

Lawful Use of Combat Drones

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Combat drones are battlefield weapons. They fire missiles or drop bombs capable of inflicting very serious damage. Drones are not lawful for use outside combat zones. Outside such zones, police are the proper law enforcement agents and police are generally required to warn before using lethal force. Restricting drones to the battlefield is the most important single rule governing their use. Yet, the United States is failing to follow it more often than not. At the very time we are trying to win hearts and minds to respect the rule of law, we are ourselves failing to respect a very basic rule: remote weapons systems belong on the battlefield.¹

I. A Lawful Battlefield Weapon

The United States first used weaponized drones during the combat in Afghanistan that began on October 7, 2001. We requested permission from Uzbekistan, which was then hosting the U.S. airbase where drones were kept.² We also used combat drones in the battles with Iraq's armed forces in the effort to topple Saddam Hussein's government that began in March 2003.³ We are still using drones lawfully in the on-going combat in Afghanistan. Drones spare the lives of pilots, since the unmanned aerial vehicle is flown from a site far from the attack zone. If a drone is shot down, there is no loss of human life. Moreover, on the battlefield drones can be more protective of civilian lives than high aerial bombing or long-range artillery. Their cameras can pick up details about the presence of civilians. Drones can fly low and target more precisely using this

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¹ This testimony draws on the following publications by the author: *The Choice of Law Against Terrorism*, J. NAT'L SEC. LAW (forthcoming 2010); *Unlawful Killing with Combat Drones*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed. Hart, forthcoming) available at <http://ssrn.com/abstract=1501144>; *Combatants and the Combat Zone*, 43 U. OF RICH. L. REV. 845 (2009); *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COL. J. TRANS. LAW 435 (2005); *Ad Hoc War*, in KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (2004).

² Eric Schmitt, *Threats and Responses: The Battlefield; U.S. Would Use Drones to Attack Iraqi Targets*, <http://www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-dro...>

³ Brian M. Carney, *Air Combat by Remote Control*, May 12, 2008, <http://online.wsj.com/article/SB121055519404984109.html#printMode>

information. General McChrystal has wisely insisted on zero-tolerance for civilian deaths in Afghanistan. The use of drones can help us achieve that.

What drones cannot do is comply with police rules for the use of lethal force away from the battlefield. In law enforcement it must be possible to warn before using lethal force, in war-fighting this is not necessary, making the use of bombs and missiles lawful.

The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (*UN Basic Principles*) set out the international legal standard for the use of force by police:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁴

The United States has failed to follow these rules by using combat drones in places where no actual armed conflict was occurring or where the U.S. was not involved in the armed conflict.

On November 3, 2002, the CIA used a drone to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen. At that time, the Air Force controlled the entire drone fleet, but the Air Force rightly raised concerns about the legality of attacking in a place where there was no armed conflict. CIA agents based in Djibouti carried out the killing. All six passengers in the vehicle were killed, including an American.⁵ In January 2003, the United Nations Commission on Human Rights received a report on the Yemen strike from its special rapporteur on extrajudicial, summary, or arbitrary killing. The rapporteur concluded that the strike constituted “a clear case of extrajudicial killing.”⁶

Apparently, Yemen gave tacit consent for the strike. States cannot, however, give consent to a right they do not have. States may not use military force against individuals on their territory when law enforcement measures are appropriate. At the time of the strike, Yemen was not using military force anywhere on its territory. More recently, Yemen has been using military force to suppress militants in two parts of the country. The U.S.’s on-going drone use, however, has not been part of those campaigns.

⁴ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2ohchr.org/english/law/firearms.htm>.

⁵ Doyle McManus, *A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time*, L.A. TIMES, Jan. 11, 2003, at A1.

⁶ UN Doc. E/CN.4/003/3, paras. 37 – 39.

The United States has also used combat drones in Somalia probably starting in late 2006 during the Ethiopian invasion when the U.S. assisted Ethiopia in its attempt to install a new government in that volatile country. Ethiopia's effort had some support from the UN and the African Union. To the extent that the U.S. was assisting Ethiopia, our actions had some justification. It is clear, however, that the U.S. has used drone strikes independently of the attempt to restore order in Somalia. The U.S. has continued to target and kill individuals in Somalia following Ethiopia's pullout from the country.⁷

The U.S. use of drones in Pakistan has similar problems to the uses in Yemen and Somalia. Where military force *is* warranted to address internal violence, governments have widely resorted to the practice of inviting in another state to assist. This is the legal justification the U.S. cites for its use of military force today in Afghanistan and Iraq. Yet, the U.S. cannot point to invitations from Pakistan for most of its drone attacks. Indeed, for much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict. Therefore, even express consent by Pakistan would not justify their use.

The United States has been carrying out drone attacks in Pakistan since 2004. Pakistani authorities only began to use major military force to suppress militancy in May 2009, in Buner Province. Some U.S. drone strikes have been coordinated with Islamabad's efforts, but some have not. Some strikes have apparently even targeted groups allied with Islamabad.

II. The Battlefield Defined

The Bush administration justified the 2002 Yemen strike and others as justified under the law of armed conflict in the "Global War on Terror."⁸ The current State Department Legal Adviser, Harold Koh, has rejected the term "Global War on Terror", preferring to base our actions on the view that the U.S. is in an "armed conflict with al-Qaeda, the Taliban and associated forces."⁹ Under the new label, the U.S. is carrying out many of the same actions as the Bush administration under the old one: using lethal force without warning, far from any actual battlefield.

Armed conflict, however, is a real thing. The United States is currently engaged in an armed conflict in Afghanistan. The United States has tens of thousands of highly trained troops fighting battles with a well-organized opponent that is able to hold territory. The

⁷ S. Bloomfield, *Somalia: The World's Forgotten Catastrophe*, THE INDEPENDENT, 9 February 2008, available at <http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html> (last visited June 8, 2009); See also, CBS NEWS, *U.S. Missile Strike Hits Town in Somalia*, 3 March 2008, available at <http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml> (last visited June 8, 2009); SPIEGEL ONLINE, *A Strike Against Al-Qaeda's Hornet's Nest*, 1 September 2007, available at <http://www.spiegel.de/international/0,1518,458597,00.html> (last visited June 8, 2009).

⁸ Remarks of National Security Adviser Condoleezza Rice, FOX NEWS Sunday with Tony Snow (*Fox News* v. broadcast, Nov. 10, 2002) transcript available at 2002 WL 7898884.

⁹ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, www.state.gov.

situation in Afghanistan today conforms to the definition of armed conflict in international law. The International Law Association's Committee on the Use of Force issued a report in 2008 confirming the basic characteristics of all armed conflict: 1.) the presence of organized armed groups that are 2.) engaged in intense inter-group fighting.¹⁰ The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat or conflict zones. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict. Terrorism is crime. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Morocco, Saudi Arabia, Spain, the United Kingdom, Yemen and elsewhere. Still, these countries do not consider themselves in a war with al Qaeda. In the words of a leading expert on the law of armed conflict, the British Judge on the International Court of Justice, Sir Christopher Greenwood:

In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.¹¹

To label terrorists "enemy combatants" lifts them out of the status of *criminal* to that of *combatant*, the same category as America's own troops on the battlefield. This move to label terrorists combatants is contrary to strong historic trends. From earliest times, governments have struggled to prevent their enemies from approaching a status of equality. Even governments on the verge of collapse due to the pressure of a rebel advance have vehemently denied that the violence inflicted by their enemies was anything but criminal violence. Governments fear the psychological and legal advantages to opponents of calling them "combatants" and their struggle a "war."

President Ronald Reagan strongly opposed labeling terrorists combatants. He said that to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements ... would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."¹²

The United Kingdom and other allies take the same position as President Reagan: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its

¹⁰ International Law Association, Initial Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law (Aug. 2008, Rio de Janeiro) www.ilahq.org. See also, Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY LAW (2008).

¹¹ Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

¹² Ronald Reagan, Letter of Transmittal, The White House, January 29, 1987, reprinted in 81 AM. J. INT'L L. 910 (1987); but see response, Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987).

context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”¹³

In the United States and other countries plagued by al Qaeda, institutions are functioning normally. No one has declared martial law. The International Committee of the Red Cross is not active. Criminal trials of suspected terrorists are being held in regular criminal courts. The police use lethal force only in situations of necessity. The U.S.’s actions today are generally consistent with its long-term policy of separating acts of terrorism from armed conflict—except when it comes to drones.

III. Battlefield Restraints

Even when the U.S. is using drones at the request of Pakistan in battles it is waging, we are failing to follow important battlefield rules. The U.S. must respect the principles of necessity, proportionality and humanity in carrying out drone attacks. “Necessity” refers to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.¹⁴ “Proportionality” prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.”¹⁵ These limitations on permissible force extend to both the quantity of force used and the geographic scope of its use.

Far from suppressing militancy in Pakistan, drone attacks are fueling the interest in fighting against the United States. This impact makes the use of drones difficult to justify under the terms of military necessity. Most serious of all, perhaps, is the disproportionate impact of drone attacks. A principle that provides context for all decisions in armed conflict is the principle of humanity. The principle of humanity supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. According to the International Committee of the Red Cross, the principles of necessity and humanity are particularly important in situations such as Pakistan:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and

¹³ Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 *LAW & INEQ.* 195, (2004), citing Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Protocol I.

¹⁴ W. Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes,* 9 *EUR. J. INT’L L.* 86, 94-95 (1998).

¹⁵ Additional Protocol I, Art. 51(5); see also Judith Gardam, *Proportionality and Force in International Law,* 87 *AM. J. INT’L L.* 391 (1993).

area in which its military operations are conducted, may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.¹⁶

Another issue in drone use is the fact that strikes are carried out in Pakistan by the CIA and civilian contractors. Only members of the United States armed forces have the combatant's privilege to use lethal force without facing prosecution. CIA operatives are not trained in the law of armed conflict.¹⁷ They are not bound by the Uniform Code of Military Justice to respect the laws and customs of war. They are not subject to the military chain of command. This fact became abundantly clear during the revelation of U.S. use of harsh interrogation tactics. Given the negative impact of that unlawful conduct on America's standing in the world and our ability to promote the rule of law, it is difficult to fathom why the Obama administration is using the CIA to carry out drone attacks, let alone civilian contractors.

Conclusion

The use of military force in counter-terrorism operations has been counter-productive. Military force is a blunt instrument. Inevitably unintended victims are the result of almost any military action. Drone attacks in Pakistan have resulted in large numbers of deaths and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism expert, David Kilcullen, said drones in Pakistan are giving "rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks."¹⁸ Another expert told the *New York Times*, "The more the drone campaign works, the more it fails—as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty."¹⁹ A National Public Radio Report on April 26, 2010, pointed out that al Qaeda is losing support in the Muslim world because of its violent, lawless tactics.²⁰ We can help eliminate the last of that support by distinguishing ourselves through commitment to the rule of law, especially by strict compliance with the rules governing lethal force.

¹⁶ International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 27 (May 2009), at 80-81.

¹⁷ William C. Banks, expert on U.S. national security law, e-mail to the author, Sept. 28, 2009 (on-file with the author).

¹⁸ Hearing of the House Armed Services Committee, *Effective Counterinsurgency: the Future of the U.S. Pakistan Military Partnership*, April 23, 2009 (Testimony of David Kilcullen).

¹⁹ Jan. 23, 2010, p. A3

²⁰ Dina Temple-Raston, *As Support Fades, Al-Qaida Shows Signs of Decline*, NPR, April 26, 2010, www.npr.org.