

Written Evidence to the UK APPG Drones Inquiry into Armed Drones and Working With Partners: Questions

November 2017

1. *How does international humanitarian law (IHL) define a non-international armed conflict?*

A non-international armed conflict refers to a situation of violence involving protracted armed confrontations between government armed forces and the forces of one or more organised armed groups, or between such groups themselves, arising on the territory of a State. The key distinction between an international and a non-international armed conflict is the nature of the parties involved: in contrast to an international armed conflict, which involves the armed forces of two or more States, in a non-international armed conflict at least one of the two opposing sides is an organised non-State armed group.

The existence of a non-international armed conflict triggers the application of international humanitarian law (IHL) which sets limits on how the parties may conduct hostilities and protects all persons affected by the conflict.

While Common article 3 to the Geneva Conventions of 1949 (hereafter “common Article 3”) provides that it applies in “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”, it does not define the notion. The ICRC relies on two well-established criteria for there to be a non-international armed conflict: the parties involved must show a minimum degree of organisation and the armed confrontations must reach a minimum level of intensity¹. The fulfilment of these criteria is determined on a case-by-case basis, by weighing up a number of factual indicators.

The level of intensity of the violence is determined by a number of indicators such as the number, duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used, the number of casualties and the extent of the damage caused by the fighting. The governmental armed forces are presumed to reach the minimal level of organization required. The level of organisation of the armed group is assessed by looking at indicative factors such as the hierarchical structure and the existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch coordinated military operations, and the capacity to recruit, train and equip new fighters. The territorial control exercised by a non-state armed group is indicative of the degree of organisation of the group but is not determinative for the application of common Article 3. It is however required for the application of the Additional Protocol II to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977.

IHL applicability depends only on the facts on the ground and on the fulfilment of the above mentioned criteria. The designation of the parties, the legitimacy or illegitimacy of the use of force or the international mandate assigned to one or more parties have no bearing on IHL applicability to a given situation. The very object and purpose of IHL would be defeated were the application of the body of law to be made dependent on the lawfulness of the use of force or on the subjective perception of the legitimacy of the cause pursued.

For further details, please see ICRC’s opinion paper on “[How is the Term "Armed Conflict" Defined in International Humanitarian Law?](#)” (2008) and the relevant parts of the ICRC, [Commentary on the First Geneva Convention, 2nd edition, 2016, Article 3](#) (paragraphs 384-451).

¹ ICTY, The Prosecutor v. Dusko Tadic, Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, The Prosecutor v. Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005, para. 84.

2. *What relevance do these criteria have for efforts to combat terrorism?*

There is a growing tendency among States to consider that non-state organised armed groups designated as “terrorist” could not be a party to a NIAC within the meaning of IHL, putting into question IHL applicability to situations involving such groups.

In fact, IHL is indifferent in relation to labels and designations given to parties to an armed conflict. It does not recognise any specific legal categories or special regime governing individuals or groups designated as terrorists. Rather, the norms of IHL apply to them according to their conduct and its nexus with an established armed conflict.

Thus, violence that is labelled as “terrorist” - whether politically or by legal norms outside IHL - may well cross the threshold of an armed conflict within the meaning of IHL triggering the applicability of IHL.

Determining whether this kind of armed violence constitutes an armed conflict for the purposes of IHL must be made exclusively on the basis of the classic IHL criteria for determining the existence of an armed conflict, irrespective of the designation given to those involved therein. Non-state armed groups designated as terrorists can become parties to a non-international armed conflict (NIAC) if the group is sufficiently organised for the purposes of IHL and is involved in an armed confrontation reaching the required threshold of intensity, as explained above. This determination shall be made objectively and on the basis of the facts on the ground. Once applicable, IHL will govern the actions of non-state armed groups designated as terrorist, as well as any measures taken in relation to them by the other parties, when they have a nexus to an ongoing armed conflict.

With respect to the involvement of non-state armed groups designated as terrorist in armed violence and the numerous counter-terrorism measures taken against them at domestic and international level, the ICRC has taken a case-by-case approach in order to analyse and legally classify the various situations of violence. Some situations have been classified as international armed conflicts (IAC), others non-international armed conflicts or even armed conflict with a double classification (concomitant existence of an IAC and a NIAC). Other situations still are entirely outside any armed conflict. In the latter case, these situations are not governed by IHL, but by domestic and human rights law and must be addressed by means of domestic or international law enforcement.

IHL does not provide a definition of terrorism. However, in situations of armed conflict, it prohibits most acts that are criminalised as “terrorist” acts in domestic legislation and international conventions.

IHL expressly prohibits “measures of terrorism” and “acts of terrorism”, whichever party to the conflict commits such acts. In this spirit, the ICRC strongly condemns any act of terrorism.

In situations of armed conflict, non-state parties to the conflict are bound by IHL just as state parties are, as already mentioned. In particular, they are prohibited from attacking civilians or civilian objects or from carrying out indiscriminate attacks. However, IHL does not prohibit attacks against military objectives. The law governing terrorism does not make such a distinction.

In this regard, in order to reflect the reality of armed conflicts and the rationale of IHL which is that military objectives can and will be attacked, the ICRC considers that acts that are not prohibited under IHL - such as attacks against military objectives - should not be labelled “terrorist” in international conventions and, ideally in domestic laws dealing with terrorism. It creates a contradiction between different applicable legal regimes. It also creates a disincentive for NSAGs to abide by IHL and, eventually, a possible obstacle for reconciliation.

For more details on the applicability of IHL to terrorism and counterterrorism, please refer to “*IHL and the challenges of contemporary armed conflict*”, [Challenges report 2015](#) (pp. 16-21) and “*IHL and the challenges of contemporary armed conflict*”, [Challenges report 2011](#) (pp.48-53).

3. *How does the ICRC interpret the application of IHL to non-state armed groups in non-international armed conflicts?*

The parties to non-international armed conflicts are at minimum required to comply with Article 3 common to the Geneva Conventions and with rules of customary IHL applicable in non-international armed conflicts². IHL is equally binding on all parties to an armed conflict, irrespective of their motivations or of the nature or origin of the conflict, though without conferring any legal status on the armed groups involved. Moreover, the belligerents must respect IHL even if it is violated by their adversary (non-reciprocity of humanitarian obligations). Customary IHL is binding on all parties to an armed conflict irrespective of their treaty obligations, therefore it is also binding on the non-state parties to the conflict and thereby fills gaps left by the relative weakness of treaty law governing non-international armed conflicts.

For more details on the binding force of common Article 3 on non-state armed groups, see ICRC, [Commentary on the First Geneva Convention, 2nd edition, 2016, Article 3](#) (paragraphs 505-508).

For more information on the ICRC study on customary IHL and the list of the rules identified as being customary by the ICRC, see [ICRC customary IHL database](#), and also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Cambridge University Press, 2005.

4. *How does the ICRC interpret IHL to define an individual's membership of a non-state armed groups in non-international armed conflicts? ("continuous-combat function")*

For the purposes of the principle of distinction between civilians and combatants in a non-international armed conflict, all persons who are not members of State armed forces or organised armed groups of a party to the conflict are civilians and are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In case of doubt as to whether a person is a civilian, he or she must be considered to be a civilian.

In non-international armed conflict, organised armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose **continuous function** it is to take a direct part in hostilities ("continuous combat function"). Consequently for the purposes of IHL, the decisive criterion for individual membership in a non-state armed group and therefore whether they lose the protection from direct attack afforded to civilians, is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function").³ This is in essence a functional membership as their membership is based on what they actually do rather than any other criteria. Continuous combat function therefore distinguishes members of the organised fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganised basis, or who assume exclusively political, administrative or other non-combat functions within the non-state armed group. Therefore it is important to remember that what is being described here is membership for the purposes of IHL and not for other bodies of law that may be applicable.

Continuous combat function requires lasting integration into an organised armed group. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate

² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Cambridge University Press, 2005.

³ To be noted, in the view of the ICRC direct participation in hostilities is defined as an act likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such “reservists” are civilians until and for such time as they are called back to active duty.

Individuals who continuously accompany or support an organised armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organised armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organised armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organised armed group. As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

Members of organised armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function. Formally, therefore, they no longer benefit from the protection provided to civilians “unless and for such time” as they take a direct participation in hostilities. IHL deprives members of organised armed groups of protection against direct attack for as long as they assume their continuous combat function.

Loss of protection against direct attack – whether due to direct participation in hostilities (civilians) or continuous combat function (members of organised armed group) – does not mean that the persons concerned fall outside the protection of the law. Even attacks against legitimate military targets are subject to legal constraints, whether based on IHL, or on other branches of international law, such as human rights law. Any military operation must comply with the rules of IHL, which prohibit or restrict certain means and methods of warfare.

IHL neither prohibits nor privileges civilian direct participation in hostilities. However, members of organised armed groups belonging to a non-State party, as well as civilians having directly participated in hostilities, can be prosecuted for any offence that they may have committed under domestic law even if, in doing so, they did not violate IHL. Moreover, just like members of State armed forces, members of organised armed groups belonging to the party to an armed conflict and civilians directly participating in hostilities must respect the rules of IHL governing the conduct of hostilities and may be held individually responsible for war crimes and other violations of international criminal law.

For more details on the topic, please refer to the ICRC’s [“*Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*”](#).

5. *Has the ICRC considered the extent to which the use of unmanned aerial systems may enhance or undermine the capacity to distinguish between combatants and civilians within conflict?*

Drones are not specifically mentioned in weapon treaties or other legal instruments of international humanitarian law. However, the use of any weapon system, including armed drones, in armed conflict situations is clearly subject to the rules of international humanitarian law. This means among other things that, when using drones, parties to a conflict must always distinguish between combatants and civilians and between military objectives and civilian objects. They must take all feasible precautions in order to spare the civilian population and infrastructure, and they must suspend or cancel an attack

if the expected incidental harm or damage to civilians or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated. Similarly, drones can in no way be used to carry prohibited weapons such as chemical or biological agents. On the other hand, there is no particular characteristic of the technology itself to suggest that drones are inherently incapable of being used in a way that would comply with the relevant international norms. Distance from a potential adversary is not a unique feature of drones when compared to other weapons or weapon systems: the operators of cruise missiles, for example, might also be located hundreds or thousands of miles away from an intended target. Drones have also enhanced real-time aerial surveillance possibilities, thereby enlarging the toolbox of precautionary measures that may be taken in advance of an attack. Under international humanitarian law, any weapon that makes it possible to carry out more precise attacks and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, must be given preference when feasible over weapons that do. Whether the use of armed drones does indeed offer these advantages will depend on the specific circumstances of their use.

If and when drones are used in situations where there is no armed conflict or the intervening State is not party to this armed conflict, it is the relevant national law, and international human rights law with its norms and standards governing the use of force in law enforcement operations, that apply, not international humanitarian law.

For more details, please read: “*IHL and the challenges of contemporary armed conflict*”, [Challenges report 2011](#) (pp 21-22 and p. 39); [Pres. Maurer 2013 Q&A on Drones](#).

See also: “[Extraterritorial targeting by means of armed drones: Some legal implications](#)” by Jelena Pejic, ICRC Senior Legal Advisor.

6. *The ICRC’s Deputy Director for the Middle East, Patrick Hamilton, recently expressed concern about rhetoric that “dehumanizes” and “demonizes” the enemy or suggests that a particular adversary is “outside the bounds of humanity”. Is the ICRC concerned about the political rhetoric surrounding the use of drones?*

The ICRC’s comments were not referring to the use of drones, but rather reflected a generalised concern around the treatment of persons hors de combat, whether the persons are wounded, sick, surrendering or detained and a call to adhere to International Humanitarian Law in all circumstances.

For more details, please read the article “[International Humanitarian Law: A legal framework for exceptional circumstances](#)” on ICRC’s blog [Humanitarian Law and Policy](#).

7. *Any Further Reflections on the use of Armed Drones, IHL and Joint Working*

On the scope of geographical applicability of IHL:

Traditionally, NIACs have been conflicts against or between non-State armed groups within the confines of a single State, in the sense of an “internal” armed conflict. Common article 3 to the Geneva Conventions explicitly provides that it is applicable on the “territory” of a State in which a NIAC takes place, without further defining the geographical scope of its provisions. The ICRC submits that IHL applies in the whole territory of the parties involved in a NIAC, whether traditional or that with an extraterritorial element (see below).

Nowadays there is a variety of additional factual scenarios, characterised by an extraterritorial element, that may also be classified as NIACs. This includes the case of the so-called “spill-over” NIAC, in which an existing NIAC spills over from the territory of the State in which it began into the territory of a neighbouring State (or States) not party to the conflict. While common article 3 does not expressly provide for this scenario, there seems to be increasing acknowledgment by States and

scholarly opinion that the applicability of IHL between the parties to the conflict may be extended to the territory of the adjacent, non-belligerent State (or States).⁴

Another scenario of NIAC with an extraterritorial element is one in which the armed forces of one or more States, or a coalition of States, fight alongside the armed forces of a “host” State, in its territory, against one or more organised non-State armed groups. As the armed conflict does not oppose two or more States - i.e. as all the State actors are on the same side - the conflict may be classified as non-international, regardless of the international component, which can at times be significant.

The ICRC is of the view that IHL does not apply beyond the territory of the parties to a NIAC, as described in the scenarios above, i.e. that IHL is not applicable in the territory of non-belligerent States. To adopt the position that IHL - and its rules on the conduct of hostilities - extend to the use of lethal force against an individual located outside the territory of the parties to an ongoing NIAC, i.e. to the territory of a non-belligerent State, would be to accept the concept of a “global battlefield”. The ICRC submits that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL, but that the threat he or she poses should rather be dealt with under the rules governing the use of force under human rights law.⁵

Human rights law does not prohibit the use of lethal force in law enforcement, but provides that it may be employed only as a last resort, when other means are ineffective or without promise of achieving the intended aim of a law enforcement operation. Lethal force is allowed if it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life.⁶

Reliance on the rules governing the use of force in law enforcement in such a scenario may also be argued to be more appropriate as a matter of policy. A non-belligerent State is by definition one that does not take part in an armed conflict being waged among others. As a result, the rules governing the possible use of lethal force in its territory by a third State pursuing a specific person located there in relation to a territorially removed NIAC should not be those of IHL. The application of law enforcement rules would be more protective of the general population in those circumstances than IHL norms on the conduct of hostilities (designed for the specific reality of armed conflict), as there is no armed conflict in the non-belligerent State. The employment of IHL conduct of hostilities rules could lawfully entail consequences in terms of harm to civilians and civilian objects in the non-belligerent territory - i.e. allow for “collateral damage” - that the utilization of the rules on law enforcement could not.⁷

What has just been said above should not, however, be understood to mean that IHL can never become applicable in the territory of a non-belligerent State. It is submitted that IHL would begin to apply in a non-belligerent State’s territory if and when the conditions mentioned above necessary to establish the factual existence of a separate NIAC in such a territory have been fulfilled. Thus, if persons located in a non-belligerent State acquire the requisite level of organization to constitute an

⁴ While common Article 3 does not expressly envisage this occurrence, there seems to be increasing acknowledgment by States and scholarly opinion that the applicability of IHL to the parties may be extended to hostilities that spill over into the territory of the adjacent non-belligerent State (or States) on an exceptional and *sui generis* basis. In line with ICTY case law, there are cogent reasons to link the geographical extension of IHL to the neighbouring country depending on the extent of control that a party to a NIAC has over the territory of the neighbouring country or over the places where hostilities are taking place in such a country. However, prevailing State practice and *opinio iuris* do not currently allow for a similar conclusion to be reached with respect to the extension of the applicability of IHL to the parties to a NIAC when the territory of a non-adjacent non-belligerent State is involved. See “*International humanitarian law and the challenges of contemporary armed conflicts*” report, ICRC, 32nd International Conference of the Red Cross and Red Crescent, October 2015.

⁵ See “*International humanitarian law and the challenges of contemporary armed conflicts*” report, ICRC, 32nd International Conference of the Red Cross and Red Crescent, October 2015, p.15.

⁶ « *Extraterritorial targeting by means of armed drones: Some legal implications* », Jelena Pejic, International Review of the Red Cross (2014), pp. 103-104 ; “*International humanitarian law and the challenges of contemporary armed conflicts*” report, ICRC, 32nd International Conference of the Red Cross and Red Crescent, October 2015, pp.15-16.

⁷ The use of lethal force is also subject to the human rights requirement of proportionality, which differs from the principle of proportionality applicable to the conduct of hostilities under IHL. In effect, the application of the relevant rules on the use of force in law enforcement circumscribes both the circumstances in which lethal force can lawfully be used, and the way in which it has to be planned and carried out.

organised non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, the situation could be classified as a NIAC and IHL rules on the conduct of hostilities between them would come into application.

In the absence of such a situation, however, the ICRC believes, for the reasons mentioned above, that there should be no departure from the normal protection afforded to persons under international human rights law.

For more details on the geographic reach of IHL applicability, please read "*IHL and the challenges of contemporary armed conflict*", [Challenges report 2015](#) (pp. 12-16) and the relevant parts of the [ICRC, Commentary on the First Geneva Convention, 2nd edition, 2016, Article 3](#) (paragraphs 452-482).

Also on the subject: "[Extraterritorial targeting by means of armed drones: Some legal implications](#)" by Jelena Pejic, ICRC Senior Legal Advisor.

On partnering:

Depending on the circumstances, State support to one or more of the Parties to an armed conflict may be unlawful under the established rules on State sovereignty, including the *jus ad bellum* that governs the legality of the resort to the use of force between States and the prohibition of interference in internal affairs.

This ICRC, however, limits its focus principally to the implications of State support for the applicability and application of IHL. Completely independent from the *jus ad bellum*, IHL is specifically adapted to the exigencies and particularities of armed conflict. IHL recognises the reality of partnerships between the Parties to an armed conflict, such as co-belligerency in international armed conflict, but neither authorises nor prohibits support to or between States or support to armed groups. It seeks only to limit the effects of armed conflict, protecting persons who are not or are no longer participating in hostilities and restricting the means and methods of warfare.

Through the provision of support to one or more Parties to armed conflict, a State may itself become party to armed conflict and consequently bound by IHL. In all cases, States are required to exercise their influence over the Parties to a conflict to ensure respect for IHL. Moreover, under to the rules of State responsibility, a State may be liable for violations - including of IHL - committed by its partners or allies. Additionally, the provision of support could have implications for individual criminal liability as a consequence of aiding and abetting serious, criminalised violations of IHL: war crimes.

For more details on the policy and legal aspects of partnering, please see the following ICRC articles recently published on the ICRC blog [Humanitarian Law and Policy](#): the first one "[Fighting together, obligations and opportunities in partnered warfare](#)" is looking at some policy aspects of partnering, the other two articles are more focused on the legal aspects: the first one "[Fighting together and international humanitarian law : setting the legal framework \(1/2\)](#)" is related to legal implications for the classification of conflicts, the second one "[Fighting together and international humanitarian law: ensuring respect for the law and assessing responsibility for violations \(2/2\)](#)" is dedicated to the obligation to "ensure respect for IHL" under common Article 1 to the GC and on State responsibility.