Is War Too Easy?

Matthew Evangelista

Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications. Edited by David Cortright, Rachel Fairhurst, and Kristen Wall. Chicago: The University of Chicago Press, 2015. 288p. $45.00.

Legitimate Targets? Social Construction, International Law and US Bombing. By Janina Dill. New York: Cambridge University Press, 2015. 386p. $90.00 cloth, $34.99 paper.

Although estimates vary, since November 2001 the United States has used armed drones—known more formally as unmanned or remotely piloted aerial vehicles—to kill several thousand people, among whom hundreds were noncombatants and perhaps unintentionally or mistakenly targeted. By contrast, during that same period, U.S. invasions of Afghanistan and Iraq —and the civil conflicts that exploded in their wake—have claimed the lives of hundreds of thousands, large numbers of them civilians innocent by any standard. Yet the attacks by drone, especially when they kill innocents, arguably attract more media attention than the more mundane violence produced by less exotic weapons—if and when the drone strikes become known. The program's very secrecy has contributed to the controversy. Without more transparency, it is hard to judge the ethical, legal, or strategic rationales for drone use. Without oversight, many critics believe, it has simply become too easy for the United States to launch drone strikes, too easy for the country to become involved in wars.

The last decade has witnessed an explosion of excellent scholarship analyzing the legal and ethical dimensions of warfare—with particular focus on the United States as the world's preeminent military power. One common feature of recent work, from journalists as well as scholars, is the paradoxical observation that the United States has become increasingly preoccupied with the legalization of its wartime practices.[1] Lawyers sign off on decisions ranging from detention to targeted killing—yet, however legal, the wars go on, most of the time occasioning little response from the U.S. public. One notable exception has been the U.S. use of drones, which, thanks to journalists' accounts based often on leaked documents, at least episodically attracts attention.[2]

Not surprisingly, the controversy surrounding drones has generated quite a number of popular and academic studies. *Drones and the Future of Armed Conflict*, edited by David Cortright, Rachel Fairhurst, and Kristen Wall, is one of the most comprehensive and evenhanded; its authors represent a range of views and areas of expertise, and the quality of the research and writing is uniformly high. The complexity of the issues surrounding drones—ethical, legal, strategic, and political—helps explain the otherwise puzzling question of why the weapons have attracted so much attention relative to the number of people they have killed.

Not that death and destruction wrought by U.S. wars of the early twenty-first century have escaped scholarly attention. Janina Dill's *Legitimate Targets?* begins by citing "criticism that US military practices inflict unacceptable harm on civilians." But she pairs that criticism with acknowledgment of widespread praise for the U.S. "subjection of every aspect of combat operations to legal review" (pp. 1–2). This juxtaposition generates the puzzle that motivates her study: How can the United States simultaneously adhere to international law governing warfare and still harm unacceptably large numbers of civilians? Her answer has produced a unique combination of international relations theorizing, legal exegesis, normative philosophy, and empirical analysis. Dill provides a synthetic yet innovative theory of the way that international law functions in the international system, particularly in the domain of armed conflict; a persuasive interpretation of the positive and customary law governing the targeting of military objects; and an explication and critique of U.S. bombing practices since the war in Vietnam. Her study culminates in a normative assessment of whether law can serve the interests of states that wage war, yet still limit harm to civilians (and even combatants) to the extent that international public opinion seems increasingly to demand, and that the law

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itself—known as International Humanitarian Law (IHL), after all—mandates.

As Dill points out, the law of war was traditionally considered *lex specialis*: Human-rights protections did not apply during armed conflict. In the current normative environment that fosters promotion of individual rights, she claims, "this understanding no longer prevails" (p. 273). "In order for warfare to meet with public approval IHL has to find a way to avoid the large-scale violation of individual rights in war" (p. 274). If it fails to do so, the alternative way to protect rights is to make wars harder, not easier, to launch—and consequently rarer.

A short review cannot begin to do justice to the richness, complexity, and subtlety of either of these books. They share a combined engagement with legal and ethical dimensions of warfare and the realities of states' use of military force in pursuit of security. They differ in important ways, too. Dill focuses on the IHL definition of a legitimate target of attack and how U.S. interpretation of its legal obligations affects the harm done to civilians. Recognizing that deliberate attacks against civilians are clearly illegal, she focuses her attention on the law governing attacks on *objects*, including ones such as electricity grids, bridges, and other infrastructure that profoundly affect civilian well-being. She does not consider which *persons*—suspected terrorists, for example—can be attacked (p. 67, n. 3) until the very end of her book. This question, by contrast, occupies much of the attention of the contributors to *Drones*.

Another important difference is audience. *Drones* is likely to appeal to a broad readership interested in the policy implications of the authors' legal, ethical, and strategic analysis. Although there are many other excellent works published and forthcoming, it could serve as a kind of "one-stop shopping" for information on drones. *Legitimate Targets?* is a more scholarly work—in the best sense. It is not an easy read, especially the first part that addresses debates within the field of international relations on the role of law, even though the author's writing is clear and systematic. The difficulty is due more to confusion in the existing literature than to her attempt, largely successful, at synthesis. Dill confronts claims from IR realists and critical legal scholars such as Martti Koskenniemi that law is "epiphenomenal" to international relations or is shaped by states to justify pursuit of their material interests. She reviews work from constructivists that sees compliance with law as a function of the efforts of norm entrepreneurs and principled beliefs. The debate, Dill argues, is misguided. Both interests and principled beliefs influence how states engage law. The more consequential questions, she claims, are whether law makes a difference to state action (what is its "behavioral relevance"), and, if so, whether the outcome coincides with what people expect law to achieve (what is its degree of "normative success"). As Dill puts it, if international law "can make a counterfactual difference for behavior, we do not have a theory as to how" (p. 41). One of her many tasks in this ambitious book is to create one.

A simple summary of Dill's theory risks doing damage to its careful construction and nuance. The author's basic claim is that international law, and the law of war in particular, represents a compromise between states' pursuit of their interests and their prior normative principles, "between utility and appropriateness," as she puts it (p. 299). How to effect such a compromise in practice depends on interpreting the law. Her own "contextual" interpretation is found in Chapters 3 (positive law) and 4 (customary law). The argumentation is original and the interpretation itself persuasive. Dill argues that to comply with the relevant law governing military objects—primarily Article 52(2) of the 1977 First Additional Protocol to the 1949 Geneva Conventions—states must adopt a "logic of sufficiency." In striving to observe the principles of distinction (between military and civilian objects) and proportionality when deciding what to attack, "belligerents have to bracket their larger political goals or moral aspirations"—what Dill calls "sequencing." They must "sharply distinguish objects and persons directly connected to the competition among enemy militaries from everything else, which is immune from direct attack." This she calls "containment" (p. 108).

The empirical core of *Legitimate Targets?* is a study of U.S. bombing practices, from the Vietnam War through the 1991 Gulf War to the 2003 invasion of Iraq. It draws on historical sources and Dill's own interviews with some 40 U.S. military commanders, pilots, navigators, legal advisers, and intelligence analysts. The author concludes that the United States has increasingly involved legal experts in the choice of targets, following a "logic of efficiency" that seeks not "generic military victory" but broader political goals—such as "regime change," in the 1999 war against Serbia over Kosovo and the wars against Saddam Hussein's Iraq. Such an approach to war responds to public attitudes that find civilian casualties repugnant and are also averse to losses among combatants. Dill connects these attitudes to growing moral concerns about individual rights. U.S. military strategies, such as "effects-based operations" and "shock and awe," seek to end war quickly, as early pioneers of air power like Giulio Douhet always promised, but they do not conform to correct interpretation of the law, in Dill's assessment. By contrast, U.S. political and military leaders—including the people she interviews—believe that the "legalization" of U.S. war-making practices has indeed produced legal outcomes. This is where the "social construction" in her book's subtitle comes in. As the world's preeminent military power, the United States shapes the law as it engages in practices that it interprets as legal or even what the law requires. In the author's words, "IHL, as interpreted by military decision-making, proves constitutive of those

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decision-makers' shared belief that the legitimacy of a target hinges on the ability of its engagement to contribute directly to the quick achievement of an overall—often political—goal" (p. 301).

The books share an underlying assumption about the legality of warfare itself. There is arguably a tension within the United Nations Charter, the main legal document governing the use of force, on the status of war in the international system. On the one hand, we have what Dill describes as the "*prohibition* on the use of force in international relations, which is already established by customary law and enshrined in Article 2(4)" of the Charter (p. 250; emphasis added). On the one hand, we have what Cortright and Fairhurst call "the *right* of self-defense" (p. 220; emphasis added). The actual wording for the latter comes in Chapter VII, Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Despite the word "inherent," Dill, several of the contributors to *Drones* (Mary Ellen O'Connell and Jennifer Welsh, especially), and perhaps the majority of international legal scholars put more emphasis on self-defense as an *exception* to a general prohibition on the use of force, rather than as a right that would be exercised often. As Dill writes, "in the modern international system war is not supposed to be easy, and belligerents have no right to have a shot at winning every war" (p. 265).

One of the main concerns of critics of the use of drones for targeted killings is precisely that it makes resort to armed force "easier" than it should be, if war is supposed to be a last resort. The United States employs force in the form of drone strikes in countries that have not launched an armed attack against it and where it is not engaged in armed conflict (such as Pakistan or Yemen) or assisting a government, with its permission, that is so engaged. The counterfactual assumption is that the United States would not deploy "boots on the ground" in those countries. The threshold for drone attacks is much lower.

Defenders of the drone strikes dispute the charge that drones make war too easy. Cortright and Fairhurst quote Kenneth Anderson, one of the most thoughtful of them. Anderson criticizes what he takes to be the drone opponents' argument—that "a successful strategy in war turns out to be immoral, not because of the damage it causes achieving its success, but because success itself increases the propensity to do it too much."[3] But there is more going on here. Anderson parts company with many international legal experts by downplaying the UN Charter's prohibition on the use of force in favor of the exception it makes for "self-defense if an armed attack occurs"—and without attending too closely to those last five words. Taking up explicitly the criticism of drone strikes outside of recognized zones of armed conflict, Anderson rejects what he calls the "legal geography of war."[4] He invokes the "inherent right of national self-defense"—not as an exception to the prohibition on the use of force in the UN Charter, but rather as a principle of customary law. Obama administration officials, such as John Brennan and Harold Hongju Koh, made the same claim in their defense of drone strikes. Anderson goes perhaps further when he refers to a "law of self-defense" or a legitimate claim of "naked self-defense." He associates it with a 1989 speech by Abraham Sofaer, then legal adviser to the U.S. State Department, which he summarizes: "Notwithstanding the importance of sovereignty, he said, in those instances in which a state was unable or unwilling to control terrorist groups in its territory, the United States saw itself as lawfully able to strike at them in their safe havens as a matter of self-defense. It was able to do so with its instruments of national security power, including civilian agents of the CIA."[5]

A number of contributors to *Drones* examine the legal aspects of U.S. use of drones for targeted killings, and they address precisely the arguments that Anderson, Brennan, Koh, and Barack Obama himself make. Karen Greenberg puts drone strikes in the context of the legal justification for policies implemented by the George W. Bush administration in the wake of the attacks of September 2001 and the extent of overlap with Obama's legal rationale for drones. Welsh focuses primarily on the moral criteria in Just War Theory, which overlap a good deal with legal principles, and engages in thoughtful dialogue with prominent philosophers such as Jeremy Waldron and Michael Walzer. Martin Cook assesses the morality of drone strikes from a military perspective, dividing his analysis into tactical, operational, and strategic levels; he finds drone use within ongoing armed conflicts to pose acceptable moral risks—and even outside recognized battlefields, he justifies drone attacks against countries that are unable or unwilling to deal with suspected terrorists by other means. O'Connell focuses on international law and adduces "eight different legal justifications" offered by the U.S. government and its supporters for drone attacks. Her chapter consists of a systematic and critical assessment of each justification. She specifically rejects the "unable and unwilling" argument put forward by Anderson and by fellow *Drones* contributor Cook as having no basis in law, Abraham Sofaer notwithstanding. She also comments on the scattershot approach of the drone defenders: "Whereas it is common for lawyers in the United States to adopt a litigation strategy that provides multiple arguments to gain a greater accumulated effect, this is not appropriate in the law on the use of force, which requires a state to invoke at least one wholly sufficient exception to the general prohibition on the use of force" (p. 64).

In her chapter, Pardiss Kebriaei assesses the relevance of U.S. domestic law, particularly the 2001 Authorization for the Use of Military Force, for attacks on countries,

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groups, and individuals not ostensibly implicated in the 9/11 attacks that prompted the law. She finds arguments by Obama's Department of Justice incompatible with the requirements of international law. To bring targeted killing "into conformity with the law," she argues, would mean limiting the application of IHL "to direct participation in actual war zones." Extrajudicial killing outside of armed conflict can otherwise only be justified "as a last resort in response to an imminent threat—where imminence means imminence," unlike in the much more elastic definitions of the Obama administration. The point of these rules, she argues, echoing the individual-rights theme of Dill's book, is "to limit the violence of war and prevent arbitrary deprivations of life" (p. 97). Again, the dividing line between critics and supporters of drone strikes marks a separation between those who stress limiting war to preserve individual rights and those who favor using war to protect societies.

Along with Mary Dudziak, who provides a valuable historical comparison to Richard Nixon's obfuscation and deceit regarding the "secret" bombing of Cambodia, most of the authors of *Drones* are concerned with questions of transparency and accountability, and the corrupting influence on the political process of the secrecy that has shrouded official U.S. drone policy. Chris Woods, in his chapter, combines a call for greater transparency with an analysis of the difficulty in assessing numbers of civilian casualties, based in part on his own investigative work in Waziristan. Rafia Zakaria's chapter also brings to bear original research on the effect of drone strikes in Pakistan, where the weapons have led to little reduction in terrorism, but have provoked substantial displacement of populations from conflict-ridden areas and deprived people of a "right to home"—human-rights consequences that are little recognized by the narrower notion of "collateral damage" from drone attacks.

Aside from the moral and legal questions, the contributors to *Drones* address the pragmatic reasons for the use of the weapons, particularly as a means of confronting the threat of transnational terrorism. Audrey Kurth Cronin criticizes many of the claims that associate drone use with a decrease in terrorist attacks against the United States, finding the evidence inadequate, and she points to counterproductive consequences of their use. Taking an opposing position, Patrick Johnson reviews the role of U.S. drones in disrupting terrorist networks and systematically addresses and rejects most criticisms of their use, leading on balance to a favorable assessment; he does, however, express some concern about the proliferation of drone technology to U.S. adversaries. Cortright and Fairhurst evaluate drone strikes and other military elements of a counterinsurgency strategy as a means of confronting terrorism and adduce a preference for nonmilitary means to deal with the problem, including "diplomacy, law enforcement, and economic development" (p. 162).

Here again the two works come together. Dill finds neither the logic of sufficiency nor the logic of efficiency to produce a "normatively successful" outcome of warfare, for they cannot "avoid large-scale violations of individual rights" (p. 289). She explores whether a "logic of liability," concentrating armed force (drones, for example) against individuals responsible for terrorism or human-rights abuses fares better. Such an approach—also explored by Welsh—has an intuitive appeal. As O'Connell suggests in her *Drones* chapter, "apparently, if the public perceives that only 'bad guys' are being killed, the killing is more likely to be accepted" (p. 71). If a policy founded on such a logic were practicable—which Dill doubts—it would, according to O'Connell, have to operate outside established international law. As she points out, "the UN Charter, which governs resort to force, has no exception to Article 2(4) for armed attacks that are precise" (p. 71).

Dill rejects targeted killing for many of the same reasons that most of the contributors to *Drones* do, but she focuses particularly on the argument that reliance on drones makes wars easier and more likely, when law and morality say war should be a rare last resort. Thus, Dill suggests that we "compare the casualty count of drone strikes" not to other forms of killing but "to alternative measures of diplomacy, development aid and law enforcement operations" (p. 308)—a view fully consonant with the policy prescriptions of the editors of *Drones*.

President Obama seemed to employ something like Dill's logic of liability in a major speech in May 2013, when he finally addressed questions about his administration's policy on drones.[6] The speech came in the wake of revelations about the targeted killing of several U.S. citizens, including Anwar al-Awlaki, a propagandist for Al Qaeda, and (in a separate attack) his 16-year-old son, and ongoing concerns about civilian casualties. Dudziak's chapter reviews very effectively the tortuous path that led to the speech—with U.S. officials refusing to acknowledge the deaths, and the Central Intelligence Agency unwilling even to admit to its (extensive) role in the drone program. Obama's speech embraces most of the eight rationales that O'Connell analyzes, but then offers this striking promise regarding future drone use: "[B]efore any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set." Indeed, this is an impossibly high standard, as the president seems to acknowledge three sentences later: "[I]t is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war." Yet he returns to the logic of liability, averring that "by narrowly targeting our action against those who want to kill us and not the people they hide among, we are choosing the course of action least likely to result in the loss of innocent life." The alternative, he claims, is "to do nothing in the face of terrorist networks," but "doing nothing is not an option."

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Obama did not mention the risk of making resort to war too easy. That is perhaps not surprising for someone whom the journalist Peter Bergen called "one of the most militarily aggressive American presidents in decades, authorizing military operations of various kinds in seven Muslim countries: Afghanistan, Iraq, Libya, Pakistan, Somalia, Yemen and, now, Syria."[7] Obama clarified the side of the dividing line on use of force on which he stands when he accepted the Nobel Peace Prize in 2009: "The United States of America has helped underwrite global security for more than six decades," he asserted, "with the blood of our citizens and the strength of our arms." Given that the United States fought no wars of genuine national self-defense between the end of World War II and the attacks of 9/11, The president clearly believes that resort to war can be legitimate even if "the purpose of military action extends beyond self-defense or the defense of one nation against an aggressor." He specifically expressed his belief that "force can be justified on humanitarian grounds."[8] Although clearly favoring a much more circumscribed role for armed force than Obama does, Dill nevertheless agrees that "war may sometimes present the only means to prevent even more violations of individual rights, for instance during a genocide" (pp. 284–85).

It is not surprising that the country with the most powerful military forces in history chooses war as its preferred response to the scourges of terrorism and genocide. Scholars who have sought to understand the "root causes" of terrorism, atrocities, and crimes against humanity find a complicated mix of economic, political, and social factors, some of which implicate the same powerful states and groups that are then called upon to come to the rescue.[9] These three factors, among many others, no doubt, make it difficult to realize the UN Charter's prohibition on war.

So the first point is that the United States, by its spending priorities and foreign policy orientation, has made war a much readier instrument than any of the alternatives. Even before the vast expansion of military and intelligence spending (much of it secret) pursued in the wake of 9/11, Andrew Bacevich had decried the lopsided consequences for U.S. foreign policy: The worldwide system of U.S. regionally based military commands—what Bacevich called the "rise of the proconsuls"—dwarfs the capabilities and reach of the U.S. State Department, making it unavoidable that armed force would take priority over diplomacy to a worrying degree. As he put it, even with the disappearance of its Cold War rival by the early 1990s, the United States could not shake its fundamental obsession with military power. At one point, the United States was spending more on the military than the rest of the world's countries combined—and most of those next on the list were its allies. "Almost without anyone's noticing," Bacevich wrote, "military power became a central element in what little remained of an American national identity."[10]

The second point—representing a far more intractable problem than swollen military budgets or even national identity—is that the alternatives that the United States might adopt in pursuit of a less bellicose foreign policy could also lead to war. The United States and many of the international institutions it founded after World War II underpin a system that in recent decades has sustained or promoted vast inequalities in wealth and political power between and within states. When we look to "root causes" of violence, genocide, and mass atrocities, they are often not exclusively internal or proximate. The structure of the international economy and the policies of the international institutions to which we often look to prevent or resolve crises abroad are in many ways complicit in generating those crises or profiting from their attempted resolution.[11] Thus, unfortunately, proposals for the United States to emphasize diplomacy or development aid as alternatives to the easy resort to war might not go far enough without more profound structural changes.

The books under review have made a persuasive case on legal and moral grounds against two of the most prominent means of armed conflict employed by the United States—aerial bombardment according to the "logic of efficiency" and drone strikes according to a "logic of liability." On pragmatic grounds, the authors of the edited volume have endorsed alternative approaches, entailing "a greater commitment to the democratic principles of political freedom, social justice, greater equality, and the rule of law" (Cortright and Fairhurst, p. 161). Is it any wonder that the United States, given its inconsistent commitment to these principles, combined with its steady accumulation of military power, finds war—relatively speaking—too easy?

Notes

1 Crawford 2013; Savage 2015.
2 For example, see Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, 29 May 2012; Scahill 2015.
3 Anderson 2013.
4 Anderson 2011.
5 Ibid., p. 7.
6 Barack Obama, "Obama's Speech on Drone Policy," *New York Times*, 23 May 2013.
7 Bergen 2014.
8 Obama 2009.
9 Klein 2007; Lopez 2013; Marks 2011; Orford 1997; Simpson 1995.
10 Bacevich 2002, p. 122.
11 Klein 2007; Marks 2011; Orford 1997.

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