

DRONES AND INTERNATIONAL LAW

Rebecca Mignot-Mahdavi explores the ways in which war, technology, and the law interact and reshape one another in the context of counter-terrorism. She demonstrates that drone programs are techno-legal machineries that facilitate and accelerate the emergence of a new kind of warfare. This new model of warfare is individualized and dematerialized in the sense that it focuses on threat anticipation and thus consists in identifying dangerous figures (individualized warfare) rather than responding to acts of hostilities (material warfare). Revolving around threat anticipation, drone wars endure over an extensive timeframe and geographical area, to the extent that the use of drones may even be seen, as appears to be the case for the United States, as part of the normal functioning of the state, with profound consequences for the international legal order.

REBECCA MIGNOT-MAHDAVI is Lecturer in International Law at the University of Manchester. She is a leading expert on issues of global security governance. Her work reflects on states' evolving legal and policy capacity to deal with security threats, where new forms of non-state transnational risk, counter-risk strategy, and technology are in play. She has also been a guest lecturer at Sciences Po since 2018, an associate fellow at the T.M.C. Asser Institute (University of Amsterdam), a research fellow at the International Center for Counter-Terrorism, and a member of the Board of Directors of the International Society for Military Law and the Law of War.

CAMBRIDGE STUDIES IN INTERNATIONAL
AND COMPARATIVE LAW: 180

Established in 1946, this series produces high quality, reflective and innovative scholarship in the field of public international law. It publishes works on international law that are of a theoretical, historical, cross-disciplinary or doctrinal nature. The series also welcomes books providing insights from private international law, comparative law and transnational studies which inform international legal thought and practice more generally.

The series seeks to publish views from diverse legal traditions and perspectives, and of any geographical origin. In this respect it invites studies offering regional perspectives on core *problématiques* of international law, and in the same vein, it appreciates contrasts and debates between diverging approaches. Accordingly, books offering new or less orthodox perspectives are very much welcome. Works of a generalist character are greatly valued and the series is also open to studies on specific areas, institutions or problems. Translations of the most outstanding works published in other languages are also considered.

After seventy years, Cambridge Studies in International and Comparative Law sets the standard for international legal scholarship and will continue to define the discipline as it evolves in the years to come.

Series Editors

Larissa van den Herik

*Professor of Public International Law, Grotius Centre for
International Legal Studies, Leiden University*

Jean d'Aspremont

*Professor of International Law, University of Manchester and
Sciences Po Law School*

A list of books in the series can be found at the end of this volume.

DRONES AND INTERNATIONAL LAW

A Techno-Legal Machinery

REBECCA MIGNOT-MAHDAVI
University of Manchester



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
978-1-009-34655-9 — Drones and International Law
Rebecca Mignot-Mahdavi
Frontmatter
[More Information](#)



Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781009346559

DOI: 10.1017/9781009346603

© Rebecca Mignot-Mahdavi 2023

This publication is in copyright. Subject to statutory exception and to the provisions
of relevant collective licensing agreements, no reproduction of any part may take place
without the written permission of Cambridge University Press & Assessment.

First published 2023

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Mignot-Mahdavi, Rebecca, 1992- author.

Title: Drones and international law : a techno-legal machinery / Rebecca Mignot-Mahdavi,
University of Manchester.

Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2023. |

Series: Cambridge studies in international and comparative law | Includes bibliographical
references and index.

Identifiers: LCCN 2022058740 (print) | LCCN 2022058741 (ebook) | ISBN 9781009346559
(hardback) | ISBN 9781009346597 (paperback) | ISBN 9781009346603 (epub)

Subjects: LCSH: Uninhabited combat aerial vehicles (International law) | Drone aircraft—Law
and legislation.

Classification: LCC KZ6687 .M54 2023 (print) | LCC KZ6687 (ebook) |
DDC 341.6/3—dc23/eng/20230105

LC record available at <https://lcn.loc.gov/2022058740>

LC ebook record available at <https://lcn.loc.gov/2022058741>

ISBN 978-1-009-34655-9 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence
or accuracy of URLs for external or third-party internet websites referred to in this publication
and does not guarantee that any content on such websites is, or will remain,
accurate or appropriate.

To my mother, Sophie Mahdavi

CONTENTS

<i>Foreword</i>	ix
BY NEHAL BHUTA	
<i>Acknowledgments</i>	xii
1 Drone Programs Reconfiguring War, Law, and Societies around Threat Anticipation	1
1.1 Drone Programs as a Network of Interacting Factors: Law × Technology × Military Strategy × Enemy	3
1.2 Compiling the Textual, Bureaucratic, and Material Traces of Drone Programs as Techno-Legal Machineries	9
1.3 A Techno-Legal Machinery	14
2 Contexts	17
2.1 Afghanistan: US Drone Operations	18
2.2 Yemen: US Drone Operations	20
2.3 Pakistan: US Drone Operations	23
2.4 Somalia: US Drone Operations	24
2.5 Iraq and Syria: US and UK Drone Operations	26
2.6 Libya: US Drone Operations	29
2.7 G5 Sahel: French Drone Operations	30
2.8 Common Patterns of Legal Rationale	35
3 The Institutionalization of Drone Programs	41
3.1 Transnational Terrorist Networks: Calling for a Systemic Individualization of War	43
3.2 Drones: The <i>raison d'être</i> and the Stabilizing Force of a Bureaucratic Machinery	53
3.3 The Normalizing Power of Legal Rationales	68
3.4 Testing the Institutionalization Hypothesis: The Interchangeability of Bureaucrats	76
3.5 Concluding Remarks	84

4	Targeting Hostile Individuals	87
4.1	The Extension of the Right of Self-Defense Conditions in a Cascade	89
4.2	Drones: Tailor-Made Machines for Individualized Warfare	108
4.3	Concluding Remarks	116
5	Endless Wars	119
5.1	Infinite Affiliation? The Uncertain Reevaluation of the Conflict Characterization and End of Conflicts	122
5.2	Infinite Action? Direct Participants in Hostilities Outside Areas and Moments of Ongoing Hostilities	138
5.3	Infinite Knowledge or Infinite Enmity?	150
5.4	Concluding Remarks	153
6	Anywhere Wars	155
6.1	The Absence of a Geographical Limitation of Conflicts in the Law	160
6.2	Drone Programs' Targeted and Anywhere Wars: First Encounter with the Perils of Precision	163
6.3	The Failed Attempts to Establish a Legal Constraint to the Geography of Drone Wars	175
6.4	Concluding Remarks	180
7	Rituals of Sovereignty	182
7.1	Infiltrating the Bodies of Populations Living under Drones: Extension of the Operating State's Power	184
7.2	The Law as an Instrument to Tame the "Other Inside": States	196
7.3	The Law as an Instrument to Annihilate the "Other Outside": Jihadist Groups	199
7.4	Concluding Remarks	207
	Epilogue	211
	<i>Bibliography</i>	216
	<i>Index</i>	256

FOREWORD

As I write this Foreword, twenty-one years to the day since the terrorist attacks of September 11, 2001, one might reasonably ask, “Do we need another book on armed drones?” The expansion and proliferation of the use of the technology in the service of the targeted killings of suspected terrorists has engendered macabre fascination and outraged denunciation since the first, shadowy strike conducted by the US against Qa’id Salim Sinan Al-Harithi in November 2002. Previous Israeli uses of the tactic of targeted killing had been criticized by the US government as extrajudicial executions, but it has been widely documented that the US embraced targeted killing with both arms after it declared a global conflict with Al-Qaeda and “associated” non-state armed groups. As the conflict in Afghanistan dragged on, and a new and even more destructive conflict in Iraq was initiated by the US-led invasion, the global use of drone technology to conduct not only surveillance and intelligence operations (“finding” and “fixing”) but also striking at targets (“finishing”) has proliferated: in addition to Yemen, Afghanistan, Pakistan, and Iraq, Somalia, Mali, Syria, and Libya were places in which drone strikes took place against suspected non-stated armed groups. Most recently, Osama bin Laden’s deputy Ayman al-Zawahiri was killed on the balcony of his safe house in Kabul on July 31, 2022, showing unequivocally that such strikes will continue even after – or perhaps because of – the end of “boots on the ground” in Afghanistan. Several other countries, including France and the UK, have in recent years adopted both the legal rationales and the technological instruments necessary to conduct drone strikes.

The evolution of the technology, bureaucracy, legal rationales, and institutional routines enabling this practice has been written about from a wide variety of angles over the last twenty years: journalistic, theoretical, legalistic, and more. Almost all studies have focused on the US program, overlooking the emerging adoption of the practice and technology by European states and others such as Australia. But Rebecca

Mignot-Mahdavi's account transcends these narrower approaches and offers instead a holistic vantage point on what she calls a "techno-legal machinery" that has become durable and continuous: an assemblage of legal rationales that stretch and reshape core legal concepts in the international law of self-defense and international laws of war; an extensive set of affordances enabled by multiple technological developments that have been assembled around and united through legal arguments and bureaucratic routines; a steadily growing infrastructure of airstrips, sensing equipment, data collection and processing, control rooms, satellite links, and computational power. Mignot-Mahdavi shows us that, taken as a whole, this assemblage has not only become highly stable and self-perpetuating, but it is now continuously future-oriented in its preoccupation with new and emerging threats.

The promise of an organized and permanent apparatus of surveillance, intelligence gathering, and data collection and processing is intensified and accelerated by innovations in machine learning and big data analytics. This is exemplified by the US Department of Defense's 2017 creation of the Algorithmic Warfare Cross-function Team, "Project Maven," to maximize the exploitation of 700,000 hours of drone footage and other data gathered during counterinsurgency drone operations.¹ The aim of this special taskforce was to bring artificial intelligence / machine learning techniques to bear on this vast data archive, in order to yield more actionable battlefield intelligence. Project Maven was recently transferred to the authority of the National Geo-Spatial Intelligence Agency in order to accelerate the development of "computer vision efforts that will deliver automated GEOINT detections to both intelligence analysts and warfighters. . . . These efforts will give us our millions of eyes to see the unseen."² The infamous Gorgon Stare³ of the Predator drone is thus not just a piece of hardware. It is also a metaphor for a permanent state of

¹ Richard H. Schulz and Richard D. Clarke, "Big Data at War: Special Operations Forces, Project Maven, and Twenty-First-Century Warfare," August 25, 2020, Modern War Institute Blog, <https://mwi.usma.edu/big-data-at-war-special-operations-forces-project-maven-and-twenty-first-century-warfare/>.

² Vice Admiral Robert Sharp, then-director of the National Geospatial-Intelligence Agency, quoted in Theresa Hitchens, "Pentagon's Flagship AI Effort, Project Maven, Moves to NGA," April 27, 2022, *Breaking Defense*, <https://breakingdefense.com/2022/04/pentagons-flagship-ai-effort-project-maven-moves-to-nga/>.

³ Arthur Holland Michel, *Eyes in the Sky: The Secret Rise of Gorgon Stare and How It Will Watch Us All* (Mariner Books, 2019).

anticipation and threat awareness afforded by the techno-legal machinery in which drones are a central actant.

Mignot-Mahdavi's book allows us to better grasp this state of affairs and see its implications more clearly. In the process she has assembled an indispensable archive of the present, piecing together factual and technical information, reportage, legal analysis, and theoretical constructs from a vast literature. The role of law is placed within this machinery not simply as rule or standard, permission or prohibition. Rather, it emerges as *the* indispensable medium for the construction and articulation of many moving parts – it authorizes, to be sure, but it also backstops the creation of new bureaucratic roles and institutional routines, and makes possible the continuity of the drone program across four different US administrations. The premises of the global battlefield, the continuous combatant, the unending *casus belli* provided by the continued *existence* of designated terrorist groups, the unwilling or unable state lacking effective sovereignty: all of these legal devices are soberly reconstructed and examined, not with the apoplexy of someone who believes that law can save us from institutionalized violence but with a coolly diagnostic eye of the analyst seeking to reverse engineer a system that now seems to run itself. Each of these legal arguments was individually controversial over the last twenty years; taken as a whole and operationalized into a standing bureaucracy of threat identification and lethal force application, they represent a revolution in the law governing the use of force by one state in the territory of another. The asymmetry in the application of these concepts should be self-evident: We find ourselves plausibly debating the legality of drone strikes over Misrata, but certainly not over Manchester or Munich. The intuitive hierarchy of sovereignty presupposed by this contrast is given legal form by the constellation of legal concepts that have been recalibrated in order to stabilize the techno-legal machinery of drone strikes. As Mignot-Mahdavi shows, this hierarchy of sovereignty brings with it a hierarchy of humanity: only some, such as denizens of Yemen or North-West Pakistan, will be compelled to bear the losses eventuating from the functioning of this vast apparatus.

The originality and insight yielded by the analysis and research found in this book answer the question I posed at the outset of this Foreword, “Do we need another book on armed drones?": Yes, we need this one.

Professor Nehal Bhuta
Chair of International Law, University of Edinburgh

ACKNOWLEDGMENTS

My unlimited thanks go to my mother, Sophie, and my father, André, for offering me the keys to explore what is visible to the eyes, but not always easy to fetch and cherish, and what is more imperceptible in the dark. Every day of my life, I have been lucky enough to get inspiration and unwavering support from two loving and free-spirited human beings who never stop learning, trying to understand the complexities of the world, and do it always with tolerance for the vulnerable, *esprit critique*, indignation but also playfulness and joy. *Merci, maman, de me porter à tout âge pour penser, oser et jouer – ce travail t’est dédié à toi, à ta force et à ta douceur, aux racines et aux ailes que tu t’es et m’as données, à ta liberté.* From a distance or close-up, my family’s support and love gave me serenity and rootedness. I also wish to thank my friends, for being such inspiring, trustworthy, tolerant, strong, and loving women.

I would like to acknowledge the generosity, with their time and mind, of Nicola Hargreaves, Professor Sarah Cleveland, Professor Steve Ratner, Professor Avril Haines, Professor Jennifer Welsh, Professor Damien Scalia, Professor Dapo Akande, Professor Stéphanie Hennette-Vachez, and Professor Bernard Harcourt. Discussions with colleagues of the Human Rights Institute of Columbia Law School, of the Individualization of War Project, of the European Forum on Armed Drones, and of the EUI International Law Working Group, and also with those whom I met at conferences and workshops, especially at the Lieber Institute of WestPoint and at the ESIL Conference in Athens, have been very constructive and inspiring. In the process of turning the thesis into a book, Sara Kendall, Loïc Azoulai, and Claus Kress have been the most generous readers and examiners I could have wished for. I will carry the memory of our discussion on December 11, 2020, forever with me. I also wish to thank the Asser community and in particular Janne Nijman, Christophe Paulussen, Sofia Stolk, Geoff Gordon, Rумыana van Ark, Berenice Boutin, and Klaudia Klonowska. I am finalizing this

book in my new home, the Manchester International Law Center, where I have again met inspiring and kindhearted colleagues and friends.

I am also forever grateful to the students who followed my classes at the University of Nanterre, Sciences Po, the University of Amsterdam, and the University of Manchester. Thank you for embarking on the learning processes I invite you on with rigor, enthusiasm, and creativity. You, and the students I will meet in the future, give me the impetus to carry out these projects. The same goes for the inspiring teachers and professors I have met along the way, from a very young age; those who were passionate about sharing with us tools that would help us think independently and critically: from Mr. Chabanel in fourth grade, Mrs. Blasco and Mr. Morris in secondary school and high school, to Professor Goulven Boudic, Professor Charlotte Girard, Professor Vaurs-Chaumette, Marina Eudes, Professor Champeil-Desplats, Professor Julian Fernandez, and, of course, Professor Poncela (and through her, I dare say, Michel Foucault!).

Professor Bhuta, Nehal, your guidance has exceeded all expectations I had when entering this journey. Thank you for believing in this project and my ability to carry it out; for giving me the space to freely explore my intuitions even when they were at the stage of Foucauldian babbling. Thank you for helping me to navigate at the right pace, in the right direction, and for giving me the support and inspiration to turn seemingly tumultuous seas into friendly ones. My heartfelt thanks for making this exploration one that never ceased to be intellectually stimulating, but also one of mutual respect, recognition, and friendship. One that I ended with nostalgia and, above all, with lasting memories of discussions behind gigantic piles of books, from Schifanoia to Edinburgh.

