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**Intelligence Agencies and the Use of Lethal Force**

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10 min presentation (30 min questions)

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## Introduction

In this paper, I argue that intelligence operatives are *not* permitted to use lethal force in the same way as the military because it is unclear that intelligence agencies have the same clearly agreed moral justification for using armed force.

**In the First Section of my paper**, I examine the moral basis for justified killing which is based on individual self-defence and defence of others. The main purpose of killing in self-defence (or defending others) is to ward-off an imminent unjust deadly threat.

I start out this section with a brief description of the moral presumption against killing. That is, all things being equal, most of us believe that killing a human is wrong.

Next, I briefly describe the rights-based moral justification for killing in self-defence. Rights-based justifications for killing in self-defence begin with a presumption that human beings have a right to life that they are permitted to defend given the correct circumstances. The final part of this section argues that there is a general duty to use forceful intervention to protect an innocent person when she is threatened with a situation where serious harm is imminent and likely.

**In the Second Section**, I provide a brief analysis of the conventional state-based perspectives for morally justifying the use of lethal force. I argue that there are two fundamental aspects to the State's responsibility in using lethal force.

First, the State has the important responsibility for using lethal force to protect the moral rights of jurisdictional inhabitants. This means that the police can use certain specific types of forceful options, not available to other persons, to ensure individuals are complying with the laws of the State.

Second, the State is also responsible to protect and preserve the "life" of a political community. Accordingly, the military have special responsibilities for using force. The conventional account for justifying

the military use of lethal force in armed conflict grants military combatants special permissions for killing enemy combatants.

**In the Third Section**, I examine the claim that the problems posed by modern conflict are better addressed by a distinct intelligence option for using lethal force.

First, I examine Mary Ellen O’Connell’s analysis of combat drone use that argues the U.S. failed to meet the international law rules governing resort to armed force and the conduct of armed force.<sup>1</sup> Gregory McNeal provides an excellent rebuttal to O’Connell’s claim that one source of concern with drone use are problems with military capabilities, especially technology and training.

Then I examine O’Connell’s second claim which is that ‘CIA operatives . . . have no right to participate in hostilities and are unlawful combatants.’<sup>2</sup> I argue that McNeal’s response to this claim fails because he does not address the moral aspect of O’Connell’s claim.

## **A. Problems with military capability**

A fundamental moral concern for O’Connell is that in places such as Pakistan the use of drones has ‘resulted in a large number of persons being killed along with the intended targets.’<sup>3</sup>

So the first problem she raises with the use of drones is a question of military capability. For example, she argues that although technology is improving, drone pilots are increasingly reliant on cameras, sensors and computers to make the decision to attack or not.<sup>4</sup> The criticism she has here is that the increasing dependence on this type of technology is making decision-makers less likely to seek on-ground-information and so it is more difficult to be certain about targets. O’Connell also suggests that perhaps the U.S. military is no longer training its members in ethics and the law of armed conflict as it once did.<sup>5</sup>

But in response to this criticism of using drones, Gregory McNeal argues that O’Connell errs on both counts.

First, he points out that, whether manned or unmanned, pilots of modern military aircraft are reliant on cameras and sensors.<sup>6</sup> He also suggests that the technology employed by drones is an argument in favour of their use in many ways.

For example, drones can loiter more effectively and wait until the moment when civilians are clear of the target.<sup>7</sup> And pilots of drones are more likely to be deliberative and less likely to make mistakes out of fear because they are not in a situation of facing personal threat.<sup>8</sup> In relation to the issue of training soldiers in military ethics, McNeal argues that the Department of Defense has institutionalised law of war education in the armed services and provides a number of convincing examples.<sup>9</sup>

He also argues that O'Connell fails to take into account the rigorous methodology followed by U.S. armed forces to mitigate harm.<sup>10</sup> He argues that 'in pre-planned operations the U.S. military follows a rigorous collateral damage estimation process based on a progressively refined analysis of intelligence, weapon effects, and other variables' and 'in practice, the mitigation steps have resulted in a collateral damage rate of less than one per cent suggests that mitigation steps are designed to ensure that the probability of collateral damage from a pre-planned operation is below 10 per cent.'<sup>11</sup>

## **B. The Problem of Paramilitary Institutions**

McNeal's argument in response to O'Connell's second claim, however, is much less convincing. A second problem in drone use, according to O'Connell, is the fact that some drone strikes are performed by the CIA (or CIA contractors) and this alone might account for the high unintended death rate.<sup>12</sup> She suggests that CIA operatives are not trained in the law of armed conflict and so are not bound by the Uniform Code of Military Justice to respect the laws and customs of armed conflict.<sup>13</sup>

This is a much more compelling argument and it is largely a moral claim. The claim is that under the law of armed conflict, only lawful combatants have the moral right to use force during an armed conflict. According to O'Connell,

“Lawful combatants are the members of a state’s regular armed forces. The CIA is not part of the US armed forces. They do not wear uniforms. They are not subject to the military chain of command. They are not trained in the law of war, including in the fundamental targeting principles of distinction, necessity, proportionality and humanity.”<sup>14</sup>

O’Connell makes the point that persons with a right to take direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants.<sup>15</sup> She suggests that CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants which makes them vulnerable to criminal prosecution for extrajudicial killing.<sup>16</sup>

McNeal’s response is that his argument for the military applies equally to the CIA use of targeting killing.<sup>17</sup> His reasoning is twofold.

First, the National Command Authority (the President or the Secretary of Defense) must approve any pre-planned strike where one civilian casualty or greater is expected, thus ensuring high levels of political accountability.<sup>18</sup>

Second, he argues that it is questionable that the CIA would exercise less care in its targeted killing operations in Pakistan when the military are operating just over the border in Afghanistan. And he points out that the CENTCOM commander supervised operations in both places.<sup>19</sup>

But this does not clarify whether or not the CIA follows the same rigorous process of collateral damage estimation and mitigation as the military. Nor does it address the concerns about appropriate education in the use of lethal force.

More importantly, it does not provide an adequate moral response to solve the problem raised by O’Connell of the intelligence operative’s combatancy status.

O’Connell’s moral claim, which seems to get overlooked by critics such as McNeal, is that realist ideologies (whether consciously or not) tend to cloud understanding of the limits to the utility of force and the benefits of promoting peace and non-violence through law. Her self-stated goal

is 'a renewed appreciation of the international law restricting the use of force and how respect for this law is the better path.'<sup>20</sup>

The point is that these drone attacks better fit the military paradigm for using lethal force than the policing paradigm, but intelligence operatives fail to meet the necessary conditions for either.

## **Conclusion**

This leads me to conclude that a basic problem that requires explanation is how state institutions relate to both conditions of conflict and moral justifications. At a simple level we can say that soldiers derive their unique type of authority to use lethal force from the military institution of which they are a part. Likewise, police officers get their authority from by being part of a police service. If so, do the police and military require the existence of a minimal law enforcement or war fighting context respectively to perform their roles or is their responsibility in using lethal force independent of context? If soldiers are operating clearly within a war fighting context then the use of lethal force is clear. But if the situation is closer to a law enforcement context then such actions could end up being judged as disproportionate uses of force.

In other words, the moral problem in using the military for conflict short-of-war is the increased risk of a disproportionately harmful outcome. But this moral problem is unlikely to be solved by adding intelligence capabilities to use lethal force into the mix.

## Notes

McNeal, Gregory S. "Are Targeted Killings Unlawful? A Case Study in Empirical Claims without Empirical Evidence." In *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by C. Finkelstein, J.D. Ohlin and A. Altman. Oxford: Oxford University Press, 2012.

O'Connell, Mary Ellen. "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009." In *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force*, edited by S. Bronitt, M. Gani and S. Hufnagel. Oxford and Portland, Oregon: Hart Publishing, 2012.

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<sup>1</sup> Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," in *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force*, ed. S. Bronitt, M. Gani, and S. Hufnagel (Oxford and Portland, Oregon: Hart Publishing, 2012), 290.

<sup>2</sup> Ibid., 286.

<sup>3</sup> Ibid., 268.

<sup>4</sup> Ibid., 269.

<sup>5</sup> Ibid., 270.

<sup>6</sup> Gregory S. McNeal, "Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. C. Finkelstein, J.D. Ohlin, and A. Altman (Oxford: Oxford University Press, 2012), 335.

<sup>7</sup> Ibid., 336.

<sup>8</sup> Ibid., 337.

<sup>9</sup> Ibid., 339-42.

<sup>10</sup> Ibid., 328.

<sup>11</sup> Ibid.

<sup>12</sup> O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," 270.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

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<sup>15</sup> Ibid., 286.

<sup>16</sup> Ibid.

<sup>17</sup> McNeal, "Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence," 332-33.

<sup>18</sup> Ibid., 332.

<sup>19</sup> Ibid.

<sup>20</sup> O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," 275-76.