

Drones unlimited? Just war rules demand accountability

Does the use of drones meet just war criteria? That depends on how you define your terms.

by [Bradley B. Burroughs](#) in the [August 31, 2016](#) issue



A rendering of an unmanned aerial vehicle (Photo © DigitalStorm)

In a move that appeared carefully calculated to tamp down criticism while escaping further scrutiny, the Obama administration in July released a report on the aerial drone strikes that have occurred outside “areas of active hostilities” between January 2009 and December 2015. In other words, the report tallied the number of drone attacks and resultant deaths in places other than Afghanistan, Iraq, and Syria.

Assessing the justice of any given war or act of war, including drone strikes, depends upon the framework used. The core of the just war tradition is that acts of violence can be justified if they meet certain criteria, such as that they are used for a just cause and by a lawful authority. Among the standard just war criteria is that the use of violence must be “discriminate,” that is, it must distinguish between combatants and noncombatants and target only the former.

If one were to judge solely from the summary offered by the Office of the Director of National Intelligence—which recorded 473 drone strikes resulting in somewhere between 2,371 and 2,581 combatant casualties and from 64 to 116 civilian casualties—the drone program might appear to be performing adequately. As the report acknowledges, however, this estimate of civilian casualties is well below even the most conservative estimates of outside observers.

The three major independent organizations that track civilian casualties—Long War Journal, New America, and the Bureau of Investigative Journalism—estimate the number of civilian casualties to fall between 212 and 801. Hence noncombatant deaths may be as low as 2.4 percent of those killed in drone strikes, taking the government’s most favorable figures, or as high as 29 percent, using the highest BIJ estimates.

The July 1 ODNI report marks the first time any administration has shared official data on casualties from drone strikes. Yet it provides merely three data points—the total number of strikes against terrorist targets outside areas of active hostilities, the estimated number of combatant deaths, and the estimated number of noncombatant deaths. Given in aggregate, the data provide little to verify the report’s claims. Identities, dates, locations, and even the number of strikes per country or per year are not given. As a result, the report does not succeed—as the accompanying White House Fact Sheet claims it does—in “demonstrating the legitimacy of our counterterrorism efforts” and showing that “rigorous standards . . . have resulted in extraordinarily precise targeting.” Instead of proving such claims, it merely asserts them.

And there are good reasons to harbor skepticism of the ODNI totals. A variety of sources, including some originating within the military, suggest that drone casualties are routinely reckoned in ways that underrate the number of noncombatants killed.

Last October, *The Intercept*, an online journal dedicated to publishing previously classified materials, released a cache of secret and top-secret documents originally produced for a 2013 Pentagon study assessing the use and effectiveness of aerial drones. Among these was an analysis of Operation Haymaker, a 2011–13 campaign against militants in Afghanistan that was jointly conducted by the military and the CIA. The analysis noted that of the 155 persons killed in aerial strikes, the vast majority of which were initiated from aerial drones, 136 were not the intended targets of the strike. Yet every one of those nontargeted persons was labeled “EKIA,” enemy killed in action.

A tautological assumption appears to influence the calculation of casualties: in most cases being killed by an aerial drone seems sufficient to establish one’s identity as an “enemy” in the eyes of those counting casualties. As the source who leaked these documents to *The Intercept* said in an interview, “If there is no evidence that proves a person killed in a strike was either not an MAM [military-age male], or was

an MAM but not an unlawful enemy combatant, then there is no question. They label them EKIA.” Numerous treatments of drone warfare—especially Chris Woods’s *Sudden Justice* and reports by Jonathan Landay for McClatchy newspapers—suggest the prevalence of such an assumption throughout the drone warfare complex.

So does use of drones meet the just war criterion of discrimination? In part, that depends upon how one defines discrimination. Most frequently, it is understood to forbid the *intentional* killing of noncombatants. If we interpret intent in a solely subjective fashion to refer to the design present in the actor’s mind, then evidence about the numbers of civilian casualties seems almost irrelevant. Yes, we should worry about the reported callousness of drone operators. According to Air Force Staff Sergeant Michael Haas, a former drone instructor, drone operators commonly refer to children as “fun-sized terrorists” and liken the killing of targets to “mowing the grass.” But so long as individual operators seek only to kill combatants and have no malicious intent as they loose their bombs, they would satisfy the criterion of discrimination under this interpretation.

But understanding intention demands a more sophisticated account that considers objective and systemic considerations. In the case of drone strikes, such attacks are part of a system plagued by challenges that make it nearly impossible to eliminate civilian casualties. Prominent among these are the problem of “latency,” the time it takes for information to be conveyed from the drone to the operator—who is generally in the United States—and back; the fact that the drone program relies heavily upon tracking mobile phones and other forms of signals intelligence, which is, in the words of former head of the Defense Intelligence Agency Michael Flynn, “an easy system to fool”; the limitations of identifying targets given current technology; and what the Pentagon report calls the “tyranny of distance,” which creates lapses in observing potential targets.

To be sure, there is no simple numerical line that defines what constitutes discriminating use of force. Nevertheless, if it is indeed the case that nearly three out of every ten persons killed by drone strikes are noncombatants, as the highest estimates indicate, then civilian casualties are so common as to be inseparable from the intention of the drone program. Even if the drone operators and those who authorize their actions have the purest designs, the objective intention toward which the program is oriented would include such a high proportion of civilian casualties that their subjective designs are secondary.

To draw an analogy: the driver who knowingly takes the wheel while severely intoxicated may not intend subjectively to harm others but only to reach a particular destination; nevertheless, the objective facts about the human body's response to alcohol make driving in such a state objectively pernicious. In the case of drone warfare, if civilian deaths are remarkably common and the technology indiscriminate, employing such weapons is at least criminally reckless, and perhaps murderous. Such possibilities—which would render drone warfare, at least in its current form, unjustifiable for just war Christians—underscore the need for greater transparency.

To this point, we've assumed that drone strikes are carried out within the context of war. However, the ODNI report covers strikes outside of "areas of active hostilities," which is to say beyond the bounds of a declared war, which raises further questions.

Determining what constitutes a war is less straightforward than one might imagine. Despite military interventions in Korea, Vietnam, Iraq (twice), Afghanistan, and elsewhere, Congress has not officially declared war since World War II. It has empowered such campaigns through less formal means, such as the Authorization for the Use of Military Force of 2001. In certain cases, these authorizations serve as the equivalent of a declaration of war.

For instance, the AUMF of 2001 enabled the president to "use all necessary and appropriate force" against those responsible for the terrorist attacks of September 11, 2001. Combined with the Bush administration's repeated identification of the Taliban as a primary contributor to those attacks, the United States rather clearly situated itself in a state of war with Afghanistan.

But beyond "areas of active hostilities"—in places like Pakistan, Yemen, and Somalia, for example—matters are considerably murkier. Unlike the conflict in Afghanistan, the United States has not clearly situated itself in a state of war with such nations, in no small part because it is generally supporting their established regimes against nonstate groups within them. The 2013 Pentagon study attested to the complexity of such cases when it observed that its operations in Yemen and Somalia occurred outside a "defined area of active armed conflict," which limited the activities it could permissibly undertake.

Legally speaking, what activities are permitted depends upon the framework under which they are pursued. If drone strikes in these areas are indeed part of a war, a

framework the Obama administration has been reluctant to adopt officially, then they are subject to the law of armed conflict; if not, then they must meet the more stringent criteria of human rights law, which permits force only as a last resort to prevent imminent harm to human life.

While the Presidential Policy Guidance issued by the Obama administration in 2013 would satisfy either, whether the actual regimen of drone strikes meets the standards of human rights law depends a great deal upon the particulars of these strikes and resultant civilian deaths. This reinforces the need for increased transparency and presses for specification of the precise relationship between the United States and these nations, or particular groups within them, that would authorize the use of force by the United States.

If drone strikes are regarded as a form of law enforcement carried out under human rights law, the United States needs to establish that it is acting in that capacity. Law enforcement officers carry badges as a sign of their vested authority; to the extent that it does not make a public case as to why it ought to possess authority in these places, the United States risks appearing to be a self-appointed deputy or even a vigilante. Similarly, law enforcement officers are situated in systems that hold them accountable for the violence they do deploy. To establish itself as acting in the capacity of law enforcement, the United States would need to clarify the forms of accountability that should apply to drone strikes.

If, on the other hand, drone strikes are being carried out under the framework of war, declaring war is vital to meeting just war standards. Among these are the criteria of just cause and right intention. According to such standards, war can only be undertaken for legitimate goals, most of all to right an egregious wrong and thereby to restore peace. When combined with the criterion of last resort, which dictates that violence is permissible only when nonviolent means prove incapable of establishing peace, these criteria require the enumeration of wrongs suffered, stipulation of terms necessary to restore peace, and provision of a time frame within which one's potential enemy may comply before nonbelligerent means will be judged ineffectual.

In short, these criteria call for something like a declaration of war, even if it comes in the form of an AUMF. Without such a declaration, drone strikes are part of a war without clear aims and thus one that threatens to be without limits and without end.

The ODNI report says that statistics on drone strikes and casualties are to be provided on a yearly basis—indicating that we should expect more of them. More frequent revelation of such information marks a step toward greater transparency, but it also points us to a future in which aerial drones continue to be a pivotal, and increasingly institutionalized, part of American foreign policy.

At their heart, the just war criteria seek to limit the violent use of force and to ensure respect for human life by placing restraints on who can be killed and under what circumstances. In aerial drone strikes, we confront a form of violence that threatens to escape beyond such bounds, portending a terrifying new world.