

SEX AND DRONE STRIKES

**Gender and identity
in targeting and
casualty analysis**

EXECUTIVE SUMMARY

This paper addresses concerns that the sex of individuals is being used as a signifier to designate people as militants in drone strike targeting decisions and post-strike analysis of casualties.

Lack of transparency around armed drone operations makes it difficult to know what standards are used to determine how individuals come to constitute a legal target in the eyes of armed drone users. However, there are some indications that the United States uses maleness as a signifier of militancy.

The blanket categorisation of adult men as militants raises moral, legal, social, and policy concerns in a number of areas:

- It erodes the protection that civilians should be afforded in armed conflict and violates many human rights, including the rights to life and due process;
- It undermines accurate casualty recording, which is a crucial basis for military, legal, and political analysis of attacks and for evaluating the use of force more generally;
- It suggests that sex can be taken as a key signifier of identity, which constitutes a form of gender-based violence and has broader implications in the reinforcement of gender essentialisms and problematic associations of masculinity with violence; and
- It sets a precedent for blanket categorisations of people, which may have problematic implications as certain states move to develop and deploy weapons systems operating with greater autonomy in the identification of targets.

The identification of people as objects for attack will always be fraught with challenges and difficulties, but using sex or gender to systematically remove a person's claim to protection as a civilian is unacceptable.

Recommendations

The following recommendations relate to the specific areas of concern in this paper:

- States must not use sex as a signifier to assume militancy in targeting attacks or in post-strike casualty analysis.
- All states should cease extrajudicial killings as well as so-called "signature" strikes whether with armed drones or by other means.
- All states operating armed drones should explain the basis on which people can be designated a target or assumed to be a "militant" and release records of their targeting decisions and operations. They should also be clear about the legal standards applicable to their use of armed drones by publishing legal advice and procedures in this area. Such information should be subject to independent scrutiny to determine compliance with international law.
- All states operating armed drones should engage in comprehensive and transparent casualty investigation and recording, in coordination with national partners, UN agencies, or other relevant international organisations and NGOs.

INTRODUCTION

The use of armed drones¹ in strikes inside and outside situations of armed conflict raises numerous legal and ethical concerns, including important human rights and humanitarian law questions. This paper addresses the reported practice of the United States and US-led coalitions² of using sex as a signifier to designate people as militants³ in targeting decisions and post-strike analysis of casualties.

This paper argues that the apparent practice of using sex as a signifier in targeting attacks and/or in conducting post-strike analysis:

- Violates human rights and is highly corrosive to existing protection for civilians;
- Undermines accurate analysis of such attacks;
- Constitutes a form of gender-based violence that also serves to reinforce problematic gender essentialisms and violent masculinities; and
- Carries grave implications for the development and deployment of weapons systems that have greater autonomy in the identification of targets.

While these issues come to the fore because of concerns raised specifically about drone strikes, they are relevant to a wider analysis of targeting and casualty analysis processes.

The legal underpinnings of drone strikes are contested, and there is often no agreement about the relevant legal standards against which the permissibility of a drone strike is to be judged. This paper uses language that attempts to bridge the divide between law enforcement and conduct of hostilities. Whether in the conduct of hostilities (combat during

1. We use the term “armed drones” to refer to remotely piloted vehicles or so-called “unmanned” aerial vehicles that carry and deploy weapon payloads

2. This paper focuses on US policy and practice in targeting and assessing drone strikes, but it is important to note that such policies and practices could provide precedent and/or guidance for that of other states.

3. The terminology in this area is fraught with difficulty because much of it has technical meaning within specific legal regimes and yet the applicability of legal regimes is itself contested. Thus we use the phrases “militants” and “civilians” as broad categories without accepting any particular legal significance to the terms at this point. Loosely defined for our purposes, militants are those that may take part in hostilities and in return could be considered “legitimate” targets of attack in hostilities in the eyes of armed drone users

an armed conflict in the legal sense) or in the use of force for the purposes of law enforcement (which may take place during an armed conflict or outside of an armed conflict), the primary concern of this paper is the use of “maleness” as a signifier of persons against whom lethal force may be used.

This discussion on signifiers should not distract from the wider and more fundamental concern that many drone strikes are extrajudicial killings, illegal under international law.⁴

SEX IN CLASSIFICATION OF CASUALTIES AND DETERMINATION OF TARGETS

Lack of transparency around armed drone operations makes it difficult to know what standards are used to determine how individuals come to constitute a legal target in the eyes of armed drone users. However, there are some indications that the United States uses maleness as a signifier of militancy. According to a *New York Times* report from May 2012, in counting casualties from armed drone strikes, the US government reportedly records “all military-age males in a strike zone as combatants ... unless there is explicit intelligence posthumously proving them innocent.”⁵

The non-governmental organisation Center for Civilians in Conflict (CIVIC) subsequently highlighted some attempted nuancing of this position by administration officials, reporting that an aide to the US President described the *New York Times* article’s characterization as a “wild oversimplification.”⁶

4. States have a legal obligation to provide due process to those suspected of crimes and cannot just kill them. See for example Article 14(1) of the International Covenant on Civil and Political Rights; A/68/382, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christopher Heyns, 13 September 2013.

5. Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves at Test of Obama’s Principles and Will,” *New York Times*, 29 May 2012.

6. *The Civilian Impact of Drone Strikes: Unexamined Costs, Unanswered Questions*, Columbia Law School and Center for Civilians in Conflict, 2012.

However, CIVIC also noted that administration officials did not deny that they presume unknown men killed in a strike to be militants.⁷ It also pointed to another administration official stating that the article was “not wrong that if a group of fighting age males are in a home where we know they are constructing explosives or plotting an attack, it’s assumed that all of them are in on that effort.”⁸

In a May 2013 release of “policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities,” the US government stated in a footnote that “males of military age may be non-combatants; it is *not* the case that all military-aged males in the vicinity of a target are deemed to be combatants” [emphasis in original].⁹

It is unclear where geographically this policy applies. The statement was only made in reference to operations conducted outside “areas of active hostilities”. Given the lack of clarity from the administration about which areas are considered to represent hostilities, it may not include some of the areas where drones are most heavily used.¹⁰

It is also unclear whether this statement is referring to the classification of people for purposes of post-strike analysis (which was the subject of the *New York Times* report) or the process of targeting. Some US drone attacks are “personality strikes,” in which there is intelligence about a specific identified individual. But the majority of US strikes are reported to be “signature strikes,” in which people are attacked on the basis of observed characteristics with no substantial intelligence regarding actual

7. James Rosen, “Obama Aides Defend Claim of Low Civilian Casualties After Drone ‘Kill List’ Report,” *FoxNews*, May 30, 2012.

8. Justin Elliott, “Dissecting Obama’s Standard on Drone Strike Deaths,” *ProPublica*, June 5, 2012.

9. Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, The White House, Office of the Press Secretary, 23 May 2013.

10. Ryan Goodman and Sarah Knuckey, “What Obama’s new killing rules don’t tell you,” *Esquire*, 24 May 2013, <http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413>.

identity or affiliations.¹¹ “Signature strikes” use patterns of behaviour assumed to indicate militancy as a basis for targeting. These patterns are determined by analysing information collected by drones that survey selected areas. Legal scholars, UN officials, and civil society groups have noted that the 2013 policy provides no clarity about what “signatures” have been or are being used in targeting decisions.¹²

While the 2013 policy specifies that the US government does not necessarily designate all military-age males as fighters, this does not mean sex is not used as one component of a “signature”. It rather means that—in some circumstances, the boundaries of which remain unknown—the government has denied that sex is sufficient on its own to designate an individual as a fighter. However, while there is very little sex-disaggregated casualty recording data available from drone strikes, the available data suggests that the vast majority of those killed by drone strikes have been men.¹³

The US government has indicated in the 2013 policy that “before lethal action may be taken” there must be “near-certainty that non-combatants will not be injured or killed.” However, use of blanket categorisations to determine who is a fighter would undermine confidence in what constitutes “near-certainty”.

On the basis of the paragraphs above, three interlinked areas of concern can be identified:

- Possible use of maleness as an indicator of militant status as part of a targeting “signature”;
- Possible use of maleness to assess “bystanders” as militants in collateral damage estimations in strikes on other targets; and
- Reported use of maleness as an indicator of militant status in post-strike casualty analysis.

11. Kevin Jon Heller, “‘One Hell of a Killing Machine’: Signature Strikes and International Law, *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013.

12. See for examples Goodman and Knuckey, op. cit.; A/68/389*, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 September 2013, p 22; Joint letter to President Obama on Drone Strikes and Targeted Killings, 4 December 2013, <http://www.hrw.org/news/2013/12/05/joint-letter-president-obama-drone-strikes-and-targeted-killings>, on behalf of American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice, NYU School of Law, Center for Civilians in Conflict, Center for Constitutional Rights Global Justice Clinic, NYU School of Law, Human Rights First, Human Rights Watch, Open Society Foundations.

13. See the Naming the Dead project from The Bureau of Investigative Journalism (<http://www.thebureauinvestigates.com/namingthedead/>), which has been recording the names of those killed by drone strikes in Pakistan based on media reports and other resources. Of the 701 casualties they have identified as of August 2014, 579 are male.

THE PROBLEMS WITH USING SEX IN PROCESSES OF TARGETING AND CASUALTY ANALYSIS

The blanket categorisation of adult men as militants—even if bounded to certain geographical areas and even if sex is not the only component of a “signature” used to determine a strike—raises moral, legal, social, and policy concerns in a number of areas:

- It erodes the protection that civilians should be afforded in armed conflict and violates many human rights, including the rights to life and due process;
- It undermines accurate casualty recording, which is a crucial basis for military, legal, and political analysis of attacks and for evaluating the use of force more generally;
- It suggests that sex can be taken as a key signifier of identity, which constitutes a form of gender-based violence and has broader implications in the reinforcement of gender essentialisms and problematic associations of masculinity with violence; and
- It sets a precedent for blanket categorisations of people, which may have problematic implications as certain states move to develop and deploy weapons systems operating with greater autonomy in the identification of targets.

ERODING PROTECTION

For the purposes of this analysis, and discounting deliberate targeting of civilians, there are five key ways in which civilians are killed or injured in drone strikes. The first two relate to direct targeting:

- They are directly targeted but on the basis of incorrect information (“personality strikes”); or
- They are directly targeted but on the basis of incorrect assumptions from background information (“signature strikes”);

Using maleness as an indicator of militant status has a bearing on the second of these mechanisms—it makes it more likely that men will be targeted because they are men.

The method of killing by drones frequently involves air-to-ground missiles, which are explosive weapons that create blast and fragmentation effects in the area around the point of detonation.¹⁴ The other

14. “Drone strikes raise fundamental concerns for humanitarian protection,” Article 36, 20 June 2012, <http://www.article36.org/weapons-review/drone-strikes-raise-fundamental-concerns-for-humanitarian-protection/>.

three mechanisms of civilian harm affect people adjacent to specific targets because:

- They are in proximity to a specific target and are incorrectly assumed to be militants and therefore their presence does not weigh against the decision to undertake the strike (and may weigh for it);
- They are in proximity to a specific target and while they are assessed to be civilians, their death or injury is assessed as acceptable “collateral damage” in the context of the strike; or
- They are in proximity to a specific target but this is not known to those undertaking the strike.

Using maleness as an indicator of militant status has a bearing on the first and second of these mechanisms.

THE MORAL PROBLEM OF USING SEX AS A CRITERION IN TARGETING

At the most basic level, using sex as a criterion in targeting presents a grave moral problem. It might be argued at an aggregate level that in a given context men are more likely to be militants than women. Or even that most men within a particular area might be militants. Nevertheless, it is unacceptable to make targeting decisions using a characteristic (sex) over which the affected individual has no control. If such a criterion is systematically used as a component of targeting it amounts to stripping a section of society of the ability to be afforded protection from attack.¹⁵

LEGAL PROBLEMS UNDER INTERNATIONAL HUMANITARIAN LAW

In situations of armed conflict, using sex as a criterion in targeting may result in unlawful deaths in specific circumstances. The practice in general erodes the presumption of civilian protection from direct attack in international humanitarian law.

According to Article 50 of the 1977 Protocol I Additional to the Geneva Conventions, “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

15. In certain political contexts conscription may compel certain sections of society into the military. While at one level male conscription might be taken as justification for using maleness as a criterion in targeting it is arguably an example of the same moral problem and so does not serve as a counter-argument to the moral concerns raised here.

The circumstances under which civilians lose protection under international humanitarian law and may be subject to direct attack are contested.¹⁶ However, it seems legally untenable for sex to be considered sufficient to reverse the presumption in case of doubt required by Article 50 above. Nor could it be argued that the link between maleness and militant status is so strong that there is no space for “doubt” and therefore the presumption of civilian status should not apply. Building on the basic moral problem stated above, such a position would effectively assert that maleness is more closely linked to militant status than it is to simple “personhood”.

Because it tends against the classification of people as civilians, in contrast to the obligation of Article 50, adoption of such a position would lead to the erosion of constraints against attack based on the international humanitarian law rules of distinction, proportionality, and precaution. These rules require that parties to a conflict “must at all times distinguish between civilians and combatants” and must only direct attacks against combatants; they prohibit launching an attack that may be expected to result in the death or injury of civilians or damage to civilian objects that would be “excessive in relation to the concrete and direct military advantage anticipated;” and they require that parties to the conflict take all feasible precautions to protect civilians against the effects of attacks. Targeting individuals without

16. Among the areas of debate, two of the most highly contested issues are: (1) who may be targeted as “directly participating in hostilities” and for how long; and (2) who may be targeted as fulfilling a “continuous combatant function,” a status by which members of organized armed groups cease to be civilians and lose protection against direct attack. For a brief summary of positions and controversies, see Human Rights Institute, Columbia Law School, Targeting Operations with Drone Technology: Humanitarian Law Implications (March 25, 2011), 15-23 available at http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Background-NoteASILColumbia.pdf (discussing and referencing, inter alia, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Nils Melzer ed., 2009); Michael Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, 42 N.Y.U. J. Int’l L. & Pol. 697, 699 (2010); 5 Ryan Goodman & Derek Jinks, The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: an Introduction to the Forum, 42 N.Y.U. J. Int’l L. & Pol. 637, 640 (2010); Kenneth Watkin, Opportunity lost: organized armed groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance, 42 N.Y.U. J. Int’l L. & Pol. 640, 692 (2010); Nils Melzer, “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques on the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities,” N.Y.U. J. Int’l L. & Pol. 831, 833 (2010)).

sufficient information to make the necessary determination is clearly unlawful.¹⁷

LEGAL PROBLEMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

While “targeted killing” is not defined under international law and can be carried out by various means, the common element is that “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.”¹⁸ Under human rights law, targeted killing cannot be legal outside of armed conflict, because it is never permissible for killing to be the sole objective of an operation (for example, in law enforcement). Lethal force under human rights law is legal only if it is strictly and directly necessary to save life, and only if there are no other means, such as capture or non-lethal incapacitation, of preventing the threat to other people’s lives.¹⁹ Thus in most circumstances, targeted killings violate the right to life, though they may be legal in some situations of armed conflict. However, the scope of

the armed conflict in which the US asserts it is engaged is not clear.²⁰

While armed drones are not the only means by which to conduct targeted killings, they do enable this practice. Because they are operated remotely, they can loiter over areas for long periods without risk to the pilots. And because armed drones enable states to kill people without having the individual in custody, they risk enabling the violation of the right to due process. The right to due process means that people must have a chance to defend themselves against a specific case being brought against them. This is not possible in situations where a person is being targeted on the basis of indicators such as maleness and without their identity, let alone specific charges, being known. If a person is being targeted on the basis of indicators such as maleness, that could mean men are more likely to have their rights—including the right to life and the right to due process—violated by the use of armed drones.

In addition, if maleness is used as a criterion for identifying persons against whom lethal force can be used to kill rather than to capture, charge, and try, then men are being denied equal protection under the law on discriminatory grounds. When maleness is used as signifier for selecting who to target, it is direct discrimination.²¹

Human rights law also gives direction to the planning and preparation of operations involving the use of lethal force, the regulatory framework within which operations can take place, and conduct of investigations and remediation.²² Using maleness as a signifier of militancy in post-strike analysis could lead to discriminatory denial of access to an effective remedy, among other things.

17. Articles 48, 51(5)(b), and 57(1) of the 1977 Additional Protocol I of the Geneva Conventions

18. See Nils Melzer, *Targeted Killing in International Law*, Oxford: Oxford University Press, 2008 and A/HRC/14/24/Add.6, *op. cit.*

19. See for example A/HRC/14/24/Add.6, *op. cit.*; A/61/311, “Extrajudicial, summary or arbitrary executions: Note by the Secretary-General,” 5 September 2006, paras. 33–45; HRI/GEN/1/Rev.6 (1982), Human Rights Committee, General Comment No. 6, para. 3; OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., Inter-American Commission of Human Rights, Report on Terrorism and Human Rights, 2002. At a conference on drones strikes under international law at Wilton Park in April 2013, “participants reiterated that under international human rights law, the use of lethal force is prohibited as a violation of right to life except in very narrow circumstances. In particular, the absolute prohibition on the arbitrary deprivation of life means that the intentional use of lethal force would only be lawful in the context of a law enforcement operation, where an individual poses an imminent threat to another’s life and where the use of such lethal force is strictly unavoidable to protect life. In addition, such use would only be lawful where other less than lethal measures, including restraint, capture and the graduated use of force, are not possible. A number of participants queried whether, in light of these international human rights standards, armed drones could ever be used lawfully in a law enforcement context. Reference was also made to the direct relevance to drone strikes of other international human rights law provisions, notably the right to fair trial, including a right to presumption of innocence.” See “Conference report: Drone strikes under international law,” Wilton Park, 17–19 April 2003, available at <https://www.wiltonpark.org.uk/wp-content/uploads/WP1249-Report.pdf>.

20. A/HRC/14/24/Add.6, *op. cit.*, p. 8.

21. Article 7 of the Universal Declaration of Human Rights states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Article 26 of the International Covenant on Civil and Political Rights states, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

22. See for example the International Human Rights Standards for Law Enforcement, United Nations Human Rights Office of the High Commissioner Centre for Human Rights; and the International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights Office of the High Commissioner, 2011.

Using sex as a targeting criterion could also have implications for human dignity. Like racial profiling, the maleness signifier is based on stereotypical assumptions about who is a potential militant (see below for more on this). Just as there are objections to using racial profiling in law enforcement contexts, relying on sex profiling in armed conflict or counter-terrorism operations is fundamentally flawed.

UNDERMINING CASUALTY RECORDING, EVALUATION AND RESPONSE

*Most troublingly, [states] have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum.*²³

The use of sex to signify militancy during the post-attack assessment of a strike poses significant challenges for appropriate casualty recording, evaluation of operational value, legality, and political acceptability of the strike(s), and for learning lessons to enhance protection of civilians in the future.

CASUALTY RECORDING

Article 36 and others have argued that comprehensive and systematic casualty recording is required in order to ensure the rights of victims and to evaluate effectively the consequences of specific attacks and broader methods of warfare. Understanding the level and nature of civilian deaths should also inform assessments of the operational, legal, and political acceptability of attacks or patterns of attack.

Various studies have pointed to shortcomings in the assessment of casualties from drone strikes. Such assessments are limited by the reliance on images from drones for post-strike data-gathering. In addition, there is a consistent lack of transparency and in some contexts apparently a lack of systematic effort to gather data. Here again the question of whether such strikes are taking place in a law enforcement or conflict context determines the

23. A/HRC/14/24/Add.6, *op. cit.*, p. 3.

applicable legal obligations.²⁴ It is also well recognised that casualty assessments can result in politicised claims and counter-claims.²⁵

The use of sex as a criterion for determining militancy further compounds the challenges of accurately categorising casualties. The assumption that all military-age males killed or injured in a drone strike are combatants or militants would tend to produce systematic undercounting of civilians killed.²⁶ Given that in “signature strikes” the specific identities of targets are unknown, adopting such a presumption in the post-strike assessment process serves to create a self-reinforcing loop—with the same assumptions being used in both targeting and assessment. Associating maleness with militancy thus makes it difficult to critically assess attacks or produce accurate casualty recording. A presumption—even if framed as rebuttable and open to challenge—that males are militants places the burden of proof the wrong way around. It should not be about proving that someone was not a militant even though they are male, but rather the burden of proof should be on those executing the strike to prove militancy.

In the section below we note that this practice has practical implications for subsequent assessments, but it can also be argued that assuming the militancy of casualties on the basis of maleness has direct moral implications. Regardless of wider legal questions, it attempts to assert the justness of a person’s death on the basis of a characteristic that is insufficient for making such a determination.

24. See for examples Kate Hofstra and Elizabeth Minor, *Losing sight of the human cost: casualty recording and remote control warfare*, *Every Casualty and Remote Control*, Oxford Research Group, August 2014, p. 8, <http://ref.ec/rc>; UN Special Rapporteur Emmerson A/68/389*, *op. cit.*, p. 13.; Ross, Serle, and Wills, *op. cit.*

25. *Counting Drone Strike Deaths*, Columbia Law School Human Rights Clinic, October 2012, p. 16.

26. See letter from Elisa Massimino, President, Human Rights First, to Barack Obama, President of the United States, May 29, 2012, <http://www.humanrightsfirst.org/wp-content/uploads/Letter-to-President-Obama-on-Targeted-Killing.pdf>, arguing that “[s]uch a policy permits both the targeting of innocent civilians in violation of international law, and allows the administration to undercount the number of civilian casualties resulting from such strikes.”

OPERATIONAL, LEGAL, AND POLITICAL EVALUATION

Lack of transparency around current drone operations and targeting makes it difficult or even impossible for external actors to assess whether those using armed drones are in compliance with international legal constraints on the use of force under international humanitarian law and international human rights law.²⁷ Regardless of this overriding problem, the likely inadequacy of casualty assessments and casualty recording—as suggested above—may also work against accurate internal evaluation by those undertaking an attack as to how satisfactory a given strike turned out to be. Such evaluations may be framed in different ways by different stakeholders, but it is reasonable to expect that the use of force in a democratic society be subject to reviews, such as:

- From an operational perspective—to determine whether military, law enforcement, or counterterrorist objectives are being achieved;
- From a legal perspective—to make a judgment about the legality of a specific attack; and/or
- From a political perspective—to assess whether specific incidents or patterns of violence accord with the political orientation of an actor including, at the widest level, the public's assessment of violence being done in its name.

In so far as any association of maleness with militancy in targeting or casualty assessment produces a pattern of inaccuracy, it will subsequently affect evaluations in these or other relevant areas.

LEARNING LESSONS TO ENHANCE CIVILIAN PROTECTION

The NGO Center for Civilians in Conflict (CIVIC) has argued that systematic undercounting of civilian casualties “could lead the US to fail to inculcate

learned lessons and institute better precautionary measures against civilian harm in subsequent strikes.”²⁸ Looked at broadly, such a dynamic can play out at a local level, in terms of the type of strikes being undertaken in a specific context, or a macro level, for example in terms of the reassessment of whole categories of weapons. As an example, of the former, in Afghanistan, the International Security Assistance Force (ISAF)'s Civilian Casualties Mitigation Team reportedly investigates all allegations of civilian casualties with a view to using this data to “improve procedures in future operations to better protect civilians.”²⁹ In terms of the latter, data on civilian casualties has been a basis for calls to change practice, policy, or law on subjects such as anti-personnel landmines, cluster munitions, and the use of explosive weapons in populated areas.³⁰

The impact on casualty recording, evaluations, or learning of future lessons from any association of maleness with militancy is, of course, dependent upon the degree of inaccuracy that it introduces into those areas. The objections presented earlier, regarding the moral and legal problems of such an approach, stand as problems independent of the inaccuracy that this practice may produce. It is certainly not the contention here that every strike undertaken using an assumption of militancy on the basis of maleness will necessarily kill civilians. Rather, we are arguing that this is a morally unacceptable basis for assessing status, and in so far as it will introduce inaccuracy into subsequent analyses, these will be systematically biased towards an under-counting of civilians.

27. For example, in both Pakistan and Yemen, where drone strikes are being committed outside armed conflict, the involvement of the CIA “has created an almost insurmountable obstacle to transparency ... because, just as all secret services, it operates on the basis of neither confirming nor denying its operations” (A/68/389*, *op. cit.*, p. 13.) In any case, none of the strikes committed in either country can be assumed to be legal, because of their extrajudicial nature. In Afghanistan and other instances of armed conflict where militaries control drone strikes, there still remains very little transparency surrounding drone operations (see Ross, Serle, and Wills, *op. cit.*)

28. The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions, Columbia Law School Human Rights Clinic and Centre for Civilians in Conflict, 2012, p.32.

29. Hofsta and Minor, *op. cit.*, p. 8.

30. See Article 36, forthcoming, *Victimisation and violence.*

GBV, SEX, AND IDENTITY— BROADER IMPLICATIONS

Gender based violence (GBV) is violence perpetrated against a person based on their sex (male, female, other) or gender (socially constructed conceptions of masculine and feminine). Acts of GBV disproportionately impact women and girls, but boys, men, or others can be targeted for acts of violence on the basis of their sex, sexual orientation, or gender identity.³¹

While drone strikes are not necessarily targeting individuals solely *because* they are men of a certain age, those executing the strikes appear to be using sex as a signifier of identity for the purpose of assessing whether or not a subject is targeted, and/or whether a strike is allowed (i.e. taking into account the sex of others in the vicinity of the strike), and/or to determine the impact of a strike subsequently. The sex of the subject is not the motivation for the attack, but it is being used as one proxy for another identity—militant—which in turn provides the motivation. If people are targeted, or considered to be militants when proximate to other targets, on the basis of their sex then this constitutes a form of GBV.

Beyond the immediate moral and legal problems of such an approach, the use of sex as a signifier of identity in targeting or analysing strikes contributes problematically to reinforcing gender essentialisms, in particular:

Notions of women as passive and weak.

There is a long social history of constructing women as the “weaker sex,” especially in the context of conflict.³² Even in the relatively recent Geneva Conventions, women are framed primarily as objects in need of protection; it is noted that in all circumstances, “women shall be treated with all the regard due to their sex.”³³ Whether made on the basis of a

31. “Gender and disarmament,” *Reaching Critical Will*, 2013, <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4741-gender-and-disarmament>.

32. R. Charli Carpenter, “Women, Children and Other Vulnerable Groups: Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue,” *International Studies Quarterly*, Vol. 49, No. 2, June 2005, p. 302.

33. See F. Krill, *The Protection of Women in International Human-*

“biological” or a “social” model, the framing of women as vulnerable and in need of protection reproduces the idea that “women and children” are “innocent” while adult men are not.

Notions of men as violent and relatively expendable. Assuming all military-aged men to be “potential” or actual combatants or militants entrenches a tendency to support “violent masculinities”—a social construction in which masculinity is linked with preparedness to use military action and to wield weapons. This in turn is often used to construct “a feminized and devalued notion of peace as unattainable, unrealistic, passive, and (it might be said) undesirable.”³⁴ While such constructions promote a masculine role of “protecting” others, they also effectively devalue male life, producing a widespread acceptance of the relative expendability of men.

Such social constructions underpin the tendency for men to make up the majority of those participating in military roles in conflict.³⁵ But by working to reinforce such essentialisms, associating maleness with militancy increases the vulnerability of men in the immediate term, exacerbating other “gender-based vulnerabilities that adult civilian males face, including risks of forced recruitment, arbitrary detention,

tarian Law (1985), *International Review of the Red Cross*, No. 249, Available at: <http://www.icrc.org/eng/resources/documents/misc/57jmfj.htm> noting Article 12, C.I and C.II, Article 14, C.III; also Art. 27; C. IV; Art. 75 and 76, P.I. describing rape and enforced prostitution as attacks on women’s honour, rather than on their physical integrity or freedom or agency, is extremely problematic. The perception of women’s sexuality as a symbol of honour belongs to patriarchal cultures and is the very reason why rape and enforced prostitution are so common during armed conflict; See also *Women and explosive weapons*, Reaching Critical Will of the Women’s International League for Peace and Freedom, February 2014, and H. Durham & K. O’Byrne, *The dialogue of difference: gender perspective on international humanitarian law* (2010), *International Review of the red Cross*, Volume 92 Number 877 March 2010

34. Carol Cohn with Felicity Hill and Sara Ruddick, “The relevance of gender for eliminating weapons of mass destruction,” *Beyond arms control: challenges and choices for nuclear disarmament*, New York: Reaching Critical Will of the Women’s International League for Peace and Freedom, 2010, p. 147.

35. Though Charli Carpenter has noted that even where women constitute a high ratio of combatants, sex is used “as a shortcut to distinction” between civilians and combatants—see R. Charli Carpenter, “Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations,” *Security Dialogue* vol. 37, no. 1, March 2006, pp. 89–90.

and summary execution.”³⁶

More broadly, such assumptions reinforce established gender hierarchies that are recognised to work against the establishment and sustainment of a more equitable society. Framing women as weak and in need of protection continues to enable their exclusion from authoritative social and political roles, while reinforcing violent masculinities reproduces the power asymmetries and gendered hierarchies that underpin many acts of GBV against women and others.

Ideas about gender serve to shape, limit, and distort political discourse and political processes through which decisions are made—especially when it comes to armed conflict. The devaluation of certain perspectives, ideas, and interests because they are marked as “feminine,” coupled with the equation of masculinity with violence gives war positive value as a show of masculine power. At the same time the perception that not going to war is weak makes it more difficult for political leaders to take decisions not to embark on military action. Similarly, such constructions make it more difficult to cut military spending or engage in disarmament.³⁷

“INNOCENT” CIVILIANS

There is already a pernicious emerging tendency to split the category of civilians into the “innocent” and the “others.” As Charli Carpenter has noted, the sorts of orientations critiqued in this paper run the risk of turning “women and children” into a proxy for “civilian” and “obfuscating the existence of men in the civilian population.”³⁸ Accepting the orientation towards gender discussed here in relation to drone strike targeting and assessment is part of slide towards accepting the wholesale killing of men because they are men.

In February 2014, a deal was reportedly reached to allow “innocent civilians” to be evacuated from the Syrian city of Homs. While the Syrian government did

36. *Ibid.*, p. 296

37. Carol Cohn et al, *op. cit.*

38. R. Charli Carpenter, 2005, *op. cit.*, pp. 303–304. Carpenter cites examples from literature and photographs of the UN Office for the Coordination of Humanitarian Affairs and humanitarian aid organisations to demonstrate the ubiquitous nature of gendered references to civilians.

not define “innocent civilians,” it did highlight “women and children, the wounded and the elderly,” raising the prospect of men being considered “combatants” unless they were either clearly too young or too old.

In response to the announcement, the terminology of “innocents” was reportedly raised as a concern by the US government. US Ambassador Samantha Power argued that since the Syrian government “has described just about anybody living in opposition territory as a terrorist and has attacked them as such, we have reason on the basis of history to be very sceptical and frankly very concerned about anybody who falls into regime hands who comes from a part of the country that has been under opposition control.”³⁹

The US was right to object to this formulation of “innocent civilians”, but policies associating maleness with militancy in the context of drone strikes can undermine a claim to moral authority on this matter.

A WARNING REGARDING AUTONOMOUS TARGETING IN THE FUTURE

As a final comment, the linking of sex and militancy discussed here should raise concerns about a trajectory towards categorising the world according to sex and other broad, binary characterisations for the purposes of killing mediated by increasingly autonomous and complex systems. The practice of “signature” strikes could presage the emergence of decision-making by computers for such attacks.⁴⁰

Already certain weapon systems rely on broad signifiers to assess whether a certain object in an area of operations represents a valid target. In existing systems this may be a particular “heat-shape” pattern or a particular radar signature. As with the detailed functioning of drone strikes,

there is little transparency from governments about the specific proxy data that are used in such systems, the research they have done on how such proxy data relates to or overlaps with civilian objects, or the policy or legal implications of these processes.

Accepting systems, bureaucratic or physical, within which human beings can be identified as militants on the basis of their sex, whether before or after attacks, sets a dangerous precedent for such associations in the future. Such broad and morally unsustainable associations are incompatible with a requirement to ensure that individual uses of force or individual attacks are under meaningful human control. Rather, they promote a future in which human control is limited to authorizing the application of mechanized bureaucratic processes, and individuals are killed without another human being knowing the reason for which the action took place.

39. Margaret Besheer, “UN Welcomes Humanitarian Access to Homs,” *Voice of America*, 6 February 2014, <http://www.voanews.com/content/syria-announces-plan-for-civilians-to-leave-homs/1845758.html>.

40. “Drone strikes raise fundamental concerns for humanitarian protection,” *Article 36*, 20 June 2012, <http://www.article36.org/weapons-review/drone-strikes-raise-fundamental-concerns-for-humanitarian-protection/>.

CONCLUSION

While recognising that the actual policies and practices that it critiques remain opaque, this paper has raised distinct concerns regarding the apparent association of maleness with militancy during the targeting of attacks or post-strike analysis. The primary objection to such a practice is moral, reinforced by the reading that such an approach goes against certain legal presumptions within international human rights and humanitarian law.

In addition, in so far as such an approach produces inaccuracies in the classification of people, these inaccuracies will systematically undermine critical analysis of the actions being undertaken. It will also undermine better civilian protection in the future. Furthermore, such practices reinforce existing problematic social orientations to gender, constitute a form of gender-based violence, and set a dangerous precedent for the categorisation of people as targets by autonomous weapons.

The identification of people as objects for attack will always be fraught with challenges and difficulties, but using sex or gender to systematically remove a person's claim to protection as a civilian is unacceptable.

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