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Meeting Summary

International Law and the Use of Drones

Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 21 October 2010

Speakers:

Prof Mary Ellen O'Connell

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Introduction

The event was organized to discuss the legality of the use of drones in international law, in particular with regard to US strikes against persons suspected of ties to Al-Qaeda, the Taliban, and associated groups around the world.

The participants included representatives of government, embassies, NGOs, media, academics and practising lawyers.

Prof Mary Ellen O'Connell

The latest developments in the area of airborne attacks include the use of unmanned drones. First being used for surveillance, the United States started arming them with missiles and using them in combat operations in Afghanistan by 2001. Since then, more than 40 other states and entities are estimated to have acquired the drone technology, including Russia, China, Iran, Israel or Hamas.

US have deployed drones in Afghanistan, Pakistan, Somalia, Yemen and Iraq. The first known use of a drone to kill a particular individual occurred against Al-Qaeda's Mohammed Atef in Afghanistan in November 2001. Later in November 2002, a suspected 'lieutenant' in Al-Qaeda was killed along with five other persons in a drone attack in Yemen, carried out by CIA personnel. In 2003, the UN special rapporteur concluded that the Yemen strike constituted a "clear case of extrajudicial killing". Drone attacks in Pakistan started in 2004 and have risen in numbers dramatically since then.

A former commander of the drone operation at Nellis Air Force in Nevada noted that all the drone operations were joint operations, not carried out by the Air Force alone. A number of people are involved in the process – from pilots in Nevada and New Mexico, to intelligence analysts at CENTCOM, to personnel located in Afghanistan, Pakistan and elsewhere on the ground. A former assistant general counsel at the CIA has suggested that all the decisions to launch strikes are made by the CIA at their headquarters in Virginia.

Even though there are concerns about the involvement of CIA personnel and private military contractors, the real issue with the use of drones is the firepower they deploy. As a military weapon, they can only be used lawfully on the battlefield, since in law enforcement the use of lethal force is limited to the situations of absolute necessity. Therefore, resort to drones must be compatible with the *jus ad bellum* (law on resort to force) and the way they are used must be based on international humanitarian law and human rights law.

The central principle of the law on resort to force is Article 2(4) of the UN Charter, a general rule on the prohibition of the use of force in international relations. The Charter contains two express exceptions to this, authorization by the Security Council pursuant to Chapter VII and the right to self-defence under Article 51 if an armed attack occurs. The International Court of Justice (ICJ) has made clear that self-defence is a term of art in international law. The ICJ has held on several occasions that the armed attack must be attributable to a state where any counter-attack in self-defence occurs, and secondly, the initial armed attack must involve significant force. The attack must involve more force than a mere frontier incident. In the *Nuclear Weapons* case, the ICJ confirmed the further requirements that any resort to self-defence comply with the principles of necessity and proportionality.

Against this legal background, the US justified its use of force in Afghanistan under Article 51; however, that ended in 2002 when Hamid Karzai became the Afghan leader, replacing the Taliban. Since then, the international forces are present in Afghanistan at his invitation in the attempt to quell armed insurrection. The lawful use of force is therefore limited to Afghanistan and must be conducted under its direction. Beyond Afghanistan, the US may have been invited to assist in some military operations in Pakistan but drones are also deployed against suspected terrorist targets in areas where there is no armed conflict or where no permission to attack has been given.

Some militant groups do cross between Pakistan and the fighting in Afghanistan. This activity does not, however, give rise to the right to the US use of drones in Pakistan. Similarly, the sporadic terrorist attacks planned or carried out by

terrorists in other countries do not give rise to the right to use drones in those states. Such attacks are sporadic and rarely the responsibility of a state where the terrorists are acting. The ICJ held in *Congo v. Uganda* that Congo's failure or inability to take action against militants carrying out sporadic armed attacks in Uganda did not give rise to any right by Uganda to cross the border and attack the groups themselves.

Within states, international human rights law prohibits governments from using excessive force against rebel groups; governments may only resort to military force if the armed opposition involves significant force. The normal standards can be found in the UN Basic Principles on the Use of Force and Firearms by the Law Enforcement Officials.

Despite this clear law, US officials argue that because the 9/11 attacks involved significant force, the US can target and kill Al-Qaeda members and other suspected terrorists and militants without warning, wherever they are found. Whereas the Bush administration used the term 'global war on terror', the Obama administration prefers to describe itself as being in an 'armed conflict with Al-Qaeda, Taliban and associated forces, in response to the 9/11 attacks, exercising its inherent right to self-defence under international law'.

The study by the International Law Association suggests that there are two minimum set of criteria that define armed conflict: 1) the presence of organized armed groups and 2) intense inter-group fighting. In light of the second requirement, the isolated terrorist attack does not constitute an armed conflict.

Even the use of drones on the basis of Pakistani consent or invitation presents itself with legal concerns. Firstly, the territorial state may not consent to the use of force in its territory in the absence of an armed conflict. Secondly, even in the situation of an armed conflict, the drone operations have to meet the requirements of necessity and proportionality. In light of the views of counter-terrorism experts such as David Kilcullen, it is doubtful whether drone strikes are in fact able to accomplish the military objective pursued. Regarding the proportionality

requirement, it has to be noted that the drone strikes are going to kill far more unintended than intended targets. Although the number of casualties per attack has come down to around 6-7, among the casualties only one person is usually on the hit list.

The US has also attempted to justify the drone use with the right of hot pursuit; however, this doctrine is only recognized in the law of the sea and has no application on land.

To conclude, in the areas where the US is not involved in an armed conflict, it cannot lawfully resort to military force. Moreover, we learned from the UK experience that law enforcement measures are in fact more efficient to counter terrorism than military force. The RAND Corporation concluded that terrorist groups usually come to an end because they join the political process and because of law enforcement. They only rarely end as a result of the use of military force. These conclusions warrant revisiting the counter-terrorism strategy as such.

Prof Michael N. Schmitt

It is important that we carefully distinguish between two different bodies of law – the *ius ad bellum* which regulates *when* states are permitted to use force, and the *ius in bello* which governs *how* that force should be used once an armed conflict exists.

The understanding of States regarding the law of self defence as set forth in Article 51 of the UN Charter evolved significantly following the 9/11 attacks. In the immediate aftermath of 9/11, the Security Council, in Resolutions 1368 and 1373, affirmed the right of the United States (and other affected States) to collective and individual self-defence against a non-state actor, in this case the transnational terrorists who had conducted the horrendous attacks. NATO and other international organizations also acknowledged that the attacks implicated the right of self-defence, as did many nations on a bilateral basis. The international community's characterization of the events as involving self-defence continued as Coalition forces commenced operations against Al Qaeda in Afghanistan.

Similarly, when Israel sent troops into Southern Lebanon in 2006 to counter Hezbollah attacks, States generally accepted its right to defend itself against the terrorists, although the Israeli operation was criticized as violating the self-defence requirement of proportionality.

It is true that the ICJ, in the *Wall* and the *Congo* cases, appears to have rejected the notion that the right to self-defence arises against an armed attack by a non-state actor. Yet, those decisions were highly controversial and widely criticized. Indeed, strong dissenting opinions correctly pointed out that not only was the Court ignoring post 9/11 state practice, but that there was nothing in the text of the Article 51 which would indicate that an armed attack cannot be launched by a non-state actor.

With regard to the use of drones, it is generally agreed that operations may be launched into the territory of another state with that state's consent, albeit with limits. Examples of such circumstances include those in which the territorial state (1) agrees to other state's self-defence action, (2) asks the other state to assist with its non-international armed conflict, as is the case in Afghanistan, (3) requests the other state's assistance in complying with its obligation to police its own territory, or (4) seeks assistance with its own law enforcement operation against terrorists. In law enforcement operations, human rights law is applicable.

It is legally more problematic when the cross border operation is conducted without the territorial state's consent. In such cases, it is necessary to balance two competing legal rights - territorial integrity and self-defence. In the face of such a conflict, international law seeks that compromise which best accommodates the two. In this regard, it must be remembered that (as acknowledged in the *Corfu Channel* case) a state shoulders a legal obligation to police its own territory to prevent it from being used for purposes harmful to other states. Therefore, the first step in the requisite accommodation is a requirement to consult the territorial state, demand it comply with its obligation to police its territory and allow it an opportunity to remedy the situation. If the state is unable or unwilling to comply with the demand, the victim state can lawfully conduct operations on its territory. However,

this is not a *carte blanche*; the victim state's operation may only be conducted for the limited purpose of striking against the terrorists.

International law sets three requirements for lawful self-defence – necessity, proportionality and immediacy. Necessity presupposes that non-forceful measures, standing alone, are inadequate to handle the situation. For instance, the victim state is limited to law enforcement measures if they are sufficient; if not, forceful measures may be resorted to by the victim of terrorist attacks (often in conjunction with parallel law enforcement actions) Proportionality is commonly misunderstood as involving the "collateral damage" of an attack. However, this is a standard of international humanitarian law. In the *ius ad bellum*, proportionality requires that the force employed by a State to defend itself does not exceed the level necessary to eliminate the imminent or ongoing armed attack. In a sense, necessity bears on the nature of the defensive response, whereas proportionality addresses its scope and scale. The immediacy condition requires that the victim state act only within the "window of opportunity", that is, the period within which the defensive response must be launched to be effective.

A few additional points are merited with regard to self-defence. First, isolated individual acts of violence should be dealt with by law enforcement officials. However, repeated acts performed by the same group may be treated as a continuing military campaign, such that the immediacy requirement is no longer at play once the campaign has been launched (because the period of attacks may be treated as an ongoing armed attack). Secondly, while it is accurate that an attack has to reach a certain threshold of harm before qualifying as an armed attack in self-defence terms, the threshold would certainly be reached whenever more than a few civilians are targeted (and perhaps even then). Lastly, if a situation arises where the state cannot possibly secure the consent of the territorial state in time to effectively defend itself, it may act even without obtaining consent.

The second body of law, the *ius in bello*, is applicable during armed conflicts, whether international or non-international. Although there are challenges in classifying hostilities involving transnational terrorists, they do constitute an armed

conflict to which international humanitarian law applies. Further, it is sometimes wrongly asserted that counter-terrorist actions may only be conducted in a "zone of operations". International humanitarian law recognizes no such concept (apart from the very specific case of medical aircraft). For instance, during an international armed conflict, a belligerent state's forces may enter the neutral states' territory if it fails to meet its obligation to ensure its territory is not used by the opposing belligerent. In the case of non-international armed conflicts, the standards outlined above with regard to self-defence and cross border operations may be analogously applied.

Much has been made of the involvement of civilian intelligence agencies, such as the CIA, in drone operations. While the policy and operational wisdom of such operations may be questioned, international law does not prohibit their involvement in either international or non-international armed conflicts. Instead, their direct participation in hostilities raises issues such as the right to strike back at them, the parameters of their detention and prosecution in domestic judicial fora.

Lastly, when assessing collateral damage for the purposes of proportionality, it is often forgotten that the assessment is based on what the planner, attacker, or commander reasonably believed at the time they planned, executed or approved a strike, and not on the degree of harm eventually caused or the military advantage achieved. In is inappropriate to condemn drone strikes as unlawful merely on the basis that they harmed civilians or failed to achieve their intended objective.

To conclude, the US drone operations are generally consistent with international law, either on the basis of self-defence with the consent of the territorial state, or because the territorial state is unable to contain the situation. Where an armed conflict in underway, the use of drones presents no truly unique issues. It is not the weapon system itself but rather how it is used that determines the legality of each particular operation. The key is compliance with existing norms of IHL.

Discussion

During the discussion, it was noted that it is not completely clear whether the Pakistani government in fact consented to the US drone operations. The most likely case is that there has been a tacit approval from the authorities, at least in some cases.

The next issue raised concerned pre-emptive self-defence. It was suggested by Prof. Schmitt that pre-emptive self-defence is not a correct legal term; it rather should be labelled anticipatory self-defence, which is recognized as a standard concept of international law. In this regard, the state has to consider the window of opportunity – the first moment it can strike back is the last moment when something else would work. Prof. O'Connell stated that the Obama administration appears to be acting on a theory of pre-emptive, not anticipatory self-defence, just as the Bush administration did. Only a pre-emptive theory explains the Obama administration's attacks on individuals on the basis that they might be planning a future terrorist attack. Pre-emptive use of military force is unlawful.

When considering the difference between the drones and more conventional weapons, it was noted by Prof. Schmitt that drone technology does not raise a distinctive issue of international humanitarian law. Prof. O'Connell agreed on the point of law, but added that drones pose new challenges in that there is no risk to the pilot and the psychological context is therefore different. US leaders seem to think they are doing something different by sending an unmanned aerial vehicle to a manned plane or using a rocket launcher from a considerable distance. In reply, Prof. Schmitt argued that in regard to the risk factor, the same could be said about numerous conventional weapons which are capable of launching attack from a distance.

Both speakers agreed that the hot pursuit doctrine is not applicable in land operations and that the term 'war on terror' is not capable of appropriate reflection of the real situation.

Lastly, the attribution of responsibility was raised as an issue with regard to the use of drones. It was agreed that while there are rules governing the recent operations, future developments when the drones may become automatically operated by computer can pose some real challenges in this area of law.

Summary by Monika Hlavkova