Drone Warfare: challenges to the law of armed conflict?

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Object of the presentation: is the use of drones lawful under the law of armed conflict (LOAC)?

Premise: context of armed conflict

LOAC does not prohibit either drones as such or their use as such

Crucial features: unmanned and distant

I. The distance of the area of attack

1) Distance of the area of attack from the main theater of military operations: existence of an ‘armed conflict’?
2) Capacity of drones to enhance situational awareness
3) A problematic current policy: signature and follow-up strikes

II. The distance of the drone operator

1) Legal status of the drone operator
2) What status for those involved in loading the drone, maintaining it, etc?
3) Ethical questions

III. Conclusive remarks
I. The distance of the *area of attack*

1) Existence of an armed conflict?

Evolution of technologies of war aims to increasing damage to the enemy while diminishing risks for the attacker: geographical distance is a means to achieve this end.

However, geographical distance plays a special role with respect to drones: drone strikes are possible without boots on the ground. Here legal issues arise:

(i) Are drone strikes linked to an existing armed conflict?
   
   Criteria: intensity of the military operations; link between the target and an existing armed conflict (eg. the targeted group must be the same)

(ii) Do drone strikes give rise to a new armed conflict?
   
   Different criteria depending on the international or non-international nature of the armed conflict

(iii) Otherwise, one must conclude that drone strikes are carried out outside the context of an armed conflict → the legal parameter is not LOAC but human rights law
2) Capacity of drones to enhance situational awareness

Drones features capable of enhancing situational awareness: video feed; equipped with high precision weapons; ability to linger for up to one day on the area

Given these features, it is not surprising that the UN Special Rapporteur on Human Rights and Terrorism has affirmed that:

“If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict by significantly improving the situational awareness of military commanders”.

3) A problematic current policy: signature and follow-up strikes

**Signature strikes:** strikes against an individual because of his/her physical vicinity with a person identified as belonging to an enemy armed group or because adopts conduct typically associated with terrorists.

**Follow up strikes:** strikes conducted after the main one, usually when relief operations are undergoing.

According to the majority of scholars and NGOs, these policies lead to the killing of innocent civilians, hence to a **war crime**. This because while members of armed opposition groups may be always attacked, civilians are legitimate targets only when they **TAKE DIRECT PART IN HOSTILITIES**.
Notion of direct participation in hostilities (DPH)

This notion is contained in LOAC treaties but is not defined.

ICRC 2009 Guidelines on DPH are not unanimously accepted.

However US has acknowledges several ‘mistakes’ in drones use, some leading to officers being reprimanded due to ‘poorly functioning command posts that failed to provide the ground commander with evidence that the targeted persons were civilians in the trucks’ (Afghanistan, Feb. 2010, 23 Afghan civilians killed and 12 wounded).

In short, those policies risk conflating ‘direct’ and ‘indirect’ participation in hostilities, thus violating the fundamental LOAC principle of distinction.
II. The distance of the *drone operator*

1) *Legal status of the drone operator*

General principle: irrelevance of the distance of the drone operator from theater: his/her *susceptibility* to attack – though *likelihood* diminishes with increase of distance

Status of ‘combatant’ if the operator satisfies the LOAC criteria for lawful combatancy (art. 4 of III Geneva Convention 1949).

*Problem:* what status if the operator is a civilian, eg CIA member? The operator is a civilian DPH but the drone does not qualify as a ‘military’ aircraft (see 2009 Harvard Manual and Air and Military Warfare).
2) The status of those loading software on drone, maintaining it, etc

Are they civilians DPH or not?

According to the *ICRC 2009 Guidelines* the answer depends on the direct causal link between the activity and the damage caused/likely to be caused to the adversary.

Problem of fact: there might be difficulties to trace the chain of command (programmer, operator, commander).
3) Ethical questions

(i) Does drone warfare create the illusion that military operations are aseptic (UN Special Rapporteur on Extra-judicial Killings spoke of ‘play-station mentality’)?

Counter-argument: possibility to view repeatedly before and after attack makes drone operators more responsible on choice whether to attack or not

(ii) The limited costs of drones and reduced risks for the operator make public opinion more prone to waging war

(iii) Drone warfare increases asymmetry between belligerents, because the theater of war is not less aseptic or less costly than before, on the opposite it is more dangerous: the targeted individual has less chances to surrender.

Numerous accounts of terrorised populations.
Concluding remarks

- The features of drones may positively affect the degree of compliance with LOAC since they may contribute to enhance the situational awareness of the commander. However, certain uses of drones in war, such as signature and follow-up strikes, raise questions under LOAC and more generally under international law. Those practices are facilitated by, but are not inherent to, the features of drones.

- On the opposite, ethical questions that are still open are numerous and thorny. For this reason we do not agree with the UK Ministry of Defence, Philipp Dunne, when he states that (Nov. 2012), ‘the ethical questions associated with the use of weapons by drones are the same as those raised by manned aircraft’.

- These conclusions are tainted by a fundamental data: paucity of official information about the use of and effects produced by drones in war.

- Given lack of official information, the only way forward for the time being is the conduct of monitoring/investigation activity within the very institution that uses drones (CIA; Mod) (in this sense both reports of the mentioned UN Special Rapporteurs). This because:
  - Judicial avenue has so far been precluded by the Act of State doctrine (v. Noor v. UK Secretary of State, 21 dic 2012)
  - External control (media, NGOs) has to rely only on partial information secretly leaked by the relevant institution

- **IN SHORT:** more information is needed upon which the reflection on the legality of drone warfare shall continue.