

The 'Secret' Matrix



If fighting has to be done is it best done with remote-controlled aircraft or drones? Some say unmanned planes improve the level of knowledge about targets, while others believe they are flying into serious legal turbulence and risking innocent lives.

tHE INCREASED USE OF DRONES BY THE administration of United States President Barack Obama has reignited the debate over their legality and moral status. Several critics have argued that they are used indiscriminately. As Scott Horton writes in Harper's, their use is a 'steady drift away from accountability and oversight.' A UN representative argues, in a just released report on targeted killings, that drones might be handled by the Pentagon and not the CIA to increase accountability and transparency considerably.

These critics pay little attention to the fact that the use of drones is subject to close oversight. True, a 2009 report for the Senate Foreign Relations Committee notes 'the precise rules are classified'. Indeed, there are good reasons for the US military to refrain from publicising the details. Revealing them would assist those who seek to evade drone strikes.

However, enough information is available from public sources to provide an overview of the way oversight works. Exploring it may reassure those who are concerned about the extended employment of drones. They may even conclude that if fight one must, drones are preferable to most instruments of warfare.

The matrix used to determine when a strike is authorised has the following elements, most of which work only because of the unique features of drones, in particular their capacity to linger for hours over a potential target:

- **Intelligence from various sources is combined**, rather than relying on one. A former CIA official disclosed last year that ‘there is a rigorous protocol for identifying militants, using video from the Predators, intercepted cell phone calls and tips from Pakistani intelligence, often originating with militants’ resentful neighbors.’

Unnamed US officials revealed earlier this year that before names are added to the target list they are ‘all reviewed carefully, not just by policy people but by attorneys...Principles like necessity, proportionality, and the minimization of collateral damage – to persons and property – always apply.’ The list is reevaluated every six months, and those targets that have not been active are removed.

Although all these requirements can be met when bombers or special forces are employed, the ability of drones to provide extensive feeds of their targets ‘in real time’, provides special opportunities to verify that the target is the one whose elimination is sought and has been authorised.

- **A scoring system is used** to evaluate potential targets. Low scores are given to high-value targets. High scores are allotted to civilians known not to be involved in acts of terror or insurgency, say a spouse. Also the number of civilians present affects the score. The higher the total score, the less likely the hit will be approved.

The way this scoring system works is illustrated by one strike that was aborted and one that was authorised. When a predator drone detected three militants planting an improvised explosive device in a road in Afghanistan on February 17, the strike was aborted after the drone’s cameras revealed children in the area. However, Baitullah Mehsud, head of the Taliban in Pakistan, was considered an asset of such high value that the presence of his wife and father-in-law were not enough to abort a strike that killed all three on August 5 last year.

- **Also the higher the score** the matrix generates, the higher the rank of those who must approve the strike, up to and including the President himself. Thus Leon Panetta, the Director of the CIA, personally approved the drone strike against Mehsud, because of concern about collateral damage.

This also means that more layers of command are involved in the review. After all, not every drone pilot can pick up the phone and call the head of the CIA, not to mention the White House. The request passes up the command chain and is reviewed at each level.

- **Reviews are conducted after the fact** to check the validity of the information on which the matrix draws. For instance, after a drone strike in Pakistan last December 8 killed Al Qaeda leader Saleh al-Somali, DNA evidence was collected to confirm the death.

THE USE OF DRONES FOR

The use of drones for targeted killings has generated

significant controversy. Some have suggested that drones as such are prohibited weapons under IHL [International Humanitarian Law] because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person. It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited. However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

The greater concern with drones is that because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed – i.e., who is a lawful combatant, or what constitutes ‘direct participation in hostilities’ that would subject civilians to direct attack – do not differ based on the choice of weapon.

Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

Drones may provide the ability to conduct aerial surveillance and to gather ‘pattern of life’ information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability enhances the ability of a State’s forces to undertake precautions in attack. But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims’ family members, showed that international forces were often too uninformed of local practices, or



TARGETED KILLING

too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation. International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based. States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audiofeed, there is a risk of developing a 'Playstation' mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHL and adequate safeguards for compliance with it.

Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State's own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor. It could also theoretically claim that human rights law's requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is 'instant, overwhelming, and leaving no choice of means, and no moment of deliberation' – would be met. This hypothetical presents the same danger as the 'ticking-time bomb' scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Professor Philip Alston, paragraphs 79 to 86, May 2010

Investigations after a February drone strike that targeted Sirajuddin Haqqani revealed that Haqqani's brother Mohammad had been killed instead.

● **The approval of the nation in whose territory the strike takes place** is often sought. Until 2009, the majority of Pakistani citizens were strongly anti-American, and many favoured the Taliban. Drone strikes, considered violations of sovereignty, were held by Pakistani citizens to be especially shocking and hence were rarely undertaken. However, Taliban attacks that killed many Pakistani civilians – some praying in mosques – made the public much more tolerant of drone strikes. Since then, these attacks have increased substantially.

Indeed, even superpowers find it in their interest to act legitimately. A decision on legality starts from the baseline that civilians are a protected class. As far as US domestic law is concerned, Executive Order 12333 prohibits the US government from engaging in assassination. However, Presidents Bill Clinton, George Bush Junior and Obama have all approved such strikes in the name of self defence, and in some cases, to prevent potential attacks.

Their authorisations – and one by the US Congress – on the record only approved strikes against those '...organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11 2001, or harbored such organizations or persons...' Whether authorisation has been extended to other individuals is an open question, given that some presidential orders are classified. Moreover, how far one can stretch the concept of prevention is subject to considerable controversy.

As far as international law is concerned, the US draws justification from Article 51 of the UN Charter: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' The US has contended that September 11 2001 constituted an armed attack, and that hence the US is in an armed conflict with Al Qaeda, the Taliban, and associated forces.

Critics continue to hold that targeted killings are illegal. Some state that Article 51 is not applicable, as it only refers to armed attacks by states. Others contend that even if one accepts that the US is in an armed conflict, there still remains the question of the militants' status as combatants. Many international legal scholars agree that those the US is fighting are civilians.

Additional Protocol 1 of the Geneva Conventions states, '[c]ivilians shall enjoy...protection...unless and for such a time as they take direct part in hostilities'. Under this rule, whether targeting killing is legal depends on how narrowly one interprets 'take direct part' especially as many targeting killings occur when an individual is not carrying arms nor fighting.

In short, although far from gaining uncontested

approval, American drone strikes against al Qaeda and its hosts and collaborators are in line with US laws and can be interpreted as complying with international law.

COLLATERAL DAMAGE

All in all, rather robust oversight. But if the matrix is so carefully drawn, how can one explain that one third or more of those killed by drones are innocent civilians? Thus, David Kilcullen and Andrew Exum, writing in *The New York Times*, cite 'press reports' when they argue that fifty civilians are killed

civilians are hit? Militants systematically use their civilian status to their advantage, both to enhance their operations and to mobilise public opinion. Thus, they use ambulances to transport suicide bombers and bombs. They store ammunition in mosques, mount anti-aircraft guns on schools, set up command centres and sniper posts in private homes.

While steps should be taken to reduce collateral damage for both moral and prudential reasons, one must note that the main fault lies with militants, who refuse to separate themselves from the true civilian population.



EXTRA-JUDICIAL VERSUS PREVENTION

The term extra-judicial killings, used by critics of assassinations by drones and other means, draws on an image taken from the criminal justice system. Indeed, some suggest that we ought to deal with militants like criminals; that is, instead of killing them, we should haul them into a court of law.

Of course, in numerous situations, such capture could not be executed, or only at very great risk to our forces and to the local civilian population. Most importantly, in dealing with Al Qaeda and its ilk, security requires preventing attacks rather than prosecuting perpetrators after the event. This is particularly evident when we are concerned with those who may acquire weapons of mass destruction. It also holds for militants who are willing to commit suicide and hence cannot be tried, and who pay no attention to what might be done to them after their assault.

Finally, even those not bent on committing suicide attacks are often true believers who are prepared to proceed despite whatever punishments the legal system may throw at them. All these kinds of attacks are best prevented rather than vainly trying to prosecute after the fact and most cannot be effectively deterred by the criminal justice system.

I abhor violence above all else and strongly favour doing everything possible to avoid armed conflict. However, if fight we must, we had best realise that there are no clean, neat wars. And that drones cause less collateral damage than other instruments of war.

for every militant; a 98 percent casualty rate. Several other media reports refer to Peter Bergen and Katherine Tiedemann's drones database at the New America Foundation, which puts the casualty rate at one-third. Recently, Bergen reported to National Public Radio that their data showed that the casualty rate has declined to about 24 percent.

All these figures, however, are based not on research, which of course is very difficult to carry out under the circumstances, but on reports in the media. Thus, the media is using the media to confirm what the media reports. In contrast, US intelligence officials estimate that between Obama entering office and this March, drones killed between four hundred and five hundred militants and about twenty civilians, putting the civilian death rate at five percent or lower.

As someone who has engaged in combat, I firmly believe that killing any innocent civilian is deeply regrettable; but the question must be asked: whose fault is it that innocent

CHATHAM HOUSE IS HOLDING A MEETING:
INTERNATIONAL LAW AND THE USE OF DRONES
 ON OCTOBER 21. SPEAKERS: PROFESSOR MARY ELLEN
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 PROFESSOR MICHAEL N SCHMITT, DURHAM
 UNIVERSITY. IS THE USE OF DRONES ANY MORE - OR
 LESS - LIKELY TO CONFLICT WITH INTERNATIONAL
 LAW THAN OTHER MORE CONVENTIONAL USES OF
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