

IS THE EXTRATERRITORIAL USE OF DRONES TO COMBAT A TERRORIST THREAT LEGAL?



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INTRODUCTION

The first UK drone strike against a UK citizen, which killed two UK nationals (Reyaad Khan and Ruhul Amin) in Syria, has brought the issue of the legality of such deployments into sharp focus and has renewed a controversy that has occupied international lawyers since the US first embarked on such action in 2004 against targets in Pakistan.

There has been much discussion and no little disquiet as to the 'offensive' use of drones in the context of extraterritorial targeting of persons and/or locations, particularly as part of a counter-terrorism operation. The present paper is a short examination of some of the legal issues and challenges involved.

WHAT IS A 'DRONE'?

'Drone' is shorthand for an unmanned aerial vehicle; in other words, a remotely piloted air system or airborne vehicle. Drone technology is used in a variety of settings: surveillance, reconnaissance, road traffic monitoring and, most saliently for present purposes, as a 'strike' or 'offensive' capability.

As a strike capability, the drone may be usefully seen as a 'weapon platform', given that such a vehicle will typically amount to a remotely operated weapon system. It will, at all times, be under the command and control of a human, albeit remotely, for the purposes of targeting, even though some functions (including take-off and landing) will often be controlled by on-board 'automatic pilot'.

THE ISSUES

In that regard, it should be noted that the use of a drone in response to a terrorist threat is, broadly, capable of falling under one of two possible legal frameworks, depending upon whether or not the intended use is in the context of an armed conflict.

If it is intended to use a drone to target a person who is a 'combatant' or a location that is a military objective within an armed conflict, the starting point (assuming that the use of force itself is justified) is international humanitarian law and, in particular, the Hague Conventions and Additional Protocol II (1977) to the Geneva Conventions. Alternatively, if an operation is mounted as (i) state self-defence to a threat in circumstances falling short of an armed conflict but where there is an imminent threat or (ii) a law enforcement operation, then, international human rights law, along with the national law of both the targeting state and the state where the operation takes place, will provide the legal framework.

Whether or not use occurs within an armed conflict, it should be stressed that, in international law, there is nothing unlawful *per se* in the deployment of a drone, nor is there any specific legal instrument addressing the offensive use of drones. Rather, their operation falls to be assessed under the general

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legal frameworks already mentioned and, in particular, the law and principles governing extraterritorial use of force and targeting. At the same time, of course, the prohibitions that do exist as to particular types of weaponry (i.e. chemical, biological, cluster munitions etc.) apply equally in the case of drones.

USE OF FORCE BY A STATE: *JUS AD BELLUM*

Assuming that an armed conflict is not already extant, the initial question is whether the state intending to use force is lawfully entitled to do so. This is governed by *jus ad bellum*, the corpus of international law that governs when a state may resort to force. The overarching principles conditioning a state's external use of force are contained in the UN Charter and in customary international law. There is an absolute prohibition of the threat or use of force "*against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*". Conversely, though, force may be used without breaching Article 2(4) where one state validly consents to the use of force on its territory by another state.

Under the UN Charter, it is the Security Council in whom the right to authorise the use of force to maintain international peace and security is vested, save a state's limited right to use force in self-defence following an armed attack². Article 51 provides that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Aside from a state's own right of self-defence, the extraterritorial use of force without the consent of the 'host' state will also be lawful if based on a legally binding (i.e. authorised by a Resolution under Chapter VII of the Charter) decision of the Security Council.

In addition to the right of self-defence and to the use of force authorised by the Security Council, there is a third circumstance where, arguably, force may be used as an exception to the general Charter prohibition: the humanitarian intervention, that is to say, in certain circumstances, it is arguably lawful for a state or states to intervene forcibly in another state in order to avert a humanitarian disaster (for instance, a tsunami) or to protect the fundamental human rights of those in that state. Proponents of humanitarian intervention argue that it is not in violation of Article 2(4) as such intervention is not directed against the territorial integrity of political independence of the state in question. Opponents argue that, whilst a state is able to, and indeed may even have a duty to, intervene and protect in such humanitarian circumstance, it must nevertheless be recognised that international law cannot be said

² See UNSCR 1368, adopted in the aftermath of 9/11, affirming the inherent right of a state to act, individually or collectively, in self-defence following a act of terrorism (armed attack) - http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1368%282001%29

to support unilateral intervention by the use of force. Perhaps a 'duty to protect' is indeed emerging as a customary norm; however it is hard to see how that duty, at present, may be carried out in the absence of Security Council authorisation.

Self-defence is, then, the key exception to the absolute exclusion on states' employing extra-territorial force, under Article 51 of the UN Charter. There are, though, numerous debates surrounding the precise interpretation of Article 51, which are relevant to the question of whether self-defence may ever justify extraterritorial use of force, through a drone, against a terrorist threat. In considering those issues of interpretation, it should be borne in mind that the two fundamental principles governing a state's right to self-defence are those of necessity and proportionality.

Necessity encompasses within it the essential requirements of a degree of immediacy (reprisals or acts of retribution not being permissible under customary international law) and the unavailability of other measures; this aligns with the provision under Article 33(1) that all 'tools of peace' must be exhausted prior to resort to force.

The definition of what amounts to 'immediacy' within the principle of necessity has prompted much discussion. As a requirement, it draws a fine temporal line. On the one hand, pre-emptive use of force is prohibited and anticipatory acts restricted; on the other hand, one must act promptly so as to avert the accusation that one's response is a retaliation or reprisal. Ultimately, the precise application of such terms is highly contingent on the precise circumstances; however there will be difficulties and uncertainty, particularly in instances of terrorism where the threat targeted might not be immediate or readily discernible. The use of drones in response to a terrorist threat could potentially fall on either side of the spectrum. It may be the case that operation of drones is 'pre-emptive' in the sense that they are used in advance and in response to a 'nebulous' supposed threat. Alternately, launching drone operations subsequent to a terrorist attack may be seen as a reprisal or act of retribution against the state subjected to their intervention. Timing a defensive response may, therefore, give rise to a host of complex and potentially unanticipated issues.

Application of the principle of proportionality is, further, capable of creating real dispute; for instance, as to whether actions by a terrorist organisation may be taken cumulatively to justify an intensified response, or whether each act or each single series of acts must be regarded in isolation. Generally, the accumulation doctrine has been received unfavourably in rationalising acts purporting to be carried out in self-defence. As the aim at hand is the maintenance of international peace and security, any methods of self-defence must be limited to a response of appropriate magnitude to diffuse the threat (termed the 'functional argument'). Proportionality, however, also includes limiting the risk of collateral damage when targeting a particular terrorist threat (particularly with reference to the risk of killing civilians) and thus feeds into any discussion of target identification.

Article 51 itself gives rise to contentious issues. It permits a state to act in self-defence (individual or collectively) in response to the occurrence of an 'armed attack'. However, the definition of an 'armed attack', and who should bear responsibility for it, remains unclear. The traditionally accepted approach was that an 'armed attack' generally referred to the launching of military action by a state. Whilst any

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armed response, based on the 'inherent right to self-defence' would lie against the 'attacking' state, and would, therefore, preclude its application where the 'armed attack' was carried out by a group of non-state actors, such as terrorist groups (see the former view based on the necessary 'attribution' of terrorist actions to the state as elucidated in the *Nicaragua*³ case). However, since the events of 9/11⁴, the prevailing view of 'armed attack' has been widened to embrace a terrorist attack or threat carried out by non-state actors, albeit the actions of Al-Qaeda were linked to the Taliban, then in 'control' of Afghanistan.

Typically, in authorising a drone strike, a state will be relying on the doctrine of 'anticipatory' or 'pre-emptive' self-defence. Although reservations have been expressed by commentators as to the boundaries of anticipatory self-defensive action, it is generally accepted that a degree of anticipatory response is permissible in a situation concerning a grave threat to national security. Use of lethal force therefore may be permissible as an anticipatory self-defence response in situations where proportionality and necessity are established. Ironically, it is anticipatory self-defence that was at the heart of the classic formulation of what amounts to self-defence under international law (in the *Caroline* case⁵ of 1837), which provided that the necessity for such pre-emptive action must be instant, overwhelming, leaving no choice of means, and no moment for deliberation.

EXTRATERRITORIAL USE OF DRONES WITHIN AN ARMED CONFLICT

Assuming that the *jus ad bellum* principles are satisfied, the legality of the extraterritorial use of drones within what is said to be an armed conflict will fall to be assessed under general principles of international humanitarian law (IHL). The application of IHL is, then, predicated on there being a prevailing 'armed conflict', of which the principal division is into (a) the international armed conflict (IAC) and (b) the non-international armed conflict (NIAC).

Working on the assumption that a terrorist threat and a state's response to such may constitute an 'armed conflict' (implying a requisite degree of both organisation of the parties and intensity of the attack), the terrorist actors would have to be agents of a state or under its control to fall within the category of an IAC. In the absence of that relationship, a terrorist threat and the corresponding response may be part of an NIAC. The division between the IAC and the NIAC may seem a stark one and, indeed, it might be thought that a new category should be established to reflect present realities, such as the notion of a 'war on terror'. However, the present delineation remains and, irrespective of whether a conflict is an IAC or a NIAC, one key issue will be whether a terrorist suspect amounts to a 'combatant' or 'civilian'.

The classification of terrorists as 'combatants' raises additional issues with regard to targeting, particularly within the context of drone deployment. When targeting a terrorist threat, the principle

³ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), 27 June 1986 – Merits <http://www.icj-cij.org/docket/files/70/6503.pdf>

⁴ See, e.g., the Preamble to UNSCR 1368

⁵ The formulation was set out by US Secretary of State Daniel Webster in his letter to the British Ambassador to the US, in the wake of the setting fire to a vessel in US waters that the British believed was filled with money, provisions and arms due to be supplied to Canadian rebels.

of distinction (i.e. the target must be military, not civilian) must be adhered to and the decision-maker satisfied that the target is 'legitimate' (i.e. a military objective, the targeting of which will give a military advantage). That assessment will also include considerations such as a terrorist's degree of 'direct' involvement in hostile acts, and the potential for collateral damage. All feasible precautions must be taken to minimize loss of civilian life, injury to civilians and the damage to civilian objects; indiscriminate military attacks are, of course, capable of amounting to war crimes.

Arguably therefore, the use of drones may be said to enhance the legitimacy of extra-territorial military operations in some senses, given the precision with which specific individuals or small groups may be targeted. Further complications may present themselves however, if the terrorist threat relocates to a non-belligerent state; in such a case, it may be increasingly difficult to satisfy the test of legitimacy. Indeed, the stance taken by the ICRC is that, if a combatant relocates to the territory of a non-belligerent state, IHL would not be applicable (with principles of IHRL, instead, being applicable)⁶.

USE OF DRONES OTHER THAN IN AN ARMED CONFLICT

Extraterritorial use of force against terrorist groups, specifically by means of drones, will necessarily engage IHRL principles in the absence of armed conflict. Here, there are two separate potential scenarios. A state may respond to a perceived threat by means of self-defence, although no armed conflict exists (broadly considered a security response); conversely, a state may respond in a narrower 'law enforcement' sense, in targeting a specific individual criminal suspect, for instance, a terrorist or a trafficker, in the absence of an 'armed attack' in any true international security law sense.

Clearly, universal and fundamental rights, such as the right to life, would be infringed by the targeted elimination of such a threat. It should be noted that the right to life is essentially non-derogable, meaning its derogation is not permissible, save at a time of war or declared public emergency which threatens the 'life of the nation' (see both the European Convention on Human Rights 1950⁷, ECHR, and the International Covenant on Civil & Political Rights 1966⁸, ICCPR). For instance, the right to life under Article 2 of the ECHR may only be derogated from in circumstances of 'absolute necessity', (see, for example, the case of *McCann and Others v. United Kingdom*⁹), and the requirement of 'strict proportionality' between the lives sacrificed to secure the gain at stake is rigidly applied.

Whether such a right extends to those based in another state has not been without its own complex history. The extraterritorial application of human rights obligations has been raised before international, regional and national¹⁰ courts, and has had the unfortunate effect of confusing, rather than, clarifying the position. The International Court of Justice (ICJ) has affirmed the binding and universal nature of human rights obligations, regardless of whether actions are taken by a state upon its own territory¹¹, and remarked on the confusion arising out of the jurisprudence of the European

⁶ <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

⁷ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁸ <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

⁹ (1995) 21 EHRR 97

¹⁰ The House of Lords in the UK was confronted by a similar complaint following UK military operations in Basra, Iraq in *Al-Skeini & Others v Secretary of State for Defence* [2007] UKHL 26.

¹¹ See, in particular, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied*

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Court of Human Rights¹². When the issue fell to be examined by the House of Lords in *Al Skeini & others*, their Lordships equally remarked on the legal confusion arising from the ECtHR decisions. Whether the position would be different in respect of the two UK nationals who were the targets of the RAF drone attacks remains to be seen.

Alternately, IHRL will also apply in the strict 'law enforcement' scenario, where a specific terrorist or criminal suspect is targeted in the absence of any specific prior attack by that individual. It must be noted that domestic law enforcement systems generally only permit the use of lethal force against a suspected criminal in extremely limited circumstances, essentially only when a serious threat is posed by the individual, and no alternative course of action is available. The same domestic law considerations of necessity and proportionality would also apply whether in fact the operation was internal or extraterritorial.

International human rights bodies, such as the UN Human Rights Committee, have taken a similar approach when reporting on targeted killings in Israel, stating: "*Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.*"¹³ This, notably, does not eliminate the prospect of the use of lethal force to eliminate specific terrorist actor (although it restricts it within rigid confines). Generally, however, as an overarching principle of international law, a state is prohibited from engaging in law enforcement operations in the territory of another state (given this constitutes a breach of state sovereignty). This principle would seemingly only be deviated from in a case where the threat to national security was incredibly grave and the host state itself is unable or unwilling to act (or, of course, consent s).

CONCLUSIONS

The present debate continues to highlight the complexity surrounding the targeting of those suspected of planning an attack and a state deciding to act on the basis of anticipatory self-defence. If the existence of an armed conflict is relied upon (with all the associated arguments as to whether either category of armed conflict fits the terrorism paradigm), then a state deploying a drone must act in accordance with IHL and ensure that military objectives, not civilian objects, are targeted. Meanwhile, if deployment is a self-defensive response to an armed attack or the imminent threat of one, the use of force must be in accordance with the Charter and must be proportionate. In the 'real world', the factual basis will often be complex, with intelligence providing the justification and with the risk of public disquiet and even community distrust.

Palestinian Territory, para. 10.

¹² European Court of Human Rights (ECtHR) examined the application of Article 1 of ECHR in a number of cases following *Banković and Others v. Belgium and 16 other Contracting States* Application no. 52207/99; [11BHRC435], often adopting contrary positions.

¹³ <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.78.ISR.En?OpenDocument>

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