



International Bar Association's Human Rights Institute Council Resolution on the use of drones for the delivery of lethal weapons

Adopted on 25 May 2017

The Council of the International Bar Association's Human Rights Institute,

Being the human rights entity of the International Bar Association, the global voice of the legal profession,

Working with the global legal community to promote and protect human rights,

Concerned about the rapidly increasing use, development, transfer, acquisition and proliferation by states of remotely piloted aircraft ('drones') for the delivery of lethal weapons, as well as their use by non-state armed groups,

Noting the report of 13 September 2013 to the United Nations General Assembly of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/68/382),

Concerned that the availability of drones may spread armed conflict and encourage states to resort to lethal force and violate human rights,

Considering that the legal and practical consequences of drone strikes need to be better understood at international and national levels,

Concerned as to possible breaches of national laws, of the international prohibition of the use of force, of international human rights law and of international humanitarian law when applicable,

Concerned about the lack of states' clarity and transparency as to the applicable legal frameworks governing drone strikes and their interpretations thereof, as well as drone strike practices and policies,

Noting the need for restatement, clarification and upholding of the legal standards that apply and the need for ensuring compliance with them,

Noting that the use of drones is frequently extraterritorial and covert, which can undermine effective legal oversight and accountability,

Resolves to assist by providing the following analysis of the legal framework applicable to the use of drones:¹

¹ This does not extend to an analysis of the legal framework applicable to lethal autonomous weapons systems (LAWS) or drones used for surveillance purposes. The present focus is remotely piloted aircraft that deliver lethal force.

General

1. **The use of drones is governed by multiple frameworks of international law:** the *jus ad bellum*, which pertains to when force may be used, and is especially relevant in assessing the legality of the use of force by a state on the territory of another state; international human rights law, which applies at all times – both within and outside of armed conflict – and strictly limits the use of force by virtue of the human rights of the affected individuals; and international humanitarian law, also known as *jus in bello*, which governs how force may be used during situations of armed conflict.²
2. To be lawful, **drone strikes must comply with all applicable international law frameworks.** The breach of one aspect will render a strike unlawful.

Drones and the law governing the use of force – *jus ad bellum*

3. Under Article 2(4) of the Charter of the United Nations, **the threat or use of force against the territorial integrity of any state is prohibited.**
4. There are accepted exceptions to this general prohibition: force may be lawfully used in the territory of another state **with the consent of the territorial state, in self-defence or by authorisation of the United Nations Security Council.**

Territorial state consent

5. Force carried out with the consent of the state upon whose territory it is used does not breach the prohibition of Article 2(4) of the Charter of the United Nations.
6. **Consent must be valid** and given by an authorised official of the legitimate government. This requires legal – and usually at least some degree of factual – control over the territory of a state. Consent should be openly, not secretly, provided.
7. Force used with the consent of the territorial state must also be consistent with international law, including international human rights law and international humanitarian law, when applicable.

The law of self-defence

8. A state may lawfully use force in self-defence as recognised in Article 51 of the Charter of the United Nations and customary international law. Self-defence may only be undertaken when the state using force has been subject to an armed attack or when such an attack is imminent. This requirement must also be observed if the state in question is assisted through collective self-defence.
9. **The use of force must be necessary to halt and repel the attack**, and proportionate to that necessity.
10. The Charter of the United Nations requires that states using force in self-defence must report such use to the United Nations Security Council.

² The Latin expressions *jus ad bellum* and *jus in bello* are commonly known and constantly used in international law. The expression *jus ad bellum* refers to the law that regulates the right to go to war, while the expression *jus in bello* refers to the law that applies in an armed conflict.

11. The possibility of **self-defence in response to an armed attack by a non-state armed group** remains a contested aspect of *jus ad bellum*. Some states have invoked self-defence on the grounds that a territorial state is unable or unwilling to mitigate an imminent threat emanating from an armed group operating within or from its territory. However, any 'unable or unwilling' standard is not a distinct test justifying the use of force, but is only valid as an application of the necessity requirement, which must be satisfied with the other requirements for lawful self-defence.
12. It is also important that it is clearly established that the non-state armed attack has emanated from the territory of the state on which forcible action in self-defence is taken.
13. If violent action committed by a non-state armed group motivated by the ideology of another state's non-state armed group, it does not, in itself, justify the use of force in self-defence against the latter group in its state territory.

Drones and international humanitarian law

14. The rules of international humanitarian law on the conduct of hostilities are of particular relevance to assessing the lawfulness of drone strikes in armed conflict, during which the application of **international humanitarian law may inform the interpretation of certain human rights obligations** in a way that differs from their ordinary interpretation outside of armed conflict.
15. **International humanitarian law becomes operative during armed conflict, whether international or non-international.** Under Common Article 2 of the Geneva Conventions of 1949, an international armed conflict exists whenever there is a resort to armed force between states. Under Common Article 3 of the same and relevant case law, a non-international armed conflict exists when there is sufficiently intense fighting between one or more states and a sufficiently organised non-state armed group, or between such groups.
16. Whether or not a drone strike occurs in the context of an armed conflict is crucial to assessing its lawfulness, since international humanitarian law and international human rights law have different rules on when and how lethal force may be used. The level and type of force inherent in the use of armed drones will rarely, if ever, be lawful under the more protective international human rights law framework outside of armed conflict. It is therefore of utmost importance that the existence of an armed conflict is not lightly assumed. It must be objectively assessed, on the basis of the factual circumstances prevailing at the material time.

Targeting under international humanitarian law

17. Under international humanitarian law, parties to an armed conflict must **at all times distinguish between civilians and combatants, and between civilian objects and military objectives.**
18. Persons may only be targeted if they are members of the armed forces, civilians directly participating in hostilities or members of organised armed groups exercising a continuous combat function, though this final category is not universally accepted.
19. **Membership of an organised armed group** does not mean membership of a group that is ideologically or politically affiliated with a party to an armed conflict, but that is not itself a party to that conflict.
20. **Direct participation in hostilities** by individual civilians will occur when a person undertakes an act designed to directly cause harm to a party to an armed conflict. In instances of targeting based on an individual's behaviour, it must be clear that the activities of this individual satisfy the standard for direct participation in hostilities. In this case, a civilian will be a legitimate target while preparing for and returning from the act, though there is some disagreement as to the length of this period.
21. International law recognises no bases upon which individuals may be lawfully targeted, other than those provided by international humanitarian law. The 'exercise of national self-defence' does not permit lethal targeting without satisfaction of relevant rules of international humanitarian law.

22. A lethal drone strike against a military objective will be unlawful if the incidental harm caused to civilians is excessive in relation to the concrete and direct military advantage anticipated.

Drones and international human rights law

23. International human rights law applies to drone use where strikes are within a state's territory or subject to its jurisdiction.
24. International human rights law applies both to the state conducting a strike, and to territorial states, and potentially includes liability for acts carried out by other states on its territory, particularly where it has given consent for such acts.
25. In cases of extraterritorial state action, jurisdiction exists where a state exercises effective control over an individual. The law may have evolved to include jurisdiction on the basis of a state's use of force against an individual, in the absence of effective control.
26. **The consent by one state to the use of force by another does not abrogate the obligations of either state under international human rights law.**

Targeting under international human rights law

27. **The right to life is universally binding on all states at all times, and is a norm of *jus cogens*.** It is applicable to drone strikes undertaken within and outside of armed conflict.
28. In situations of armed conflict, the right to life is informed by targeting rules under international humanitarian law, with the result that lethal force used in accordance with international humanitarian law will not ordinarily amount to an arbitrary deprivation of an individual's right to life.
29. During peacetime, the right to life mandates that lethal force can only be intentionally used when it is **strictly necessary and proportionate to save another person's life against an imminent (immediate) illegal threat of death or serious bodily injury, or to prevent a crime involving grave threat to life.**
30. To qualify as necessary, there must be no possibility of capture or non-lethal incapacitation.
31. In order to be proportionate, an action must be limited to the threat it is responding to; in the case of a use of lethal force, this requires that such force is only used in response to a threat to life.
32. Therefore, **targeted killing** by drone strike, outside of an armed conflict, will almost certainly be a breach of the targeted individual's right to life, unless the individual was imminently carrying out an attack that endangered life, and there was no alternative avenue for halting the attack (ie, arrest or incapacitation).

The right not to be subjected to cruel, inhuman or degrading treatment

33. The psychological harm reported to be suffered by those living within the regions in which drones regularly operate can amount to a breach of the right not to be subjected to cruel, inhuman or degrading treatment.

The requirement of transparency

34. The failure by states to be transparent limits the ability to determine the lawfulness of lethal drone operations. Though there is a trend toward increased transparency, the rate of change is slow, and a concerning number of strikes continue to be carried out covertly or in accordance with secret principles and targeting criteria.

Accountability

35. Drone strikes in contravention of international law can **engender the responsibility of the state(s) involved**, including those states that may have assisted in a strike, for instance by providing intelligence, or the use of an airbase. States responsible for breaches of international obligations have a duty to make **reparations**, including cessation and guarantees of non-repetition, compensation and restitution.

36. If drone strikes in situations of armed conflict have resulted in grave breaches or other serious violations of international humanitarian law, they are likely to also constitute war crimes under **international criminal law**. When the crime of aggression becomes operative under the Statute of the International Criminal Court, drone strikes may also produce individual responsibility on this basis, where their use forms part of a manifest violation of the Charter of the United Nations.
37. In the event that **non-state armed groups** utilise drones, they will be responsible under domestic criminal law. During an armed conflict, members of non-state armed groups may be held individually criminally responsible for breaches of international humanitarian law. The individual leaders of such groups may, additionally, be held responsible under international criminal law for the actions of their subordinates under the principle of command responsibility. Non-state armed groups may be responsible for breaches of international human rights law, though the law in this area continues to develop.

Investigation and access to remedies

38. A lethal drone strike may violate both international human rights law and international humanitarian law.
39. **Outside of armed conflict, all suspected cases of unlawful death must be promptly, thoroughly, effectively, independently, impartially and transparently investigated.** Governments must make every effort to undertake such investigations. A failure to properly investigate inherently violates the right to life. Contrary to these legal standards, the secrecy surrounding the use of drones has often precluded appropriate investigations from being undertaken.
40. **During armed conflict, international humanitarian law** imposes a duty to investigate where there is a reasonable suspicion that a war crime has been committed, for instance, whenever civilians have been killed. This duty applies during international and non-international armed conflicts, as a matter of treaty and customary international law.
41. Victims of strikes carried out in breach of international law, along with their families, are entitled to **effective remedies**. This requires a state to ensure that an effective judicial structure capable of affording such remedies is in place. At present, some regions in which drone strikes are carried out lack the necessary infrastructure and/or individuals lack access to the judicial system to enable the realisation of these remedies. Extraterritorial strikes may also make it difficult for victims to access justice mechanisms of the targeting state.

Appeal

42. Against the background of this analysis of the legal framework applicable to the use of drones, the International Bar Association's Human Rights Institute appeals to all relevant international and national agencies, non-governmental organisations and all bar associations, that they assist in disseminating the present resolution and, in particular, in bringing it to the attention of Ministries for Foreign Affairs and Ministries for Defence, with a plea that they inform themselves about this framework and strictly observe the legal standards that apply to the use of drones for the delivery of lethal weapons.

A Background Paper to this Resolution is available at: <https://tinyurl.com/3cu92amc>



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