The Characterisation of Armed Conflict and Targeted Killing of Suspected Terrorists under International Humanitarian Law: Reflections on the Future of Jus in Bello

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Abstract

The use of drones for the targeted killing of suspected terrorists has raised a number of complex legal issues for scholars and practitioners in field of international law. This paper will focus on the applicability of international humanitarian law in such situations and the characterisation of drone warfare as armed conflict.

In this context, the scope of armed conflict as a concept of international humanitarian law will be explored. In doing so, emphasis will be placed on the need for accountability to ensure greater compliance with international law.

Keywords: International law, drones, Unmanned Ariel Vehicles, international human rights law, war crimes, Vienna Convention on the Law of Treaty.

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Introduction

The targeted killing of suspected terrorists has in recent years been a subject of considerable controversy, in particular since the killing of Qaed Salim Sinan al-Harethi in 2002 by a Hellfire missile shot by a Predator drone.\(^{(1)}\) Concerns about the legality of such strikes have been raised by various UN Special Rapporteurs, including Philip Alston, the former Special Rapporteur Extrajudicial, Summary and Arbitrary Executions.\(^{(2)}\) In his 2010 report he stated that targeted killing by drones had led to a ‘highly problematic blurring…. of the boundaries of the applicable legal frameworks’.\(^{(3)}\) Alston commented that the result ‘has been the displacement of clear legal standards with a vaguely defined license to kill’.\(^{(4)}\) The issue this paper seeks to address concerns the legal framework for the use of lethal force by armed drones, focusing in particular on the applicability of international humanitarian law.\(^{(5)}\)

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(2) Philip Alston, ‘Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, “Study on Targeted Killings,”’ (28 May 2010) UN Doc A/HRC/14/24/Add.6

(3) ibid

(4) ibid

It will begin first by providing context for the use of drones and examining the significance of characterising a situation as one of armed conflict for the targeted killing of suspect terrorists. It will then examine the applicability of international humanitarian law to armed drones and the legal basis for the use of lethal force beyond the boundaries of the conventional battlefield. In light of the object and purpose of international humanitarian law, it will be argued that States deploying drones are obligated to comply with international law. Accordingly, it is only by adherence to the letter and spirit of the law that the military interests of a State engaged in armed conflict can be preserved.

The Proliferation of Drone Technology and the Context for the Use of Drones in Armed Conflict

The technology enabling the use of drones can be traced back to the First World War. Until 2001 drones were for the most part used only for reconnaissance. They were employed for this purpose during the Vietnam War and in Kosovo. Compared to other weapons, the advantages of using drones are many but a chief factor is that they avoid risks to State forces. Drones became an everyday reality with the initiation of the ‘war on terror’ and are now a weapon of choice for militaries across the globe. Today, the proliferation of drones appears inevitable and, within a decade, it is predicted that almost every single country will have its own armed drones. At the time of writing, nine

= trol Warfare (MIT Press 2016); Stuart Maslen, Nathalie Weizmann, Maziar Homayounnejad and Hilary Stauffer, Drones and Other Unmanned Weapons Systems under International Law (Brill 2018).
(7) Mark Mazzetti, The way of knife, the CIA, a secret army and a war at the ends of the earth (Scribe 2013) 91
(11) Defence one, ‘Every Country Will Have Armed Drones Within 10 Years’ (6 May 2014) < http://www.defenseone.com/technology/2014/05/every-country-will-have-armed-drones-within-ten-years/83878/> accessed 10 April 2019; The armed drones club has grown exponentially See Clay Dillow, ‘All of These Countries Now Have Armed Drones’ (Fortune, 12 Feb 2016) < http://fortune.com/2016/02/12/these-countries-have-armed-drones/> accessed at 19 July 2016; seven countries have used armed drones in combat: the United States, Israel, the United Kingdom, Pakistan, Iraq, Nigeria, and Iran See New America, ‘World of Drones: Military’ < http://securitydata.newamerica.net/world-drones.html> accessed 10 April 2019.
countries including the UK, USA, Pakistan, Turkey, Israel, Iraq, Iran, Nigeria and Azerbaijan are using armed drones in combat.\(^{(12)}\) The rapid proliferation of drone technology among states and militant groups alike poses a new threat to the international community. Several non-state actors including ISIS, Hamas, Hezbollah, or Houthi rebels, have incorporated drones into their operations.\(^{(13)}\) Employed by both State and non-state actors, drones pose a diverse range of complex challenges to the regulatory framework for the use of armed force. The section that follows focuses on one of these challenges: the characterisation of armed conflict for the application of international humanitarian law to operations involving the use of lethal force.

**The Characterisation of Armed Conflict**

To determine the lawfulness or otherwise of lethal force by an armed drone, clarity is required on the applicable legal framework. The applicable legal framework is determined by the status of a situation: If the context is one of armed conflict, international humanitarian law will apply with significant implications for the use of lethal force. The significance of characterising a situation as one of armed conflict was commented on by Philip Alston, the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, in his *Study on Targeted Killings*:

> Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.\(^{(14)}\)

As the existence of armed conflict has bearing on the legal framework for use of lethal force, it is essential to understand how situations are characterised as such under international humanitarian law. The most authoritative point of reference for the characterisation of armed conflict is provided in the case of *Prosecutor v Tadic* before the International Criminal Tribunal for the former

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\(^{(14)}\) UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, UN Doc A/HRC/14/24/Add.6, 28 May 2010, para 85.
Yugoslavia. In its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (the Tadic Jurisdiction Decision), the Appeals Chamber of the Tribunal defined the concept of armed conflict as follows:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.

The definition propounded in Tadic Jurisdiction Decision was developed by the Tribunal as one of the tests required to determine the applicability of international humanitarian law for subject-matter jurisdiction over war crimes. In order for a situation to be characterised as one of armed conflict, there

(15) For discussion of the definition provided by the Tadić Appeals Chamber see: Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press 2010) Pp.115–58.

either had to be ‘a resort to armed force between States’ (international armed conflict) or a situation of ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ (non-international armed conflict).\(^{(17)}\)

Once the existence of armed conflict is confirmed, international humanitarian law applies restricting the use of lethal force according to principles of humanity, distinction, proportionality and military necessity. For example, under the law of armed conflict commanders must take ‘[a]ll feasible precautions … to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.’\(^{(18)}\) It is prohibited to launch ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.\(^{(19)}\)

Rules concerning the use of lethal force under international human rights law are more stringent than under international humanitarian law. As stated above by Alston, the use of armed drones is ‘almost never likely to be legal’ if that status of the situation does not render international humanitarian law applicable.\(^{(20)}\) Although both bodies of law may apply simultaneously, in particular in situations of non-international armed conflict, the specific rules that will apply will require an assessment of the situation’s status. The section that follow considers the challenge this specifically poses to the extraterritorial use of drones.

**The Applicability of International Humanitarian Law to the Use of Drones**

As mentioned above, international humanitarian law applies only where there is a situation of either international or non-international armed conflict. In either context, drones *per se* are not considered inherently indiscriminate or

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\(^{(17)}\) ibid
\(^{(20)}\) UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, UN Doc A/HRC/14/24/Add.6, 28 May 2010, para 85.
The ‘use of drones is no different from a pilot dropping a bomb from a fighter jet, or a soldier firing a gun’.

A key issue determining the legality of the use of drones for targeted killing concerns the geographical scope of the law of armed conflict. Vogel notes that controversies surrounding drone warfare are not really about the weapon itself but, *inter alia*, ‘defining the battlefield in a conflict with a transnational non-state actor’. The geographic scope of the law of armed conflict has become a subject of considerable controversy, in particular since the initiation of US drone strikes in undeclared warzones after 11 September 2001. Given the geo-political significance of the United States, and its influence over the foreign policy of third States, this section will focus on the position adopted by the US for the extraterritorial use of lethal force by drones.

The approach adopted by the Government of the United States after 11 September 2001 – a position that has since maintained by different US government administrations – is that lethal force can be exercised without any geographic restriction provided the context is one of counterterrorism. This interpretation of the law was provided in 2012 by John Brennan, then a Legal Advisor to President Obama:

> As the President has said many times, we are at war with al-Qa’ida … Our ongoing armed conflict with al-Qa’ida stems from our right—recognized under international law—to self defense. 

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The characterisation of the campaign as one of ‘armed conflict’ would have attracted less attention had it been limited to situations of active hostilities (for example, in Iraq and Afghanistan). However, the US position on the geographic scope of armed conflict is not one consistent with State practice in the field of international humanitarian law. The controversy generated by this more expansive approach to the use of lethal force was alluded to by Brennan:

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

Brennan acknowledged that ‘[o]thers in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields.’ Indeed, the position of the UK government is substantially different to that of the United States. Commenting on the qualification of US campaign as one of ‘armed conflict’, Michael Fallon, the UK Minister of Defence stated:

It is for the Americans to defend or describe their own definition. We would consider on a case-by-case basis, where there is an armed conflict between government authorities and various organised armed groups, and we would look at various factors case-by-case … such as the duration or

(26) However, see the position adopted by the US Supreme Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
(27) Ibid.
(28) Ibid.
intensity of the fighting.\(^{(29)}\)

The approach described by Fallon as UK Minister of Defence recognises the requirements that exist for the characterisation of non-international armed conflict under international humanitarian law. As noted by the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Musema* case, ‘whether a conflict meets the criteria of Common Article 3 is to be decided on a case by case basis.’\(^{(30)}\) Accordingly, an assessment of facts is necessary to determine the status of any given situation. In order for a non-international armed conflict to exist, as established in the *Tadic* case, the hostilities must reach a certain threshold of intensity and the parties must possess a sufficient degree of organisation.\(^{(31)}\) The approach taken by the United States is to conceive the existence of non-international armed conflict in global terms, making it unnecessary to assess the status of individual situations. As stated by Brennan, ‘we have the authority to take action … without doing a separate self-defense analysis each time.’\(^{(32)}\)

US officials have claimed that the State is engaged in an ongoing armed conflict between ‘al-Qa’ida, the Taliban and other associated forces’.\(^{(33)}\) In addition to the absence of any geographic restriction on the use of lethal force, this proposition is legally problematic because it imputes the actions of multiple, distinct non-state armed groups to al-Qa’ida. In order to attribute the actions of an armed group to Al-Qaeda, some assessment is required of the level of

\(^{(29)}\) UK Parliament Joint Committee on Human Rights, Oral evidence: The UK Government’s policy on the use of drones for targeted killing, HC 574, Wednesday, 16 December 2015, 3.


\(^{(31)}\) Prosecutor v Tadic, Case No. IT-94-1-T, Opinion and Judgement, May 7, 1997 at para 561-562


control exercised by the leadership of al-Qa’ida over the armed group.\(^{(34)}\) The broad terms used to articulate the US position – referring to ‘al-Qa’ida and its affiliates and adherents’ – raises significant questions as to how assessments of status are undertaken for the use of lethal force. How is ‘affiliation’ defined? Is it necessary to be subject to chain of command or is mere association enough? No clarification has been provided on how ‘affiliates’ or ‘adherents’ qualify as legitimate targets. This conflation opens the door for a policy of targeting that does not comply with the requirements by international humanitarian law. As noted by Christine Gray, ‘[i]t is the substantive law that is crucial, and it is here that the USA’s position is weakest’.\(^{(35)}\)

Given the issues that exist with the US position, and the fact that drones continue to be procured by other countries for similar use, how should the use of such weapons be regulated? The section that follows posits some reflections on the application of international law, foreign policy, and the importance of third States ensuring accountability for the use of lethal force.

**Reflections on the Future of International Humanitarian Law and the Use of Force against Suspected Terrorists**

One of the most fundamental prerequisites for the effective regulation of drones is clarity concerning the applicable legal framework. As noted by Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta,

> Though not inherently illegal weapons, drones do make the deployment of lethal force across borders much easier than before, and as such they pose significant risks to the protection of life. In this context the legal paradigm that is followed does make an important difference. If the assumption is that of a global non-international armed conflict, to which IHL applies as the dominant legal regime, then it becomes much easier to justify lethal force, than if one takes the default legal framework of IHRL as the governing regime.\(^{(36)}\)


Even in a situation where international humanitarian law applies and a drone strike is legal, the question must be asked as to ‘whether it is wise to do so’. (37) Accordingly, international human rights law should be taken as default legal framework. (38) ‘Such an approach is the only way in which force remains the exception, thereby protecting the right to life in the long term’. (39)

The importance of maintaining such protection is underlined by the changes that have occurred under the Trump administration with drone policy becoming ‘less restrained, less transparent and less accountable’. (40) The following three changes were stated in a report issued by the Stimson Center:

1) Expanding the targets of armed strikes by eliminating the requirement that the person pose an ‘imminent threat’;

2) Loosening the requirement of ‘near certainty’ that the target is present at the time of the strike to a ‘reasonable certainty’, and

3) Revising the process through which strike determinations are made by reducing senior policymaker involvement and oversight in such decisions and delegating more authority to operational commanders. (41)

Another worrying development is the expansion of areas of ‘active hostilities’, with the designation three more provinces in Yemen as areas falling within the category. (42) A similar approach has affected operations in Somalia. (43) Such measures increase the likelihood of death and injury to civilians in these
Under the previous policy, an attack could only be ordered if there was ‘near certainty’ that a target was present and civilians would not be killed or harmed. Now those planning an attack need only show ‘reasonable certainty’. This undermines the protection provided to the civilian population under international humanitarian law, with significant implications for principles of distinction and proportionality. Such policies set significant precedents and influence the behaviour of third States in their approach to the use of lethal force. On account of this, and in light of the violations that have been reported, the use of drones requires scrutiny to ensure their compliance with international law.

According to Heyns, Akande, Hill-Cawthorne and Chengeta,

> There is an urgent need for the international community to gain greater consensus on the interpretation of the constraints that international law in all its manifestations places on the use of drones. This is important not only because of the implications for those who currently find themselves on the receiving end of drones, but in order to keep a viable and strong system of international security intact. A central component of such a security system is the rule of law. Drones should follow the law, not the other way around.

The issue is one of compliance with international law. In the context of armed conflict, the requirements of international humanitarian law must be adhered to. If war crimes are to be prevented, the protection the law provides to the civilian population should be not be compromised. In addition, international law: Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/28/38, 15 December 2014, para 56.
human rights law prohibits the deprivation of life. As noted in the conclusions of UN Human Rights Council Expert Panel:

The starting point of any legal analysis on armed drones should be existing international law, in particular the prohibition against the arbitrary deprivation of life. Modifying well-established rules of international law to accommodate the use of drones might have the unintended long-term consequence of weakening those rules. The existing legal framework was sufficient and did not need to be adapted to the use of drones, rather, it was the use of armed drones that must comply with international law.\(^{(47)}\)

**Conclusion**

The challenge is one of ensuring greater compliance with international law. In addressing the obligation of States to ‘respect and ensure respect’,\(^{(48)}\) it is instructive to recall the shared interests that bind the international community. These interests are reflected in treaties of international law such as the Charter of the United Nations and the Geneva Conventions of 1949. They are also reflected rules of customary international law of an *erga omnes* nature: ‘States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.’\(^{(49)}\)

The obligation to prevent violations of international humanitarian law includes a duty to resist measures that undermine the protection provided by


the law. The characterisation of the campaign against al-Qa‘ida or ISIS as an armed conflict of global dimensions weakens the framework upon which the applicability of the law is based. It also obscures the distinction that has existed from time immemorial between war and peace, with deleterious consequences for accountability.

The continuing lack of accountability for the extraterritorial use of lethal force creates fertile conditions for future conflict. As such, it poses a pressing challenge for the maintenance of international peace and security. If international peace and security are not protected, the threat to the international legal order is an existential one. Accordingly, there is an urgent need for issues of compliance with international law to addressed.
References


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