

The Efficacy, Legality and Morality of Uninhabited Aerial Systems: A Military Lawyer's Perspective

by

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With the recent killing of Taliban leader Mullah Akhtar Mansoor in a missile strike from an American remotely-piloted aircraft (RPA), and Australia's announced intent to acquire similar systems, questions have arisen about the operation, efficacy, legality and morality of the weapons. Professor Charles Dunlap, a retired US Air Force military lawyer, will examine, from a proponent's perspective, issues associated with RPAs based on the US experience, as drawn from open sources. He will outline their use and will consider their effectiveness. He will also briefly discuss the relevant international law, along with additional limitations imposed by US domestic policies. He will further examine several specific objections that have been made concerning RPAs, including those related to civilian casualties. At the conclusion of the presentation, he will entertain audience questions.

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Major General Charles J Dunlap Jr, USAF (Retd), the former Deputy Judge Advocate General of the United States Air Force, joined the Duke University Law faculty in July 2010 where he is a professor of the practice of law and Executive Director of the Center on Law, Ethics and National Security. He holds a BA from St Joseph's University, and a JD from Villanova University. He is also a distinguished graduate of the National War College where he was co-winner of the Chairman of the Joint Chiefs of Staff Strategy Essay contest. His teaching and scholarly writings focus on national security, international law, air power, civil-military relations, 'lawfare', cyber war, military justice and ethical issues related to the practice of national security law.

Dunlap retired from the Air Force in June 2010, having attained the rank of major general during a 34-year career in the Judge Advocate General Corps. In his capacity as Deputy Judge Advocate General from May 2006 to March 2010, he assisted the Judge Advocate General in the professional supervision of more than 2200 judge advocates, 350 civilian lawyers, 1400 enlisted paralegals and 500 civilians around the world. In addition to overseeing an array of military justice, operational, international, and civil law functions, he provided legal advice to the Air Staff and commanders at all levels.

Dunlap previously served as staff judge advocate at Headquarters Air Combat Command at Langley Air Force Base, Virginia, Headquarters Air Education and Training Command at Randolph Air Force Base, Texas, US Strategic Command in Omaha, Nebraska, US Central Command Air Forces, Shaw AFB, South Carolina, and US Central Command, Tyndall AFB, Florida, among other leadership posts. He served overseas in Korea and the UK, and

deployed for operations in the Middle East and Africa, including short stints in support of the wars in Afghanistan and Iraq. He also led military-to-military delegations to Colombia, Uruguay, Iraq and the Czech Republic.

A prolific author and accomplished public speaker, Dunlap's commentary on a wide variety of national security topics has been published in leading newspapers and military journals. His 2001 essay written for Harvard University's Carr Center on 'lawfare', a concept he defines as 'the use or misuse of law as a substitute for traditional military means to accomplish an operational objective', has been highly influential among military scholars and in the broader legal academy.

Professor Dunlap: Thank you very much Mark. It is really wonderful to be here and I really appreciate being able to speak to an audience which is primarily English speakers because one of the great things about the military, is that you do get to travel, you really do get to see the world. And one of my favourite countries, after Australia, of course, is South Africa. Anybody been to ... any South African's here? Well, it's a fascinating country and they've a very interesting Air Force but we had a good relationship with them.

I went there and, as Hugh knows, I like to be a good guest, so I was sampling the wine served at this dinner that they took me to and I picked up this one bottle of wine and they have 12 official languages there, but this bottle was entirely in Afrikaans. I poured a little glass, I took a sip and to be perfectly honest with you, it was terrible. All the South Africans were looking at me and smiling and I'm drinking this stuff and finally after about ten minutes, one of the wives of a South African officer, she leans over and she says 'Sir, you do know you're drinking the salad dressing, don't you?'

That is actually a true story. I said, 'Of course, we do that in America all the time'. And they believed that! I am not going to officially be speaking for the US Government, but I'm going to give you my own opinion. Those of you who disagree with drones, I hope this will arm you with the correct information, if you disagree. But, I have to tell you, I'm a proponent and that will be the flavour that we'll see here. The drones have gotten a lot of play, as you know. We killed the Taliban leader not too long ago and I think it's fair to say that drones have become an important part of the US war machine. It doesn't mean that drones are strategy; it's a tactic to support a strategy.

The US has a lot of plans in the future, as you can see, we're going to be spending \$3 billion on the drone force, building it up and I think that we'll continue to see the development, implement and fielding of drones across the armed forces in the US. There are a number of types of drones; the vast majority of the 10 000 drones in the US system are actually the small variety. The reconnaissance drones. There's actually about four or five hundred of the armed variety of which you probably know of the Predator. It fires the Hellfire missile which is a laser-guided missile originally developed to go after tanks. It's method of operation is a little bit complicated if you're not familiar with it and it depends obviously a lot on satellite communications. This is one reason why if you want to use a drone in conventional war, in other words,

against a country or adversary that has the ability to defend itself, it can be complicated because that data link is extremely important. The microsecond, the short time it takes for that link to work, actually makes the difference on the handling of the drone.

There's a couple of myths that I want to debunk here; there's actually something on the Air Force website that talks about this. A lot of people aren't aware it takes 200 people to do one drone sortie, to support one drone sortie. That's everybody from lawyers to maintenance personnel, communications personnel, intelligence personnel not to mention the two operators involved. I think you'll see that the operation, in terms of how it does its targeting, is much the same as it is for a conventional mission with a manned aircraft. It's not uniquely different, as a lot of people would want you to believe.

This is from *The Guardian* and there's two parts to this I want you to remember, as we get a little further into the presentation. Those two parts outlined in red. Because you will hear as we'll see later on, people saying, 'Well, the children can't sleep because of the sound of the drones'. I'm not sure what they're hearing, but they're not hearing drones because you don't hear something at 20 or 25 000 feet. So that would be one indicator that maybe it isn't exactly what people are saying.

We're seeing the development of smaller and smaller ammunition. There's actually a video that goes along with this where this small ammunition is being used, designed to be used on drones where it can actually go in between those two cut-outs and take out the target without necessarily damaging people in close proximity. I think we'll see even more developments of smaller drones, drones that are survivable in a contested environment. Most of the drones that we have today are not really survivable in a contested environment, meaning if there were aircraft or any anti-aircraft systems.

A couple of quick notes about the law. Strangely enough, Mr Krauthammer is just a columnist for *The Washington Post*, a paper in the US. He actually did a pretty good job at summarising what the international law is with respect to drones. There's two bases that you can look at. One is an imminent threat. This is essentially like a law enforcement context. In other words, you act in self-defence based on an imminent threat to you or your forces or to your country and that can justify an attack under law of armed conflict or international humanitarian law or the law enforcement or international human rights law.

The other basis would be status-based targeting. In other words, under international law or the law of armed conflict, someone, a member of the armed forces of a belligerent party or an organised armed group directly engaged in hostilities even if it's not state actors, they can be attacked at any time at any place, simply based on the status of being a member of that organised armed group. That's generally what international law says.

One of the issues that comes up a lot in the US is, 'Can you target Americans under that international law?' And the answer is, and there's a longer thing that we can get into if you're interested during the Q&A, but the answer is 'Yes', because the US Supreme Court has essentially said, 'If you go over to the enemy, then you suffer the

consequences of being one of the enemy'. In other words, you don't get a special legal status because you're an American and you've gone over to the enemy. It's based on *Saboteur*, a case that came out during World War II, in which saboteurs were delivered by submarine to the United States and two of them, at least one of them, possibly two of them, were actually US citizens and they were tried by military commission during World War II and executed. There's a great book by my colleague that came out and I like to tell folks it's short. You can actually read it if you're interested in the US Constitutional Law basis as to why drone strikes are lawful under the US Constitution.

I was really surprised that Geoff Powell wrote that because Geoff doesn't have a background in the military. He has a PhD in Divinity Studies as well as his law degree and I thought it was going to come out exactly the opposite but it's very interesting. Now one of the unique things about US law and different from the courts in other countries is that courts generally do not get involved with targeting decisions. In other words, the courts basically say, 'We are not competent to determine who should be targeted. We don't have an intelligence [background]; we're not military leaders' and so forth. So it's a political question, in other words, it's determined by the elected branches of government which in US law is the Executive Branch, the President and, of course, then the Legislature.

We also then have the question, 'Where can strikes take place?' And the US view of it is this. Our legal authority isn't limited to the hot battlefields because the adversaries aren't limited to the hot battlefields. This is one map representing Al Qaeda's global presence. Here's another map that indicates where ISIS has spread itself. You know, in our history we've had world wars where you know the adversary. We like to say the enemy gets the vote and personally I think that this idea that we have a different legal regime for the hot battlefields versus everywhere else is problematic in this respect. What does it incentivise the enemy to do? If the enemy perceives that it is legally more difficult to attack him in another location, he's going to metastasise out to other locations. Typically, that's going to be places with weak governments and failing states. So should the law incentivise adversaries to do that? I would say 'No'.

The US takes the position that the authority is not limited to that. However, there are a number of limitations that go into that, especially if the adversary is located in a third country, meaning that you try to get the consent of the nation first. There's a lot of dispute about this because part of the problem is, a lot of nations that may want to consent, may not want to do so publicly. That creates a public relations kind of issue with respect to drones but here's one thing to keep in mind. This is just a fact. I go to things all the time in the States where people are saying, 'We're violating the sovereignty of Pakistan'. Really? Okay. The Pakistanis could shoot down the drones that we have anytime they wanted to. The Pakistanis have a very sophisticated Air Force. They have F-16s. Most drones are essentially World War II-type aircraft. They're not jets. They're propeller driven. They're not hard to shoot down with an advanced aircraft. There are exceptions, some other capabilities and specific kinds of technologies that may make it more difficult, but typically, when people say we're violating their sovereignty, this is what I always think of.

There's a theory in international law, that basically says that if a threat is coming from a third country and that country is unwilling or unable to stop it, that doesn't mean that you have to continue to suffer from that threat.

Recently, there's been a new legal advisor to the US State Department, Mr Egan, and he gave a pretty important speech that's worth reading in this regard. This is hard to see but basically what he says is that if you don't have consent in order to have legal justification under the unwilling or unable theory, you have to do everything else before you use force. In other words, you have to try to work with the government and get them to do something. It's only when that government has demonstrated [they can't] and you've exhausted everything else that you can use force in that third country. I hear this all the time, 'You just kill one; they just make another'. Well, maybe! What do you think? Does killing a senior operational leader make a difference?

Here's a few. Just ask yourself, 'Would history have been different?' I always think of George Washington who was almost killed by the British in the winter of 1776. If he'd been killed outside of New York, which he almost was, I think we'd be part of the Commonwealth today. I really believe that. Not, that that would be a bad thing but it would be a very different. That'd be a very good thing, I'm sure, but it'd be a very different course of history. I'm not saying that this—it's called decapitation strategy—that it always works, as the only way of working but I am not a believer in the idea of, 'Oh, it's better to keep them alive'. No.

Even in our country, as big as our military is, if you keep killing the top guys, we don't have an endless supply of great leaders, so the idea of taking out the top people does make a difference. And being at Duke University, we saw that happen with our basketball team. You can't lose your top players and expect to [win].

Here's a good analogy, it is not involving drones but it is speaking to the issue of senior operational leaders. I only know what I read in the newspapers here, but as you might know, in Columbia, there's been an insurgency for 50 years. A few years ago, there was allegedly, in the newspaper, a CIA program that enabled the killing of about two dozen leaders of the FARC [Revolutionary Armed Forces of Columbia].

How was it done? A covert-action program that gave them a GPS kit for their otherwise dumb bombs. Then they got intelligence as to where the leaders were. They took out two-dozen of these senior leaders and what did we see last January? The violence ending. Now, there's lots of other things associated with that. But that is one factor which I think speaks to the idea that taking out the leadership can and does make a difference in insurgencies. In US policy, we have something called the Presidential Policy Guidance. There are things in there that I really don't like because it tells the enemy too much, but I'll talk about that in a second.

But this is for counterterrorism operations outside the area of active hostilities. This is on the Web and it's things not necessarily mandated by law. Mr Egan recently talked about two of these things that the Administration's particularly proud of. One is that it establishes that you have to have a near certainty of zero civilian casualties before you're permitted to launch an operation. This could be Special Forces or it could be a drone strike. Now, from a military perspective, what issue do you see about that?

Male speaker: It invites human shields.

Professor Dunlap: Yeah, what's the enemy going to do? Oh, you're telling me if I have civilians here that there is no possibility I'm going to be struck? Here's Dunlap's theory. I don't know if you all remember, but more than a year ago now, there was an American hostage and another, I think, an Italian hostage were killed in a drone strike against two Taliban leaders. The US didn't know the hostages were there but it did kill these two leaders and people are saying, 'Why were those two leaders there with the two hostages'. Easy for me to figure out. The leaders thought they were bullet proof. Hey, not only do we have a civilian, we have an American hostage and we have another foreign hostage. Here's the thing, the enemy especially today, these enemies will go to school on every well-intended thing we try to do. You always have to red team it. 'How are they going to take a good thing that we're trying to do and turn it into something bad?' This is one way I would suggest.

In addition, he wants to make the point that there is no such thing as signature targeting, if you're talking about signature targeting meaning every male in the area is considered to be a combatant. That's not the way that targeting is done. I've never seen rules of engagement that work like that. But I will say this. I go to these conferences all the time and they say, 'Well the military doesn't know the name of the person that they're killing.' That's most of war throughout history.

Typically, when somebody's shooting at somebody, you don't have a file on who that person is and you're not always going to know all the details. Actions do speak louder than words. They will look at the activities and what we'll see in the few minutes, and sometimes hundreds of hours are spent studying individual targets partly to gain more intelligence. They do what's called a pattern-of-life analysis. They want to see who's going to this guy. They have other technological means to examine that particular location and they'll look at it for hundreds of hours. Does this work?

Well, a lot of the papers that were captured in the Bin Laden raid have now been declassified and released partly through litigation, I have to tell you, but partly voluntary disclosure. A woman, Jennifer Williams, a very interesting person, wrote an article in *Foreign Affairs*. She had studied these documents and came up with some interesting findings and that did verify what the Administration had been saying. I don't like everything the Administration has said, but when you go through the Presidential Policy Guidance, there's this big long administrative process before someone can be targeted with a drone strike outside of an area defined for hostilities. And as you can see from this, the paperwork and the letters that were in Bin Laden's lair support the idea that they are following what they seem to be saying in public. Lets take a look at some of the controversies. In the US, drone strikes are very popular. Fifty-eight percent of Americans approve, and I would say that's probably even higher now and what was interesting to me is when you dig into the poll that was taken by the Pew Research Center, which is a very reputable organisation.

The higher the education level, your support of drone strikes goes up dramatically. Living in the academic environment that I do and everybody seems to not like everything that the military does. But in the US, anyway, and I think that speaks the idea that when people get information, they come to understand why this would be a

good way of applying force if you're at the point where force is indicated. And more recently, just a few days ago, the poll came out and in the US, the military is the most trusted institution in American society. Well ahead of organised religion, well ahead of the Supreme Court, well ahead of ... you can see where our Congress is down here unfortunately. Wow!

Honestly, this is not such a great thing for democracy, in a lot of ways. But it just goes to show you because in that Pew poll, one of the other things that they asked was what percentage of the population was very concerned about the legality. Only 29 per cent said that [they were]. I think a lot of that is because they have high confidence in the military doing the right thing, even though there's other polls that say 71 per cent of the American public doesn't feel like they understand the military. Because such a small percentage of people in the US serve in the military and now fewer and fewer even have relatives that have served. So I think it is kind of interesting.

What does the world think? Now this poll, and I double-checked it this morning, did not include Australia, so we can't really say it's the world. It's part of the world. Israel and Kenya are the only two countries I think that really support US drone strikes. Most countries don't like the US drone strikes and they don't like US surveillance. But it doesn't seem to matter all that much because they still have 65 per cent approval rating. I tried to dig out some statistics for Australia and the only one I got was about a year ago that said 53 per cent of Australians value the defence relationship with the United States, which is a little lower than I thought it might be. But still, notwithstanding the drone strikes and so forth. I couldn't find anything on drone strikes, a poll of Australians on drone strikes.

Amazingly, we've recently seen an expansion into Italy where Italy is now lending the space drones to be used in connection with Libya. Very unpopular in Europe but I think that the Italian Government, in any event, sees their value. Twenty-fourteen there was this prediction. I think ten years is probably too much. There's ten countries now that have armed drones and the Chinese are exporting an armed drone. That's why the Nigerians have them. And I suspect that there'll be a lot more countries with armed drones, a lot sooner than even ten years. I thought this was an interesting article when I was looking at Australian drones and so forth, where this writer talked about 85 countries now have some kind of drone. There's a difference between surveillance drones, which I think Australia has, and armed drones.

I think this is a very interesting observation and, just speaking for myself, we need Australians at the table developing norms for armed drones. I'll tell you why, and this is just me speaking:

- Australia has a real military. Americans don't like being lectured by some European country, like Liechtenstein, some country that doesn't have a military or is not actually fighting.
- [Australia is] country that knows Americans and is respected by Americans. I think it is important, in my judgement it would be very valuable, to have Australians at the table as norms are being developed for armed drones—even if we disagree. *Defence White Paper*, as Mark talked about, predicts or calls for the acquisition of armed drones.

Canadians, this really kind of surprised me especially with the current government in Canada, that the Chief of Defence called for armed drones and that the Canadian military needs them. They do but the fact that he came out and said that surprised me.

Let me ask you this, 'Are drones cowardly?' The reason I bring this up is there's a lot of David Carrs around. David testified before our Congress that they were cowardly because the Taliban, the Pashtuns didn't respect people who used drones. Yeah, I'm not too worried about that personally. These are [the people] using disabled children as suicide bombers so I'm not being kept up at night that some Pashtun doesn't have any respect for me. And against Islamic State, they're burying children alive. Do we worry that it's better to be feared with these people than respected according to whatever their idea of respect is. Unfair advantage; I get this all the time.

There are people out there that will tell you that the law of warship balance, like each side should have an equal shot and that this is unfair. How are insurgencies going to win against this technology? Well, I guess they're not. I mean the answer is they won't. They have to go through the political process. General Deptula, who I think a lot of, he makes the point, 'War isn't about fairness. It's about following the rules'. But it's not about a fair fight. In fact, military strategy is built on the idea of orchestrating the unfair fight, meaning the adversary doesn't have the opportunity to win. And George Patton had this point of view. How about this? What do you think?

How about David versus Goliath? Missile weapon. Why didn't David go up to Goliath with a sword and battle it out in close quarters? Because he [Goliath] was a giant! I mean that's why, since the beginning of warfare, belligerents have sought ways of bringing their weapons to bear before the adversary could bring his weapons to bear. This is one reason why Philip of Macedonia invented the 16-foot spear. And Alexander the Great, his son used it, when everybody else was using the 12-foot spear, to conquer the known world at that time. Agincourt changed the nature of warfare. French knights at that time were the super weapon. The heavy armoured knight was destroyed by the English Bowman. Thousands and thousands of arrows were shot at them from afar before they could bring their weapons to bear. The rain helped, lots of things helped. Horses were not that armoured. Knights fell in the mud. Yeoman came out with the battle-axes and killed them or they were suffocated.

The same thing is true in the First Gulf War. Everybody likes to say, 'Oh the Iraqis had a terrible military'. No, they didn't! They had a good military. I'm talking about the First Gulf War—they had good Soviet doctrine and they were competent with their tanks. The problem is when an M1A1 has 2200-metre-range main gun and a [Iraqi] T72 [tank] has an 1800-metre-range gun, you can see what happens. The idea of killing the adversary from afar is not new. What about the PlayStation mentality? Philip Alston. I'm trying to think of the right words to use to describe him, but let me just say that I disagree. In an official report to the UN, he talks about drone operators having a PlayStation mentality. All I can think of is he's somehow imprinting his personality onto others because I never saw that, ever.

The idea [is] that maybe he would have a PlayStation mentality if he was a drone pilot. But in the real world, it's different. This is something that you're going to have to think about. A very good article came out about two years ago by a drone pilot where he talks about when you keep looking at that target for hundreds, or maybe

even thousands of hours, on a high definition screen, you get to know who you're going to kill pretty well. It's not like in most [ground] combat situations where people are just shooting at moving [targets]. [With drones], they're studying this individual and that makes it an intensely personal experience. And it does take a toll on some of them.

That's why it's very stressful for the people [operating UAVs]. One of the things that we're struggling with, in the US, is getting enough pilots because we're now buying more UAVs than manned aircraft by a considerable amount. So getting enough pilots is quite a challenge. Recently, there's been authorised [the training of] enlisted personnel to fly some drones.

A recent story came out because of the whole Philip Alston thing in the US. The PlayStation [comment] is very, very offensive as it would be to any professional military person. But why do they evoke such a strong reaction? I'm giving you Dunlap's theory here. Lets look at chemical warfare. Why is chemical warfare so loathed? Because, you know what the reality is? There's a lot worse ways to die than in a chemical weapon [attack]. A chemical weapon might be a better way of dying than some of the ways that are perfectly lawful. Ever heard of thermobaric weapons? If they don't incinerate you, they'll pull your lungs from your stomach wall and you'll bleed to death. [It's a] perfectly legal weapon but there's all kinds of prohibitions on chemical weapons. Why is that? Well, there's actually scientific studies that show that it taps into primordial fear of being poisoned, that we get from our ancestor's ancestor's ancestors. Poison was something that they really feared because they could eat the wrong food and be killed.

I would say that there's something like that associated with drones. It's the fear of being hunted by something that you can't do anything about. And there's scientific studies that show that we're hardwired to have that fear and that's why the flight syndrome is built into us. I don't think it's a mistake or coincidence that these weapons systems are called Predators because that is the psychological mindset that you want to put in the adversary. You want the adversary to be constantly thinking that he's being hunted, that somebody's watching him and he could die at any moment. In that way, you inflict Clausewitzian friction into this operation.

Do they [UAVs] cause excessive casualties? Well, let's go over the law real quickly here because some people think if you kill five civilians and you kill four enemy then that's [OK]. But that's not the way the proportionality test works. What it is, and this is from Protocol One; Australia's a party to Protocol One, the US is not, but we accept this as customary international law. The actual proportionality test is that the casualties caused are not excessive and are in relation to the military advantage. The military advantage of killing one person, if it's the right person, might be very great and it might justify a lot of civilian casualties. That's the law.

And in the new DoD Law of War Manual, it admits it's subjective because somebody has to make the determination of what is the value of the military advantage. I say this because we've got to resist the idea that we can come up with some sort of a logarithm or some set of numbers that will tell you. I will tell you that there've been rules of engagement (I'd suggest that some folks in this room know keenly what I'm talking about) that will say that if there's going to be 30 casualties then you have to

have this level of military advantage and it's going to be 50 at some other level. For anybody that's been involved in operations, the idea that you can predict with that kind of fidelity, 29 versus 30, is absurd. Be that as it may, it's ultimately up to the commander.

I use the Bureau of Investigative Journalism's statistics because it is the most drone hostile set of statistics. And if you don't believe me, take a look at their website. They spend a lot of time talking about how horrible drones are. But these are their statistics. They're a little hard to read. I looked from 2013 through 2016 and I double-checked it this morning. Partly because when you fly in from the States, you're going to get up at two o'clock in the morning anyway, but this is the maximum number of civilians killed versus the maximum number of people killed.

Like I said, it's not a numbers thing [defining] what is excessive but numbers are a factor. Take a look at those numbers, especially as the weapon system has developed and matured and is being used in the field. Let's take a look at Yemen. Through this morning and there was a June 12th drone strike in Yemen. I changed those numbers. Make your own judgement but that doesn't look excessive to me. Somalia. Fewer drone strikes but there's the numbers. You won't see these numbers in the press. You know what numbers you'll see in the press? They'll say hundreds of civilians have been killed because what they'll do is go back to when the systems were first used; not the way systems are being used now. [They will] come up with a different figure and they won't mention that in the last five or six years, the number of civilians killed has gone down dramatically. This is just an observation.

I won't say there's no such thing as an innocent civilian, but when you see that word used, how do they know that? They don't. Somebody is entitled to legal protection as a civilian even though they could be pretty darn evil. They could be criminals. They could be supporting the enemy in all sorts of ways. Doctor Bornstein, who was the Librarian of Congress years ago, talked about Americans suffering from the myth of popular innocence. Americans like to believe that everybody, and you guys will probably [agree], everybody actually thinks like Americans and are actually good people. They just have these few evil guys at the top who are making trouble. Americans don't like to believe that sometimes there are whole societies that are infected with evil. Another writer, a couple of years later, talked about Serbia. People like to think it was just Milosevic. No, it wasn't. There were thousands and thousands of supporters of exactly what he was doing.

So, I think the point is, not that these people should be targeted and I'm not saying that. I'm just saying that they're not innocent civilians necessarily, not the sentient adult population anyway. Where's some of the criticism? Is it assassination? In the US, we have an executive order that prohibits assassination, but assassination has a very specific meaning. Assassination is killing someone for political purposes when you're not at war with that country and that's prohibited by international law. The US President doesn't have to issue an executive order to criminalise that. But assassination in wartime is different. When you use perfidy, for example, by dressing yourself up like you're in the Red Cross, so that you can get close to an adversary leader and then kill him—that's perfidy; that's illegal. But killing an individual member of the enemy is not assassination.

It's not assassination because if you're in an armed force, just your status of being in the military means you could be killed. The example I'd like to use is a Public Affairs Officer asleep in her bed completely unarmed; she can have her throat slit and that would not necessarily violate international law if there's an armed conflict ongoing.

An example of this would be the killing of Yamamoto during World War II. The US Army Air Corps went out to kill him specifically. They'd broken the Japanese codes, knew where his plane was going and in the longest P-38 mission in World War II, Yamamoto's aircraft was shot down. Perfectly legal.

Lets look at some of the criticisms in humans rights group. Amnesty International. You see the cover. Wouldn't you think that that was a quote from somebody? Or that they had interviewed women based on that? Actually, this is why it pays to read down on the footnotes. What they said is, 'Oh well, we didn't actually talk to many women or girls'. There's no citation that they actually quote, but if they'd interviewed more Pakistani women, maybe they would've got a different view.

But here's the thing that really gets me. Has anybody ever been up to that area in Pakistan—the tribal area? You know if you go to Saudi Arabia, it's really very 12th century in a lot of ways. If you go up to that tribal area of Pakistan, that's like the 4th century up there. But, the idea that everything that flies might be considered a drone would not surprise me. It's crazy, but if you've met the people up there, it is really a very different world. From *The Guardian*, I quote a David Carr point. 'It's very unusual for you to be able to hear a Predator when it's cruising.' Very unusual and so people who are saying that they heard it, if they actually existed, I don't know what they're hearing, but it wasn't a drone.

You never fly drones in pairs or threes like that. There's a number of reasons for that. Number one would be inefficient use of the platform, but the other thing is the operators don't have that kind of situational awareness to be able to fly in formation like that. So the people who are saying that they saw three together, they're either making it up or they're not talking about a drone. This Taliban guy is being interviewed. He doesn't even know that there's a drone up there.

Here's a reporter for Humans Rights Watch. Joshua Mailman wrote something. Now you'd look at that and you would think the report, which talks about 45 deaths, was about drones right? Wouldn't you? Well, actually most of the deaths that they talk about in that report were from a cruise missile attack. That is one reason why we don't use cruise missiles because when you launch a cruise missile, it's going to have an extended flight time and there's no changing the target once you launch that weapon; it's going to go to its designated main point of impact period. In Yemen, like in the tribal area of Pakistan, they see something up in the air, drone, fighter, aircraft, helicopter, you know, and they make the argument that every drone strike we do is illegal.

Then the Open Society Foundation came out with a report and they talk about transparency. Everybody wants the US Government to be more transparent but you want to know something. I've yet to see one of the reports from these organisations where they listed their sources so that they could be checked. The reason they say

they don't do it is that it would put them in jeopardy. So security is the reason they're not transparent. Christopher Swift went to Yemen and dressed up like a Yemeni and went into the rural area. In an email to him I said, 'What do you think about this?' And I got all this back. He told me I could use it but you know they hire other likeminded organisations to do their polling.

This came out very recently and I know something about this because I was on the working group. Stimson Center—very respected. Here's the problem and there were good people on it. But the problem is they would not let me or anybody else see the draft before they published it. There's just a ten-person group of whom nobody had ever been involved in drone operations. A general was on the group but when he was Commander of Central Command, that's when there were a high number of civilian casualties. Their [Stimson Center group] big recommendation was improved transparency. This is the kind of thing that they want—information. The problem with that is, that it's extremely valuable to adversaries. If you got all that information about every drone strike, you could reverse engineer and come up with strategies to avoid them. I mean it is as simple as that.

Kind of ironically, the day after this came out or shortly thereafter, the President giving the Congressional Medal of Honour to a SEAL and he talked about, 'we have to explain to people that secrecy is necessary in military operations'. I've written an article about the Stimson Centre Report on my blog because it's this whole transparency. In democracy, transparency's a good thing. But we need to understand the cost. If the cost is going to be to neutralise the value of the weapon system then we have to think that through. American Civil Liberties Union came out with this idea about how horrible drone strikes were and then the very next day there was a [media article about a] drone strike that killed 150 fighters. It wasn't just drones, it was manned aircraft as well. But the point is, this was Al Shabaab. These were the people who did the Kenyan mall massacre and then went to the university and massacred innocent students.

There is a plan now in the US, supposedly any day now, they're going to come out with some statistics as to drone strikes from the US Government. The *New York Times* has already said, 'Well, they can't be trusted'. Okay, that's why I used the Bureau of Investigative Journalism. I've written a whole thing about drone critics and so forth. This is something else that we hear a lot about; blowback. 'Oh, you've just caused more' or you kill somebody and then you create more insurgence. Actually, a guy did a study, that came out recently, said, 'No, that's actually not true'. It doesn't mean that drones are popular or that Americans are popular but people in Pakistan, in the tribal areas anyway, recognise that it's the only way of going after these people who are causing them so much heartbreak. What about this? If you don't do a drone strike, does that mean that there are no civilian casualties? Maybe, but not necessarily. I would suggest to something that I'm calling a moral hazard. This is the traditional definition of moral hazard but I'm working on a new one.

What I'm saying is that each time you forego a drone strike, which would be legal under international law, for some policy reason, then you transfer risk from you and the military or you and the intelligence agency onto the civilians on the ground. You don't have to worry anymore about being criticised for civilian casualties. But the people on the ground are going to suffer whatever that person who now lives will do

to them and their family. Whether it's turning their daughter into a sex slave, whether it's putting them in a cage and drowning or setting them on fire or killing other innocent people.

Here's an example. Has anybody seen *Eye in the Sky*? I think it's good; I highly recommend it, actually. There's some things in there that I've never seen; I wish we had that little bug drone. That would be very convenient to have actually. But my friend General Deptula got very upset about it. He wrote a critique and I think he's wrong and just cover your ears because some squealers are here.

There's overwhelming evidence that terrorists are in this location. They're putting together suicide vests and it's known that they're going to go out and kill scores of civilians. Then there's one girl, one young girl, who is selling bread. She walks out right in front of the building and when they're doing the collateral damage assessment, they're even moving the pip around, they still know they're going to kill her. So it goes through. Of course, the US people are saying, 'Bomb, bomb!' and the Brits, it was a British operation, go through a lot of discussion and concern and yes and no and so forth. General Deptula doesn't use the words 'moral hazard' but I think what he's saying is much the same thing.

So we can't think that if we forgo a drone strike or don't use that system, that civilians are necessarily going to live. As John Stuart Mill said, 'There's a moral issue with inaction' and so this idea that it doesn't mean that there's a near certainty that no civilians are going to be killed.

To consider effectiveness of drones, go back to the same Jennifer Williams article. She digs out some more information but here's the part that I think military people understand. But it's hard to get others to understand which I think is extremely, extremely important. When the enemy knows that drones are out there hunting them, it changes their behaviour. And it changes their behaviour so that they become like Osama Bin Laden. He holes himself up, he's not visible, he can't leverage his charisma, he doesn't communicate, or only through [others]. That inflicts all kinds of friction [on his organisation]. It changes the nature of the relationship between a commander and his troops. I think there is a very valuable, psychological impact in having this system operating. I think it's often underestimated.

I don't know if anyone's been following US politics, but allow me to say that there's a polarisation occurring (that would be a kind way of putting it). But the one thing that both parties agree on is the drone program, including the people that have access to material that I certainly don't have access to, [is effective]. Mike Morell, Deputy Director of the CIA and a civil servant for most of his career, served many different administrations. He made the observation that he really believes that this is the most effective tool that we've had—'we' meaning the US.

A couple of scholars did a study of the effectiveness of drone strikes in Pakistan. This is a little hard to read but they conclude that 'Yes, they're unpopular, but it does work. It decreases the amount of terrorism in that area.'

Even *The Guardian*, which is not the most drone-friendly publication and of course the President make this point, that no real professional in government, in the military

or civilian side wants to kill other human beings. People in bars do, but not people in the military or government who have real responsibility, but there are some things I believe in this world that can only be dealt with by force. So we have to decide whether this option is a better way of using force in certain situations as one tactic in a strategy than other options there might be available.

And I might add that people say, ‘Well, why didn’t you use Special Forces?’ Okay, then you’ve got to fight your way in and fight your way out. There was a good article in a US magazine by the guy who wrote *Black Hawk Down*, [Mark Bowden]. He makes the point that ground operations historically have caused more civilian casualties than air operations. He concludes from that that’s why the President, whose party and personal disposition is not to use things like drones, why they use them. During the Kosovo operation when we did have a pilot shot down, there were 28 000 troops involved in the rescue operation and they were launching B-52s if the Serbians started to come towards the area [the pilot was in]. The reason we use drones is these areas are virtually inaccessible by almost any other means. If we had a US pilot down, we’re going to get that pilot out.

So there are operations that are ideally suited for Special Forces and capture operations but it’s not every operation where some of these adversaries are. People say, ‘Well, why didn’t you go in and pay compensation to the civilians that were killed?’ Okay, they’re in a location that we can’t get to and if we try to go there, we’re going to have to fight our way in to pay compensation, even assuming we were required to do so under international law.

So I think that one of the challenges that we have is really thinking through the implications [of our use or non-use of drones].

End of Presentation

Note: Words in square brackets [] were added during editing for clarity.