

Government response to advisory report no. 23 on armed drones by the Advisory Committee on Issues of Public International Law (CAVV)

Introduction

On 16 July 2013 the Advisory Committee on Issues of Public International Law (CAVV) presented its advisory report on armed drones, which had been requested by the Minister of Foreign Affairs on 5 January 2013. The minister then informed the House of Representatives about this request for advice, also on behalf of the Minister of Defence (Parliamentary Paper 33 400 X, No. 49). The government is grateful to the CAVV for its sound advice, which is a valuable contribution to the development of ideas on the use of armed drones. Like this response, the advisory report is confined to international law aspects of the use of armed drones. The government is aware that other considerations such as military/operational, technical and ethical considerations also play a part in the deployment of drones.

Government response

The CAVV states that armed drones are not prohibited weapons. The conditions and circumstances under which they may be used are no different from the rules on the use of any other weapon system. The government agrees with this conclusion.

In discussing the relevant rules of international law, the CAVV makes a distinction between possible legal bases for the use of force outside a state's territory and the applicable legal regimes that regulate the use of force.

The CAVV identifies consent by the state where an attack by means of an armed drone is carried out, a UN Security Council mandate and the right to self-defence as recognised international legal bases for the use of force. This is in line with the description of legal bases in the memorandum on the legal basis and mandate for missions involving Dutch military units, which the government sent to the House of Representatives in 2007 (Parliamentary Paper 29 521, No. 41).

The government endorses the conclusion that consent must be *valid* if the prohibition on the use of force is not to be breached. The CAVV provides a number of useful criteria for assessing whether valid consent has been given in a specific instance. In this connection it refers to the requirements laid down by the International Law Commission in the Articles on the Responsibility of States for Internationally Wrongful Acts and on the basis of the 1969 Vienna Convention on the Law of Treaties. At the same time, the CAVV rightly points out that, despite these criteria, uncertainty may arise as to whether or not legally valid consent

has been given. This can only be determined in specific instances when all the relevant facts have been taken into account. However, these facts are not always available, among other things because consent may be tacit and there is no requirement that it be made public.

Another accepted legal basis is self-defence against armed attack by another state. According to the CAVV, the applicability of the right to self-defence in response to armed attacks by autonomous, organised armed groups is increasingly accepted. The government takes the view that such a right to self-defence against organised armed groups is indeed part of international law. This is illustrated, for example, by the UN Security Council's adoption of Resolutions 1368 and 1373 after the 11 September attacks, in which the Security Council reconfirmed the right to self-defence in response to those attacks. The deployment of Dutch troops against al Qa'ida and the Taliban in Afghanistan and round the Arabian peninsula after the 11 September attacks was based on such a right (Parliamentary Paper 27 925, No. 166).

The most relevant legal regimes that may be applicable to the use of armed drones are international humanitarian law (IHL) and human rights. The government largely endorses the CAVV's conclusions regarding these areas of law. As the CAVV indicates, there are a number of issues within these regimes for which the law is still far from being established. These are general issues that are not specifically related to the use of armed drones. Among other things, the CAVV mentions the extraterritorial applicability of human rights. The government believes that this category also includes the question of how IHL and human rights relate to one another when both are applicable. According to the CAVV, IHL overrides provisions from other applicable legal regimes in cases where provisions conflict, since IHL is specifically designed for the conduct of hostilities and hence constitutes the *lex specialis*. In the government's view, the decision in such instances will depend on which provision relates more specifically to the particular case. In some instances this may be a provision from a legal regime other than IHL.

The CAVV mentions certain characteristics of drones that may allow targets to be selected even more accurately and collateral damage to be limited. For example, a drone can track a target from the air for longer than a fighter aircraft, so that an attack can be launched at a moment when potential collateral damage can be kept to a minimum. The ability of a drone to come closer to a potential military target without endangering the pilot's life may also help to provide a clearer picture of the target's surroundings and so limit collateral damage. The government agrees that drones possess these characteristics.

The government shares the CAVV's view that, in cases where human rights are applicable, the planned and deliberate killing of a specific individual is only permitted in the most exceptional situations.

Conclusion

The CAVV states that there are no loopholes in international law regarding the deployment of armed drones. Armed drones are a relatively new phenomenon, but are legally no different from other weapon systems such as fighter aircraft and artillery, and hence are subject to the same rules. The government therefore endorses the conclusion that there is no reason to consider the existing international legal framework inadequate to regulate the use of armed drones. What matters is that the existing rules should be complied with.

Nevertheless, as the CAVV indicates, there are general issues of international law regarding the use of force and the deployment of weapons that need further clarification. In recent years the Netherlands has worked for greater clarity in this area, among other things by bringing together international experts as part of the Oud-Poelgeest process. This process has led to a number of recommendations which were presented to the House of Representatives in 2010 (Parliamentary Paper 27 925, No. 255). These Leiden Policy Recommendations on Counter-Terrorism and International Law, as they are known, are directly relevant to the use of drones. These issues are also being studied by the International Centre for Counter-Terrorism and the Hague Institute for Global Justice, which both receive grants from the Ministry of Foreign Affairs.

It is unlikely that armed drones will cease to be used. On the contrary, it may be assumed that more countries will purchase or develop them. This further emphasises the importance of strict compliance with the law and transparency on the use of armed drones. In this connection, the government welcomes the recently stated intention of the United States to be more transparent about the deployment of drones.

The CAVV's advisory report is confined to the international law aspects of the use of armed drones. However, to make a well-founded judgement on their use, the issue needs to be considered more broadly, since military/operational, technical, ethical and other considerations are also involved. A round table with representatives from civil society will be held this autumn to shed more light on all these aspects. A report on the meeting will be submitted to your House.