

Drones: Mapping the Legal Debate

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ABSTRACT: The purpose of this paper is to provide a very preliminary sketch of the legal debates about the use of unmanned aerial vehicles (UAVs) – otherwise known as drones. I will focus on two main areas of contention: firstly, whether or not the United States is legally at war with those caught in its crosshairs and, secondly, whether or not these individuals qualify as legitimate targets within the dominant frames of war. At the same time, however, I will also consider if this reliance upon international law serves only to normalise the violence that is being inflicted, displacing important ethical and political questions with purely technical concerns about proportionality, discrimination and military necessity. The law, I argue, may be part of the problem, not a solution to it.

KEYWORDS: Drones, Targeted Killing, International Law, Pakistan, Somalia, Afghanistan, Yemen.

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Introduction

In his acceptance speech for the Nobel Peace Prize in 2009, President Obama attempted to distance himself from Bush's "war on terror", telling his audience in Oslo that 'even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war' (Obama, 2009). He reminded them that he had already prohibited the use of torture,

ending one of the most disturbing aspects of his predecessor's time in office. He also reiterated his commitment to closing down Guantánamo Bay – a promise that has yet to be fulfilled almost five years down the line. One policy that he inherited from the Bush administration that has not waned under his leadership is the covert drone program run by the Central Intelligence Agency. Indeed, since taking office in 2009, Obama has launched an estimated 450 attacks involving Unmanned Aerial Vehicles (UAVS) in Pakistan, Somalia and Yemen, killing an estimated 4,379 people (Bureau of Investigative Journalism, 2013). Details of these attacks and the exact numbers killed remain clouded in secrecy, with the United States government initially refusing to even confirm the existence of the drone program let alone comment on individual strikes. Yet there can be little doubt that we have witnessed a massive escalation in the number of attacks, reflecting Obama's preference to 'lead from behind', minimising the numbers of boots on the ground and avoiding expensive exercises in nation-building.

Proponents of targeted killings insist that the policy is the most efficient and ethical way of dealing with suspected terrorists, avoiding costly interventions on the ground, lengthy prison terms and high numbers of civilian casualties. In a speech to the Wilson Center, Obama's Homeland Security Advisor John O. Brennan (2012) argued that 'by targeting an individual terrorist or small number of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimise the risk to civilians than a remotely piloted aircraft'. Similarly, Kenneth Anderson has argued that 'even if the whole notion seems to some disturbingly close to arbitrary killing, not open combat, it is often the most expedient – and, despite some civilian casualties that do occur, most discriminatingly humanitarian – manner to neutralise a terrorist without unduly jeopardising either civilian or American lives' (2009: 2).

The idea that the United States is able to take out high-value targets without any of the risks has an obvious appeal, especially for a nation still tarnished by the horrifying excesses of the Bush era. But opponents of the drone program have criticised what they see as an unethical and potentially illegal use of military force, with one former Law Lord comparing the use of drones to cluster bombs. He argued, 'from time to time in the history of international law various weapons have been thought to be so cruel as to be beyond the pale of human tolerance' (Lord Bingham

quoted in Verkaik, 2009; see also Greenwald, 2012a; 2012b; 2013). In particular, they warn that the risks to civilians far outweigh the potential benefits, noting that less than 2% of those killed can be considered high-value targets whilst the rest are comprised of low-level insurgents and innocent civilians (Bergman and Tiedemann, 2011; Boyle, 2012: 4; *Living Under Drones*, 2012: 125-131; Bureau of Investigative Journalism, 2013). As well as questioning the efficacy of these attacks, opponents of the drones program have also raised a number of legal objections to the use of targeted killings as a weapon of war. The legal landscape in this matter is particularly troublesome, not least because many of the key principles of international law do not easily translate into these new contexts; boundaries are blurred, concepts are twisted beyond recognition and commentators cannot even agree what legal framework even applies.

The aim of this paper is to provide a preliminary sketch of this confused and rather complex legal landscape, mapping out the main areas of contention so that we can begin to interrogate the claims that are being made on both sides. It is, however, impossible to do justice to all the arguments that have been made in such a short piece. Indeed, those already familiar with the debate will notice that, in this paper at least, I have chosen to side-line questions about potential violations of state sovereignty, the legal status of CIA agents or the particular problems posed by the use of drones in US airspace or against US citizens.ⁱ Instead, I will focus on what I consider to be the two main areas of contention: the presence of an armed conflict in which these killings would be permissible and the legitimacy of those the United States government has chosen to target. My central argument is as follows: although targeted killings are not themselves illegal, the policy pursued by President Obama displays a reckless disregard for the central tenets of international law and struggles, even on its own terms, to provide a secure legal basis for the use of drones. At the same time, however, I also want to point to the limitations of relying on international law, pointing to the way in which ethico-political considerations about the pain and suffering of others tend to be displaced by technical questions about the legality of targeted killings (Zehfuss, 2013; T. Gregory, 2012; Weizman, 2010; Asad, 2007). Indeed, the wider project from which this paper emerges focuses particular attention on the way which these legal debates tend to obfuscate the violence that is inflicted

upon the bodies of the victims, echoing Elaine Scarry's concern that injuries inflicted in war are often relegated to the margins of the debate (1987: 72-75).

Presence of Armed Conflict

The first area of contention between supporters of the drone program and its opponents is whether or not the United States is actually at war with those it is targeting. The extent to which an individual drone strike can be considered legal is largely dependent on the context within which it occurred as it is the context that determines which legal framework should apply. In a report published in 2010, the UN Special Rapporteur on extrajudicial, summary and arbitrary killings noted that if a drone strike occurs within an armed conflict then both International Humanitarian Law (IHL) and human rights law apply, meaning that the legality of each attack is determined by the applicable *lex specialis*. It is assumed, for example, that combatants, by virtue of their status as combatants, have surrendered some of their right to life and are, as a result, vulnerable to attack. In other words, a combatant can be legally targeted as long as it is a military necessity, the use of force is proportionate to the anticipated gains and due consideration is given to the expected harm that is likely to be caused to civilians (Alston, 2010: 10; see also *Living Under Drones*, 2012: 103-104).ⁱⁱ If, however, the strike occurs outside the context of an armed conflict, then the use of force no longer comes under the terms of IHL but is governed by human rights law within a framework that has become known as the "law enforcement" model. In contrast to IHL, the law enforcement model only allows lethal force to be used if it is required to protect the lives of others and if no other measures, such as apprehension or non-lethal incapacitation, are available (Alston, 2010: 11). Crucially, this rules out the possibility of targeted killings as government policy because the 'intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never

permissible for killing to be the *sole objective* of an operation' (Alston, 2010: 11 emphasis in original; see also Amnesty International, 2012: 5-12).ⁱⁱⁱ

The Obama administration has been reluctant to outline its own interpretation of the relevant legal framework in any detail, aggravating both proponents of the drone program and critics alike (see Anderson, 2009; 2010; Amnesty International, 2013; Alston, 2011).^{iv} The few announcements that have been made in public suggest that the administration considers the Authorisation for the Use of Military Force (AUMF), which was enacted in the aftermath of the terrorist attacks on the 11th September 2001, as sufficient basis for its program of targeted killings. In his speech to the Annual Meeting of the American Society of International Law, State Department Legal Advisor Harold Koh (2010) argued that 'the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, [...] and may use force consistent with its inherent right to self-defence under international law'. He went on to argue that recent events had demonstrated that al-Qaeda had not abandoned its intent to attack the United States and that, 'in this on-going armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself' (Koh, 2010). More recently, the General Counsel of the Department of Defense Jeh Johnson (2012) argued that the 'bedrock of the military's domestic legal authority continues to be the Authorisation for the Use of Military Force'. Ten years later, he argued, 'the AUMF remains on the books, and it is still a viable authorisation today' (Johnson, 2012).

Yet the suggestion that the United States is in a state of war with those it is targeting has been called into question for a number of reasons, not least the unconventional nature of the enemy. Although many of the definitions relating to non-international armed conflicts are unclear, the UN Special Rapporteur on extrajudicial, summary and arbitrary killings argues that treaty and customary law set out some basic conditions that need to be met, including the requirement that armed groups display some minimal level of organisation (Alston, 2010: 16-17). The fractured and decentralised nature of these groups is a particular problem as it makes it extremely difficult for the United States government to adequately demonstrate that it is at war with them, especially those located outside of Afghanistan. The position of the Obama administration is that the AUMF only permits the targeting of organisations

that have 'entered the fight alongside al-Qaeda' or are 'co-belligerent[s] with al-Qaeda in hostilities against the United States' and government officials have rejected claims that they are engaged in a military operations against unrelated groups (Johnson, 2012). Nevertheless, the United States government has not only refused to provide any direct evidence that these groups are linked to either the Taliban or al-Qaeda, it has failed to show that the proper internal mechanisms are in place to ensure compliance with the appropriate legal structures (Alston, 2011: 283; Cole, 2012). Beyond a few public pronouncements about upholding the law and abiding by good-old American values, the administration has done little to reassure international observers that drone strikes outside of Afghanistan comply with the terms set out in the AUMF.

Commentators have also questioned the legal basis of drone strikes outside of the war in Afghanistan under the terms set out in the AUMF, criticising what they see as an exponential expansion of both the spatial and temporal dimension of what Stephen Graham calls the 'battlespace' of the war on terror (Graham, 2009; see also D. Gregory, 2011; Alston, 2011: 325). In addition to the criteria establishing which groups count as legitimate targets in a non-international armed conflict, international customary law also sets out a minimum threshold in regards to intensity and duration that must be surpassed in order for acts of violence to qualify as acts of war (Alston, 2010: 17). The position of the US government is that terrorists associated with al-Qaeda continue to engage in hostile action against the United States in various locations around the world, including Pakistan, Somalia and Yemen (Brennan, 2012; Koh, 2010). Jeh Johnson (2012), for example, argued that there is nothing in the wording of the AUMF that restricts the use of force to what he describes as 'hot battlefields', insisting that the 'AUMF authorised the use of necessary and appropriate force against the organisations and persons connected to the September 11th attacks – al Qaeda and the Taliban – without a geographic limitation'. Similarly, the Attorney General has argued that the United States is at war 'with a stateless enemy, prone to shifting operations from country to country', claiming that 'neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan' (Holder, 2012).

However, this rather sweeping interpretation of the AUMF is unlikely to satisfy even the most basic legal requirements. Whilst those targeted killings that are conducted

within a recognised theatre of war may be legally permissible according to the prevailing framework of international law, the policy pursued by President Obama does not adequately address the requirement that targets are members of a clearly-identifiable, centralised group, nor does it provide sufficient evidence that the AUMF permits the United States to pursue an unrestricted war against terrorism that exceeds any geographical or temporal limits (Amnesty International, 2012). More importantly, this problem cannot be solved simply by appealing the right to self-defence under Article 51 of the UN Charter. Even if we leave aside concerns about whether or not the right to self-defence, as it is set out in Article 51, can be extended to non-state actors, the International Court of Justice has a clear threshold that must be reached before lethal force can be used in response. As the UN Special Rapporteur makes clear, 'sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force in self-defence [as...] the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate' (Alston, 2010: 13).

Legitimate Targets

The second area of contention focuses on the legal status of those the United States has chosen to kill. It is important to note from the outset that there is 'nothing inherently problematic about selective targeting provided the selected targets are otherwise lawful objects of attack' (Glazer, 2010). Indeed, the Obama administration has been quick to stress that the United States has both a moral and a legal obligation to be as selective as possible in its campaign in order to minimise civilian casualties (Brennan, 2012; Holder, 2012). In his speech to the Annual Meeting of the American Society of International Law, for example, Koh (2010) compared drone strikes on suspected terrorists in Pakistan to the shooting down of Admiral Isoroku Yamamoto's plane during World War Two, insisting that the 'targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects'. If we accept that these killings occurred within the context of an armed conflict then the legality of a specific strike would be

determined by the principles of IHL. Combatants, by virtue of their status as *combatants*, are considered to be legitimate targets and can be lawfully killed as long as the attack can be demonstrated to be necessary, proportionate and discriminate. However, the unconventional nature of the conflict and fluid character of the enemy, whose status is akin to that of a partisan rather than a lawful combatant, means that the boundaries between soldiers and civilians is difficult to maintain.

The irregular status of enemy fighters, who wear no uniform and display no clear insignia, has led proponents of drone strikes to suggest that 'the United States and its allies can make a strong case that the main source of the problem is those who abuse their civilian status to attack truly innocent civilians and to prevent our military and other special forces from discharging their duty' (Etzioni, 2010: 66). But the rules on targeting irregular combatants are very clear and the International Committee of the Red Cross (ICRC) has recently issued specific guidance on the matter, insisting that civilians may be lawfully targeted only if they are directly participating in hostile action and have a 'continuous combat function' within a militant group (2009: 33). In the first instance, the ICRC states that a hostile act must satisfy three additional cumulative requirements in order to render the perpetrators legitimate targets for attack. Firstly, there is the 'threshold of harm', which specifies that there should be a *likelihood* that the act will impact the military operations of the enemy or cause harm to innocent civilians (2009: 47-51). Secondly, the ICRC requires that there must be a direct causal link between the specific act and the harm that is likely to result. A truck driver delivering ammunition to a position on the front line would, in this view, be considered legitimate, whereas a truck driver transporting ammunition from a factory to a storage facility to be delivered to the frontline at an unspecified future date would not (2009: 51-58). Finally, the ICRC states that the act must be part of a 'belligerent nexus' and 'specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another' (2009: 64). In other words, in order to be considered a legitimate target, a civilian must engage in an act that intentionally seeks to cause harm to his enemy. An act of self-defence, civil unrest or criminal violence would not meet the relevant criteria.

The ICRC has also issued quite specific guidance about the timeframe in which a civilian can be considered a legitimate target, stating that a hostile act starts at the moment when a particular act begins (e.g. loading bombs on to a plane) and

terminates when this individual act comes to an end (2009: 65-69). Yet despite these quite strict temporal limits, the notion of a 'continuous combat function' has been criticised by the UN Special Rapporteur on extrajudicial, summary and arbitrary killings for creating a *de facto* status determination that appears to exceed the individual act and allow for states to target civilians not directly engaged in hostile action (2010: 20-21). The UN Special Rapporteur also warns that the creation of this category raises the risk of a state erroneously targeting someone who has disengaged from their function within the militant organisation and cannot, therefore, be viewed as a legitimate target (2010: 21). But even the patchy and rather problematic language used by the ICRC would preclude many of those currently being killed by the United States from being considered legitimate targets. As Philip Alston has made clear, 'the practice of secret killings conducted outside conventional combat settings, undertaken on an institutionalised and systematic basis, and with extremely limited if any verifiable external accountability, is a deeply disturbing and regressive one' (2011: 289).

In the absence of an armed conflict, by contrast, individuals may only be targeted if they pose an imminent threat to the lives of innocent civilians that cannot be prevented with non-lethal measures. Although the United States government has been reluctant to specify the legal basis for its actions, officials from the Obama administration have invoked the idea that these militants pose an imminent threat on a number of separate occasions. The US Attorney General argued that 'the evaluation of whether an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window could cause to civilians, and the likelihood of heading off future disastrous attacks against the United States' (Holder, 2012; see also Department of Justice, 2013). Likewise, Koh (2010) has argued that the decision to target specific individuals is dependent upon a number of considerations, 'including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses'. But commentators have noted that this position is premised upon a 'radical re-interpretation of the concept of imminence', which cannot be sustained in either theory or practice (Amnesty International, 2012: 1; Amnesty International, 2013: 4-5). Crucially, the concept of imminence, as it has traditionally been understood, only

applies to the rarest of circumstances, where an individual poses an immediate threat that must be dealt with immediately (Alston, 2010: 13). The fact that many of those targeted have been on kill-lists for extended periods of time 'raises significant questions about how the self-defence test is satisfied' (*Living Under Drones*, 2012: 108).

Questions surrounding both the legitimacy and the legality of those targeted have only deepened with revelations about the use of so-called signature strikes, which target individuals based on their behaviour rather than any concrete evidence that they are involved in militant activities, and the fact that the United States government appears to be working on the assumption that all military-age males in the vicinity of the attack are lawful combatants unless evidence emerges posthumously to suggest otherwise (Becker and Shane, 2012; Amnesty International, 2012: 1-3; *Living Under Drones*, 2012: 12-13). This 'guilt by association' or 'guilty until proven innocent' approach, as it has been termed by a number of commentators, seriously undermines the administration's already shaky legal framework (Becker and Shane, 2012; Boyle, 2012; *Living Under Drones*, 2012: 30). One former advisor on Obama's counterterrorism group condemned this attempt to massage the figures on civilian casualties, insisting that 'the Obama administration's 'guilt by association' approach implies an indifference to the combatant status of the potential victims that is at odds with the legal and moral responsibility to make this determination before killing them' (2012: 7-8). Boyle is equally unimpressed with the use of signature strikes in place of evidenced-based attacks, warning that there is an obvious risk that drone operators will misinterpret purely innocent activities as suspicious behaviour (2012: 9). Indeed, the joke amongst State Department officials is that when the CIA sees three guys doing jumping jacks it automatically thinks it is a terrorist training camp (Becker and Shane, 2012).

Conclusion

The purpose of this essay has been to provide a preliminary sketch of some of the main legal issues animating debates about targeted killings and the use of unmanned drones. I noted right from the outset that it would be difficult to do justice

to what is an incredibly fraught and complex legal landscape in such a short space of time, limiting myself to what I consider to be the two main areas of contention: the presence of an armed conflict and the legal status of those being targeted. Part of the difficulty is that supporters and opponents of the drone program struggle to even agree about the applicable legal framework, making many of their arguments entirely incommensurable. However, this paper has raised some serious questions about the legality of current US policy, pointing to the ways in which the Obama administration has twisted existing legal constructs to their breaking points as they try to demonstrate the existence of armed conflict that would permit the use of drones against selected targets. At the same time, however, I also showed that the United States has struggled to establish whether or not their targets are indeed lawful combatants who may be legitimately targeted. Indeed, it is difficult to find fault with the UN Special Rapporteur's assessment that the use of drones represents a 'highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force' (Alston, 2010: 2). This is a problem that is only compounded by the Obama administration's refusal to act in a transparent and accountable manner, which raises additional questions about its ability to satisfy not only the requirements of IHL and human rights law but also the relevant domestic law (Alston, 2011: 283).

However, we should also be cautious about treating the use of drones as a purely legal exercise, without taking the time to consider how the very precepts of international law might serve to normalise, legitimise and enable incredibly violent and horrific acts. As Eyal Weizman argues in the context of Israel's assault on Gaza in 2008/09, 'might it be that the attack was not restricted by an extensive use of IHL but rather that a certain interpretation and use of this law has enabled, not only the justification of violence, but crucially inflicting greater levels of destruction?' (2010: 12; see also Weizman, 2011; Asad, 2007). Indeed, it is interesting to note that both the horror of war – the burnt bodies and bloody remains – and the terror of war are almost entirely absent from the dominant legal accounts. There is, for example, little discussion of the wider harm caused to those the communities above which the drones hover; the fact that parents are often too scared to send their children to school, that emergency services are now unwilling to respond to those in need in case the target is struck again or the fact that the constant buzz of drones has led to

an exponential rise in mental health issues (*Living Under Drones*, 2012). Similarly, the gruesome effects these weapons have on the bodies of their victims, which has left many families unable to mourn their loved ones because all they could is 'collect [unidentified] pieces of flesh and put them in a coffin' (quoted in *Living Under Drones*, 2012: 59-60; see Cavarero, 2011). Perhaps it is time, then, that we recognise international law may be part of the problem rather than a solution to it.

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ⁱ Concerns about the violation of state sovereignty have provoked considerable controversy, as it could be argued that they are a violation of Article 2(4) of the UN Charter. In order for these targeted killing to be legal, the United States would need to a) demonstrate that it has the permission of the second to conduct military operations within its territorial borders or b) invoke its right to self-defence under Article 51 of the UN Charter because the target state is either unwilling or unable to stop armed attacks launched from within its territory (*Living Under Drones*, 2012: 105-106; Alston, 2010: 12). The Attorney General appears to have confirmed this view, acknowledging that 'international legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally' (Holder 2012). He went on to argue that 'the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved – or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States' (Holder, 2012; see also O'Connell, 2009: 21; Alston, 2010: 12). Following the death of Anwar al-Awlaki, a US citizen who was killed in Yemen in 2011, there has been considerable debate about the ethics and the legality of targeting Americans. The White House sought to establish its legal position in a Department of Justice white paper that was leaked earlier this year but a number of questions still remain unanswered (Department of Justice, 2013). Questions have also been raised

about the role of the CIA, with some commentators suggesting that agents could be liable to prosecution (Alston, 2010: 21-22; O'Connell, 2009: 25-26).

ⁱⁱ Crucially, the same standards apply whether the conflict is an international armed conflict between states or a non-international armed conflict between a state and a non-state actor, such as a terrorist group (Alston, 2010: 10).

ⁱⁱⁱ This does not mean, as the UN Special Rapporteur makes clear, that states are prohibited from using lethal force during the course of law enforcement operations. Indeed, the legal obligation that states must respect the right to life 'entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals [and...] terrorists' and may *require* them to use lethal force in certain situations. However, it does mean that Obama's "shoot-to-kill" policy may be illegal *if it cannot be shown that the United States is actually at war with those who find themselves caught in his crosshairs*.

^{iv} Kenneth Anderson, for example, has criticised the Obama administration for allowing the legal basis for its drone policy to steadily erode from under its feet by failing to defend the use of targeted killings (2010: 27-30; 2009: 3). In his view, 'a clear statement of legal position need not be an invitation to negotiate [because...] in international law, a state's assertion that its policies are lawful, particularly such an assertion from a great power in matters of international security, is an important element all by itself in making it lawful, or at least not unlawful' (Anderson, 2010: 30; see also; Etzioni, 2010; Krauthammer, 2013). However, the suggestion that pronouncements by the United States government override IHL and international human rights law has been rejected by the UN Special Rapporteur, who insists that 'this approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based upon whether the broader cause in which the right to use force is invoked is "just", and impermissibly conflates *jus ad bellum* and *jus in bello*' (Alston, 2010: 14).