

Ben Lerner | UAVs and Force: Current Debates and Future Trends in Technology, Policy and the Law

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Executive Summary

This study examines a representative sample of the ongoing legal and policy debates surrounding the United States' use of unmanned aerial vehicles (UAVs) to support or undertake lethal force abroad, particularly with respect to the surveillance and targeting of non-state asymmetric actors. The study also explores technological trends in the development of UAVs for purposes of undertaking force or force-supporting missions, as well as the trajectory of legal and policy developments in response to the use of UAVs, including possible policy consequences of further restricting the use of such platforms.

The commentary contained throughout the study is derived in part from interviews with primary sources—drawn from leading think tanks, human rights organizations, technology companies, and academia—representing a range of opinions on the technological feasibility, legality, and policy advisability of deploying UAVs for lethal force purposes. The study also draws extensively on secondary research on these same questions, from sources across the opinion spectrum.

The study finds that there are significant trends taking place in the development of UAV technology relevant to their use for intelligence-surveillance-reconnaissance (ISR) purposes in support of lethal force, and for the exercise of lethal force itself. The technology trends identified through primary source interviews and secondary source analysis include: [1] a continuing demand for, and development of, UAVs for Intelligence, Surveillance and Reconnaissance (ISR) and munitions deployment purposes; [2] the extension of the geographic range of UAVs, particularly in the context of their use aboard aircraft

carriers, although obstacles may remain with respect to trade-space issues surrounding payload vs. endurance; [3] UAV designs incorporating greater levels of autonomy, requiring less direct remote piloting by humans; [4] increasing precision and maneuverability, through innovations such as smaller, lighter-weight UAVs with correspondingly smaller munitions, as well as interest in the use of directed energy as part of the UAV platform; and [5] increasing proliferation of UAV technology to both state and non-state actors, with potential for “dual-use” capabilities between ISR and weapons deployment.

The legal section of this study begins with a survey of analysis as to whether American UAV strikes abroad are in compliance with international law, specifically the *jus ad bellum* (the laws governing when a nation may resort to war) and *jus in bello* (the laws governing how a nation must conduct itself during war). In the section on compliance with *jus ad bellum*, President Obama, then-State Department Legal Adviser Harold Koh, then-Assistant to the President for Homeland Security and Counterterrorism John Brennan, and Attorney General Eric Holder, all make the case that the Obama administration's use of UAVs abroad complies with the *jus ad bellum*, asserting that UAV strikes are consistent with the right to self-defense under international law, that the force being used is both necessary and proportionate, and that the use of UAVs is also justified by the imminent threat that terrorist organizations pose to American national security. While some experts support the Obama administration's arguments in this regard, others register disagreement, asserting that the administration is changing traditional understanding of the concept of “imminence” in *jus ad bellum*, and that

UAV strikes in Pakistan especially are not legal acts of self-defense because they are not being undertaken in response to an “imminent” threat.

Other points of contention are also identified within the section on compliance with *jus ad bellum*. Scholars disagree on whether a state has a legal right to exercise self-defense against non-state actors inside the territory of a state not having carried out the attack itself. Additionally, scholars also debate the extent to which the arguably ambiguous nature of Pakistan’s consent to UAV strikes on its territory should have any bearing on whether such strikes are legal.

With respect to whether the advent of UAV technology will affect the development of *jus ad bellum*, the study identifies and explores three outlooks on the development of *jus ad bellum* trends relative to UAVs: [1] the view that *jus ad bellum* needs to be adjusted to account for UAVs in a way that would *temper* their use for lethal force; [2] the view that current *jus ad bellum* principles should enable UAV use (or alternatively, temper UAV use); and [3] the view that current *jus ad bellum* principles are inadequate to deal with the realities of terrorism and need to be adjusted to better address the threat.

After examining the question of compliance with *jus ad bellum* and discussing possible trends in this area, the study moves on to the debate over whether the United States’ use of UAVs abroad is part of an “armed conflict” that therefore triggers application of the “law of war” (*jus in bello*) rather than the laws of peacetime. While contemporary understanding has been that *jus in bello* applies to international armed conflict (armed conflict between states) irrespective of the extent and level of hostilities, customary international law holds that *jus in bello* only applies to non-international armed conflict (conflict be-

tween a state and a non-state actor) once a certain threshold of violence has been reached. The United States government has asserted repeatedly that the United States is in an armed conflict with al Qaeda that is not geographically limited, and therefore on solid legal ground in deploying UAVs for lethal force outside of Afghanistan. While this view finds support among some experts, others disagree—asserting for example that terrorism is a crime, rather than an armed conflict, or that combatants cannot be properly identified once the fighting moves off of a so-called “hot” battlefield.

The discussion of whether the United States is in an “armed conflict” lays the foundation for the question of whether the United States’ use of UAVs is in compliance with *jus in bello* within that armed conflict. The components of *jus in bello* include the concepts of [1] “necessity”, the obligation to use the force required to accomplish the mission at hand; [2] “distinction”, the requirement to distinguish combatants from civilians during wartime; [3] “proportionality”, the obligation to balance the military advantage to be gained from attacking a target against the projected loss of civilian life or property resulting from the attack; and [4] “humanity”, the requirement of military forces not to inflict unnecessary suffering, including upon opposing military forces.

The Obama administration has repeatedly defended UAV strikes as complying with the *jus in bello* components described above. Some experts agree with the administration’s defense of UAV strikes in this regard—noting, for example, that UAVs are designed to be more precise and therefore ensure greater compliance with *jus in bello* norms like distinction and proportionality, and that the laws of war may actually *require* the use of UAVs given their precise nature. Other

experts, however, assert that UAV strikes are not in compliance with *jus in bello*—arguing, for example, that the administration’s introduction of a “co-belligerency” concept to a non-international armed conflict increases the likelihood that the administration is not adequately distinguishing between combatants and civilians, and that such lack of distinction is likely throwing off the proportionality calculus at the expense of civilians on the ground.

On the question of whether advancements in UAV technology will yield trends in the development of *jus in bello* principles, scholars in this study focus primarily on [1] the effect of UAV technology advancement on requirements concerning civilian casualties; and [2] the effect of the increasing autonomy of UAVs on *jus in bello* compliance.

The study notes a significant speech given by President Obama at National Defense University in May of 2013, in which he stated that beyond Afghanistan, “before any [UAV] strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.” Some experts argue that President Obama’s standard goes beyond what international law on proportionality has traditionally been understood to require, though it remains to be seen as to what effect his standard will have on proportionality expectations in the future. Aside from President Obama’s NDU address, however, the advances in UAV technologies are likely to catalyze an ever-increasing expectation that, commensurate with the growth in precision and other capabilities, there should be correspondingly fewer civilian casualties resulting from UAV strikes. Additionally, the significant advances in the autonomy of UAVs has prompted some experts to call for international law prohibiting the development of “fully autonomous” weapons, capable

of selecting targets without any human involvement in the actual targeting decisions.

With respect to domestic laws governing the use of force abroad, the study examines ongoing debates concerning the 2001 Authorization for the Use of Military Force (AUMF) and the War Powers Resolution, followed by an overview of the various views concerning the need to establish a judicial entity (referred to by some as a “drone court”) to provide judicial review prior to or after the execution of a UAV strike.

While some critics of the AUMF view it and subsequent government interpretations of it—authorizing force against al Qaeda and its “associated forces”—as violating international law in some respects, others have also asserted that the use of UAVs against various terrorist targets has violated the terms of the AUMF itself, extending strikes to targets beyond what the AUMF envisions. Some experts, however, have argued that the AUMF does not limit American forces to the pursuit of al Qaeda solely within Afghanistan, and that therefore UAV strikes against such targets outside Afghanistan are permissible. Significantly, there are indications that Congress may soon debate, and possibly re-write, the AUMF in order to address questions that have been raised about how the Obama administration has applied it in the context of UAVs, among other reasons.

Aside from disagreements over the use of UAVs in the specific context of the 2001 AUMF, a debate has also arisen as to the necessity for congressional authorization at all when the United States is taking military action in the form of UAVs. This particular debate has centered on whether the President is required to obtain congressional authorization for the use of force, per the War Powers Resolution, when such force consists of the deployment of UAVs. The Obama administration previously argued, in the context

of the use of force in Libya in 2011, that the use of UAVs eliminated the need for ground troops and did not risk US casualties, and that therefore the sorts of “hostilities” contemplated by the War Powers Resolution were not at issue under these circumstances. Some experts, however, reject this view, arguing that such reasoning would lead to the conclusion that even of the use of nuclear weapons—which do not involve ground troops and do not risk US casualties—would not trigger the War Powers Resolution, and that in any event, the sustained bombing of targets by UAVs is consistent with a common sense definition of “hostilities”.

On the question of whether a “drone court” should be established, the study identifies and explores three categories of opinion: [1] Analysts who support the creation of a “drone court” because they believe such a court would provide necessary legal review and authorization of targeted killings *ex ante* (prior to a targeted killing taking place); [2] Analysts who oppose the creation of a “drone court” as an *ex ante* entity because of the belief that it would not provide the necessary oversight of the Executive Branch; and [3] Analysts who oppose the creation of such a court because they believe that judges should have no role in targeting decisions.

After concluding the survey of major legal debates and trends regarding the use of UAVs for lethal force abroad, the study moves on to an examination of the debates on the *policy advisability* of UAV strikes, the policy trends in this area, and possible policy ramifications of further restricting UAV strikes.

Although UAV strikes against terrorist targets have eliminated leadership and other key figures in al Qaeda and its associated forces, while offering other significant benefits for the United

States with respect to combating terrorist organizations, three common policy objections to UAV strikes have persisted: [1] To the extent that UAV strikes result in civilian casualties, such strikes create anti-American resentment on the ground that ultimately adds recruits to the ranks of, or otherwise empowers, terrorist organizations, and create global resentment resulting in reduced support for US counter-terrorism efforts; [2] The use of UAVs creates a dynamic resulting in the “de-humanization” of warfare, both in terms of the UAV operator being too far removed from the lethal act, and in terms of the government’s willingness to resort to force via UAVs without the national deliberations on force that might otherwise ensue if troops were to be put in harm’s way; and [3] As other nations acquire UAVs, the manner in which the United States has deployed them for lethal force is setting a bad precedent for other nations to follow, in way that run counter to American interests.

There is significant debate over whether UAV strikes truly create a localized or global resentment that is counterproductive to US counterterrorism efforts—often referred to as “blowback”—and if so, whether such developments outweigh the counterterrorism benefits that UAV strikes offer. Some analysts, for example, assert that to the extent that UAV strikes result in some civilian casualties, the strikes radicalize individuals into joining the ranks of al Qaeda, offer propaganda opportunities to al Qaeda, or create disapproval amongst countries on which we rely for counterterrorism cooperation, all of which is ultimately counterproductive. Other analysts, however, argue for example [1] that the data on “blowback” is inconclusive in that anger on the ground directed at UAV strikes does not definitively translate into recruitment for terrorist organizations; [2] that even if some individuals are

incentivized to join al Qaeda, it is likely at the “foot-soldier” level and is therefore outweighed by the elimination of highly-skilled terrorist operatives; and [3] that undue focus on “blowback” creates a sort of strategic paralysis, tending to counsel against any action that may cause harm—an impractical and self-defeating method of warfare.

Experts also debate whether the remote piloting of UAVs, and the removal of the pilots from the physical danger that warfighters might otherwise face in combat, creates a problematic “dehumanization” of warfare at the tactical and policy levels. At the tactical level, some scholars allege that the lethal use of UAVs lends itself to a “videogame mentality” from the UAV operator’s perspective, whereby the likelihood of civilian casualties actually increases as the result of a level of psychological “removal” of the pilot from the battlefield, while others argue that not only are UAV operators not as psychologically removed from the battlefield as often portrayed, but also that there are plenty of other weapons platforms that remove the operator from the actual territory on which the targets are struck, making the UAV no different from other platforms in this regard.

At the policy level, some experts have raised concerns that the ability to send UAVs to undertake lethal force will make governments like that of the United States more inclined to resort to force without what would otherwise be a publicly deliberative process on whether force should be used in the first place. Others, however, argue that the advent of UAV technology will not make the United States any more likely to use force than it has in the past, that in fact the use of UAVs actually gives policymakers more options for addressing conflict and possibly avoiding larger conflicts, or that as a practical matter, we only use UAVs in countries whose governments are

already working with the United States on some level.

A third point of contention on the policy advisability of UAV strikes is that as other countries continue to acquire UAV capabilities, those countries will look to US practice on using UAVs to target terrorists abroad to determine, and justify, their own operations—operations which, in some instances, the United States would perhaps disagree. Some experts are skeptical of this concern, however, noting that other nations will continue to be guided by their own interests rather than America’s example, that the United States is already setting appropriate precedent in this area, and that countries contemplating whether to launch UAV strikes will still have to contemplate the political and diplomatic risks of such action before doing so.

After exploring the most prominent policy debates on the use of UAVs for lethal force, this study examines possible policy trends in this area. Some of those trends (either projected, or called for, by policy experts) include: [1] a projection for increasing scrutiny of UAV use in the lethal force context, followed by the public’s eventual recognition of the national security benefits that UAVs offer; [2] the call for some sort of normative framework—whether in the form of a treaty or something less binding—in order to address proliferation concerns; [3] a projection that UAVs will prompt a new paradigm for the use of force that falls short of fully formed “armed conflict”, perhaps requiring new rules; and [4] the call for the United States to be held accountable for when other nations, using intelligence provided to them by American UAVs, carry out force that results in civilian casualties, even when the United States itself does not directly attack any targets.

Finally, this study looks at expert opinion on the policy ramifications of placing further restrictions on the use of UAVs for lethal force. There is concern that curtailing or eliminating UAV use would be a major setback for American national security and the ability of the US government to protect the nation from terrorist threats, and also that such a decision would actually endanger civilians on the ground by exposing them to more indiscriminate violence, either from terrorist organizations or from our allies who would feel compelled to intensify combat against such forces absent our UAV support. There is also concern that the establishment of a “drone court” would effectively end the UAV program because such judicial intervention would be institutionally unable to keep pace with the fleeting nature of targeting opportunities.

The study concludes with some observations that UAV use is likely to continue to appeal to the United States government as a warfighting and intelligence tool, given [1] the continued rise of non-state terrorist actors in difficult-to-access parts of the world, as demonstrated for example by al-Qaeda affiliate al-Shabaab’s September 2013 assault on a Kenya shopping mall, resulting in scores of civilians killed; and [2] the relatively lower costs of UAV operations, as asserted by some analysts, as compared to other options—an important consideration in the current budget-constrained sequestration environment. Additionally, the study observes that further analysis may be required regarding UAVs as an increasingly prominent feature of American defense posture towards conventional state actors such as China.

By design and by necessity, this study is not comprehensive and does not fully capture the wide range of analysis that has been done on these subjects. Rather, it is intended as a point of

departure for policymakers, public policy analysts, and others who will have to grapple with what effect advances in unmanned aerial technology will have, or should have, on how the United States defends itself and its national interests.

Readers should also be aware that this study deliberately did *not* endeavor to analyze ongoing debates or trends in the area of domestic use of UAVs (i.e. border security, search-and-rescue, etc.). Additionally, this study did *not* include analysis of the debate regarding the use of UAVs to carry out lethal force abroad against a terrorist target who is also an *American citizen*—this study focused solely on the use of UAVs to target *foreign national terrorists* abroad. Though domestic use of UAVs and the issue of targeting American citizens abroad are both prominent subjects of current debates, they are beyond the scope of discussion contained in the pages that follow.