

Some legal considerations raised by the UK's use of armed drones

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Summary of recommendations:

- **The UK Government should publish a coherent framework of its understanding and interpretation of key areas of international law relevant to drone strikes;**
- **The UK Government should restate its interpretation of the imminence requirement within the law on self-defence to confirm the rejection of pre-emptive self-defence;**
- **The UK Government should ensure adequate detail is included within its published post-strike reports to demonstrate that drone strikes are adhering to international law on targeting;**
- **The UK Government should endeavour to discuss, in post-strike reports, the proximity of civilians to particular strikes and how they have been impacted;**
- **The UK Government should set out its interpretation of when an internal armed conflict can be said to be at an end and when IHL ceases to apply.**

The use of armed drones raises an important set of legal problems. These are not *new* or *unique* problems, in that the law that applies to drones also applies to all other weapons and weapon systems. As such it would be disingenuous to suggest that drones create unique issues of international law. Nevertheless, it is contended within this note that the use of armed drones raises non-unique legal issues in a manner that *is* unique and which must be addressed by the government in specific relation to the use of armed drones. The capabilities provided by drones in terms of geographical reach and on-going surveillance make them particularly susceptible to the charge that they allow the use of force in a manner that is problematic under international law.

On this basis, three legal issues are considered presently, with recommendations made as to how the UK Government might adequately address them within its ongoing drone programme. These are: the

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notion of imminence when force is used in self-defence; the methodology employed by the UK in identifying individuals who may be targeted and its related implications for the subsequent reporting of drone strikes; and the UK Government's understanding of at what point an internal armed conflict will end with the result that international humanitarian law (IHL, also called the law of armed conflict) will cease to be applicable.

As with all instances of the extraterritorial use of force, the main questions of international law are those of the initial *resort* to force (governed by *jus ad bellum*) and the *conduct* of that use of force (governed variously by IHL, international human rights law (IHRL), or both).

An important consideration that must at all times be remembered is that international law is inherently flexible. Therefore, it is possible to arrive at interpretations of the same area of law that differ tremendously. It is submitted that every aspect of international law relevant to the use of armed drones may be subject to multiple interpretations, some very narrow and others very broad. This can have the effect that, while under one interpretation a particular operation may be deemed to be wholly unlawful, while under another it could be entirely lawful.

Thus, the a foundational legal issue facing the UK Government is the need to provide a more coherent framework of the Government's understanding and interpretation of certain key areas of international law as they relate to drone strikes. Failure to do so may undermine any claim as to the lawfulness of particular armed drone strikes, or of the drone programme in general. Without a coherent framework of interpretation, international law risks losing its capacity for meaningful regulation. The converse of this is that the government's claims to lawfulness will lack persuasiveness and may encourage other states to adopt creative interpretations of international law in order to present as lawful behaviour this is highly questionable.

With this in mind, this note will now set out some specific issues of international law and the UK's armed drone use.

The law on the use of force

Questions under the rubric of *jus ad bellum* concern the initial resort to extraterritorial force. This is less of a controversial area in terms of the UK's use of drones than other aspects of international law and as such will be dealt with briefly.

The international law is such that the use of force is generally prohibited² unless it falls within one of the limited categories of permissible force. These are force used in individual or collective self-defence;³ force used with the consent of the state within whose territory it occurs;⁴ and where the use of force has been authorised by the UN Security Council.⁵

The use of armed drones by the UK in Syria has been justified in terms of the collective self-defence of Iraq.⁶ The use of armed drones has also been justified by the consent of the Government of Iraq which, though explicated in terms of strikes within Syria, no doubt relates to the use of armed drones within its own territory.⁷

It is submitted that the current approach of the UK in terms of its ongoing use of drones appears to satisfy the requirements of self-defence within international law. Drone strikes against Islamic State of Iraq and the Levant (ISIL) are conducted in the face of a threat that may be fairly classified as sufficiently grave to constitute an 'armed attack', and, in the face of that threat, it is difficult not to conclude that they are necessary and proportionate.⁸ Likewise, the Government of Iraq appears uncontroversially to satisfy the requirements necessary to provide valid consent to the use of force within its territory,⁹ which it has given, requesting intervention against ISIL.¹⁰

Where the UK conducts drone strikes against threats that have not yet materialised, it is important that the concept of 'imminence' is not interpreted in an overly broad manner. Though a previous

² United Nations Charter, Article 2(4).

³ United Nations Charter, Article 51. Additionally the right of states to use force in self-defence is a part of customary international law, law that, put simply, arises as a result of practice carried out by states over time and which is accepted by those states and others as being lawful.

⁴ Draft Articles on State Responsibility, Article 20.

⁵ United Nations Charter, Chapter VII.

⁶ Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council (26 November 2014) UN Doc. S/2014/851.

⁷ Ibid.

⁸ These factors feature prominently in the Intelligence and Security Committee report to Parliament on the use of drones in Syria: Intelligence and Security Committee of Parliament 'UK Lethal Drone Strikes in Syria' (26 April 2017) HC 1152.

⁹ For a detailed discussion of these requirements under international law and their relation to drone strikes by the US, see Max Byrne 'Consent and the Use of Force: an Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3(1) *Journal on the Use of Force and International Law* 97.

¹⁰ Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General (25 June 2014) UN Doc. S/2014/440; Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (22 September 2014) UN Doc. S/2014/691.

Government has asserted the UK's rejection of pre-emptive self-defence,¹¹ subsequent interpretations have been posited which suggest a widening of the category in a manner that appears to indicate some increased degree of pre-emption. In the Government's response to the Joint Committee on Human Rights' 2015-16 report into the use of drones it was stated that '[a]n effective concept of imminence cannot ... be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack'.¹² Further, UK Attorney General Jeremy Wright QC asserted that the UK Government should not be 'prevented from meeting its first duty of protecting its citizens without nailing down the specific target and timing of an attack.'¹³ Finally, in relation to the August 2015 drone strike that killed Reyaad Khan, Government Communications Headquarters (GCHQ), in response to an inquiry by the Intelligence and Security Committee, appeared to suggest that the strike had been conducted in part due to gaps in their surveillance coverage of those targeted which led them to fear an unanticipated attack from ISIL, rather than in relation to a specific imminent attack.¹⁴ These later statements suggest a broadening of the concept of imminence beyond its historic understanding of a threat that is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation.'¹⁵

Though it is not claimed presently that the UK has adopted an understanding of imminence that allows pre-emptive self-defence by the back door, it is arguable that the concept of imminence has been expanded. The capacity to respond to threats provided by armed drones creates the danger that this tendency towards an expanded definition of imminence may be exacerbated. Therefore it is vital that the expansion of this element of self-defence is not allowed to continue unchecked—the UK government should further confirm its interpretation of the imminence requirement under *jus ad bellum* in order to clearly dispel the impression that pre-emptive drone strikes carried may be authorised in all but name.

The law relating to the conduct of hostilities

¹¹ HL Deb 21 April 2004, vol 660, cols 370-1.

¹² Joint Committee on Human Rights 'The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015–16' Fourth Report of Session 2016–17 (12 October 2016) HC 747; HL Paper 49, 16.

¹³ The Rt. Hon. Jeremy Wright QC MP 'The Modern Law of Self-Defence' (11 January 2017) speech given at the International Institute for Strategic Studies, London. Text available at <https://www.ejiltalk.org/the-modern-law-of-self-defence/>.

¹⁴ Intelligence and Security Committee of Parliament 'UK Lethal Drone Strikes in Syria' (26 April 2017) HC 1152, 15.

¹⁵ Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Special Representative to the US (27 July 1842), quoted in James A Green 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 *Cardozo Journal of International and Comparative Law* 429, 436.

In terms of IHL, perhaps the most important issue is that of the method by which the UK identifies targets during lethal drone strikes. This issue applies to both dynamic and pre-planned strikes. During an internal armed conflict, such as the one in which the UK is involved in against ISIL in Syria,¹⁶ those who are not members of a state's armed forces continue to be recognised as civilian by IHL and as such are generally protected¹⁷ and may not be made the object of attack.¹⁸ Nevertheless, civilians will lose this protection if, and for such time as, they take a direct part in hostilities.¹⁹ This has the result that members of non-state armed groups, such as ISIL, are legally civilians who have lost their protection as a result of their participation in hostilities.

This idea of direct participation has been interpreted by the International Committee of the Red Cross (ICRC) such that members of non-state armed groups may be targeted at any time due to having lost their civilian protection, but 'membership' is specifically defined as the carrying out of a 'continuous combat function'.²⁰ Therefore, individuals that a lay person might call a member of such a group may not be a member in the eyes of international law under this interpretation, due to the function they carry out for the group, e.g. if they deal solely with propaganda or financial transactions.²¹ Conversely, the United States has interpreted 'membership' on the basis of an individual's formal tie to a group, regardless of whether they have carried out any hostile act.²²

The UK appears to adopt a more narrow interpretation of direct participation. The Joint Service Manual on Armed Conflict (JSM) does not deal with individuals who are members of non-state armed groups, instead asserting that under IHL civilians may not be targeted unless taking a direct part in hostilities.²³ Furthermore, the question of whether an individual is directly participating is viewed as

¹⁶ Despite straddling the border between Iraq and Syria, the conflict remains 'internal' as it does not involve fighting between states, as is required to render the conflict 'international' according to common Article 3 of the Geneva Conventions. This distinction is important as the classification of a conflict as either internal or international impacts upon the nature of the rules governing the conduct of hostilities. Broadly speaking, during international armed conflicts the treaty law governing hostilities and other related activities is more comprehensive.

¹⁷ Protocol Additional to the Geneva Conventions (Protocol II), Article 13(1). Though this Protocol applies only to certain internal conflicts exhibiting specific features, many of its provisions, including Article 13, are binding on all states during all internal armed conflicts as they exist as an aspect of customary international law. See, Jean-Marie Henchaerts and Louise Doswald-Beck *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press 2005).

¹⁸ *Ibid*, Article 13(2).

¹⁹ *Ibid*, Article 13(3).

²⁰ Nils Melzer *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009) 33.

²¹ *Ibid*, 51.

²² Department of Defense *Law of War Manual* (June 2015, updated December 2016) 228.

²³ *The Joint Service Manual of the Law of Armed Conflict* (2004) JSP 383, 5.3.3, 15.8.

'a question of fact', illustrating that the UK's approach only contemplates attacks against those who are actually participating,²⁴ thereby excluding the possibility of strikes against individuals purely due to their formal membership of an armed group. Importantly, the JSM states that 'use of the words "are taking" emphasizes that a potential or future fighter may not be attacked as such'.²⁵ This presents a picture of the UK as maintaining a robust interpretation of this aspect of IHL which serves to limit the incidence of civilians being mistakenly targeted.

It is important that this approach is consistently applied by the UK in the everyday reality of its drone use. It is not being implied by this note that the UK is not applying these principles, but there are causes for concern that it is important for the UK Government to be mindful of, and to address going forward.

The Ministry of Defence maintains a record of British airstrikes against ISIL carried out in support of the Government of Iraq, which is a very positive thing for it to do, allowing public assessment of these airstrikes.²⁶ Each strike that is reported contains a brief description of the attack, which generally includes the type of aircraft that carried out the strike, the ordnance used, the location, and often the activity that was being carried out by those who were targeted. By including the activity of those being targeted, the record publicly demonstrates that the strike was against individuals who were lawfully targeted due to their direct participation. However, in 2017, of 47 drone strikes thus far undertaken and reported²⁷ 11 contain insufficient detail to make this assessment.

For instance, on 28 September 2017, a Reaper drone is described as having attacked a sniper team, which is clearly a lawful target, but also 'another group of terrorists, [and] a Daesh held building'.²⁸ Similarly, on 15 September 2017 a Reaper is described as having 'conducted two attacks ... with Hellfire missiles against terrorists moving through the area.'²⁹

²⁴ Ibid, 5.3.3.

²⁵ Ibid, 15.6.5.

²⁶ British Forces Air Strikes in Iraq and Syria: Monthly List (last updated 7 November 2017) <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list>.

²⁷ As of 30 November 2017.

²⁸ RAF Air Strikes in Iraq and Syria: September 2017 (7 November 2017) Ministry of Defence <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-september-2017>.

²⁹ Ibid. Other strikes in 2017 containing insufficient detail were carried out on the following dates during 2017: 1 January; 8 January; 24 May; 8 September; 9 September; 13 September; 15 September; 25 September; 28 September; 5 October and 14 October. All are available at <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list>.

These references to groups of 'terrorists' or ISIL held buildings are insufficient to demonstrate the requisite direct participation in order to confirm the lawfulness of the strike. Under the UK's own interpretation of IHL, only acts of hostilities will render an individual a lawful target. The Government should publish more details as to *what it is that makes these individuals terrorists* in order to demonstrate its commitment in practice to the principles of IHL that it posits so laudably within the JSM.

It is submitted that this is even more important in light of the fact that in some instances, strikes that appear particularly 'successful' are promoted by the provision of extra detail. One strike in particular, on 9 May 2017, appears to be one such example. In that strike a public execution of prisoners by ISIL was disrupted by a drone strike which targeted and killed a sniper positioned above the crowd.³⁰ In the MOD report detail is given as to the context of the strike, the fact that an execution was averted, even the fact that the prisoners who were about to be killed were 'shackled'.³¹ The video of this strike was subsequently made public and appeared in various news outlets,³² which implies that the MOD were perhaps particularly pleased with it. The fact that this level of detail is provided for very 'successful' strikes puts into stark contrast those about which very few details are given.

That the MOD reports the details of its strikes is to be applauded but the Government must ensure that enough detail is given in every case to make it clear that each strike is lawful. Simply referring to 'terrorists' or 'extremists' is unacceptable as membership of such a group (in lay terms) does not necessarily render an individual targetable. In some cases it is not beyond the realms of possibility that, without additional identifying factors, a 'terrorist' could have been a mistakenly identified civilian.

In addition to this, the Government should confirm that this monthly list represents the full list of strikes that have been undertaken and that there are no covert strikes carried out that are not included within the list.

³⁰ RAF Air Strikes in Iraq and Syria: May 2017 (updated 7 November 2017) Ministry of Defence <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/may#tuesday-9-may>.

³¹ Ibid.

³² See, for instance, Josie Ensor 'RAF Drone Footage Shows the Moment a Missile Stops ISIL Carrying Out a Public Execution' (20 September 2017) *The Telegraph* <http://www.telegraph.co.uk/news/2017/09/20/raf-drone-footage-shows-moment-missile-stops-public-execution/>.

Finally, the 9 May strike is the only one in 2017 that explicitly refers to the proximity of civilians. In all others there are no references to the presence of civilians, and certainly no suggestions that civilians may have been hurt or killed incidentally by any drone strike.³³ Indeed, the Government has previously stated that no civilians have been killed in the campaign against ISIL.³⁴ If correct this would be an excellent achievement, and the present author has heard many service people claim that it is correct, but the claim would be far more credible if reference was made to civilians within the strike reports published by the MOD. Therefore it is recommended that this information be published within the reports going forward, detailing the proximity of civilians to a strike and the fact, if correct, that none were killed or injured.

The temporal application of IHL

A further issue stemming from the application of IHL is that of when that legal regime ceases to apply.

As stated, the law principally applicable to the UK's use of armed drones is that branch of IHL which governs internal (or non-international) armed conflicts,³⁵ by virtue of the fact that force is used against non-state armed groups, rather than other states.

It is stating the obvious to point out that armed conflicts involve a greater degree of force and consequent danger to those affected by them than operations in peacetime. However, it is necessary to briefly comment on the legal basis for why this is the case, in order to make a broader point about the practice of the UK.

IHL only applies when there is an armed conflict, and at no other time. During an armed conflict, IHL has the effect of reducing the protections against lethal force enjoyed by individuals in peacetime. Outside of an armed conflict the right to life³⁶ protects individuals against lethal force, prohibiting it

³³ As stated above, civilians may not be targeted under IHL, but the death of a civilian as an incidental consequence does not render a strike unlawful. IHL allows incidental civilian deaths or damage where it is proportionate to the anticipated military advantage of an operation: Protocol Additional to the Geneva Conventions (Protocol I), Article 51(5)(b).

³⁴ Jonathan Beale 'Have RAF Air Strikes Against IS Killed No Civilians?' (12 September 2016) *BBC* <http://www.bbc.co.uk/news/world-middle-east-37339184>.

³⁵ Hostilities during internal armed conflicts are governed by common Article 3 of the Geneva Conventions, customary international law and (in specific cases) Protocol Additional to the Geneva Conventions (Protocol II). During international armed conflicts hostilities are governed by the full gamut of Geneva Conventions, customary international law and Protocol Additional to the Geneva Conventions (Protocol I).

³⁶ Protected under numerous treaties as well as customary law. E.g. International Covenant on Civil and Political Rights, Article 6; European Convention on Human Rights, Article 2; American Convention on Human Rights, Article 4; African Charter on Human and People's Rights, Article 4.

in all cases where its use would be 'arbitrary', which is generally interpreted as any use of lethal force that is not strictly necessary and proportionate in order to protect life.³⁷ During an armed conflict however, the word 'arbitrary' is reinterpreted to mean force which is used in violation of IHL.³⁸ Thus while outside of an armed conflict the death of an individual can never be the primary objective of a mission, this is lawful within an armed conflict, if conducted in accordance with the parameters laid down by IHL. Likewise, during peacetime it is never lawful to conduct an operation in the knowledge that it will produce civilian casualties, while during an armed conflict it is permissible to anticipate incidental civilian casualties to the extent that they are proportional to the military advantage gained. It is clear, therefore, that the law is such that during an armed conflict, civilians and others are much more likely to be killed, injured or otherwise harmed than outside of one. In relation to armed drones, it is very difficult to imagine their lawful use outside of an armed conflict,³⁹ and as such their use is conditional on the existence of an armed conflict and the application of IHL.

It is thus vital to know when IHL applies and when it does not. As IHL only applies during armed conflicts its application depends on when armed conflicts are understood to begin and end. At their most basic, internal armed conflicts begin when fighting between a state or group of states and a non-state armed group reaches a given threshold of intensity and the group involved exhibits a sufficient degree of organisation.⁴⁰ This is uncontroversial and has generally been straightforwardly applicable to concrete instances of internal armed conflict, having been used to identify conflicts in numerous international hearings.⁴¹

More problematic is establishing when an armed conflict ceases and IHL no longer applies. The International Criminal Tribunal for the former Yugoslavia, in its *Tadić* decision, stated that internal armed conflicts last 'beyond the cessation of hostilities until a peaceful settlement is achieved'.⁴² Under this approach IHL would apply until a peace settlement has been reached regardless of whether the intensity of fighting has dropped below the required threshold for such a conflict to begin, or whether the non-state armed group was no longer sufficiently organised. Commentators have

³⁷ See, for instance, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on targeted killings (28 May 2010) UN Doc A/HRC/14/24/Add.6 [32].

³⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 [25].

³⁹ It is not impossible that under some circumstances their use could be in accordance with IHRL, but this would be conduct that is vastly different from that which is currently undertaken by the UK.

⁴⁰ *Prosecutor v Tadić* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) [70]; International Law Association Committee on the Use of Force, Hague Conference 'Final Report on the Meaning of Armed Conflict in International Law' (2010) 2.

⁴¹ For instance, *Tadić* *ibid*; *Prosecutor v Limaj, Bala and Musliu* IT-03-66-T, Judgment, 30 November 2005; *Prosecutor v Rutaganda* ICTR-96-3, Judgment, 6 December 1999.

⁴² *Tadić* (n 40) [70].

suggests an alternative approach, in which an internal armed conflict will cease when insurgents are 'beaten'⁴³ and that 'the lack of a peace agreement cannot be considered determinative.'⁴⁴ On this basis an internal armed conflict will end when fighting becomes less intense or when the armed group becomes degraded to such an extent that it is no longer sufficiently degraded.

The former approach, requiring a peace agreement risks extending the application of IHL to post-conflict situations. Under this approach drones could be used for a long period after an armed conflict has ceased to be one in a factual sense. Under the latter, once fighting has subsided the resort to drones would be regulated by IHRL alone and therefore their use would be far more constrained.

With this controversy over interpretation in mind, it would be hugely beneficial for the UK government to set out its own interpretation of when an internal armed conflict can be said to be at an end and when IHL ceases to apply. This is particularly necessary in view of the capacity offered by drones for far-reaching and ongoing low level uses of lethal force—the advanced technological nature of armed drones requires the deployment of increasingly precise interpretations of international law. Without doing so, there is a risk of prolonging the use of armed drones and therefore increasing the risks posed to affected civilians.

Conclusion

It is not suggested that the UK is violating international law through its drone programme but it has been highlighted that there are various actions that the government can take to further confirm and demonstrate its continued adherence to the law.

This non-exhaustive list represents some important issues of international law that are raised or enhanced by the UK's use of armed drones. Importantly it also provides recommendations to the Government in order to effectively respond to those concerns.

As has been shown, these issues are not unique to the use of armed drones, but on the basis of the advanced capabilities offered by drones they become more clearly and immediately pressing. The fact that these issues may arise in relation to other mode and methods of warfare does not mean that they should not be addressed in specific relation to drone use.

⁴³ Yoram Dinstein *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 48.

⁴⁴ Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 253.