

Unmanned Aircraft Systems

The Moral and Legal Case

By AMITAI ETZIONI

The substantial increase in the employment of unmanned aircraft systems (UAS) in Afghanistan, Pakistan, and other arenas has intensified the debate about the moral and legal nature of the targeted killing of people who are said to be civilians. As I see it, the United States and its allies can make a strong case that the main source of the problem is those who abuse their civilian status to attack truly innocent civilians and to prevent our military and other security forces from discharging their duties. In the longer run, we should work toward a new Geneva Convention, one that will define the status of so-called unlawful combatants. These people should be viewed as having forfeited most of their rights as civilians by acting in gross violation of the rights of others and of the rules of war.

To support this thesis, we must go back to the period in which the precept that currently dominates much of the public discourse

on the issue at hand was forged. For generations, growing efforts had been made to limit wars to confrontations among conventional armies, sparing civilians. That is, a sharp line was drawn between soldiers (who were considered fair targets during war) and civilians (whose killing was taboo). True, these shared understandings were not always observed. Thus, during World War II, the Nazis tried to break Great Britain by bombing London, and their dive bombers attacked many other civilian centers. The Allied forces bombed Dresden, set a firestorm in Tokyo, and leveled Nagasaki and Hiroshima. However, these attacks were condemned, or at least ethically questioned, precisely on the grounds that they eroded the line that ought to separate armed forces from civilians and protect the latter.

Over the last decade, however, we have witnessed a rise in terrorism with a global reach and potential access to weapons of mass destruction—the gravest threat to our security, as well as that of our allies and many others.

Kandahar Province, Afghanistan, along Pakistan border

These terrorists systematically and repeatedly use their civilian status to their advantage, both to enhance their operations and to mobilize public opinion. Thus, they have used ambulances to transport suicide bombers and their bombs—and have had their allies complain when security forces started checking ambulances, causing delays in their services. Terrorists disguised themselves as civilian passengers to hijack airplanes full of innocent people, turning the planes into missiles to kill thousands working peacefully at their desks—and afterward found people who complained vociferously about the security measures that were introduced to prevent such attacks. Furthermore, terrorists stored their ammunition in mosques, mounted anti-aircraft guns on top of schools and hospitals, set up their command and control centers in private homes and made them into bivouacs, and then screamed bloody murder when any of these installations were hit by our bombers, artillery, or drones. In short, we must make it much clearer that those who abuse their civilian status are a main reason for the use of UAS and targeted killing against them—rather than merely against military targets.

Another way to illustrate this key point is to conduct the following mental experiment. Take any fighting force—for instance, the Japanese military in World War II. If that force is abiding by the rules of war—wearing clear insignia identifying the troops and their encampments, and thus the government that is accountable for their actions—they can be (and were) legitimately targeted, bombed, and killed. No one raises moral or legal issues—beyond a few pacifists who would rather surrender than fight at all—even if the particular unit is not engaged in battle: it might be resting in its camp, being resupplied, or training in the hinterland. Now imagine that the same troops—performing the same military roles—take off their uniforms, put on civilians' clothing, and move into civilians' homes, community centers, and shrines. Are they no longer legitimate targets?

Unlike armchair ethicists, who write about this matter and never come closer to combat than watching a movie in a theater, I have some first-hand experience in the matter. In 1946, I was a member of the *Palmach*, a Jewish underground commando unit that

pressured the British to allow Jews who escaped Nazi-ravaged Europe to settle into what would become Israel. (I say “pressured” because unlike our competitor, the *Irgun*, we fought a largely public relations war. We did so by alerting the British military to leave before we blew up the buildings that housed them—to grab headlines, not bodies.) One day, we attacked a British radar station near Haifa. A young woman and I, in civilian clothes and looking as if we were on a date, casually walked up to the radar station's fence, cut the fence, and placed a bomb. Before it exploded, we disappeared into the crowd

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Does all this mean we should attack masses of civilians merely because some of them have attacked us or may be about to? Certainly not. What it does mean is that to negate the tactical advantages abusive civilians have and to minimize our casualties, we must attack them whenever we can find them, before they attack us. As we shall see shortly, UAS are a particularly well-suited means to serve this goal.

Hence, instead of apologizing each time the wrong individual is targeted or collateral damage is caused, we should stress that *the issue would be largely resolved in short order if the abusive civilians would stop their abusive practices and fight—if they must—according to established rules of war. They cannot have it both ways—that is, violate these rules repeatedly and seek to be shielded by them. And while investigations after each incident have their place, in order to determine whether we received wrong intelligence or to further refine the decisionmaking matrix involved (more about*

Air Force MQ-9 Reaper at Kandahar Airfield, Afghanistan



U.S. Air Force (Ehren Lopez)

millling around in an adjacent street. All the British could do was either indiscriminately machinegun the crowd—or let us get away. Indeed, their inability to cope with abusive civilians was one reason the British retreated from Palestine and scores of other colonial territories, the French ultimately lost the war in Algeria, the Soviet Union left Afghanistan, and the United States pulled out of Vietnam (although the North Vietnamese regular forces also played a key role).

this shortly), they should not be construed as an indication that the main source of the problem is our response to abusive civilians who attacked us.

To suggest that we need a new shared understanding, for which we must first make the moral case and then move to ensconce it in a new Geneva-like convention, is far from implausible. After all, the Geneva Conventions have been extended, revised, and augmented several times.

Amitai Etzioni is a University Professor and Professor of International Relations at The George Washington University.

Smaller Print

In examining the arguments about the moral and legal status of using UAS (and other forms of targeted killing), I am using as my text an October 2009 article in *The New Yorker* by Jane Mayer. The article touches on all the major issues involved, albeit with a dose of liberal coloring. (The article is called “Predator War,” a name that is both accurate and revealing. Mayer has previously written critically about the treatment of terror suspects in her 2008 book, whose title again speaks volumes: *The Dark Side*.)

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Pakistani Taliban commander reaffirms commitment to guerrilla warfare in South Waziristan tribal region



AP Images (Ishraq Mahsud)

Mayer opens her reportage with a case in point: a man is lounging on a rooftop somewhere in Pakistan. He has a bunch of visitors. He is not well; he has diabetes and a kidney disease. We even can see—thanks to a drone hovering above—his IV drip. Suddenly, poof, two missiles strike, and all we have left is a torso. Several of the visitors are also dead.

The picture changes, though, as Mayer reports that the man on the rooftop was Baitullah Mesud, a man responsible for the

assassination of Benazir Bhutto, the September 2008 bombing of the Islamabad Marriott, and numerous attacks on American and coalition forces in Afghanistan. Another case Mayer points to is a 2002 killing by a UAS of a few people driving in a car deep inside Yemen. One of them, Mayer tells us, was Qaed Salim Sinan al-Harethi, an al Qaeda operative who is reported to have played a key role in the bombing of USS *Cole*. It is helpful to keep such cases in mind when one faces the questions that Mayer, speaking in effect for other skeptics of the program, raises about the use of UAS.

Are Abusive Civilians Criminals?

Some suggest that we would be better off if we dealt with abusive civilians like criminals; that is, instead of killing them, we haul them into a court of law. Of course, in numerous situations, including the two Mayer describes, such capture could not be executed or only at very great risk to our forces and to the local civilian population.

Moreover, often—say, when dealing with al Qaeda leaders and foot soldiers and others like them—security requires *preventing* attacks rather than prosecuting the perpetrators after the attack. This is particularly evident when we concern ourselves with terrorists who may acquire weapons of mass destruction. It also holds for terrorists who are willing to commit suicide during their attack and hence cannot be tried, and who will pay no mind to what might be done to them after

their assault. Finally, even terrorists not bent on committing suicide attacks are often “true believers” who are prepared to proceed despite whatever punishments the legal system may throw at them. All these kinds of terrorists are best prevented from proceeding rather than vainly trying to prosecute them after the fact, and most cannot be effectively deterred by the criminal justice system.

In contrast to prevention, law enforcement often springs into action after a criminal has acted: when a body is found, a bank has been robbed, or a child has been kidnapped. By and large, the criminal law approach is retrospective rather than prospective. Law enforcement assumes that punishment after the fact serves to deter future crimes (not to eliminate them, but to keep them at a socially acceptable level). This will not do for the likes of Osama bin Laden.

This is not to say that, if captured, terrorists should not be granted basic human rights. They should not be killed when they can be safely detained and held, nor should they be subjected to torture or detained indefinitely without an institutionalized review of their status. However, they are not entitled to the full plethora of rights our citizens are entitled to; they choose to fight in a way that abuses the rules on which these rights are based.

I leave it for another day to examine the argument implied in the rules of war that both parties have the same basic moral status, and hence both must abide equally by the rules, and to examine the notion of fair play—which suggests that when we kill many of the enemy but have only few casualties of our own, there “must be” something foul in the way we fight. Suffice it to say here that those who attack us in the disguise of being civilians and who act brutally, not only toward our civilians, but also even toward their compatriots (for example, if they heed a different version of the same religion, or happen to be women, minors, or of a different color), do not have the same moral standing as our troops.

Enough Accountability?

The preceding analysis does not suggest that UAS should be used indiscriminately against anybody who may threaten our security or that of others. The statement Mayer quotes that “no tall man with a beard [that is, similar to bin Laden] is safe anywhere in Southwest Asia” is obviously false.

Indeed, the use of UAS is subject to close review. The U.S. military developed a set of criteria that must be met before a strike is authorized. The details are not publicized, but during a visit with officers of a brigade before it shipped out to Afghanistan, I was told that these criteria include the reliability of the intelligence that identified the target (in some cases, verification from two independent sources is required) and the number and status of other people in the area. The less reliable the information and the greater the potential collateral damage, the more people review the information and the higher the rank of those in the military who must approve the strike—all the way up to the Commander in Chief. Strikes also are reexamined after they occur in cases when we have erred. Thus, in effect, abusive civilians benefit from an extensive review before targeted killing takes place.

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One should, though, note that just as the matrix (the decisionmaking apparatus used by the military) can be too accommodating, it can also be too restrictive. In several cases, the delay in making the decision or the strictness of the criteria employed allowed abusive civilians of considerable rank and power to escape. (Bin Laden was given the time to escape to a new location when the Pakistani government delayed giving permission for the attack on its soil in 2004.)

And, at least according to one source, after General Stanley McChrystal decided to cut back on bombing and targeted killing because of what was considered excessive collateral damage, our casualties increased. The *Washington Post* reported on September 23, 2009, that there had been “a sharp increase in U.S. troop deaths in Afghanistan at a time when senior military officials acknowledge that American Servicemembers are facing greater risks under a new strategy that emphasizes protecting Afghan civilians.” The moral ground for this approach is far from self-evident. I turn below to the argument that such sacrifices will

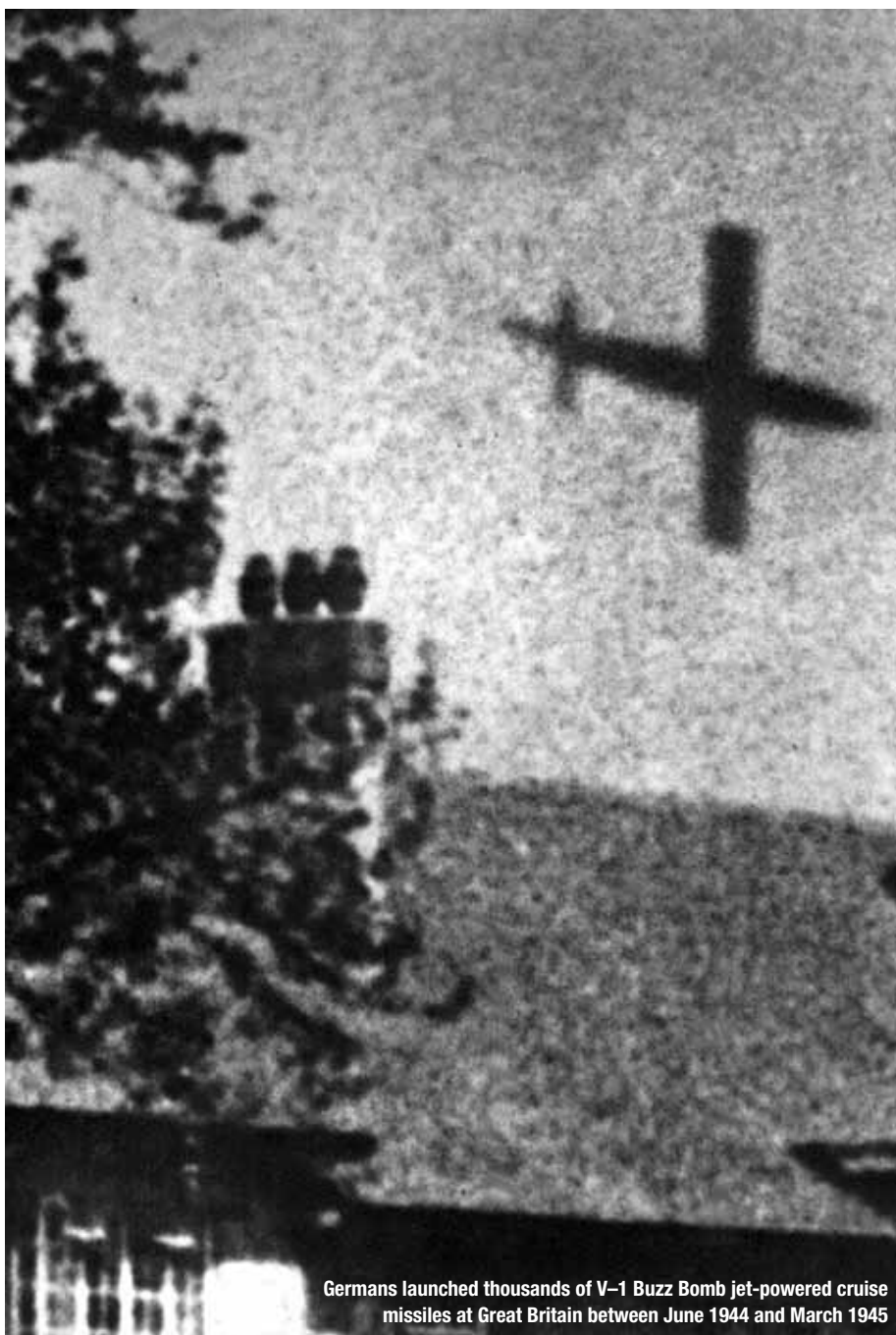
win over the population, and hence will save lives—ours and theirs—in the longer run.

What about Collateral Damage?

Even if one fully accepts that targeted killing of the leaders and maybe foot soldiers of groups such as al Qaeda is justified, one still must be concerned, for moral and prudential reasons, about collateral damage—which involves by definition innocent civilians. Here, too, one must first reiterate that the main fault lies with the abusive citizens who refuse to separate themselves from the local population. Second, to some

extent collateral damage could be reduced by enabling the general population to leave an area before an attack, as the Pakistani army did in Swat Valley, or by encouraging the general population to separate itself from abusive citizens, as Israel did during the 2009 operation in Gaza.

Third, the extent of potential collateral damage is and should continue to be one criterion in the matrix of decisionmaking used by the U.S. military when UAS strikes are authorized. That is, consideration is given not only to the “values” of the target and to the reliability of information about the target, but also to the



USA (New York Times Paris Bureau Collection)

Germans launched thousands of V-1 Buzz Bomb jet-powered cruise missiles at Great Britain between June 1944 and March 1945

number and kind of innocent civilians surrounding the target (children in particular).

Additionally, one should note that some of the population acts like part-time spies, intelligence agents, lookouts, and providers of services such as accommodations and medical care to the terrorists. To the extent that these services are provided voluntarily rather than coerced, the population must be warned that they will be treated the same ways as combat service support personnel who provide such services.

Last but not least, there is no reason to hold that UAS cause more collateral damage than bombing or even attacks with Special Forces or regular ones.

Are UAS Legal?

Are UAS strikes legal by our own laws? Congress has authorized the President “to use all necessary and appropriate force” against “persons he determines planned, authorized, committed, or aided” the attacks of 9/11 or

the targets are engaged in combat against us, many legal experts state that the strikes are not in violation of Executive Order 12333’s prohibition on assassination.

Are strikes legal according to international law? Mayer reports that:

for the U.S. government to legally target civilian terror suspects abroad it has to define a terrorist group as one engaging in armed conflict, and the use of force must be a “military necessity.” There must be no reasonable alternative to killing, such as capture, and to warrant death the target must be “directly participating in hostilities.” The use of force has to be considered “proportionate” to the threat. Finally, the foreign nation in which such targeted killing takes place has to give its permission.

Without going into a detailed analysis of whether the U.S. strikes in all the cases, from Pakistan to Yemen, meet all these criteria, I should point out that international law (and

always as straightforward as one would need to meet the standards. For instance, the Pakistani government protests publicly the use of UAS, but privately provides bases for them and intelligence to identify targets. Does this mean that the foreign power did or did not give consent? And why should a government be expected to seek the consent of a nation that supports terrorism—say, if Israel targets a terrorist in Damascus, should it await the consent of Syria?

Most important, laws are not carved in stone. They are living documents. The constitutional right to privacy did not exist until 1965. Our current understanding of the First Amendment right to free speech, considered the most absolute right of them all, is an interpretation of the text fashioned in the 1920s. The Geneva Conventions were developed over decades—and thus can be further developed.

Do UAS Alienate Populations?

Prudential arguments against the use of UAS are that they antagonize the population, create martyrs, invite retaliatory attacks, entail the loss of moral high ground, and undermine the legitimacy of the local government (for cooperating with Americans). All this may be true, but the same holds for other means of warfare. Using bombers often generates even more collateral damage and resentment. Attacks by Special Forces are considered more alienating than strikes by

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who harbored such persons. The Obama administration, like its predecessor, has stated that this act of Congress grants it the legal power to authorize UAS strikes. And because

for that matter, domestic law) is rarely that unambiguous. Indeed, there is considerable literature on the subject, which reaches a wide range of conclusions.¹ Nor are the facts

Pakistani religious group rallies against suspected U.S. drone missile strike on tribal areas



UAS because they entail a blatant violation of sovereignty. Nor are there necessarily fewer mistaken targets or less collateral damage when Special Forces or regular forces are used. Last but not least, important segments of the population resent the presence of foreign troops—and the governments they support—for a variety of sentimental, cultural, religious, and nationalistic reasons. No wonder that in areas and periods in which the use of UAS was scaled back, there was no noticeable change in the attitudes of the population.

Hence, the main issues are how quickly we can turn over security to native forces and the extent to which we should interfere in the way the people govern themselves—not which means of warfare we use, as long as we stay engaged. Indeed, the reason UAS have recently gained special attention is largely because of their novelty and because their employment is rapidly growing. If they were replaced tomorrow with Autonomous Rotorcraft Sniper Systems or some other new means of warfare, similar issues would be raised about those technologies.

Also, one should take into account the preferences of the American people and their allies. Using Special Forces or regular troops instead of UAS increases our casualties and tends to undermine public support for the mission. UAS contribute to staying the course as long as necessary.

In Cold Blood?

Finally, UAS are criticized on the grounds that they are manned by people sitting in air-conditioned offices in Nevada or Florida, playing around with a joystick before they go home to have dinner and coach Little League. According to Mayer, ethicist Peter W. Singer believes that the drone technology is “seductive,” because it creates the perception that war can be ‘costless.’” Moreover, the *victims* (Mayer’s term) remain faceless, and the damage caused by the UAS remains unseen. Mary Dudziak of the University of Southern California’s Gould School of Law opines that “[d]rones are a technological step that further isolates the American people from military action, undermining political checks on . . . endless war.”

This kind of cocktail-party sociology does not stand up to minimal critical examination. Would the people of the United States, Afghanistan, and Pakistan be better off if terrorists were killed in “hot” blood—say, knifed by Special Forces, blood and brain matter

splashing in their faces? Would they be better off if our troops, in order to reach the terrorists, had to go through improvised explosive devices blowing up their legs and arms and gauntlets of machinegun fire and rocket-propelled grenades, traumatic experiences that turn some of them into psychopath-like killers?

As I see it, however, the main point of moral judgment must be faced earlier in the chain of action, well before we come to the question of which means are to be used to kill the enemy. The main turning point concerns the question of whether we should go to war at all. This is the crucial decision because once

Secretary of State Clinton meets in Islamabad with tribal members angry about U.S. aerial drone attacks along Afghan border



If all or most fighting were done in a cold-blooded, push-button way, it might well have the effects Mayer suggests. However, as long as what we are talking about are a few hundred drone drivers, what they do or do not feel has no discernable effects on the nation or the leaders who declare war. Indeed, there is no evidence that the introduction of UAS (and before that, high-level bombing and cruise missiles that were criticized on the same grounds) made going to war more likely or extending it more acceptable. Anybody who followed the history of our disengagement in Vietnam after the introduction of high-level bombing, or the difficulties President Obama faced in increasing troop levels in Afghanistan in the fall of 2009—despite the recent increase in UAS use—knows better.

Moral Turning Point

As someone who lost many friends in combat and saw many wounded, and who inflicted such losses on others, I strongly abhor violence. I have written books, essays, and op-eds, testified before Congress, consulted the White House, and demonstrated in the streets to promote peaceful solutions and urge the curbing of the use of arms, from handguns to nuclear bombs.

we engage in war, we must assume that there is going to be a large number of casualties on all sides and that these may well include innocent civilians. Often, discussions of targeted killings strike me as being written by people who yearn for a nice clean war, one in which only bad people will be killed using “surgical” strikes that inflict no collateral damage. Very few armed confrontations unfold in this way. Hence, when we deliberate whether or not to fight, we should assume that once we step on this train, it is very likely to carry us to places we would rather not go, but must. The UAS are a rather minor, albeit a new, stepping stone on this woeful journey. **JFQ**

NOTE

¹ See, for example, Peter M. Cullen, “The Role of Targeted Killing in the Campaign against Terror,” *Joint Force Quarterly* 48 (1st Quarter 2008), 22–29; David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *The European Journal of International Law* 16, no. 2 (2005); and Steven R. Ratner, “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad,” *Journal of Political Philosophy* 15, no. 3 (2007).