Killing by Drones: The Problematic Practice of U.S. Drone Warfare

By Peter Rudolf

The ethical evaluation of armed drones could hardly be more controversial. First of all, there is a fear that their increased availability could lower the threshold for using military force. Because drones are a military instrument that can be used easily and without risk – so the argument goes – there are concerns that they enable recourse to military action without the criterion of *ultima ratio* being fulfilled, i. e. without pursuing or even considering other options first. On the other hand, there is an expectation that drones can facilitate morally justifiable missions, e. g. for humanitarian purposes, which otherwise might not take place. For the most part, however, proponents of combat drones base their arguments less on *jus ad bellum* than on *jus in bello.* Because of their precision, the use of combat drones is said to suit the principle of distinction between civilians and combatants better than other types of operations. According to another argument used by proponents, they also reduce the risk for one's own soldiers, whose protection is a moral duty when they are sent into justifiable combat mission. Indeed, in a moral evaluation of the use of armed drones, what counts first and foremost is whether the organized use of force in which they are deployed is justified. Although combat drones may become problematic in themselves if they are developed into "autonomous weapons systems" capable of deploying deadly force without the direct control and direct involvement of a human being in the decision pro-

cess, their development has not yet reached this stage.

Nevertheless, as the American philosopher and war ethicist Michael Walzer has written with regard to his own country's practice, combat drones have become a source of moral unease precisely because of how easily they enable targeted killings. For the U.S., the use of drones has become the method of choice in the war against Al-Qaeda and its allies. Although the Obama government has broken with the ideology and rhetoric of the "war on terror", it certainly does not regard fighting Al-Qaeda as a police and criminal matter. As regards the legitimacy of its actions in international law, the Obama administration still claims the existence of an "armed conflict" with Al-Qaeda and associated forces (who are not defined in any more detail) on one side, and the U.S. on the other. It argues that this "armed conflict" is not geographically restrictable, which is highly contentious under international law and is also not an opinion shared by allies of the U.S. A number of criteria for the existence of a "non-international armed conflict" can be found in international treaty law and customary law. But it is problematic whether any such degree of duration and intensity of violence exists outside of Afghanistan and Pakistan's border region with Afghanistan (and formerly Iraq), and whether "non-state armed groups" can be identified as a party to the conflict, so that one can speak of

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an "armed conflict" under *International Humanitarian Law* (IHL).

In its public justifications under international law, the administration refers not only to the existence of an "armed conflict" between Al-Qaeda and associated forces on one side and the U.S. on the other, but also to a very broadly defined right to pre-emptive self-defense. It remains unclear, however, whether both lines of justification are valid in all cases. It appears that the administration finds it necessary to invoke the right to self-defense in order to legitimize operations away from the "hot" battlefields. And yet it is claimed that there is no need to conduct an analysis regarding the applicability of the right to self-defense before every targeted attack. Behind this lies an understanding of the imminence of a threat which is legally and ethically dubious because it is so very broad. A white paper by the United States Department of Justice considering the circumstances under which it would be legal to kill American citizens in foreign countries contains a number of statements on this point. It says that the threat posed by Al-Qaeda and its associated forces demands a "broader concept of imminence", since the U.S. government may not be aware of all planned attacks and so cannot be confident that none is not about to occur. In this view, therefore, a person who has been continually involved in plotting attacks against the U.S. and has not obviously renounced or abandoned those activities constitutes an imminent threat.

Within this legitimizing context, combat drones have enabled a largely opaque institutionalized practice of more or less targeted killings in the grey area of asymmetric conflicts.[1] Targeted killings and drone attacks are now frequently cited in the same breath. Targeted killings are a practice which, in the case of the U.S., has only become possible with such intensity because long-range, remote-controlled, highly accurate combat drones can be used. Yet the problems associated with targeted killing – defined as the planned killing on behalf of a state of particular individuals who are not in custody – are not dependent on a specific technology and not limited to the U.S. Israel, for example, took a leading role in this respect (and, by the way, the U.S. used to publicly criticize Israel for such activities prior to 9/11).

It appears that the availability of drones, which can be deployed without risks to U.S. soldiers and intelligence operatives, has had the effect[2] of lowering the threshold for their use and increasing the number of target persons, that is, to include persons whose killing cannot be convincingly justified using the criteria of necessity and proportionality. People are killed in Yemen, for example, because the technology makes it easy. If the drones did not exist, Washington would hardly go to the trouble of sending teams to arrest or kill these target persons.[3]

Killing is politically more opportune and less risky for U.S. security forces than capturing suspected terrorists. If anyone is going to be captured or arrested, it is more likely that other countries' security forces will do it. Handling detainees causes problems for the U.S. – after all, Guantánamo is still supposed to be closed down. Despite official denials, the difficulties involved in capturing suspected terrorists

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have created incentives to kill.[4] Hence it is questionable to what degree the ostensible preference for capturing suspected terrorists – which was reaffirmed by President Obama in May 2013 – actually affects the bureaucratic decision process.

The use of drones has long gone beyond eliminating leading figures of Al-Qaeda and the Taliban. According to calculations by the New America Foundation, as far as is known and confirmed by two public sources, 55 Al-Qaeda and Taliban leaders were killed by drone attacks in Pakistan between 2004 and mid-April 2013. This means that they are just a small fraction of the total number of people killed by drone attacks in that period – which the organization estimates at between 2,003 and 3,321. In Yemen, the number of Al-Qaeda leaders killed since drone attacks began under Obama is 34 out of an estimated total of 427 to 679 killings.[5] In other words, the large majority of attacks are targeted at low-ranking members of the Taliban and al-Qaida.

The administration's public justifications of its drone program always give the impression that it solely involves the precise killing of leading terrorists and those posing a serious potential threat. Yet most CIA drone strikes in Pakistan appear to be of the "signature strike" type. During such operations, persons or groups of persons are attacked apparently on the basis that they exhibit a particular pattern of behavior, from which it is concluded that they present the risk of a threat.

Precisely for attacks of this kind, the official line that "collateral damage" is extremely rare hardly seems credible, particularly since a number of shocking mistakes have come to light. There are no really reliable figures for the number of people killed in drone strikes or for the number of "non-combatants" falling victim to these attacks. The administration remains silent on this point. The figures that some organizations compile on an ongoing basis differ considerably from each other and involve a high level of uncertainty, for methodological as well as purely practical reasons. They are based on media reports, mainly in English-language media. Their sources often remain anonymous, and their reliability is uncertain. It can be assumed that not all strikes are reported. There is no way to verify the distinctions made in such reports between civilians and militants, for example. The term "militant", which is used time and again to make it clear that the victims are not innocent, is never defined and also irrelevant in international law.[6] A positive trend, so to speak, can be seen in an apparent substantial drop in the number of civilians killed by drone strikes in the tribal areas of Pakistan. According to calculations by the Bureau of Investigative Journalism, the proportion of civilians killed fell from 14 percent in 2011 to 2.5 percent in 2012.[7]

As problematic as American drone warfare is, and however much it shapes opinions on the instrument of armed drones, one has to keep in mind: Although technology has facilitated the practice of more or less targeted killings, it required and requires the specific legitimization resulting from the permanent state of war in which the U.S. has imagined itself to be since September 11, 2001. Within this context of legitimization, a bureaucratic apparatus of killing has developed, whose decisions are largely free of political or independent legal

oversight. The lists of targets are not independently verified either beforehand or afterward, the criteria are largely kept secret, and decisions are taken by a group of publicly unaccountable decision-makers, without so much as a subsequent independent review. The U.S. has developed an institutionalized policy that rightly causes moral unease.

[1] For a comprehensive discussion of this point, cf. Rudolf, P. / Schaller, C., 'Targeted Killing' - Zur völkerrechtlichen, ethischen und strategischen Problematik gezielten Tötens in der Terrorismus- und Aufstandsbekämpfung, Berlin: Stiftung Wissenschaft und Politik, 2012; on the subject of what is known about the drone war, cf. Rudolf, P., Präsident Obamas Drohnenkrieg, Berlin: Stiftung Wissenschaft und Politik, 2013.

[2] Obama himself, during an appearance on "The Daily Show" on October 18, 2012, addressed the temptation that drone warfare presents: "There's a remoteness to it that makes it tempting to think that somehow we can, without any mess on our hands, solve vexing security problems." Shane, S., "Election Spurred a Move to Codify U.S. Drone Policy", in: The New York Times, November 24, 2012.

[3] A former official tasked with selecting targets neatly expressed this point: "It's not at all clear that we'd be sending our people into Yemen to capture the people we're targeting. But it's not at all clear that we'd be targeting them if the technology wasn't so advanced. What's happening is that we're using the technology to target people we never would have bothered to capture." Quoted in: Junod, T., "The Lethal Presidency of Barack Obama", in: Esquire, 2012.

[4] One of Obama's leading anti-terrorism advisors, who did not want to be named, had this to say: "We never talked about this openly, but it was always a back-of-the-mind thing for us." Klaidman, D., "Kill or Capture: The War on Terror and the Soul of the Obama Presidency", Boston/New York: Houghton Mifflin Harcourt, 2012, 126.

[5] Concerning these figures, cf. Bergen, P. "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killings", testimony presented before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, April 23, 2013, 4 ff.

[6] See International Human Rights and Conflict Resolution Clinic, Stanford Law School / Global Justice Clinic, NYU School of Law, Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan, 2012, 30 ff.

[7] See Columbia Law School, Human Rights Clinic, Counting Drone Strike Deaths, New York, October 2012; Woods, C., Serle, J. & Ross, A. K., "Emerging from the shadows: US covert drone strikes in 2012", Bureau of Investigative Journalism, January 3, 2013.

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