

OPINION

Drones, Targeted Killings and the Politics of Law

Wouter G. Werner

'It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government's sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects' biographies and recommend to the president who should be the next to die.

This secret "nominations" process is an invention of the Obama administration, a grim debating society that vets the PowerPoint slides bearing the names, aliases and life stories of suspected members of Al Qaeda's branch in Yemen or its allies in Somalia's Shabab militia.' (New York Times, May 29, 2012).

1 Introduction

The past decade or so, drone warfare has moved to the center of public and academic debates. Whereas initially 'Guantanamo' (and the iconic orange suits) stood for whatever was wrong with the US response to terrorism, nowadays the focus has moved towards targeted killings, with special attention for those killings conducted by drones. Some recent examples are the Stanford/NYU report *Living Under Drones*,¹ Jeremy Scahill's book and documentary *Dirty Wars*,² interviews with pilots of predator drones,³ academic studies on the legal, military and ethical aspects of drones⁴ and reports by the UN special rapporteur on counter terrorism. In this opinion, I will focus on one of the latest of these reports, which was launched in March of last year (the UN SRCT Drone Inquiry, hereafter: 'the report').⁵ The report basically updates earlier reports on drone warfare, this time through a beautifully constructed website, which literally and metaphorically shows the sites where US, UK and Israeli drones have hit. Through a study of some thirty recent attacks with reported civilian casualties, the report retells a by now familiar story about drone warfare; a story of destabilization of societies living under drones, civilian casualties, lack of transparency, and shaky normative foundations. In this way, the report makes another important contribution to the

1 Stanford/NYU report, *Living Under Drones: The Aftermath of Drone Attacks* (2012), <http://www.livingunderdrones.org/download-report/>.

2 Jeremy Scahill, *Dirty Wars: The World is a Battlefield* (New York: Nation Books, 2013).

3 Matthew Power, 'Confessions of a Drone Warrior,' *GQ*, March (2013), <http://www.gq.com/news-politics/big-issues/201311/drone-uav-pilot-assassination>.

4 Peter Bergen & Daniel Rothenberg (eds.), *Drone Wars, Transforming Conflict, Law and Policy* (Cambridge: Cambridge University Press, 2014).

5 UN SRCT Drone Inquiry (2013), <http://unsrct-drones.com>.

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ongoing struggle over the lawfulness and legitimacy of policies of targeted killings.

At the same time, the report reflects some of the underlying tensions that come with attempts to subject drone warfare to the laws of armed conflict. I will focus on two of these tensions below. Both tensions are illustrative of the politics of international law today; a politics that is made possible by the significant increase of legal rules and regimes the past few decades. As the International Law Commission has put it, it is difficult to imagine today 'a sphere of social activity that would not be subject to some type of international legal regulation.'⁶ However, the rise of legal rules, regimes (and one may add: sensibilities)⁷ should not be understood as simply the subjection of politics to the rule of law. It is (also) the creation of new vocabularies for political struggle, as the debates on drone warfare attest.

2 The promise and practice of drone warfare

The first tension (or gap) I would like to discuss is that between the promise and practice of drone warfare.

As the report makes clear, there is nothing inherently immoral or illegal about the use of drones per se. They are subject to the same rules as other weapons, and they can be used for both legal and unlawful purposes. More than that, drones come with the promise of small scale, smart wars that produce less death and destruction than more expensive, traditional military operations. Technically speaking, drones offer better opportunities to live up to the laws of armed conflict than, for example, F 16 air fighters. Pilots in traditional air fighters have to decide in very short time where to drop bombs, and normally cannot remain circling around their targets in order to minimize collateral damage. Drones, by contrast, allow for more time to identify targets, to deliberate about targeting decisions, to consult military lawyers and to check and re-check the sites under potential attack. Moreover, the information available on screen is much better readable than in the cockpit of an air fighter. In other words, drones seem to offer much better chances of living up to the requirements of distinction and proportionality in warfare.

Not surprisingly, states that are using drones never get tired telling the story of the legal and moral superiority of drone warfare. After all, who would not prefer targeted killings over untargeted killings? And yet, with the increased possibilities of drones, as Megret has argued,⁸ comes a decreased tolerance for 'collateral damage.' After all, if wars are conducted so smartly, why all these civilian casualties?

6 Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* A/CN.4/L.702, para 4.

7 David Kennedy, *Of Law and War* (Princeton: Princeton University Press, 2006).

8 Fred Megret, 'The Humanitarian Problem with Drones,' *Utah Law Review* 5 (2013): 1283-1319.

In practice, drone warfare has by now been routinely associated with the use of lethal force by a military superior state, mostly in an attempt to neutralize 'dangerous individuals' residing in unruly zones. And indeed, because of their technical capabilities, drones make an almost perfect fit for states engaged in killings in the twilight zone of war and peace. Much of the legal and political struggles over drone warfare today are about 'legal construction of war': the question how we construe the legal situation in which drone attacks take place. Where for example the US sees drone warfare as the humanitarian alternative to full-scale war, some critics view them as extra-judicial killings that violate basic human rights. And where the US proudly argues that drone strikes surgically target 'militants,' the Pakistani High Court have labeled them as criminal 'serial killings' of civilians.⁹

Even if one – if only for the sake of argument – would accept that targeted killings take place in times of armed conflict, several other pivotal questions remain. One question concerns the legal nature of the armed conflict. Under the laws of armed conflict, there are only two types of conflict: international or non-international. The term 'international armed conflict' is normally reserved for conflicts between states. Nevertheless, the Israeli High Court applied the term to the conflict between Israel and Palestinian armed groups (without any intention of recognizing Palestinian statehood) and the Bush administration spoke of a 'global war on terror.' Similarly, the term 'non-international armed conflict' is traditionally applied to territorially delimited conflicts between states and organized armed groups, or between such groups themselves. Nevertheless, the Obama administration has labeled its fight against Al Qaida and its associates as a non-international armed conflict with global dimensions (thus provoking associations with Carl Schmitt's idea of a 'global civil war'). Another set of questions regards the determination of targeted persons. Under the laws of war, one classical example of a lawful target is the 'combatant.' Combatants can be targeted by virtue of their *status*; a status that sets them apart from civilians and grants them the right to be treated as prisoner of war upon capture. In targeted killing operations, however, the person concerned is seldom a combatant in the traditional legal sense of the word. Instead, such operations target individuals who are deemed to be dangerous, based on their previous behavior, risk assessments of their future behavior, their alleged 'associations' etc. They are construed as lawful military targets, yet denied the privileges of prisoners of war – and, as in Guantanamo, even the basic fair trial protections of ordinary suspects.

While drones thus offer better possibilities to live up to basic obligations under the laws of armed conflict, in practice they are used in ways that challenge the very foundations of this legal regime. Constitutive distinctions such as the ones between war and peace, civilian and combatant, international and non-international armed conflicts have become problematic in the context of drone warfare today.

9 Peshawar High Court, Judgment of 11 April 2013, <http://www.peshawarhighcourt.gov.pk/images/wp%201551-p%2020212.pdf>.

3 The promise and politics of international law

One of the recommendations of the report is that the Human Rights Council is to adopt a Resolution 'urging all states (...) to comply with their obligations under international law, including international humanitarian law and international human rights law, in particular the principles of distinction, precaution and proportionality.' This call for respect of international law is understandable in light of some past practices of targeted killing, such as for example the signatory strike as used by the US in Pakistan (targeting individuals based on certain general characteristics like being a military-aged male carrying a weapon). Such practices are clear violations of the obligation to distinguish combatants from civilians that do not directly participate in hostilities.

At the same time, relying on the promise of international law to address the humanitarian problems of drone warfare requires too big a leap of faith. As the report concludes, there is a lack of agreement between states on the interpretation of almost all core provisions of the relevant law, be it the right to self-defense, the threshold of application for international humanitarian law, or the definition of lawful targets. Basically, states disagree on when it is permitted to use force in counter-terrorism operations, which legal regime regulates such force and who can be legally targeted. These are all fundamental political disagreements framed in the legal technicalities of conflict and security law. The report's call upon states to reach 'consensus' on these contentious issues is thus sympathetic, but not very realistic. All states would probably favor a consensus, as long as it is reached on their terms.

For those who are concerned about the way in which targeted killings are conducted, the solution is not to hope for some magical legal formula that would tell objectively what is right and wrong with contemporary counter-terrorism operations. There is no other way than to engage in the legal-political debates themselves; not as an objective outsider but as another participant in the invocation and mobilization of law.¹⁰ In other words, the way forward is not to 'speak law to power,' but rather to mobilize power through legal argumentation.

After all, targeted killings do not take place in a legal vacuum, but in a space filled with legal categories and humanitarian sensibilities. Governments such as the US and Israel have come to understand that their struggle to a significant degree is about winning the legal argument and being perceived as 'civilized warriors.' They do mobilize (international) law to construe permissive categories such as 'unlawful combatants'; just like critics invoke the law to stop, restrict or check targeted killing programs. They take great pains to explain how carefully planned their attacks are; just like critics keep emphasizing the civilian casualties. The legal struggles, however, should not be framed in terms of traditional conflict and

10 For a related argument, see Wouter Werner, 'The Curious Career of Lawfare,' *Case Western Reserve Journal of International Law* 43(1) (2010), http://law.case.edu/journals/JIL/Documents/43_Werner.pdf.

security law only. As Johns has pointed out, targeted killings take place in a web of legal and normative regulations that normally escape the attention of international lawyers, such as intra-organizational normative structures or the legal structures surrounding technology used in killing operations (e.g., contractual relations, coded architectures or intellectual property rights).¹¹ This field of regulation too should be recognized as a field that offers possibilities for critique and legal contestation.

11 Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013).