



Drone Strikes and Never-Ending Wars

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Drone strikes have been a core strategy of the so-called global war on terror. But there have also been many questions raised surrounding the effectiveness, transparency, legitimacy, and ethics of their use.

Technology has fundamentally altered not only how security is defined, but also how it is sustained and even enhanced. Nowhere is this new reality more apparent than in the so-called “global war on terror,” where there is little agreement about counterterrorism tactics and strategy. A core part of the so-called war on terror has been the utilization of drone technology. In the context of warfare, the drone has at least three functions: surveillance, killing, and providing targeting for another weapons system. The significance of the new technology is not so much that drone operators *must* decide between surveillance and firing but that they *can* decide. The drone often removes the need for indirect fire (where the shooter cannot see the target). Under such circumstances, the use of drones is a significant advantage to the side employing them.

Analysts point to several factors indicating why targeted killings by the United States (U.S.) are likely to increase in the foreseeable future. Drone strikes put fewer American lives at risk and provides a low-cost alternative to expensive and unwieldy conventional forces, especially given projected cuts in the defense budget and a dwindling public appetite for long wars. The reasons for the shift to combat drones are obvious: it lessens the burdens and responsibility on a state’s taxpayers, policymakers, and military. But drones have drawbacks, too.

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From a broad perspective, the use of armed drones in response to terrorism may actually be counterproductive. It has at times proved detrimental and terrifying, not just to the targeted individuals but to entire populations, killing innocent civilians and fueling resentment that has fed into terrorist recruitment and radicalization, intensifying the very terrorism that the drones are intended to combat. Those fears have been made ever more real by the surging number of casualties caused by targeting high-value terrorists in Pakistan, Yemen, Somalia, Iraq, Syria, and Afghanistan. The debate over the proper use of drone strikes abroad remains far from settled and has raised many questions about their effectiveness, transparency, legitimacy, and the ethics surrounding their use. These issues deserve more attention.

Legal and Moral Issues

 A Reaper Remotely Piloted Air System (RPAS) comes into land at Kandahar Airbase in Helmand, Afghanistan. Breaking new ground for the RAF, the MQ-9 Reaper has become an invaluable asset in the fight against terrorism in Afghanistan. It is able to spend great lengths of time silently observing the enemy before using a range of precision munitions to defend coalition troops and civilians from danger. This image was a runner-up in the RAF 2011 Photographic Competition. Photographer: Fg Off Owen Cheverton Image 45153241.jpg from www.defenceimages.mod.uk For latest news visit: www.mod.uk Follow us: www.facebook.com/defenceimages www.twitter.com/defenceimages

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Despite frequent condemnation of the U.S. cross-border drone strikes as patently illegal, the legality question is not so straightforward because international law is not precise. Even though the U.N. Charter explicitly prohibits states from employing “the threat or use of force against the territorial integrity or political independence of any state” (Article 2(4)), it provides two exceptions, recognizing an “inherent right of individual or collective self-defense

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if an armed attack occurs against a Member of the United Nations.” (Article 51). The other exception relates to authorization by the Security Council (Articles 39, 41, 42). Debate over the breadth of the self-defense exception dates back to the 1950s, focusing on the “inherent” nature of the right, what constitutes an “armed attack,” and when an armed attack “occurs.” This is the essence of the current controversy over pre-emptive self-defense, which the United States invokes to justify preventing an attack by responding to it before it actually occurs.

The International Court of Justice (ICJ) has generally treated self-defense as a narrow exception to the prohibition on force. In the 1985 case of *Nicaragua v. United States*, for example, it held that to give rise to a right of self-defense, an attack must be a significant one. The ICJ has also upheld the principles of necessity and proportionality, finding that self-defense is not permissible even against an armed attack if the self-defense is not necessary to accomplish the purpose of defense or if it is disproportionate in terms of civilian lives or property lost. Perhaps the court’s most important finding is that the prohibition on the use of force and the limited self-defense exception have become a part of customary international law.

As Rosa Brooks has argued, ambiguity and vagueness in these core legal concepts of “self-defense” and “armed attack,” as well as related doctrines of “imminence,” “proportionality,” and “necessity,” permit the U.S. to make plausible arguments for legality, while allowing other states simultaneously to condemn the attacks as unlawful. In the absence of a single overarching international authority and judicial system to declare who is right, the answer, if it ever arrives, will depend on the development of a consensus within the international community, which could take many years to build.

It is not even clear that use of drones against suspected terrorists is governed by the law of armed conflict (LOAC) in the first place. If these are more appropriately regarded as law enforcement actions, as some believe, then they should be governed by law-enforcement rules and limited by international human rights law. The intentional targeting of suspected terrorists poses vexing questions surrounding the legal principle of ‘innocent until proven guilty.’

As a matter of U.S. constitutional law and criminal law, does the executive branch, acting through the military or the intelligence community, have the right to kill a suspected terrorist whose guilt has not been adjudicated in court? Does it violate the right to life and the prohibition of arbitrary killing, protected by, among other things, Article 6(1) of the International Covenant on Civil and Political Rights?

In U.S. law, a drone attack, like any other targeted killing, arguably, but not necessarily, violates a ban on assassination by U.S. personnel dating back to an executive order issued by President Gerald Ford in 1976. Until 1975, many high officials inside the U.S. government, including President Ford, did not know that the Central Intelligence Agency (CIA) had ever plotted to kill foreign leaders. All that changed, however, as a result of a series of exposes published in *The New York Times* by investigative journalist Seymour Hersh. In early 1976, following several disclosures, investigations and public revulsion, President Ford issued the executive order banning the assassinations. The ban on assassination is still in effect in a later executive order promulgated by President Reagan.

Another question is how those who employ armed drones can justify ‘collateral damage’ to innocent bystanders who become unintended victims. The LOAC allows the targeting of enemy combatants and expressly prohibits targeting

civilians, but so long as reasonable steps are taken to avoid collateral injuries, and the loss of civilian lives is proportional to the military advantage, the accidental killing of civilians is not a war crime. But this does not mean that it is morally or politically justified. More fundamentally, international law raises questions about the right of the U.S. to target individuals without the consent of the government on whose territory the killing occurs. Does the UN Charter's Article 2(4) prohibition on the use or threat of force against the territorial integrity or political independence of another state even allow such attacks?

The U.S. has argued that the attacks are permissible because the targeted state is either unwilling or unable to police its own territory and prevent the targeted individuals from carrying out terrorist acts. The 2005 ICJ case of *Congo v. Uganda* appears to weaken the U.S. argument, holding that Uganda's military incursion into Congo to stop cross-border attacks by Congo-based insurgents was unlawful. Most scholars and most states appear to adopt the ICJ's broad understanding of the Article 2(4) prohibition on force and narrow understanding of Article 51's self-defense exception. Nevertheless, the debate continues.

Both the Bush and the Obama administrations have argued that the United States should maintain its ability to use all of the tools in its arsenal, including armed drones, to prevent terrorist organizations and groups from attacking the U.S. homeland. On September 17, 2001, President Bush [signed an executive finding](#) that authorized the CIA to "kill or capture al-Qaeda militants around the globe." While some officials within the Bush administration defended the drone strikes as consistent with and conforming to international law, others emphasized their effectiveness rather than their legality, arguing that the use of drones has given the U.S. a new dimension of capability that most other

nations lack. Still, [others have added](#) that some limits must be placed on drone strikes against U.S. citizens overseas—that is, Americans should not be targeted without prior approval by a military panel or a federal judge.

On balance, the U.S. government continues to regard the drone program in Yemen, Somalia, Afghanistan, and the border regions of Pakistan as part of the ongoing U.S. war with al-Qaeda, which has been waged pursuant to the 2001 Authorization for the Use of Military Force by which Congress authorized the president to take military action against nations, organizations, or persons involved in the 9/11 attacks. As long as the attacks are aimed at individuals associated with al-Qaeda and are for the purpose of preventing future acts of terrorism against the United States, they appear to fall within the scope of the authorization. The U.S. government contends that international law permits the United States to use force against al-Qaeda and its affiliates in countries where there is an extant armed conflict to which al-Qaeda or its associates are party. If the drone strikes are part of the war with al-Qaeda, the argument goes, the law of armed conflict applies. The Obama administration [has taken the view](#) that the law of armed conflict applies to drone strikes, whether they are part of the war or are used as a separate military strategy such as counterterrorism.

The ethical and legal issues raised by the rapidly developing drone technology pale in comparison to those presented by the Pentagon's development of new autonomous weapons systems. These amount to fully independent robots, guided by artificial intelligence, which can decide on their own whom and when to kill. These projects, to which the Defense Department has committed billions of research dollars, have prompted an intensifying debate among legal scholars and ethicists: "Can a machine be trusted with lethal force?" "Who is

at fault if a robot attacks a hospital or a school?” “Is being killed by a machine a greater violation of human dignity than if the fatal blow is delivered by a human?” A Pentagon directive requires that autonomous weapons use “appropriate levels of human judgment.” Scientists and human rights experts [have argued](#) that the standard is far too broad, insisting that such weapons be subject to diligent application and “meaningful human control.”

Transparency and effectiveness



Reaper Drone image by [Wikimedia Commons](#).

Critics have argued that the U.S. drone program lacks transparency and is largely unknown to the general public and most government officials, including most members of Congress. There is also little doubt that innocent civilians are dying in drone attacks. Some studies have demonstrated the disconnect between public statements and what researchers have discovered about civilian casualties from U.S. drone strikes. White House counterterrorism advisor John Brennan has often attributed “surgical precision” and “laser-like focus” to the drone program. Critics argue that stressing the notion of surgical precision in the face of many civilian casualties caused by such attacks is downright misleading. In some cases, the CIA may not even have known the identity of the people it has killed. The presumption that all military-age males killed in drone strikes have been “militants” [cannot withstand strict scrutiny](#).

Several organizations or publications have informed the public debate on civilian deaths from drone strikes. These include, among others, the New America Foundation (NAF), the *Long War Journal* (LWJ), the Bureau of Investigative Journalism (BIJ), the *Columbia Law School Human Rights*

Clinic (CHRC), the *International Human Rights and Conflict Resolution Clinic* at Stanford Law School, and the *Global Justice Clinic* at the NYU School of Law, which have conducted an investigation into several aspects of the U.S. targeted killing program in Pakistan and have [provided a detailed narrative](#) about the law and the policy behind it.

Despite Brennan's and the CIA's denials of unintended civilian deaths, the Bureau of Investigative Journalism in London has reported that 371 drone strikes in Pakistan killed between 2,564 and 3,567 people between 2004 and the first half of 2013. Between 411 and 890 (12%-35% of the total) were civilians. Fewer than one-quarter of those killed in drone strikes in Pakistan [have been civilians](#). As of August 2016, President Obama [has authorized and confirmed](#) 506 drone strikes, killing an estimated 3,040 military combatants and 391 civilians.

The lack of government transparency on drone strikes raises serious questions about their effectiveness and accuracy. If the drone attacks are to be effectively utilized, [critics argue](#), they have to be used for short-term interventions with the intention of using them rarely, selectively, transparently, and only against those who can realistically target the United States. Absent a realistic threat against the U.S., it is difficult to justify a killing as self-defense and thus permissible under Article 51. Otherwise it is arguably just an extrajudicial killing of an un-convicted, often unindicted, criminal suspect as well as a violation of the U.N. Charter's prohibition on the use of force.

Managing Risks or Seeking Long-Term Solutions

It is time to think outside the box in which the states fighting terrorism have locked themselves, and to make the case for why the U.N. and other

development organizations should be empowered and encouraged to support civic engagement, societal improvement, and low-level civil society rebuilding as a means to battle the unrest and despair that fuels terrorism. One expert reminds us that drone strikes and the arrest of key leaders can be effective against smaller and more traditional terrorist groups, but not against most radicalized and jihadist groups. Paradoxically, some U.S. allies, such as Pakistan, who often cooperate with Washington, provoke terrorist activities by their very authoritarian policies and practices. The U.S. needs as many allies as possible in its military counterterrorism efforts, but some of those allies are likely to prove as problematic as drone strikes in the broader effort to prevent and contain terrorism by winning over the hearts and minds of the people.

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