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Drone killings in Principle and in Practice

Morten Dige

Abstract: It is a widely accepted claim that whether a given technology is being justly used in the real world is a separate question from moral issues intrinsic to technology. We should not blame the technology itself for immoral ways it happens to be used. There is obviously some truth to that. But I want to argue that what we see in the real world cases of drone killings is not merely an accidental or contingent use of drone technology. The real life use reflects to a large extent features that are inherent of the dominant drone systems that have been developed to date. What is being imagined "in principle" is thus to a large extent drone killings in dreamland. I use an historic example as a point of reference and departure: the debate over the lawfulness of nuclear weapons.

Key words: Drones, targeted killing, just war

1. Introduction: "Unlawful in general"

In 1996, the International Court of Justice issued an advisory opinion on the legality of the threat or use of nuclear weapons. The original advisory opinion was requested by the World Health Organisation but the court ruled that the question did not fall within the scope of the WHO's legitimate activities. But the General Assembly of the UN chose to act on behalf of the WHO by adopting a resolution to have the court render an opinion on the following question:

Is the threat or use of nuclear weapons in any circumstances permitted under international law? (International Court of Justice 1996)

The question, in other words, was whether the threat or use of nuclear weapons was *unlawful in general* as a matter of legal *principle*. The court divided the question into 7 sub-questions and answered all seven in the negative. The vote was unanimous or with only minor dissent regarding six of these. However, there was a split decision (7-7) on

the question whether the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict. A "majority" of seven judges (with the Court's President as casting vote) held the opinion that the current state of international law could *not decide* "whether the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict" (i.e. *jus in bello*)

A number of the dissenters found that there could be no feasible circumstances in which nuclear bombings could meet the requirements of distinction and proportionality. In the words of the dissenting opinion of the Court's Vice President, Stephen Schwebel from the US:

It cannot be accepted that the use of nuclear weapons on a scale which would – or could – result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have pernicious effects in space and time, and render uninhabitable much of all earth, could be lawful. (Schwebel 1996:320/98).

The context of the quote is important, however. It may appear as if the representative of the world's leading nuclear power argued that nuclear weapons could never be lawful. But the characterization above applies only to "strategic", so-called "countervalue" use (as opposed to "counterforce" uses). His own dissent was based on almost opposite reasons, namely 1) that the court was indeed in a position to decide whether or not the threat or use of nuclear weapons could be lawful and 2) that the court should have acknowledged that certain threats and "tactical" uses of nuclear weapons would be positively lawful. Schwebel made an extended reference to the threat (and by hypothesis use) of nuclear retaliation during the first Gulf War, had the Iraqi forces resorted to chemical warfare, as an example of this.

Schwebel remarks that nuclear weapons present "a titanic tension between State practice and legal principle." Now, if "state practice" refers to the historical uses of nuclear weapons, then Schwebel is stating the obvious. The nuclear bombings of Hiroshima and Nagasaki were indeed titanic violations of the principles of discrimination and proportionality. They were, in Jeff McMahan's formulation, the "the most destructive single terrorist act, ever committed" (McMahan 2009:129).

The solution according to Schwebel, however, is *not* to bring state practice in line with legal principles by outlawing nuclear weapons. His central claim was that

there is nothing unlawful about the use of nuclear weapons *in principle*. One can *imagine* ways to use nuclear weapons that would not violate *jus in bello*. For example, one could imagine a purely defensive nuclear depth charge against an aggressing submarine warship carrying nuclear missiles. It is possible, in such a scenario, that only lawful targets were killed and that the usual proportionality problem of long term contamination etc. were significantly reduced. Or, one could imagine large enemy forces isolated in the middle of a desert but with long range attacking capabilities. Killing them all with a "tactical" (or even "surgical") nuclear weapon would not necessarily be disproportionate. Legal principles should ideally be capable of accounting for all possible state practices and not e.g. outlaw something that would in fact be justified by *jus in bello*. Schwebel thought that holding the door open for nuclear deterrence and retaliation would be erring on the safe side.

Now, such considerations not only brings state practice and legal principles (and by implication, moral principles as well) in a titanic tension, they also bring them very far apart, thus diminishing their mutual relevance. That opens the possibility that we might side exclusively with one of them. In Schlegel's words:

One way of surmounting the antinomy between practice and principle would be to put aside practice. That is what those who maintain that the threat or use of nuclear weapons is unlawful in all circumstances do. Another way is to put aside principle, to maintain that the principles of international humanitarian law do not govern nuclear weapons. (Schwebel 1996:311/89)

Schwebel found both alternatives unsatisfactory because he thought that certain (imagined) uses of nuclear weapons would be positively in line with international humanitarian law. Not only does IHL not rule out nuclear weapons *per se*. The right to national self-defence could make them justified.

What I want to point out is that there must be a wide range of considerations in between the principled and the practical ones in Schwebel's sense. The lawful uses of nuclear weapons he imagined are rather fanciful and that may be no accident. What if such uses were not part of the purposes and intentions that drove the development of nuclear weapons forward? Are the tactical or surgical kinds of nuclear weapons even part of the arsenal that nuclear powers possess? I can imagine that what have been termed merely "tactical" nuclear weapons are in fact still weapons with the

devastating effects described in the quote above. Further, that if such "surgical" nuclear weapons do indeed exist, I find it hard to believe that they are the *only* possible answer to the imagined threats. For example, are there any feasible scenarios in which the *only* possible way to stop a submarine warship is to nuke it?

I propose to call such considerations *pragmatic*. Pragmatics in linguistics concerns itself with the significance of an utterance's *context* in terms of e.g. the intentions of and relations between the language users. Analogously, the pragmatics of a technology provides the context of it in terms of its concrete workings, the intentions of its development, its social and political genesis, its in-built purposes, the relations of those affected by the technology and so on. Pragmatic considerations thus move from the "tactical" level of the concrete practical use of a given technology to the "strategic" level of the overall aims and strategies that constitute the design of technologies and weapons systems and thus define their realistic applications. I will show that the promises of drone killings "in principle" are of limited relevance because the actual uses are not merely contingent.

2. Principle and practice in drone killings.

In the introduction to his anthology on *Killing by Remote Control*, B.J. Strawser states the following:

I believe it is the failure to differentiate drone use in principle and drone use in practice that is the cause of so much of the current confusion in the present debate. [...] Whether a given technology is being justly used in the real world is, of course, a critically important question for scholars to analyze and debate. But it is, to be sure, a separate question from moral issues intrinsic to technology that can be analyzed regardless of present context (Strawser 2013:8).

There are a number of reasons to be skeptical about the import of these remarks. Strawser tries to give the impression that controversial or immoral drone practices are a kind of dual use problem. On the face of it this might look plausible. It is a well-known phenomenon that a technology is being used in ways that are problematic (morally or otherwise) due to factors that are entirely *extrinsic* to the technology in question and contrary to the intentions of the engineers behind it. As an example we could think of nuts and bolts which, apart from their intended use can be put into

homemade grenades and become instruments of maiming and killing. A passenger plane or a bus can become an instrument of terror. We have witnessed both of these "dual uses" to a sickening degree recently. But we should not blame nails or buses and try to outlaw them just because they can be misused in these ways.

Now, my claim is that drones do not fall into this category. It is not that they were designed for entirely different purposes than the ones they are in fact used for. In fact, I will try to argue the opposite. In a famous quote Seneca, the Roman philosopher and statesman, stated that "A sword never kills anybody; it is merely a tool in the killer's hand".¹ This is obviously over-simplified. That a sword is being used for killing is not surprising since it is its *intended* use, what it is designed for. It is not only a result of factors external to the sword technology. And the analogous "Guns don't kill people; it is people who kill people" is of course BS in the extreme if the gun in question is a military assault weapon.

Strawser and many others (e.g. Arkin 2009; Hallgarth 2013; Whetman 2015; Buchanan and Keohane 2015) would argue that drones represent something in between. They are like nuclear power that can be used in aggressive terror bombings on the one hand and in linear accelerators for cancer therapy on the other. Thus, making unjust use of nuclear power is not essential for that technology. Even if it was initially developed in a terrorist strategy of civilian bombings there is nothing wrong with the technology *per se* or in principle.

But this argument only works because the technology is defined in terms broad enough to allow for a broad range of possible applications. What we are really talking about, however, are *military* drones which are instruments at a later point of specified development and design than nuclear energy. They are *pragmatically* developed for highly specific kinds of strategies and targets. The military drone, then, is the nuclear bomb rather than the linear accelerator. They carry with them a number of *inherent* or *definitional features* which ought to be included in how we think about drone killings and if our thinking about drone killings *in principle* is carried out in abstraction from such definitional features, then military drones are let off the moral hook too easily. I find it more relevant to think along pragmatic lines as I sketched it. I will thus try to point out some of the definitional features of drone killings that need to be included in our moral assessment of them.

¹ In *Letter LXXXVII*.

3. Drones and extreme asymmetry

Military drones are developed for conflicts of extreme asymmetry since they are ill equipped to deal with enemies with more than minimal anti-aircraft defence capabilities. Given that the enemies are terrorist organisations we are of course tempted to consider it an advantage that we are in near total control. But as we shall see shortly this brings us into an entirely new territory in terms of international law and the ethics of armed conflict because there is a point where a conflict of extreme asymmetry can be understood neither in terms of war nor in terms of self-defence but rather as some kind of annihilation program where our enemies, in the graphic formulation by Uwe Steinhoff, are "treated like cockroaches on the receiving side of pest control" (Steinhoff 2013:207).

Drones will probably also be difficult to apply in territories dominated by regimes with near symmetric political power and influence. That drones are primarily used in countries like Pakistan and Yemen is no *accident*. Imagine what would happen if they were used to target suspected terrorists in Brussels (where quite a few seem to loom large). The somewhat more symmetric political influence by Belgium and the EU makes such a scenario very unlikely (we hope). The current drone-based strategy aims at massive or near total surveillance and control of a territory which is, formally speaking, under a foreign nation's sovereign control. It is not hard to imagine the destabilising effects of this.

The profound social, cultural and psychological impact of this for the civilian population constitute new and additional forms of asymmetry as described in the report, "Living under Drones" by research teams from Stanford and NYU (International Human Rights and Conflict Resolution Clinic 2012). Populations in remote areas of Pakistan and Yemen are de facto living at the mercy of a foreign power over which they have no influence, let alone democratic control. I find it not too implausible that such a situation could "remind those on the receiving side of such technology all too much of times allegedly past, where the self-proclaimed *Herrenmenschen* and the harbingers of civilization discipline the brutes, mostly by killing them" (Steinhoff, *ibid.*).

4. Drones and aggression

Military drones are designed for aggressive rather than defensive purposes. Due to the combination of surveillance and "surgical" lethal functions, drones are designed for targeted killings of persons who have been under drone-based surveillance for an extended period of time. This widens the "window of opportunity" for engaging in preventive attacks significantly. It has of course been argued by a number of theorists that targeted killings can be interpreted as self- or other-defence in an expanded meaning of the term (see e.g. McMahan 2012). The so-called "High Value Targets" (HVT) are typically portrayed as people who are continuously involved in either planning or executing terrorist attacks. Terrorists killed in drone attacks are thus considered to pose an ongoing, unavoidable threat due to their mere existence and killing them whenever there is an opportunity to do so is then justified as an act of self- and other-defence.

For one thing, this goes up against a strong current in international legal theory and ethics which insists that preventive (i.e. not strictly pre-emptive) attacks are indeed an act of aggression. It is important to note that most of the US drone killings do not take place in a regular armed conflict. Except for Afghanistan, drone killings are carried out without any declaration of war which means that the terrorists killed can by no means be considered enemy combatants. Rather than being an act of war, drone killings could better be understood as an act of self-defence against organized criminals and this seems to have become the preferred paradigm during the Obama administration (Brooks 2013). The problem is that such self-defence operations are under much stronger restrictions in terms of necessity (immediacy of the threat and absence of alternatives to killing), proportionality, presumption of innocence, and proof of guilt beyond reasonable doubt than killings categorized as acts of war (Blank 2012:1668; McMahan 2012:147). In self-defence (in contrast to war), killing the enemy should be the *last* resort and we do not generally accept killings of innocent bystanders as a collateral effect of law enforcement operations. The more one broadens self-defence justifications into non-urgent scenarios the stricter the proportionality constraint should be. Yet, given the epistemic limitations in the real world, current drones cannot be operated in a way that reflects such constraints.²

Further, it seems that terrorists often enter the list of HVT (a.k.a. the White House Kill List) due to *past* terrorist activity rather than concrete evidence of

² I am indebted to an anonymous referee for making this point.

current plans. It then becomes doubtful whether the targeted killings qualify as self- or other-defence rather than a death penalty – which again ought to be administered under much more demanding criteria. Jeff McMahan has reported that most people found his proposed justification of the killing of Bin Laden as an act of self-defence "surprising" (McMahan 2012). Most people seemed to perceive it quite simply as an execution, only it was an "extra-judicial execution" without trial, based on criteria that are at best unclear (Kretzmer 2005:176). Grégoire Chamayou states the dilemma nicely:

To sum up, the only two possibilities turned out to be unworkable: either (1) the strikes were a law enforcement activity, in which case they ought to conform to the restrictions that applied to them, one of which called for the gradation in the use of force – something that was impossible for the drone – or (2) they were covered by the laws of war, although these laws do not apply in zones that are currently not experiencing armed conflict, such as Pakistan or Yemen, where they nonetheless operate at present (Chamayou 2015:171).

Especially dubious are the widespread, so-called "signature strikes" based on "patterns of life analyses". A US Senior Administration Official recently described the choice of targets as involving

[A] variety of signatures, from the information and intelligence that in some ways is unique to the US government, for example [...] to the extent an individual's activities *are analogous to those traditionally performed by a military* (emphasis mine) (*Guardian* 1 July 2016).

It goes without saying that second-guessing the militant or otherwise violent nature of a target hardly constitutes proof of guilt beyond reasonable doubt. Neither does it meet the principle of discrimination. This leads me to the definitional problem of collateral killings in drone strategies.

5. Drones and collateral casualties

That drone killings represent a particular problem of collateral killings is of course a controversial claim as it goes against a widespread notion that drones are clearly better at distinguishing between combatants and noncombatants than alternative weapons systems. But here we have to be clear what the alternative weapons systems are. Given that drones are designed for the asymmetric conflicts of counterinsurgency and

counterterrorism we ought to compare them with alternatives from within that context. Targeted killing by drones should be compared broadly to alternative counterterrorism strategies and narrowly to other kinds of targeted killings. An obvious example of the latter is the targeted killing of Osama Bin Laden which was carried out, not by drones, but by a commando, "boots on the ground".

The following remark by Strawser is thus deceptive: "Drones, for all their current and potential misuse, have the potential for tremendous moral improvement over the aerial bombardments of earlier eras" (Strawser 2012). It goes without saying that if the bombardments of e.g. German cities during WWII are the reference, then almost all other weapons systems would compare favourably in terms of discrimination and proportionality. But the alternative to drone strikes in the context of counterinsurgency and asymmetric conflicts is not aerial bombardments. No one would have seriously proposed an aerial bombardment of the entire village in which Osama bin Laden was presumed to reside.

Whether drone killings involve an "acceptable" proportion of civilian costs also depends on how these are defined. As I just mentioned above, civilians pay a huge price simply by "living under drones". The terror of omnipresent lethal weapons hovering in the sky is forced upon enemies and civilians without distinction (see Boyle 2015: 115-17, Braun and Brunstetter 2013).

In a similar vein (as Strawser), Avery Plaw has argued that the proportion of civilian deaths as a result of drone killings compare favourably with the proportion of civilian deaths in the operations of "Antigovernment Elements" (AGE) in Afghanistan (e.g. Al Queda and the Taliban). Again, this should hardly be the relevant yardstick, since terrorist organizations by definition pursue their objectives by targeting civilians. To be fair, Plaw seems mainly to introduce the number of AGE civilian killings in a comparison of civilian casualties due to drone strikes with the number of civilians that would potentially be *saved* if drone killings of terrorist leaders significantly weakened the AGE's ability to terrorize and kill civilians.

But this is another "in principle" argument. There are strong reasons to doubt that the killing of the 40 to 70 "High Value Targets" in the years 2004-2011 (as reported by Plaw 2013:143) has significantly reduced the capacities of AGE. Quite a few leading experts in counterinsurgency have argued that the practical impact of drone strikes may well be the opposite (Kilkullen and Exum 2009; Matulich 2012). There are a

couple of plausible explanations for this. First, the enhanced asymmetry of drone strikes leaves the AGE's with three alternatives, namely 1) surrender, 2) targeting "civilian combatants" of the aggressor state (i.e. the drone operators) or 3) targeting civilians perceived as "enemies of the cause". Due to their status as unjust combatants they should *in principle* opt for 1). But the real world rarely works that way. Rather, alternative 3) is the foreseeable result, unless we succeed in uprooting evil by killing them all at a faster rate than new replacements can be recruited. Secondly, civilian victims of and witnesses to drone strikes do not make sophisticated proportionality considerations. They typically do not care whether the proportion is 3.86% or 23.85% which is the spectrum covered by four different databases reporting on drone strikes in Pakistan (Plaw 2013:138f).³ What they experience is disregard for civilian lives by the drone operators, leading them to the (no doubt naïve) conclusion that they are better protected by supporting or at least not opposing their local war lords.

6. Drones and official secrecy

That reliable data are hard to come by may be no accident either. Drone killings are carried out in a double isolation from public scrutiny. First, the drone strategy is accompanied by the dogma of giving "no safe haven" to terrorists. As a consequence, drone strikes are typically carried out in remote areas and their radical unpredictability in time and place ("anytime, anywhere") is once again definitional. This is another reason why the drone strategy falls outside the framework of the Laws of Armed Conflict: Wars have to be defined by a declared combat zone and some idea of a temporal scope.

When things go wrong, as they invariably do in armed conflicts, we have to rely on information provided by the drones' surveillance equipment which, for all their shiny features do not give us the full picture:

Drone technology without ground support leaves few options for post-operatic investigations. Further, verifying the combatant status of casualties is mostly impossible" (Rosén 2013:12)

The isolation from ground troops or other potential witnesses "makes it significantly easier for governments to avoid public scrutiny of their military adventures" (Sparrow

³ I think the broadness of this spectrum (a factor 6) should temper our trust in bold claims about the superior precision of drone strikes in terms of discrimination between combatants and noncombatants.

2009:27). Facts about the real status of victims can be hard to ascertain and there are at least a number of concrete examples of inflated claims about "High Profile" killings that turned out to be not so high or even not the alleged persons at all.⁴ One may wonder whether the tendency to inflate the status of targets is a result of the physical isolation of the drone operators. Strawser finds it an attraction of killing by remote control that drone operators can even wait and bring other people into the room for difficult decisions giving more room for checks and oversight. I think that depends on who you bring into the room. Given the isolation and secrecy surrounding the operations it could also make room for a dangerous kind of "group think" that increases the likelihood of immoral decisions. Many people were brought into the room when the Nazis decided on "the final solution" of the Jewish question but that did not make it any less immoral.

Second, drone killings are to a large extent ordered and carried out by intelligence agencies which are *by definition* not keen on a high level of transparency. There is thus a discrepancy or paradox involved in the advanced surveillance and documentation capacity of the drones and the secrecy and impenetrability of the operations. On this background, Waldron is right to remind us "how reluctant we should be to deploy principles authorizing homicide in an environment from which we know legal process will be largely banished" (Waldron 2012:122-23). If it is so ethical and effective, where is the information?

It is therefore at best half a truth to say that "we move pixel by pixel towards ultra high definition and total transparency" (Rosén p. 17). And maybe not even that because the technology opens up the possibility to operate in theatres that have hitherto been considered too remote and too complex. An ultra-high definition picture of a complex situation does not necessarily make the situation less complex. Rather than lifting the fog of war we are left in "the twin fogs of war and official secrecy" (See Ackerman 2016).

Are military drone strategies *necessarily* cloaked in such official secrecy or is this merely a contingent feature of current strategies? The answer once again depends on the extent to which pragmatic considerations are taken seriously. Drone killings seem to be intimately linked to a security paradigm that has dominated strong military powers for quite some time, in which official secrecy, lack of transparency and intense

⁴ For some details on this, see Boyle 2015, Mayer 2015.

political spin (if not propaganda) is indeed definitional. I see no sign of any fundamental change of this in the near future.⁵

7. Drones and "combatant immunity"

Military drones are designed to radically increase the safety of "our" (supposedly just) combatants. Strawser argues that this is not only morally *justified* but morally *required* by his self-declared "principle of unnecessary risk".

It is wrong to command someone to take an *unnecessary* potentially lethal risk in an effort to carry out a just action for some good; any potentially lethal risk incurred must be justified by some strong countervailing reason (Strawser 2013:344).

But this principle is formulated in such a qualified way that it is of limited relevance in the real world. The real world is overpopulated with strong countervailing reasons!

Uwe Steinhoff presents one type of such countervailing reasons:

[W]hen police officers are ordered to make traffic stops and in that context ask for driver's licenses, for instance, we do *not* arm them to the teeth and do *not* put them into heavy body armor. The reason for this is quite simply that the citizens do not want that: they want to be confronted with a recognizable human being, not with a Star Wars storm trooper. If this is already sufficient as regards "countervailing reasons" against the strongest protection, then certainly there will be a lot of countervailing reasons in the case of drones. (Steinhoff 2013: 206)

What would the analogous countervailing reasons be here? Maybe something like the following: People in remote areas of Pakistan racked by terrorists and warlords want to be "protected" by people who make a serious attempt to communicate and to live up to their noble intentions; by people who make an effort to negotiate the terms of their strategy with those who have to be "living under drones" with all the social and psychological repercussions of that. If this is not the case but rather something close to the opposite (operations based on a somewhat relaxed definition of "low level militants", a foreign power simply imposing its strategic terms on the civilian population), one should not be terribly surprised if insurgent recruitment tends to increase after each drone strike. Giving priority to drone killings over other counter-

⁵ Thanks to an anonymous referee for pressing me on this point.

insurgency methods (that involves more "boots on the ground") seems to alienate "hearts and minds" instead of winning them over. Again my point is that this is not a contingent, practical consequence but due to the asymmetry, distance, and isolation inherent in drone strategies.

8. Overall policy and its implementation

The five considerations above all raise serious doubts about the following statement by Strawser:

If one believes that the current US policy of targeted killings is morally objectionable, then it is the policy that should be objected to, not this particular way of implementing it (Strawser 2012).

I am not going to claim that there is no room for improvement within the current US drone practice. I should sincerely hope so in light of the few substantial accounts of concrete drone killings that has been brought to light. Incidentally not due to an uncompromising policy of transparency from the CIA but rather to an uncompromising persistence by critical journalists (see e.g. Cloud 2011). But I do not buy the notion that the US policy was formulated prior to and independently from the option to carry it out by the use of drones. It seems to me much more plausible that US policy was strongly informed by prospects and scenarios formulated by the drone producers.⁶ There was not an extensive program of exclusive targeted killings prior to implementation of military drones.

It would in a way be tempting to argue that the direction is opposite: drones define or constitute policy. That would, however, be over-simplified as well. It goes without saying that the policy of targeted killings is *also* a response to a new type of threat posed by small groups of exceptionally dangerous enemies. The truth is therefore rather that technology and policy are interrelated in a more complex way. But that would be enough to challenge the view that military policy is one thing, how it is implemented quite another.

We can of course *dream* of drones with genuinely humanitarian purposes. For example types of surveillance drones whose primary function is to warn civilians of terrorist threats in their vicinity or to conduct surveillance of atrocities against civilians

⁶ An indication of this kind of influence can be found in Strawser as well when he uncritically canvass the producers' laudatory descriptions of drone capabilities of discrimination and precision.

(Whetham 2015). But again: the reason why this is not the reality is not just that military drones happen to be used differently in practice. It is due to the fact that this was never their intended use and that they were not designed that way. The day drone producers sit down and talk to the people who are supposed to enjoy better protection from drones might mark the beginning of an entirely different, truly humanitarian weapon. But that day is yet to come and it may well be the day that Satan would be skating to work.

In the beginning, I quoted Seneca for the view that a sword never kills anybody. Seneca was a wise man and this was actually not a view he held himself. He ascribed it to "certain men". Here is another quote which is probably closer to his own view: "Arms observe no bounds; nor can the wrath of the sword, once drawn, be easily checked or stayed; war delights in blood."⁷

⁷ In *The Madness of Hercules*, lines 403-05

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