



**CANADIAN GLOBAL AFFAIRS INSTITUTE**  
**INSTITUT CANADIEN DES AFFAIRES MONDIALES**

# **What Role and Rules for Canada's Armed Drones?**

by **Craig Martin**  
December 2018

# POLICY PERSPECTIVE

---

## WHAT ROLE AND RULES FOR CANADA'S ARMED DRONES?

by Craig Martin

December 2018



CANADIAN GLOBAL AFFAIRS INSTITUTE  
INSTITUT CANADIEN DES AFFAIRES MONDIALES

Prepared for the Canadian Global Affairs Institute  
1800, 421 – 7th Avenue S.W., Calgary, AB T2P 4K9  
[www.cgai.ca](http://www.cgai.ca)

©2018 Canadian Global Affairs Institute  
ISBN: 978-1-77397-055-4



## ► Executive Summary

---

*The Canadian government announced in June 2017 that it was planning to purchase and deploy armed drones. Yet to date it has provided virtually no information on how and for what purpose such armed drones would be used, beyond anodyne comments that they would be used like any other conventional weapon. However, conventional weapons have varying capabilities and purposes, and implicate international law in different ways as a result. Armed drones have been primarily used for the purpose of targeted killing, in ways that have raised significant legal questions and triggered claims of excessive civilian deaths. Canadians should be concerned about how, for what purpose, and according to what limitations the government plans to deploy armed drones. Other countries have provided greater transparency than Canada regarding the law and policy framework governing the use of armed drones. This essay reviews how armed drones have been used elsewhere, explains the significant legal issues that are implicated by the different ways in which drones have been used and what that implies for the role of Canadian armed drones. It suggests that strict, clear and publicly disclosed limits be placed on drone use to ensure compliance with Canada's international law obligations.*



**T**here was considerable media attention surrounding the announcement in June 2017 that the Department of National Defence (DND) was planning to purchase and deploy armed drones. But the defence policy<sup>1</sup> which disclosed the new plan provided scant detail on how and for what purpose such armed drones would be used. Chief of Defence Staff (CDS) Gen. Jonathan Vance reassured journalists at the time that the drones would not be used for “Hollywood-like black-ops assassinations.”<sup>2</sup> He suggested that armed drones were “just another weapon”, to be used in the same way as any other conventional weapon, in accordance with established rules of engagement and the governing principles of international law. Such vague and anodyne comments do not address the complex issues surrounding the deployment of armed drones. They do not begin to explain how armed drones would be used and for what purpose, or under what precise rules and limitations.

The United States has predominantly used drones for targeted killing operations against suspected terrorists and insurgents, in ways that have raised serious legal objections and allegations of excessive civilian deaths. Canadians should thus be concerned about how the Canadian Forces would propose to employ drones, and whether such use would be in compliance with Canada's international law obligations. Yet more than a year after the initial announcement, the government has provided no further information on the plans for armed drones. The European Union and even the United States have provided greater transparency than Canada regarding the law and policy framework for their use of armed drones. This short essay will review how armed drones have been used elsewhere, and explain the significant legal issues that are implicated by the different ways in which drones have been used. It will suggest that strict, precise and publicly disclosed limits be placed on drone use to ensure compliance with international law.

## Historic Role of Armed Drones – Targeted Killing Operations

To say that armed drones are “just another weapon” and that they will be used in the same manner as other conventional weapons does not get us very far in thinking about their role or purpose. Weapons differ widely in terms of their capabilities and effects, depending on the purposes for which they were designed, which in turn dictate how they are typically used. A sniper's rifle and a grenade serve different purposes, have different capabilities and are thus used very differently. The uses of each will implicate the governing law in different ways. In some circumstances the use of a sniper's rifle may be lawful while the use of a grenade would not be. So, in thinking about how Canada might use armed drones, we need to think a little more deeply about how armed drones

---

<sup>1</sup> Minister of National Defence, *Strong Secure Engaged: Canada's Defence Policy*, (2017): <http://dgpaapp.forces.gc.ca/en/canada-defence-policy/docs/canada-defence-policy-report.pdf>.

<sup>2</sup> Canadian Press, “Canada's New Military Drones Won't be Used in Black-Ops Missions Like Assassinations: Defence Chief,” *National Post*, June 9, 2017: <http://nationalpost.com/news/canada/canadas-new-military-drones-wont-be-used-in-black-ops-missions-like-assassinations-defence-chief>.



have been used in the past, for what purpose, based on what capabilities and in what relationship with the governing law.

The current generation of armed drones, particularly the American MQ-9 Reaper and MQ-1 Predator series, were developed primarily for the purpose of targeted killing.<sup>3</sup> What began as an intelligence-gathering instrument was weaponized soon after September 2001 as part of a new U.S. program to kill members of transnational terrorist organizations such as al-Qaeda and its “associated forces”. The United States has used the armed drones almost exclusively for this purpose in the 17 years since, in both acknowledged theatres of armed conflict such as Afghanistan, and in countries like Pakistan, Yemen, Sudan, Somalia, Libya and Mali, in which the United States was not a belligerent in an ongoing armed conflict.<sup>4</sup>



Figure 1: A United States Air Force MQ-1 Predator returns from an Operation Enduring Freedom mission in Afghanistan. (Source: US Air Force/Wikimedia Commons)

The armed drone is a weapon system that is particularly well suited to the task of targeted killing. It has a long range (many thousands of kilometres, depending on payload and fuel-tank configurations), can be deployed over a target for over 20 hours at a time, hovering at heights of up to 50,000 feet, out of sight and usually out of earshot of those on the ground. This provides

<sup>3</sup> Targeted killing has been defined as when “lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.” Philip Alston, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” *United Nations Human Rights Council*, May 28, 2010, Doc. A/HRC/14/24/Add.6, citing Nils Melzer, *Targeted Killing in International Law* (2008), at 4-5. In this essay it is taken to have a broader meaning that includes so-called “signature strikes”, discussed below, in which individuals are targeted based on indicia that are taken to support the inference that the individuals are members of organized armed groups or are civilians taking direct part in hostilities.

<sup>4</sup> There is a large and ever-growing literature on the U.S. use of drones. For short studies of the first decade, see John Sifton, “A Brief History of Drones,” *The Nation*, Feb. 7, 2012; and Aaron M. Drake, “Current U.S. Air Force Drone Operations and their Conduct in Compliance with International Humanitarian Law – An Overview,” *Denver Journal of International Law & Policy*, vol. 39, no. 4 (2011); Gen. John P. Abizaid and Rosa Brooks, *Recommendations and Report of the Task Force on US Drone Policy*, (2<sup>nd</sup> ed., 2015).



benefits of stealth and persistence as compared to other airborne weapons systems.<sup>5</sup> At the same time, the drones have enormous intelligence-gathering capacity, with high-resolution video cameras that allow operators and supporting intelligence and targeting teams to assess huge amounts of data on potential targets on the ground. Because the drones are operated remotely, usually from thousands of miles away, the operators are exposed to no personal risk and are thus under far less stress than conventional pilots. And they are supported by intelligence analysis and targeting teams, often at separate locations. This combination should mean that targeting decisions will be more accurate and less prone to error than those of the pilot of a conventional aircraft (though, as will be discussed below, this is not always so). Finally, the current generation of drones deliver missiles and GPS- or laser-guided bombs that are both accurate and precise, in that they are relatively small in terms of their explosive power and blast radius, thus limiting the range of potential collateral damage.<sup>6</sup>

The American targeted killing operations can be divided into two distinct kinds, which have been labelled “personality strikes” and “signature strikes”. Personality strikes are planned attacks mounted against identified individuals, typically persons who have been designated as targets on one of several kill lists maintained by a number of different agencies in the U.S. government.<sup>7</sup> Personality strikes are planned and executed based on specific intelligence about targeted individuals, who are typically considered high value targets in terrorist or insurgent organizations. The notorious killing of the American imam, Anwar al-Awlaki, who was a propagandist for al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, would be a classic example of a personality strike.<sup>8</sup> Personality strikes outside of the context of a traditionally defined armed conflict are presumably exactly the kind of Hollywood-like black-ops assassination to which General Vance referred, and which he indicated Canada would not be planning to undertake.

Signature strikes are attacks against people whose identity is unknown, and who are targeted on the basis of a number of indicia or criteria that constitute a signature or a typical profile of an insurgent or terrorist that is said to be sufficient to justify an attack. The idea here is that the observation of facts that satisfy the criteria or indicia establishes the inference that the persons are “combatants” or “civilians taking direct part in hostilities” (legal terms which will be explained below), so as to make them legally targetable under international humanitarian law (IHL). In contrast to personality strikes, these attacks are typically the result of decisions based entirely on real-time observations of the persons targeted, rather than being based on intelligence about them obtained in advance. In short, targeting decisions are made in real time based on the person's actions, rather than planned targeting based on the person's status. The United States has not disclosed the criteria it uses for signature strikes, and the practice remains highly controversial. Many legal scholars argue that some of the criteria that the United States appears to use would

---

<sup>5</sup> See Lynn E. Davis et al., *Armed and Dangerous? UAVs and U.S. Security*, (2014): [https://www.rand.org/pubs/research\\_reports/RR449.html](https://www.rand.org/pubs/research_reports/RR449.html)

<sup>6</sup> Drake, note 4.

<sup>7</sup> Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012: <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

<sup>8</sup> For accounts of this killing, see e.g., Jeremy Scahill, *Dirty Wars: The World is a Battlefield* (2013); Mark Mazzetti, *The Way of the Knife: The CIA, A Secret Army, and a War at the Ends of the Earth* (2013).



lead to targeting that is unlawful under IHL,<sup>9</sup> and that the practice has resulted in the killing of an unjustifiable number of innocent civilians, raising at least the possibility of systemic violations of IHL.<sup>10</sup>

One final distinction that has to be explained, before turning to explore the law itself, relates to where armed drones are used. The United States has employed armed drones, for both personality and signature strikes, in two quite different contexts. The first is in the context of a recognized armed conflict in which the United States is a belligerent, such as Afghanistan or Iraq. Whether an armed conflict exists or not is determined by principles of IHL (also referred to as the law of armed conflict, or *jus in bello*), which will be explained more below. This use of drones by the U.S. in armed conflicts such as Afghanistan can be called the use of drones in a “traditionally defined armed conflict”.

The second context in which the United States has engaged in targeted killing with drones, however, is far less clear. The United States has used drones to kill members of insurgent groups and terrorist organizations in Yemen, the tribal provinces of western Pakistan, Sudan, Somalia and Libya, to name just a few. In several of these instances, the United States was not a party to or belligerent in any armed conflict then in progress within that country, and it did not have the consent of the government of the country in which it was using such force to engage in the targeted killing.<sup>11</sup> These strikes in situations outside of traditionally defined armed conflict raise a host of more complicated issues, which we will return to after exploring in more detail the relevant legal regimes.

## The Governing Law

In order to assess the manner in which Canada might plausibly deploy armed drones it is necessary to have some understanding of the governing legal principles. There are several distinct legal regimes that are relevant. The most clearly implicated is IHL. This is the law that first of all determines when an armed conflict, in legal terms, has come into existence, and if so, what kind. There are two kinds of armed conflict in legal terms: an international armed conflict, which is a conflict among states and a non-international armed conflict, which is a conflict between a state and one or more armed groups (or among such armed groups) within the territory of a state.<sup>12</sup>

---

<sup>9</sup> See e.g., Kevin Jon Heller, “‘One Hell of a Killing Machine’: Signature Strikes and International Law,” *Journal of International Criminal Justice*, vol. 11, no. 1 (2013): <https://academic.oup.com/jicj/article/11/1/89/938075>.

<sup>10</sup> See e.g., Alston, Note 3; Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, Sept. 2012: <https://law.stanford.edu/publications/living-under-drones-death-injury-and-trauma-to-civilians-from-us-drone-practices-in-pakistan/>; Center for Civilians in Conflict, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, (2012): <https://civiliansinconflict.org/publications/research/civilian-impact-drones-unexamined-costs-unanswered-questions/>; Alice K. Ross, “Who is Dying in Afghanistan’s 1,000-plus Drone Strikes?,” *The Bureau of Investigative Journalism*, Jul. 24, 2014: <http://www.thebureauinvestigates.com/2014/07/24/who-is-dying-in-afghanistans-1000-plus-drone-strikes/>.

<sup>11</sup> See e.g., David Sanger and Eric Schmitt, “As Rift Deepens, Kerry has Warning for Pakistan,” *The New York Times*, May 15, 2011; Mark Mazzetti, “U.S. Intensifying a Secret Campaign of Yemen Airstrikes,” *The New York Times*, June 8, 2011.

<sup>12</sup> For general treatises on IHL, see e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2<sup>nd</sup> ed. (2010); Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict* (2014). For treatises on non-international armed conflict in particular, see Lindsay Moir, *The Law of Internal Armed Conflict* (2002); Michael N. Schmitt et al., *The Manual on the Law of Non-International Armed Conflict with Commentary* (2006).



International armed conflict is governed by a far more robust and elaborate legal framework than non-international armed conflict. Nonetheless, in both instances, IHL governs the conduct of armed forces and fighters engaged in the process of armed conflict, both authorizing the use of lethal force, and governing who and what is protected, who and what can be targeted, and under what restrictions and limitations. The Geneva Conventions (and their Additional Protocols) and the Hague Conventions are the principle treaty sources of IHL.<sup>13</sup>

The second key legal regime governs the conditions under which a state may use force in or against another state in the first place. This regime, commonly referred to by its Latin name, *jus ad bellum*, is provided for in the UN Charter. The foundation is a general prohibition on the use of force against other states (Article 2(4)), with only two exceptions: the use of force in response to an armed attack, as an exercise of the inherent right to individual or collective self-defence (Article 51) and a use of force authorized by the UN Security Council to restore or maintain international peace and security (Articles 39 and 42).<sup>14</sup> Thus, the American use of drone-launched missiles against non-state actors in Yemen, without the consent of the Yemeni government, constitutes a use of force, and absent UN authorization must be justifiable as a legitimate act of self-defence in order to be lawful.<sup>15</sup>

Finally, a third international legal regime that can be relevant to the use of drones is that of international human rights law. This regime may operate in any *lacunae* left by IHL when drones are used in a traditionally recognized armed conflict, and it may be the primary legal regime when the drones are used in circumstances that do not constitute a traditionally defined armed conflict. In other words, if the circumstances are such that IHL does not authorize and legitimize the use of lethal force, then human rights law would impose a much higher bar to justify its use, in order to justify a violation of the right to life, and the right not to be deprived thereof without due process of law.<sup>16</sup>

Turning briefly to the operation of these regimes, there are a number of fundamental principles of IHL that particularly apply to considerations of how and when armed drones might be used within armed conflict. The first is the principle of distinction, which requires belligerents to distinguish between combatants and military objectives on the one hand, and civilians and civilian objects on the other.<sup>17</sup> IHL effectively divides individuals in armed conflict into two separate categories, namely combatant and civilian (despite the relatively recent unsuccessful American

---

<sup>13</sup> *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 UNTS 135 (1950)(*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 UNTS 287 (1950)(*Geneva Convention IV*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I)*, 1125 UNTS 3 (1979), June 8, 1977; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol II)*, 1125 UNTS 609 (1979), June 8, 1977; *The Hague Convention (II): Laws and Customs of War on Land*, 32 Stat. 1803, July 29, 1899; *The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land*, 187 CTS 227, Oct. 18, 1907.

<sup>14</sup> Generally on *Jus ad Bellum*, see Yoram Dinstein, *War, Aggression and Self-Defence* (6<sup>th</sup> ed. 2017); and Christine Gray, *International Law and the Use of Force*, (4<sup>th</sup> ed. 2018).

<sup>15</sup> Craig Martin, "Going Medieval: Targeted Killing, Self-Defence, and the *Jus ad Bellum* Regime," in *Targeted Killing: Law and Morality in an Asymmetrical World*, Claire Finkelstein and Jens Ohlin eds., (2012): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1956141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956141).

<sup>16</sup> See e.g., Melzer, chapters 9 and 13.

<sup>17</sup> *Additional Protocol I*, note 13, Art. 51; and on customary international law relating to IHL, see International Committee of the Red Cross, *Customary International Humanitarian Law - Vol. 1: Rules*, (2005).



and Israeli attempts to create a new status of “unlawful enemy combatant”).<sup>18</sup> The term combatant is defined in the Geneva Conventions as the members of armed forces of a state (not including medical and religious personnel).<sup>19</sup> Combatants, who must wear identifying markings (such as uniforms) and carry weapons openly, are both authorized to use lethal force and are targetable in an international armed conflict based on their status alone, regardless of their conduct at the time. Civilians, however, are protected, and the principle of distinction prohibits the deliberate targeting of civilians “unless and for such time as they are taking direct part in hostilities” (commonly shortened to the acronym DPH). This issue of precisely when you can target a civilian is both controversial and central to considerations of employing armed drones in targeted killing strikes.

Two more principles of IHL central to the use of drones are the principle of proportionality and the principle of precautions in attack. The principle of proportionality prohibits attacks that are expected to cause incidental death or injury to civilians (or damage to civilian objects), which would be excessive in relation to the concrete and direct military advantage.<sup>20</sup> When taken together with the principle of distinction, it should be clear that IHL does not prohibit the killing of civilians in war. Rather, it prohibits the deliberate targeting of civilians, and it prohibits attacks targeting military objectives that will collaterally kill or injure a disproportionate number of civilians. In addition, the principle of precautions in attack requires commanders to take “all feasible precautions” to avoid or minimize incidental harm to civilians and civilian objects. How one is to measure the value of human life against the importance of the specific tactical military advantage sought, and what constitutes all feasible precautions, particularly in the heat of the moment, is of course the subject of considerable debate. But IHL nonetheless imposes these legal limits on the operations of armed forces in order to protect civilians, and the rules of engagement and military manuals that govern the operations of the armed forces of the world do in fact reflect these limitations.<sup>21</sup>

## Legal Implications for Targeted Killing with Drones

How do these principles impact the operations of armed drones in a traditionally defined armed conflict? It is important to note that the most likely scenarios involve non-international armed conflict, such as the insurgency in Afghanistan. Countries like the United States, the U.K. and Canada operate in such armed conflicts against organized armed groups, such as the Taliban in Afghanistan or ISIS in Syria and Iraq. It has to be emphasized that the members of such armed groups enjoy civilian status. The status of combatant is limited to international armed conflict, and in any event, the members of non-state actor armed groups do not qualify as members of a country's armed forces. Also, they are often difficult to distinguish from other civilians who are taking no part in hostilities. Al- Qaeda members, for instance, do not wear uniforms or other

---

<sup>18</sup> For the Israeli analysis of the issue, see *Public Committee Against Torture in Israel v. Israel*, HCJ 762/2 [2005].

<sup>19</sup> *Geneva Convention III*, note 13, Art. 4; *Additional Protocol I*, note 13, Art. 43.

<sup>20</sup> *Additional Protocol I*, note 13, Art. 43.

<sup>21</sup> See e.g., Canadian Department of National Defence, *Canadian Forces Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Level*, (2001): [https://www.ficnl.org/fileadmin/migrated/content/uploads/Canadian\\_LOAC\\_Manual\\_2001\\_English.pdf](https://www.ficnl.org/fileadmin/migrated/content/uploads/Canadian_LOAC_Manual_2001_English.pdf).



identifying insignia, while carrying arms openly is common among all members of society in countries like Afghanistan.

One key question, then, is under what circumstances and conditions can Canada's armed forces target the members of an insurgent or terrorist armed group engaged in a non-international armed conflict? The short answer is that they can do so only if and for such time as the members of the armed group are taking direct part in hostilities, a test that requires both a temporal and an action nexus to the conduct of hostilities. There is controversy over the scope of this temporal and nexus test, and there have been efforts to expand it.<sup>22</sup> This limitation is frustrating those fighting such armed groups, knowing that the people who may be harvesting rice in the afternoon are engaging in hostilities at night. But such is the law, and it may be recalled that the Allies prosecuted Germans after the Second World War for killing members of the French resistance when they were not actively engaged in hostilities.

The limitation has significant implications for targeted killing with drones. In particular, the principles of distinction and precautions in attack raise serious questions for the conduct of signature strikes. As indicated earlier, depending on the criteria or the elements of the signature that are employed, the conduct of signature strikes may violate these fundamental principles of IHL. The Americans have not disclosed the criteria used in their operations, but evidence suggests that in some strikes the criteria have included such elements as (i) "military age males" in an area of known insurgent or terrorist activity; (ii) "consorting" with known militants; (iii) being among a "group of armed individuals" travelling in enemy-controlled territory; and (iv) being in a "suspicious camp" in enemy-controlled territory. These have been criticized on the grounds that attacking individuals on the basis of such criteria would run a high risk of killing innocent civilians, and likely violate the principles of distinction, proportionality and precautions in attack.<sup>23</sup>

What is more, there is some evidence that the very features of armed drones that should make them less prone to targeting errors may actually counter-intuitively lead to a greater number of errors – in the form of excessive and accidental civilian deaths – than airstrikes with manned aircraft. The U.S. Air Force has observed this unlikely discrepancy in its own analysis of airstrike data,<sup>24</sup> and I have elsewhere explored the reasons that might explain why drone operations could be prone to such error.<sup>25</sup> In short, we would expect fewer errors in targeting using drones, because of their persistent hover times, group analysis, massive amounts of real-time video feeds of the potential targets and the use of small precisely guided munitions. But viewed through the lens of our understanding of cognitive psychology, these very features may increase misperception and systematic errors in targeting. The long timeframes and wealth of data, together with the diffusion

---

<sup>22</sup> The Supreme Court of Israel provided useful analysis of this test in its [famous targeted killing case](#), *Public Committee Against Torture in Israel v. Israel*, note at 18; even the ICRC has come [around to discussing](#) the idea that members of armed groups may be targeted so long as they perform a "continuous combat function": ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, (2009): <https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities> .

<sup>23</sup> Heller, "Signature Strikes and International Law," note 9.

<sup>24</sup> Lawrence Lewis, "Drone Strikes: Civilian Casualty Considerations," *Joint Coalition Operational Analysis*, June 18, 2013: <http://cna.org/research/2013/drone-strikes-civilian-casualty-considerations>

<sup>25</sup> Craig Martin, "A Means-Methods Paradox and the Legality of Drone Strikes in Armed Conflict," *International Journal of Human Rights*, vol. 19, 2015: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2535945](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535945)



of analysis among two or sometimes three teams, lend themselves to the kind of misperception and misinterpretation caused by confirmation bias when decision-makers are operating on pre-conceived hypotheses or assumptions. This is exacerbated by such factors as premature cognitive closure, egocentric perception, overconfidence in the technology and group-think within the decision-making body. This hypothesis regarding possible misperception is supported by one of the few well-publicized targeting errors in Afghanistan, when an airstrike in Uruzgan Province killed 23 civilians, including children, after a drone team had tracked and observed a convoy of trucks for over six hours.<sup>26</sup> The transcript of their conversations (one of the few so disclosed) reveals how the drone operating team's observations of each new piece of evidence should have indicated that the group was civilian, was misinterpreted and assimilated to the pre-conceived assumption that the group must be Taliban.<sup>27</sup>

## Role of Canadian Drones

Armed with this understanding of how armed drones have been used, and of the international law principles that would govern their use, let us return to the question of how, and under what rules, Canada would propose to use armed drones. The first question is with regard to the theatres in which Canada would intend to use them. Can we presume that they would only be used in the context of traditionally defined armed conflicts in which Canada is a legitimate belligerent? That is to say, can we disregard *jus ad bellum* considerations in thinking about the limits that should be imposed on armed drones? While one would like to think so, Canada's participation in airstrikes against ISIS in Syria, as an act of collective self-defence on behalf of Iraq, and on the highly dubious grounds that the Syrian government was "unwilling or unable" to prevent armed attacks from ISIS, would suggest otherwise.<sup>28</sup> I say these grounds are dubious because the "unwilling or unable" doctrine is not an established principle in the doctrine of self-defence, and while invoked by the United States, the U.K., Israel and Australia, it remains highly contested and controversial.<sup>29</sup> So questions must be asked and answered about the *jus ad bellum* limits on Canada's potential use of armed drones. I would suggest that a clear limit be established against the use of drones in a manner that is likely inconsistent with the prohibition on the use of force against other states. This is surely necessary in order to implement General Vance's reassurance that drones would only be used in compliance with international law.

---

<sup>26</sup> Maj. Gen. Timothy P. McHale, "Memorandum for Commander, United States Force-Afghanistan/International Security Assistance Force, Afghanistan – Subject: Executive Summary for AR 15-6 Investigation, 21 February 2010 CIVCA Incident in Uruzgan Province"; and Gen. Stanley A. McChrystal, "Memorandum for Record – Subject: AR 15-6 Investigation, 21 February 2010 U.S. Air-to-Ground Engagement in the Vicinity of Shahidi Hassas, Uruzgan Province, Afghanistan.": <http://www.isaf.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf>.

<sup>27</sup> David S. Cloud, "Anatomy of an Afghan War Tragedy," *Los Angeles Times*, Apr. 10, 2011: <http://articles.latimes.com/2011/apr/10/world/la-fg-afghanistan-drone-20110410>. See also McChrystal, note 26.

<sup>28</sup> Letter dated March 31, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/2015/221: <https://www.justsecurity.org/wp-content/uploads/2015/12/Canada-Article-51-Letter-Syria-03312015.pdf>.

<sup>29</sup> See e.g. Alex Moorehead, "Brazil's Robust Defense of the Legal Prohibition on the Use of Force and Self-Defense," *Just Security*, Apr. 20, 2018: <https://www.justsecurity.org/55126/brazils-robust-defense-legal-prohibition-force/>; For my own analysis of the doctrine, see Craig Martin, "Challenging and Refining the 'Unwilling or Unable' Doctrine," *Vanderbilt Journal of Transnational Law*, (forthcoming, 2019).



Similarly, one might be inclined to think it can be presumed that Canada is not planning to engage in personality strikes in any systematic fashion. CSIS, the CSE and other Canadian intelligence bodies are not likely to have either the capacity or the authority to engage in the kind of intelligence gathering necessary to support such a program.<sup>30</sup> That means that if Canada were to be engaging in a program of personality strikes, it would be doing so at the behest of, and based almost entirely upon the information provided by, foreign intelligence agencies such as the CIA. That would be highly problematic.<sup>31</sup> In any event, personality strikes are far more a feature of counter-terrorism than they are of traditionally defined armed conflict, even in the context of counter-insurgency in a non-international armed conflict such as Afghanistan. General Vance himself seemed to rule out participation in such Hollywood-like black-ops assassinations. But again, questions need to be asked and explicitly answered regarding what limits will be imposed on Canadian Forces participation in such practices.

This would suggest that the primary purpose for armed drones would be to engage in signature strikes in the context of traditionally defined non-international armed conflict. Some may think that the drones could be used to provide basic ground support for coalition troops engaged in hostilities with insurgents, rather than targeted killing. The fact is that they are simply not designed for or typically used in such operations. The ordnance that they deliver is too small to be effective for such operations, and manned aircraft with more firepower are far more effective in this role. But if Canada is to use them for signature strikes, then for the reasons discussed above it is imperative that DND ensures that the criteria it establishes are not merely sufficient for identifying persons as insurgents, such as members of the Taliban, but that they also satisfy the standards for targeting civilians taking direct part in hostilities in accordance with established rules of IHL. In short, if Canada is to acquire and use armed drones in armed conflict, it must establish clear policies governing operations, including precise and restrictive rules of engagement, to ensure strict adherence to the principles of distinction, proportionality and precautions in attack. And what is more, Canada must *be seen* to be adhering to these principles, and otherwise complying with its obligations under international law. The Geneva Conventions require states to develop procedural safeguards in order to comply with these principles, including the establishment of specific mechanisms for implementation, assessment and enforcement.<sup>32</sup>

Canada is lagging behind other countries in this regard. Even the United States, which has been severely criticized for the lack of transparency and accountability of its targeted killing program, under former president Barack Obama published a number of fairly detailed documents outlining the law and policy bases for using force, and for placing persons on the so-called kill lists.<sup>33</sup> Perhaps far more instructive for the Canadian context, as a country still contemplating whether and how to use armed drones, is the European Union's experience. The European Parliament has called for a European Council decision on how and in what circumstances member states might

---

<sup>30</sup> On the legal authority of Canadian intelligence services generally, see Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (2007).

<sup>31</sup> For problems with CIA targeting, see Philip Alston, "CIA and Targeted Killing Beyond Borders," *Harvard National Security Journal*, vol. 2 (2011): [http://harvardnsj.org/wp-content/uploads/2011/02/Vol-2\\_Alston1.pdf](http://harvardnsj.org/wp-content/uploads/2011/02/Vol-2_Alston1.pdf).

<sup>32</sup> *Ibid.*

<sup>33</sup> See e.g., White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, (2016): <https://fas.org/man/eprint/frameworks.pdf>.



use armed drones, before they become more engaged in the acquisition and development of such weapons systems. The European Parliament has published studies on the subject, exploring the law and policy issues implicated by the use of armed drones.<sup>34</sup> In the United Kingdom, an EU country that has already developed and used armed drones for targeted killing in Afghanistan, the defence ministry has published an 85-page document laying out the government's policy on the purpose and use of armed drones, including detailed discussion of the legal, moral and ethical issues implicated.<sup>35</sup> The Canadian government, under both the Conservatives and the Liberals, has struggled with issues of transparency and accountability in relation to the conduct of the Canadian Forces in armed conflict, whether it be regarding the treatment of detainees in Afghanistan,<sup>36</sup> or engaging in combat against ISIS in Iraq after announcing a cessation of participation in those hostilities.<sup>37</sup> It needs to do better.

## Conclusion

All of this suggests that DND must provide far more transparency and accountability, first of all in explaining the reasons for acquiring armed drones, and then in articulating the purpose for which they will be deployed, and precisely how and pursuant to what limits they will be used. The use of drones in non-consenting states can trigger an armed conflict. Signature strikes based on improper criteria can constitute war crimes, or at a minimum, violations of fundamental principles of IHL. Greater transparency requires the promulgation of detailed rules of engagement and other policies governing the use of armed drones, together with accountability in the form of established procedures and mechanisms for ensuring compliance *ex ante*, as well as for the *ex post* investigation of any suspected incidents involving targeting errors. Military necessity often requires some degree of secrecy regarding operations, which justifies not providing real-time disclosure to the public. But that does not preclude all disclosure. In a representative and deliberative democracy, the government is required to provide the public with information on why it proposes to acquire and deploy a new weapons system, how exactly the weapon will be used, and what rules will be established to ensure that in using this new weapon the country will be complying with its obligations under international law.

---

<sup>34</sup> European Parliament Directorate-General for External Policies Policy Department, *Towards an EU Common Position on the Use of Armed Drones*, (2017): [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578032/EXPO\\_STU\(2017\)578032\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578032/EXPO_STU(2017)578032_EN.pdf) .

<sup>35</sup> U.K. Ministry of Defence, Development Concepts and Doctrine Centre, *Unmanned Aircraft Systems: Joint Doctrine Publication 0-30.2*, (2017):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/673940/doctrine\\_uk\\_uas\\_jdp\\_0\\_30\\_2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673940/doctrine_uk_uas_jdp_0_30_2.pdf) .

<sup>36</sup> See e.g., Eileen Olexiuk et al., "Is the Afghan Detainee Case Unfinished Business?" *OpenCanada.org*, June 14, 2017:

<https://www.opencanada.org/features/afghan-detainee-case-unfinished-business/>

<sup>37</sup> Robert Fife, "Canadian Sniper's Record-Breaking Kill Shot an 'Incredible Achievement,'" *The Globe and Mail*, June 22, 2017:

<https://www.theglobeandmail.com/news/politics/canadian-snipers-record-breaking-kill-shot-an-incredible-achievement/article35441728/>.

## ► About the Author

---

**Craig Martin** is a professor of law at Washburn University School of Law, and is currently a visiting scholar at Perry World House at the University of Pennsylvania. He specializes in international and comparative constitutional law as it relates to the use of force and armed conflict. He is a graduate of the Royal Military College of Canada, and served as naval officer in the Canadian Forces prior to his career as a lawyer and legal scholar. He studied law at the University of Toronto, and has graduate degrees in law from Osaka University (Japan) and the University of Pennsylvania (U.S.).

## ► **Canadian Global Affairs Institute**

---

The Canadian Global Affairs Institute focuses on the entire range of Canada's international relations in all its forms including (in partnership with the University of Calgary's School of Public Policy), trade investment and international capacity building. Successor to the Canadian Defence and Foreign Affairs Institute (CDFAI, which was established in 2001), the Institute works to inform Canadians about the importance of having a respected and influential voice in those parts of the globe where Canada has significant interests due to trade and investment, origins of Canada's population, geographic security (and especially security of North America in conjunction with the United States), social development, or the peace and freedom of allied nations. The Institute aims to demonstrate to Canadians the importance of comprehensive foreign, defence and trade policies which both express our values and represent our interests.

The Institute was created to bridge the gap between what Canadians need to know about Canadian international activities and what they do know. Historically Canadians have tended to look abroad out of a search for markets because Canada depends heavily on foreign trade. In the modern post-Cold War world, however, global security and stability have become the bedrocks of global commerce and the free movement of people, goods and ideas across international boundaries. Canada has striven to open the world since the 1930s and was a driving factor behind the adoption of the main structures which underpin globalization such as the International Monetary Fund, the World Bank, the World Trade Organization and emerging free trade networks connecting dozens of international economies. The Canadian Global Affairs Institute recognizes Canada's contribution to a globalized world and aims to inform Canadians about Canada's role in that process and the connection between globalization and security.

In all its activities the Institute is a charitable, non-partisan, non-advocacy organization that provides a platform for a variety of viewpoints. It is supported financially by the contributions of individuals, foundations, and corporations. Conclusions or opinions expressed in Institute publications and programs are those of the author(s) and do not necessarily reflect the views of Institute staff, fellows, directors, advisors or any individuals or organizations that provide financial support to, or collaborate with, the Institute.