

Drone Technology and the Trump Doctrine

Written by Mary Ellen O'Connell and Brian Boyd

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MARY ELLEN O'CONNELL AND BRIAN BOYD, JUN 29 2017

Within a few days of his inauguration, United States President Donald Trump had dinner at the White House with his son-in-law Jared Kushner, political strategist Steve Bannon, defense and intelligence officials, and no legal advisors. The dinner conversation involved a military operation planned for Yemen during the next moonless night. That night was January 29 when thirty U.S. Navy Seals, together with local and regional allies, attacked the village of Ghaylil in Bayda province, close to the front lines of Yemen's civil war. Apparently, no one at the dinner thought to ask if the United States had any legal right to attack Ghaylil or to fight Yemen anywhere.

It turns out that the residents of the tiny community are on the same side as the U.S., the side of Saudi-backed Abdrabbuh Mansur Hadi. The village had to be fortified and guarded from Houthi fighters, supporting Hadi's Iran-supported opponent, Ali Abdullah Saleh. The residents reportedly remain confused as to why they were attacked. One definite possibility is that the U.S. acted on bad intelligence, since the beneficiary of the raid is Saleh.

Ironically, the operation likely had nothing to do with the civil war. Journalists suggest it was a targeted killing or assassination mission to find and kill a terrorist suspect, Qassim al Rimi. Al Rimi is high on the current U.S. kill list as a member of Al Qaeda in the Arabian Peninsula. If Al Rimi was ever in the village, he was alive after the raid, taunting the U.S. on the internet. As many as thirty other people, however, were killed, including ten children under the age of 13, women, elderly, and a Navy Seal. One child was an 8-year old Yemeni-American girl, named Nawar al-Awlaki. On learning of the carnage, the foreign minister of Yemen announced that such 'extrajudicial killings' were 'condemned acts that support terrorism' by provoking hostility.

Trump reacted quite differently to the tragedy in Ghaylil. Rather than demanding an investigation into how it went so terribly wrong, his administration attempted to assert it had been a major success, resulting in the collection of important intelligence. That claim was quickly abandoned in the cold light of facts revealing the 'important intelligence' were old propaganda videos. Trump then followed his now common practice of moving on to the next headline grabbing distraction and handed Yemen to the military by designating it a 'zone of active hostilities.' The designation permits the military under U.S. law attack without White House approval. Again, international law does not seem to come into Trump's calculus.

Trump also loosened the Obama administration's goal of zero civilian casualties in counter-insurgency operations. This change is linked to the deaths of over 100 civilians in the U.S. St. Patrick's Day airstrike on an apartment building during the battle against ISIS for control of Mosul, Iraq. In early April, Trump authorized a reprisal attack on Syria that consisted of 59 Tomahawk cruise missiles, despite the fact reprisals are strictly forbidden in international law. In late April, Trump permitted the use of 'the mother of all bombs' in Afghanistan. Use of the MOAB conflicts with international humanitarian law (IHL) restrictions on the indiscriminate use of force, duty of civilian protection, as well as the principles of necessity and proportionality. In late May, Navy Seals carried out another raid in Yemen, much like the one on 29 January. This time about a dozen people died. The U.S. claims 6 were militants and 5 were civilians. Again, no word on why it is lawful for the U.S. to fight in Yemen or how the operation complied with IHL. In mid-June, the Trump administration announced it would send 4,000 more troops to Afghanistan to try to break the 'stalemate' in the 16-year old conflict.

Trump's first six months in office have been characterized by a floundering, scattered approach to most issue areas,

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including security. Still, the new administration has reflected some consistency in using greater lethal force than predecessors and paying no attention to international law. In both respects Trump is not breaking new ground. He is moving in the same direction begun by President Bill Clinton at the end of the Cold War. Trump has simply taken the direction to its logical conclusion.

Targeted killing, excessive force, and wars without end defy law, morality, and pragmatism. Explaining why such practices have taken root requires examining the role of technology.

Technological Imperatives

Since the first use of a drone in lethal operations in 2001, the U.S. has moved inexorably beyond the agreed limits on official use of deadly force. One former CIA lawyer has observed: 'People are a lot more comfortable with a Predator strike that kills many people than with a throat-slitting that kills one.' So comfortable, in fact, that Americans from *The New Yorker* to former President Obama casually joke about death from above. But that was years ago. Having become comfortable with remotely controlled targeted killing, other means to the same end are also on the rise.

Thanks to the drone, the U.S. has returned to practices banned after Vietnam and the dirty wars of Central America. The Clinton administration acquired the first weaponized drones from defense contractor, General Atomics. He then tasked the CIA with using the drone to hunt and kill Osama bin Laden in 2000. Clinton modified the executive order of President Gerald Ford banning assassination. He could not, of course, modify the international law prohibiting assassination as murder or the use of military force on the territory of another State, outside the terms of the United Nations Charter. All three classes of American weaponized drones, the Predator, the Reaper, and the Avenger, deploy the tank-killing Hellfire missile, developed by Lockheed-Martin.

Thus before 9/11, the hardware and strategy of targeted killing were essentially in place for the drone campaigns to follow. President Bush signed another document, a memorandum of notification (MON), on September 17, 2001 that, together with other authorizations, provided his permission for the CIA to kill terrorist suspects, including Americans, on a "high value target list," which has become known as the "kill list." From its first use in Afghanistan months later, to Yemen in 2002, Pakistan in 2004, and Somalia in 2006, Bush authorized more attacks year after year. Apparently, checking names off the list counted as success regardless of the fact the list kept growing.

During his 2008 presidential campaign, Barack Obama criticized the mad policy of Bush's 'global war on terror.' Drones per se were not widely discussed at that time because their use was still classified. U.S. officials said little about them. That changed in 2009 under Obama when he dramatically increased drone attacks. During his first week in office in January 2009, advised by former Clinton officials now on his staff, to authorize a CIA drone attack in Pakistan. That strike killed a number of people, including a leading figure working against the Pakistani Taliban and that man's two young children. This tragedy did not deter the president. He authorized a dramatic increase in drone attacks, doubling the number of attacks in Pakistan in 2009 over 2008 and doubling them again in 2010 over 2009. In 2011, he authorized the first intentional targeting of an American, Anwar Al Awlaki, in Yemen. Two weeks later, Awlaki's teenage son, also American, was killed. By the end of Obama's time in office roughly 5,000 civilians, including 200 children, were struck down in drone attacks. Despite all the killing, Al Qaeda continues and has spun off or inspired more barbaric groups such as ISIS and Boko Haram.

In a 2011 UK military report on drones, the authors raised concerns over a technology that weakens psychological barriers to killing: That attacks are "carried out by unmanned aircraft [...] and that the use of ground troops in harm's way has been avoided, suggests that the use of force is totally a function of the existence of an unmanned capability—it is unlikely a similar scale of force would be used if this capability were not available."

Throughout history as new weapons technology has appeared, legal or moral barriers to its use are set aside. French philosopher Grégoire Chamayou argues in his book, *A Theory of the Drone*, that the capacity to kill without being killed elides into a judgment that those possessing the capacity also possess the right to use it. Possessing the means to kill with little risk to the one killing creates psychological pressure to use those means, which in turn demands justifications in policy and law. Richard Falk reaches a similar conclusion: "The international law of war has

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consistently accommodated new weapons and tactics that confer significant military advantages on a sovereign state, being rationalized by invoking 'security' and 'military necessity' to move aside whatever legal and moral obstacles stand in the way."

"Security" is a claim made at home and abroad. In July 2016, Dallas police used a bomb disposal robot to blow up a suspect cornered in a parking garage. United Nations Special Rapporteur on Extrajudicial Killing, Christof Heyns, a South African, deplored the killing: "Militarised policing – detonating a bomb remotely to kill a sniper rather than alternatives – treats the public as enemies, as in war." It seems the public has become inured to killing by officials, however. Most of us wish to believe that killing done in our name is lawful and ethical, so we are willing to believe the increasingly thin legal and strategic arguments justifying it. Under Trump the justifications have vanished altogether and, yet, France and Germany found his reprisal attack on Syria 'just and proportionate.'

In this context of weakened respect for law and moral principles, new weapons are appearing that relieve humans of the kill decision entirely. Advances in artificial intelligence mean that once a robot is constructed and programmed, it will be able to make the decision to attack without additional human intervention, even years after being deployed. South Korea already protects its Demilitarized Zone with autonomous sentry guns; Israel is building kamikaze drones and weaponized, unmanned ground vehicles to patrol its (legally disputed) borders; American arms dealers are developing stealth fighter drones and even boats. The U.S. Defense Advanced Research Projects Agency (DARPA) has inspired copycat programs in China and Russia, leading to a low key but highly dangerous new arms race, one in which even ISIS participates. Parties to the Convention on Certain Conventional Weapons have been working since 2013 toward a new protocol controlling or prohibiting fully autonomous robotic weapons, but the Chamayou and Falk perspectives hold out little hope for restraint—unless something changes the global mindset.

Recovering Law and Morality on Killing

Perhaps the presidency of Donald Trump will bring about such change. His law free military policy may be the final straw that brings the world back to the ancient principles of law and morality restricting resort to lethal force to all but true exigent circumstances. It is not the technology that should dictate those circumstances but the actual need to save life immediately. The law on the use of lethal force begins with the human right to life. Lives may lawfully be taken in certain restrictive situations—but the right itself and the conditions it sets for the lawful taking of life are absolute. Unlike lesser rights, authorities may not suspend or derogate from the right to life. Heyns and Probert properly concluded from these points that the right to life is *jus cogens*, a peremptory norm of international law. Other peremptory norms closely allied with the right to life include the prohibition on the resort to force in UN Charter Article 2(4) and the prohibition on intentional targeting of civilians during armed conflict.

These facts about the right to life have significant implications for interpreting the law regulating the use of lethal force. A norm in the category of *jus cogens* does not change according to the rules governing treaties and customary international law. The protections inherent in these norms do not disappear when new weapons technology emerges or new forms of criminal conduct challenge society. State practice that is inconsistent with the prohibition on force or unlawful killing is always a violation—it does not add up to a new, more permissive and flexible right to kill.

Even with a lawful basis for using military force, it is unlawful in armed conflict to hunt down and kill a named individual for past actions or some hypothetical future crime. Combatant immunity is the principle that members of a state's armed forces will not be prosecuted for the IHL-compliant deaths they cause within armed conflict hostilities. Lawful targeting is based on a person's status as a fighter, not who the individual is. A commander might be known by name and targeted, but the legality of the targeting depends on the commander's active role in the fighting. IHL restricts killing for past actions, revenge, hypothetical future actions, or future deterrence.

If targeted killing is restricted on the battlefield, it is *a fortiori* unlawful away from an armed conflict zone. Under customary international law an "armed conflict" exists if and only if organized armed groups are engaged in fighting of certain intensity. These factors trigger the law permitting intentional killing to accomplish a military objective. Outside armed conflict and absent the right to resort to armed force, lethal military force may only be used to save a life which is immediately, directly threatened. Since peacetime rules thus restrict the taking of life, and forbid putting

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bystanders' lives at risk ("collateral damage" being applicable only in war zones), the use of the aptly-named Hellfire missile by Predator drones is shown by its track record to be too imprecise for use outside an armed conflict zone.

Some object that it is too difficult to comply with these legal restrictions when challenged by lawless criminal organizations like ISIS. Nothing, however, is easier than *not* killing. The idea that *not* killing is hard has grown out of the false assumption that military force is an effective tool against terrorism. Foreign policy realists, weapons manufacturers, and some academics advance this myth despite substantial social-scientific evidence to the contrary. And even if drone attacks could end terrorism, using them for targeted killing would remain unlawful and immoral.

For decades, the United States has been engaged in continuous armed conflict, spurring extraordinary investment in defense industries and the development of new weapons. Such investments have given rise to the use of concepts like "security" and "military necessity" to overcome legal and moral barriers to using new weapons.

Yet international humanitarian law's restrictions on killing, which have developed to incorporate fundamental, universal moral principles, still remain. Restrictions on killing in war require that combatants never intentionally target civilians; that they attack only as required by military necessity; and that the death and destruction caused not be disproportionate to the value of the military objective.

These international legal principles compel seeking non-lethal solutions to conflicts. Killing is never the only option. Its use by the United States as a first option has burgeoned, fostered by the false assumption that lethal force is an effective tool to achieve all sorts of goods. It is not. Social-science research demonstrates that long-term stability, both within and between communities, is rarely achieved through the use of force. And even if it were, one cannot justify evil means by a worthy end. This understanding needs renewal and re-commitment. We stand on the threshold of still easier means to kill, under new leadership guaranteed to use it.

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