



COMMISSIE VAN ADVIES INZAKE VOLKENRECHTELIJKE VRAAGSTUKKEN
Advisory Committee on Issues of Public International Law

ADVISORY REPORT ON
ARMED DRONES

TRANSLATION

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Abbreviations

CAVV	Advisory Committee on Issues of Public International Law
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (also referred to as 'the European Convention on Human Rights')
ECtHR	European Court of Human Rights
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ICRC	International Committee of the Red Cross
ILC	International Law Commission
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

Preface

On 5 January 2013 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (CAVV) to draw up an advisory report on the lawfulness of using armed drones.

The request for an advisory report stated that the international legal aspects of armed drone attacks needed to be clarified. The CAVV was asked to advise on the lawfulness of using drones and conditions for their use, in the light of the following questions:

- How, from the point of view of international law (*jus ad bellum*, *jus in bello*, human rights law), do you assess the lawfulness of using force involving armed drones, particularly as regards the distinction between situations arising in and outside the context of armed conflict?
- How do you view geographical and temporal limits to the applicability of the *jus ad bellum* and *jus in bello* in this connection?
- How does consent by the state on whose territory such drones are deployed affect the assessment of the lawfulness of their use, and what conditions must such consent satisfy?
- What conditions can be laid down for the use of armed drones on the basis of international law?
- Is current international law adequate to regulate the use of armed drones, or is new law required?

A committee made up of CAVV members Professor Gill, Professor van den Herik, Professor Lammers and Professor Werner took the lead in drawing up this advisory report.

The CAVV discussed the draft advisory report at a plenary meeting on 10 June 2013, and the final text was adopted on 5 July 2013.

MAIN CONCLUSIONS OF ADVISORY REPORT ON ARMED DRONES

General

- Armed drones are not prohibited weapons.
- A country may use armed drones outside its own territory to attack enemy combatants in an armed conflict, provided there is a recognised legal basis for doing so.
- Besides the legal criteria, the deployment of armed drones involves considerations of a military-operational, policy-related and ethical nature. This advisory report focuses primarily on the international legal framework and discusses these other considerations only in conjunction with the legal aspects. A frequently heard ethical reservation concerning the deployment of armed drones is that, because of the distance between the person controlling the drone and the area of operations, there are fewer psychological inhibitions with respect to employing lethal force (the 'PlayStation' phenomenon). More research is needed to determine whether this phenomenon actually exists. Moreover, it is unclear what its legal relevance would be if it *were* found to exist. Legally speaking, the attacking party's attitude to his or her target is immaterial to whether the target is legitimate and all necessary precautions have been taken to limit collateral damage.

Legal bases for the use of force

- If a state has given its consent for the use of force on its territory, this avoids a breach of the prohibition on the use of force as laid down in article 2 (4) of the Charter of the United Nations ('UN Charter'). This prohibition on the use of force also exists in customary international law. The requirements on what constitutes valid consent are elaborated in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) and can be analogously derived from the requirements laid down in the Vienna Convention on the Law of Treaties. Experience shows that in specific situations questions arise about consent having been given. These can involve tacit consent or conflicting statements about consent, or, in the case of failed states, the absence of a functioning competent organ.
- If a legally binding UN mandate authorises the use of force, armed drones may be deployed to implement the mandate, provided such action accords with the general

conditions and objectives of that mandate. It is not necessary for the UN Security Council to give explicit authorisation for the use of armed drones.

- Armed drones may also be deployed in exercise of the right of self-defence within the meaning of article 51 of the UN Charter, provided the conditions for the lawful exercise of this right have been satisfied. Self-defence is permitted only in response to an armed attack (or the imminent threat of such an attack) and must be exercised in accordance with the requirements of necessity and proportionality as laid down in customary international law.

Applicable legal regimes governing the deployment of armed drones

Besides having a valid legal basis, any use of force must comply with the applicable legal regime. The legal basis relates to the question of whether force may be used, while the legal regime regulates how, where and against whom force may be used.

International humanitarian law

- In situations of international armed conflict between states, the applicability of international humanitarian law (IHL) is limited to the territory¹ of the warring states. The territory of third (neutral) states is in principle inviolable. In non-international armed conflicts between one or more states and one or more organised armed groups, or between such groups, in principle IHL applies only to the territory of the state where the conflict is taking place.
 - The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the warring parties move into the territory of another – usually neighbouring – state and continue hostilities from there. IHL does not apply to the territory of a third state simply because one or more members of the armed forces of a warring party are physically located on the territory of that third state. IHL only becomes applicable if hostilities are conducted from the territory of a third state and the authorities of that state neglect, or are unable, to take adequate measures to prevent this.
- Attacks by means of armed drones may not be directed at civilians unless they are directly participating in hostilities. ‘Direct participation in hostilities’ should be interpreted according to the key criteria formulated in the Interpretive Guidance on the Notion of

¹ In this advisory report, ‘territory’ is taken to include the land, airspace, maritime internal waters and territorial waters of a state.

Direct Participation in Hostilities under International Humanitarian Law of the International Committee of the Red Cross (ICRC).²

- A 'signature strike', in which one or more individuals are the object of a targeted attack based on certain characteristics or 'signatures' is only lawful if it is directed against a legitimate military target and if the other conditions for carrying out an attack, as laid down in IHL, have been met. If doubt exists as to the status of an individual as a legitimate target, the attack must not be carried out. The fact that a person belongs to a particular age group, is present in an area where operations are being carried out or has an outward appearance that matches a certain profile is not in itself sufficient to designate that person as a legitimate target.
- An attack or planned attack carried out by an armed drone, whether or not it is directed against a specific individual, is lawful within the context of IHL if (1) an armed conflict is taking place; (2) the attack is carried out within the area to which the IHL applies; (3) the attack complies with all the applicable rules and restrictions concerning the conduct of hostilities. The fact that the persons targeted in many cases cannot defend themselves against such an attack does not detract from its lawfulness. Hostilities in the context of an armed conflict are not a sporting event and IHL does not require that opponents enjoy equal chances on the field of battle. Many other weapons systems have been devised to attack opponents from short or long range and to maximise the advantage of the attacking party.

Human rights

- If an armed conflict is not taking place, the cross-border use of armed drones is in principle regulated by international human rights law and, in particular, the right to life. In situations where force is used in third states, the question of the extraterritorial applicability of human rights law arises. International human rights courts and other institutions hold differing views on the extraterritorial applicability of human rights. The law on this point is still far from being settled.
- The targeted killing of an individual outside the context of an armed conflict is prohibited in all but the most exceptional situations and is subject to strict conditions. These situations are limited to the defence of one's own person or a third person from a direct and immediate threat of serious violence, the prevention of the escape of a person who is suspected or has been convicted of a particularly serious offence, or the suppression of a

² See ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, N. Melzer, 2009.

violent uprising where it is strictly necessary to employ these means (i.e. targeted killing) in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for as long and in so far as strictly necessary and proportionate. There must be a legal basis in national law and any indication of a violation of the right to life by the security services or other state organs must be investigated at national level.

- The deployment of an armed drone in a law enforcement situation will hardly ever constitute a legal use of force. The principle of proportionality as it applies within international human rights law is considerably stricter than under IHL, in particular to prevent innocent people falling victim to such attacks.

Responsibility of third states

- States that deploy armed drones in contravention of international law are responsible for the consequences. In very specific circumstances, third states that assist armed drone operations that contravene international law may be held responsible for their part in the operations concerned. Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts gives the relevant criteria for this form of responsibility. The requirements of article 16 are strict. The mere fact that a third state takes part in a multinational military operation in which another state uses armed drones unlawfully does not suffice to render that state responsible.
 - If third states consent to the use of their air bases for the launch of unlawful armed drone attacks they may render themselves responsible if all the conditions of the above-mentioned article have been satisfied, such as prior knowledge of the unlawfulness of the attacks.
 - The sharing of secret information about individuals by a third state can render them responsible in certain circumstances if the information is used to carry out an unlawful targeted attack on a person. The information-sharing state must be aware of the fact that the operating state is pursuing a policy of targeted killing that contravenes international law and the shared information must make a significant contribution to the unlawful attack.

New law?

From an international legal perspective, new law is not necessary to specifically regulate the use of armed drones. The law that applies to the deployment of armed drones is precisely the same as that which applies to the deployment of conventional combat aircraft or other

military weapons systems. Current international law is adequate and capable of fully regulating operations of this kind. Nevertheless there are general questions of international law that require further clarification. These include the right to self-defence against non-state actors, the requirements relating to consent for the deployment of weapons on the territory of another state and the extraterritorial applicability of human rights law.

1. INTRODUCTION AND STRUCTURE OF THE ADVISORY REPORT

The use of unmanned aircraft – commonly referred to as drones – has increased exponentially in recent years. Drones can be used for various purposes. This advisory report deals with *armed* drones. In particular, it looks at situations in which states deploy armed drones to attack individuals who are on the territory of another state, whether or not during an armed conflict. Such cross-border deployment of armed drones raises a number of questions about whether this is lawful under international law.

The deployment of armed drones is not just a legal issue. It also has political and military/strategic benefits, as the risks to the attacking party are substantially lower. Together with a smaller number of military casualties, this will help sustain public support for operations over a longer period. It has also been claimed that the use of armed drones allows far more accurate selection of targets, with more time to reflect and obtain legal advice. One drawback that is often mentioned is the supposed reduction in psychological inhibitions on the part of those that steer or control the aircraft from a distance – an effect sometimes referred to as the ‘PlayStation’ phenomenon. Here it should be mentioned that more research is needed to determine whether this phenomenon actually exists; nor is it entirely clear what its legal relevance would be if it *were* found to exist.³ A related suggestion is that the highly asymmetrical level of safety, whereby the risks to one party are reduced to practically zero, may make civilian casualties less acceptable to the public. The use of such weapons may thus have an adverse impact on efforts to win the public’s ‘hearts and minds’. Finally, we should also mention the fact that prolonged armed drone attacks may have a profound social and psychological impact on people living in the area concerned. It is above all these drawbacks that have recently led to a public debate on the desirability of drones, as well as critical reports by non-governmental organisations (NGOs).⁴

In addition to legal considerations, the deployment of armed drones therefore calls for serious reflection on the related operational, psychological and policy issues. However, this advisory report will only look at the legal questions regarding the lawfulness of deploying armed drones. These questions firstly concern the possible legal bases for deployment, i.e.

³ M.N. Schmitt, ‘Drone Attacks under the *Jus ad Bellum* and *Jus in Bello*: Clearing the “Fog of Law”’, in *Yearbook of International Humanitarian Law* (2010), vol. 13, (pp. 320-321). In this connection Schmitt comments ‘It is not the mental attitude of the attacker which matters, but rather his or her ability to properly identify lawful targets and avoid collateral damage to the extent possible.’ See also P. Ducheine & F. Osinga, ‘Gebruik van drones kan wel degelijk nut hebben’, in *NRC Handelsblad*, 25 March 2013.

⁴ See *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, September 2012, at www.livingunderdrones.org. See also Pax Christi, *Onbemand maakt onbemand? Een verkenning van het debat over drones en robots in oorlogsvoering*, May 2011.

consent by the state where the drones are used, the existence of a UN mandate sufficient to authorise the use of force, and the right of self-defence.

Apart from these questions, which traditionally fall within *jus ad bellum* (the right to use force), questions arise as to which legal regimes are appropriate for regulating the use of force. In cases of armed conflict, this is international humanitarian law, also known as *jus in bello*) and, where applicable, international human rights law (IHRL). In situations that do not qualify as armed conflict, IHL is not applicable and the use of force is mainly regulated by IHRL. The most relevant human right in this case is the right to life.

Both aspects (legal bases and legal regimes) need to be considered, since in all cases where force (lethal or otherwise) is used there must be a clear legal basis for action, and the deployment of any weapon must meet the legal requirements governing where, how and against whom force can be used. Our discussion of the applicable legal regime will also look at the geographical and temporal limits to IHL, especially the question of whether armed conflict in or between particular states can 'travel' with a combatant that moves to a third state.

The main question in this advisory report is 'how, from the point of view of international law (*jus ad bellum*, *jus in bello*, human rights law), do you assess the lawfulness of using force involving armed drones, particularly as regards the distinction between situations arising in and outside the context of armed conflict?' In answering it, we will also look at whether the fact that a particular attack involves an armed drone makes it necessary to deviate from the general rules governing the use of force, and hence whether current international law is adequate to regulate the use of armed drones or new law is required.

The structure of this advisory report is as follows. Section 2 deals with the increasing use of drones as weapons during armed conflict, and as a new method in the fight against terrorism. Section 3 looks at issues arising from the possible violation of the sovereignty of the state where the operation is carried out, with reference to the relevant provisions of the *jus ad bellum*, and analyses the possible legal bases for such action. Section 4 describes the legal regimes applicable to (1) action in connection with hostilities during an armed conflict and (2) situations that do not qualify as armed conflict and are subject to IHRL. Section 5 discusses the responsibility of third states. Finally, section 6 presents some conclusions and recommendations on the deployment of armed drones, answering each of the questions in the request for this advisory report.

2. THE USE OF ARMED DRONES

The use of drones by states during armed conflict or for other public purposes is nothing new. Such aircraft were already being used for reconnaissance, information-gathering and target selection during the Vietnam War. Drones are now used for many purposes by a growing number of states, both in and outside the context of armed conflict. More than 40 states now possess drones.⁵ The additional and detailed information that unmanned aircraft can provide may be crucial in averting military hazards and risks to personnel. The use of *armed* drones is more recent, and has greatly increased in recent years.⁶ Three states are now making effective use of armed drones: the United States, Israel and the United Kingdom. There is one known instance of the use of a drone by a non-state entity, Hezbollah, in 2005.⁷ In the future, use may be made of armed drones that can select their targets autonomously, with human personnel acting in a supervisory capacity only. Since it seems unlikely that such aircraft will be deployed in the medium term, they will not be discussed in the remainder of this advisory report; however, the deployment of any weapons system, whether or not it is wholly or partly autonomous, remains subject to the legal framework set out below.

Armed drones are used to attack identified adversaries or presumed terrorists ('personality strikes'), as well for 'signature strikes'. A signature strike is an attack on one or more persons based on a number of characteristics or 'signatures', although the identities of the individuals concerned are not known.⁸ The lawfulness of both kinds of action is analysed in this advisory report.

It should be emphasised here that armed drones are not in themselves prohibited weapons. In principle, the targeted killing of an individual is no more or less lawful if an armed drone has been used for this purpose. However, the manner and the large-scale nature of the deployment of armed drones to attack persons raise questions as to whether such operations are necessary or proportionate. Moreover, even in the case of signature strikes, the requirements and restrictions regarding the selection of legitimate targets, as well as the obligation under IHL to distinguish between civilians and combatants, remain fully applicable.

⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *UN Doc. A/HRC/14/24/Add.6*, 28 May 2010, para. 27.

⁶ C. Klapwijk & H. Meerveld, 'Unmanned Aerial Vehicles: het debat over de opkomst van onbemande vliegtuigen', in *Militaire Spectator*, vol. 181, no. 11 (2012), pp. 484-485.

⁷ See footnote 4, Pax Christi report, p. 13.

⁸ A. Entous, S. Gorman & J.E. Barnes, 'U.S. Tightens Drone Rules', *Wall Street Journal*, 4 November 2011, also at <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html>, last checked on 4 June 2013.

3. LEGAL BASES

A state's airspace is part of its territory, and hence is within its exclusive jurisdiction. The guiding principle in international law is that entering a foreign state's territory without its consent is a violation of that state's sovereignty. Entering a foreign state's airspace is permitted in accordance with a recognised legal basis, including consent by the state concerned (whether or not granted under a bilateral or multilateral treaty or treaty regime). For civil aviation there is a multilateral treaty regime that regulates the right of international commercial flights to overfly or land in states' territories.⁹ State aircraft (all aircraft used for military, police or other government purposes) may in principle enter a foreign state's airspace only if granted express consent for one or more specific flights. Furthermore, consent granted to civil aircraft to overfly a state's territory cannot be used if they have armed military personnel or military equipment on board.¹⁰ In the absence of specific consent, entering a foreign state's airspace and the use of force are only permitted in accordance with another recognised legal basis, i.e. a mandate from the United Nations Security Council, or the right of self-defence. These legal bases are discussed in further detail below.

3.1 Consent by the territorial state

Consent by the territorial state in which an armed drone attack takes place prevents this from being deemed a violation of the prohibition on the use of force. Under article 20 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, the consent must be valid, and the operation must remain within the limits of the said consent. Consent must be granted in advance or at the same time as the operation. Consent granted after the event is known as a waiver or acquiescence, and entails loss of the right to invoke responsibility. Consent is valid only if it is voluntary, i.e. is not granted under duress. Analogous application of Part V, section 2 of the VCLT can provide additional grounds for assessing the validity of consent. Applying article 46 of the VCLT *mutatis mutandis*, a state may not invoke the fact that its consent has been expressed in violation of a provision of its internal law on the

⁹ Convention on International Civil Aviation, Chicago, 7 December 1944, UNTS (United Nations Treaty Series), vol. 15, p. 295. Article 3 states that the convention does not apply to state aircraft, as defined in that article.

¹⁰ Article 20 commentary, para. 9, in Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, November 2001.

division of competences as invalidating its consent unless that violation was manifest to the operating state or concerned a rule of its internal law of fundamental importance.¹¹

Consent must be granted by a competent organ or authority of the state where the action is carried out. Which organs are competent to grant consent can be derived analogously from the relevant provisions of the VCLT. Article 7(1)(b) of the VCLT states that the practice of the state concerned is of relevance, as are other circumstances showing that the state's intention was to consider a particular person as representing the state for such purposes. This applies, for instance, to consent granted by defence ministers or commanders-in-chief. Under article 7(2) of the VCLT, heads of state, heads of government and ministers for foreign affairs are automatically considered as representing their state.

The state granting consent is at liberty to attach certain conditions to its consent, provided these do not conflict with other obligations under international law. The actual consent must be sufficiently specific. A general agreement (bilateral or otherwise) to cooperate militarily in order to maintain peace and security, or to guard borders, cannot be considered as consent or as an invitation to deploy military personnel or use force.¹² The state that has been granted consent may not carry out any activities other than those agreed, unless separate consent for this is granted. Neither the state granting consent nor the state to which it is granted may diverge from the requirements laid down by international law for the use of force. The consent does not have to be made public, provided it meets the other requirements for valid consent as set out above.

The existence of consent must be clearly established, but according to the ILC consent may be granted implicitly in very specifically defined circumstances. In this connection the ILC has referred to the *Savarkar* case, in which a court of arbitration found that French sovereignty had not been infringed in this matter, since the French *gendarmerie* had assisted the British authorities in arresting Savarkar and hence had implicitly consented to the arrest.¹³ However, the existence of consent can never be presumed. If a state permits another state to use airbases to carry out drone operations or other operations aimed at gathering intelligence to be used directly for the drone operations, this can also be seen as a form of implicit (or 'tacit')

¹¹ See also International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, para. 265-266.

¹² International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 46.

¹³ See footnote 10, commentary on article 20, para. 8.

consent to the drone operations.¹⁴ Opening up airspace to drones could also be seen as evidence that consent has been granted implicitly.¹⁵ However, this can only be determined case by case, taking account of all the relevant facts. Consent can in principle be withdrawn at any time, unless agreed otherwise (for example under the terms of a treaty). A state cannot consent to the violation of human rights.¹⁶

In cases involving implicit consent, uncertainty may arise as to whether or not consent has actually been granted. Moreover, in the case of 'failing states', or states embroiled in civil war, it is not always clear who is authorised to speak on behalf of the state. These are questions of general international law, and the answers will not only be applicable to the use of force involving armed drones. However, these questions have arisen in connection with armed drone attacks in particular, and specifically drone attacks by the United States in Pakistan, as it is not clear whether Pakistan consented to these.¹⁷

3.2 UN mandate

A second possible legal basis for the use of force arises from the UN Charter. Given the UN Security Council's primary role in the maintenance and restoration of international peace and security, the Security Council can issue a mandate for the use of force. This mandate can authorise the use of force for specific purposes, e.g. by a UN peacekeeping force in order to carry out specific tasks and attain specific objectives. Alternatively it can issue a general mandate authorising one or more member states to 'take all necessary measures' to maintain, restore or help restore international peace and security. In either case the mandate need not contain a specific reference to the possible deployment of armed drones, provided this can reasonably be assumed to accord with the conditions and objectives of the mandate. For example, if a mandate permits a UN peacekeeping force to take action against armed organisations operating in a particular state, the deployment of drones could help implement

¹⁴ In this light, Pakistan's consent to the CIA's use of two airbases in Baluchistan and at Jacobabad in Sindh until at least 2011, and perhaps longer, could be seen as evidence of implicit consent to the United States' actions. See International Crisis Group, *Drones: Myths and Reality in Pakistan*, Asia Report No. 247, 21 May 2013, pp. ii, 1, 3-5.

¹⁵ *Ibid.*

¹⁶ See footnote 10, commentary on article 20, para. 10.

¹⁷ 'Pervez Musharraf admits permitting "a few" US drone strikes in Pakistan', *The Guardian*, 12 April 2013. On the other hand, UN Special Rapporteur on human rights and counter-terrorism Ben Emmerson had expressly stated after a visit to Pakistan that no consent had been granted (14 March 2013). It does seem likely that consent existed from around early 2004 to November 2011, as the United States used Pakistani military bases for drone operations during this period. Consent was probably withdrawn after the attack on Osama bin Laden and an incident at the Afghan-Pakistani border in November 2011, in which 24 Pakistani soldiers died. See <http://www.nrc.nl/nieuws/2011/12/02/pakistan-gaf-zelf-toestemming-voor-dodelijke-navo-luchtaanval>, last checked on 4 July 2013. See also footnote 14.

the mandate by carrying out reconnaissance, surveillance and other related missions in support of ground troops. Such action could even include the use of force from the air by drones, provided this is in accordance with the mandate. A Security Council mandate does not have to give specific and explicit authorisation for the deployment of armed drones. Security Council practice is that mandates lay down general objectives and parameters for a particular mission, but specific means of carrying out the mandate are seldom if ever mentioned. The deployment of specific weapons and weapons systems depends on whether these can reasonably be deemed in accordance with the particular mandate. If so, use of the weapon or system is in principle permitted. Of course, the Security Council is at liberty to set specific limits to this. When force is authorized, this could mean that a situation of armed conflict is present, in which case, the rules of IHL relating to the conduct of hostilities (discussed below in Section 4) would be applicable.

3.3 Self-defence

The third legal basis for the use of force is the right of self-defence. This is subject to a number of legal conditions. Since the right of self-defence is based on both the UN Charter and customary international law, the conditions laid down in both of these must be met. Article 51 of the UN Charter states that the right of self-defence can only be exercised in the event of an armed attack (or an imminent threat of such an attack), and that this right remains in force until the UN Security Council has taken the necessary measures to maintain international peace and security. The Charter also includes a procedural requirement that states must report the exercise of this right to the Security Council immediately. According to interpretations by international courts, interpretative resolutions by the UN General Assembly and the literature on public international law,¹⁸ an armed attack must involve the use of armed force of a relatively significant nature, which exceeds the level of a small-scale armed incident or criminal violence. The attack must be launched or directed from outside the attacked state. Armed attacks may be carried out either directly (by one state against another) or indirectly (by an armed group directed by a state, or with significant involvement on the part of a state). Apart from these generally accepted alternatives, an armed attack can be carried out by an organised armed group that is autonomous (i.e. not dependent on a

¹⁸ For an overview, see, for example, S. Ratner, 'Self-Defense Against Terrorists: The Meaning of Armed Attack', in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, L. van den Herik and N. Schrijver (eds), Cambridge University Press, 2013; Y. Dinstein, *War, Aggression and Self-Defence*, 5th ed. (2011), pp. 187 ff.; T.D. Gill, 'Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law', in T.D. Gill & D. Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press (2010), pp. 187-198; T. Ruys, 'Armed Attack' and Article 51 of the UN Charter, Cambridge University Press (2010), pp. 419 ff.

state) and operates from within a foreign state, without being directed by that state, but with a greater or lesser degree of tolerance or support for the group's actions. It is somewhat disputed whether this latter form of armed attack is enough to warrant exercising the right of self-defence, but the applicability of this right in response to such an attack is increasingly accepted, provided the attack is sufficiently grave in terms of its scale and effects to be compared to an attack carried out by a state.¹⁹

In addition to the requirement that there is an armed attack, customary international law requires that the right of self-defence must be exercised in accordance with the criteria of necessity, proportionality and immediacy. These prescribe that the right of self-defence remains in force as long as there is an ongoing or imminent armed attack,²⁰ that under the circumstances there must be no adequate alternative ways to ward off or prevent the attack, that the defensive action must be designed to ward off the attack and prevent further attacks and involve no more force than is needed for this purpose, and that the action must be undertaken within a reasonable period of time, in the light of relevant circumstances, such as the need to ascertain the identity of the attacker and to deploy armed forces. In short, self-defence means the legal use of proportionate force against an armed attack when there are no adequate alternative ways to ward off the attack and prevent its continuation. Alternatives include adequate collective measures by the Security Council or specifically, in the case of attacks by an armed group, adequate law enforcement by the state where the group is located and from which it is operating.

While the right to self-defence applies, force may be used under the above conditions against the state or entity that is carrying out and/or directing the armed attack, as long as this is necessary to ward off the attack or prevent its continuation from the same source. The right of self-defence cannot be exercised on the territory of a state that is taking adequate measures to prevent its territory from being used to launch attacks on other states, or on the territory of third states that have not been involved in an earlier attack from within another state. If the attack has been prevented and there is no direct, clear threat of further attack from the same source in the immediate future, the right of self-defence no longer applies. When the right of self-defence is exercised, the deployment of drones is not in itself prohibited. In this connection there are various kinds of missions that can be carried out

¹⁹ See UN Security Council Resolutions 1368 and 1371 of 2001. See also 'Leiden Policy Recommendations on Counter-Terrorism and International Law', N. Schrijver and L. van den Herik, 1 April 2010, paras. 38-44, *Netherlands International Law Review*, vol. 57, 2010, pp. 533-550.

²⁰ For more details, see the AIV (Advisory Council on International Affairs) and CAVV advisory report on Pre-emptive Action (AIV no. 36, CAVV no. 15), July 2004. See also footnote 19, 'Leiden Policy Recommendations on Counter-Terrorism and International Law', paras. 45-48.

using drones, including attacks on persons and/or objects to the extent that this is necessary and proportionate, as described above. However, having a valid legal basis for the use of force cannot be seen in isolation from other factors. Action taken to exercise the right of self-defence must of course be in accordance with the applicable legal regimes regulating the use of force, as described below. It should be noted here that the regime governing self-defence is no different if drones are used.

4. LEGAL REGIMES APPLICABLE TO THE DEPLOYMENT OF ARMED DRONES

When deploying any means of force or weapon system, apart from the question of whether there is a valid legal basis for the action, questions also arise as to which legal regimes govern the use of force. For example, even in cases where the right of self-defence is lawfully exercised, international humanitarian law (IHL)²¹ or international human rights law (IHRL) may apply. So a valid legal basis cannot be seen in isolation. For instance, the right of self-defence does not determine which means are permitted, or how an attack is to be carried out. Even if there is a valid legal basis for the use of force, an attack may still be deemed unlawful under IHRL or IHL.²² In cases where the right of self-defence is lawfully exercised, the use of force will almost always occur in the context of an armed conflict, even though the *jus ad bellum* and *jus in bello* (IHL) are completely independent, separate areas of law. In the case of the other possible legal bases (a UN Security Council mandate or consent), the existence of armed conflict will depend on whether the conditions for such a conflict are satisfied and whether the operating state is a party to the conflict (in cases of self-defence, this is presumed to be the case).

4.1 Applicability of IHL

When force is used in the context of armed conflict, the primary applicable legal regime is IHL, plus IHRL where necessary and applicable. The two regimes coexist, and complement one another to the extent that they are both applicable. Where their provisions conflict, the most specific provision prevails.²³ This follows from the *lex specialis derogat legi generali* principle (referred to below as the *lex specialis* principle), which is a general instrument of legal interpretation. IHL is a legal regime that strikes a balance between humanity and military necessity. On the one hand its purpose is to prevent or limit human suffering

²¹ For a general introduction in Dutch on this, see B.P. Pieters & A. Vermeer, *Inleiding Humanitair Oorlogsrecht*, Netherlands Red Cross, T.M.C. Asser Press, 2011.

²² See footnote 10, commentary on article 21. See also International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, para. 25.

²³ See J. Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in Gill & Fleck, *op. cit.*, (see footnote 18), pp. 72-75.

wherever possible, and to protect categories of vulnerable people. On the other hand, it takes account of the reality of armed conflict, in which the warring parties' purpose is to secure a victory (military or otherwise) and defeat their adversary by means of force. The conduct of hostilities in the context of armed conflict is regulated in detail by IHL, which prevails over other applicable legal regimes wherever their provisions conflict, as IHL is specifically designed for this purpose. Below we will therefore discuss only IHL provisions pertaining to the conduct of hostilities. In situations where there is no armed conflict, or where despite the existence of armed conflict the hostilities paradigm does not apply (e.g. when maintaining law and order in occupied territories), the situation is different and provisions from other legal regimes apply in addition to those of IHL. This is discussed in section 4.3.

As a matter of basic principle, IHL applies only in situations of armed conflict. International armed conflict is any armed encounter between the armed forces of two or more states, or the complete or partial occupation of enemy territory, whether or not there is armed resistance to the occupation. A situation of non-international armed conflict arises in the event of persistent, relatively intensive hostilities between one or more states and an organised armed group, or between such groups.²⁴ In geographical terms, IHL applies to an international (inter-state) armed conflict throughout the territory of all the states involved in the conflict as belligerents. The territory of states not party to the conflict remains inviolable, unless those states consent to – or are unable to prevent – military operations being carried out from within their territory by a party to the conflict against another party.

In the event of non-international (intra-state) armed conflict, IHL in principle applies only to the territory of the state where the conflict is taking place. In some cases the conflict may spill over, i.e. all or part of an armed group moves to the territory of another – usually neighbouring – state or is expelled to adjoining territory from which the group continues hostilities (for example, the PKK partly operates from northern Iraq against the Turkish government, which in turn regularly carries out operations in northern Iraq against PKK elements operating from there). Such operations are subject to IHL, even if the operation is not deemed lawful or its lawfulness is contested under the *jus ad bellum* as described in Section 3.

Temporally, an international armed conflict lasts from the commencement of hostilities, or of the occupation of enemy territory, until a peace agreement is signed or the hostilities come to

²⁴ Common Article 2 to the four Geneva Conventions of 1949; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber (2 October 1995), para. 70.

a complete and lasting end. A non-international armed conflict lasts until an agreement is reached or the factual conditions for continuation of the conflict no longer exist.²⁵

4.2 Deployment of armed drones and lawfulness of targeted killings under IHL

Under IHL, all attacks (defined in IHL as all acts of violence against the adversary, whether in offence or defence)²⁶ on persons and/or objects are subject to the rules on conducting hostilities. These rules prescribe that attacks may only be targeted at enemy armed forces and military objects, and attacks on civilians and civilian objects as such are prohibited; that before an attack takes place the status of the person or object to be attacked must be determined as clearly as possible under the prevailing circumstances; that attacks involving weapons that do not allow a distinction to be made between military targets and civilians and civilian objects, or weapons that would cause unnecessary suffering and unnecessary injury to enemy armed forces, are prohibited; and that an attack on a military target that may also strike civilians or civilian objects may not be carried out if the expected collateral damage to civilians and civilian objects would be excessive in relation to the specific military advantage that is intended to be derived from the attack. As regards attacks on enemy armed forces during an international armed conflict, every member of the enemy armed forces, except medical and religious personnel, is a legitimate target, whether or not the person in question is taking part in hostilities at the time of the attack, unless the person has been put out of combat as a result of injury or illness, or has clearly and unambiguously laid down his or her weapons and surrendered (whereupon the person is a prisoner of war and may not be attacked). Civilians who participate directly in hostilities lose their protection against attack for the duration of their participation. It should be mentioned here that there is so far no general agreement as to the exact meaning of 'direct participation in hostilities'.²⁷ The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law lays down three cumulative criteria for assessing whether an act qualifies as direct participation: (1) the act must cause perceptible damage to, or adversely affect the

²⁵ For the geographical and temporal applicability of IHL, see, for example, C.J. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck, *The Handbook of International Humanitarian Law* 2nd ed., Oxford University Press (2008), pp. 45-72.; J. Kleffner, *op. cit.* (see footnote 23) in Gill & Fleck, *op. cit.* (see footnote 18), pp. 64-66.

²⁶ Article 49 of the First Additional Protocol to the Geneva Conventions, 1977.

²⁷ See footnote 2. The ICRC published this report after a lengthy study on the subject by an international group of experts. The group was not unanimous about the findings, and some members criticised specific parts of the publication; this was therefore published by the ICRC itself, rather than on behalf of the group. The main points of contention were the ICRC's 'continuous combat function' criterion for loss of protection against attack for members of organised armed groups in non-international armed conflicts and the concept of military necessity as a restraint on the use of force in Section IX of the report. Broad consensus was reached on most of the other points. This advisory report adopts the ICRC criterion for loss of protection in non-international armed conflicts by members of organised armed groups with a 'structural combat function', without stating that this is binding law.

military operations of, a party to the conflict, (2) there must be a causal link between the act and the harm or effect, and (3) the act must benefit a party to the conflict. Despite criticism of some parts of the ICRC guidance, these three criteria remain relatively uncontroversial.

In the context of a non-international armed conflict, members of organised armed groups with a continuous combat function, as well as members of the armed forces of the state that is fighting the armed group, are legitimate military targets. This also applies to civilians who participate directly in hostilities; they lose their protection against attack for the duration of their participation. Captured fighters and equivalent personnel and civilians do not have prisoner-of-war status, but must at all times be treated humanely and with respect for fundamental human rights. The state may prosecute persons who have taken up arms or have otherwise committed hostile acts for their participation in the armed conflict and for ordinary crimes such as murder, manslaughter or destruction of property that have been committed in that context.

Participation in hostilities by civilians, including government personnel who are not in military service, is not in itself considered a war crime or violation of IHL. However, only combatants – i.e. a state's official armed forces – enjoy immunity from criminal prosecution under IHL for participation in hostilities. In addition, only combatants are entitled to treatment as prisoners of war if they fall into the adversary's hands. This means that anyone lacking combatant status can in principle be prosecuted for actions associated with participation in hostilities under the national law of either their own state (unless such participation by non-military government personnel is otherwise legally permitted by the national legislation of the state they represent) or of a state that has jurisdiction over them (for example, because they have been taken prisoner by the adversary). Under Dutch law, only members of the armed forces are legally permitted to participate in hostilities, provided this is in accordance with IHL and their other official instructions.²⁸ Participation in hostilities by non-military personnel, including government personnel who are not in military service, is punishable as an ordinary crime.

In the context of an international or non-international armed conflict it is not prohibited to deliberately attack a specific person who is a legitimate military target in order to kill or injure that person, provided this is done in accordance with the rules of IHL. Such a planned and deliberate attack is often referred to in practice and in the literature as a 'targeted killing'²⁹ and is a legitimate military action, provided it is not done in a perfidious or treacherous

²⁸ Article 38 of the Military Criminal Code (*Wetboek van Militair Strafrecht*).

²⁹ For more on this, see N. Melzer, 'Targeted Killings in Operational Law Perspective', in Gill & Fleck, *op. cit.*, (see footnote 18), pp. 277-301.

manner (for instance, by feigning protected status to gain the adversary's trust) and that it is done in accordance with the other rules for conducting hostilities. Determining whether a particular person can rightfully be deemed a legitimate target very much depends on the reliability of the available information. An attack must be based on the clearest and most accurate information possible as to the status or actions of the person to be attacked. It is therefore important that the legal systems in the operating states include procedural safeguards to ensure that the decision-making process for the selection of targets is as careful, transparent and accurate as possible. Although the standard here is not as strict as for criminal evidence (this would not be feasible in a combat situation), there must be a reasonable conviction that the target is legitimate (a military target) based on the existing information and indications at the time of the attack. The rule is that the attack may not take place if there is doubt as to whether a person is a legitimate target. If a state selects targets without observing these safeguards, this can lead to violation of IHL.

In attacks during an armed conflict, including operations involving a targeted killing, any weapon or method of combat that is not prohibited under IHL may be used. The attack may be carried out from any range, and the person designated as the target does not have to be warned of the attack in advance. However, any civilians in the target area must be warned in advance, provided this is feasible under the prevailing circumstances without jeopardising the operation. The difference between a targeted killing in the course of hostilities during an armed conflict and an extrajudicial execution is that the former is directed at a member of the enemy who qualifies as a military target under IHL. However, it is prohibited to attack a person who has made his or her intention to surrender clear to the adversary, or has been taken prisoner, or is otherwise in the enemy's physical power; deliberately killing or seriously injuring such a person would be deemed a war crime.

The above also applies to a planned, deliberate armed drone attack on one or more specific persons in the context of an armed conflict. A signature strike on an individual or group of individuals is lawful if it is clear that the persons to be attacked are either members of enemy armed forces or civilians directly participating in hostilities; in cases of doubt, however, the attack may not take place. Thus the crucial question regarding the lawfulness of signature strikes is which 'signatures' are used to select individuals as targets. Only signatures designed to select members of armed groups with a combat function (fighters) or civilians directly participating in hostilities are lawful.³⁰ These may, for example, include the criterion that persons are in a training camp, or are transporting weapons, or are otherwise planning

³⁰ For more details, see K.J. Heller, "One Hell of a Killing Machine": Signature Strikes and International Law', *Journal of International Criminal Justice*, vol. 11, no. 1, pp. 89-119 (2013).

an attack. The criterion that the person is a man of military age or associates with other known combatants is not sufficient. IHL prescribes that, when planning and carrying out an attack, everything feasible must be done to ensure that the persons to be attacked are not protected persons but military targets.³¹

An armed drone is not prohibited under IHL, and owing to its ability to track a target from the air for a long time it is more capable than many other weapons systems of verifying the status of the intended target. An armed drone can also be deployed at a time when the expected collateral damage can be kept to a minimum. The weapons that are usually deployed from the drone (guided bombs and air-to-ground missiles such as the Hellfire) are conventional weapons that are part of many states' arsenal and are likewise not prohibited under IHL. Provided the drone is deployed within the qualitative, geographical and temporal range of an armed conflict in accordance with all the rules set out above, there is no legal reason to deem such an attack unlawful in advance. The fact that the persons targeted in many cases cannot directly defend themselves against such an attack does not detract from its lawfulness. Hostilities in the course of armed conflict are not jousting tournaments or sporting events; even though honourable conduct and 'chivalry' have historically been part of IHL and have to some extent been incorporated into it, this has never implied that adversaries on the battlefield should have 'equal chances' or that it is prohibited to kill an adversary from a distance. If this were the case, bows and arrows, rifles, machine guns, artillery and military aircraft would long since have been prohibited weapons.

In conclusion, a planned drone attack is lawful under IHL if (1) the conditions for the existence of an armed conflict are fulfilled, (2) the attack is carried out within the area to which IHL applies and (3) the attack complies with all the applicable rules and restrictions laid down under IHL concerning the conduct of hostilities.

4.3 Applicability of human rights law, and targeted killings outside the context of armed conflict

Outside the context of an armed conflict IHL is not applicable, and the use of force (lethal or otherwise) is mainly regulated by the IHRL (as elaborated in national legislation that will not be further discussed here). When there is effective control of territory or persons in situations of armed conflict, IHL is not the only applicable legal regime; it is then supplemented by human rights law. In all situations where lethal force is or may be used, both in and outside

³¹ Cf. article 57(2)(a)(i) of the First Additional Protocol to the Geneva Conventions, 1977.

the context of an armed conflict, IHRL, in addition to national law, requires that adequate, transparent and independent reporting and monitoring procedures be set in motion to ensure that the action is in accordance with all the legal requirements and, where necessary, to act adequately and expeditiously to prevent violations of the applicable law or investigate and prosecute violations. IHL includes the duty to investigate alleged violations and prosecute the perpetrators, or take measures to prevent any recurrence. As far as Dutch military personnel are concerned, the Public Prosecution Service in Arnhem plays a role in every operational action by the armed forces during international missions. If the Netherlands armed forces were to deploy armed drones in the future, such deployment would be subject to the same procedures.

Since the use of armed drones in international anti-terrorism operations often takes place on the territory of another state, the first question that arises is whether the operating state is still bound by international human rights law if its action is carried out on the territories of third states. Does the operating state exercise jurisdiction that implies the applicability of human rights? The answer to this question can be found in the doctrine of extraterritoriality of human rights.

According to international case law, the concept of jurisdiction is mainly determined by the relationship between the state and the individual, and does not have to be territorially limited. If there is a relationship in which the state exercises 'control and authority' over the individual, the state has jurisdiction and hence must respect that individual's human rights. The question is whether such a relationship exists in cases of targeted killing. The most restrictive view is that taken by the European Court of Human Rights (ECtHR). In the *Banković* case³² the ECtHR ruled that the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) can only apply extraterritorially in exceptional situations. This would be the case if there is effective control over the foreign territory and its inhabitants owing to military occupation, or if the state exercises some or all public powers with the consent of, at the invitation of or with the acquiescence of the territorial state (*Banković*, para. 71). In the *Alejandro* case, on the other hand, the Inter-American Commission on Human Rights found that shooting down a civil aircraft was sufficient proof of 'authority and control' (*Alejandro*, para. 25).³³ In *Al-Skeini*,³⁴ the ECtHR found that the United Kingdom was exercising public powers in Iraq and, in particular, had authority and bore

³² ECtHR, *Banković and others v. Belgium and others*, decision of 12 December 2001, application no. 52207/99.

³³ However, it has been argued that *Banković* and *Alejandro* differ in that *Banković* involved collective, depersonalised use of force, whereas *Alejandro* involved selective, individualised use of force.

³⁴ ECtHR, *Al-Skeini and others v. United Kingdom*, judgment of 7 July 2011, application no. 55721/07.

responsibility for security in part of the country. Under these special circumstances the Court held that the UK had authority and control over individuals killed during security operations and therefore had jurisdiction over those individuals (*Al-Skeini*, para. 149). It could then be argued *a contrario* that, in the absence of such exercise of public powers, the ECtHR considers that there is no extraterritorial applicability whatsoever, and that the associated obligations do not apply to the operating state. In that case the territorial state still has positive obligations derived from the right to life, including the duty to hold an investigation. International courts of human rights and other institutions hold differing views, and the law on this point is still far from being established.

In order to prevent a situation of lawlessness from arising, the UN Human Rights Committee has stated in General Comment no. 31 that a state's obligation to respect human rights extends to:

'anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... This principle also applies to those within the power or effective control of the forces of the State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation.'³⁵

In this connection the Committee expressly accepted the extraterritorial applicability of human rights to military operations and peacekeeping operations outside the territory of the state concerned.³⁶

In situations in which the relevant IHRL is deemed extraterritorially applicable, the legal framework that applies to the state operating with drones is as follows. Under IHRL, the use of lethal or potentially lethal force is permitted only in exceptional situations. Apart from imposition of the death penalty in states where this is still legal, these situations are confined to defending one's own person or a third person from a direct and immediate threat of serious violence, preventing the escape of a person suspected or convicted of a particularly

³⁵ General Comment no. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10, as confirmed by the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 [2004], ICJ Rep 136, para. 111.

³⁶ See Concluding Observations on the second periodic report of Israel, UN Doc. CCPR/CO/78/ISR (2003), para. 11 and 17, as quoted by R.K. Goldman, 'Extraterritorial application of the rights to life and personal liberty, including habeas corpus, during situations of armed conflict', in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, L. van den Herik and N. Schrijver (eds.), see footnote 18.

serious offence, or suppressing a violent uprising (below the threshold of a non-international armed conflict), where it is strictly necessary to employ these means in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for so long and in so far as strictly necessary and proportionate. There must be a legal basis in national law, and any alleged violation of the right to life by the security services or other state organs must be investigated at national level.

International case law has also formulated a precautionary principle, which requires that the question of whether lethal force is strictly necessary must be considered at each moment of the action. The necessity principle has qualitative, quantitative and temporal dimensions. Qualitatively, the force must be strictly necessary in relation to the objective to be attained. Quantitatively, the force used must not be excessive. Temporally, the use of force must still be necessary at the time of the action. The proportionality principle prescribes that use of force be justified in the light of the nature and seriousness of the threat. These IHRL requirements are very different from the IHL principles with regard to permitting collateral damage and injury to third persons. Whereas under IHL collateral damage and injury are not unlawful in the context of hostilities during an armed conflict provided these are not excessive in relation to the expected specific military advantage of an attack, injuring or killing third persons when using force is in principle prohibited under IHRL, other than in exceptional situations, and then only to the extent that this is strictly necessary and proportionate, subject to the aforementioned precautionary principle.

Under IHRL, targeted killing is a use of force that is permitted only in the most exceptional situations. Since targeted killing involves the use of deliberate, planned lethal force, it is hard to reconcile with the precautionary principle, and would in all likelihood be permitted only in exceptional situations. Conceivable examples include hostage rescues, perhaps the arrest of armed, highly dangerous suspects posing a high level of risk to the arrest team or third persons, or the shooting-down of a 'renegade' aircraft that has been taken over by terrorists and may be about to be used as a flying bomb. Under very specific circumstances the use of deliberate, planned lethal force would not necessarily be unlawful in such emergency situations, but otherwise it would almost always conflict with the right to life. It has been suggested that the requirement of an 'immediate' threat of serious violence should be interpreted differently in the case of extraterritorial antiterrorist operations, since in such situations there is usually no available alternative to arrest by the operating state. The suggestion is then to exceptionally permit targeted killing if there is a very high risk of the

person being directly involved in serious future terrorist activities.³⁷ In most such scenarios, however, the deployment of a military weapon such as an armed drone would be a suitable method only in highly exceptional cases. The deployment of drones for surveillance and intelligence purposes in law-enforcement situations is readily conceivable, but the use of such a relatively heavy military weapon for attacks on ground targets outside the context of an armed conflict would in most cases almost automatically conflict with the strict requirements of necessity and proportionality that apply under IHRL – especially if there were a risk that innocent civilians would also be victims of the drone attack.

5. RESPONSIBILITY OF THIRD STATES

The above legal framework sets out the obligations applicable to states carrying out drone attacks. Operating states are primarily responsible for the deployment of armed drones and the associated consequences. Under very specific circumstances, third states that assist such operations can also be held responsible for their contribution. Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts lays down the following criteria for such responsibility:

- (a) the third state which assists the primary state in the commission of an internationally wrongful act by the latter has knowledge of the circumstances of the act;
- (b) the act would be internationally wrongful if committed by the third state.

This therefore means assistance that makes an actual and significant, although not necessarily essential, contribution to the commission of the wrongful act.

The requirements of article 16 are strict; the mere fact that a third state takes part in a multinational military operation in which another state uses armed drones unlawfully does not suffice to render that state responsible. A third state allowing airbases to be used for the launch of drone attacks may render itself responsible if all the conditions in article 16 have been satisfied and the third state thus has prior knowledge of the unlawful circumstances. Another form of assistance is the sharing of secret information on individuals by a third state. The state could be rendered responsible under article 16 if the information is used for an unlawful targeted killing. However, this would only be the case if the state sharing the information were aware that the operating state pursued a policy of targeted killing in which

³⁷ D. Kretzmer, 'The legal regime governing the use of lethal force in the fight against terrorism', in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, L.J. van den Herik and N.J. Schrijver (eds.), see footnote 18.

targets were selected without due care, and if the shared information made a significant contribution to unlawful targeted killing.

6. CONCLUSIONS AND RECOMMENDATIONS

A number of conclusions can be drawn in the light of the above analysis; however, this should not be interpreted to mean that all the possible questions and controversies regarding the deployment of armed drones in specific situations have been dealt with.

First, it should be emphasised that armed drones are not in themselves prohibited weapons under international law. The use of armed drones is regulated by specific rules and regimes within international law, as set out in this advisory report. In principle, there are no special rules for the use of armed drones that deviate from these rules. However, certain issues are especially relevant to situations in which armed drones are used. These include issues of consent, the possibility of third states being rendered responsible (or jointly responsible), invoking the right to self-defence against non-state entities, the temporal and geographical scope of armed conflicts to which IHL applies, and the extraterritorial applicability of human rights.

If a state aircraft such as an armed drone enters a foreign state's airspace, this always requires valid consent for the specific objective involved from the state concerned or else another valid legal basis under international law. In the absence of a valid legal basis, such entry is a violation of sovereignty and an unauthorised intervention by the operating state against the other state. If force is used in this connection, the prohibition of the use of force will also have been violated. If such entry takes place *with* consent, the operating state must abide by the scope of the consent; failure to do so without additional explicit permission makes the action unlawful. If such entry takes place with a legal basis other than consent, the operating state (or other entity, e.g. an international organisation such as the UN) must abide strictly by the requirements and conditions of the legal basis concerned. In this connection it should be noted that self-defence is subject to (1) requirements derived from the UN Charter, and (2) conditions derived from customary international law. These allow no latitude for action against purely potential dangers that have not yet become manifest, or against specific individuals purely on the basis of suspected involvement in terrorist or other subversive activities, unless these have the scope and scale of an (imminent) armed attack that cannot be responded to by any other available means.

A valid legal basis for the use of force cannot be seen in isolation. In every situation where force (lethal or otherwise) is used, the requirements under the applicable legal regime must also be met. In situations in which the threshold of armed conflict has been reached or exceeded, the primary regime is international humanitarian law (IHL), which is applicable during international or non-international armed conflict. In all cases, the use of force is subject to the requirements for conducting hostilities, as laid down in IHL. Furthermore, hostilities may only be conducted against a party to an armed conflict under the following conditions: qualitative (existence of an armed conflict), temporal (as long as the conditions persist) and geographical (within the territories of the states that are parties to the conflict). In this connection it should be noted that the territories of states that are not parties to an armed conflict are inviolable and that military operations on neutral territory by one party to an armed conflict against another party to the same conflict are prohibited, other than in exceptional cases. These only arise if the third state allows its territory to be used by a party to an armed conflict to carry out military operations against another party (in which case the state concerned itself becomes a party to the conflict), or persistently or flagrantly fails to keep its territory sufficiently free of operations carried out by one party to an armed conflict against another party. If in the latter case such operations are carried out by a non-state party, there is some dispute as to whether the right of self-defence can be invoked; however, it is increasingly accepted that the attacked state is entitled to take action, including proportionate armed action, to put an end to such operations, provided the attack is sufficiently grave in terms of its scale and effects to be compared to an attack by a state. However, this certainly does not provide *carte blanche* to wage war anywhere in the world against individuals or groups that may have similar views to or sympathise with the adversary but are not themselves involved in the conflict concerned. Nor is there any such thing in international law as a 'war' against a phenomenon such as terrorism; an armed conflict ('war') can only be waged against one or more specific parties if the conditions for the existence of an armed conflict have been fulfilled.

If the above conditions have been fulfilled, attacks can be carried out against persons and objects subject to attack, including attacks with armed drones, provided this is done in accordance with IHL. There are no rules in IHL prohibiting the deployment of unmanned aircraft as weapons in an armed conflict or stating that attacks using armed drones are unauthorised or unlawful, provided the requirements of IHL are met.

In situations of armed conflict in which there is effective control over territory or persons (such as when territory is occupied or persons are in the physical control of an adversary), or outside the context of armed conflict, the applicable legal regime in relation to the targeting of

persons is that of human rights law and the paradigm of law enforcement. Current international law does not provide a clear answer to the question of whether obligations under IHRL apply extraterritorially in the absence of effective control over the territory or the exercise of public powers. If IHRL is deemed extraterritorially applicable, it may be stated that the planned, deliberate killing of a specific individual is only permitted under very special circumstances. The deployment of a relatively heavy military weapon system such as an armed drone will almost always be a disproportionate and unnecessary use of force. Under international human rights law, the death of bystanders by way of 'collateral damage' cannot in principle meet the criteria of necessity and proportionality.

There are no loopholes in international law that would create a legal vacuum for the deployment of armed drones. The deployment of armed drones is fully covered by existing international law. The conditions and circumstances in which they can be deployed are no different from the rules applicable to the deployment of any other weapons system. Nor is there any reason to believe that the existing international legal framework is inadequate to regulate the deployment of armed drones. Quite simply, if an attack carried out by a conventional fighter aircraft such as an F-16 is lawful under international law, it would also be lawful if it were carried out using an armed drone and vice versa. The applicable law is exactly the same, whatever platform is used for the attack. Any legal uncertainty mainly concerns broader issues of international law that reflect changing international conditions, such as the greater role of non-state actors in the international community. However, such issues are not specifically related to the deployment of armed drones, although the debate on drones will make it more urgent to raise, and if possible resolve, these issues at international level. It is beyond the scope of this advisory report to make proposals on this. The debate about armed drones largely revolves around the question of what the applicable rules are, whether the existing rules are correctly applied, and the lack of transparency regarding the circumstances in which drones are actually deployed.

Compliance with the applicable rules of international law is not just a legal duty for every state but is in the interest of all states, including those that currently have the technological capacity to deploy such a relatively sophisticated weapon system as an unmanned aircraft with offensive capacity. At the moment only a few countries possess such capacity, but this seems set to change. Unmanned aircraft may be reasonably sophisticated, but they are not the exclusive domain of a handful of states, and the necessary technology is not so exotic or expensive as to prevent other states from developing their own capability in this area. To avoid setting precedents that could be used by other states or entities in the fairly near future, it is vital that the existing international legal framework for the deployment of such a

weapons system be consistently and strictly complied with. States need to be as clear as possible about the legal bases invoked when deploying armed drones. There must also be sufficient procedural safeguards for assessing the selection of targets and the proportionality of attacks, allowing lessons to be learned for future interventions.

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The Advisory Committee on Issues of Public International Law advises the government and parliament on international law issues.

Professor M.M.T.A. Brus
Chair of the Advisory Committee on Issues of Public International Law
P.O. Box 20061
2500 EB The Hague

Date: 5 January 2013

Re: Request for an advisory report on drones

Dear Professor Brus,

More and more questions are being raised as to the use of armed unmanned aircraft, commonly known as drones. Armed drones are now being deployed in various parts of the world, in particular against specific individuals as part of the fight against terrorism. Existing rules and principles of international law regarding the use of force have been invoked in this connection. Aside from the fact that detailed factual information is needed in order to make a well-founded assessment of the lawfulness of specific drone attacks, it has become a matter of debate whether certain principles of international law may be invoked to justify the lawfulness of using armed drones.

The international law aspects of armed drone attacks need further clarification. Given the CAVV's expertise, I would welcome your advice on the lawfulness of, and conditions governing, the use of armed drones. I therefore request you to draw up an advisory report on the subject, based on the following questions:

- How, from the point of view of international law (*jus ad bellum*, *jus in bello*, human rights), do you assess the lawfulness of using force involving armed drones, particularly as regards the distinction between situations arising in and outside the context of armed conflict?
- How do you view geographical and temporal limits to the applicability of the *jus ad bellum* and *jus in bello* in this connection?
- How does consent by the state on whose territory such drones are deployed affect the assessment of the lawfulness of their use, and what conditions must such consent satisfy?
- What conditions can be laid down for the use of armed drones on the basis of international law?

- Is current international law adequate to regulate the use of armed drones, or is new law required?

I look forward to receiving your advisory report by 1 August 2013.

Yours sincerely,

Frans Timmermans
Minister of Foreign Affairs

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