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BRIEF**

DRONES AND TARGETED KILLING: DEFINING A EUROPEAN POSITION

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SUMMARY

The era of drone warfare is underway, but the European Union has been largely passive in its response. It has not reacted publicly to the US campaign of drone strikes or tried to develop an alternative standard for the use of lethal force. As EU states seek to acquire drones themselves, and with the technology spreading around the world, the EU should take a more active stance. A European initiative would be timely because changes in US policy mean there may be a greater chance for a constructive dialogue on this subject within the transatlantic alliance.

The EU should base its position on the idea that lethal force should only be used outside theatres of conventional military operations against individuals posing a serious and imminent threat to innocent life. President Barack Obama has now embraced a similar standard for US policy, though he interprets it in a far more permissive way, and retains the underlying idea of a global armed conflict against al-Qaeda. The EU should press Obama to follow through on his rhetoric by further restricting US strikes and begin discussions to explore the idea of self-defence as the basis for lethal strikes outside the battlefield. It should also encourage greater transparency and accountability from the US and work to end the anomalous notion of an unbounded war with a loose network of terrorist groups.

Since the United States carried out the first lethal drone strike, in Afghanistan in October 2001, drones have emerged from obscurity to become the most contentious aspect of modern warfare. Armed drones or unmanned aerial vehicles (UAVs) are now the United States' weapons platform of choice in its military campaign against the dispersed terrorist network of al-Qaeda. They offer an unprecedented ability to track and kill individuals with great precision, without any risk to the lives of the forces that use them, and at a much lower cost than traditional manned aircraft. But although the military appeal of remotely piloted UAVs is self-evident, they have also attracted enormous controversy and public concern. In particular, the regular use of drones to kill people who are located far from any zone of conventional hostilities strikes many people as a disturbing development that threatens to undermine the international rule of law.

Although the United Kingdom and Israel have also employed armed UAVs, the US has carried out the vast majority of drone strikes, especially those outside battlefield conditions. These attacks have been directed at suspected terrorists or members of armed groups in a series of troubled or lawless regions across a sweep of countries around the wider Middle East, encompassing Pakistan, Yemen, and Somalia, that are not otherwise theatres of US military operations. The US recently opened a new drone base in Niger, raising fears that armed drones might at some point be used in the Sahel or North Africa, though so far the base appears to be used only for surveillance flights. Since entering the White House in 2008, President Barack Obama has dramatically increased

the use of remotely piloted aircraft to kill alleged enemies of the US. According to one estimate, his administration is responsible for almost 90 percent of the drone attacks that the US has carried out.¹

The US use of drones for targeted killing away from any battlefield has become the focus of increasing attention and concern in Europe. In a recent opinion poll, people in all European countries sampled were opposed to the use of drones to kill extremists outside the battlefield and a large majority of European legal scholars reject the legal justification offered for these attacks.² But European leaders and officials have responded to the US campaign of drone strikes in a muted and largely passive way. Although some European officials have made their disagreement with the legal claims underlying US policies clear in closed-door dialogues and bilateral meetings, EU member state representatives have said almost nothing in public about US drone strikes.³ The EU has so far failed to set out any vision of its own about when the use of lethal force against designated individuals is legitimate. Nor is there any indication that European states have made a serious effort to influence the development of US policy or to begin discussions on formulating common standards for the kinds of military operations that UAVs facilitate.

Torn between an evident reluctance to accuse Obama of breaking international law and an unwillingness to endorse his policies, divided in part among themselves and in some cases bound by close intelligence relationships to the US, European countries have remained essentially disengaged as the era of drone warfare has dawned. Yet, as drones proliferate, such a stance seems increasingly untenable. Moreover, where in the past the difference between US and European conceptions of the fight against al-Qaeda seemed like an insurmountable obstacle to agreement on a common framework on the use of lethal force, the evolution of US policy means that there may now be a greater scope for a productive dialogue with the Obama administration on drones.

This policy brief sketches the outline of a common European position, rooted in the idea that outside zones of conventional hostilities, the deliberate taking of human life must be justified on an individual basis according to the imperative necessity of acting in order to prevent either the loss of other lives or serious harm to the life of the nation. It argues that such a position would now offer a basis for

renewed engagement with the Obama administration, which has endorsed a similar standard as a matter of policy, even if its interpretation of many key terms remains unclear and its underlying legal arguments remain different. Finally, it suggests that European states will need to clarify their own understanding and reach agreement among themselves on some parts of the relevant legal framework as they refine their position and pursue discussions with the United States. None of these efforts will necessarily be easy. But unless the EU defines a position on remotely piloted aircraft and targeted killing, it risks neglecting its own interests and missing an opportunity to help shape global standards in an area that is vital to international peace and security.

Arguments for a European stance

There are several ways in which the EU has an interest in the elaboration of a clearer position on drone strikes and targeted killing, and in a broader effort to promulgate more restrictive international standards in this area. The EU is committed to put human rights and the rule of law at the centre of its foreign policy, and many Europeans are likely to consider the widespread use of drones outside battlefield conditions incompatible with these principles. The EU has in the past condemned Israeli targeted killing of Palestinians. For instance, in March 2004, the European Council issued a statement describing the recent Israeli strike against Hamas leader Sheikh Ahmed Yassin as an “extra-judicial killing”. It added: “Not only are extra-judicial killings contrary to international law, they undermine the concept of the rule of law which is a key element in the fight against terrorism.”⁴ Although there are, of course, differences in the contexts of US and Israeli actions, the EU should continue to use its influence to work against the spread of a practice that it has previously opposed.

In addition, there is a significant body of evidence that drone strikes in these regions have a damaging impact on local life and political opinion that can fuel anti-US and anti-Western sentiment. A detailed study of drone strikes in Pakistan found that they deterred humanitarian assistance to victims (because of the alleged practice of “double-tap” targeting in which two missiles are launched successively at the same target), caused financial hardship to victims’ extended families, exerted a psychological toll on communities, and inhibited social gatherings and community meetings.⁵ A careful study by the International Crisis Group found some evidence that “there is less opposition within FATA [the Federally Administered Tribal Areas] to drone strikes than among activists and commentators in the country’s

¹ “These figures cover Pakistan and Yemen, where the vast majority of US out-of-theatre drone strikes have taken place; they are taken from the database maintained by the National Security Studies Program, New America Foundation, available at <http://natsec.newamerica.net/> (hereafter, National Security Studies Program database).

² “Global Opinion of Obama Slips, International Policies Faulted”, Pew Research Global Attitudes Project, 13 June 2012, available at <http://www.pewglobal.org/2012/06/13/chapter-1-views-of-the-u-s-and-american-foreign-policy-4/#drones>.

³ The most critical comment that I have found by a European official about a US drone strike was made in 2002 by the then Swedish foreign minister, Anna Lindh, who described the killing of suspected al-Qaeda member Ali Qaed Sinan al-Harithi in Yemen as “a summary execution that violates human rights”. See Brian Whitaker and Oliver Burkeman, “Killing probes the frontiers of robotics and legality”, *Guardian*, 6 November 2002, available at <http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida>.

⁴ “Council Conclusions on Assassination of Sheikh Ahmed Yassin”, European Council, 22 March 2004, available at http://europa.eu/rapid/press-release_PRES-04-80_en.htm.

⁵ “Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan”, International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, 2012, pp. 73–101, available at <http://www.livingunderdrones.org/download-report/>.

urban centres”, but concluded that the drone programme was exploited by hardliners in Pakistan to ignite anti-US sentiment and encouraged a harmful dependence of the US on the Pakistani military as its primary counterterrorism partner.⁶ Some Western diplomats in Yemen argue that drone strikes are not broadly unpopular, but scholars who have studied the issue contend that a more focused and restrained use of strikes against high-level members of armed groups would limit civilian casualties and be more effective in reinforcing US national security.⁷ A young Yemeni activist who testified before the US Senate Judiciary Committee in April 2013 said that drones had become “the face of America to many Yemenis” and complicated the internal political dynamics in his country.⁸

US drone strike practices also complicate intelligence co-operation between EU member states and the US, because of the risk that information handed over by Europeans will be used as the basis for lethal strikes that might be considered illegal in the source countries. In December 2012, the British High Court dismissed a case brought by a young Pakistani man whose father was killed by a drone strike, seeking to establish whether information provided by British intelligence services was used by the CIA’s drone programme; the case is currently under appeal.⁹ The German government came under strong domestic criticism after a US drone strike killed a German citizen of Turkish descent in Pakistan in October 2010 amid claims that the German police had provided US intelligence agencies with information about his movements.¹⁰ A federal prosecutor is investigating the legality of the killing, and in the meantime the German government has instituted a policy of not passing information to the US that could be used for targeted killing outside battlefield conditions, but activists argue that it is impossible to know whether any piece of information might form part of a mosaic used in targeting decisions.¹¹ In Denmark, a public controversy has blown up over claims by a Danish citizen, Morten Storm, that he acted as a Western agent inside Yemeni jihadist circles and helped the CIA track the radical cleric Anwar al-Awlaki, who was killed by a drone strike in September 2011, with the knowledge of Danish intelligence services.

Meanwhile, European governments are increasingly acquiring armed drones for their own military forces and, in some cases, encountering strong public or political opposition. German Defence Minister Thomas de Maizière’s announcement of his wish to purchase armed UAVs for the Bundeswehr prompted campaigning groups to launch an appeal entitled “No Combat Drones” and provoked criticism from opposition parties. In the UK, the shift of control of British drones from Nevada to a Royal Air Force base in Lincolnshire led to a demonstration of several hundred people. Italy, the Netherlands, and Poland are among other EU member states that are seeking or considering the purchase of armed drones, and European defence consortia are exploring the possibility of manufacturing both surveillance and armed UAVs in Europe. To defuse public suspicion of drones in Europe, EU governments have an interest in reducing the controversy provoked by US actions and developing a clearer European line about when lethal strikes against individuals are permissible.

Armed drones are proliferating (and developing in sophistication) rapidly beyond Europe. Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the US until now from setting an unchallenged global precedent. Already Chinese state media have reported that the country’s Public Security Ministry developed a plan to carry out a drone strike against a Burmese drug trafficker implicated in the killing of several Chinese sailors, though the suggestion was apparently overruled.¹² As well as China, which has an active drone programme, Russia, Saudi Arabia, and Turkey are either developing or have announced an intention to purchase armed UAVs. The US assertion that it can lawfully target members of a group with whom it declares itself to be at war, even outside battlefield conditions, could become a reference point for these and other countries. It will be difficult for the EU to condemn such use of drones if it fails to define its own position more clearly at this point.

In considering the development of EU policy on armed UAVs and targeted killing, it is important to distinguish between the different issues involved. Some critics of drones are opposed to any use of armed UAVs and would like European countries to forswear their acquisition and work against their proliferation. Campaigners argue that the development of drones “lowers the threshold to armed aggression” and is associated with an unacceptable level of civilian deaths.¹³ One study of combat operations in Afghanistan found that strikes involving UAVs were “an order of magnitude more likely to result in civilian casualties per engagement” and attributed this in part to a lower level of training for UAV

6 “Drones: Myths and Reality in Pakistan”, International Crisis Group, Asia Report No. 247, 21 May 2013, pp. 25, 34, available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/247-drones-myths-and-reality-in-pakistan.pdf>.

7 Author interview with senior Western diplomat, 8 November 2012; “Gregory Johnsen on Yemen, the US, and Drones”, OpenCanada.Org, 14 December 2012, available at <http://opencanada.org/features/the-think-tank/interviews/gregory-johnsen-on-yemen-the-u-s-and-drones/>.

8 “Statement of Farea Al-Muslimi”, United States Senate Judiciary Committee, 23 April 2013, available at <http://www.judiciary.senate.gov/pdf/04-23-13Al-MuslimiTestimony.pdf>.

9 “Drone victim to appeal ruling over UK support for CIA strikes in Pakistan”, press release, Leigh Day, 21 December 2012, available at <http://www.leighday.co.uk/News/2012/December-2012/Drone-victim-to-appeal-ruling-over-UK-support-for-Ravi-Somaiya,-Drone-Strike-Prompts-Suit,-Raising-Fears-for-US-Allies>, the *New York Times*, 30 January 2013, available at http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit-raises-concerns-on-intelligence-sharing.html?_r=0.

10 Herbert Gude, “Raining Death: German Jihadist Killed in US Drone Attack”, *Spiegel Online*, 30 April 2012, available at <http://www.spiegel.de/international/world/german-citizen-killed-in-us-air-strike-after-joining-the-jihad-a-830585.html>.

11 Author interview with official in the German Federal Foreign Office, 30 May 2012; author interview with Andreas Schüller, 17 May 2013.

12 Christopher Bodeen, “China Emerging as New Force in Drone Warfare”, *Associated Press*, 3 May 2013, available at <http://bigstory.ap.org/article/china-emerging-new-force-drone-warfare>.

13 See, for instance, “Appeal: No Combat Drones!”, *Drohnen-Kampagne*, available at <http://drohnen-kampagne.de/appell-keine-kampfdrohnen/international/appeal-no-combat-drones-english-version/>.

operators in minimising civilian harm.¹⁴ But other analysts have argued that the use of drones in circumstances where armed forces face a choice between different weapons platforms reduces civilian casualties because of the greater precision of UAVs.¹⁵

In any case, the outcry over the level of civilian casualties in drone attacks is focused primarily on their non-battlefield use, where there is enormous dispute over who might be a legitimate target, and where many people understandably feel that there should be a much lower tolerance of civilian death than in conventional zones of hostilities. Remotely piloted drones are troubling because, by facilitating the killing of targeted individuals outside battlefield conditions, they extend the use of force into areas and even countries where it might not traditionally have been contemplated. The impersonality of UAVs seems to give them a less intrusive quality than manned aircraft, let alone missions involving the placement of troops on the ground, and in this way lower the barrier to the killing of individuals in countries where conventional military operations are not underway. The possibility that states could claim that they too are entitled in principle to kill any member of an armed group with which they declare themselves to be at war adds to the concerns to which the technology gives rise. Moreover, drones allow lethal force to be used in a particularly covert and unaccountable way, raising the prospect of a future where it becomes hard to know which country or organisation has carried out an attack.

Yet seeking to ban the use of armed UAVs would not be an effective way to deal with these problems. There is little if any prospect of such a campaign gaining traction. Moreover, it would deprive European countries of a military and surveillance platform that many regard as attractive. For these reasons, the most constructive way for Europeans to address the dangers posed by UAVs is likely to be through working towards a clearer international standard for the use of force outside battlefield conditions, covering substantive questions of targeting as well as transparency and accountability, both through discussions within the EU and dialogue with the US.

The legal basis of US policy

It would be particularly timely for the EU to clarify its position on the use of lethal force against members of non-state groups because US policy is now evolving. Obama has spoken of the importance of “creating a legal structure, processes, with oversight checks on how we use unmanned weapons [...] partly because technology may evolve fairly

rapidly for other countries as well”.¹⁶ A number of retired US military officers have warned that an excessive reliance on drones could be counterproductive for US national security, and the administration has reduced the number of drone strikes sharply in recent months.¹⁷ In his major counterterrorism speech of 23 May, Obama said that the US was at a crossroads in its campaign against al-Qaeda, that the fight was entering a new phase, and that it was important to “discipline our thinking, our definitions, our actions” lest the US “be drawn into more wars we don’t need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states”.¹⁸

Former administration officials have said the US is at fault for not doing more to work with allies to develop global rules on drone strikes. Former State Department legal adviser Harold Koh said recently that the administration “should be more willing to discuss international legal standards for use of drones, so that our actions do not inadvertently empower other nations and actors who would use drones inconsistent with the law”.¹⁹ EU member states are in a position to use their influence to support those groups within the administration who are pushing for improved standards and greater internationalisation. As one former Obama administration official put it, the US government is subject to few domestic checks on its interpretation of international law in this area, so the reaction of allies is “the main test and constraint for the administration [...] if other states don’t object, the conclusion is that they are not concerned”.²⁰

In order to understand the inflection points in US policy, and the way in which the EU could most usefully intervene, it may be helpful to look more closely at the evolution and proclaimed legal basis for US policy. The targeted killing programme began as part of a broader campaign to “find, fix, and finish” members of the terrorist network responsible for the attacks of September 11, a covert global manhunt operated both by the CIA and US Special Forces. Although no clear record of US drone strikes exists, one investigative group estimates that the US has carried out 370 strikes in Pakistan, killing in the range of 2,500–3,500 people; around 50 strikes in Yemen, killing 240–349 people; and between three and nine strikes in Somalia, killing 7–27 people.²¹ For several years the drone programme was not officially acknowledged, but in the last three years administration officials have gradually revealed some of the legal basis and

¹⁴ “Drone Strikes: Civilian Casualty Considerations”, Joint and Coalition Operational Analysis (JCOA), 18 June 2013, document on file with author.

¹⁵ Daniel Byman, “Why Drones Work”, *Foreign Affairs*, Jul/Aug 2013, pp. 37–8; William Saletan, “In Defence of Drones”, *Slate*, 19 February 2013, available at http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html.

¹⁶ Mark Bowden, *The Finish* (New York: Atlantic Monthly Press, 2002), quoted in Micah Zenko, “Reforming US Drone Strike Policies”, Council on Foreign Relations, January 2013, p. 24, available at http://i.cfr.org/content/publications/attachments/Drones_CSR65.pdf.

¹⁷ Scott Shane, “Debate Aside, Number of Drone Strikes Drops Sharply”, the *New York Times*, 21 May 2013, available at <http://www.nytimes.com/2013/05/22/us/debate-aside-drone-strikes-drop-sharply.html>.

¹⁸ Barack Obama, speech at the National Defense University, Washington DC, 23 May 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (hereafter, Obama, speech at National Defense University).

¹⁹ Harold Koh, “How to End the Forever War?”, speech at the Oxford Union, Oxford, 7 May 2013, p. 14, available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>.

²⁰ Author interview with former US administration official, 22 February 2013

²¹ Figures from the Bureau of Investigative Journalism; see <http://www.thebureauinvestigates.com/2013/06/03/may-2013-update-us-covert-actions-in-pakistan-yemen-and-somalia/>.

procedures for drone strikes, and some official documents have been published or leaked to the media. Nevertheless, several important aspects of the legal justification and policy guidelines for US drone strikes remain unclear.

US officials have at times offered two different legal justifications for the use of lethal force without being clear about the precise boundary between them. The first and most important justification relies on the claim that the US is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces, authorised for the purpose of US domestic law by a Congressional resolution (the Authorization for Use of Military Force, or AUMF) passed on 14 September 2001. While administration officials admit that the international laws governing such a conflict against an external non-state group are unclear, they contend that the rules should be understood by analogy with more traditional forms of conflict to allow the targeting of all members of enemy forces wherever they are found. At the same time, they recognise that other parts of international law, concerning state sovereignty, limit the scope for US action: when alleged enemy fighters are located on the territory of a state with whom the US is not at war, strikes can only be carried out with the consent of that state, or when it is unable or unwilling to suppress the threat posed by the fighters itself.

At times, however, administration officials have appeared to add an additional or alternative justification: the US can act in self-defence against imminent threats to its national security. For example, John Brennan, at the time Obama's top counterterrorism adviser, said in April 2012 that "the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may *also* use force consistent with our inherent right of national self-defence" (emphasis added). This justification seems to address situations where the US feels the need to use lethal force outside the boundaries of an existing armed conflict; it looks back to earlier cases where the US used military force in response to terrorist acts, such as President Ronald Reagan's strike against Libya in 1986 and President Bill Clinton's attack on supposed al-Qaeda facilities in Sudan and Afghanistan in 1998. However, in the present context, it appears to intermingle or conflate a number of different notions: first, the concept of self-defence under the principles of *jus ad bellum* (the laws governing the use of force between states) as a justification for violating the sovereignty of another state, traditionally assessed by reference to the so-called "Caroline criteria" elaborated by the US in 1842; second, the threat to innocent life as a justification for the deliberate killing of an individual person (perhaps with reference to some conception of human rights law or principles); third, perhaps, some idea that an actual or imminent armed attack by a non-state group provides a justification for the targeted state to use force against that group as a collective entity.

Because the administration has not been clear about the precise justification for the strikes it has carried out so far,

we cannot be certain whether all of them fall within the scope of the "armed conflict" justification. Some scholars who have followed the administration's pronouncements closely believe this to be the case.²² Another possible explanation for the apparent ambiguity in the US position is that there were disagreements within the administration about the scope of the alleged armed conflict, and that the formula of alternative justifications was chosen to allow flexibility between differing views.²³ In any case, the question of who can lawfully be targeted under the armed conflict justification has been left vague in two crucial respects. First, the administration has given little indication of how it assesses membership of the enemy forces, a concept that is far from clear in the case of non-military organisations such as al-Qaeda.²⁴ Second, the administration has given very little information about how it defines the "associated forces" that are said to be part of the enemy in the armed conflict against al-Qaeda. The testimony of senior US military officers before a recent hearing of the Senate Committee on Armed Services revealed a remarkable degree of confusion on this question, including on whether such forces had merely to be affiliated to al-Qaeda or had also to be involved in planning attacks against the US.²⁵ It is through the concept of "associated forces" that the targeted killing campaign has been extended to Yemen and Somalia, where the core al-Qaeda grouping responsible for the September 11 attacks has no presence.

The significance of the distinction between the armed conflict and self-defence justifications can best be understood with reference to the different paradigms to which they appeal. The armed conflict justification is based on what could be described as a logic of collective membership: individuals can be targeted on the basis of their status as members of a group against which the US is engaged in hostilities. The self-defence justification is based on a logic of individual threat: individuals can be killed only after a determination in their individual case that a strike is necessary to avoid an imminent threat to life that cannot be prevented in any other way. The second justification thus seems to entail a significantly higher threshold to be met before targeted killing can be authorised – though the Obama administration's use of behavioural criteria to determine membership of al-Qaeda and its associated forces means the distinction is not in practice a hard-and-fast one.

Two further points are worth noting. First, the administration has acknowledged that in the case of American citizens, even when they are involved in the armed conflict, the

²² Kenneth Anderson and Benjamin Wittes, *Speaking the Law: The Obama Administration's Addresses on National Security Law* (Stanford, CA: Hoover Institution Press, 2013), p. 28, available at <http://www.hoover.org/taskforces/national-security/speaking-the-law/>.

²³ According to reports, State Department legal adviser Harold Koh opposed extending the armed conflict model outside Afghanistan and Pakistan; see Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin, 2012), pp. 140, 219–220.

²⁴ See Ryan Goodman, "The Drone Question Obama Hasn't Answered", *The New York Times*, 8 March 2013, available at <http://www.nytimes.com/2013/03/09/opinion/the-drone-question-obama-hasnt-answered.html>.

²⁵ Rosa Brooks, "The War Professor", *Foreign Policy*, 23 May 2013, available at http://www.foreignpolicy.com/articles/2013/05/22/the_war_professor.

US Constitution imposes additional requirements of due process that bring the threshold for targeted killing close to that involved in a self-defence analysis. These requirements were listed in a Department of Justice white paper that became public earlier this year.²⁶ Second, the administration has at times suggested that even in the case of non-Americans its policy is to concentrate its efforts against individuals who pose a significant and imminent threat to the US. For example, John Brennan said in his Harvard speech in September 2011 that the administration's counterterrorism efforts outside Afghanistan and Iraq were "focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qaeda and its associated forces".²⁷

However, the details that have emerged about US targeting practices in the past few years raise questions about how closely this approach has been followed in practice. An analysis published by McClatchy Newspapers in April, based on classified intelligence reports, claimed that 265 out of 482 individuals killed in Pakistan in a 12-month period up to September 2011 were not senior al-Qaeda operatives but instead were assessed as Afghan, Pakistani, and unknown extremists.²⁸ It has been widely reported that in both Pakistan and Yemen the US has at times carried out "signature strikes" or "Terrorist Attack Disruption Strikes" in which groups are targeted based not on knowledge of their identity but on a pattern of behaviour that complies with a set of indicators for militant activity. It is widely thought that these attacks have accounted for many of the civilian casualties caused by drone strikes. In both Pakistan and Yemen, there may have been times when some drone strikes – including signature strikes – could perhaps best be understood as counterinsurgency actions in support of government forces in an internal armed conflict or civil war, and in this way lawful under the laws of armed conflict. Some attacks in Pakistan may also have been directly aimed at preventing attacks across the border on US forces in Afghanistan. However, by presenting its drone programme overall as part of a global armed conflict, the Obama administration continues to set an expansive precedent that is damaging to the international rule of law.

Obama's new policy on drones

It is against this background that Obama's recent counterterrorism speech and the policy directive he announced at the same time should be understood. On

the subject of remotely piloted aircraft and targeted killing, there were two key aspects to his intervention. First, he suggested that the military element in US counterterrorism may be scaled back further in the coming months, and that he envisages a time in the not-too-distant future when the fight against the al-Qaeda network will no longer qualify as an armed conflict. He said that "the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat" and that while al-Qaeda franchises and other terrorists continued to plot against the US, "the scale of this threat closely resembles the types of attacks we faced before 9/11".²⁹ Obama promised that he would not sign legislation that expanded the mandate of the AUMF, and proclaimed that the United States' "systematic effort to dismantle terrorist organizations must continue [...] but this war, like all wars, must end". The tone of Obama's speech contrasted strongly with that of US military officials who testified before the Senate Committee on Armed Services the week before; Michael Sheehan, the Assistant Secretary of Defence for Special Operations and Low-Intensity Conflict, said then that the end of the armed conflict was "a long way off" and appeared to say that it might continue for 10 to 20 years.³⁰

Second, the day before his speech, Obama set out regulations for drone strikes that appeared to restrict them beyond previous commitments (the guidance remains classified but a summary has been released). The guidance set out standards and procedures for drone strikes "that are either already in place or will be transitioned into place over time".³¹ Outside areas of active hostilities, lethal force will only be used "when capture is not feasible and no other reasonable alternatives exist to address the threat effectively". It will only be used against a target "that poses a continuing, imminent threat to US persons". And there must be "near certainty that non-combatants will not be injured or killed".

In some respects, these standards remain unclear: the president did not specify how quickly they would be implemented, or how "areas of active hostilities" should be understood. Nevertheless, taken at face value, they seem to represent a meaningful change, at least on a conceptual level. Effectively, they bring the criteria for all targeted strikes into line with the standards that the administration had previously determined to apply to US citizens. Where the administration had previously said on occasions that it focused in practice on those people who pose the greatest threat, this is now formalised as official policy. In this way, the standards are significantly more restrictive than the limits that the laws of armed conflict set for killing in wartime, and represent a shift towards a threat-based rather than status-based approach.

²⁶ "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force", US Department of Justice, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (hereafter, "Lawfulness of a Lethal Operation", US Department of Justice).

²⁷ "Obama reflects on drone warfare", *CNN Security Clearance*, 5 September 2012, available at <http://security.blogs.cnn.com/2012/09/05/obama-reflects-on-drone-warfare/>.

²⁸ Jonathan S. Landay, "Obama's drone war kills 'others', not just al Qaeda leaders", McClatchy Newspapers, 9 April 2013, available at <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UaTvutLVCS0>.

²⁹ Obama, speech at National Defense University.

³⁰ "Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force", US Senate Committee on Armed Services, 16 May 2013, pp. 10, 18, available at <http://www.armed-services.senate.gov/Transcripts/2013/05%20May/13-43%20-%205-16-13.pdf>.

³¹ This and succeeding quotations in this paragraph are from "Fact Sheet: US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities", Office of the Press Secretary, The White House, 23 May 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

In effect, the new policy endorses a self-defence standard as the de facto basis for US drone strikes, even if the continuing level of attacks would strike most Europeans as far above what a genuine self-defence analysis would permit.³² The new standards would seem to prohibit signature strikes in countries such as Yemen and Somalia and confine them to Pakistan, where militant activity could be seen as posing a cross-border threat to US troops in Afghanistan. According to news reports, signature strikes will continue in the Pakistani tribal areas for the time being.³³

However, the impact of the new policy will depend very much on how the concept of a continuing, imminent threat is interpreted. The administration has not given any definition of this phrase, and the leaked Department of Justice white paper contained a strikingly broad interpretation of imminence; among other points, the white paper said that it “does not require the United States to have clear evidence that a specific attack on US persons or interests will take place in the immediate future” and that it “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans”.³⁴ The presidential policy guidance captures the apparent concerns behind the administration’s policy more honestly by including the criterion of continuing threat, but this begs the question of how the notions of a “continuing” and “imminent” threat relate to each other. Even since Obama’s speech, the US is reported to have carried out four drone strikes (two in Pakistan and two in Yemen) killing between 18 and 21 people – suggesting that the level of attacks is hardly diminishing under the new guidelines.³⁵

It is also notable that the new standards announced by Obama represent a policy decision by the US rather than a revised interpretation of its legal obligations. In his speech, Obama drew a distinction between legality and morality, pointing out that “to say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance”. The suggestion was that the US was scaling back its use of drones out of practical or normative considerations, not because of any new conviction that its previous legal claims went too far. The background assertion that the US is engaged in an armed conflict with al-Qaeda and associated forces, and might therefore lawfully kill any member of the opposing forces wherever they were found, remains in place to serve as a precedent for other states that wish to claim it.

Looking forward, Obama’s speech strongly suggests that the time leading up to the withdrawal of most US forces from Afghanistan by the end of 2014 could be a crucial period for

the evolution of US policy, and a significant window for the EU to pursue discussions with the US. When US troops are no longer fighting on the ground in Afghanistan, there will be no conventional military operations against al-Qaeda or the Taliban around which a notional armed conflict can be focused and no zone of hostilities in which status-based targeting is clearly justified. Nor will it be possible to justify drone strikes in Pakistan as necessary to prevent attacks on US forces in Afghanistan. Much of the language of Obama’s speech suggests that he regards the withdrawal of troops from Afghanistan both as a likely justification for further reducing drone strikes and perhaps also as a logical moment to reconsider the nature of the campaign against al-Qaeda more broadly. There is no guarantee that Obama will be ready to declare the armed conflict over at that point, or even to rethink the legal prerogatives he claims in the conflict, but he has clearly flagged these questions for consideration.

A basis for European engagement with the US

If this is the US position, what about the EU? EU member states have not yet tried to formulate a common position on the use of lethal force outside battlefield conditions. Some EU member states may not have settled views on the subject, they may incline to different answers to some unresolved questions of law, and they are subject to somewhat different restrictions through their domestic legal frameworks. While European countries have not taken public positions, Germany, Austria, and some Nordic countries are among those that have tended to be more direct in their criticism of US policy in private meetings, while France and the UK probably have greater sympathy with the US. Other EU member states that do not face a serious threat from international terrorism or deploy military forces in overseas operations against non-state groups may not have felt any need to consider their views on these issues at all.

Nevertheless, it seems possible to construct a central core of agreement that would be broadly shared across the EU. The foundation of this common vision would be the rejection of the notion of a de-territorialised global armed conflict between the US and al-Qaeda. Across the EU there would be agreement that the confrontation between a state and a non-state group only rises to the level of an armed conflict if the non-state group meets a threshold for organisation, and if there are intense hostilities between the two parties.³⁶ The consensus view within the EU would be that these conditions require that fighting be concentrated within a specific zone (or zones) of hostilities. Instead of a global war, Europeans would tend to see a series of discrete situations, each of which needs to be evaluated on its own merits to decide whether it qualifies as an armed conflict.

Outside an armed conflict, the default European assumption would be that the threat of terrorism should be confronted within a law enforcement framework. This framework would not absolutely prohibit the deliberate killing of

³² For an argument that the new guidelines render the existence of an armed conflict irrelevant for targeting purposes, see Robert Chesney, “Does the Armed-Conflict Model Matter in Practice Anymore?”, *Lawfare Blog*, 24 May 2013, available at <http://www.lawfareblog.com/2013/05/does-the-armed-conflict-model-matter-in-practice-anymore/>.

³³ Peter Baker, “In Terror Shift, Obama Took a Long Path”, the *New York Times*, 27 May 2013, available at http://www.nytimes.com/2013/05/28/us/politics/in-terror-shift-obama-took-a-long-path.html?hp&_r=0.

³⁴ “Lawfulness of a Lethal Operation”, US Department of Justice, p. 7.

³⁵ National Security Studies Program database.

individuals, but it would set an extremely high threshold for its use – for example, it might be permitted where strictly necessary to prevent an imminent threat to human life or a particularly serious crime involving a grave threat to life.³⁷ Where the threat was sufficiently serious, the state’s response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat. In any action that involved the deliberate taking of human life, there would have to be a rigorous and impartial post-strike assessment, with the government disclosing the justification for its action. Finally, EU states might perhaps agree that in the face of an armed attack or an imminent armed attack, states can use force on the territory of another state without its consent, if that state is unable or unwilling to act effectively to restrain the attack.

This consensus provides a basis on which the EU can step up engagement with the US on drones and targeted killing. At the heart of the EU position is the belief that the use of lethal force outside zones of active hostilities is an exceptional measure that can only be justified on the basis of a serious and imminent threat to human life. At a time when drone technology is proliferating rapidly, EU leaders should be more forthright in making this argument publicly – especially since Obama has adopted it, at least rhetorically, as an element of his policy. While Europeans may be reluctant to accuse Obama of having violated international law, they can assert their own vision and encourage Obama to follow through on his rhetoric by elevating the idea of a strict imminent threat-based approach to the use of deadly force outside the battlefield. European leaders and officials should welcome Obama’s latest moves to restrain drone strikes and his intimation that the armed conflict against al-Qaeda may be nearing its end. In this way they would reinforce the standards implicit in his speech and make clear that America’s closest allies will be watching to see how far he matches his words with action.

At the same time, the EU and its member states should use their private communications with the Obama administration to continue to press for greater clarification and transparency in US drone strike policies. They should ask US officials to explain those aspects of the drone programme that remain uncertain: the meaning that the US attaches to the term “associated forces”, the definition of a “continuing and imminent” threat, the basis for deciding what level of threat justifies targeted killing, and the criteria and processes by which the US reviews drone strikes after the fact and assesses whether there have been civilian casualties (it is notable that Obama’s speech considered various ideas for reviewing proposals for targeted strikes beforehand, but

said nothing about post-strike review). EU officials should encourage the US to interpret these terms in a strict and restrictive way, so that the constraints they embody are made as meaningful as possible. In particular, the EU and its member states should press the Obama administration to scale back or abandon the idea that groups outside Afghanistan and Pakistan should be classed as associated forces, which has done more than anything else to turn the fight against al-Qaeda into a global armed conflict.

The EU should also encourage the Obama administration to provide much more information about individual drone strikes in the future, including the threat posed by the target and, as far as possible, an accounting of those killed and injured – something that may be more likely if drone strikes are transferred progressively from the CIA to the Department of Defence, as officials have suggested will happen. Finally, the EU should test US willingness to rethink its broader armed conflict model or declare its proclaimed armed conflict against al-Qaeda at an end, perhaps linked to the forthcoming withdrawal of US forces from Afghanistan.³⁸ The EU might point out that if US targeting policies are in fact much more restrictive than allowed for under its legal paradigm, it has little to lose from rethinking that paradigm, while it stands to benefit in the future by setting a more restrained precedent for other states.

Looking further ahead, the EU and its member states could build on these exchanges and undertake a broader effort with the US to explore the possibility of agreeing common standards for the use of drones and other methods of conducting targeted strikes. It would be enormously valuable if the EU and the US could together agree on a set of guiding principles for the kinds of operation that technological change is making possible, rooted in a common interpretation of the applicable parts of international law. (To avoid problems arising from the different obligations that states may face under domestic law or regional instruments, such a code of conduct should be based on laws that have broad or universal adherence or are recognised as customary.) This would be the most powerful step that Europe could take towards establishing a global standard for drone strikes that does not undermine the international rule of law, before the evolving practice of other states overtakes any such effort.

Unanswered questions on the use of lethal force

An effort to develop a set of standards for the use of force outside battlefield conditions would require the EU to define its own views on the subject more completely than it has done so far. The EU should therefore begin internal discussions aimed at clarifying and refining its position,

³⁶ See Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmschurst, ed., *International Law and the Classification of Conflicts* (Oxford University Press, 2012), pp. 51–54.

³⁷ These criteria are taken from “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”, document adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, September 1990, available at <http://www.unrol.org/files/BASICP-3.PDF>.

³⁸ Declaring an end to its proclaimed armed conflict against al-Qaeda would also remove the justification for the United States’ detention of terrorist suspects at Guantanamo Bay, but that question is beyond the scope of this paper.

while simultaneously extending discussions with the US aimed at exploring the possibilities of reaching a common position. Such discussions could begin in the twice-yearly transatlantic dialogue between EU and US legal advisers. They could also be pursued in smaller groups, such as the informal West Point Group of like-minded states involved in hostilities in Afghanistan. The discussions on self-defence mentioned by the former legal adviser to the British Foreign and Commonwealth Office, Sir Daniel Bethlehem, in a recent law review article (in which he described a strand of debate “largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct”) are one example of the kind of process that might be pursued.³⁹ It would also be desirable for civil society organisations to be allowed to contribute to the process, through discussion forums such as the Oud Poelgeest meetings convened by the Netherlands.

There are a number of particular areas where European views seem incompletely resolved, or where international legal standards are unsettled, on which intra-EU discussions might initially focus:

- What, if any, are the geographical limits to armed conflicts between states and external non-state groups? While European officials and scholars generally reject the notion of a global armed conflict, they do not appear to have a settled answer to the question of whether territorially focused armed conflicts (such as the conflict in Afghanistan) must be confined within a single state, or how far they can spread. Assuming that at least some enemy forces may be targeted by virtue of their status, may they be targeted even after they have crossed the boundaries of another state (leaving aside the question of whether that use of force infringes the sovereignty of the third state)? Is any geographical proximity to the conflict required, or is it simply the participation of the individual in the conflict that is decisive?
- What categories of persons may be targeted during an armed conflict between a state and a non-state group, and under what circumstances? Unlike the armed forces of states, armed groups aren’t often composed of a clear and easily identifiable group of fighters. This raises the question of who (if anyone) within the group should be regarded as a fighter who can be targeted at any time, and who as a civilian who can only be targeted if he or she is directly participating in an attack (according to a firm rule of the laws of armed conflict). In its widely discussed interpretive guidance on direct participation in hostilities, the International Committee of the Red Cross (ICRC) proposed that members of organised armed groups (defined as those

who performed a continuous combat function) should be understood to lose their protection against direct attack for as long as they assumed this function.⁴⁰ The US has, at least in the case of detention, developed a similar but slightly different test of “functional membership” in an armed group. Do EU member states see these standards as compatible, and do they agree with them? Beyond members of organised armed groups, what other actions would qualify as direct participation in such conflicts, and do states agree with the ICRC that civilians lose protection only for the duration of each specific act?

- Under circumstances in which individuals involved in an armed conflict do not benefit from protection against attack as civilians, are there any other restrictions on when they may be targeted? Largely in response to the changing nature of armed conflict and the rise in lethal action directed against individuals, there have been a number of suggestions in recent years that additional restrictions may apply in some cases, especially outside battlefield conditions. In its decision on targeted killing, the Israeli High Court of Justice ruled that members of armed groups, even when they appeared to be taking a direct part in hostilities, could not be attacked “if a less harmful means can be employed”. In its interpretive guidance on direct participation, the ICRC argued that the restraining role of the principles of military necessity and humanity would increase “with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing”.⁴¹ There have also been suggestions in recent years that international human rights law may regulate the actions of states in some circumstances during armed conflict, particularly in areas where the state exercises a high degree of control. All of these arguments have been the focus of fierce debate, and discussions on this subject are likely to play a significant role in determining the evolution of the laws of armed conflict in coming years.
- Outside an armed conflict, what framework governs the deliberate taking of life, and how does it apply in regions where the writ of law enforcement is limited? Most Europeans would assume that human rights law provides the relevant framework, though there are questions about how far human rights treaties cover the use of lethal force outside a state’s territory, and the US has traditionally argued that human rights treaties such as the International Covenant on Civil and Political Rights do not apply extraterritorially. If

³⁹ Daniel Bethlehem, “Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors”, the *American Journal of International Law*, October 2012, p. 770, available at http://www.asil.org/pdfs/ajil/Daniel_Bethlehem_Self_Defense_AJIL_ARTICLE.pdf (hereafter, Bethlehem, “Principles”).

⁴⁰ Nils Melzer, “Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law”, International Committee of the Red Cross, 1 July 2009, available at <http://www.icrc.org/eng/resources/documents/publication/p0990.htm> (hereafter, Melzer, “Interpretive Guidance”).

human rights law does apply, how do its provisions regarding the right to life govern actions against terrorist groups in lawless areas? In recent cases, the European Court of Human Rights has applied the European Convention to situations of military activity or hostage-taking in ways that recognise a wider scope for action that results in people's deaths than would be the case under normal peacetime conditions. How far can these precedents be extended, and what are their implications for situations where terrorists are judged to pose an imminent threat to human life?

- Under what conditions does the right of self-defence allow for the use of lethal force on the territory of another state without its consent? As mentioned above, there have been inter-governmental discussions on this issue. The suggestions set out by Sir Daniel Bethlehem would provide a focus for further discussion.⁴²
- The notion of imminence plays a central role both in the assessment of whether an individual poses a threat to the lives of others that would justify the deliberate taking of his life, and in assessing when the threat of an armed attack justifies the use of force on the territory of a sovereign state without its consent. Should the concept be interpreted in the same way or in different ways in these respective contexts?

At the least, such discussions might help to define a European position on the use of force outside battlefield conditions. But it is possible to imagine that some kind of broader transatlantic consensus might also emerge. Some EU member states may be wary of searching for an agreement with the US that might lead to a weakening of what they regard as a clear legal framework based on a firm differentiation between armed conflict and law enforcement. But if the analysis of this paper is correct, it is at least worth exploring whether the notion of self-defence might provide the foundation for a meaningful degree of convergence between European and US views. Under current circumstances, European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way. However, much more discussion will be necessary to flesh out the terms of this statement, and to explore the further questions of whether such a threat-based analysis might also apply in some circumstances during armed conflict, and where the boundaries of armed conflict should be set.

Conclusion

Targeted killing through the use of remotely piloted aircraft represents a fundamental challenge to traditional conceptions of peace, war, and the international rule of law. The deliberate killing of alleged members of an enemy force is associated with armed conflict, yet the circumstances of drone strikes – the ability to strike against a designated individual, at a time of one's choosing, far away from any battlefield – are far removed from a conventional notion of wartime. In this way, every drone strike expands the sphere where military force is the arbiter and shrinks the realm where the law is enforced through impartial adjudication. Committed as it is to the international rule of law, the EU must do what it can to reverse the tide of US drone strikes before it sets a new benchmark for the international acceptability of killing alleged enemies of the state.

As a practical matter, the EU should press the US to continue scaling back its use of drone strikes, and to go further in meeting the requirements of transparency and accountability in the attacks it carries out. Beyond this, though, there is a broader struggle underway to define the rules governing the use of lethal force outside theatres of conventional military operations. Here the EU needs to make its voice heard, both to define its own views of the appropriate standards and to try to work towards greater international consensus on the issue. The shift in US policy towards a greater reliance on self-defence as an operational principle seems to offer an opening for further discussion. But US practice remains very far from what Europeans would like to see and its legal justification continues to rely on premises that most Europeans reject.

However, the fact that Obama has embraced a standard that Europeans should find easier to accept than previous US claims creates an opening for Europeans to explore the implications of self-defence against individual threats as a justification for the use of lethal force. At the same time, Europeans should continue to encourage the US to go further in rethinking or abandoning its claims of a global armed conflict that provides authority to target enemy fighters as a group. These discussions may prove to be long and painstaking. But they are surely worth exploring as an effort to sustain the international rule of law at a time when rapid technological change in the area of weaponry threatens to erode it.

⁴¹ Melzer, "Interpretive Guidance", p.80.

⁴² Bethlehem, "Principles".

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