

“Reaching for the Remote: Drones and the United States’ Counter-terror Mission”

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Abstract

The use of Remotely Piloted Aircraft (RPAs or “Drones”) by the United States’ as an element within its “targeted killing” counter-terrorism effort has been both applauded as a low-cost and low-risk means of disrupting terror group operations and strongly condemned as illegal, immoral, and establishing a dangerous precedent. This paper will focus on two dimensions of lethal RPA operations: 1.) legal arguments, applying the principles of necessity, distinction, and proportionality; 2.) the effectiveness of the campaign as a counter-terror strategy, weighing costs and benefits of that campaign. These two dimensions raise questions about the status of enemy forces encountered, the shape and size of the battle-space, and the costs and benefits derived from specific actions. Studying RPA use in the United States’ counter-terror mission may be then used to consider the broader ramifications of the United States and its allies conducting a long, borderless war against al-Qaeda and associated groups.

Introduction

The United States has increasingly relied on the use of Remotely Piloted Aircraft (RPAs) to conduct lethal strikes in its on-going counter-terrorism campaign. RPAs (or “drones,” colloquially) are employed in a variety of missions, the majority of which are

un-armed reconnaissance missions where highly sensitive sensors and real-time high-definition video are used to provide battlefield intelligence. In fewer missions drones carry air-to-ground missiles, and among these, an even smaller number release those munitions.¹ The use of RPAs in areas of active hostilities, such as in Syria, Iraq, Yemen, when they are used by military forces against military targets, is uncontroversial. As the Stimson Center report on the United States' drone program concluded, RPAs do not represent a "strategic" shift in military technology; they use off-the-shelf sensors, targeting systems and air-to-ground weapons that were already in use by other airborne platforms. When these aircraft are deployed beyond areas of active hostilities to apply lethal force they become part of the controversial United States' "targeted killing" program. While so-called "high value targets" are frequently killed, so too are unfortunate civilians who happened to be in the wrong place at the wrong time.

This paper will briefly describe the role of unmanned aerial systems in combat, and then analyze the legal framework in which they operate. Then I will turn to interrogate the literature on the effectiveness of targeted killing operations, especially as it pertains to "decapitation" strikes and the potential for "blow-back" against using RPAs as part of a counter-terrorism campaign in areas outside active hostilities, focusing on Pakistan. I conclude that targeted killing can be effective in limited situations, but blow-back is a significant handicap and considerations of the precedents they set indicate greater caution and limited use. The United States' employment of drones to kill terrorists wherever they can be found lacks a definable and attainable strategic military objective. Ultimately, this new form of conflict, which is essentially borderless and endless, will require new legal

standards, just as the law of armed conflict was adapted over the past century to constrain the increasingly destructive power of contemporary warfare.

Unmanned Aircraft in United States Combat Operations

While President Obama was reducing US presence on the ground in Iraq and Afghanistan, a choice was made to increase the deployment of armed remotely piloted aircraft (RPAs), popularly referred to as “drones.” More precisely, drones are part of an Unmanned Aircraft System, consisting of the aircraft itself, and the control and monitoring systems associated with it, and the sensors and weapons it might carry. The history of such aircraft is almost as old as manned flight. The first successful flight of an unmanned, powered aircraft occurred on March 6, 1918 by a Curtiss-Sperry Aerial Torpedo, designed and built by Lawrence Sperry working with a grant from the U.S. Navy. After the First World War, Sperry would successfully tackle the problem of remote (or radio) control of an unmanned aircraft in flight. These early attempts were the beginning of unmanned aviation which, through years of dormancy and spurts of innovation and use, eventually led to the highly specialized and successful aircraft systems in use today.²

The term “drone” is often used imprecisely and carries with it a set of popular misconceptions, according to the Stimson Center’s 2014 Recommendation and Report of the Task Force on the United States Drone Policy. First, remotely piloted aircraft are simply that: aircraft that are controlled by a pilot who happens to be in a different location, often very far away from where the RPA is operating. They are not semi-autonomous machines that can select their own targets and make life-or-death decisions without human input. Secondly, this technology is characterized singularly as killing machines though a

vast majority of RPA missions are unarmed and are used for intelligence, surveillance, and reconnaissance (ISR); less than one percent of Defense Department RPA missions are armed. RPAs are often criticized as a cheap, safe, but less accurate alternative to manned aircraft missions; however, due to their ability to “loiter” over a target flying slowly, RPAs are actually more precise and carry better targeting sensors than do their manned counterparts. Finally, RPAs are neither “super-weapons” that present a radical departure from existing technology; nor are they “strategic” in the sense that they represent a new offensive front in US power projection—only a tiny fraction of the small percentage of RPA missions that are armed have been conducted outside the traditionally-defined battlespaces of Iraq and Afghanistan.

For “unmanned aerial systems,” a surprising number of people are involved in operating and maintaining them. A U.S. Air Force officer involved in their operation commented that, “the only thing that is unmanned with this system is a little teeny tiny piece of fiberglass that’s on the end of this very long, people-intensive spear.”³ A single Combat Air Patrol mission flown by the U.S. Air Force using their large MQ-1 “Predator” or MQ-9 “Reaper” requires 160-180 personnel to fly the twenty-four hour mission. Larger aircraft such as the Global Hawk may be supported by up to 500 personnel for longer missions. Aircraft assigned to U.S. Army aviation brigades will be staffed by nearly 130. These individuals maintain, prepare and fly the aircraft, as well as operate sensors, monitor real-time video, analyze data that is gathered, and make command decisions.⁴

Although there are many public misperceptions about “drones” that can be easily addressed, controversy regarding their relative effectiveness and attending costs is not so easily dismissed, as President Obama cautioned,

“to say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power—or risk abusing it.”⁵

In the next section I investigate the legal issues connected with targeted killing and the use of RPAs.

Law of Armed Conflict

International Humanitarian Law (IHL), or the Law of Armed Conflict addresses when, where, and how belligerents are to engage in organized violence. It is a special body of international law that aims to regulate behavior that would otherwise be illegal. Outside of war, killing people amounts to murder, and destroying property is a crime, but during active hostilities these actions are allowable, under certain circumstances, and must be carried out by authorized individuals against legitimate targets. These legal standards have been established through convention, such as The Hague and Geneva Conventions, by customary practice of belligerent states, and domestic legal restrictions, such as the United States Department of Defense Manual on the Law of War. These standards were established in part to protect those not participating in hostilities from the inevitable death and destruction that attend all forms of warfare. There are four broad principles that govern armed conflict: Necessity (sometimes known as Last Resort), Distinction, Proportionality, and avoidance of unnecessary suffering. The following examines RPA targeted killing operations along the necessity, distinction, and proportionality dimensions.⁶

Necessity for Combat Operations

For combat to be legal, it must be necessary. Necessity in the modern era is based on self-defense, which includes mutual self-defense among allies against aggression.

Article 2 of the United Nations Charter essentially outlaws wars of aggression, and places the burden on member states to resort to force only as a last resort:

“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

This must be read along Article 51 of the Charter, which preserves the right to self-defense in the face of aggressive war,

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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.”

Together, the intent of the UN Charter, along with other compacts that preceded and followed it, is to first exhaust all other remedies prior to the use of force, and that force should be used only to protect the territory and political independence of member states. To that end, states can use force only in self-defense, or in the defense of others.

The United States Government views its current counter-terror operations as part of an on-going armed conflict against al-Qaeda and affiliated organizations, a war that was

brought by al-Qaeda (and affiliated groups) when it was attacked on September 11, 2001. The United States also maintains that those same organizations and individual members of those groups continue to plan attacks on its citizens and interests globally and therefore has the right to defend itself against attack. For domestic legal purposes, the administration has cited the 2001 congressional Authorization for the Use of Military Force as domestic legal authority to carry out its counter-terror strategy. The U.S. government has also relied upon United Nations Security Council Resolutions, authorizing “all necessary measures” to “root out terrorism.”⁷ Finally, it is the position of the U.S. government that in executing this strategy, it complies with all applicable international laws. In a 2011 speech to the American Society of International Law (ASIL) Mr. Harold Hongju Koh, then serving as the U.S. Department of State Legal Adviser, stated, “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”⁸

Early in President Obama’s term, after the failed attempt of Umar Farouk Abdulmutallab to detonate an improvised explosive device aboard a trans-Atlantic flight on Christmas day 2009, the new president and his administration found themselves in the uncomfortable position of attempting to explain that the nation was safe and that their new law enforcement approach (in contrast to George Bush’s “Global War on Terror”) was effective. The consequence was that President Obama appeared to backtrack, saying on January 7, 2010.

“We are at war. We are at war against al-Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent

people, and that is plotting to strike us again. And we will do whatever it takes to defeat them.”⁹

In an address at the National Defense University in May of 2013, President Obama said that in our counterterror strategy the US should, “define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” In the same address, the president reminded his audience that,

“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.”¹⁰

The combined effect is to assume that the United States Government considers itself to be at war, and is waging that war fully within the bounds of International Humanitarian Law, by convention and common practice.

Others do not share this position. Former United Nations Special Rapporteur on Counter-terrorism and Human Rights, Ben Emmerson, has said that,

“as a matter of international law the U.S. drone campaign in Pakistan is therefore being conducted without the consent of the elected representatives of the people, or the legitimate Government of the State. It involves the use of force on the territory of another State without its consent and is therefore a violation of Pakistan's sovereignty.”¹¹

Mr. Emmerson’s legal argument hinges on permission given by a host nation to conduct lethal operations in its country. This has been countered by the United States government’s argument that unilateral action is allowable when a host nation is either

unwilling or unable to provide ascent and assistance with removing a threat to international peace and security. In confronting a widely dispersed threat, the United States believes it is justified to act whenever and wherever necessary.

Thus, geographically, the United States' war is essentially limitless. In a September 2011 speech John Brennan, serving then as the United States Homeland Security Advisor, addressed this revolutionary view of a battlefield,

“An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.¹²

In this statement, Brennan summarized the three critical legal issues that establish the United States' view of the military necessity of its targeted killing program: 1.) an armed conflict is ongoing, 2.) it is being conducted legally, even absent imminent threats that would otherwise trigger actions in self-defense, and 3.) the United States can act unilaterally where other governments are unwilling or unable to assist neutralizing a threat to peace and security. From the perspective of the United States, targeted killing, to include those conducted by RPAs, meet the principle of military necessity. These tactics

and weapons systems represent one element of a lawfully conducted war against a non-state aggressor who brought war upon the United States.

Necessity includes the consideration that a war should be won as quickly and efficiently as possible.¹³ “An interpretation of military necessity that only permitted consideration of the immediate situation could prolong the fighting and increase the overall suffering caused by the war.”¹⁴ Knowing the overall strategic military objective is vital to fully incorporating the law of armed conflict into one’s own military operations. It provides the logically necessary object to which action must be directed to win as quickly and efficiently as possible. Absent a clear strategic military objective toward which armed force can be applied, attaining a quick and decisive victory is not possible. A prolonged conflict, regardless of intensity, prolongs the attending suffering of civilians caught in the crossfire. The fifteen-year-old Authorization for the Use of Military Force (AUMF), passed by the United States Congress in 2001 in response to the September 11 terrorist attacks, does not stipulate a clear, obtainable military objective. “Using all force necessary...to prevent *any* acts of international terrorism against the United States”¹⁵ is an unrealistic military objective, or is at least insufficiently well defined to limit action. The use of RPAs to kill individual terrorists abroad does not itself constitute a strategy.

The Principle of Distinction

The principle of distinction (also known as “discrimination”) in the law of war is the long-held belief that non-military objects and those not participating in combat should not be subject to indiscriminate attack or subject to injury related to an attack on military objectives, within certain reasonable limitations. Care must be taken to avoid causing

damage to civilians and their property in the pursuit of military objectives. Defining who is and who is not a combatant, and what is a legitimate military objective is therefore important.

Article 52 of Protocol I Additional to the Geneva Convention defines a military object as: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” The U.S. Department of Defense Law of War Manual sets a two-part test for “military objects”:

“The definition of military objective insofar as objects are concerned may be divided into two parts, both of which must be met for the object to be considered a military objective: (1) that the object somehow makes an effective contribution to military action; and (2) attacking the object, in the circumstances, offers a definite military advantage.”¹⁶

The manual goes on to say that, for example, a house or business that would otherwise be a civilian object, but is presently being used to provide cover, or a vantage point, or to house communication, or command and control for enemy forces are also military objects, so long as it is providing a definite military advantage. Secondary, psychological effects on the enemy are allowed, but diminishing the morale of civilians is not a definite military advantage. However, “attacks that are otherwise lawful are not rendered unlawful if they happen to result in diminished civilian morale.”¹⁷

Defining “combatants” is somewhat more difficult. Traditionally, there are only two categories under consideration in the International Humanitarian Law, “combatants”

and “non-combatants.” So, a combatant is a member of the armed forces engaged in armed conflict between two states. Combatants wear uniforms, are organized into recognizable formations, carry their weapons openly and respond to and give orders using a discernable chain of command. Combatants have the right to directly engage in hostilities and are granted certain immunities in exchange for becoming legitimate targets themselves. For example, if captured, combatants can expect to be treated as a prisoner of war, not be tried and convicted of any domestic crimes allegedly perpetrated during hostilities, and can expect to be repatriated at the conclusion of hostilities. Combatants that are said to be “hors de combat” (set aside from fighting, by being wounded or captured) are immune from attack and are not allowed to engage in combat.

Conversely, the traditional view is that everyone else is a non-combatant. In some cases, as in Additional Protocol II to the Geneva Convention, combatant can also refer to “dissident armed forces and other organized armed groups.” The United States maintains that civilians who engage in hostilities are sometimes referred to as “illegal” or, “unprivileged,” combatants who may not be entitled to prisoner of war status, though are not immune from attack. This distinction is seldom explicitly recognized as a class of individual in law of war treaties.¹⁸

“‘Unlawful combatants’ or ‘unprivileged belligerents’ are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and POW status).”¹⁹

The specific nature and duration of a civilian's engagement in hostilities, which would deprive them of their protected status, is open to interpretation. According to some, one's potential to engage in hostilities does not render that person a combatant. The International Committee of the Red Cross has concluded that,

“While in some countries, entire segments of the population between certain ages may be drafted into the armed forces in the event of armed conflict, only those persons who are actually drafted, i.e., who are actually incorporated into the armed forces, can be considered combatants. Potential mobilization does not render the person concerned a combatant liable to attack.”

To that end, the U.S. Government's position is that while military-aged males may be combatants, “it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.”²⁰

Having defined what constitutes a legitimate target of military action, what requirements exist to put the principle of discrimination into practical effect? Article 57 of Protocol I Additional to the Geneva Convention states:

“1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”

Those engaged in combat must therefore take care to be sure that what they attack is a legitimate military target, and to spare from attack all non-combatants and civilian objects. This distinction is not always entirely easy to make in a “war on terror.”

“Terrorists” vs. “Combatants”

The United States does not consider members of terrorist groups engaging in hostilities to be lawful combatants, but rather “unprivileged belligerents.” Members of terror groups rarely wear uniforms, they do not usually have distinctive markings that can be seen from some distance; they do not carry arms in open, or are organized in recognizable formations with clear lines of authority. It is the position of the United States that non-state actors (such as al-Qaeda), can engage in armed conflict, and as such must be bound by international law.²¹ Terror group members conduct their activities clandestinely, and may be engaged in planning, training for, or conducting an act of terrorism only part-time. The secret, part-time nature of terrorism, along with the intermittent (or non-existent) lines of direct communication is what makes terror plots difficult to detect and disrupt, and is also what makes it difficult to clearly define the law of war status of the members and leaders of terror groups. For example, would religious indoctrination, or writing religious justifications for violence count as engaging in hostilities? Making the distinction between terrorists, civilians, and belligerents is problematic in the present

operational environment and usually requires intensive effort at intelligence gathering and analysis.

Status of U.S. Operators as Lawful Combatants

The clearest distinction is that uniformed members of the Armed Forces are lawful combatants. Civilian intelligence agency personnel in fully integrated units are also considered combatants. The realm of covert action is, as one might expect, somewhat murkier. By executive order, the United States does not conduct “political assassination.”²² It does, however, carry out lethal covert operations, which must be expressly authorized by the President of the United States in writing, and the appropriate individuals in congress must be notified. It is by these “lethal findings” that President Obama has authorized drone strikes abroad conducted by intelligence agencies, often in coordination with elements of the armed forces.²³ The status of civilian contractors has generated some controversy. Presently, civilian contractors are generally not allowed to release weapons from U.S. Government aircraft, but they may maintain, equip and operate UAS to include intelligence gathering, provided they are not part of a decision to use lethal force.²⁴

The operational environment of the United States’ targeted killing program makes clear distinctions between the traditional combatant and non-combatant classes difficult. That International Humanitarian Law was built—at least in part—to mitigate the effects of war felt by civilians not directly participating in hostilities, the inability to make uniform and predicable distinctions between these two classes makes the application of that specialized body of law problematic. Even when allowing for the not-universally accepted

class of “unprivileged belligerent,” the activity associated with contemporary terrorism makes this distinction possible only with considerable effort and information gathering.

Principle of proportionality

Proportionality means that the force used against a military objective must be proportional to the military advantage that could be gained by attacking it. In trying to achieve a military advantage, the least amount of lethal force should be used in order to minimize the risk to civilians and their property and to avoid causing excessive suffering even among combatants. The U.S. Department of Defense Manual on the Law of War stipulates:

“In war, incidental damage to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, applying the proportionality rule in conducting attacks does not require that no incidental damage result from attacks. Rather, this rule obliges persons to refrain from attacking where the expected harm incidental to such attacks would be excessive in relation to the military advantage anticipated to be gained.”²⁵

Commanders must be sure that the risk of harming civilians and civilian objects is not greater than the military advantage gained.

The U.S. Counter-insurgency (COIN) field manual, notes that, “sometimes doing nothing is the best reaction,” and “some of the best weapons for counterinsurgents do not shoot.”²⁶ Proportionality has a different character in irregular warfare; the COIN manual notes that, rather than a clear calculation of military benefit versus the risk of collateral damage,

“in a COIN environment, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.”²⁷

Therefore, proportionality is entirely dependent upon the threat posed by the military objective targeted. The greater the threat posed, and the greater advantage gained by its removal from the battlefield, the more incidental damage to civilians and civilian objects is allowed; care must still be taken to minimize collateral damage. Therefore, proportionality requires at least two separate evaluations: 1.) the military advantage to be gained, and 2.) the potential for damage done to non-military objects.

Collateral damage can be calculated in a number of ways. The death or injury of civilians not engaged in hostilities, the damage done to their homes, businesses, and community infrastructure are observable and their measurement is fairly unambiguous. However, as will be discussed below, damage done to diplomatic relationships, diminished reputations, can also be considered part of the “collateral damage” of a military tactic. Furthermore, studies have documented psychological trauma suffered by civilians not physically injured by RPA operations.²⁸ Though more difficult to calculate, it is sensible to include these costs when applying the principle of proportionality, and there is some evidence that some U.S. government policy makers do. The ethical application of power was discussed during John Brennan’s Senate hearing to confirm him as the Director, Central Intelligence Agency (CIA). The Chair of the Senate Select Committee on Intelligence (SSCI), Senator Dianne Feinstein opened his hearing by reporting that, “I also

intend to review proposals for legislation to ensure that drone strikes are carried out in a manner consistent with our values” (SSCI 2013). Brennan himself testified that many people “have a misunderstanding of what we do as a government, and the care that we take, and the agony that we go through to make sure that we do not have any collateral injuries or deaths.”²⁹

Further muddying the application of the principle of proportionality, terrorist organizations intentionally violate the laws that typically constrain state-actors in armed conflicts. For example, we know through reporting by United Nations Special Rapporteur Philip Alston that Taliban leaders have expressly stated their intention to violate the law of armed conflict by specifically targeting civilians and civilian objects. “A copy of the Taliban’s *Leyeha*, or book of rules, signed by the ‘highest leader of the Islamic Emirates of Afghanistan,’ was obtained by two journalists who met with a Taliban commander in late 2006.” The Taliban manual commanded, “It is forbidden to work as a teacher under the current puppet regime... If the teacher continues to instruct contrary to the principles of Islam, the district commander or a group leader must kill him.”³⁰ In this example, if the Taliban, as a matter of stated policy, *intentionally* kills civilians and destroys non-military objects, does that raise the risk of allowing them to remain on the battlefield, which therefore raises the military advantage gained by targeting and killing Taliban leaders and soldiers? Is it reasonable to use the expected future behavior of the enemy to weigh the advantages of conducting military action against them? That parties to a conflict have divergent views of what constitutes a reasonable application of force complicates the application of legal constraints to the conflict, to include the principle of proportionality.

The Special Problem of Signature Strikes

Lethal RPA missions are divided into two classes: targeted, and “signature.” In this section I will take a closer look at the problems raised by signature strikes. A so-called “signature strike” is one where the identities of the individuals targeted are not known ahead of time, but their behavior—observed over several days—fits a certain pattern that leads the observers to believe that they are involved in a terrorist organization.³¹ This could mean that they are seen with weapons, at a location known to be frequented by terrorists, or being observed to communicate with known terrorists. This targeting procedure was first made public in a *New York Times* article in 2008, which described the process as:

“Instead of having to confirm the identity of a suspected militant leader before attacking, this shift allowed American operators to strike convoys of vehicles that bear the characteristics of Qaeda or Taliban leaders on the run, for instance, so long as the risk of civilian casualties is judged to be low.”³²

The U.S. government has yet to officially acknowledge signature strikes as an element of its targeting process, but instead focuses its commentary on targeted strikes against individuals whose identity, whereabouts, and relationship with terrorist groups is known.

It was in two of these “signature strikes” in January 2015 that killed US born al-Qaeda propagandist Adam Gadahn, al-Qaeda operational commander Ahmad al Farouq, along with two hostages, American Warren Weinstein and Italian Giovanni Lo Porto. According to an April 2015 Stratfor analysis, the death of Farouq is a significant blow to al-Qaeda as he was an “upcoming young leader” and was selected to lead al-Qaeda’s planned expanding operation on the Indian subcontinent. Gadahn, on the other hand, while

not operationally significant, the Stratfor analysis noted that, “it is quite telling that As-Sahab media has been uncharacteristically silent in 2015. Perhaps Gadhafi was more important to As-Sahab’s media and propaganda campaigns than anticipated.”³³

That such an apparent success can be so tragically drowned out by the deaths of two innocent hostages deserves greater attention and serves to highlight the perception of collateral damage that has plagued U.S. counterterror drone operations. *Foreign Policy* analyst Micah Zenko concluded bluntly, “the United States simply does not know who it is killing,” in a counterterror policy that he characterized as “out of control.” He further assesses that,

“I’m not saying that these men [US citizens intentionally or unintentionally killed by drone strikes] are good guys. Except for Abdulrahman al-Awlaki, each of the other unknowingly targeted Americans might have been members of al-Qaeda or affiliated groups, or provided material support for external terrorist plots.

However, the policy that allegedly guides U.S. counterterrorism operations does not justify the killing of those unknown individuals who by chance are later determined to be terrorists.”

Signature strikes make it difficult for the United States to argue that its counterterrorism operations strictly adhere to international law and common practice. Signature strikes may violate two important principles in the law of armed conflict: 1.) the principle of discrimination: targeting military objectives, while protecting civilians and their property, and 2.) the principle of proportionality: using force that is proportional to the expected military advantage gained by an attack. Apart from problematizing the application of these principles, the signature strike tactic suffers from a lack of

transparency. Indeed this lack of transparency makes it even more difficult to accurately assess the effectiveness and ethical or legal status of the tactic.

With regard to discrimination, it seems unlikely that signature strikes, in which the precise identities of the individuals targeted is not known, can be said to meet the test that commanders “do everything feasible” to be sure that they are indeed attacking military objectives. That uncertainty would also make it difficult to avoid or at least minimize the chance of killing or wounding civilians or damaging their property. Applying the principle of proportionality to signature strikes is problematic: if the identity of the individuals targeted is not known, but is based instead on a pattern of behavior, then it may be very difficult to make the appropriate calculation. Determining the military advantage of attacking an individual, or group involved in an activity that appears hostile may not be possible from aerial surveillance. Signature strikes appear to risk causing excessive destruction that is not proportional to the military advantage gained, and may in fact be counter-productive. As noted for the COIN environment, which can be applied here, “An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”³⁴

One of the most consistent complaints about the United States’ drone campaign is that it is difficult to reliably assess the program without more detailed information from the U.S. government. Additional information on how the United States creates target lists, the measures it takes to minimize collateral damage, and a summary of casualties is frequently called for. These were among the Stimson Center’s recommendations found after its year-long study of the program.³⁵ Secrecy is necessary in carrying out military operations. However, greater transparency will serve to fill an information vacuum currently occupied

by terror-group propagandists who adroitly use collateral damage caused by drones to recruit, and may help bolster support for drone operations among allies of the United States. Of course, transparency would also provide important information to legitimate targets, which they could use to avoid becoming a casualty. This is a natural limitation of a tactic that seeks to minimize risk to U.S. personnel while at the same time tries to curtail collateral damage that inevitably comes from air strikes. The unconventional nature of the conflict in which the United States finds itself will require creative solutions to the problem of transparency.

The White House tried to dispel charges that the U.S. government drone program is excessively secretive by issuing two statements in early July 2016. The first was an Executive Order that instructs the executive branch to, “continue to take certain measures in present and future operations”³⁶ to comply with international law and minimize the risk to civilians, and also orders the Director of National Intelligence (DNI) to publish an annual report on strikes undertaken “Against Terrorist Targets Outside Areas of Active Hostilities.” The DNI, in accordance with the Executive Order released a summary, (barely more than two pages) which tabulated the number of strikes, and the number of dead combatants and non-combatants. It also laid out possible reasons for the discrepancy between U.S. government casualty estimates and those of non-governmental organizations. The DNI assessed that generally its estimates may be more accurate because it can draw on a wide range of sources, to include sensitive intelligence sources, such as human assets in the field, signals and geospatial intelligence. “This combination of sources is unique and can provide insights that are likely unavailable to non-governmental organizations.”³⁷ This

hardly does much work to allay concerns that the U.S. government is not being as forthright as it might need to be.

Not all drone strikes are created equal. From their uncontroversial use in areas of active hostilities, to targeted strikes outside “hot” battlefields, to the so-called “signature” strike, where the precise identity of those targeted is not known, they become increasingly controversial. Signature strikes bear some unique challenges that should prompt careful scrutiny of the practice.

Costs and Benefits of the Use of Drones

As President Obama cautioned that just because something is legal, does not necessarily mean that it is prudent, the present question deserves examination along legal as well as prudential avenues. Having taken a close look at the legal framework, and found that applying existing law of armed conflict to terrorist organizations and an essentially boundless war against them is problematic, I turn attention to measuring the effectiveness of RPAs as a counter-terrorism tool. I will first look at the current debate on the overall effectiveness of targeted killing programs, then turn to the effect such programs could have on public opinion among populations where they are most actively prosecuted.

Effectiveness

Hunting and killing key leaders in terrorist organizations and insurgencies has been an important element of U.S. counter-terror and counter-insurgency operations. The effectiveness of these “decapitating blows” is not a settled issue. Robert Pape argues that these sorts of campaigns are rarely successful.³⁸ Criticizing the limited scope and strict

definitions of “success” found in previous studies of “decapitation” effectiveness, Johnston, concludes that that leadership decapitation, “1.) increases the chances of war termination; 2.) increases the probability of government victory; 3.) reduces the intensity of militant violence; and 4.) reduces the frequency of insurgent attacks.”³⁹ These “High Value Targets” (HVTs) are routinely killed through a variety of means and working through a target deck can provide convenient metrics and a sense of progress, but these operations do not always lead to strategic gains over the long run. Matt Frankel concluded in 2011,

“Too often, HVT campaigns are plagued by poor intelligence, cause unnecessary collateral damage, spur retaliatory attacks, and in many cases, yield little to no positive effects on the insurgent or terrorist group being targeted.”⁴⁰

Furthermore, these HVT campaigns are most successful when carried out by local forces, and least successful when led by occupying or colonial powers; they are best against highly centralized organization, and when they are but one part of a much larger strategy.⁴¹

Jenna Jordan concluded in part, that, “Ideological organizations are most likely to experience a cessation of activity following the removal of leader, while religious organizations are highly resistant to leadership decapitation.”⁴²

In 2012, Stephanie Carvin argued that measuring success in targeted killing as a counter-terror tactic is currently not possible due to differing definitions of success, lack of reliable data, and widely divergent cases in which targeted killing campaigns are conducted. She concludes that for these reasons empirical studies have failed to produce consistent results and a confident judgment; rather than measure effectiveness, there are sufficient grounds to have a “normative debate over whether such policies are

appropriate.”⁴³ Carvin suggests that absent clear empirical evidence on effectiveness as a counter-terror tool, researchers and policy-makers should focus on gathering data that could contribute to such an empirical measure, while presently focusing on the ethical dimension of the issue.

Agreeing in part, but coming to a different conclusion, Javier Jordan argues that empirical studies of the effectiveness of HVT campaigns are very difficult to generalize from specific cases, which explains the variance in measuring effectiveness. Rather, these campaigns should be studied on a case-by-case basis. He found that because al-Qaeda in the Afghanistan/Pakistan region relies on three sets of elements, namely 1.) a hierarchical command structure, 2.) individuals with qualified (or specialized) skill sets, and 3.) material resources, specifically money, sanctuary, training facilities, and weapons, the United States’ RPA led targeted killing program has been effective at reducing al-Qaeda’s overall effectiveness.⁴⁴ Johnson and Sarbahi found that while available data do not allow for an empirical analysis of whether drone strikes result in increase terror group recruitment in Pakistan, they did find that the targeted killing campaign changed overall terror activity there. They found that drone strikes in Pakistan reduces the level of terrorist violence, reduces the lethality of those attacks, but these effects may not persist beyond five weeks. They also found that killing HVTs does not result in increased violence (as was hypothesized elsewhere).⁴⁵ Together, this implies that though targeted killing by RPAs may be effective, those effects are mostly tactical, rather than strategic; i.e. they may effectively reduce terrorist violence locally, for a limited amount of time, but drone strikes probably do not have much effect on the larger strategic goal of eliminating terrorist violence.

In a recently concluded study, Lehrke and Schomaker compared three broad approaches to counter-terror operations and measured their effectiveness against terrorist organizations at a variety of operational levels. They found that though drone strikes appear to be counter-productive, capturing terror group leaders (sometimes known as “rendition”) was more effective. Both of these approaches were vastly less effective at reducing incidents of terrorism in the West than increasing defenses, or hardening potential targets of terrorism.⁴⁶ This implies that a mixed approach is best. Just as there is no single “cause” for radicalization or the decision to carry out violence in the name of a particular movement, there is no single best approach, though some are better than others. Lehrke and Schomaker conclude that “an integrated strategy is needed, one that targets each level of terrorist movements in a different way so as to be effective along several dimensions while limiting backlash.”⁴⁷

Effect on Foreign Public Opinion

Retired U.S. Army General Stanley McChrystal, former commander, U.S. Joint Special Operations Command, identified a critical problem with the United States’ targeted killing program: its potential negative effects on public opinion.

“What scares me about drone strikes is how they are perceived around the world. The resentment created by American use of unmanned strikes...is much greater than the average American appreciates. They are hated on a visceral level, even by people who’ve never seen one or seen the effects of one.”

McChrystal concluded that the program exacerbates a “perception of American arrogance that says, ‘Well we can fly where we want, we can shoot where we want, because we

can.”⁴⁸ There are clear long-term consequences for this element of the US counterterrorism program. Stephen Walt (2014) observed,

“Every time the United States goes and pummels another Muslim country—or sends a drone to conduct a ‘signature strike’—it reinforces the *jihadis*’ claim that the West has an insatiable desire to dominate the Arab and Islamic world and no respect for Muslim life. It doesn't matter if U.S. leaders have the best of intentions, if they genuinely want to help these societies, or if they are responding to a legitimate threat; the crude message that drones, cruise missiles, and targeted killings send is rather different.”

Some of the resentment felt in Pakistan against the United States and its drone program may stem from 1.) the secretive nature of the program itself and 2.) the manner in which the Pakistani government responds to the program. Secrecy allows interlopers to fill in details that support their own narrative as needed. Perhaps more importantly, the Pakistani government has never officially accepted the program as legitimate, though it is now widely known that it has cooperated with the United States government to conduct the drone strike program within its borders. Former Pakistani Ambassador to the United States Sherry Rehman noted, “the U.S. drone program in Pakistan has always been criticized in Pakistan...whatever agreements General Musharraf [President of Pakistan 2001-2008] made with the Americans on flight boxes and bases, there was no parliamentary or public buy-in for that.”⁴⁹ In 2010, the online website “Wikileaks” published classified U.S. diplomatic cables that appeared to prove that high-ranking members of the Pakistani government were privately agreeing to (even encouraging) the United States’ drone program, while publicly protesting it for domestic political reasons.

Former Pakistani Prime Minister Yousaf Raza Gilani was quoted, “I don’t care if they do it [drone strikes] as long as they get the right people. We’ll protest in the National Assembly and then ignore it.”⁵⁰

Saba Imtiaz argues that “drones are not the sole cause of anti-US sentiment in the country” and that opposition to the United States has existed for decades prior to the first armed drone mission in Pakistan. “In fact,” she explains, “drones are not the core problem in US-Pakistan relations, but rather a symbol, for many, of what is wrong with American interventionism in general.” Imtiaz quotes Pakistani Ambassador Rehman, who believes that drone strikes in Pakistan have become the “foreign policy face” of the United States, and were delegitimizing “much of the good the US government does in Pakistan.”⁵¹ Thus, the “cause” of anti-U.S. sentiment in Pakistan is very likely complex and cannot be reduced to one or two constituent elements. This was among the conclusions of Johnson and Sarbahi, “At the least, our findings suggest that any link between increased support for counterinsurgent or increased anti-Americanism, on the one hand, and terrorist attacks (or recruitment), on the other, is more complicated...public anger at counterterrorist actions may not necessarily translate into the collective action necessary...that results in an escalation of terrorist attacks.”⁵²

Some have suggested that the “blow-back” problem is a myth—that public opinion polling in aggregate does not account for widely divergent views of the drone program, and anecdotal stories on their own are not convincing. When polling is disaggregated by region in Pakistan, among people who live in places where they are conducted most, drones strikes receive the greatest support, where strikes are not conducted at all, support is lowest. Interviews conducted where most drone strikes occur have found that the

population generally believes drones are accurate, effective, and preferable to large-scale military operations.⁵³ In Peshawar, for example, a movement comprising six political parties, rights groups, and business leaders, released a declaration that—in part—expressed support for drone attacks:

“If the people of the war-affected areas are satisfied with any counter militancy strategy, it is the Drone attacks which they support the most. According to the people of Waziristan, Drones have never killed civilians...A component of the Pakistani media, some retired generals, a few journalists/analysts, and pro-Taliban political parties never tire in their baseless propaganda against Drone attacks.”⁵⁴

Taken together, at least this suggests that the relationship between United States’ drone strikes and Pakistani public opinion is highly complex.

Part of the problem with assessing efficacy of, and any negative impacts associated with, the United States’ drone program is a scarcity of official data on the numbers of combatant and non-combatant casualties. A small number of private organizations gather data using open-source media reporting. The Long War Journal and the Bureau of Investigative Journalism, Pakistan Body Count, for example scan local news reporting in Pakistan to count the number of strikes conducted, and the numbers of killed and wounded, both targeted al-Qaeda and Taliban militants and civilian non-combatants. Daniel Byman highlights the difficulty in arriving at an accurate estimate of casualties in the secretive program.

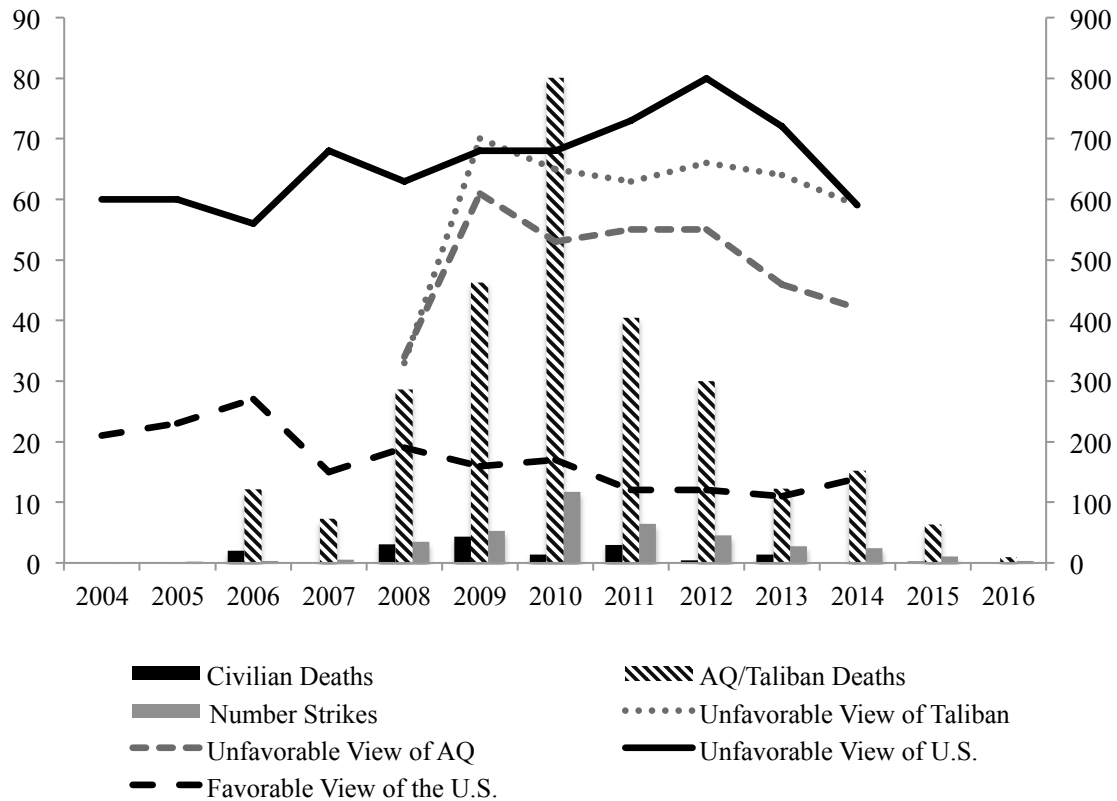
“Zeeshan-ul-hassan Usmani, who runs Pakistan Body Count, says that ‘neither [the United States] nor Pakistan releases any detailed information about the victims . . .

so [although the United States] likes to call everybody Taliban, I call everybody civilians.”⁵⁵

Clearly neither approach contributes to accuracy. According to the Long War Journal, since the program began in 2004, 2,799 al-Qaeda and Taliban militants and 158 civilians have been killed in 392 U.S. drone strikes in Pakistan.⁵⁶ The Bureau of Investigative Journalism presents a possible range of casualties. By their estimate, in 424 strikes in Pakistan between 424-966 civilians have been killed out of a total of 2,499-4,001 dead.⁵⁷

Overlaying these data with public opinion polling conducted by the Pew Research Center, we can gain a rough understanding of the effect of drone strikes on Pakistani’s opinion of the United States and of the Taliban and al-Qaeda (Figure 1). Generally, Pakistanis have had a persistent negative view of the United States; in the survey years presented by Pew (between 2004 and 2014), on average sixty-six percent of respondents had a negative view of the United States, while only seventeen percent had a positive impression. The trend has been negative, with eighty percent of Pakistanis surveyed reporting a negative view of the United States in 2012, but improving significantly since then, in 2014 sixty percent held negative views of the United States. Similarly, twenty-seven percent of Pakistanis surveyed had a positive view of the United States in 2006, but that number has steadily, and marginally decreased since then, with just fourteen percent reporting a positive view in 2014. Since 2009 a majority of Pakistanis have negative views of both the Taliban and al-Qaeda. This number rose dramatically between 2008 and 2009. In 2008 just thirty-three and thirty-four percent of respondents held negative views of the Taliban and al-Qaeda, respectively; that figure jumped to seventy and sixty-one percent respectively in 2009.

Figure 1: Drone strikes, casualties and public opinion in Pakistan, by year (opinion percentages left vertical axis, number of strikes and casualties right vertical axis)



Drone Strike Data from the Long War Journal; Opinion polling by Pew Research Center

This suggests a weak relationship may exist between drone strikes, casualties and Pakistani public opinion of the United States and al-Qaeda. This relationship is also somewhat mixed: as strikes increase, opinion of the United States falls; but as the number of militants killed rises, opinion improves, albeit very slightly. One should also note that perhaps the effect of reducing the number of strikes conducted on reducing negative opinion is somewhat lagged. This suggests that while the ends are approved of, the means

to that end are not. There are a few problems with using this analysis to understand the effects of drone strikes on “radicalization” of local populations where drones operate. First, a representative Pakistani surveyed by Pew for the purposes of gauging public opinion on a range of subjects may not serve as a good proxy for the population most susceptible to the recruitment efforts of al-Qaeda, the Taliban or groups like *Daesh* (the so-called Islamic State, or ISIS/ISIL) in Pakistan or Afghanistan. Secondly, it cannot account for the manner in which drone strikes are used by terrorist groups in their recruitment propaganda. That said, if the argument is that drone strikes are souring the opinion of masses of otherwise uninvolved people in the areas where they occur, then we can see that at least there is a weak relationship between drone strikes and public opinion about the United States and its adversaries.

The use of RPAs to kill terrorists outside traditional battlefields may not, on its own, account for anti-American sentiment among the population where they operate, but they likely reinforce already existing negative perceptions of United States’ hegemony and its ability to project power globally unilaterally, seemingly without consequences. The other public-perception problem with RPA targeted killing operations is that the American public believes that reliance on this particular tactic is essentially costless: a cheap, reliable alternative to more labor-intensive military operations.⁵⁸ In fact, we have seen that there are reputational and diplomatic costs associated with using drones and there is evidence that the American public is attuned to such a cost and generally wishes to minimize those costs where possible.⁵⁹

Conclusion: A Global War Without End?

An armed unmanned aircraft is nothing more than the continuation of a long process of separating combatants from one another, reducing the mortal risk borne by engaging in hostilities. As hand-to-hand combat gave way to the longbow, which gave way to the smoothbore firearm, which was replaced by rifled weapons and artillery pieces, rockets, guided missiles, and bomber aircraft—an armed drone extends the lethal reach of the individual at its controls. It is difficult to argue that drones are less precise, or represent a greater violation of sovereignty, or would enrage people more than a full-scale invasion or the regular insertion of special operations teams. The concept of using an unmanned aircraft to kill one's enemies is not controversial. What is in question is: who can be killed, under what conditions? Unfortunately there isn't a single, definitive, authoritative answer to that question.

We have seen that competent and convincing legal arguments can be made for and against targeted killing; I argue that is because the operational environment in which these unmanned missions are conducted makes a clear application of existing law problematic. The behavior of terror groups' operatives makes it difficult to clearly distinguish combatants from non-combatants and forces the contemplation of a third category of unprivileged belligerents. We have also seen that absent a clear strategic military objective, two problems arise: 1.) reliance on tactical advantage alone may not achieve the goal of winning a conflict as quickly and efficiently as possible, which may thereby extend the suffering of a civilian population proximate to the fighting, 2.) it is difficult to determine with accuracy the military advantage of prosecuting an individual target, which problematizes the application of the principle of proportionality. Thus, evaluating the United States' drone program using legal argument alone is probably insufficient.

Furthermore, since the United States appears to lack a clearly defined, and attainable strategic objective, measuring effectiveness is also difficult. Though targeted killing may provide short-term tactical success, long-term strategic success against a dispersed, ideologically driven foe like al-Qaeda (and associated groups) is not assured, and may be out of reach. Even if successful at reducing terrorist violence, drone strikes are very likely reinforcing anti-American sentiment abroad, undercutting the United States' wider diplomatic efforts at advancing its interests.

Perhaps the ultimate question is whether or not it is prudent to conduct an essentially endless and boundless war in aid of protecting people from terrorist violence. Have drones allowed the United States to effectively de-territorialize armed conflict? If enemy combatants (legal or otherwise) can be found anywhere outside areas of active hostilities, and if these combatants can be killed wherever they are found, has war become geographically boundless? Furthermore, is the United States government determined to conduct a virtually endless war to prevent “any future acts of international terrorism against the United State?”⁶⁰ Current international law and domestic authorities (provided by the United States) are insufficient to preclude abuse in the future. It is likely that warfighting has fundamentally changed in nature such that states and non-state entities engage in armed conflict; conflicts will be generally longer in duration, lower in intensity, and less bound by international frontiers.

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