

UN, Statement of a Special Rapporteur on Drone Attacks

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[Source: Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency, United Nations, Human Rights, Office of the High Commissioner, January 2013 available at <http://www.ohchr.org/Documents/Issues/Terrorism/SRCTBenEmmersonQC.24January12.pdf>]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[1] The Special Rapporteur today issued the following statement at a press conference in London:

In June of last year, at the Human Rights Council in Geneva, a group of States, including two permanent members of the Security Council, as well as Pakistan and a number of other concerned States, made a joint statement asking me to carry out an investigation, within the framework of this mandate, into the use of drones in the context of counterterrorism operations.

[2] I issued a statement shortly afterwards to the effect that those States using this technology, and those States on whose territory it is used, are under an international law obligation to establish effective independent and impartial investigations into any drone attack in which it is plausibly alleged that civilian casualties were sustained. I also indicated that if those States did not take steps to establish sufficiently robust and impartial investigations it may, in the final resort, be necessary for the UN to conduct

investigations into individual drone strikes. [...]

[3] At present there are at least three main legal theories vying for primacy of place on this question. There are those who contend that outside situations of recognized international armed conflict, the applicable framework is international human rights law, under which it is unlawful to engage in any form of targeted killing. The standards set out in Covenant on Civil and Political Rights, and particularly the provisions of Article 6 which protects the right to life, permit the use of lethal force only where it is strictly necessary as a matter of immediate self-defence. Under this analysis States wishing to take action against suspected terrorists located outside a recognised situation of international armed conflict must first try to effect an arrest, and may use lethal force only if the person they are seeking resists arrest and it proves strictly necessary to use firearms.

[4] At the other end of the spectrum the analysis that has been promoted by international lawyers in the United States, and by John Brennan, President Obama's nominee to head the CIA, to the effect that Western democracies are engaged in a global against a stateless enemy, without geographical boundaries to the theatre of conflict, and without limit of time. This analysis is heavily disputed by most States, and by the majority of international lawyers outside the United States of America.

[5] A third way of analysing the issue is to ask whether a terrorist organisation is engaging in an internal (or non-international) armed conflict with a particular government such as the governments of Pakistan, Yemen and Somalia; and then to ask whether and in what circumstances it is lawful for a third State to become engaged as a party to an internal armed conflict in support of the government forces. It is clear that as a matter of international law such engagement may be lawful if it takes place at the express request of the government of the State concerned. It is much less clear whether it can be lawful for an outside State such as the US to use military force without the express consent of the State concerned. International lawyers disagree on whether tacit consent or acquiescence is sufficient; on whether the deployment of remote targeting technology in such circumstances amounts to a violation of the sovereignty of the State on whose territory it is used; and on whether it may nonetheless be lawful if the State concerned is either unwilling or unable to tackle the terrorist threat posed by an insurgent group operating on its territory. The absence of consensus on these very fundamental questions of international law is the focus of intense debate at the United Nations at the moment, and will form the subject of a series of high-level discussions and negotiations between States and experts over the coming year, aimed at bridging these very different points of view.

[6] The reality here is that the world is facing a new technological development which is not easily accommodated within the existing legal frameworks, and none of the analyses that have been floated is entirely satisfactory or comprehensive. And they may differ in their application in different theatres of conflict. The legal situation in Afghanistan for instance, where there is a recognised international armed conflict is very different from that in the Federally Administered Tribal Areas of Pakistan, which in turn is very different from Yemen or the State of Palestine. And even within a country like Yemen, there may be parts of the

country in which some would take the view that there is an internal armed conflict taking place, whilst in other parts of the country this is clearly not the case. Given the relative ease with which this technology can be deployed, and given its relatively low cost (both in economic terms, and in terms of risk to the lives of service personnel of the States deploying the technology) the issue now has to be confronted squarely by the international community. [...]

[7] The central objective of the present investigation is to look at the evidence that drone strikes and other forms of remote targeted killing have caused disproportionate civilian casualties in some instances, and to make recommendations concerning the duty of States to conduct thorough independent and impartial investigations into such allegations, with a view to securing accountability and reparation where things can be shown to have gone badly wrong with potentially grave consequences for civilians.[...]

Discussion

1. What is the threshold of violence to be reached for a situation to become an international armed conflict? A non-international armed conflict? Is one drone attack sufficient for the existence of such armed conflicts? Does it matter who or what is the target of the attack?
2. (Para. 5) Does the consent of the state in whose territory the attack by another state takes place have an impact for the applicability of IHL? Even if this attack is directed at an armed group? Does consent affect the classification of the conflict? If yes, how? Does it matter whether the armed group is controlled by the territorial state?
3. What is the geographical scope of application of IHL in international armed conflicts?
4. What is the geographical scope of application of IHL in non-international armed conflicts? Is it possible to have a non-international armed conflict spread over two or more countries? Spread all over the world?
5. (Para. 6) Is it possible to have a non-international armed conflict only in parts of the territory of a state? Does IHL apply only to the parts of the state affected by the armed conflict or to its whole territory?
6. Do the levels of intensity and of organization of the parties need to be reassessed state by state every time a non-international armed conflict spreads into a new state? Does your answer change depending on new state's geographic proximity to the previously existing armed conflict? On the link between the target and the original armed conflict?
7. In your opinion, what is the appropriate legal framework to consider the legality of targeted killings? How many frameworks are mentioned by the Special Rapporteur? Are targeted killings in some circumstances lawful under IHL? Under international human rights law? Under what conditions? What are the relevant rules in each framework?
8. (Para. 2) Is the requirement for independent and impartial investigations into drone attacks an obligation under IHL? Under international human rights law? If the latter, then is it applicable in the context of an armed conflict? What is the relationship between the two bodies of law?
9. For which rules governing the conduct of hostilities may the use of drones raise particular problems? Are they unable to respect the principle of distinction? The principle of proportionality? Would the obligation to take all feasible precautions require the use of weapons or weapons platforms other than drones? Under what circumstances? (P I Arts 51, 52, 57)

10. What is the difference between means and methods of warfare? Can a weapon that can distinguish between civilians and combatants be used in an indiscriminate way? Are drones inherently indiscriminate weapons or are alleged increased civilian losses primarily due to the way they are used? (P I Art, 51)

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