

Drone Warfare: Defending the Indefensible

Written by Joseph A. Camilleri

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JOSEPH A. CAMILLERI, JUL 20 2013

In an important speech delivered in May 2013, President Barack defended drone warfare by invoking, at least implicitly, the just war doctrine.[1] This much awaited explanation rested on two pillars: that the United States is formally at war, and that the use of drone technology is the most effective and least destructive way of achieving the military objective.

Why did the US president feel compelled to offer this long awaited, lengthy, though less than convincing explanation of US policy? Put simply, because the use of drones was now the subject of increasing contention internationally and to a lesser extent within the United States itself. During Obama's presidency the use of drones had become the favoured response of the US military and intelligence establishment to the terrorist threat, hence the need to offer something approaching an intellectually cogent rationale for this strategic option.

The sustained and expanding application of drone technology was now described by liberal critics of the Obama administration as 'more extreme and conservative than that pursued by George W. Bush.' [2] Several factors had contributed to the growing unease. Notable in this regard were the responses of the President's nominee as the next CIA director, John Brennan, when appearing before the Senate Intelligence Committee for his confirmation hearing in February 2013. Apart from evading almost every question dealing with the 'drone' program, he did little to reassure the Senate that it would be fully apprised of the Administration's approach to drone use, let alone the specifics of its targeting criteria or decision-making processes.[3]

Rise in Drone Strikes and Casualties

The Central Intelligence Agency (CIA) has been flying unarmed drones over Afghanistan since 2000. Armed unmanned aerial vehicles (UAVs), commonly known as drones, were actually used during the air war against the Taliban in late 2001, but it was not until February 2002 that the CIA first used a drone for a pure CIA 'kill operation'. According to one estimate, the US inventory in 2002 comprised only 167 drones with only a few unmanned systems in the air, but by 2010, the number of aerial units had risen to over 7,000,[4] comprising an array of vehicles of different size and capability with deployments spread well beyond Afghanistan and Pakistan.[5] The ensuing number of casualties has been difficult to calculate, but the two most reliable assessments are those provided by the Bureau of Investigative Journalism and the New America Foundation. The former estimates that between 2004 and early July 2013 the United States conducted 371 drone strikes in Pakistan, of which 319 occurred during the Obama presidency. The total number reported killed in these strikes is estimated at between 2,564 and 3,567, of which civilians accounted for between 411 and 890 deaths. An additional 1,179 to 1,485 were reported injured.[6] The data sets compiled by the New American Foundation are remarkably similar, indicating that by mid-April 2013 307 strikes had been authorised in Pakistan – six times more than during the Bush presidency – resulting in some 2,003 to 3,321 fatal casualties.[7]

The other major development since 2009 has been the significant expansion of drone strikes in Yemen. According to the Bureau of Investigative Journalism, US covert action in Yemen during the period 2002–2013 involved some 46 to 56 confirmed US drone strikes (with some 240 to 349 reported killed) and a possible 80 to 99 additional strikes (with some 282 to 455 reported killed). Some 10 to 23 drone strikes were conducted in other countries, primarily in Somalia (with 50 to 170 reported killed).[8] The first known strike in Yemen under the Obama Administration targeted

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the southern village of al-Majalah, killing 41 members of two families, half of whom are thought to have been children aged between 1 and 15.[9]

The rationale for Obama's increasing reliance on drone warfare is not hard to discover. In the minds of US strategic planners, this new state-of-the-art weapon appears remarkably effective, risk free and relatively inexpensive. Especially attractive is the drone's capacity for accurate surveillance and precise lethal targeting, and importantly its ability to remain airborne much longer than a piloted aircraft. Significantly, drones reduce the need to deploy US troops on distant and dangerous terrain, hence drastically reducing US casualties, while enabling those directing the unmanned vehicles to remain safely ensconced thousands of miles away at CIA headquarters in Langley, Virginia. As for cost, the most powerful drone currently in use by the CIA and the military, the MQ-9 Reaper, can be acquired for about \$12 million per unit, whereas the price tag on the F-22, the US Air Force's most advanced war plane, is thought to be at least ten times higher.[10] Most importantly, drone warfare is far less visible to the US electorate and to that extent less likely to be the source of sustained public contestation. The combined effect of these advantages has led US planners to entertain the applicability of drone warfare to diverse terrains and conflicts.

Official Justification

Unsurprisingly, the official justification has chosen to place the emphasis on other aspects of drone warfare. Though official advocacy of the technology has been relatively muted, at least until Obama's May 2013 speech, the main grounds on which the US is seeking to justify its reliance on drone technology are reasonably clear. US conduct, it is argued, has a sound basis in both US and international law, and US drone strikes comply with the principles of 'distinction' and proportionality. US State Department Legal Adviser Harold Koh offered the first comprehensive account of the Obama administration's line of reasoning:

. . . this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.[11]

Though carefully formulated, this was nonetheless a partial explanation emphasising the laws of war, but focusing only on two of the principles governing these laws. Though not fully articulated, the premise underlying the entire legal defence is that the United States is at war.

It was left to the president himself some three years later to offer a fuller explanation which attempted to synthesise the ethical and legal basis of the Administration's position. His defence of drone warfare, though touching on many aspects of US practice, may be usefully reduced to four key propositions: a) terrorism is a serious and ongoing threat, therefore the United States remains at war; b) drone technology is well suited to meeting the challenges posed by the mobility and elusiveness of the enemy; c) the use of drones enables the military objective to be pursued with minimum casualties, notably civilian casualties; d) drone warfare complies with international humanitarian law, and despite inherent difficulties can be made to accord with the necessary standards of transparency and accountability.

For Obama drone strikes are part of the armoury that the United States can use to prosecute the 'war on terror' now in its twelfth year. In other words, the legal basis for drone warfare can be traced to the initial response formulated by the Bush administration back in September 2001. It is worth recalling that at no stage did the United States seek or receive UN Security Council authorisation to use force under Article 42 following the attacks.[12] Nor was it feasible to pursue the other legal avenue that would have allowed for US military force in Afghanistan, namely the consent of the existing Afghan government.

The Bush Administration was left with only one legal option, that is, recourse to the provision for individual or

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collective self-defence provided for under Article 51 of the UN Charter. On the basis of this provision, the US congress passed legislation on 14 September 2001 titled *Authorisation for the Use of Military Force Against Terrorists (AUMF)*, enabling the use of armed force against those responsible for the attacks. Two features of the legislation are worth noting. First, it does not constitute a declaration of war – something which the US president studiously avoided – and it designates Taleban troops as supporters of terrorists rather than soldiers. In other words, the legislation is carefully crafted to evade the legal implications associated with a declaration of war, thereby placing US actions outside the protection afforded by the Geneva Conventions and due process of law. Secondly, the use of drones is but one further instance of such practice and, as the President's May 2013 statement made clear, its legal basis remains unchanged.[13]

President Obama was nevertheless anxious to impress on his domestic and international audiences his administration's commitment to ensure both legality and minimisation of casualties. Though he did not explicitly refer to the notion of last resort, he stressed that his strong preference was to detain and prosecute terrorists, but that this option was not always feasible. Given that al-Qaeda and its affiliates often took refuge in remote tribal regions, the deployment of Special Forces might simply provoke a military exchange posing a serious risk to both US troops and local civilians, and potentially 'trigger a major international crisis'. [14] The covert targeted killing of terrorists, made possible by drones, was considered a much preferable option. The new technology, precisely because it made for more precise targeting, was better placed to minimise civilian casualties. And even terrorists were targeted only when they 'pose(d) an imminent threat to the American people, and when there (were) no other governments capable of addressing the threat'. [15] Moreover, the United States took care to consult with allies, and to respect the sovereignty of states. The President concluded by acknowledging the need for 'strong oversight of all lethal action'.

A Flawed Case

While Obama's address sought to highlight the drone programme's ethical and legal basis side by side with its military effectiveness, several of the claims made rested on scanty evidence, and a number of questionable propositions. The claim that the United States is at war can best be understood as the legacy of the Bush administration's proclamation of the 'war on terror' in September 2001. However, no official exposition over the last twelve years has satisfactorily explained in what sense this 'war' goes beyond hyperbolic metaphor and how it accords with the generally accepted criteria of what constitutes war.

Countries and communities are subject to all kinds of threat, including serious loss of life and property, whether it be at the hands of deranged individuals or criminal groups of various kinds, some of which have developed a sophisticated organisational infrastructure. The narcotics trade and human trafficking are just two examples. But states are not strictly speaking 'at war' with such groups except in a psychological or symbolic sense. They are not taking military action against the military threat posed by another state – action which by definition is clearly subject to the laws of war. When characterising the threat posed by 'terror' Obama employs a range of linguistic devices that militate against clarity and precision of argument. At times the threat is equated with the actions of a specific organisation, al-Qaeda; at other times he refers to the threat posed by 'al-Qaeda and its affiliates'; at other times still to al-Qaida and 'associated forces'; and every so often to an even vaguer entity or set of entities that might include Hezbollah or any number of 'radicalised individuals' operating in the Western world, some of whom may even be citizens of the United States. [16] In this fluctuating depiction of the war, it is difficult to know precisely against whom it is waged, what the specific objectives might be, and what might be considered justifiable action to meet the perceived threat. Whether it is the result of careful design or lack of adequate reflection, this formulation cannot provide the basis for a cogent justification of military action based on accepted legal principles of conduct in war.

The fluid characterisation of the enemy, it should be noted, serves a useful purpose in that it allows the United States to strike against any set of targets, not just in Afghanistan. A war, which is not exactly a war, offers US administrations one other advantage: they can keep using the legislation to meet any kind of eventuality so long as they can point to a terrorist threat, even though the original threat posed by al-Qaeda and its supporters in Afghanistan has long since passed. No matter how many cells, networks or individuals are disabled, new threats can be said to arise located in an ever more geographically diffuse environment. In this sense the 'war on terror' can always be shown to be successful, but not entirely so, hence the need for further action – in this sense it becomes

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literally a war without end. If it is difficult to accept the proposition that the 'war on terror' constitutes war in the normal sense of the word, then it is even more difficult to accept the claim that covert targeted killing of the kind associated with drone warfare in Pakistan or Yemen can operate within the framework of the laws of war.

It is difficult to avoid the conclusion that US counterterrorism policy since September 2001, of which the drone strategy is the most recent manifestation, has sought to maximise its freedom of manoeuvre by creating a highly ambiguous legal space. The dividing line between combatants and civilians has been consciously blurred as has that between military necessity and expediency, with the obvious aim of minimising the obligations of the American state imposed by international humanitarian law on the hand and human rights standards as specified in the International Civil and Political Rights Convention on the other. It is as if US military planners, lured by the dazzling efficiency of drone technology, came to regard the ethical and legal implications of its use as secondary considerations. A mindset had taken hold, which viewed the technology as irreversible progress to which ethics and law would have to adjust as best they could.

Admittedly, the terrorist seeks maximum psychological and military advantage, 'purposefully obfuscating his belligerent status by posing as a civilian – and in many cases targets civilians and conducts operations in civilian settings.'^[17] But the US response can be said to have been just as obfuscatory, which helps to explain why many questions critical to any decision to wage war have been effectively sidestepped: What are the political and military objectives of the 'war on terror'? If this war is to be conducted in the name of self-defence, who is to be defended against whom, for how long and at what cost? And importantly, how is success to be determined? All of which leaves another question unanswered: does the congressional Authorisation for the Use of Military Force of September 2001 provide a blanket legal basis for US counterterrorist operations anywhere, at any time, and for an indefinite future?

Here we can do no more than briefly consider a few of these questions. The laws of war require that force be used as a last resort, but no official explanation of the strategy governing drone strikes has so far demonstrated how targeting decisions effectively incorporate this principle. Some analysts have gone so far as to argue that the Obama administration may have adopted a 'kill, not capture' approach to counterterrorism to avoid the legal headaches associated with detaining and trying suspected terrorists.'^[18] This may or may not be the case, but the fact remains that US pronouncements on the subject have been remarkably vague, simply asserting that physical capture of terrorists is often difficult or simply not feasible. Even if this were true, the 'last resort' principle would require the decision-maker to establish that elimination of a particular target at a particular time and place is a military necessity. Such an argument in turn depends on establishing beyond reasonable doubt that drone strikes are conducted against those and only those who have attacked or are imminently threatening to attack the United States. Is drone targeting conducted in accordance with this requirement?

The available evidence on this question is less than reassuring. Though a good many al-Qaeda and Taleban leaders have been killed in drone strikes in Pakistan – accounting, according to one estimate, for 55 deaths between 2004 and mid-April 2013 – the number is said to represent only 2 per cent of all drone related fatalities in Pakistan.^[19] The overwhelming majority of those killed is made up of lower-ranking members of al-Qaeda and the Taleban, members of 'associated' organisations, other loosely defined militants, supporters of various kinds, including family members and friends, and civilians unconnected to any of these. It is difficult to see how such a disparate group can be the subject of precise targeting. Regardless of its technical accuracy, drone targeting remains vulnerable to highly deficient knowledge of the human terrain, which helps to explain the large number of civilian casualties referred to earlier and the periodic reports of drone strikes on funerals, wedding parties and even rescue efforts to help those injured in previous strikes.^[20] Given the shortcomings of human intelligence, it is hardly surprising that those in charge of US targeting policy have been prepared to designate any male of military-age in the strike zone as a militant.^[21] Equally instructive is the growing number of drone operations in Yemen and the accompanying shift from 'personality' strikes aimed at specific suspects to 'signature' strikes (already widely used in Pakistan) aimed at largely unknown individuals who are said to be engaged in patterns of suspicious behaviour.^[22] Drone warfare generally and signature strikes in particular make it hard if not impossible to apply even the most basic rules of armed conflict, including *hors de combat* immunity and the possibility of individual surrender.

The legal and ethical case for drone strikes is further weakened by the secrecy with which such strikes are

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conducted and the token attention paid to the sovereignty principle. Obama's May 2013 speech shed little light on existing procedures for ensuring compliance with the laws of war. It was not at all clear, for example, that the CIA has the command structure, legal expertise or training competence to ensure that all personnel can be held accountable for their actions. No doubt this factor weighed heavily in the President's stated desire to explore a more effective system of accountability. Yet, he said little to suggest the likelihood of any drastic overhaul of existing procedures, contenting himself instead with a vague commitment to consult with Congress in considering options for increased oversight. As for respecting the sovereignty of relevant states, serious questions remain as to whether the governments of Afghanistan, Pakistan, Yemen or Somalia have formally consented to the conduct of drone strikes within their respective jurisdictions, and even whether the United States formally requested such consent. Former Pakistan president Pervez Musharraf did concede that he had agreed to US demands, but this revelation was made only in a television interview several years after he had departed from the political stage. No government, it seems, has been prepared to argue publicly in favour of US drone strikes on its territory for the obvious reason that such strikes are widely opposed by the local population. Indeed, all the major political parties in Pakistan contesting the May 2013 general election were at one in condemning such strikes – a position which the incoming Pakistani prime minister Nawaz Sharif has repeatedly enunciated since his election, but to which the US administration has responded with its customary silence.[23]

The Blowback Effect

That drone warfare rests on weak ethical and legal foundations may not unduly trouble the policy-maker intent on securing the military and political gains such warfare can deliver. However, as is often the case, he will sooner or later discover that law and ethics cannot be so easily divorced from practical politics for the blowback effects are as real as they are wide-ranging. Drone attacks have not prevented retaliation either against US personnel and facilities or against the security forces and installations of the governments the United States is seeking to protect, as evidenced by numerous al-Qaeda attacks in Afghanistan and Pakistan. Nor has the calculus that such pain is the price the 'war on terror' has to pay if it is to secure the elimination of the enemy or at least the decapitation of its leadership been borne out by subsequent events. Terrorist groups have been able to exploit the anger provoked by drone strikes to recruit extensively among either the communities directly affected, or neighbouring and even distant communities, at times in different countries and different theatres of conflict. Moreover, recruitment of new members is often complemented by new forms of local resistance to the invasive thrust of Western technology. Some analysts have gone so far as to argue that drone counterterrorism may 'help create localized Islamist emirates.'[24]

The ill will generated by the military use of drone technology among large sections of the population in Afghanistan, Pakistan, Yemen and other parts of the Muslim world is now widely acknowledged. The killing of innocents, women and children, unintended though it may be, is often perceived as the 'dishonourable' use of force, particularly in the context of local codes of honour, prompting as a result a range of violent reactions. Nor is the fallout limited to the traditional subcultures of rural Pakistan, as evidenced by angry protests in Pakistan's major cities. Negative sentiments about the United States have now become pervasive in Pakistan, with 68 per cent strongly opposed to US drone strikes – 74 per cent gave as their primary reason the killing of innocent civilians – and 72 per cent rating America unfavourably.[25] Popular discontent, now widespread in Afghanistan and Pakistan and rapidly rising in Yemen,[26] threatens to destabilize the very governments they are supposed to protect. Even tacit support for drone strikes has tended to weaken the legitimacy of already fragile governments, thereby creating politically unstable conditions highly favourable to terrorist propaganda and the creation of terrorist safe havens.

Serious consideration of longer term implications cannot but raise another sobering prospect. The United States has thus far been able to conduct drone strikes confident in the knowledge that it possessed an unchallenged supremacy in the military applications of the technology, based in part on its highly sophisticated intelligence and data analysis capability. But there is no reason to think that other states will not be able to develop in the relatively near future more modest capabilities to deal with perceived threats either within or close to their borders, whether it be Turkey in relation to what it sees as the Kurdish threat in northern Iraq or China intent on crushing the periodic *Uyghur* uprisings in Xinjiang province. Reports suggest that by 2010 some 680 drone programs were at various stages of development in different parts of the world, to which should be added the increased likelihood of exports of drones and drone technology by the more advanced states, notably the United States and Israel.[27] Turkey is moving

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ahead with plans to develop its own indigenous armed UAV to meet Turkish Air Force requirements, and is likely to export the technology to Egypt.[28]

The apparent inability of the Obama administration to think through the costs and consequences of increased reliance on armed drones is perhaps a casualty of the Bush legacy, best encapsulated by the 'war on terror' and the doctrine of preemption on which it rests. The underlying rationale was that to counter the unprecedented threat posed by terrorism and nuclear proliferation US security policy might at times need to operate outside the confines of the rule of law, hence the recourse to enhanced interrogation techniques, 'extraordinary rendition' and indefinite detention at Guantanamo. Now in its fifth year of his presidency Obama is still trying to extricate US policy from the lingering consequences of the Iraq war, combat operations in Afghanistan as well as the Guantanamo fiasco, only to find himself ensnared in another misadventure – covert targeted assassinations – also conducted in the name of the 'war on terror'. No doubt the powerful pressures emanating from Congress, the intelligence agencies and the military establishment more widely are integral to the decision making equation. But so is the less tangible but no less powerful hold which faith in the technical fix still exerts on the US political imagination. It is as if short-term political expediency combines with long-term technological optimism to blunt the capacity for wise leadership.

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[12] This is true of all three Security Council resolutions: 1368 (12 September 2001); 1373 (28 September 2001); 1386 (20 December 2001)

[13] Obama, *supra* note 1.

[14] *Ibid.*

[15] *Ibid.*

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[17] Vogel, 'Drone Warfare and the Law of Armed Conflict', 118.

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[19] Bergen, *supra* note 7.

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[22] Greg Miller, 'CIA Seeks New Authority to Expand Yemen Drone Campaign', *Washington Post*, 18 April 2012 (accessed at http://articles.washingtonpost.com/2012-04-18/world/35453346_1_signature-strikes-drone-strike-drone-program on 15 May 2013).

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