



International Law and the Practice of Targeted Killing with Drones

Seminar Report

The practice of targeted killing with Drones has been the subject of much recent debate in the international community and press. On the 24th May, 2012 the Institute hosted an evening lecture on this controversial subject. Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law chaired the event, Professor Mary Ellen O'Connell, Research Professor of International Dispute Resolution, University of Notre Dame, was the keynote speaker, and Professor Charles Garraway CBE, from Chatham House and the University of Essex, acted as commentator.

Professor O'Connell opened her presentation by reviewing the history of the drone. Drones are defined as sleek, unmanned aerial vehicles (UAV) that don't carry a human operator, which are expendable and can either be lethal or non-lethal load carriers or alternatively described as 'remotely piloted' vehicles. Drones were first used for reconnaissance during the war in Vietnam, but were first weaponised and used for targeted killing in armed conflict hostilities in Afghanistan in 2001. The current drone used by the U.S. is the Reaper which can carry up to 14 Hellfire missiles or two bombs weighing up to 500 pounds.

Professor O'Connell went on to discuss the first use of drones outside of an armed conflict in November 2002 in Yemen which resulted in six deaths (the CIA operated drones out of Djibouti). It was suggested that there was information that the U.S. Air Force found the use of drones in non-armed conflict zones problematic and had consequently refused to carry out the operation. Consequently, the operation was delegated to the CIA. Drones have also been used by the U.S. in Somalia since 2006 and Pakistan since 2004. The Bureau of Investigative Journalism estimates that between 296 and 687 individuals have been killed by the U.S. in Yemen, between 58 and 169 in Somalia and between 2440 and 3113 in Pakistan.

As a result of the use of drones by the U.S. in Pakistan and Somalia, President Obama's administration has been compelled to defend its targeted killing policy; 'targeted killing' having been defined by Melzer as *'the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them'*. Professor O'Connell highlighted that a range of legal arguments could be traced from five major speeches since March 2010, given by Harold Koh (State Department Legal

Adviser), John Brennan (Counter Terrorism Advisor), Jeh Johnson (Pentagon Lawyer) and Eric Holder (Attorney-General) and that these five arguments were being used concurrently by the U.S. along with an extra two which had since been abandoned.

The first legal argument analysed by Professor O'Connell, which has since been dismissed by President Obama, was that the U.S. was engaged in a global armed conflict with Al-Qaeda. The existence of an armed conflict has an impact on certain rights, for instance the right to life under Article 6 ICCPR, as the term 'arbitrary' is analysed within a peacetime context. Consequently the Bush administration – to avoid such a restriction – referred to 'global war' to place the situation outside of the ICCPR and within the remit of International Humanitarian Law (IHL).

The second argument presented by the U.S. was that target killings were an exercise of the inherent right to self-defence against an imminent threat, under Article 51 of the UN Charter. Professor O'Connell suggested that this argument was unsustainable due to its incompatibility with the first, which was reliant upon the presence of an armed conflict or 'global war' and could therefore not be classified as an 'imminent threat' and would not fall under Article 51.

The third argument currently used by the U.S. was that targeted killing was a lawful counter terrorism measure in situations where States were unable or unwilling to take counter measures against terrorism. It was suggested by Professor O'Connell that this argument was a result of practical reality rather than international law and in such situations the option available to states would instead be to use the UN Security Council to get authority to use force in another state's territory.

The fourth argument drawn from the speeches was that Pakistan and Yemen had consented to the U.S. use of drones within their territories. Professor O'Connell highlighted that this argument was problematic for the U.S. in relation to Somalia, which would be unable to consent to such action. There is also a problem of locating legitimate consent within a state. A government could only consent to something for which it holds authority. Al-Qaeda incidents are rarely within armed conflict situations, therefore use of force to deal with criminal organisations should be through the police and whilst it is possible for a state to use its military, it can only do so under the correct rules.

The fifth argument presented was that of 'precision', meaning that attacks by drones were precise and subsequently allowed the U.S. to kill in situations where it couldn't if it had to rely upon troops. Drone use in armed conflict situations are governed by IHL.

Following the presentation of Professor O'Connell, Professor Charles Garraway provided comments and further thoughts on the topic. He addressed the subtle distinction between target killing and targeted assassination and stressed that the latter is unlawful. Target killings were

legitimate during armed conflict provided both the target and the method were legitimate and IHL was adhered to.

Professor Garraway also suggested that the issues surrounding drones were not to do with the drones themselves but with what they are being used for and how they are being used. Previous weapons systems had been banned due to the way in which they were used, for example, cluster munitions. Professor O'Connell argued that drones were not neutral as the U.S. was carrying out more targeted killings and because of the apparent ease with which the U.S. went from using them for reconnaissance purposes to weaponisation.

In conclusion Professor O'Connell and Professor Garraway raised three salient points. The first point was that one of the key questions over the next 10 years would be the legal foundation for the use of drones and the relationship between the Law of Armed Conflict (LOAC) and International Human Rights Law. It was felt that the U.S. had not helped this issue because it was applying LOAC when it was not applicable.

The second point concerned the future use of drones. Drones offer greater precision and the advantage that the decision is removed from the immediacy of the battlefield. With suggestions that the U.S. Air Force is reluctant to use drones in non-armed conflict zones, there will be in future an issue with who will be operating drones; the military or a civilian organisations such as the CIA.

Finally, targeted killing has a short term impact on terrorism suppression. In the long term such killings are counter-productive and do not contribute to the resolution of conflicts.

Report prepared by Rebecca Francis