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A Transatlantic Conversation on Drone Policy

CONFERENCE REPORT

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INTRODUCTION

Armed unmanned aerial vehicles (UAVs) — more commonly referred to as drones — have become a central pillar of the United States' counterterrorism strategy. After more than a decade of use by the United States in an increasing number of theaters, a number of European state and non-state actors have expressed growing concern regarding the lack of transparency, accountability, and clarity surrounding the U.S. drone program. Europe's concerns are of more urgent priority now, more than ever, as drone proliferation increases at a rapid pace.

On 23 April 2015, the Stimson Center and the Heinrich Boell Foundation hosted a seminar to discuss transatlantic views on drones and explore the potential for developing international standards and norms to guide the sale, transfer, and use of armed drones in the future. The seminar — influenced in part by the Recommendations and Report of the Stimson Task Force on U.S. Drone Policy — brought together U.S. and European participants to discuss the current state of drone policy within the United States and Europe, the legal frameworks that underpin current use, and the challenges presented by uncontrolled proliferation of drone technology worldwide.

CURRENT STATE PRACTICE

The discussion began with an overview of current drone policies within a variety of countries. Government representatives joined workshop participants to examine current government policies surrounding drone transfer and use.

The United States Government released a new U.S. Export Policy for Unmanned Aerial Systems in February 2015. While the policy remains classified, the State Department released an unclassified summary that outlines the policy's key tenets and represents the culmination of many years' work looking at the ways in which drone technology is unique to other military weapons systems. The policy sheds light on potential implications for future transfers of U.S. drones, and can serve as a starting point for a more focused conversation on international drone standards. The policy addresses all military drones, including armed systems, and requires more sophisticated systems to be transferred through Foreign Military Sales — that is, government-to-government agreements — so as to provide greater scrutiny and oversight over end-use. While the policy provides a more detailed (classified) framework for transfer decisions, these decisions will continue to be conducted on a case-by-case basis.

U.S. drone transfers are governed by a number of different laws, regulations, and policies — including the Arms Export Control Act, Export Administration Regulations for commercial drones, the Foreign Assistance Act, the International Traffic in Arms Regulations, the Conventional Arms Transfer Policy, as well as the Missile Technology Control Regime (MTCR).[1] The new export policy adds several obligations for recipient countries in the form of four "principles for proper use." These principles require recipients of U.S. drones to use the systems in accordance with international law, including international humanitarian law and international human rights law; to use them in operations involving the use of force only when there is lawful basis for the use of force under international law; to not use them for unlawful surveillance or unlawful use of force against domestic populations; and to provide training on the use of drones so as to minimize the risk of damage or unintended injury.

Though questions were raised as to whether these principles impose a stricter standard for drone use than what the United States applies to its own use of drones. Participants discussed whether the principles are consistent with U.S. practice, and challenged the U.S. government to clarify its own interpretation of drone "use in accordance with international law, including humanitarian law and international human rights law". Despite their vagueness, the principles for proper use can serve as part of a larger effort to establish international standards for the transfer and use of drones. Current activities surrounding this effort include U.S. training for drone operators and sharing lessons learned and best practices with partners and allies. Conference participants acknowledged that the new export policy represents a positive step towards greater clarity for U.S. drone exports, but some noted that it contains significant transparency gaps and needs further development. For example, participants stated that it is not clear from the policy whether transparency regarding a recipient's use and transfer are also required, and highlighted this as an area for clarification.

Participants discussed what forums might be appropriate for discussions on international standards as outlined in the new U.S. policy. Possible venues include the MTCR and the Wassenaar Arrangement. Some participants expressed skepticism about Wassenaar's utility in this context, since the Arrangement does not address the use of the technology, but merely lays out whether the technology should be controlled. Participants noted that the challenge will be in trying to establish standards that not only apply to and work for the United States and key partners and allies, but that extend to countries that may not share similar views on the issue — such as China, Russia, South Africa, and the United Arab Emirates.

The United States is far ahead of most European states in developing drone policies, in part because it uses armed drones far more than any other country. Most European governments do not have a policy for armed drones, given that most European governments do not possess robust drone programs. The diversity of European approaches and degree of engagement makes a common European policy challenging. Currently, the United Kingdom is the only European country to use armed drones. While many European countries do not currently have plans to acquire armed drones, several European governments are working towards the development of unmanned combat air systems to be operational by 2025.

Most European states do not have individual policies for armed drones because they do not expect to engage in future combat operations outside of the purview of the North Atlantic Treaty Organization (NATO). Therefore, some participants suggested shifting the conversation from the state level to the development of a NATO-specific policy. Participants thought it might be useful for NATO to address proliferation concerns — including those posed by non-state actors — as well as offer greater distinction amongst various military technologies. As drone technology continues to evolve, the lines are becoming increasingly blurred between lethal systems and other non-lethal platforms that offer unique tactical advantages.

A joint policy could allow European states to utilize the advantages of certain drone technologies — such as persistence and distinct surveillance capabilities — while making sure that they are governed by a framework guided by legal and ethical concerns. In Europe, drones are generally regulated by multiple agencies within the military and the civil aviation authorities, with responsibility divided based on airspace, use, and airworthiness certification. Some participants mentioned that civilian authorities (politicians) should have a greater role in the regulation of drones and not leave decisions to the military and aviation authorities alone.

Although no broader European effort seems yet to exist to define common rules for armed drones, a comprehensive European drone policy could be helpful in addressing three main areas. First, a future policy could take into account legal and ethical considerations for use, and distinguish between the capabilities that drone technology provides and the *use* of such capabilities. Second, a policy on drone proliferation and use could differentiate between drones (remotely piloted aircraft) and autonomous weapons systems. Third, a policy on drone technology could seek to limit proliferation and address issues surrounding use.

SESSION 1: SETTING THE SCENE
— A TRANSATLANTIC DISCONNECT?

The participants began the discussion with questions about the nature and gravity of the transatlantic disconnect surrounding drone use. Participants questioned whether the problem is rooted in varying perceptions and interpretations of the "war on terror", or on the strategies and tactics by which countries are engaging in that war — particularly through targeted killings using drone strikes. Further questions centered on whether the use of drones in counterterrorism operations is a strategically wise and effective form of foreign policy.

Within the current public debate, participants noted a conflation of issues between ethical and legal concerns regarding drone strikes, as well as when drone uses are practiced under which circumstances. Participants stated that the very nature of the debate therefore makes it difficult to challenge the USG's dominant narrative. Participants reiterated that the drone debate is particularly challenging due to the lack of agreed terms or definitions. For example, understandings of the authorization for use of military force vary across the Atlantic. There is, however, a strong will to have this discussion particularly as the U.S. narrative faces increasing scrutiny both in Europe as well as in the U.S.

Participants also noted that there appears to be a difference in the ways in which the United States and European countries more generally view the post-9/11 security environment. In the United States, the events surrounding 9/11 serve as key considerations for determining boundaries to and legitimization of the use of force, both within the military and policy circles. Prior to 9/11, the United States was more inclined to act when specifically authorized. The U.S. security environment tends now to lend to action if not explicitly "unauthorized." It was noted that these two aspects could be attributed to areas of divergence between the United States and Europe regarding the use of force, particularly the use of drones, in combat.

The participants found it worth noting that the apparent disconnect over drones appears to be mainly between the United States government and the European public, rather than between E.U. governments and the U.S. government. Few European governments have provided explicit opinions regarding the U.S. drone program and fewer still have spoken out publically against it. As many participants noted, some European governments are themselves involved in the U.S. drone program — often through intelligence sharing or data transfers.

In Europe, the debate over drones is often focused on ethical issues more than on issues regarding security, efficacy, transparency or accountability. The ethics of drone use are of primary concern in part due to the fact that drones are largely associated with U.S. targeted killings and signature strikes — or strikes that are conducted based on patterns of behavior rather than by targeting a

specific individual. Of central concern is the number of civilians reportedly killed by drone strikes. Beyond the ethical concern, the potential backlash of such incidents is often mentioned in European debates — be it by strengthening anti-U.S. and anti-Western sentiment or by being used as a tool for recruitment by terrorist groups. The participants noted that the information surrounding civilian casualties is an important issue that requires more transparency.

Additionally, a significant number of European lawyers have rejected the idea that drone strikes, when used to support the global war on terror or target individuals deemed to pose an imminent threat to national security, were legal under the U.N. Charter. Questions of legality were further raised due to the fact that some of the United States' drones are operated by the Central Intelligence Agency. There is, however, greater European support for the use of drones for close air support operations in legal armed conflict or established war zones such as those seen in Afghanistan.

After discussing the possible tenets of a transatlantic divide, participants moved into discussions on the ways in which countries could work to address the mutual grievances. Participants noted two key aspects that could influence the U.S. debate: evidence that strikes are ineffective outside of legal armed conflicts/"hot-battlefields," and greater push back from partners and allies. Evidence suggesting that targeted drone strikes are ineffective at achieving their strategic aims — be it because the strikes fuel anti-Western sentiments or serve as a recruiting tool for terrorist groups — could prompt reconsiderations of the U.S. targeted killing program. Similarly, if European allies limited their own participation in the U.S. drone program, such as by restricting data sharing, the United States might be persuaded to more thoroughly review its current program. Participants expressed reservations, however, about the likelihood of such action until European governments become less ambivalent and develop clear positions on the issue.

In terms of acquiring more sophisticated drone technology, several European countries agreed in 2013 to develop a European counterpart to the U.S. and Israeli reconnaissance and surveillance drones that dominate the global market. These countries include France, Germany, Greece, Italy, the Netherlands, Poland and Spain. France, Italy and Germany recently reaffirmed their commitment to this plan, pledging a two-year study to lay the foundations for a European drone program to be operational by 2025.[2] The participants noted that public information on concrete specifications of this plan are so far lacking, and it will be interesting to see the details that states can and cannot agree on, and whether the project leads to common standards for transparency and oversight.

While participants were not aware of any larger efforts on the European level to establish common standards for drone use or transfer, they mentioned the European Parliament's adopted motion on the use of armed drones from February 2014. It calls on the European Union to establish a common position and policy response — at both the regional and international level — for the issue of lethal drone use. The motion highlighted the issue of targeted killing and noted that, in the event of civilian casualties, countries should be obligated to undertake independent investigations, provide public explanations of those incidents and, when applicable, provide redress to families of the victims.[3]

SESSION 2: AN ETHICAL AND LEGAL FRAMEWORK

Participants moved on to discuss the ethical and legal concerns surrounding current drone use and transfer. The use of armed drones has raised a number of legal questions on which there is no clear consensus, e.g. on where current practices challenge established legal norms. Generally, participants noted that issues of legality cannot be disentangled from issues of transparency.

The session opened with questions about whether it makes sense to talk about the ethical and legal concerns of drones specifically or about the broader challenges presented by the use of force outside of established war zones. Participants discussed the legal frameworks that currently address targeted killings, including international humanitarian law (IHL) and international human rights law (IHRL), and noted the controversy surrounding the scope of application of both.

Participants discussed the feasibility of a specific drone accountability regime, but several participants noted that such a regime could risk undermining the existing body of international law that applies to the lethal use of drones. Many participants stated that they do not think drones require a new legal framework, but rather underscored the need for a greater common understanding of the specific areas of international law that govern lethal use of drones. These areas could include varying interpretations of breaches of sovereignty, theatres of non-international armed conflict, or definitions of imminence. Participants noted that greater agreement and clarity could help in developing the foundations for international standards on use — especially as more countries and actors acquire drone technology.

Participants underscored the similarities between the current drone debate and previous national security controversies, stating that the current debate resembles those discussed within the Bush administration about the detention program. They noted that one of the biggest mistakes during the Bush administration was not having open discussions with partners and allies about the U.S. detention program. Participants stated that the Obama administration is making similar mistakes with regard to the U.S. drone program. While the U.S. administration has referenced the U.S. drone program in various high level speeches and statements[4] over the past years, participants emphasized the importance of engaging in diplomacy that extends beyond domestic speeches and announcements.

Some participants sought to identify substantive legal rules that could guide drone use, noting that due to its highest regard for the protection on civilians, international human rights law should provide a point of departure for such discussions. Participants discussed a number of safeguards that could be imposed on legal determinations of when it is justifiable to target and kill an individual with a drone. These could include the following:

- Drone strikes must not part of a deliberate, general and automatic "shoot-to-kill" policy

- Drone strikes must only be used against individuals who pose a clear and future danger that must be imminent and just about to materialize

- Countries must assess, immediately before targeting an individual, whether the danger could be averted by other, milder forms of force, including arrest

- Drone operations must be planned and controlled in such a way that the use of lethal force is avoided or minimized to the greatest extent possible - furthermore, there must be some form of supervision and control

- Before the attack - the identity and the activity of the potential target must be established through verified information

- After the attack - an official independent and impartial investigation of drone strikes must be conducted and, if appropriate, compensation must be awarded.

In responding to these suggested rules, some participants questioned whether the Israeli Supreme Court's verdict from 2006 on targeted killing might serve as a model for developing legal criteria for targeted strikes.[5] Others noted that the Israeli Supreme Court provided an interesting case, as it integrates IHL and IHRL in an effort to better protect individual rights. Participants highlighted that European courts are undergoing a similar effort in trying to balance between IHL and IHRL with regard to countries' human rights obligations. Some participants expressed reservations about the likelihood for judicial review of drone strikes or use in the U.S. context, stating that it is not likely to be undertaken with regard to any ongoing military operation. However, U.S. judicial review might be possible in a different context, such as for drone use at the border or by local police. Participants discussed whether courts should set or create drone policy more generally, with some participants nothing that the role of courts should be limited to determine the legality of particular actions and legal rules/laws.

From a legal point of view, it seems feasible to reach agreement on a set of international rules or guidelines to regulate the use of armed drones outside hot battlefields or active hostilities. When discussing who should lead this effort, participants stated that the United States has most experience in the use of drones and the attempt to formulate a policy around use. It therefore would be important for the United States to play a role, some participants argued a leading role, in any future efforts to engage in international discussions. It was suggested by some participants that the United States start with concentric circles of close partners and allies to work towards common international standards for use. Given the challenges wrought by the lack of public support for the United States drone program, reaching an agreement even amongst key allies will be challenging enough as a start.

The secrecy surrounding current drone use poses a considerable challenge to establishing clear legal frameworks, however. While many participants noted that there is no need for a new legal framework to guide drone use, they did highlight the need to develop some level of consensus on specific aspects or attributes of drones that the rules could and should address. The need for more open discussions between partners and allies was noted, and many participants agreed that this is an area where action could be taken in the near term.

The session concluded with a discussion of four main themes. First, disagreements remained on whether there are "gaps" or merely "ambiguities" within international law that require greater clarity, while the latter position found more support among the participants. Second, the group highlighted that pressing questions remain regarding the ways in which existing international legal principles are acted upon. Third, the participants noted that the secrecy surrounding current drone use poses a considerable challenge to establishing clear legal frameworks. In particular, participants underscored the challenge of holding governments accountable for their policies and actions when there is little to no access to details on the policies and on their implementation in practice. Fourth, participants questioned how to address the speed at which technology is evolving and the impact that new technology will have on methods used by governments to accomplish their objectives.

SESSION 3: FACING THE RAPID AND UNCONTROLLED PROLIFERATION OF DRONE TECHNOLOGIES

In the third session, participants discussed the issues posed by rapid proliferation of drone technology. Key questions highlighted whether drones constitute a special or unique technology, which capabilities nonproliferation policy could or should focus on, and whether current regulatory regimes such as the MTCR are appropriate frameworks to guide the transfer and use of drone technology.

Participants discussed current trends in drone proliferation and noted that one challenge to addressing proliferation concerns is the number of invested stakeholders involved. In the past 15 years, the number of countries known to possess drones has risen dramatically. While estimates vary, it is believed that at least 80 countries currently have some form of unmanned capability. Of these, more than 20 are believed to be developing — or have already developed — armed drones, while many others possess drones of different classes for a variety of purposes.[6] Only the United States, the United Kingdom, and Israel are known to have employed armed drones in conflict, but other countries continue to deploy lethal capabilities, and it is likely that more countries will use drones in combat as the technology advances. Participants also noted the use of drones by non-state actors, including Hezbollah and Hamas.

Yet, the development of appropriate norms and policies to regulate drone transfers and the way recipient states use them is currently lagging behind technological progress. Therefore, participants suggested starting out by researching why countries want drone technology and for what intended purposes so as to help establish norms for transfer that can keep pace with the technological evolution.

In addressing whether drones constitute a "special" technology, participants highlighted key attributes that make drones special — though not necessarily unique. Some participants highlighted the commercial application and dual use of drones, and that commercial activity in this regard poses a challenge for nonproliferation. It was further noted that drones, compared to other systems, are easier to deploy and can therefore lower the threshold for engagement or for lethal use. Numerous types of drones are also readily available for use by non-state actors, which may pose a distinct risk in the current security environment. Additionally, drones carry with them a certain degree of political sensitivity due to an associated concern about government and private surveillance. Participants noted that many of the issues and questions surrounding drone technology are similar to those posed for cyber capabilities.

Participants noted that, because drone technology is ubiquitous and difficult to regulate entirely, states must identify the technologies or capabilities that pose particular proliferation concerns. For example, more sophisticated systems that have greater range or payload, have stealth capabilities, or can attain high speeds are likely easier to control than less-sophisticated systems — though smaller, less-sophisticated systems may prove more difficult to defend against and therefore pose a notable risk. Semi-autonomous or autonomous aspects were also noted as potential capabilities to consider for proliferation control. Some participants suggested that countries explore mechanisms for testing technical solutions to some proliferation threats, such as "backdoors" or "kill switches" that could render drone technology inept if it fell into the "wrong hands". One major question with regards to the future is whether technology and weapons can be designed to be legal- or treaty-proof. Many participants reiterated the importance of transparency in establishing a policy to regulate the transfer of such technology, though some participants noted that there may be instances when it might be advantageous to keep some aspects classified.

Participants noted that the development of international standards for drone proliferation may soon be high on the agenda of many countries as well as private industry, particularly as non-state actors and countries of concern acquire drone technology. Policy decisions need to reflect the fact that in the medium term the U.S. will lose its dominant position in the field of technological development of drones. Participants noted that such standards could build upon established frameworks such as the Wassenaar Arrangement, the MTCR, and the E.U. Common Position on Arms Exports. Some posited whether countries could draw lessons for banning certain drone technologies from established treaties such as the Chemical Weapons Convention (CWC) that banned everything except for specific purposes. Other participants, however, cautioned that old paradigms for arms control will not work to regulate drones — in part because advances in drone technology are largely commercially driven and because relatively simple drone technology could have significant impacts on security. Participants noted, for example, that the MTCR does not address certain aspects of drone technology that makes it distinct from other systems and therefore does not serve as the right framework for considering drone proliferation. Moreover, because the distinction between commercial and military drones is becoming less clear, some participants stated that international standards for drones should focus more on drone use.

National governments as well as industry partners could benefit from such discussions, particularly as industry holds concerns about the impact of disparate controls on business operations and market trends. While international regimes designate what items should be controlled, national governments determine how those items are controlled, and the variance could cause additional challenges for industry stakeholders. Some participants noted that regulation is good for companies because it holds national governments accountable for implementing regulatory policies.

Furthermore, the difference between domestic regulation and international regulation raises critical questions about conditions for use placed on drone transfers. Participants returned to the earlier discussion on the new U.S. drone export policy and its imposition of four principles for proper use upon recipient states. Participants noted that it is unclear what criteria the U.S. will use to assess compliance (or lack thereof) with those principles. Participants thus underscored the importance of developing meaningful standards that are precise in what technologies they seek to target, and controls that establish transparent monitoring systems so as to allow for better regulation of use.

Some participants noted that a code of conduct or an agreement among a smaller group of like-minded states could provide an appropriate forum for establishing international principles for use. Participants stated that this could be one area for transatlantic cooperation and is likely to be where the U.S. government will start in its international outreach. A few participants noted, however, that it might be beneficial for European governments to drive this discussion rather than waiting for the United States to initiate it.

Key stakeholders other than governments also seek to develop standards in order to address privacy and safety concerns associated with wider availability and use of drones. Participants noted differing opinions about the limits to privacy, both between the United States and Europe as well as within the European Union. It was stated that in Europe there is no clear mechanism for tracking who uses commercial drone technology or how they are using it, and this poses a number of safety and privacy concerns. Regulations, therefore, might focus on no fly areas — such as restrictions in urban areas - civil liability provisions, or a civilian override system to ensure remote pilot capabilities.

Participants concluded that focused and sustained international engagement is key to developing international proliferation standards. Moreover, participants thought export controls could be a useful starting point, but should be carefully considered when determining what technologies are feasible to target and include for international regulation.

CONCLUSION

While the seminar took place, President Obama revealed that a U.S. drone strike in the Afghanistan-Pakistan region had accidentally killed two humanitarian aid workers- American citizen Warren Weinstein and Italian citizen Giovanni Lo Porto- who had been held hostage by al Qaeda.[7] The White House also announced the deaths of two other Americans killed by drone strikes that were affiliated with al Qaeda, but not specifically targeted. The announcement framed much of the discussion of the seminar by underscoring the need for greater transparency, accountability, and oversight of the U.S. drone program. The seminar concluded with a discussion on ways in which a focused effort on international standards could continue, particularly before drone use and proliferation increased even further. Participants were eager to continue the discussion, and initiate conversations with partners and allies that would include key non-governmental stakeholders rather than wait for the often slow and bureaucratic mechanisms of official diplomacy to begin.

The views represented in this report were made by individual participants and do not necessarily reflect consensus amongst workshop participants or the institutional views of the Heinrich Böll Foundation or the Stimson Center.

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NOTES

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COVER IMAGE

Photo by Sgt Corinne Buxton RAF/MOD, sourced via Wikimedia Commons.