

Written Evidence to the All Party Parliamentary Group on Drones Inquiry: 'The Use of Armed Drones: Working with Partners'

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Implications under international law for governments that aid and assist other governments in the use of drones

1. I have been asked to give written evidence to the APPG inquiry into the 'ethical, legal and operational issues that surround the use of armed drones' by the UK and its partners. This evidence relates to the international law implications for a state that aids or assists another state in the use of drones where the use by that other state is an internationally wrongful act.
2. As an Associate Fellow with the International Law Programme at Chatham House,¹ I was the lead researcher in a project at Chatham House that examined the international law framework applicable to cooperation between states in armed conflicts and in counterterrorism operations. The project focused on the issue of whether a state is responsible in international law for assisting a wrongful act where the assistance it gives is used by the recipient state to carry out actions that are in violation of international law. In doing so, the project sought to clarify the scope of international law on the issue and to provide practical recommendations for governments on how to ensure compliance with international law.
3. Under this project I authored a paper, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, published by Chatham House in November 2016.² The paper is relevant to the inquiry by the Group. The following is a summary of the paper, extracted from the paper itself.
 - States often assist each other in armed conflicts and in counterterrorism operations. This assistance can take many forms, for example the loan of airbases and the exchange of intelligence information.

International law and Article 16 of the Articles on State Responsibility

- The law in this area includes a general rule set out in Article 16 of the International Law Commission's Articles on State Responsibility, which provides that a state that aids or assists another state in the commission of an internationally wrongful act by the recipient state is internationally responsible, where certain conditions are fulfilled.
- Article 16 will be engaged if:

¹ This evidence is submitted in a personal capacity. Chatham House does not take institutional positions.

² <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>

(a) A state provides 'aid' or 'assistance': these are construed broadly, to cover a wide range of types of assistance.

(b) The assistance contributes significantly to the internationally wrongful act.

(c) The international obligation breached by the state receiving the assistance also binds the state providing the assistance.

(d) The assisting state has both knowledge and intent.

- 'Knowledge' in this context means actual or near-certain knowledge of specific illegality on the part of the recipient state. Where the assisting state is 'wilfully blind' – that is, makes a deliberate effort to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality – that is also sufficient to satisfy the mental element under Article 16. Constructive knowledge – that the assisting state 'should have known' – is not sufficient.

- If a person whose acts are legally attributable to the state has relevant knowledge, the state is fixed with that knowledge. Where the situation is dynamic, the responsibility of the assisting state may evolve as the facts, and its level of knowledge, develop.

- 'Intent' in this context does not require the assisting state to desire that the unlawful conduct be committed. Nor does the assisting state have to be in common cause with the principal. Knowledge or virtual certainty that the recipient state will use the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever the assisting state's desire or purpose.

- Article 16 does not impose a duty on assisting states to make enquiries before providing assistance. This matter is governed by the primary rules in question. But if a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye. Under Article 41 of the Articles, where a state assists in maintaining a breach of a peremptory norm of international law, there is no need to show knowledge or intent.

- Assistance provided by a state to a non-state actor will give rise to international responsibility where the acts of the non-state actor can be attributed to another state under the rules of attribution. Article 16 has been invoked by analogy in the context of state assistance to non-state actors.

Other rules of international law relevant to aiding and assisting

- There are also specific rules of international law that are relevant to state-to-state assistance in armed conflict and counterterrorism situations, including under international humanitarian law and international human rights law. These typically impose stricter requirements on assisting states than the general rule in Article 16. Article 16 and relevant primary rules are capable of being invoked together, in the context of enforcement in the courts, of obligations regarding aiding and assisting.

- There are some specific obligations in primary rules regarding assistance to non-state armed groups. Under international humanitarian law, states are obliged not to assist wrongful conduct, regardless of whether that conduct is carried out by a state or non-state group.
- There are some primary rules that demand pre-assistance enquiries, which might also be termed 'due diligence'.

Recommendations for strategies for assisting states

- Governments should have procedures in place to enable them to make an informed decision in advance about assistance to be offered to states and non-state actors, including an assessment of the risks involved. These procedures should cover all forms of cooperation, including the use of military assets such as drones and bases, the sharing of intelligence, the provision of weapons, capacity-building and the handling of detainees.
 - The procedures should include the identification of the relevant factual circumstances; the identification of risks; strategies to mitigate risks; and, in light of all these, the process for taking the final decision.
 - Strategies that assisting states should draw upon to ensure compliance include attaching conditions to assistance; vetting and training recipients of assistance; and monitoring and following up on any risks identified.
 - Assessment of the risks of assistance should take place at all appropriate points in time, bearing in mind the dynamic circumstances in which cooperation often occurs.
 - States should elaborate their procedures and strategies in policy guidelines, which should be made public. Where possible, the conditions upon which assistance is granted should also be made public.
 - States assisting other states or non-state armed groups should, as far as possible taking into account considerations of national security and international relations, be transparent about both the factual information surrounding their assistance – particularly where allegations of breaches of international law are concerned – and their understanding of the applicable legal framework.
 - States should share and coordinate best practice with other states, following the precedents in the field of arms transfers.
4. The above is a summary only; further information can be found in the paper referred to.

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