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Targeted Killing, Unmanned Aerial Vehicles and EU Policy

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Highlights

High-level UN and EU officials, senior legal, policy and military advisors and leading academics in the fields of international humanitarian and human rights law met at the European University Institute on 22 February 2013, under the auspices of the Global Governance Programme, to discuss the direction and development of EU policy in response to targeted killing practices using unmanned aerial vehicles.

The GGP High-Level Policy Seminar (HLPS) tackled the controversial practice of targeted killing using unmanned aerial vehicles from a range of law and policy perspectives. The core concerns of the HLPS were:

- *The desirability for a European response to contemporary US practices;*
- *The need to develop European policy both to anticipate Member State capability acquisition and to influence the emergent norms that will shape the proliferated use of UAVs for targeted killing operations;*
- *Widespread criticism of the opaque nature of the CIA programme.*

This Policy Brief proposes in particular that both the EU and Member States should start to develop policy positions, in dialogue with each other and the US, and that transparency and accountability requirements must be fulfilled to enable the legality of targeted killing practices to be assessed.

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POLICY BRIEF



Background

The US practice of targeted killing of terrorist suspects has attracted a great deal of attention in the last twelve months. This included the leak of a US Department of Justice White Paper that discussed legal justification for killing a US national who is also a senior operational leader of Al-Qaeda or associated force, and the confirmation hearings for John Brennan, the nominee (now incumbent) for director of the Central Intelligence Agency. Conservative estimates suggest that the US targeted killing campaign in Pakistan, Yemen and Somalia has caused three thousand fatalities over the past decade. This immediate context raised the question of European States' approach to the tactic.

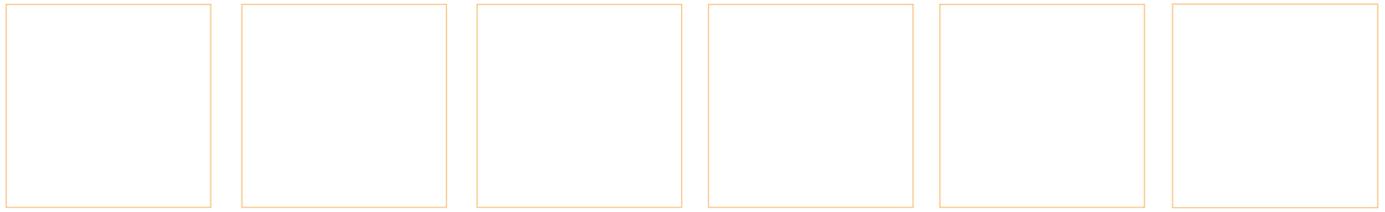
Targeted killing, the intentional premeditated killing of an identified individual by a State away from a hot battlefield, is neither specifically defined nor regulated under international law, but remains governed by applicable international humanitarian and human rights law. The practice of targeted killing has recently converged upon the use of armed Unmanned Aerial Vehicles (UAV) that give rise to additional considerations and concern, given that a number of European States have been reportedly seeking to acquire military UAV capabilities.

Current Practices

Starkly divergent approaches to the legal basis of current targeted killing practices are evident in the two States that dominate the current practice of targeted killing terrorist suspects. The Israeli Supreme Court outlined the legal framework governing the targeting of civilians taking direct part in hostilities

in December 2006, subsequently endorsed by another judgment in 2008. The Israeli policy and practice has been the subject of two investigating committees. The legal framework only applies to targeted killings beyond Israel's borders and is limited only to civilians directly participating in hostilities, provided, that less harmful means are unavailable and that the proportionality principle is adhered to. Ex-post review must be undertaken. The processes by which targeting decisions are made, and subsequently investigated, are clear. All stages of the decision to target an individual must be recorded in writing, and a distinction made between facts, assumptions and hypotheses. Authorisation is required from the highest levels of the military and government, and strikes are subject to independent investigation. Informal reactions from the Palestinian population to the strike may be used to trigger review. Compensation is payable in the event that the ex-post investigation finds an error or violation of law or procedure. There is a possibility of judicial review by the Israeli Supreme Court. Overall, the record of actual accountability for errors and deviations from policy is not strong, despite a very elaborate legal framework.

The US practices are largely obscure as the legal framework has not been disclosed, the involvement of the Central Intelligence Agency (CIA) remains classified, and there is no official acknowledgment even of operations in which Joint Special Operations Command (JSOC) participates. Little is known about the decision-making process either by the JSOC or the CIA, but Congressional Intelligence Committees are provided with classified briefings. There is currently no provision for judicial review. While the geographical location of the strike alleg-



edly determines whether an operation is currently conducted by the Department of Defence (DOD) or the CIA, there is widespread criticism of the opaque nature of the CIA programme and it is believed that its transfer to the DOD would alleviate at least some of these issues.

Governing Law

Targeted killing raises legal issues with regard both to the use of force and the conduct of hostilities. The two intertwined US justifications revolve around the claim of an ongoing armed conflict with Al-Qaeda and associated forces, and to the right of self-defence. The claim of self-defence relies on an expanded notion of imminence. These justifications were reiterated in the US Department of Justice White Paper that was leaked immediately prior to the High-Level Policy Seminar, but which outlined only the narrow position related to targeting (extraterritorially) US citizens who were senior members of Al-Qaeda or associated force. While indeterminacy regarding the legal justification to use force remains problematic, it is clear from the legal justifications invoked by the US that its targeted killing operations are to be governed by the armed conflict legal framework. The US continues to consider itself in an armed conflict with Al-Qaeda and associated forces, and membership of either category makes a person targetable. The notion of associated force is not defined, but seems to involve some concept of co-belligerent groups. On what evidential basis another terrorist group is deemed an associated force is unclear.

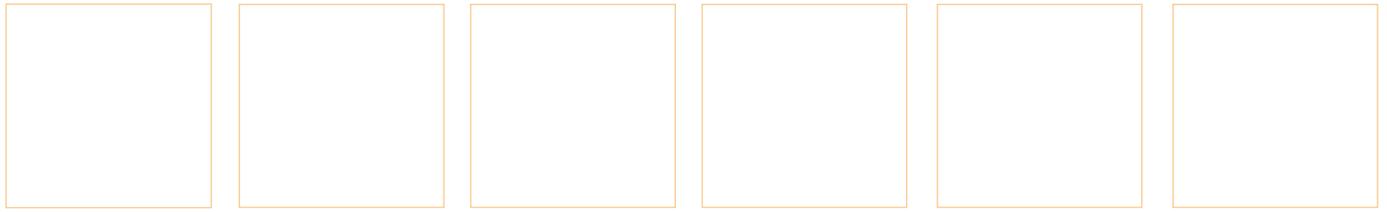
The general consensus of the High-Level Policy Seminar is that there is little scope for lawfully conducting targeted killings under the framework of

human rights law. Questions of legality therefore hinge primarily upon the existence of an armed conflict and the concomitant temporal and geographical scope of the battlefield. There is little agreement about how human rights and humanitarian law can be simultaneously applied in practice. Despite the interpretative influences that infuse the principles of one into the other, there is a strong preference to keep these legal frameworks separate with regard to targeted killing. A key risk is the use of law enforcement measures otherwise prohibited by International Humanitarian Law (IHL) on the battlefield (such as tear gas), or conversely, the use of military grade weapons in law enforcement situations.

The Idea of the Battlefield

A core divergence between the US and European positions revolves around their respective views that contemporary targeted killing operations were conducted under the paradigm of armed conflict and hence governed by IHL, or fell under law enforcement operations regulated by human rights law. An additional point of divergence is that the US declines to apply human rights law to complement IHL in non-international armed conflicts.

Some experts advocate a more vocal objection to the US invocation of the armed conflict paradigm, not least because not all the facts were available to make this determination, but also that no European State has accepted this paradigm even after a series of terrorist attacks post-9/11. Invoking the armed conflict paradigm leads to relative permissiveness for the use of force, which is exacerbated by unclear geographical and temporal boundaries. While the US has embraced the concept of global war, and is therefore



reluctant to accept geographical limitations to the battlefield, several experts express significant doubts about the validity of this position. European governments reject the paradigm, but do not comment on US strikes undertaken in reliance on the paradigm.

Beyond the narrow considerations over the limitations of the battlefield, the capacity for persistent surveillance and constant targeting ability afforded by Unmanned Aerial Vehicles (UAV) may necessitate a reappraisal of the current limitations to extraterritorial of human rights obligations, as it may become tantamount to exercising effective territorial control.

Transparency and Accountability

The High-Level Policy Seminar voiced concerns over the opaque processes that govern contemporary targeted killing practices. There is a general lack of information relating to the entire operation, ranging from the legal justification underlying the strikes, the selection of targets, the chain of command and authorisation, and the broader impact of targeted killing operations. At a minimum, there needs to be: transparency over the legal basis underlying these operations, both as a matter of international and domestic law; clarity with regard to the operational responsibility of the entity engaging in these practices; and an assessment of the impact through independent investigation. Minimal international standards and international scrutiny are required in addition to domestic measures to ensure compliance.

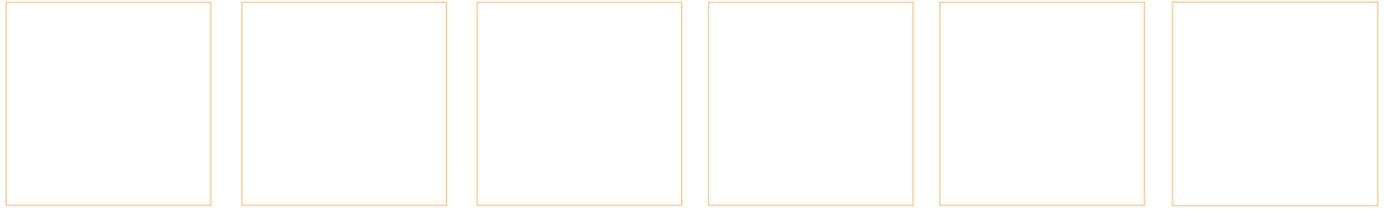
While greater transparency is likely to ameliorate a number of issues associated with targeted killings using UAVs, and despite clear standards expounded

in human rights law, the transparency standards under IHL are less well-developed, not least because the [International Committee of the Red Cross](#) has not explicated the transparency requirements for IHL. This lack of transparency criteria under IHL is unfortunate because it undermines the call for greater transparency for targeted killing campaigns conducted under the paradigm of armed conflict.

The minimum procedural requirement would be a prompt and effective investigation, accompanied by a mechanism for reparations. Despite the technological innovations introduced by the UAVs in targeted killing operations, targeting remains the critical legal issue and assessing the legality of such strikes is hampered by secrecy. A special level of scrutiny could be one way of overcoming these difficulties.

Targeting and Direct Participation in Hostilities

Under the armed conflict framework which the US applies, membership in “Al-Qaeda” or an “associated force” as determined by the US, renders an individual targetable. Members of these groups are considered to have a continuous combat function such that they directly participate in hostilities. The extent or nature of membership required to make a person targetable is not defined. But a filter of “imminent threat” is applied to decisions about whether to target a specific individual. As the US Department of Justice White paper indicates, imminence is a wide concept, extending to the “last clear chance” to strike the individual rather than his or her proximity to an imminent attack. It was also noted that in assessments about the proportionality of the strike under the laws of war, “military age males” in



the vicinity of military activity were deemed as non-civilian casualties, and thus not relevant to the proportionality analysis.

It was commented that the legality of a strike depends on the information available concerning the individual and his or her combat role. In targeted killings using UAVs, the direct participation requirement is often difficult to meet. The reliance on membership without more might be inconsistent with the general duty to take precautions.

Personality Strikes and Signature Strikes

There are currently two main methods of identifying the individuals for targeted killing strikes. Personality strikes target known individuals who are named on secret “kill lists”, while signature strikes depend upon pattern of life intelligence indicative of a threat posed by the individual. The lack of transparency concerning the compilation and maintenance of these “kill lists” are at the core of the legal issues relating to personality strikes. Signature strikes problematically circumvent the requirement of direct participation in hostilities and are therefore of dubious legality. It was contended by one expert that signature strikes essentially avoid the direct participation requirement, and are of dubious legality. The discounting of “military age males” in the proportionality assessment is similarly an evasion of the legal framework. The practice of signature strikes requires a strong statement in opposition from other States.

Clarifying and publicising both the processes involved for compiling the “kill lists” and the individuals who are named on them would ameliorate some of the issues related to personality strikes. In

addition, the lack of transparent accountability processes aggravate the legal issues raised, particularly by signature strikes, which would require a post-strike investigation not least for a collateral damage and incidental injury assessment that may, in turn, indicate necessity for altering future targeted killing operations.

Follow-up or “double-tap” strikes were underscored as being particularly odious and almost certainly constituting a war crime. Even if initially a combatant, the victim will be of *hors de combat* status, and at any rate the strike is likely to be unlawful for directly attacking first responders.

Establishing European Norms

While European States are not currently engaging in targeted killing using UAVs, and arguably may need neither to expound their interpretation of governing law nor their policy to govern these practices, there is widespread concern about the continuing European silence on the issue. A number of European States either possess, or have declared their intention to develop and to procure, armed UAVs capabilities. The prospect of European States deploying armed UAVs mandates the development of policy regulating their use. Compounding Member State inaction, the EU currently does not have a policy on the issue, although the EU Council Working Group on International Law (COJUR) has been instructed to begin a debate on the topic.

The need to develop a EU policy is fundamental for three reasons. First, the lack of European backlash against covert US practices could be interpreted as acquiescence in contemporary practices,



which demand more extensive debate and discussion. Second, failing to establish a robust norm could create difficulties for criticising abusive uses of UAVs as technological capacities proliferate. Third, a European policy is necessary to build relations with the US. In particular, there is concern to ensure that information passed by the EU to the US, under the Terrorist Finance Tracking Programme (TFTP), would be used in a manner inconsistent with EU law, and more broadly that there is potential of third State complicity because of information-sharing. To ensure a continuing political willingness to cooperate with the US on counter-terrorism issues, it would be necessary to convince the European Parliament and the public opinion that safeguards are in place in relation to the sharing of information.

Articulating a European policy would be beneficial both to provide a clear critique of the current US position and to propose viable policy alternatives. Moreover, if unchallenged, the peril that protracted practice of targeted killing through the use of UAVs will become accepted as international law will remain. The development of a European policy may evince opposition to those States which currently possess and use UAVs for targeted killing operations, from unilaterally developing the legal standards governing their use.

Many experts believe that it is not necessary to have a specific EU position at this point, especially since the EU does not possess any specific expertise on IHL, and it may be beneficial for Member States to adopt and clarify their own stance on the issue independently. Differences between common and civil law approaches may further hinder the timely development of a harmonised EU position. Indeed, encouraging European States to develop their own

policy positions may have the benefit of circumventing direct confrontation with the US over their current targeted killing practices by paving an indirect route to principled critique instead.

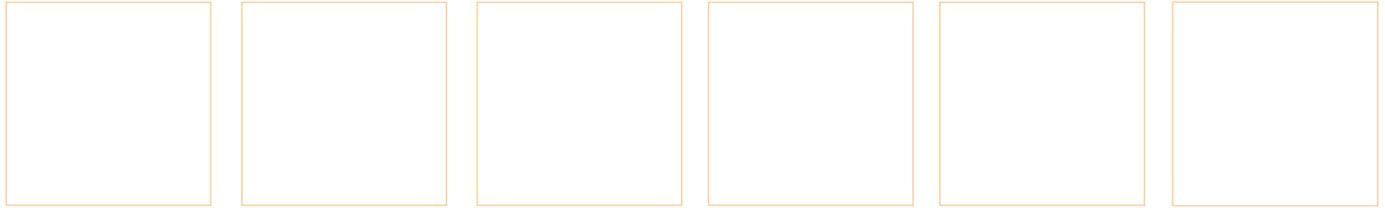
Proliferation and Global Dialogue

UAV technology is capable of widespread proliferation and potentially democratises the use of force to sub-State entities and even individuals. Numerous States currently possess this technology, or are on the trajectory to acquire it in the near future. In particular, China's reported consideration to use a UAV to kill extraterritorially a drug lord allegedly responsible for the deaths of eleven of its nationals underscores the need to establish consensus over the limitations for targeted killing practices with UAVs.

There is also a sense that rapid technological advancement, and their military applications, was outstripping the ability of the law to sufficiently regulate its use. While extant legal principles remain clearly applicable, there is a lack of clarity in their translation to practical standards.

Policy Recommendations

On 23 May 2013, President Obama delivered an important Counterterror Policy speech that was accompanied by the release of a brief Presidential Policy Guidance. While these initiatives represent important early steps towards addressing some of our concerns, there remain significant ambiguity with regard to the standards and procedures governing targeted killings through the use of UAVs. To guard against future normalisation of the practice



of targeted killing, transparency and accountability must move to the foreground to ensure the practice remains exceptional. In light of the issues and concerns raised during the past months, we propose the following recommendations:

- The non-policy of European institutions and States on this issue has a limited lifespan. Not only US policy, but proliferation and European States' own interest in the technology strongly underscores the need for each European State to develop its own position about targeted killings and UAVs, and this position will be shaped in dialogue with the American approach. An agenda should be established for European legal advisors to initiate the process of a European discussion and to strive towards a consensus, where possible.
- The EU should consider the best modality by which to engage Member States on the issue directly. This would help Europe to assist and influence any articulation of global standards. The EU, led on this issue by the Counter-terrorism Coordinator, might consider developing its own policy positions.
- Sharing information is a critical issue such that without further clarification, future cooperation with the US could be jeopardised. The EU should seek engagement with the US Congress to demonstrate that the law enforcement paradigm is not overly restrictive.
- Consideration should be given to a non-proliferation regime that Europe can spearhead. Particular attention needs to be given to non-State acquisition of weaponised UAVs and the concomitant threats.
- The processes for creating the "kill lists" that name targetable individuals for personality

strikes should be made clear and transparent. The procedures involved in confirming the identity of named individuals for particular targeted killing operations, and the precautions taken, also requires transparency. A restricted interpretation of imminence needs to be affirmed, and a mechanism for appeal and removal should be established.

- Signature strikes need to be strictly limited, and if conducted, should be carefully scrutinised for their legality. Follow-up "double-tap" strikes should be unreservedly condemned as unlawful.
- Developing specificity in the applicable standards is a key hurdle and States should not be left to make the final decision. Existing rules retain much traction and relevance, and claims about the need to revise or re-invent the existing legal rules should be carefully scrutinised.
- Any set of principles must address the need for strong accountability mechanisms, based on international law, for this tactic and this technology. A threshold for initiating independent investigation and principles that regulate such investigations need to be clearly articulated.

President Obama's Counterterror Policy Speech and Presidential Directive

On May 23, 2013, President Obama announced a new Presidential Policy Guidance governing targeted killings. In his speech, President Obama announced an intention to transfer all targeted killing operations away from the CIA to the Department of Defence, and mooted the possibility of judicial or other oversight over such operations. The Guidance, a summary of which has been released, attempts to



address some of the criticisms and questions of the kind raised by experts during the High-Level Policy Seminar. In particular, the Guidance articulates a preference for capture over lethal force, authorises lethal force against a target that poses a “continuing, imminent threat” to US persons, and requires “near certainty” that non-combatants will not be injured or killed. It also disavows the so-called military-aged males standard for determining combatancy. The Guidance provides a clearer and more comprehensive statement on such issues than has been previously made available in US government officials’ speeches on the practice of targeted killing. However, many concerns raised in the High-Level Policy Seminar remain unaddressed, including the continued application of the “armed conflict” framework, the interpretation of combatant applied in targeted decisions, the meaning of “associated forces” and of “imminence”. The Guidance also leaves open the possibility of signature strikes, and the use of targeted killing in support of another state’s security interests. The Guidance also indicates that targeted killing will remain an important part of US counter-terrorism strategy for the foreseeable future.

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