

Drones, Technology, and the Normalization of Exceptionalism in Contemporary International Security

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Abstract

This article focuses on the normalization and institutionalization of (previously) exceptional security measures and the correspondent challenges to the constitutional foundations of Western democracies. It argues that established mechanisms of legal and political accountability are increasingly being challenged by technological developments with an impact on security practices. Technological developments unfold at a quicker pace than legal and constitutional change, and this mismatch can be critical.

Resumo

Drones, Tecnologia e a Normalização do Excepcionalismo na Segurança Internacional Contemporânea

O artigo foca-se na normalização e institucionalização de medidas de segurança (que antes eram excepcionais) e os correspondentes desafios aos fundamentos constitucionais das democracias ocidentais. Argumenta-se que os mecanismos de responsabilização jurídica e política são crescentemente postos em causa pelos desenvolvimentos tecnológicos, com inerente impacto nas práticas securitárias. Os desenvolvimentos tecnológicos ocorrem a um ritmo bem mais elevado do que os necessários ajustamentos jurídicos e constitucionais, e este desajustamento pode ser crítico.

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Introduction

The international security environment that emerged after the terrorist attacks of 11 September 2001 in New York and Washington (hereafter 9/11) introduced new dynamics in the practice of international security. The most significant of these changes did not occur in the provision of insecurity; rather, they happened in the way liberal democracies have responded to threats they have been confronted with. Exceptional security measures focusing on individuals such as torture, extraordinary renditions, indefinite detentions, unauthorized surveillance, and targeted killings existed before 9/11. However, since then, they became widespread, to a larger extent openly recognized and accepted by governments, and, most importantly, they are gradually becoming an integral part of the normal instruments to fight non-state violence. To some extent, the post-9/11 era is more acutely characterized by the changes observed in the way Western democracies fight security threats than by the threats themselves these democracies are confronted with.

Although some of these practices, including torture and extraordinary rendition, have decreased in recent years, others have been internalized by Western democracies and its employment has been expanded. Mass surveillance, reliance upon digital metadata, and the use of drones for surveillance (Wall and Monahan, 2011), data gathering, and targeted killings are part of a *new normal*, in which notions of time and space are contested, and where technological asymmetries amplify power relations.

By directly causing the death of the object of those actions, targeted killings bring illiberal practices to its ultimate level. For the purpose of this article, the main issue at stake is not the existence of targeted killings. Countries such as Russia, Israel or the United States (US), among others, have been employing this extreme practice for some years – in some cases, even before 9/11 and without drones. What constitutes a novelty is the fact that these actions became no longer an exception when countering terrorism. As will be demonstrated below, the number of US targeted killings observed during the last years has increased exponentially, turning the Obama mandates into what some have labelled as the drone presidencies (Holmes, 2013; Bowden, 2013). Importantly, targeted killings carried out with drones have been officially recognized by the British government and have been a common practice by Israel; although its origin dates back a few decades, targeted killings (with drones or by other means) became a common practice by the Israeli security forces since the second intifada that started in 2000 and lasted until 2005.

In this context, the article explores the consequences of what is labelled here the *normalization of exceptionalism*, i.e. the process through which measures that until recently were seen as exceptional and last-resort options become normalized and institutionalized, and treated as a *normal* instrument in addressing identified security challenges. In concrete, it inquires the way targeted killings challenge constitu-

tional pillars of liberal democracies and the relationship they have with war and conflict.

Several factors concur for explaining the recent rise of the usage of targeted killings by Western democracies, chiefly the US. Cost-benefit analysis (whatever the nature of the cost), higher preciseness of the strikes, or the mere existence of the drone technology are to be found among the most commonsensical ones. While recognizing a multitude of arguments, the research conducted here, though, understands these killings as a form of risk management that goes beyond legal concepts such as preemption or self-defense¹. Moreover, the risk management reasoning enables a closer analysis of the concept of exceptionalism as well as the implication of its usage for challenging the constitutional foundations of liberal democracies.

The article starts with a debate on the way the risk literature has been employed for explaining post-9/11 responses to security threats. In addition, it will look into the concept of exceptionalism, in order to define it and operationalize it further on. In the following section, it will briefly revisit the process through which individuals became the centre of international (in)security concerns, aiming at understanding whether targeting individuals facilitates international conflict. Afterwards, the article addresses the issue of targeted killings. It will do it by looking into the way this practice has become normalized, by analyzing the number of incidents in recent years. Finally, it will explore and apply the concept of exceptionalism to investigate the challenges currently posed by targeted killings to liberal democracies.

Importantly, the article understands the challenges posed by targeted killings via drones to the constitutional foundations of liberal democracies as illustrative of a broader trend by which technological developments impact security practices and expose our societies to new dynamics.

Security, Risk and the Exceptional

The period towards the end of the Cold War closed an era that, despite being marked by severe concerns, was to some extent more predictable for decision-makers in the field of security. Up until that point, leaders and societies in Western democracies, and mainly in the US, faced one major, clear identifiable threat. But advances in technology, societal changes, and the emergence of environmental concerns, among other factors, gradually created a society increasingly concerned with the future and, concomitantly, with the risks it faced or it could face. Sociologists such as Anthony Giddens and Ulrich Beck identified these trends arguing that this emerging risk-society was a “systematic way of dealing with hazards and insecurities induced and introduced by modernization itself” (Beck, 1992, p. 21).

1 See Fisk and Ramos (2016) for a compilation of studies on preventive action.

Within the risk reasoning, societies fear the future, but not only the threats that they know already; they also fear the unknown unknowns, and it is their awareness of the existence of the unknown that makes societies willing to rely on precautionary action to reduce their exposure to risk.

The impact of 9/11 on Western societies expanded this notion and has taken the fear of the unknown into a new level. The Islamist terrorist threat, with its non-conventional and guerrilla characteristics and religious inspiration, had the precise qualities that could operate this expansion of the concept of risk society. This has been possible because the risk society has the fear of the enemy as a constitutive principle (Aradau and Van Munster, 2007 and 2009). Beck advocated that new risks are uncontrollable, unpredictable and potentially affect everyone; in the immediate post-9/11, the Islamist terrorist threat seemed to have precisely those characteristics. Also in the context of the post-9/11, other authors have understood risk as a legitimizer of a precautionary logic, which dictates that any level of risk is now unacceptable and should be avoided at all costs (Rasmussen, 2006; Petersen, 2011).

The precautionary logic is a cornerstone in the risk literature. But most importantly, it is also the notion that bridges this reasoning with idea of exceptionalism. Exceptionalism is part of precautionary governmental processes that challenge law's relationship with the future, institutionalizing the above – mentioned fear of the enemy as a constitutive principle for the risk society. According to Jef Huysmans, exceptionalism reshapes political communities in three ways: it redistributes fear and trust; it reconsiders inclusion and exclusion; and it institutes a predisposition towards violence (Huysmans, 2006 and 2008). It is precisely this last consequence of the exceptional condition that will be explored below. In parallel with other factors the way Western societies react to the fear of the unknown has contributed to changes in the nature of war and conflict. In the words of Christopher Coker (2009), today's practices of war and intervention should be understood in terms of tactics rather than strategic goals, and management rather than control. According to this logic, targeted killings seem to be a form of risk management (Kessler and Werner, 2009) that has strong constitutional implications. But how did we get here? How did targeting individuals come to be seen as the most efficient way of doing counter-terrorism? The roots of this logic can be understood as a result of the individualization of (in)security, a theoretical and political process that will be addressed in the section below.

Sanctioning Individuals

In the context of the restructuring of international politics in the post-cold war era, academics working on security studies identified a shift in the framework and referent objects of security. Until that point, the state had been the main referent object of security, i.e., an entity that is taken as a focus for analysis in security studies, or

“that which is to be secured” (Peoples and Vaughan-Williams, 2015, p. 4). But during the 1990s, security studies academics from the Schools of Aberystwyth, Copenhagen, and Paris, among others, developed theoretical thinking having the individual as the main referent object of security (Booth, 1991; Wyn Jones, 1995; Krause and Williams, 1997; Buzan and Hansen, 2009), theorizing about the processes by which security is constructed (Buzan, Waever and de Wilde, 1998) and the sociological dimensions of security practices (Bigo and Tsoukala, 2008). These critical security studies found fertile ground for widening and deepening security’s research agenda in some political developments taking place during the same time. The United Nations Development Program of 1994 and its introduction of the concept of Human Security are among the most relevant ones, illustrating this individualization of security.

In parallel, the post-Cold War period inaugurated the “sanctions decade” (Cortright and Lopez, 2000), a decade that witnessed a relevant increase of the instauration of United Nations (UN) sanctions against states such as Libya, Iraq, Yugoslavia, Haiti, Liberia and Afghanistan, among others. Whereas the main cause of legitimacy of these sanctions was the insecurity of their (national) individuals and the impossibility of emancipation, the massive use of this instrument also had negative consequences on those very same individuals. By using the state as the framework for sanctioning, the implementation of this regime had severe unintended consequences, of which the main example is the humanitarian crisis in Iraq in the 1990s (van Sponeck, 2006). Therefore, using the state as a reference for punishing led to collective punishing and to turning people against the external punishers rather than against their leaders (Wallenstein, 2005, p. 229).

The way found for facing these counter-productive measures was to individualize the recipients of the sanctions, due to the role of the former in fabricating the lack of security of their citizens. These targeted sanctions, also called smart sanctions, targeted only the individuals or organizations that were linked to a particular censurable conduct. By this, the state was no longer the referent framework for implementing the sanctions because *individuals* were the agents of insecurity. These dynamics contributed to detaching the concept of insecurity from the one of state. This *individualization of insecurity* is especially apt for ensuring international security against violence by non-state actors. This is particularly well illustrated in the UN sanctions regime against individuals affiliated with the Taliban and bin Laden, introduced in 1999 with UN Security Council Resolution 1267, a regime further expanded after 9/11 through a series of other resolutions.

Recent Developments

A similar dynamic was observed in the aftermath of the terrorist attacks of 9/11. Following an initial phase where conventional war against two states (Afghanistan and Iraq) constituted the core of the “war on terror”, the reference point quickly

changed from the state to the individual. But that fact did not necessarily reduce the intensity of the conflict. What it did change was the way the US and its allies, having the focus on individuals – rather than on states – dealt with the fear of the unknown. Seeing individuals as the main sources of (perceived) high levels of diffused insecurity led Western democracies to change their relation to law and their constitutions. Targeted killings can be seen as yet another case of illiberal practices that were adopted in the course of the “war on terror” (Bigo and Tsoukala, 2008), grouped together with widespread use of torture or massive surveillance. These practices not only challenge the rule of law in Western societies and the security vs freedom equation, but also fundamentally overrule the principle of reciprocity (Parisi and Ghei, 2003), a fundamental pillar of the just war tradition and in international law. The long shadow of 9/11 witnessed the end of reciprocity (Jenkins and Godges, 2011; Osiel 2009). But the implications of targeted killings go even beyond that, as will be demonstrated in the following section.

Targeted Killings and Exceptionalism

Is there anything riskier and more threatening to constitutionalism and the rule of law than the state of exception? Under which conditions do democracies remain democratic under the exceptional? What happens when the exceptional becomes the normal? These questions are fundamental cornerstones of the debate around the rise of the number of targeted killings. The number of drone strikes carried out during the outgoing Obama Administration are ten times higher than the ones carried out during the previous Bush Administration. The numbers precise related to this practice are difficult to calculate due to the secrecy that involves the drone strikes, covering both the decision-making process and the aftermath of the attacks. Additionally, the information provided officially is either non-existent or, at best, highly incomplete, and ground reports by victims are often misleading and can be exaggerated. Therefore, investigative journalism organizations and other NGOs such as The Long War Journal, the Bureau of Investigative Journalism, Arwars.org, or Drone Wars UK, are widely perceived as the most reliable sources for providing data. According to the Bureau of Investigative Journalism, there were 373 strikes in Pakistan between 2009 and January 2017, causing between 2,499-4,001 casualties. As for Yemen, the US covert action has materialized in 143-163 confirmed drone strikes with a total of 592-860 casualties. In Somalia, where US covert action started in 2007, there were 32-36 drone strikes with a death toll of 242-418. And in Afghanistan, from 2015 only, there are reported 1308-1309 strikes having killed 2,390-3,050 people. A big percentage of these casualties are confirmed civilians². As for Israel,

2 All the numbers were retrieved from <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>. They were lastly updated on 20 January 2017.

Falk (2015) provides a list with 12 of the most relevant targeted killings carried out by Israel between 2000 and 2010. How can we understand these dynamics?

It can be argued that inter-state conflict has severe costs, not only financial, but also political and social ones. Starting a conflict is a difficult and extreme decision because it implies troop and warfare deployment, casualties, political pressure, and a high financial burden. None of these aspects is observed to the same extent when the conflict is against individuals or smaller groups and the tactic used is targeted killings via drones. This manifestation of Beck's individualization is reinforced by the secrecy that involves these practices. It can be argued that the smaller (financial, political and social) costs involved in targeting individuals as opposed to targeting states contribute to the normalization of exceptional security measures. But this explanation is highly incomplete. In a different social context, in a different time, the numbers revealed above would have created outrage and social mobilization from Western constituencies. What are the forces that explain this absence of self-reflection and the continuation of such a practice?

Understanding the way modern societies relate to the unknown provides new elements to answering that question and for understanding the way that drone technology is changing the nature of war and conflict. As mentioned by Coker (2009), risk became the language of war in everything but the name. The way we think about war – when it is justified, how it should be fought and how it is perceived – is now fully dominated by the notion of risk management. In this sense, the characteristics of drone technology (at least considering how it has been used outside battlefields) impact the nature of modern conflict, expanding the battlefield to a global scale without observing principles of last resort, imminence of threat, and proportionality. By becoming the language of war, then, risk and drones facilitate the state of exception, challenging principles of international law. It is this line of reasoning that led Kessler and Werner (2008) to understand targeted killings as a form of risk management, blurring categories of peace and war, legal and political, and going beyond established mechanisms of accountability. I will proceed now to show that the implications of these actions also affect fundamental principles of constitutionalism.

Constitutional Challenges

The vast majority of targeted killings observed in the last years took place in Pakistan, Yemen and Somalia, countries with which the attacking country is not at war. Being outside the state of war has several legal implications. One of them is that the engagement on those specific conflicts and the authorization for those killings do not follow the constitutional procedures that, in liberal democracies, ensure the exceptionality of war. War, or the resemblance of it, is not exceptional anymore. The laws of war (McMahan, 2009) were made *by* states *for* states, and the political

systems of liberal democracies created mechanisms making war against other states an exceptional event. When the agents of insecurity become the individual, those constitutional checks and balances that ensure the exceptionality of war are not observed. Although it should be underlined that international law does not prohibit targeted killings per se, the tight criteria established for allowing that practice are often not observed. And even though the debates on the legal interpretation of those criteria are complex and not consensual, it is beyond discussion that many attacks are straightforwardly illegal, many cause illegitimate collateral damage, and many are decided in the absence of enough information on the target.

The Separation of Powers' Dimension

Decision-making on targeted killings challenge liberal conceptions of separation of powers, a principle that has been a pillar of constitutional democracies for more than two centuries. By relying on Presidential/executive power, they do not engage the judicial branch in a process that is seen by many as extra-judicial execution. Issues such as fair trial, right to defense and right to be heard, assured in civil courts, are not observed in the case of targeted killings using military drones. Parliamentary/legislative control (or Congress control, in the case of the US) is also highly disregarded, leading to the non-verification of the dynamics of checks and balances (Bradley and Goldsmith, 2005). Even though the due process clause can be alleviated in exceptional cases, many international lawyers would argue that it cannot be ignored on a systematic way (Fiss, 2015).

Efficiency, cost reduction, and autonomy are presented as positive features of drone usage. The combination of these characteristics allowed the US to decimate the Al-Qaeda leadership in the Af-Pak region, for example. But it also led to a massive number of casualties that are not justifiable. It led to an exponential increase of extrajudicial killings, therefore having the executive branch overtaking functions of the judicial. In the words of Peter Singer (2012):

“America’s founding fathers may not have been able to imagine robotic drones, but they did provide an answer. The Constitution did not leave war, no matter how it is waged, to the executive branch alone.”

The Legitimacy of the Targets

US drone activity has also expanded the notion of “legitimate target” to a point not supported by international law, especially with regards to the so-called “signature strikes”, by which unidentified militants are targeted on the basis of their network and behavior. At the same time, it has inverted the burden of proof in the definition of what constitutes a militant, presuming that someone of a given age and of a given sex in a particular context is a militant and therefore a legitimate target.

The authority in which the outgoing Obama Administration found itself invested is far broader than what the Constitution and international law allow. As advocated by the American Civil Liberties Union, outside of armed conflict, both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury. An extrajudicial killing policy under which names are added to CIA and military “kill lists” through a secret executive process and remain there for months is plainly not limited to imminent threats.

Drones are Appealing to Democracies

From a different perspective, it is worth noting that the majority of the countries possessing drones are well-established democracies. At first sight, this may not mean anything new. Democracies such as the US, Israel, France and the UK possess the most advanced weaponry available, including nuclear devices. Therefore, having the most advanced drones does not come as a surprise. From a theoretical point of view, though, there could be more sophisticated explanations for why the checks and balances, as well as the separation of powers typically observed in democratic states, are not observed in the cases of targeted killings using these weapons.

Frank Sauer and Niklas Schörning argue that drones are particularly appealing to democratic states because their advantages are precisely related to the reasons why democracies go to war so exceptionally. These authors claim that “the specific interests and norms that are conventionally taken to be pivotal for democratic peacefulness – the need to reduce costs, the short-term satisfaction of particular ‘risk-transfer rules’ for avoiding casualties, and the unkeep of a specific set of normative values – constitute the special appeal of unmanned systems to democracies” (Sauer and Schörning, 2012, p. 365). When combined with a broad perception about the need for precautionary action, all these factors come together and turn something highly exceptional (a decision to kill an individual) into a tool like any other. The numbers presented in this article reveal that targeted killings have become normalized at the expense of strong constitutional breaches. The nature of war and conflict has now fundamentally shaken liberal democratic societies. To conclude with the words of Christopher Coker (2009, p. 26, emphasis in the original):

“The logic of risk colonisation since 9/11 has fundamentally changed traditional concepts of security. It has led to the concept of a ‘long’ or ‘never-ending war’, an *astrategic*, tactically driven risk management policy which locks the West into an endless process of risk management. A risk society is necessarily a safety society, one that is permanently on the defensive.”

Conclusion

This article advances four theoretical arguments. In line with the literature on risk, the first one sustains that contemporary societies' relation with the unknown offers a possibility for illiberal security practices to flourish. The second argument is that these illiberal practices are also facilitated by the individualization of insecurity, a process that allows the executive power to escape the democratic checks and balances that (used to) make war and conflict an exceptional event. Thirdly, I expand Kessler and Werner's argument that targeted killings are better understood as a risk management technique, a practice normalized after 9/11; this normalization was made possible because 9/11 was a critical juncture that enabled forms of extreme coercion by expanding the outreach of the 'state of exception'. Finally, drawing on the literature on risk and exception, the article shows how the general practice of targeted killings with drone strikes presents fundamental challenges to democratic constitutionalism; this happens because technological developments occur at a quicker pace than legal and constitutional change, and because the democratic constitutional procedures regulating the state of war had interstate war as a framework of reference and are not easily transferable for the majority of the scenarios brought about by contemporary non-state conflict.

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