

Preface: Coming to Terms with Drones

Christof Heyns¹

During the last decade the use of armed drones or remotely piloted aircraft has become a central issue of both global security and human rights agendas. Drones are bound to be part of the arsenals of states for the foreseeable future and may be joined by other new technologies, such as increasingly autonomous weapons systems. These unmanned systems invariably point toward the greater depersonalization of the use of force.

Drones are not illegal weapons, but they are unique in some respects, which necessitates special care in the regulation of their use. They make the long-distance deployment of targeted lethal force across national borders much easier than before. These remotely controlled aircraft allow the states using them to keep their own forces out of harm's way, while gathering information and directing force with great precision against those they single out for targeting.

As a result, some of the traditional extralegal constraints on the use of force by states—such as political resistance against placing a nation's soldiers at risk, individual reluctance to kill, and geographical distance—no longer seem to apply, or at least not with the same power. Drones could make it easier to go to war, and to stay at war (we have yet to see how a drone war ends). They also seem to make it easier for states to decide to

1. United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions and professor of human rights law, University of Pretoria.

use force in situations that may not qualify as armed conflicts, for example, in places far away from established battlefields. The increased use of drones raises the specter that targeted killing—traditionally the exception, in need of justification—could become the rule, not requiring special justification.

At the same time drones—depending on the quality of the information available to those who make targeting decisions—may offer unique potential to hit only specified targets. The delivery of force may be depersonalized, but the targeting outcome may be more personalized. The argument that drones can potentially reduce harm to civilians who are not participating in hostilities cannot be ignored—provided that they are used appropriately within the confines of armed conflict.

The issue today is no longer whether drones are part of the future—it is widely accepted that they are likely to be used more rather than less in the future. The question is not about their legality but, rather, about how their use is to be regulated to secure the values at the core of the international system, such as the protection of life and the containment of the use of force.

The challenge is to ensure that the same framework for the use of drones is accepted by a multiplicity of states, each responding to its own perceived security needs. The likely proliferation of drones militates against accepting a precedent where drones are used in secret programs by an increasing number of states, each interpreting the rules of international law to suit its own purposes. The proliferation of armed drones, if not subject to proper constraints, poses potential risks to global security, in addition to individual lives, because it can make the use of force by different sides easier.

This danger is exacerbated by the extent to which the possibility to press a button to deploy targeted lethal force anywhere can bring about an exaggerated sense of one's own ability to solve global problems—problems that may in reality be intractable and in fact be aggravated through the use of force. This may displace other, less coercive and in some cases more sustainable solutions, such as diplomacy, negotiation, or capture and trial, and in general may reduce reliance on multilateral as opposed to unilateral approaches to issues of global security.

In view of the above, it is important not to focus on one specific state and its use of drones—an exercise that more often than not imperceptibly distorts one's perspective, whatever the point of departure—but to

consider the issue in principle. What would be an acceptable regime regarding drones for the countries of the world as a whole?

Trying to strike the right balance between the permissible and the impermissible use of drones is a complicated task that will continue to present challenges to the collective wisdom of the human race for many years to come. This task raises pressing issues of realpolitik, as well as legal, ethical, psychological, and other questions. How do the short-term perceived military gains offered by drones compare with the long-term consequences? Only a proper consideration of the whole range of dynamics involved can provide a proper perspective. In this context time is of the essence. The longer that precedents of the liberal use of force through drones are set by the first states to have this technology, the more difficult it will be to contain their use in the long run.

Some have argued for new law or at least a new interpretation of international law, in order to deal with the threats of global terrorism, and by extension for a more permissive legal framework for the use of drone weapons. This takes the form of a flexible interpretation of imminence during self-defense and a broad interpretation of the targetability of specific groups or associated forces.

Increasingly, however, states and commentators express themselves in favor of the view that the established legal framework—which offers general principles of law on most of the areas concerning the use of force that are accepted by the majority of states—should be maintained and applied to the use of drones, with an accompanying emphasis on the importance of greater accountability and transparency. I have emphasized in various reports to the United Nations and others my view that drones should follow the law, not the other way around.

It may indeed be asked whether the unique features of drones and the ease of their use do not require a specifically rigorous application of the existing international framework, in order to counter the potential risks they pose, while at the same time making sure that one does not eschew the benefits they may offer. Part of such an approach would take the form of maintaining a narrow interpretation of notions such as imminence, participation in hostilities, and the designation of parties to a conflict. Moreover, while the principles of transparency and accountability are established in both international human rights law and international humanitarian law, it may be necessary to give them more precision and traction.

Finding a sustainable way to deal with drones could also entail further strictures in the way in which international standards are applied. I will mention five possible aspects of such an approach that become apparent in the context of drones and can also be equally applicable to other advanced technologies:

- Higher precaution standards. Some commentators have made the argument that if drones do offer greater targeting precision, higher standards of precaution in avoiding harm to protected civilians also should be maintained when these weapon platforms are used, in terms of targeting decisions and in assessing possible accountability afterwards.
- The role of the United Nations (UN) Security Council. The UN Security Council is the primary international body responsible for world peace. The UN Charter requires states that use force in self-defense on the territory of another state to report this to the Security Council. This is a transparency requirement aimed *inter alia* at protecting state sovereignty and by implication at containing the geographical spread of violence. The ease with which drones could be used to cross international borders could prompt a demand that, whenever there is a change in the material circumstances of such a first resort to the use of force, a further notification to the Security Council is due.
- Monitoring transnational drone killings. It may be beneficial for the UN, including its human rights machinery and in particular its field offices, to assume a specific role in monitoring transnational killings by states through drones or other means outside the context of established conflict zones. This could be in the form of a public record—at least of the numbers and the names—of those killed. This would draw on and further enhance the important work that is already being done by civil society groups.
- Domestic overview of drone operations. Some civil society watchdogs—non-governmental organizations as well as the press—have played an important role in pushing for greater transparency, and will continue to do so. However, states and other parties also have an important but neglected role to play in this regard. This may, for example, include oversight in the legislature but also by national human rights commissions. At the time of writing, steps to ensure stronger domestic overview of casualties inflicted by drones are being debated in the Congress of the United States.
- Focusing on state complicity in drone strikes. The implication of global cooperation between states and others in gathering and sharing information that is used to support drone strikes needs to be considered. Those providing such

cooperation may find themselves being considered complicit in strikes that violate their own standards or those of the international community.

The above are examples that deserve attention of some of the possible elements of a long-term framework for dealing with—and containing—the use of drones by states. Further debates will no doubt yield additional ideas—not least on how to avoid a situation where drones fall into the hands of nonstate actors.

It is to be welcomed that states around the world are increasingly engaged in these debates. Those that have drones are asked by other states and by international organizations to justify their use on a principled basis, knowing that many of their interlocutors may in the future resort to the same arguments. Those that do not have drones but foresee that they might in the future likewise know that what they say now can later be used against them. States on whose territory drones are or may be used—with or without their approval—have an equally clear interest in letting their views be known. In this context, intergovernmental organizations such as the UN and regional organizations have an important role to play.

Although the involvement of states in these debates is important, they invariably reflect a specific perspective. States respond most directly to their immediate interest. The voices of those who are more detached—academics, researchers, and policy experts—are equally important in mapping out a conceptual framework that the different sides can recognize as acceptable in the long term. The past decade has shown the importance of these voices in shaping the global response to drones.

While it is important that these debates take place around the world—the use of drones by any state is an issue of global concern—it is of particular importance that they take place in the United States of America, the primary repository of drone technology, and for that very reason the state whose example will set the tone for much of what will be done in the rest of the world.

For this reason the availability of the present multidisciplinary volume is welcome. By setting out the views of people with a high level of experience and knowledge in the field and making them accessible to readers around the world, the book makes an important contribution to the global process of coming to terms with armed drones.

