



THE USE OF DRONES IN ARMED CONFLICTS

The continuous increase in the use of unmanned aircrafts and the different criteria used to decide as to their possible attacks raise legal questions in the field of International Law

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INTRODUCTION

An Unmanned Aerial Vehicle or Unmanned Aerial System, also known as drone, is an aircraft that has no crew on board. It is defined as a reusable vehicle with no crew that can keep a controlled and sustained flight level propelled by a reaction or blowing engine¹.

Although there is nowadays no doubt about their efficiency, versatility and capacities, even in the civil environment, we can foresee an important UAS deployment with an operation requirement in the whole structure of the air space. There are still many challenges pending, among which we can find: insertion in the air space, operators training, certification of the system

airworthiness, radio- electric spectrum for command, control and payment charge or risk management.

The International Civil Aviation Organization (ICAO) regards UAV as aircrafts. Therefore, the current Recommended Regulations or Civil Aviation technical specifications are applicable to all of them².

It is interesting to analyze the use of drones in areas of armed conflict, particularly their use for military purposes from a point of view of the legal framework.

With respect to this, the Bureau of Investigative Journalism, a non- profit organization based in London estimates that attacks with drones that occurred between 2004 and 2013 have caused, only in Pakistan, between

2500 and 3000 deaths (including hundreds of civilians and almost 200 children) and more than a thousand injured people³.

GENERAL LEGAL FRAMEWORK

Semi- automatic systems, such as drones, are controlled and driven by humans remotely. Regulations regarding international law of armed conflict (ILAC) do not make any reference to the use of drones but it is applicable to it⁴. In this way, principles of International Humanitarian Law, such as the distinction between civil and military targets and the necessary proportionality in the use of force, imply a potential interest in the use of drones.

For the purposes of International Humanitarian Law, the legitimacy in the use of drones, taking into consideration those principles mentioned, lies in checking whether they actually have the advantage to allow to make more precise attacks, avoiding or minimizing the loss of civilians, injuries caused to civilians and/or damage to civilian property.

Moreover, when drones are used in situations that are not related to armed conflicts, the applicable law will not be international humanitarian law but domestic law and international law of human rights⁵.

The situation is even more complex, for example, in the case of a person directly taking part in hostilities from the territory of a non- belligerent state or who moves within the territory of a non- belligerent state after having taken part in an armed conflict. The issue lies in getting to know whether lethal force may be legally used against that person and which legal framework would be applicable. There are different opinions about this.

The International Committee of the Red Cross (ICRC) considers that International Humanitarian Law would not be applicable in such situation, which means that this person should not be regarded as a legitimate target under the laws of war⁶. Advising to do the opposite would imply that the whole world may be considered a potential battlefield and, therefore, any person could be considered a legitimate target for International Humanitarian Law⁷.

Attacks with drones are aimed at one specific military target (an individual or group of individuals) as it is

considered a threat. The current international laws do not include an exact definition of this type of acts; however, there is a common element in all operations with said purposes: the intended use of lethal force against an individual or group of individuals considered to be a potential threat by those carrying out the attack.

DEBATE ON LEGALITY OF ATTACKS WITH DRONES

Having defined the area of study, the debate on legality of operations with armed drones implies two key issues. First, whether the operation is a legal act of the use of force according to international law which has few exceptions regarding the prohibition of the use of force: the exercise of the right of legitimate defense “in case of armed attack” and the authorization by the Security Council given within the framework of Chapter VII of the UN Charter.

Second, whether the attack was in line with International Humanitarian Law, that is, standards that rule the behavior of parties in an armed conflict. These regulations rely on two important principles: proportion, that is, not to cause consequential damages that are not proportional with relation to the proposed military target, and distinction that requires to distinguish between combatants –that may be a legal attack target– and civilians that cannot be legally attacked unless they directly take part in hostilities.

RECENT USE OF DRONES IN CONFLICT SITUATIONS

Tribal Areas under the Federal Administration of Pakistan

By August of this year, the number of confirmed attacks

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1. interference with missiles.

2. However, the complete integration of UAS in the different types of air space and airports will need the development of “new” regulations to complement the existing ones. The goal of ICAO is to provide with the international regulatory framework to support the safe operation of UAS in the whole world in a harmonized and proper way that may be compared to the operation of manned aircrafts.

3. Available at http://www.swissinfo.ch/spa/noticias/politica_suiza/La_Fronda_se_organiza_V_drones_y_robots_asesinos.html?cid=35857204

4. Interview to Peter Maurer, president of the ICRC held on May 10, 2013, on the ICRC website.

5. Interview to Peter Maurer.

6. Interview to Peter Maurer.

7. Regarding possible attacks with drones carried out by the United States in the borders of Afghanistan and Pakistan, in order to state whether the Geneva Conventions have been breached, the Human Rights Council asked Ben Emmerson, UN Special Rapporteur on Counter Terrorism and Human Rights, to carry out some research on that topic. According to the British lawyer, the main purpose of the study is to assess whether the attacks with drones have caused a disproportionate number of civilian victims, which is against International Humanitarian Law (IHL). The results of the research carried out will be presented during the 68th UN General Assembly.



with drones (between 2004 and 2013) carried out by the Central Intelligence Agency (CIA) in the area of the Tribal Areas under the Federal Administration (FATA) of Pakistan was 369⁸.

There may be three possible contexts applicable to these cases:

› Context of international armed conflict: In this context, both International Humanitarian Law and International Law of Human Rights are applicable. It is important to understand the specialty criteria among them taking into considerations the circumstances of the case under study.

The different Geneva Conventions (I to IV) of 1949, in Article 2, establish that said Conventions will be applicable to all cases in which state of war has been declared or when there is an armed conflict between two or more member states, even in the case in which one of the states involved has not been recognized by the others. In light of the foregoing, we do not consider attacks with military drones in FATA as an international armed conflict, they are not part of a context of state of war declaration nor are they considered as an armed conflict among States.

› Context of non- international armed conflict: The question, in this context, would be within the criteria of the Geneva Conventions of 1949 and common law. The non- state organization needs to have a minimum structure so that it will be possible to identify its members. Second, it is essential that all Geneva Conventions be applicable. Moreover, the non- state organization has to be armed and able to set out conflict to government levels.

Besides this, the State in conflict (which has to be intense and continued) must try to counteract the members of the non- state organization with its regular military forces. Last, it is important for the conflict in question to be subject to discussion by the UN Security Council or General Assembly.

Under these standards, in the case of FATA, we can observe that the Additional Protocol II to the Geneva Conventions of 1949 on protection of victims of non- international armed conflicts is applicable to those States that are part of it. The United States government has not signed nor ratified it, so it is not applicable to them as regulations, although we can say that the provisions stated therein are binding in this case because of the *ius gentium*.

However, attacks were not carried out by the armed forces but by the CIA and, also, the random characteristic of these attacks is not in line with the need to have a certain intensity level and continuity in the conflict.

› Context of inter- state use of the armed force: The UN Charter expressly forbids the use of the armed force⁹, with two exceptions: that the territorial State where operations are carried out agrees to the use of force within its territory by a third party State or that it cannot deal with the threat by itself or that the State making use of the armed force is legitimated by the right to legitimate defense, whether individual or collective¹⁰.

Taking into consideration the consent given by the territorial State, although we can say that the State gives legitimacy to the use of force in the territory of the State in question, this does not mean that International

Humanitarian Law is not applicable to attacks or military operations being carried out. The Pakistan Prime Minister; Nawaz Sharif, has condemned attacks with drones in Pakistan saying that said practices “are a violation of international law and of the UN Charter”¹¹.

If we go further in detail, we can mention that in a ruling issued on April 11, 2013 by the Supreme Court of Peshawar, it is clear that attacks with drones are a war crime and a serious violation to human rights.

In the case of attacks with drones in the FATA region (Pakistan), those attacks were firstly considered as legitimate based on the idea that the Pakistan government would not or did not want to deal with the problem of terrorism in its territory. Even the possibility that there was an implicit agreement between the United States and Pakistan which authorized attacks with drones was considered.

Another sign of the lack of acceptance with respect to the consent given by Pakistan can be found in the ruling issued on April 11 by the Supreme Court of Peshawar in which it is stated that attacks with drones are considered a war crime and a serious violation of human rights.

We also have to remember that the exceptional exercise of the right to legitimate defense inherent to the States requires that the use of force be made because of a first attack by another State.

However, after September 11, 2001, the United States administration has accepted the theory of preventive or anticipatory legitimate defense for which a first attack is not necessary. This doctrine is extremely controversial.

Another issue that has been largely discussed in relation with the right to legitimate defense is whether it can justify the use of the armed force against non- state organizations or groups. As regards this issue, the International Court of Justice has resolved in a case related to armed activities in the territory of the Democratic Republic of Congo to deny such possibility so it will not be possible to justify attacks with drones under the theory of legitimate defense¹².

Attack in Datta Khel (North Waziristan) Pakistan

In March 2011, while a meeting in Datta Khel was being held among its residents and some Taliban representatives to solve a conflict regarding a chromium mine in the area, there was an attack with US unmanned aircrafts that killed 26 people, of which some were Taliban insurgent and the rest, most of them, were civilians.

Information from US and Pakistan official sources gave different numbers of people dead and of civilians and insurgent people. According to the information given by US intelligence agents, of the 32 people who were present at the meeting, 13 were Taliban insurgent and 11 of them were killed. Datta Khel is one of the most attacked targets in the

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air campaign that the CIA carries out by means of the use of drones over Pakistan¹³.

Differences between attacks in Afghanistan, Iraq and Pakistan

In the international perception, and more in particular in the US perception, there is a clear armed conflict between the US and Al- Qaeda (as well as the forces supporting them and providing shelter).

As the Security Council has recognized the right to legitimate defense after the September 11 attacks to the United States, it seems to have implicitly recognized, according to part of the doctrine, that it was an “armed attack” as defined in Article 51 of the Charter, thus giving the possibility for the actual exercise of legitimate defense by the State that was attacked.

According to different reports, operations with drones in conflict areas, such as Afghanistan and Iraq, are carried out by American Armed Forces. The Army prepares a list of persons selected as target of eventual attacks. In order for them to be included in the list, two verifiable human information sources and additional material evidence are necessary (Report of the Special Rapporteur: par. 9, par. 21)¹⁴.

8. "Covert War on Terror"; The Bureau of Investigative Journalism. Available at <http://www.thebureauinvestigates.com/category/projects/drone-data/>

9. Article 2.4 of the 1945 UN Charter.

10. United Nations Organization, UN Charter; article 51: 1945.

11. "Sharif blasts US drone attacks on Pakistani soil", PressTV; May 31, 2013.

12. Available at http://www.centredelas.org/index.php?option=com_content&view=article&id=1065%3Aison-legales-los-ataques-con-drones-militares&catid=40%3Aconflictos-i-guerres&Itemid=61&lang=es

13. Available at <http://www.ieee.es/documentos/areas-tematicas/retos-y-amenazas/2011/detalle/DIEEE037-2011.html>

14. See Pozo Serrano, Pilar; "The use of drones in current conflicts: an international law perspective". Available at http://www.belt.es/expertos/home2_experto.asp?id=5712

On the contrary, the air campaign against terrorists from Afghanistan, sheltered in Pakistan, was carried out by the CIA.

Attacks from Israel

Selective attacks have become an open and declared practice since September 2000.

The process for approval of a selective attack in Israel requires:

- › Information that shows that the identified person has actively taken part in terrorist acts (planning, execution or preparation of the attack).
- › Determination of the place and method of attack to be used (generally, an air attack).
- › Assessment of the risk of side effects and of potential political impact. If there are real chances to catch the person identified, this possibility must always be chosen.

The complete plan must be approved by a high level political representative and the possibility for the practice to have an external, judicial or any other kind of review is not considered.

The Israeli Supreme Court ruled regarding this governmental policy in a decision held in December 2006 which accepts the practice of the government but with some corrections. In this ruling, the Court considered that the Intifada that started in 2000 was different from the First Intifada in the sense that it was an international armed conflict between Israel and Palestinian terrorist groups which gave legitimacy to the use of force by Israel.

However, based on the characteristics of the conflict, the decision imposed conditions on Israel regarding the legality of operations of selective attacks that were more restrictive than those established in the International Humanitarian Law regulations that are applicable to conventional international armed conflicts.

First, the description of the members of terrorist organizations as illicit fighters (decided by the Israeli government) is rejected and they are considered civilians who participate directly in hostilities. The ruling highlights that the mere belonging to a terrorist organization would not be enough to turn an individual into a legitimate attack target and it is necessary to give evidence of their direct participation in the instigation or execution of a terrorist act.

Second, the ruling does not consider general International Humanitarian Law provisions as it conditions the legitimacy of selective attacks to the lack of a reasonable option to arrest the terrorist, a feature that was already part of Israeli policies. The ruling also adds that

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some incidents related to this practice may be subject to judicial review¹⁵.

Air attack in Yemen in September 2011

Al- Awlaki, an extreme Muslim minister, was killed during an air attack in September 2011 in Yemen. Other two important cases were the ones of Samir Khan and Awlaki's son, Abdulrahman, a young 16- year- old boy from Denver, both of whom died in the same attack.

CONCLUSIONS

From the texts and background analyzed, we can conclude that:

- › In the context of International Law applicable to Armed Conflicts, the use of drones has not been prohibited nor considered as deceitful or discriminatory. In this sense, they are not different from weapons shot from manned aircrafts such as helicopters or other combat aircrafts. However, it is important to note that, although drones are not illegal themselves, their use is subject to international law¹⁶.
- › Moreover, the use of drones does not always have weapons or war purposes. For example, as regards civilian uses, they can help to identify fire events and, therefore, save lives. They can also be used to gather key information for the personnel providing assistance in areas affected by natural disasters. In the future, it is possible that drones may also help to distribute emergency aid in distant zones. Actually, most military drones do not carry weapons and they are used for surveillance purposes, in particular to give information about the location and identification of enemy targets.
- › As regards military uses, those who are in favour of their use state that they contribute to the precision of attacks and the reduction of side effects. However, there are reports of damage caused to civilians considered as undesired effects.
- › There are neither treaties nor agreements of this type or any other international regulations regarding this type of devices.
- › However, International Humanitarian laws are applicable to all weapons used and to how they are used. The parties to a conflict must always have in mind the principle of distinction (both between combatants and civilians and military targets and civil property). Moreover, they cannot be used to transport prohibited weapons, such as chemical or biological agents.

- › It is necessary to give preference to weapons that allow to enhance the accuracy of attacks and that contribute to avoid or reduce loss of civilian lives, injuries to civilians or damage to civil property. It is still necessary to determine whether drones fall into this category.
- › In situations in which there is no armed conflict, national laws and the international law of human rights are applicable, in particular regulations regarding maintenance of order.
- › Pursuant to International Humanitarian Law, it is possible to use lethal force against combatants and civilians that directly take part in hostilities during an armed conflict.
- › An interesting question is the legal term to be used for teleoperators of distant weapons systems, as in this case. These persons are the ones who operate the system, identify the target and shoot missiles. It is, *prima facie*, understood that drones operators and their chain of command are responsible for what happens. Distance does not release them from the obligation to apply the principles of distinction and proportionality and to take all necessary precaution for the attack. By analogy, teleoperators are not different from manned aircraft pilots as regards their obligation to abide by International Humanitarian Law and, also, they can be subject to legal attacks pursuant to International Humanitarian Law¹⁷.
- › Pursuant to the *ius ad bellum*, regulations of International Law that establish when the use of force is legal in international relations, the prohibition of threat and use of force set forth in article 2.4 of the Charter does only admit two exceptions: the exercise of the “inherent right to individual and group legitimate defense” in case of an armed attack, recognized in article 51 of the Charter and, also, in custom law rules, or the possible authorization of the use of force by the Security Council within the framework of Chapter VII of the Charter.
- › Pursuant to the *ius in bello*, all parties to a conflict –even in those cases in which the use of force is not justified– must respect some regulations regarding means and methods of combat. International Humanitarian Law is based on two main principles: proportionality (between the expected specific military advantage and the foreseeable incidental damages caused to civilians) and distinction (between civil and military targets).
- › Following this analysis, there are weapons that are

15. See Pozo Serrano, Pilar; *op. cit.*

16. ICRC. Available at <http://www.icrc.org/spa/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

17. Available at www.icrc.org



El Derecho Internacional Humanitario se fundamenta en dos principios cardinales: el de proporcionalidad (entre la ventaja militar concreta esperada y los previsibles daños incidentales a civiles) y el de distinción (entre objetivos civiles y militares).

illegal themselves because they cause indiscriminate damage or unnecessary suffering, such as chemical and bacteriological weapons which led to their prohibition and there are some other weapons which may be legal according to the way they are used.

- › The International Court of Justice has indicated that States must not use weapons that cannot distinguish civil targets from military ones (ICJ, Nuclear Weapons Advisory Opinion, p. 257), stating, however, that international practice establishes that for a certain type of weapons to be against International Humanitarian Law, they have to be prohibited by an international treaty. This has been confirmed by article 8.2.b.xx) of the Rome Statute of the International Criminal Court, which describes the following as war crimes in international armed conflicts: Employing weapons, projectiles and

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material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

- › We understand, then, that the specific nature of drones is not per se or intrinsically against International Humanitarian Law. It is said that they are more a means of transport than a weapon or, in any case, a mixed system that is as legal as any other system used in a theater of operations with a control, surveillance and accuracy capacity that is the result of a cutting edge technology.
- › Therefore, they are not prohibited by the law nor by agreements and their use is permitted provided they comply with International Humanitarian Law provisions.
- › The question is not whether the aircraft is manned or not but whether it complies with applicable regulations or not.
- › Therefore, legality of their use must be analyzed in each specific case. The main objections against their use focus on three elements: the fact that drones have been one of the systems used by some states to make "selective attacks"; the intervention of civilians at some stages of the operations carried out by means of drones as this may imply a direct participation of civilians in hostilities and, last, the application of the principle of proportionality, that is, whether the military advantage expected from the attack would justify the number of foreseeable civilian victims. As regards the latter, it is necessary to explain that the different interpretations of the concept of military necessity and the principle of proportionality become more complex due to the differences as to a factual question as already mentioned, the number of civilian and military victims¹⁸.
- › The mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, before the Commission on Human Rights of the UN General Assembly dated April 9, 2013, recommends States to establish moratoria on aspects of lethal autonomous robotics and calls for the establishment of a high level panel for those devices that can articulate an international community policy on this issue.

18. Consultation source and extract from conclusions available at www.ieee.es. Opinion documents, Pilar Pozo Serrano, No. 37/2001, "The use of drones in current conflicts: an international law perspective".