to use too little force lessens the probability of success and blurs the line between *jus ad bellum* and *jus in bello* if the rationale for such action is a reduction of risk to combatants at the expense of increased risk to noncombatants. And here we begin to understand why combatants' consent and risk ought to be deeply tied to decisions about resorting to war. The tension plays out when the U.S. government tries to explain "collateral damage" caused by airstrikes, in general, and drone strikes, in particular.

The most easily argued position for risk in the morality of war lies in the principle of double effect. If there is a way to prevent or mitigate the poor consequence of killing noncombatants, we are morally bound to do so, even if it requires greater risk to ourselves. Walzer puts it this way, "When it is our action that puts innocent people at risk, even if the action is justified, we are bound to do what we can to reduce those risks, even if this involves risks to our own soldiers."<sup>15</sup> To return to Operation Allied Force, we placed others at risk while refusing to accept any for ourselves "even when that acceptance was necessary to help others."<sup>16</sup> In concluding the thought Walzer says, "A fixed policy that their lives are expendable while ours are not can't, it seems to me, be justified."<sup>17</sup> This is where perceived risk aversion, unmanned warfare, and justice collide.

If drone strikes are directed against legal targets, such strikes are likely to kill

noncombatants. If a sniper is just as effective at killing the intended target with less collateral damage, then it is likely incumbent on the executor of military force to use that method even if it entails greater risk. Here we walk a fine line, for we are bound to risk our forces only as required. It becomes a balancing act that increasingly chooses a bomb from 30,000 feet or a Hellfire missile from 7,000 miles away rather than a well-trained Marine or Ranger with a rifle. This is the commanders' quandary, and how history judges their decisions remains to be seen. Suffice it say placing innocents at risk while accepting none for yourself is, in the end, morally problematic.

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## **Risk and a Lasting Peace**

In a discussion of the Kosovo war with a Serbian friend, Michael Ignatieff laments, "We weren't even prepared to risk the life of our own soldiers in battle." His friend then says, "They were ready to risk the life of my wife and my children but not their own soldiers' lives." Ignatieff finishes the thought with, "If we had really fought them, face to face, he was implying, and if we had faced death, as they had done, then we might have had his respect."<sup>18</sup>

There are those who will express dismay over the idea that such respect from adversaries is relevant in matters of war, but for a number of reasons, I think it most certainly is relevant. The equality of a combatant's consent to harm forms the foundation of justified killing in war; however, there is another reason that has

nothing to do with morality and ethics—the practical matter of someday finding peace. David Koplow suggests this “self-deterrence” is one of the main reasons combatants exercise restraint in warfare—for the purely practical matter of dealing with former enemies when hostilities cease. History, he says, is full of bitter enemies who do not remain so.<sup>19</sup>

Respect on the battlefield cannot be undervalued as a stepping-off point to solving the difficult issues surrounding a lasting peace. There is cause for concern in a world of persistent conflict, as a former Army Chief of

of the devil behind them.”<sup>20</sup>

Singer goes on to say:

While we use such adjectives as “efficient” and “costless” and “cutting edge” to describe the Predator [unmanned aircraft] in our media, a vastly different story is being told in places like Lebanon, where the leading newspaper editor there called them “cruel and cowardly” or in Pakistan, where “drone” has become a colloquial word in Urdu and rock songs have lyrics that talk about America not fighting with honor.<sup>21</sup>

These accounts do not illuminate any grand concordance between our view of what we are doing with unmanned warfare and how it is received. It seems, in fact, our views could not be further apart.

We have allowed our technology and the disciplined way we go about our actions in war to obscure our view of how the enemy sees those same concepts and actions. We want to prosecute war humanely; it is why we place such a premium on avoiding collateral damage. Yet our enemies see weakness and dishonor. Christopher Coker says the U.S. military was demoralized in Mogadishu because “its technology did not always allow it to fight humanely.”<sup>22</sup> Technology does not always raise the level of discourse in war. Sometimes superior technology does not allow us to “talk to them in a way they can understand.” The Western concept of “instrumentalizing” warfare is no guarantee of successful outcomes or even of setting the required conditions. It “may be a virtue in our own eyes, but it devalues war in the eyes of others.”<sup>23</sup>

If we are to set the necessary conditions for whatever desired outcomes we may support, we have to consider how lethal unmanned and robotic systems support those interests. Fighting “without honor” or in “cruel and cowardly” ways or being backed by the “forces of evil” is not likely to be a successful strategy. This

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Staff has stated, where we are simply setting conditions for desired outcomes. How can we achieve *jus post bellum* if we refuse to confront the possibility that how we fight and how it is judged by those we fight has enormous implications for the desired end state. This is why former President George W. Bush’s statement that “we’re talking to them in a way they can understand” is so disconcerting. In no conceivable way is unmanned warfare speaking to those we are fighting in a way they understand.

Singer recounts the story told by a Special Forces officer of a visit to the tribal regions of Pakistan where the U.S. launched just shy of two hundred drone strikes. The officer said: “One of the elders...went on to tell how the Americans had to be working with forces of ‘evil,’ because of the way that their enemies were being killed from afar, in a way that was almost inexplicable. ‘They must have the power

is not to imply we cannot find effective ways of using advanced technology in these kinds of fights, only that what we have done so far does not seem to be having the desired effects. “Robots [and armed unmanned weapons] can never ‘win hearts and minds’ and would likely indicate to the protected population that the intervening nation does not view the mission as very important, certainly not important enough to risk its own peoples’ lives.”<sup>24</sup> The last clause is perhaps the most salient in arguments about the resort to war and consideration of the means with which we plan to execute it. How can combat and the destruction it will surely bring be “worth” doing if it is not worth risking greatly to achieve the end result? Walzer explains it this way, “...I fully accept the obligation of democratically elected leaders to safeguard the lives of their own people...But this is not a moral position. *You can’t kill unless you are prepared to die* [italics from Camus]. But they cannot claim, we cannot accept, that those lives are expendable, and these are not.”<sup>25</sup>

Michael Gross, writing in the context of the Israeli Defense Force incursion in Lebanon in 2006 and Gaza in 2008, is blatantly clear on the jus ad bellum consequences of a lack of willingness to risk. He says:

When a nation or group goes to war, it has to decide how much risk it is willing to shoulder to achieve its political aims. If a society is unwilling to risk the lives of its soldiers in armed conflict, then it must search for alternative means to realize its goals. While combating armies have an obligation to protect their soldiers to the greatest extent possible, no army can mitigate risk on the back of innocent noncombatants.<sup>26</sup>

## Conclusions

As much as we wish it were not so, we cannot escape the conclusion that armed conflicts are an inevitable part of the human

condition. And yet our “unusually useable” weapons have altered the calculus for the resort to war in a way that has made it far too easy to enter combat all across the globe. We have gone beyond inevitable into the realm of prevalent.

Recall the riveting picture of President Barack Obama’s national security team huddled around a small table getting near-real-time information during the raid that killed Osama bin Laden. The tension, even in that two-dimensional view of the weight of Presidential decision making, is palpable. The stakes were incredibly high; it was worth sending in the nation’s best special operators. Who believes there is similar concern over the 386 reported drone killings? Unmanned and robotic warfare make us lose a sense of the gravity of taking human life. If we are to pull ourselves back up the slippery slope, we must begin to recognize that how we plan to fight is as important in ad bellum discussions as the “should” and “when.” We have to recapture the idea that consent to harm and risk in war ought to be inherent.

**The moral equality of combatants is essential... to maintain war as a rule-governed activity.**

The moral equality of combatants is essential, as Walzer explains, to maintain war as a rule-governed activity. Combatants are inextricably bound to each other in a shared fate. Their moral equality comes from the consent to face death together in the melee of combat. Their willingness to endure all war has to offer also gives them fundamental rights under the laws of war. As Ignatieff explains, “The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed...But this contract is void when one side begins killing with impunity.”<sup>27</sup> Such

impunity stands the just war theory on its side.

It is morally unsupportable to ask innocents to bear the burden of risk in war when belligerents are not willing to take on any of the same. And because how we fight is increasingly tied to basic criteria of the just war ethic in the resort to war, we cannot allow ourselves to be seduced by the asymmetry of our technology. Even if risk were no longer essential in just warfare, this technological way of war may severely impact an ability to find a lasting and just peace.

Speaking to our adversaries in a language of war they can understand is important. President George W. Bush apparently thought so, though the chosen language seems to have been incorrect. There is still a need to seek peace, to find a settlement to whatever grievances led to war. An ability to respect the way an adversary fights can be the basis of beginning the long conversation leading to lasting peace. To the extent we can find ways to use emerging technologies to bolster this, we ought to do so. Where we find it affecting the conversation as moral equals, we are bound to discard it. It would be the greatest folly to commit military force incapable of achieving the desired national objectives they were invoked to secure.

The defining picture during the bin Laden raid ought to be the norm when legitimate authorities commit their militaries to combat operations. When diplomacy fails, it ought to cost us more than it currently does—perhaps if it did there would be a greater impetus to come to some compromise and solution. We ought to expect our leaders to lose sleep, wrinkle, and go prematurely gray over matters of life and death. We ought to expect average citizens to feel something of the weight—the fear and grinding slog—of mortal combat. War ought to cost us more than a debt we can put off to future generations. Unfortunately it does not, and while both diplomacy and military effectiveness suffer, something deeper still may be lost—our very morality in the depths of war. Without the willingness to risk greatly, we really have no business making decisions about the mortality of others. We ought to at least be willing to die in order to kill. Perhaps Camus was right. **IAJ**

## NOTES

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