

**THE LEGALITY OF THE UK'S USE OF
ARMED UNMANNED AERIAL VEHICLES (DRONES)**

OPINION

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1. We have been asked by Peacerights to advise on the legality of the UK Government's use of armed drones. This is a matter of pressing public interest. Much debate has focused on the US Government's use of drones, including President Obama's recent announcement of increased codification of future US drone use¹. However, there has been far less attention on the UK's drones programme. In this opinion we specifically address the UK Government's use of drones.

1.2. The UK deployed and used armed drones in Iraq² and piloted armed drones in Libya and possibly other territories³, but their use has grown considerably in recent years in the conflict in Afghanistan.⁴ Several UK "Reaper" drones in Afghanistan are now operated from the UK.⁵ There is no public information to suggest that the UK has yet used drones outside zones of armed conflict.⁶ However, clearly, there is a risk that continued use will lead the UK to deploy them in the same way as the US: to carry out extra-judicial killings outside a theatre of conflict.

1.3. There are also serious concerns that the UK is assisting the US in the execution of its own drones programme: through the provision of targeting intelligence by the intelligence services and the Ministry of Defence and Government Communications Headquarters (GCHQ)⁷; logistical support (for example, provision of communications relays and the possible piloting

¹ C Woods, 'Obama Frames Covert Drone War as Necessary Evil', The Bureau of Investigative Journalism (BIJ), 23 May 2013 (<http://www.thebureauinvestigates.com/2013/05/23/obama-frames-covert-drone-war-as-necessary-evil/>)

² *Dawn of the Drones*, Aerospace Defence Management Journal, Issue 42 (http://www.defencemanagement.com/article.asp?id=354&content_name=Aerospace&article=10649)

³ <http://www.guardian.co.uk/world/2012/jul/26/british-pilots-drones-libya>

⁴ Hansard, 1 November 2012: The UK has fired "293 Hellfire precision guided missiles and 52 laser guided bombs" from UK-controlled Reaper drones in Afghanistan.

⁵ R. Wall, 'UK Conducts Firsts Reaper Drone Strike Controlled from Britain', Bloomberg.com, 1 May 2013 (<http://www.bloomberg.com/news/2013-05-01/u-k-conducts-firsts-reaper-drone-strike-controlled-from-britain.html>). Although it is possible that they have been operated from RAF Waddington in Lincolnshire since at least October 2012. 'RAF Reaper Drone Squadron Stood Up at RAF Waddington', BBC World News, 23 October 2012.

⁶ Defence Minister Andrew Robathan has confirmed the UK does not use armed UAVs against terrorist suspects outside Afghanistan (Hansard, HC Deb 26 November 2012 c29W). However there is a question mark against unarmed drone use.

⁷ This was the subject of legal challenge in *R (Noor Khan) v Secretary of State for Foreign & Commonwealth Affairs* [2012] EWHC 3728 (Admin). Permission for judicial review was denied, but is subject to appeal.

of US drones at RAF Waddington⁸), and the deprivation of citizenship of UK citizens to facilitate US drone strikes against them⁹. However, we have concentrated on the UK's own use of drones in this opinion.

1.4. This opinion is divided into the following parts:

Section 1 – Introduction and Executive Summary

Section 2 – Factual Context

Section 3 – Legality as Weapons Under International Law

Section 4 – Legality of Use in Afghanistan under International Humanitarian Law (IHL)

Section 5 – Legality of Use in Afghanistan under International Human Rights Law (IHRL)

Section 6 – Other Public Law Duties associated with drones

Section 7 – Conclusion

1.5. In brief, we conclude that in the absence of international agreements, armed drones themselves are unlikely to be illegal *per se*, but that fully automated drones would breach international law. As to whether the UK's use of drones in Afghanistan breaches international law: we have evaluated the available evidence of the UK's prolific use of drones in Afghanistan in light of the onerous restrictions which international humanitarian law (IHL) and international human rights law (IHRL) place upon their use. We conclude that it is highly likely that the UK's current use of drones is unlawful. There is a strong probability that the UK has misdirected itself as to the requirements of the IHL principles of proportionality, distinction and humanity and as to its human rights obligation to protect human life and to investigate all deaths (civilians and combatants alike) arguably caused in breach of that obligation. We conclude that the European Court of Human Rights (ECHR) is capable of application to the UK's use of drones and that

⁸ R. Verkaik, 'US Drones bombing Africa operated from RAF bases in the heart of the Lincolnshire countryside' Daily Mail, 9 March 2013 (<http://www.dailymail.co.uk/news/article-2290842/US-Drones-bombing-Africa-operated-RAF-bases-heart-Lincolnshire-countryside.html>)

⁹ C. Woods, A.K. Ross & O. Wright, 'British terror suspects quietly stripped of citizenship ... then killed by drones', The Independent, 18 February 2013 (<http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html>)

human rights accountability and the rule of law require its application. We call for urgent accountability for the UK’s drones programme.

2. FACTUAL CONTEXT

2.1. A comprehensive survey of the factual material relating to drones is outside the scope of this opinion. We recommend the Drone Wars UK and Bureau of Investigative Journalism websites¹⁰ for further details. In brief however, the increasing use and development of armed drones has led to calls for regulation and accountability for drone attacks from civil society, international institutions and international lawyers. There are many reasons for the growing concerns, which include the following:

- 2.1.1. The rapid increase in the use of drones since c.2009¹¹;
- 2.1.2. Their use outside of zones of armed conflict by the US, creating a ‘global battlefield’;
- 2.1.3. The high number of civilian casualties caused by their use¹² and concerns as to ‘blast radii’ of the missiles used by drones¹³, despite claims as to accuracy¹⁴;
- 2.1.4. The risk of ‘playstation mentality’ – disconnection from reality leading to prolific and inhumane use by the operator¹⁵;

¹⁰ See www.dronewarsuk.wordpress.com and <http://www.thebureauinvestigates.com/category/projects/drones/>.

¹¹ S. Rodgers, ‘Drones by country: who has all the UAVs?’, The Guardian, 3 August 2012. (<http://www.guardian.co.uk/news/datablog/2012/aug/03/drone-stocks-by-country>) and S. Rodgers, ‘Drone War: every attack in Pakistan visualised’, The Guardian, 25 March 2013 (<http://www.guardian.co.uk/news/datablog/interactive/2013/mar/25/drone-attacks-pakistan-visualised>.)

Although fatal US drone strikes took place in Afghanistan in 2001 and Yemen as early as November 2002.

¹² The Pakistan Government estimates over 400 civilians killed out of c.2,200 people killed overall by US drone strikes. A.K.Ross, ‘Pakistan Government says at least 400 civilians killed in drone strikes’, BIJ, 15 March 2013 (<http://www.thebureauinvestigates.com/2013/03/15/pakistan-government-says-at-least-400-civilians-killed-in-drone-strikes/>). The Bureau of Investigative Journalism had calculated that 411-884 civilians had been killed by those strikes. P. Bergen and K. Tiedemann, ‘The Drone Wars, Killing by remote control in Pakistan’, The Atlantic Monthly, 27 October 2010 (<http://www.theatlantic.com/magazine/archive/2010/12/the-drone-wars/308304/>) records around 30% losses, albeit noting a decreasing trend.

¹³ 15-20m, according to the NYU-Stanford Report, *Living Under Drones* (<http://www.livingunderdrones.org>). Blast radii vary according to the size and type of the warhead used.

¹⁴ It is claimed that the slower flight velocity of drones provides them with greater precision than a manned aircraft. They can circulate above targets, and therefore can wait and evaluate. Once launched, missiles can be guided to their target. Some legal commentators have pointed to the opportunity that drones present for *greater* compliance with IHL than with other weapons systems (see e.g. Blank LR, *After ‘Top Gun’: How Drones Strikes Impact the Law of War* 33 U Pa J Int’l L 675 2011-2012))

¹⁵ Philip Alston and Hina Shamsi, ‘A killer above the law’, The Guardian, 2nd August 2010 (<http://www.guardian.co.uk/commentisfree/2010/feb/08/afghanistan-drones-defence-killing>). See also P.W.Singer,

- 2.1.5. The risk that the consequence-free nature of fighting remotely leads to increasing use of drones by Governments and thus loss of life;
- 2.1.6. The distance between perpetrator and strike location leading to a lack of accountability, investigation and reparation;
- 2.1.7. Continuing Government secrecy regarding their use;
- 2.1.8. The decreasing costs of drones leading to concerns as to proliferation and use by non-state actors;
- 2.1.9. Difficulties of detection and defence against their use;
- 2.1.10. Time-lag in operation of drones via satellite¹⁶: 1-4 seconds is significant when civilians may enter a target area;
- 2.1.11. Drones may place a greater emphasis on intelligence rather than visual recognition of a target's combat function. Intelligence can be, and is often, wrong;
- 2.1.12. Increasing automation leading to autonomous operation - automated firing systems are already employed in other weapons, such as counter-rocket systems and drone technology will soon be capable of carrying out automatic targeting and firing.¹⁷;
- 2.1.13. The psychological effect on populations of the constant threat of possible drone strike¹⁸;
- 2.1.14. Converse concerns on the psychological effects on operators of 'fighting remotely'; and
- 2.1.15. Drones use tending to increase information exchange (and thus complicity) with third states such as the US¹⁹;

'Military Robots and the Laws of War', The New Atlantis, Number 23, Winter 2009, pp. 25-45, (<http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war>.)

¹⁶ Philip Alston and Hina Shamsi, 'A killer above the law', The Guardian, 2nd August 2010. See also P.W.Singer, 'Military Robots and the Laws of War', The New Atlantis, Number 23, Winter 2009, pp. 25-45, (<http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war>.)

¹⁷ *The UK Approach to Unmanned Aerial Systems*, MoD, JDN 2-11, 30 March 2011 paras 507-8 records the MoD's view that such operations are potentially legal: "it would be only a small technical step to enable an unmanned aircraft to fire a weapon based solely on its own sensors, or shared information, and without recourse to higher, human authority. Provided it could be shown that the controlling system appropriately assessed the LOAC principles (military necessity; humanity; distinction and proportionality) and that ROE were satisfied, this would be entirely legal..." The MoD goes on to note that it has no 'current intention' to develop wholly unmanned systems.

¹⁸ *Drone attacks traumatizing a generation of children*, Channel 4 News, 5 March 2013 (<http://www.channel4.com/news/drone-attacks-traumatising-a-generation-of-children>)

¹⁹ *Supra*, note 17, pp.4-6 "the practicalities of retaining sovereignty for key enablers, such as communications and navigation systems, are already unrealistic".

...and that increased loss of life will result, and international peace and security compromised, perhaps irreversibly.

The UK's use of drones

2.2. Only a little is currently known about the UK's use of drones. The number of 'weapons releases' per annum has been disclosed through FOIA responses²⁰ (27 in 2008; 44 in 2009; 70 in 2010; 102 in 2011; and 120 in 2012). The percentage of weapons releases by British drones in Afghanistan is high: research suggests that 38% of drones releases in Afghanistan in 2011 were by British drones.²¹ This is extraordinary when it is considered that the UK has only a small number (c. 5) armed drones in Afghanistan, compared to over 100 US armed drones. David Cameron reportedly stated in December 2010 that UK drones had killed "more than 124 insurgents"²². However, where the strikes are taking place, how they are taking place, and what deaths and injuries have resulted (whether to persons deemed 'combatants' or civilians) is all unknown. For example, there has been no public acknowledgement of whether drones are used solely in a combat-support role or whether they are also carrying out 'targeted killings': strikes on specifically targeted individuals carried out away from the battlefield. The evidence suggests that targeted killings are taking place.²³ However, attempts to obtain this information through Freedom of Information Act (FOIA) requests and Parliamentary questions have been blocked.

2.3. Only a single incident of civilian death caused by a UK drone has been reported.²⁴ This occurred on 25 March 2011 when a Reaper fired on two pick-up trucks. Two insurgents and four civilians were said to be killed and two

²⁰ C. Cole, 'Turning the spotlight on British drone secrets', *dronewars.net*, 8 March 2013

(<http://dronewarsuk.wordpress.com/2013/03/08/turning-the-spotlight-on-british-drone-secrets/>)

²¹ C. Woods and A.K. Ross, *Revealed: US and Britain launched 1,200 drone strikes in recent war*, *BIJ*, 4 December 2010 (<http://www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars/>)

²² R. Winnett, 'British Troops could withdraw from Afghanistan before next Christmas', *The Telegraph*, 7 December 2010 (<http://www.telegraph.co.uk/news/uknews/defence/8185561/British-troops-could-withdraw-from-Afghanistan-before-next-Christmas.html>)

²³ Drone Wars UK briefing to the Parliamentary Defence Select Committee: "We know from published RAF operational updates that UK Reapers have tracked "high value" targets for many hours before finally launching weapons", citing 'RAF and Joint Helicopter Force (Afghanistan) Weekly Ops Update' 19-25 February 2012 (<http://www.raf.mod.uk/rafoperationalupdate/opsupdate/opsupdate25feb2012.cfm>)

²⁴ N. Hopkins, 'Afghan Civilians Killed by RAF Drone', *The Guardian*, 5 July 2011 (<http://www.guardian.co.uk/uk/2011/jul/05/afghanistan-raf-drone-civilian-deaths>)

civilians were injured. A further incident in 2009 in which two children were injured has also been reported.²⁵ It is also known that a drone was involved in the death of a British serviceman in 2009 from ‘friendly fire’. Tellingly, it was reported following the Inquest that *“British Army staff in the operations room saw pictures of the base beamed from a camera on an unmanned drone, but instead of recognising it as Patrol Base Almas, they believed it was an insurgent location and sent the attack helicopters in.”*²⁶

2.4. In June 2012, Defence Minister Nick Harvey said that an International Security Assistance Force (ISAF) investigation had been carried out into the 25 March 2011 incident and had concluded that the actions of the Reaper crew were “in accordance with extant procedures and ISAF rules of engagement”.²⁷ The report is being withheld. He also referred to this case as the only instance of civilian deaths caused by UK drones that he was “aware” of.

2.5. It is improbable that these two incidents are the only instances of civilian casualties caused by UK drone attacks. When the Prime Minister reportedly stated in 2010 that 124 “insurgents” had been killed, FOIA responses show that 144 drone strikes had been carried out at that time. Since then 222 further strikes took place in 2011-2012 alone. And the numbers of strikes are increasing. This suggests that over 350 Afghans have been killed by UK drones, but with a civilian casualty rate of c.1%. This is far lower than the accepted estimates of civilian casualties caused by the US drone programme. One possible explanation is that UK/ISAF rules of engagement are stricter than the US. Another may be that the way the UK uses drones is different: for example if ‘targeted killings’ are never or are only infrequently carried out and ordinary drone use is confined to the ‘battlefield’. However, neither explanation satisfactorily explains the low UK civilian casualty claims. There is no reason why civilian casualties would be markedly different between a

²⁵ *Ibid.*

²⁶ N. Britten, ‘Coroner Accuses Army Officials of ‘Complete Loss of Situational Awareness’ Over Soldier’s Death, The Telegraph, 7 September 2012 (<http://www.telegraph.co.uk/news/uknews/defence/9528804/Coroner-accuses-Army-officials-of-complete-loss-of-situational-awareness-over-soldiers-death.html>)

²⁷ Hansard, HC Debates, 26 June 2012: Column 187W (<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm>)

‘battlefield’ strike and a ‘targeted killing’ given that both types of strike strive to avoid civilian casualties and given that the ‘battlefield’ in counter-insurgency operations in Afghanistan is usually an area used, farmed and populated by civilians. The UK statistic suggests that civilian casualties are not being accurately recorded or investigated; and that an overly-broad definition of ‘combatant’ is being used by British forces.

Current investigations

2.6. The international community has now begun to act to investigate drone use.

In January 2013, the UN Special Rapporteur on Counter-Terrorism and Human Rights, Ben Emmerson QC, announced an investigation into 25 case studies of drone strikes from Pakistan, Yemen, Somalia, Afghanistan and Palestine, stating:²⁸

“The exponential rise in the use of drone technology in a variety of military and non-military contexts represents a real challenge to the framework of established international law and it is both right as a matter of principle, and inevitable as a matter of political reality, that the international community should now be focussing attention on the standards applicable to this technological development, particularly its deployment in counterterrorism and counter-insurgency initiatives, and attempt to reach a consensus on the legality of its use, and the standards and safeguards which should apply to it. The plain fact is that this technology is here to stay, and its use in theatres of conflict is a reality with which the world must contend. It is therefore imperative that appropriate legal and operational structures are urgently put in place to regulate its use in a manner that complies with the requirements of international law, including international human rights law, international humanitarian law (or the law of war as it used to be called), and international refugee law.”

His investigation is expected to report in October 2013. He has indicated that the UK Government will be asked to cooperate with the investigation, which suggests that a UK strike in Afghanistan may be among the case studies. He has also indicated an intention to set up a permanent

²⁸ B. Emmerson, ‘UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use drone and other forms of targeted killing for the purpose of counter-terrorism’, News Release, 24 January 2012 (<http://www.ohchr.org/Documents/Issues/Terrorism/SRCTBenEmmersonQC.24January12.pdf>)

investigations unit with the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions.²⁹

2.7. The Parliamentary Defence Select Committee is investigating the UK's use of drones in Afghanistan.³⁰ An all-parliamentary group on drones has also been launched.³¹ Given the statistics above, such scrutiny is long overdue.³²

3. LEGALITY AS WEAPONS UNDER INTERNATIONAL LAW

3.1. Ben Emmerson QC may be correct that 'drones are here to stay', but this does not preclude asking whether they are, as a class of weapons, lawful. This is the same exercise that the International Court of Justice carried out at the request of the UN General Assembly regarding nuclear weapons in its advisory opinion of 8 July 1996.³³ Indeed, International Humanitarian Law (IHL) requires (Art 36 Additional Protocol (1) AP(1)) a review of any new weaponry for compliance with its standards.

3.2. We therefore ask whether drones are legal weapons under international law. This is, in essence, to ask whether or not drones comply with the *jus ad bellum* – the laws governing the resort to force.³⁴

3.3. The international community has acted to ban and regulate certain weapons through the conclusion of weapons-specific treaties, including poison and poisoned weapons; biological and bacteriological weapons; gas and chemical weapons; incendiary weapons; laser weapons designed to cause permanent blindness; explosive bullets; expanding bullets; booby-traps and anti-

²⁹ O.Bowcott, 'UN to investigate civilian deaths from US drone strikes', The Guardian, 25 October 2012 (<http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes>)

³⁰ C. Cole, 'UK Defence Select Committee to investigate use of armed drones', Drone Wars UK, 20 November 2012 (<http://dronewarsuk.wordpress.com/2012/11/20/uk-defence-select-committee-to-investigate-use-of-armed-drones/>)

³¹ A.K.Ross, 'UK Parliament launches group to focus on drones', BIJ, 18 October 2012 (<http://www.thebureauinvestigates.com/2012/10/18/uk-parliament-launches-group-to-focus-on-drones/>)

³² Department of Justice White Paper, NBC News (http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

³³ "Legality of the Threat or Use of Nuclear Weapons" – ICJ Advisory Opinion of 8 July 1996 - General List No. 95 (1995-1998)

³⁴ The *jus in bello* is the laws of war, or IHL, that is, the rules applying to how states must conduct themselves during international or non-international armed conflicts.

personnel mines; cluster munitions; non-detectable fragments; and explosive remnants of war. Lord Bingham once expressed an opinion that drones may join this list.³⁵

3.4. There is some debate as to whether drones constitute “weapons” or are simply a means of delivering them. But just as missiles deliver their payload, and guns deliver a bullet, it is submitted that drones, as part of a weapon delivery system, should be classed as weapons. In any event, any technical distinctions of this nature should not permit armed drones to circumvent legal prohibitions on the use of weapons.

3.5. However, the ICJ’s *Nuclear Weapons* judgment shows the difficulty of arguing that a particular weapon is prohibited by international law in the absence of specific conventional prohibition. There are very few conventions that relate to drones. Even where, in the case of nuclear weapons, there were a growing number of conventions limiting the acquisition, manufacture, possession, deployment and testing of nuclear weapons, the ICJ found that they did not in themselves amount to a comprehensive conventional prohibition on their use (§63) nor had any such customary international law rule emerged (§73). Part of the reason for this was that the main nuclear weapons convention – the Non-Proliferation Treaty – had specifically permitted the then 5 nuclear weapon states to retain their weapons.

3.6. The ICJ also considered whether IHL prohibited the use of nuclear weapons. IHL does not permit any and all weapons to be used. Art 22 1907 Hague Regulations records that “*the right of belligerents to adopt a means of injuring the enemy is not unlimited*”. Principles of IHL prohibit the use of weapons that do not discriminate between civilian and military targets and which cause unnecessary suffering. These prohibitions are now recorded in Additional Protocol 1 (“AP1”).

³⁵ J.Rozenberg, *Interview with Lord Bingham on the Rule of Law*: “it may be, I’m not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used.” (http://www.biicl.org/files/4422_bingham_int_transcript.pdf)

Art 35(2) states as follows:

“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”

Art 51(5) states:

“5. Among others, the following types of attacks are to be considered as indiscriminate:

...(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Art 52(3) states:

“3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

3.7. In the *Nuclear Weapons* case, the ICJ found that these principles must be applied to any contemplated use of nuclear weapons. The Court found that the principles governing the use of nuclear weapons were “intransgressible” (§78) and observed that “*in view of the unique characteristics of nuclear weapons,...the use of such weapons in fact seems scarcely reconcilable with respect for such requirements*” (see §§92-95). However, although the distinction may not be important, it was unable to declare nuclear weapons themselves to be incompatible with them. In light of this conclusion, and the current proliferation of drones, it is unlikely that drones would be found to contravene these principles *per se* such that they could be declared to be unlawful. However, applying these principles to the use of drones within armed conflict may demonstrate that armed drones are unlawful according to IHL, either completely or in all but very limited circumstances. This is explored in section 4 below.

3.8. However it is possible to conclude now that autonomous drones are unlawful *per se* under IHL. They fall foul of the *jus ad bellum* in that robots do not fall within the definition of lawful combatants.³⁶ In our opinion they would, as a class of weapons, also breach IHL's requirements of *humanity* and *distinction* (see section 4 below). They may not therefore take part in combat operations. Autonomous drones, whilst no doubt under development (the UK's estimate is that the technology will be available in 5-15 years³⁷), have not yet been deployed. It is possible that conventional prohibition could also be achieved before proliferation. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions recently called for such control.³⁸

3.9. Of course, the international community may still regulate and, if necessary, prohibit the use of drones through arms control treaties. This has been the practice in relation to emerging methods of warfare in the past, sometimes regarding modes of warfare not dissimilar to drones³⁹. However, this practice has decreased and progress slowed down in the post-WWII years. Nevertheless, an international drones treaty should be firmly on the agenda of governments and civil society. Whilst we await that, drones are deemed to be regulated by the voluntary Missile Technology Control Regime (MTCR)⁴⁰, to which thirty four, mainly Western, countries are a party. The MTCR is intended to limit proliferation through shared common export control guidelines and a common list of controlled items. The separate Wassenaar Arrangement⁴¹ stipulates further voluntary non-proliferation

³⁶ See Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *Denv J Int'l L & Pol'y* 101 2010-2011, at 137. (See also <http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war>.)

³⁷ *Supra* note 17.

³⁸ N. Cumming-Bruce, *UN Expert Calls for Halt in Military Robot Development*, *New York Times* 30 May 2013 (http://www.nytimes.com/2013/05/31/world/europe/united-nations-armed-robots.html?_r=0)

³⁹ For example, the *Declaration Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature*, signed at The Hague 29 July 1899.

⁴⁰ <http://www.mtcr.info/english/index.html>

⁴¹ <http://www.wassenaar.org/>

arrangements. However, these schemes do not seek to prevent or regulate how drones are used.

3.10. As noted above that Art 36 of the Additional Protocol to the Geneva Conventions (AP1) requires governments to consider and determine whether any new weapon, means or method of warfare complies with the above principles and any other rule of “international law applicable to the High Contracting Party”. It states as follows:

*“Art 36. New weapons
In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”*

The UK Government is therefore under a duty to consider whether armed drones contravene any rule of IHL and, indeed, of international law, including IHRL. Note that the duty applies not only to weapons, but also methods of warfare. Such an analysis need not anticipate every possible unlawful use of a weapon, but must focus on its normal, anticipated, use. However, it must be a comprehensive review of likely usage.

3.11. The UK Government has stated in response to Freedom of Information Act (FOIA) requests that it has carried out an Art 36 review of the Reaper drone, “comprising legal reviews dated 3 August 2006, 4 February 2008, 14 May 2010 and 29 November 2010”. However, it refuses to disclose any of the documentation. It is not therefore known whether the UK’s Art 36 review complied with this standard.

4. LEGALITY OF USE IN AFGHANISTAN UNDER IHL

4.1. As can be seen from the *Nuclear Weapons* case, it is unlikely that drones themselves – i.e. their manufacture, stockpiling, export etc.- would be ruled to contravene IHL principles such that they are deemed to be unlawful *per se*, i.e. that they violate the *jus ad bellum*. However, the question of whether the

UK's use of armed drones complies with the laws governing the conduct of war – the *jus in bello* – is much more likely to lead to a conclusion that drone use is unlawful. As the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions has stated:

*“a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.”*⁴²

4.2. IHL applies to the conflict in Afghanistan, to which the UK is a party as a member of the International Security and Assistance Force (ISAF). ISAF operates in Afghanistan at the invitation of the Afghan Government, and is permitted to use force through successive UN Security Council Resolutions authorizing the taking of “all necessary measures”⁴³. The conflict in Afghanistan, is generally accepted to be a non-international armed conflict⁴⁴, since the Taliban were deposed and Hamid Karzai's government, in which the Afghan Government were elected. In that conflict, is assisted by ISAF in suppressing insurgent Taliban forces.

4.3. If the conflict is accepted to be non-international in nature, then the Geneva Conventions do not apply, save for Common Article 3 (the requirement of humane treatment). However, customary international humanitarian law (described below) does apply, and this largely reflects the content of the conventions. This is the applicable IHL.

4.4. The UK accepts that IHL governs its conduct in Afghanistan, although it seeks to avoid the application of human rights law (as described in section 5 below). The US also accepts that IHL applies to the conflict in Afghanistan⁴⁵. The US also, controversially, states that IHL applies to its use of drones for

⁴² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, 28 May 2010 (A/HRC/14/24/Add.6)

(<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>)

⁴³ See UNSCR 1386 (2001) UN Doc S/RES/1386 (2001) and successor resolutions, most recently UNSCR 2069 (2012) UN Doc S/RES/2069 (2012).

⁴⁴ ‘Afghanistan, Applicable International Law’, Rule of Law in Armed Conflicts Project (http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1)

⁴⁵ J.Garamone, ‘Geneva Convention Applies to Taliban, not Al Qaeda’, American Forces Press Service, 7 February 2002 (<http://www.defense.gov/News/NewsArticle.aspx?ID=43960>)

targeted killing outside recognised zones of armed conflict i.e. in Africa, Yemen, and Pakistan. In a reverse of the Bush administration's efforts to avoid IHL (the Geneva Conventions) applying to its use of torture in Guantanamo and at rendition sites (through its (mis)use of "unlawful combatant" status), the US now positively welcomes the application of this body of law. The reason has less to do with a change of administration, but the nature of the acts carried out. Whilst IHL prohibits torture absolutely, it permits and sanctions the killing of combatants within armed conflict. However, there is no precedent and no adequate justification for the 'global battlefield' that the US administration posits.⁴⁶ As such, any UK complicity in the operation of the US programme would be similarly unlawful.

4.5. There are four key principles said to be derived from IHL regarding the use of force during conflict: necessity, humanity, proportionality and distinction⁴⁷. These principles are relevant to answering the questions of if and when and in what circumstances the UK may use armed drones in Afghanistan.

4.6. The principles of necessity, humanity, proportionality and distinction are stated to be the "basic principles of the law of armed conflict" in the MoD's own Manual of the Law of Armed Conflict⁴⁸. And the ICJ found the principles of distinction – between combatants and civilians – and of humanity – avoiding unnecessary suffering – to be the "cardinal principles" of IHL in its *Nuclear Weapons* decision.⁴⁹

4.7. The ICRC's authoritative study of customary international humanitarian law⁵⁰ also confirms that the four principles have attained the status of customary international law. Customary international law is a binding body

⁴⁶ For a robust critique of the US' legal approach, see O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 *Denver J Int'l L & Pol'y* 585 2010-2011 at 585.

⁴⁷ See Ministry of Defence Joint Service Manual of the Law of Armed Conflict, Joint Service Publication 383, 2004 Edition

(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf)

⁴⁸ *Ibid*, Ch.2

⁴⁹ *Supra*, note 33 at [78]

⁵⁰ Customary International Humanitarian Law, Vol. I, Henckaerts & Beck, ICRC (2009) (see <http://www.icrc.org/customary-ihl/eng/docs/home>)

of international law enforceable between states and, in certain circumstances, between an individual and the state. It is defined in the statute of the International Court of Justice as “*evidence of a general practice accepted as law*” (Art 38(1)(b)). It is important to establish that customary international law effectively protects these four principles for two reasons. Firstly, because the Geneva Conventions only apply to international armed conflict. So it is important to establish that equivalent customary rules govern the conduct of hostilities in Afghanistan. Secondly, because, unlike treaties such as the Geneva Conventions (which have not been incorporated into English law⁵¹), customary international law can be enforced directly by individuals in domestic courts (see *enforcement* heading at the end of this section below).

4.8. The ICRC’s customary international humanitarian law study reviewed state practice and *opinio juris* regarding the principles of IHL taken by states to apply during armed conflict in general. This resulted in a comprehensive list of customary international humanitarian law rules. This is an authoritative and important source of the law that applies the principle of distinction is reflected in Rule 1 (*the principle of distinction between civilians and combatants*); Rule 7 (*the principle of distinction between civilian objects and military objectives*); Rule 11 (*Indiscriminate attack*) and Rule 20 (*Advance warning*). The principle of necessity is reflected in Rule 2 (*Violence aimed at spreading terror among the civilian population*) and Rules 16 (*Target verification*) and 21 (*Target selection*). The principle of proportionality is reflected in Rule 14 (*Proportionality in attack*); Rule 15 (*Precautions in attack*); and Rule 17 (*Choice of means and methods of warfare*). And the principle of humanity can be seen reflected in Rule 70 (*Weapons of a nature to cause superfluous injury or unnecessary suffering*); Rule 87 (*Humane treatment (civilians)*) and Rule 89 (*Violence to life (civilians)*). Also of relevance is Rule 150 (*Reparation*).

4.9. We now analyse the UK’s use of drones according to each of the four principles of IHL below.

⁵¹ Save for the Geneva Conventions Act 1957 (<http://www.legislation.gov.uk/ukpga/Eliz2/5-6/52/contents>)

Necessity

4.10. The concept of military necessity – that armed attacks must offer a “definite military advantage” – is generally assumed to be satisfied in relation to the US/UK drone programme, certainly that operating in Afghanistan. However, this principle is not one of mere generality; the test must be satisfied in respect of each individual drone attack. This requires knowledge of the drone strikes carried out by the UK, information that is not currently available.

4.11. However, the question of whether the drones programme in general is militarily necessary is not as straightforward as may first appear. Primarily because the use of drones is viewed by many as counter-productive, as they radicalize the civilians living under their shadows. As Professor Ryan Vogel summarises:

“Some...assert that the military advantage of many of the drone attacks is minimal to nil, because either the importance of the target is often overstated or, more importantly, because the civilian losses generate increased hostility among the civilian population, thereby fueling and prolonging the hostilities.”⁵²

The previous Prime Minister of Pakistan has stated that drone strikes “do no good, because they boost anti-American resentment throughout the country.”⁵³ Recent testimony before the US Senate Judiciary Committee from a Yemeni witness to drone attacks confirmed the same.⁵⁴ See also the NYU-Stanford Report ‘Living Under Drones’.⁵⁵ It is therefore debatable that the use of drones are a military ‘own goal’, which, properly evaluated, fall foul of the requirement of military necessity. Certainly, this is a question which needs a careful answer, both as a matter of generality and on a case-by-case basis.

⁵² Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 Denv J Int’l L & Pol’y 101 2010-2011, p.126

⁵³ S. Shane, *C.I.A. to Expand Use of Drones in Pakistan*, New York Times 3 December 2009 (<http://www.nytimes.com/2009/12/04/world/asia/04drones.html?pagewanted=all>)

⁵⁴ G.Greenwald, ‘A Young Yemeni writer on the impact and morality of drone-bombing his country’, The Guardian, 1 May 2013 (<http://www.guardian.co.uk/commentisfree/2013/may/01/ibrahim-mothana-yemen-drones-obama>)

⁵⁵ *Living Under Drones*, NYU-Stanford, September 2012 (<http://www.livingunderdrones.org>)

- 4.12. The UK's approach to the principle of necessity in relation to drones is not known. There is an urgent need for clarification.

Humanity

- 4.13. According to the MoD manual on the Law of Armed Conflict, the principle of humanity “forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes”. It therefore restricts inflicting further suffering than is absolutely necessary.

- 4.14. Applied to drones, we take this principle to prohibit killing a combatant with a drone when it is possible to disable or arrest the combatant, or if the combatant would wish to surrender. When troops are on the ground in Afghanistan, this principle, applied properly, should significantly curtail the use of drone strikes. Without its application, there is a significant risk that as increasing reliance is placed on drones, humanitarian options for detaining personnel cease to appeal to military planners.⁵⁶ Until such time as a drone is invented that merely disables its targets, these weapons may often therefore breach the principle of humanity.

- 4.15. The ICRC supports such an interpretation. In its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*⁵⁷ it states as follows (p.80):

“While it is impossible to determine, ex ante, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.”

- 4.16. This aspect of the ICRC's interpretation of the principle of humanity is controversial however. Whilst he questions the ICRC's use of authorities for the proposition, Professor Ryan Goodman also argues for the same⁵⁸:

⁵⁶ See e.g. Asim Qureshi, *The 'Obama doctrine': kill, don't detain*, The Guardian 11 April 2010 (<http://www.guardian.co.uk/commentisfree/cifamerica/2010/apr/11/obama-national-security-drone-guantanamo>)

⁵⁷ N. Melzer, *Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, May 2009 (<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>)

⁵⁸ Goodman, *The Power to Kill or Capture Enemy Combatants*, NYU Research paper, 8 February 2013 (<http://ssrn.com/abstract=2213960>)

“...the modern law of armed conflict (LOAC) supports the following maxim: if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided.”

He argues for the least-restrictive-means (LRM) to be used against targets, citing a number of existing IHL provisions in support, such as the ‘release on the spot rule’ in the ICRC Commentary to Additional Protocol 1, whereby military units must release and indeed humanely supply enemy combatants they come across in the field if they are unable to detain them.

- 4.17. Most tellingly, this interpretation also finds support in the UK Ministry of Defence’s own Manual on the Law of Armed Conflict⁵⁹, cited by the ICRC in its guidance. It states as follows (§2.2):

“Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve a legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”

Goodman notes that the MoD authors of the manual took issue with the ICRC’s interpretation of this passage, but also notes that an author’s views as to interpretation are not conclusive.

- 4.18. Does adopting this ‘least restrictive means’ approach mean not only that the UK must disable/capture targets when possible, but also that they must do so even when this involves the assumption of greater risk? In this respect, the ICRC guidance is less helpful, suggesting that there is no obligation on the UK to assume any such risk (p.82). Goodman however characterizes this as an extremely conservative approach. He argues that an increased risk to troops in carrying out a less harmful attack should be placed in the balance when ascertaining which mode of attack complies with

⁵⁹ *Supra*, note 47

IHL. The Israeli Supreme Court’s 2006 judgment in *PCATI v Israel*⁶⁰, is authority for this:

“Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required...However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (see §5 of The Fourth Geneva Convention). Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent..”

Does the UK adopt the same approach to its use of drones? The statistics detailing prolific use of drones in Afghanistan suggest not. This, in our opinion, is unlawful.

4.19. In addition to preventing strikes where less harmful means could be deployed, the principle of humanity also prohibits successive drone strikes – such as the US practice of ‘second strikes’⁶¹ – which may harm rescuers. It also prohibits any strikes that endanger civilian populations (see also the principle of distinction below). Again, not enough is known about UK drone strikes in this regard.

4.20. Other aspects of drones also suggest that they are liable to be deemed “inhuman”. For example, how is a combatant able to surrender to a drone? As drones are able to survey their targets for considerable periods, should there not be a corresponding right for a combatant to surrender to the drone before he is killed? And how is any surrender to take place? The ICRC have noted this issue in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, which states:

⁶⁰ *PCATI v Israel* HCJ 769/02 (2006) (http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf)

⁶¹ J. Serle, ‘UN expert labels CIA tactic exposed by Bureau a war crime’, BIJ, 21 June 2012 (<http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/>)

“While operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”⁶²

On the face of it, this rules out the use of drones for attacks in any situation other than one in which it is already known or reasonably assumed that a combatant would not surrender given the opportunity. Again, is this the UK’s approach?

4.21. Similarly, how are civilians to be warned of a possible strike, so that they may vacate the area, as is required by Art 26 Hague IV? Such requirements of warning are not simply a relic of the past. A recent symposium of experts noted that *“effective advance warnings must be issued to the civilian population, unless circumstances do not permit...”*⁶³, noting that such requirements applied equally to drones.

4.22. Again, has the UK recognised and applied these issues, and what practices does it have as regards accepting surrender and warning civilian populations? Similar questions could be asked about the customary IHL rules such as Rule 112, requiring parties to a conflict to *“search for, collect and evacuate the dead without adverse distinction”* and Rules 115-117 requiring burying of the dead and recording of all available information in relation to deaths and disappearances and provision of the same to family members. The distance between drone operator and victim renders these requirements of customary international humanitarian law very hard to achieve.

4.23. Furthermore, anticipating the introduction of fully autonomous drones, it should be argued strongly that the principle of humanity, with its subjective evaluation of the likely suffering, injury or destruction caused by a contemplated attack, requires human evaluation. Essentially, only humans

⁶² *Supra*, note 57, p.82

⁶³ *Manual on International Law Applicable to Air and Missile Warfare* (2009), Harvard International Humanitarian Law Research Initiative, Rule 37 (<http://www.ihlresearch.org/amw/>)

can be the arbiters of humanity. Whilst artificial intelligence etc. may be able to quantify the relevant data, it cannot, properly form a view of what constitutes humane and inhumane conduct in a given situation. This decision is one based upon the human experience and all that this entails. As Vogel states: “*human judgment is often critical in exercising restraint in armed conflict*”⁶⁴.

4.24. It is also possible that, even before autonomous drones are a reality, the ‘playstation mentality’ that many argue affects drone operators also renders these weapons as inhumane. Drones are designed to eliminate emotion, adrenaline and human fallibility. If operators are desensitized to the human implications of a strike, then going ahead with such a strike risks contravening the humanity principle.

4.25. Recent reports have also highlighted the effect on civilian populations of being monitored by armed drones. They have noted severe psychological effects, particularly in children, of an awareness of being monitored and the constant risk of attack. Such effects also fall to be considered under the principle of humanity. Arguably, they would require, at the very least, the monitoring of such effects, limiting drone use in population areas, and a limiting of the number of strikes.

Distinction

4.26. The principle of distinction requires that attacks be directed only against combatants and military objectives, and not against civilians. Art 51 AP1 states as follows:

“The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”

This reflects earlier Geneva Convention provisions, and is in turn reflected in the principles of customary international humanitarian law set out at para 4.8 above. It can be seen in specific IHL provisions, such as Art 25 of the

⁶⁴ *Supra*, note 52, p.137

1907 Hague IV Convention, which prohibits aerial bombardment “by whatever means” of undefended towns, villages or dwellings.

4.27. Of course, the difficulty for the UK in the conflict in Afghanistan is that Taliban fighters are parts of their community, and may often intentionally fail to distinguish themselves from civilians. Nevertheless, if this tactic has been successful, UK forces cannot attack with drones. To do so would breach the principle of distinction.

4.28. Many IHL lawyers argue that the principle of distinction does not amount to an absolute prohibition on the taking of civilian life. Instead, it focuses attention on whether sufficient steps were taken to appropriately target an attack⁶⁵. However, whether or not this is the case, the principle requires the taking of significant precautions. For example, Hague IV (reflected in customary international law) requires a commander to do “all in his power” to warn “authorities” before an aerial attack “except in cases of assault”.

4.29. In the authors’ opinion, the principle of distinction can and must be interpreted to require higher standards of distinction for the use of drones than, say, apply to artillery shells. Hand-in-hand with the benefits (and the disadvantages to a population) of constant, low risk, monitoring comes greater responsibility to use that technology appropriately. Commanders must make more than reasonable efforts to gather intelligence before they attack, they must be certain. If drones are capable of what the drones lobby claim, then certainty should be possible. A higher standard should apply to weapons that claim discernment. This is consistent with the guiding aim of IHL of protecting civilians. If a technology enjoys the ability to accurately discern civilians and targets prior to a strike, then it is no use comparing it to a cannonball or an artillery shell. If certainty, or near certainty is enabled,

⁶⁵ e.g. MoD Manual on the Law of Armed Conflict, *supra*, note 47, para 2.5.3: “*This obligation is dependent on the quality of the information available to the commander at the time he makes decisions. If he makes reasonable efforts to gather intelligence, reviews the intelligence available to him and concludes in good faith that he is attacking a legitimate military target, he does not automatically violate the principle of distinction if the target turns out to be of a different and civilian character.*” It is submitted that this sets the bar too low.

then the principle of distinction will require such certainty or near certainty. This is why, in an article broadly positive regarding drones' capabilities to fulfill IHL standards, Professor Laurie Blank states:

*"In an age when the information-gathering capabilities of drones make extraordinary amounts of information available, it is reasonable to examine whether using drones adds any heightened standard for the use of information in analyzing targets, potential collateral damage and other considerations..."*⁶⁶

This is also why Human Rights Watch commented in their 2009 report into drone attacks during Operation Cast Lead in the Gaza Strip that *"with..advanced visual capabilities, drone operators who exercised the proper degree of care should have been able to tell the difference between legitimate targets and civilians..."*⁶⁷ Although the reverse argument – that inaccurate weapons should be given a greater margin of error – should be guarded against.

4.30. It should also be noted that the distance involved between operator and potential victim also has consequences for the principle of distinction. A drone operator is reliant on intelligence to a much greater extent than a soldier in the field, or even perhaps an aircraft under fire. Whilst their ability to see beyond the wall of a homestead in Afghanistan may be impressive, a drone operator, lacking first-hand experience, only knows to look into these buildings as a result of intelligence provided to him or her. And whilst a drone operator may easily see the number of individuals in such a compound, it cannot easily see who is carrying a weapon, who flees and who reaches for a weapon when the moment of combat arrives. The principle of distinction therefore requires drone operators to scrutinize and verify their intelligence and visual inputs to a much greater degree than presently appears to be the case from the statistics re. civilian casualties.

4.31. As with the other principles of IHL, it can also be argued that the principle of distinction requires human operation in order to make target

⁶⁶ Blank LR, *After 'Top Gun': How Drones Strikes Impact the Law of War* 33 U Pa J Int'l L 675 2011-2012)

⁶⁷ *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*, Human Rights Watch (2009) (http://www.hrw.org/sites/default/files/reports/iopt0609web_0.pdf)

assessment decisions. The principle should also be interpreted to prohibit the use of automated targeting drones.

4.32. There are a number of other characteristics of drones that raise a presumption that drone strikes will fall foul of the principle of distinction, particularly if used in any area in which civilians may be present (i.e. built areas or farming areas). For example, the time delay caused by transmitting data between operator and drone of 1-4 seconds raises considerable risks in any situation involving the possible presence of civilians in the vicinity (i.e. any targeting in a built-up or covered area). Similarly, the significant blast radii of hellfire missiles of upwards of 15-20 metres⁶⁸ may also raise a presumption that drone strikes are unlawful, particularly when considered alongside the other factors relating to the principle of distinction that we have identified. It was for such reasons that the ICRC opined in a similar fashion in relation to cluster munitions:

“these characteristics...raise serious question as to whether such weapons can be used in populated areas in accordance with the rule of distinction and the prohibition of indiscriminate attacks. The wide area effects of these weapons and the large number of unguided submunitions released would appear to make it difficult, if not impossible, to distinguish between military objectives and civilians in a populated target area.”⁶⁹

4.33. Certain types of strikes can also be said to be prohibited absolutely by the principle of distinction. ‘Second strikes’ for example that target rescuers. It is not currently known whether the UK has used multiple strikes.

4.34. We are bound to note the counter-argument however, that drones’ ability to survey a target for hours or days at a time will lead to more accurately targeted attacks that more easily preserve civilian life. Used properly, this may be the case. But comparing drones to aircraft strikes is a false comparison. Attacks by jet fighters, which announce their presence loudly, and which take time to arrive at a target, will be much less likely to

⁶⁸ *Supra*, note 55

⁶⁹ ICRC Observations on the Legal Issues Related to the Use of Cluster Munitions, UN Doc CCW/GGE/2007/WP.8

occur in a counter-insurgency conflict, precisely because of the risks of causing civilian casualties where combatants are among the civilian population. Comparing drones to a weapon which would not be used does not enhance drones' credentials. It is arguable that drones' 'ability to linger' leads to greater damage than these sparingly used alternatives. The question is, simply, 'does the prolific use of drones in Afghanistan comply with IHL?' not 'are drones better or worse than another weapon?'

4.35. Of course, the correct application of the principle of distinction depends on correctly classifying 'combatants' and 'civilians'. The groups were not expressly defined in the Geneva Conventions, which only set out criteria describing regular armed forces entitled to Prisoner of War status. In Additional Protocol 1, civilians are defined negatively as "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse*" (Art 50(1)). Armed forces are described as (Art 43) "*all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.*"

4.36. The elements of organization, command structure, responsibility to a party to the conflict and internal discipline have lead to an assumption that the vast majority of targets in Afghanistan will not constitute armed forces⁷⁰. However, in addition to members of armed forces, civilians "*taking an active part in hostilities*" may also be targeted under IHL. This is reflected in Art 51(3) AP1, which states:

"Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

⁷⁰ See Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, OUP, Oxford, 2011. p.139.

4.37. Drone operators must therefore accurately ascertain whether potential targets are either armed commanded groups or civilians taking a direct part in hostilities. Unless the answer is a clear one, then IHL prohibits the carrying out of a drone strike.

4.38. Similarly, civilian objects, such as homes and vehicles, cannot be targeted under IHL. Whether an object that is civilian in appearance has become a military object turns upon ascertaining whether the “*nature, location, purpose, or use*” of the object is military. Art 52(3) of AP1 states that if there is any doubt about an object’s use, then it shall be presumed to be civilian in nature. Therefore without certainty through intelligence – a high standard to attain – objects that are civilian in appearance cannot be attacked. This includes homes, farms and vehicles.

4.39. As for civilians, as noted above, only those ‘taking a direct part in hostilities’ may be targeted. What constitutes ‘taking a direct part in hostilities’ is therefore a critical question, which affects the legality of a great number of UK drone attacks. But, just as for civilian objects, we do not know what rules the UK applies to this question. Afghan civilians are entitled to know; since they would wish to avoid engaging in conduct that may appear to drones overhead that they are ‘taking an active part in hostilities’. This could include carrying arms in particular areas, or permitting Taliban sympathisers from their community to enter their homes, attending funerals etc.

4.40. There is no definition of what constitutes ‘direct participation in hostilities’ in the main IHL treaties – the Geneva Conventions and Additional Protocols. This issue was explored by the Israeli Supreme Court in 2006 in *PCATI v Israel*⁷¹, which found that members of terrorist groups would never cease to take a direct part in hostilities. They could therefore be targeted at any time. For civilians who could not be so characterized, the court emphasized the question of whether or not such civilians are

⁷¹ *Supra*, note 60

performing the “function” of combatants. It listed persons transporting combatants, or collecting intelligence on the opposing forces as sufficiently taking a direct part in hostilities (§35). However, it also stated that persons selling food or medicine to combatants, or providing general strategic analysis, monetary aid or distributing propaganda supporting them are not taking a direct part (§35).

4.41. The ICRC’s guidance on the classification of civilians, the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*⁷², was promulgated in 2009. This stated that civilians lose protection as long as they are “directly participating” in a specific hostile act, but that once such participation ceases, they regain protection. Of course, this raises the question of what constitutes “direct participation”. The ICRC indicated that persons performing exclusively political, administrative or other non-combat functions are not participating in hostilities. It distinguished between acts which may well be hostile in that they are part of the general war effort or sustain the war, and acts which amount to direct participation in hostilities. This requires a direct causal link between the participation and harm i.e. “if either the specific act in question, or a concrete and coordinated military operation of which that act forms an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold [of harm].”⁷³. However, even participation of that degree only satisfies the ICRC’s standard if the act is a belligerent one i.e. the act is “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.” This excludes, for example, violent crime or acts of self defence.

4.42. And unlike members of organized armed groups, who are deemed to be exercising a “continuous combat function” and therefore are direct participants for the time that they remain part of the armed group; civilians “who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-

⁷² *Supra*, note 57

⁷³ *Ibid.*, p.58

combat functions” are only able to be targeted for the time that they are directly engaged in hostilities (i.e. attacks).

4.43. Considering the ICRC’s guidance, Vogel concluded as follows:

“It seems that if the ICRC’s interpretation of direct participation in hostilities is used, then many of the United States’ drone strikes may not properly distinguish between combatant and civilian – particularly those attacks against ‘civilians’ (e.g. members of...Taliban, and associated forces who perform only political, religious, or other ‘non-combat’ functions for the group) located in their homes. However, if one concludes that membership in an inherently violent non-state armed group within a recognized armed conflict severs an individual’s civilian protected status, then drone strikes that target such individuals likely meet the requirement to distinguish...”⁷⁴

Clearly, this is a vexed question, the US’ answer to which has been heavily criticized. For example, Hina Shamsi notes that the US has argued that drug traffickers linked to the Taliban can be targeted and killed⁷⁵. However, it is not known whether the UK takes a similarly expansive approach to military objects and participation in hostilities or not. Nor is it known whether the UK’s policy employs the same, or different distinctions to those found by the Israeli Supreme Court or those found by the ICRC. Nor is it known whether public references to ‘insurgents’ reflect different, or the same, standards applied under IHL to combatants and civilians directly participating in hostilities. Any classification of combatants and ‘civilians participating in hostilities’ that strays wider than the ICRC’s guidance is, it is submitted, a misdirection in law and unlawful.

4.44. A Parliamentary question has been raised regarding the UK’s policy on this matter, which received the following answer:

“The Parliamentary Under-Secretary of State, Ministry of Defence (Lord Astor of Hever): Within the context of the operational environment in Afghanistan, we report the number of casualties that are caused by UK forces’ actions, whether these are civilian or insurgent casualties, as accurately as practicable.

⁷⁴ *Supra*, note 52, at p. 122

⁷⁵ Shamsi, *Remarks*, 104 Am Soc’y Int’l L Proc 165 2010

The Ministry of Defence does not, as a matter of course, monitor overall insurgent or civilian casualty figures. However, in all circumstances where a possible civilian casualty is reported, UK forces will investigate the circumstances. The presumption of that investigation will be that any casualty is a civilian unless it can be established that the individual was directly involved in immediate attempts or plans to threaten the lives of International Security Assistance Force personnel.”⁷⁶

This policy does not appear to be enough to satisfy the above concerns, as it is reliant on the reporting of a possible civilian casualty. If an assumption of ‘combatant’ has already been made pre-strike, then it is unlikely that this assumption will change post-strike, save in the most obvious cases of collateral damage. Whilst the emphasis on immediacy does go some way to suggesting that the definition of ‘direct participation’ is close to the ICRC’s, it may still be wider. The ICRC emphasizes the need for a direct, one step, causal link to harm to ISAF forces. And the reference to “attempts or plans” raises concerns as to what the UK deems to constitute planning. Could attending a *Jirga* (community meeting) at which some express opposition to ISAF forces constitute planning? Or logging onto a jihadist website? Nor does this answer the question of how the UK applies its own definition. Where does it draw the line as to “direct involvement”? Close scrutiny of the UK’s definition of ‘direct participation in hostilities’ is required.

4.45. Clearly, there is a strong incentive for the UK to class all casualties as ‘insurgents’/‘combatants’ *ex-post facto*, and not as civilians. Certainly, in the absence of adequate post-strike investigations (and again, the UK’s approach to such a critical matter is unknown) it is easy to see how an assumption of “‘combatant’ unless there is clear evidence to the contrary”, could develop. In light of the evidence – hundreds of drone strikes and only 4 deemed civilian deaths – we posit that the UK has misdirected itself as to who may be a civilian under IHL and the extent of its duties to investigate and ascertain.

⁷⁶ *Hansard*, HL Deb 13 November 2012 c261WA

4.46. And, once again, all of the above places a great deal of pressure on intelligence. This is acknowledged by Vogel, who states: “*there may also be concern with drone strikes’ dependency on reliable intelligence for acquisition of targets.*”⁷⁷ Although he notes that this pressure is not unique to drones. Nevertheless, given the absence of any other sources of information for a drone operator (other than visual inputs, which he or she will usually require intelligence to interpret), the pressure is particularly acute in relation to drones.

Proportionality

4.47. The principle of proportionality involves a balancing of the effect of any attack with the military aim involved, in order to prohibit disproportionate ‘sledgehammer to crack a nut’ attacks. See Art 51(5) AP1:

“Among others, the following types of attacks are to be considered as indiscriminate:...[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Crudely, the principle permits attacks that cause civilian casualties if the ends justify the means. This is reflected in the Rome Statute of the International Criminal Court, which criminalizes only the causing of civilian death and destruction that is “excessive” compared to the anticipated military advantage. However, where such interpretations start to dilute the principle of discrimination they should be resisted. Furthermore, the claimed superior discrimination of drones can be relied upon to argue for heightened proportionality standards such that any civilian casualties amount to a disproportionate attack. Blank alludes to this:

*“proportionality in the context of UAV strikes is being, or could soon be, reconfigured, that we are seeing a recalibration of the relationship between military advantage and civilian casualties – away from ‘excessive’ and towards ‘none’.”*⁷⁸

⁷⁷ *Supra*, note 52, p.124

⁷⁸ *Supra*, note 66, p.715

4.48. Furthermore, UK drone operators will also need to be in possession of very good intelligence in order to be in a position to make a decision as to proportionality. For example, Art 57(1) AP1 requires that “*in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.*” Indeed, Art 57(2)(c) AP1 requires that advance warnings of attack are given to civilian populations “*of attacks which may affect the civilian populations, unless circumstances do not permit this.*”

4.49. The principle of proportionality, in balancing military advantage, should also require an evaluation of the seniority and strategic importance of the personnel to be targeted. It could be argued that only senior personnel may be targeted by drone attack, given the attendant risks of breaches of IHL that we have highlighted. This finds support in an unlikely place, the US Army Field Manual, which states:

“In COIN [counter-insurgency] environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.”⁷⁹

Vogel also alludes to this issue, stating:

“Determining whether drone strikes meet the requirements of proportionality will always be a case-by-case analysis. Higher numbers of civilian casualties may meet the proportionality test, for example, if the target is a very senior leader of the enemy whose elimination may more likely lead to a quicker cessation of hostilities and fewer military and non-military deaths. On the other hand, striking low-level fighters or supporters in public places, where collateral damage is virtually assured, may not meet the test.”⁸⁰

4.50. Again, as with the principle of distinction, it is not known whether the UK adopts this approach in relation to its drone strikes, but given their high numbers, it appears unlikely that it is being applied correctly.

⁷⁹ US Army US Marine Corps Counterinsurgency Field Manual, 2009, p.7-7

⁸⁰ *Supra*, note 52.

4.51. And again, as with the principle of humanity, that of proportionality also requires a human operator. Autonomous drones should fall foul of this standard. Professor Noel Sharkey⁸¹ states that “*there is no way for a robot to perform the human subjective balancing act require to make proportionality decisions*”, stating that it is very difficult to “*calculate a value*” for the military gains for any given attack.

Enforcement

4.52. The above survey demonstrates that IHL standards do have an important role to play in regulating drone use. We have also made clear that there is a severe shortage of information regarding the UK’s use of drones in Afghanistan. Nevertheless, considering the intensive use of UK drones for targeted killing in Afghanistan (see statistics at para 2.2 above) it is possible to conclude in the abstract that it is highly likely that the UK’s use of drones in Afghanistan will have breached the relevant core standards of IHL – of humanity, proportionality, necessity and distinction. For example, applying the principle of humanity, drones may only be used when targets may not be disabled or arrested by other means, even if such alternative means involve a greater risk to UK troops. And the UK should have given adequate warning to civilian populations of imminent attack. And applying the principle of distinction, particularly an elevated standard in view of the claimed precision of drone strikes, drone attacks should not target nor affect civilians or potentially civilian persons or objects. The incident involving the mistaken killing of a British serviceman through drone misidentification (see para 2.3 above) starkly illustrates the dangers. And any civilians who are not directly participating in hostilities (adopting the ICRC’s guidance) should not in any event be targeted. e.g. not religious personnel or Taliban supporters etc.

4.53. These IHL standards are customary international law standards. In the absence of a statutory bar to incorporation, they form part of English law and may be adjudicated upon in English Courts (see *Trendtex Trading*

⁸¹ Sharkey, *Saying ‘No’ to Lethal Autonomous Targeting*, Journal of Military Ethics 369

Corporation v Central Bank of Nigeria [1977] 1 QB 529). Furthermore, given the UK Government’s policy adoption of these IHL standards (see for example the Ministry of Defence Manual on the Law of Armed Conflict), the Courts may review the Government’s compliance with its own policy, essentially as a species of legitimate expectation. This was the exercise the Court undertook in relation to Geneva Convention standards in *R (Haidar Ali Hussein) v SSD* [2013] EWHC 95 (Admin) (on appeal), summarized by Collins J at §20:

*“The second ground is based on an alleged failure to abide by the requirements of the Geneva Conventions, insofar as they are applicable. They are, it is submitted, part of international law which is incorporated into domestic law...In the skeleton arguments, there has been much learning on whether the Conventions are to be regarded as incorporated into domestic law. The observations of Lord Denning, MR in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, upon which Mr Owen particularly relies, are at p.554G. He concludes that 'the rules of international law, as existing from time to time do form part of our English law'. But there has not been universal acceptance of this in subsequent cases. However, it is not in my view necessary to determine the question. It is clear from the policies that the Defendant has accepted that CPERS must be treated in accordance with any applicable Geneva Convention and must in particular be treated at all times in a humane fashion. Thus whether the obligation to treat CPERS in such a manner applies as a matter of law does not need to be determined since as a matter of fact the Defendant has decided to do so. Any failure to comply with relevant obligations would constitute a breach of the approach that the Defendant is applying and so would be unlawful in public law terms.”*

- 4.54. There is an urgent need for the English Courts to review the UK’s policy and practice in relation to its drone programme in Afghanistan, whether as a matter of policy and generality or with reference to a particular strike. This was essentially the exercise that the Israeli Supreme Court carried out in relation to targeted killings in the Occupied Palestinian Territories in the *PCATI* case cited above. The English courts may also carry out this exercise, just as they did in *Haidar Ali Hussein*.

5. LEGALITY OF USE IN AFGHANISTAN UNDER IHRL

5.1. Of course, IHL is not the only body of law of potential application to the UK's drones programme. International Human Rights Law (IHRL) protects victims from the unlawful use of force and requires investigation wherever credible allegations of a breach are made. The UN Special Rapporteur, Philip Alston summarises the criteria of human rights law in determining whether a use of force was lawful:

“Under human rights law: a State killing is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force necessary). The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.”⁸²

5.2. In the UK context, the applicable human rights protections are most clearly found in the European Convention on Human Rights (ECHR).

5.3. Almost all commentators have deemed international human rights law to only apply to drone strikes occurring outside conflict zones (i.e. the US' programme). Some rely on the opinion of the ICJ in its *Nuclear Weapons* opinion⁸³, in which it stated that (§25):

“whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 ICCPR, can only be decided by reference to the law applicable in armed conflict”.

However, in *Congo v Uganda*⁸⁴, the ICJ held that both bodies of law – IHL and IHRL – are capable of application to the acts of states engaged in armed conflict. At §216, the ICJ stated as follows, citing its earlier Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory:

⁸² *Supra*, note 42.

⁸³ *Supra*, note 33.

⁸⁴ *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ (2005), p.168

“216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In this Advisory Opinion the Court found that

“the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (I.C.J. Reports 2004, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.”

The ICJ went on to hold Uganda responsible for violations of both IHL and IHRL in that case.

5.4. Most pertinently in relation to the UK, the Grand Chamber of the European Court of Human Rights (ECtHR) also applied the ECHR to the actions of UK forces in Iraq in *Al-Jedda v United Kingdom* [2011] ECHR 1092, *Al-Saadoon v United Kingdom* 61498/08 [2010] ECHR 282 and *Al-Skeini v United Kingdom* (55721/07) (2011) 53 EHRR 18.

5.5. In *Al-Skeini*, the ECtHR found that UK human rights jurisdiction extended to individuals affected by the UK’s conduct in Iraq. The ECtHR held that individuals killed whilst under the authority and control of UK forces were within the UK’s jurisdiction for the purposes of the ECHR. Such authority and control arose in relation to any Iraqi civilians killed during the carrying out of security operations in the UK’s area of responsibility. All such individuals were thus protected by the right to life enshrined in Art 2 ECtHR and relatives were entitled to investigations of their relatives’ deaths pursuant to the procedural duty that protects the right. A further case, *Hassan v UK*,

concerning the arrest and disappearance of an Iraqi civilian taken under British control in Iraq in 2003, is to go before the Grand Chamber in due course.

- 5.6. In *Al-Jedda*, the ECtHR found the right to liberty under Art 5(1) ECHR and the procedural protections under Art 5(4) ECHR were not ousted by, and effectively overrode, the power to intern civilians arising under IHL and UN Security Council Resolutions.

Human Rights Jurisdiction

- 5.7. Again, it is not known whether the UK applies human rights standards to the operation of its drones programme, although it would appear not, given the high level of drone use recorded in the statistics cited at the beginning of this opinion. It is anticipated that the UK will raise a series of barrier arguments in a bid to avoid human rights accountability for its drones programme. In the first case challenging UK activities in Afghanistan – *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (which challenged the practice of handing-over prisoners to torture in Afghanistan) - the Ministry of Defence avoided litigating these barrier issues by promulgating a policy replicating the ECHR standards so that the Court could review the Government's compliance with the policy instead. Perhaps it was felt that the facts of the case would compel the Court to find human rights jurisdiction and it was better to argue these points on different facts. That opportunity is likely to present itself shortly in current cases such as *R (Noorzai) v SSD* (hearing pending).

- 5.8. An in-depth analysis of the various barrier arguments that the UK Government is likely to erect to prevent the application of human rights law is beyond the scope of this opinion. They are familiar from the cases of *Al-Jedda*, *Al-Skeini* and *Al-Saadoon*, which related to Iraq, and in all of which the ECtHR rejected the UK's attempts to evade accountability.

- 5.9. However, one barrier argument directly concerns drones themselves and is worth considering in more depth. ECHR Art 1 requires a victim to have been

within the jurisdiction of the UK before he/she can benefit from the rights in the convention. In most cases such jurisdiction is territorial, as the incident in question occurs in the UK. However, jurisdiction is not exclusively territorial (see *Bankovic v Belgium* 11 BHRC 435 at §§61, 67; and *Al-Skeini* §§131-132). The Grand Chamber in *Al-Skeini* recognised a number of exceptions to the territoriality principle, including when “*the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s Article 1 jurisdiction*” (§136). It is not necessary in such circumstances for the state to be in a position to guarantee all of the convention rights to that individual, but must guarantee “*the rights...that are relevant to the situation of that individual*” (§137).

5.10. The Grand Chamber also found in *Al-Skeini* that ECHR jurisdiction would flow when “*as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory*” (§138). In those circumstances the state has the responsibility to secure all of the convention rights within the territory under its control (§138).

5.11. The Grand Chamber in *Al-Skeini* concluded that the UK had exercised ECHR jurisdiction in Iraq. This had been exercised “*through its soldiers engaged in security operations in Basrah during the period in question*” (§149). They had “*exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention*” (§149). Also relevant was the fact that “*the UK (together with the US) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq.*” (§149) Those security roles are summarized at §§21 and 147 of the judgment:

“The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the civil administration in Iraq

in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.” (§21)

5.12. These roles are very similar to the roles undertaken by British troops in Afghanistan, provided for in successive UN Security Council Resolutions beginning with UNSCR 1386 of 2001 which, *inter alia*, authorized the establishment of an “*International Security Assistance Force [ISAF] to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment*” (UNSCR 1386 §1) and authorized that force “*to take all necessary measures to fulfill its mandate*” (§3). UNSCR 1386 also notes the UK’s offer to take the lead in organizing and commanding the ISAF.

5.13. Assuming therefore that the requisite degree of authority is exercised by UK forces operating in Afghanistan, through the UN mandate and its use of drones and ground forces (if necessary together with other nations’ forces, as in Iraq), the question is whether the UK exercises the requisite degree of control over drone victims. Such control need not be exercised in a physical sense. For example, the third applicant in *Al-Skeini* died whilst eating dinner with her family, when bullets fired by unseen assailants entered her home through the wall and killed her (*Al-Skeini* §44). The Grand Chamber found that the requisite degree of control was exercised over her as she had been killed during security operations (§149, above). Provided therefore that drone operations are recognised as security operations, there is no reason of principle why the use of a drone to attack an individual cannot found a similar degree of control and thus establish a similar jurisdictional link with the victims.

5.14. The earlier Grand Chamber case of *Bankovic* found that no jurisdictional link was established by high altitude bombing in Serbia. However, whilst *Al-Skeini* did not expressly reverse *Bankovic* save in certain specific areas (the concepts of ‘*espace juridique*’ and the inability to ‘divide

and tailor' ECHR rights extra-territorially), it has replaced it as the authority on extra-territorial jurisdiction. Moreover, there is a significant difference between the bombing raids in *Bankovic*, in which such a premium was placed on avoiding NATO losses that planes were not permitted to fly below fifteen thousand feet, and drone attacks in Afghanistan occurring as part of UN-sanctioned security operations, accompanied by the actions of British forces on the ground and occurring as a result of intensive and prolonged surveillance of the targets. The characteristics of drones as compared to high altitude aircraft bombing also urge a finding of ECHR jurisdiction. The close monitoring of the target by the drone operator; his/her ability to call-off a strike if he/she believes civilians are in the area; and the claimed ability to carry out surveillance of targets for days at a time, together with the contemporaneous recording of all this information (which can be readily reviewed for the purposes of investigation), creates a much stronger degree of control over the target than that found in *Bankovic*, indeed stronger than that of the third applicant in *Al-Skeini*. The Grand Chamber in *Al-Skeini* can be seen to clearly reject the idea of jurisdictional 'red lines' (the arbitrary nature of the 'inside/outside British bases' concept favoured by the UK was specifically put to the UK by Judge Ann Power at the hearing) in favour of a factual analysis. That includes temporal red lines as well as geographical ones. It would be unnecessarily inflexible to suggest that, in this era of drone warfare, ECHR rights are irrelevant simply due to the fact that the weapon is fired from the air rather than the ground.

- 5.15. This conclusion is also consistent with the views of others concerning the application of the ICCPR, another human rights treaty, to US drone attacks occurring outside Afghanistan. The UN Special Rapporteur, Philip Alston declared in his study of the use of drones for targeted killings in May 2010 that "*the legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force.*"⁸⁵ He recognised no limitation on the application of the ICCPR to drone victims. Of course, his limitation of this to killings occurring outside armed

⁸⁵ *Supra*, note 42, §31

conflict should be recognised as occurring prior to the Grand Chamber’s decision in *Al-Skeini*, which expressly applies human rights standards to killings occurring during a period of occupation and armed conflict.

5.16. Of course, the UK is also a signatory to the ICCPR and it may also be enforced in domestic courts where reflective of customary international law or otherwise held to impose public law obligations. However, the ECHR is directly incorporated into English law and is therefore the more relevant human rights standard.

Human Rights Protections

5.17. In light of the above, persons targeted by British drones in Afghanistan should benefit not only from the protections of IHL but also human rights law. The effect of this is significant, as targeted killings are unlawful under human rights law. Intentional lethal force is only permitted to protect against a threat to life, and where there are no other means – including detention or disablement – of preventing that threat to life. Article 2 of the ECHR states as follows:

“Article 2 – Right to life

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.”

5.18. In *McCann v United Kingdom* (1995) 21 EHRR 97, the ECtHR considered the targeted killing of three IRA personnel in Gibraltar. It held that Art 2 ECHR required that (§§149-150):

“the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2...In keeping with the importance of this provision (art. 2) in a democratic society, the Court must,

in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.”

5.19. The ECtHR went on to exercise careful scrutiny of the targeted killing operation, observing that (§211) “...the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.” And that (§203) “It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar.” The ECtHR concluded that: (§213):

“In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.”

5.20. In *Al-Skeini* the Grand Chamber recognized that the deaths in question occurred during occupation in which conditions of armed conflict prevailed (§161). However, citing *McCann*, it reiterated that conditions of armed conflict did not disapply Art 2 ECHR, save where a derogation was entered under Art 15 ECHR. It stated that (§162) “Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c)”.

5.21. The requirement to use “no more [force] than absolutely necessary” in Art 2(2) places a significant restriction on drone use. Only when it is absolutely necessary to kill someone rather than arrest/disable them will the use of drones be lawful. And even then, drones may only be used for one of the purposes in Art 2(2), most relevantly, in self defence under Art 2(2)(c).

Provided therefore that UK jurisdiction for the purposes of the ECHR is established, then the application of the ECHR would limit the use of drones solely to situations in which there is an immediate threat to life. This prevents the carrying out of ‘targeted killings’ and narrowly circumscribes their use even on ‘the battlefield’.

5.22. It is also notable that Art 2 ECHR makes no distinction between combatants and civilians and whether or not they are participating in hostilities. All persons within the jurisdiction of the UK benefit from its protections. Combatant status/participation in hostilities is only relevant to the extent that it may inform the question of whether a drone strike fell into the narrow category of instances in which the use of force to take a life was “absolutely necessary” and related to one of the purposes set out in Art 2(2).

5.23. Not only does the application of Art 2 ECHR narrowly circumscribe the circumstances in which drones may be used, Art 2 ECHR also imposes a number of positive duties on the state. Most importantly, the state is required to investigate any “arguable” (*Sahin v Turkey* (App No 7928/02)) breach of Art 2 ECHR. It must not await a complaint but investigate proactively of its own volition. Such investigations must be effective, independent, sufficiently prompt, subjected to public scrutiny and permit the victims to participate (*Al-Skeini* §§163-167). The investigation must be broad enough to address ‘systemic’ questions (ie. broader issues of state responsibility: system, management and culture; instructions, training and supervision).

5.24. It is not known how the UK is currently investigating its drone strikes. The single incident recorded in Parliamentary answers (see para 2.3 above) referred only to an ISAF investigation. It is not known whether the Royal Military Police also carried out an investigation, in accordance with their statutory duties under the Armed Forces Act 2006. However, the adequacy of Royal Military Police investigations have been called into question by the decisions in *Al-Skeini* and in domestic judicial review litigation such as *R (Al-Sweady & ors) v SSD* [2009] EWHC 2387 (Admin) and *R (Ali Zaki Mousa) v*

SSD [2011] EWCA Civ 1334. The most recent judgment *R (Ali Zaki Mousa (No.2)) v SSD* found that an inquest equivalent procedure was required for all deaths in Iraq. The conclusion of the investigation stated in Parliament, that the civilian deaths had been caused “in accordance with extant procedures and ISAF rules of engagement”, is startlingly similar to the investigative conclusions in these cases, which were later found to be inadequate. The answer also suggests an unduly narrow approach to the investigation which does not take account of the legal constraints we highlight in this opinion.

- 5.25. A state of armed conflict does not absolve the state from carrying out such an investigation. The Grand Chamber stated in *Al-Skeini* (§164):

*“... the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict... It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed (see paragraph 93 above), concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed... Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-9...).”*

- 5.26. Art 2 ECHR also imposes other positive obligations upon the state in relation to drone victims. The State has a positive obligation to protect individuals from harm, by taking appropriate steps to safeguard life, and reasonable and effective measures to avoid a risk of arbitrary deprivation of life. In the context of drones, for example, this may require the publishing of the targeting policy, or prior notification to civilians where attacks are contemplated in built-up areas. These measures might be said to undermine the effectiveness of drones. However, greater consideration needs to be given to measures that would enable civilians to avoid being affected by drone use.

5.27. Art 2 ECHR may also impose requirements of transparency in relation to the UK's drones programme. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated as follows, citing ICCPR and Inter-American Court of Human Rights jurisprudence:

“87. The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed above. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.”⁸⁶

5.28. ECHR caselaw lends some support to this. The Grand Chamber of the ECtHR recently recognized the “right to the truth”, in a case concerning rendition to torture (*El-Masri v Macedonia* (App. No. 39630/09, 13.12.12)). Following intervention from the UNHCR:

“the right to the truth was an autonomous right triggered by gross violations, as in the case of enforced disappearances...Knowing the truth about gross human rights violations and serious violations of humanitarian law afforded victims, their relatives and close friends a measure of satisfaction....”

The ECtHR adopted this language in its conclusions (§191).

5.29. Lastly in the context of Art 2 ECHR, it should not be forgotten that the UK also has a duty to provide reparation to victims of drone strikes that breach the Art 2 ECHR standards.

Other rights

5.30. Although Art 2 ECHR is most relevant, studies have shown that drone use affects not only communities' fundamental right to life, but also their mental health; educational opportunities; burial traditions and willingness to attend funerals; their economic, social and cultural activities; community

⁸⁶ *Supra*, note 42.

trust; and their willingness to rescue victims and provide medical assistance. See the Stanford-NYU Report, 'Living Under Drones'⁸⁷, which makes clear the debilitating effect on whole communities of the constant low level fear that living under the shadow of drones entails. As such, the rights to be free of torture and mistreatment (including psychological mistreatment) (Art 3 ECHR); and their rights to privacy (Art 8 ECHR), freedom of conscience and religion (Art 9 ECHR), of expression (Art 10 ECHR) and association (Art 11 ECHR) may all be engaged by the UK's use of drones in Afghanistan.

Enforcement

5.31. Pursuant to s7 Human Rights Act 1998, ECHR rights are directly enforceable by victims against the Ministry of Defence in the English courts.

6. OTHER POTENTIAL UNLAWFULNESS

6.1. We have set out above potential actions against the British government for breach of customary international humanitarian law and human rights law in respect of its use of drones. We consider below further potential means of legal redress.

6.2. Information: as we have described, one of the principle mischiefs of the UK's use of drones is its lack of transparency regarding the UK's drones programme. Much of the preceding debate has taken place in the abstract, because so little is known about the UK's use of drones. There are serious concerns that the UK has failed to adequately analyse the effects of its use of drones and that its (presumed) conclusions as to the legality of their use are unsafe.

6.3. We have set out above how the ECHR investigative duty and the right to truth described in *El-Masri* may assist in this regard, particularly when coupled with the Government's duty of candour in judicial review proceedings. Existing means of obtaining information, such as through the

⁸⁷ *Supra*, note 55.

Freedom of Information Act 2000 and Parliamentary questions, has not permitted an adequate level of scrutiny.

6.4. It is possible that the Government's lack of transparency regarding its decision to deploy UK-controlled drones in Afghanistan (and associated decisions), may also breach public law principles. Publication of the legal basis, its considerations of the many legal issues identified above, and its operational rationale for drone use all would greatly advance public debate and are matters of significant public interest.

6.5. There is no general common law duty to provide reasons for decisions. However, given the effect on fundamental human rights set out above, it could be argued that the current level of public reasoning fails to comply with a public law duty to give reasons in such particular cases. For example, the High Court found a duty to give reasons in a sensitive human rights context in *R v DPP ex parte Manning* [2001] QB 330, which concerned a prosecutor's decision not to prosecute persons following an inquest. Lord Bingham held as follows (§33):

“It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute...But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited...In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given.”

6.6. In *R (Saleh Hasan) v Secretary of State for Trade & Industry* [2008] EWCA Civ 1312, the Court of Appeal reiterated that there was no general duty to provide reasons, even in the human rights context of arms exports to Israel. However, this case may be distinguished on the basis that the Court found that the claimant was not liable to be affected by the arms export licensing decisions in question. A case brought on behalf of a person affected by the

UK's drones programme may avoid such a hurdle. Further, the Defendant in *Hassan* was able to rely upon Parliamentary review of the licensing decisions in question, which is of lesser application in the context of drones. Finally, the Court also emphasized that publication of licensing decisions after the fact would not enable anyone to challenge them. However, publication of details of the UK's drones programme may enable challenge.

6.7. Breach of Policy: At para 3.10 above described the UK's policy regarding the adoption of new weapons systems. An inadequate weapons review may constitute insufficient inquiry of the decision maker. Under the *Tameside* duty, the Government is *under a duty to "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly"* (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065B). This may require him to elicit outside views. But in any event, "reasonable steps" would include analyzing the issues highlighted in this opinion.

6.8. UK Complicity in third states' drones programmes: a consideration of the issues associated with the UK's complicity in other states' drones programmes is outside the scope of this opinion. However it is noted here for completeness. See *R (Noor Khan) v Secretary of State for Foreign & Commonwealth Affairs* [2012] EWHC 3728 (Admin).

6.9. War crimes: willful killing or causing of serious injury in breach of IHL is a war crime under Art 8 (2)(a)(i) of the Rome Statute of the International Criminal Court. Intentionally directing attacks against the civilian population, civilians not taking a direct part in hostilities, or civilian objects is a war crime under Art 8(2)(b)(i),(ii),(iv) and Art 8(2)(e)(i). Attacks causing incidental civilian damage that is clearly excessive in relation to the concrete and direct military advantages is a war crime under Art 8(2)(b)(iv). Killing or wounding a combatant who has surrendered is a war crime under Art 8(2)(b)(vi). These crimes are incorporated into domestic law in the International Criminal Court Act 2001.

- 6.10. Although criminal accountability is outside the scope of this opinion, it follows from our analysis of the UK's compliance with IHL that war crimes may have been committed by the UK in its use of drones in Afghanistan. Prosecutors should be invited to investigate these matters.

7. CONCLUSION

7.1. Whilst we acknowledge the limited evidence that is available regarding the UK's use of drones, we have considered the available information as to their prolific and increasing use in Afghanistan. David Cameron said in December 2010 that 124 "insurgents" had been killed by drones, at a time when FOIA responses suggest that 144 drone strikes had been launched. Since then, there have been 222 further drone strikes, in 2011 and 2012 alone. And the numbers are increasing. This suggests that in excess of 350 Afghans have already been killed by UK drone strikes, without any significant public debate or legal analysis.

7.2. The legal analysis above demonstrates how IHL and IHRL place significant constraints on drone use, and impose onerous duties of investigation and reparation. For example, applying the IHL principle of humanity, drones may only be used when targets may not be disabled or arrested by other means, even if such alternative means involve a greater risk to UK troops. The UK must also give adequate warning to civilian populations of imminent attack. And applying the principle of distinction, particularly an elevated standard in view of the claimed precision of drone strikes, drone attacks that affect civilian populations should not have occurred. Further, IHL also places significant limitations on when civilians are deemed to be directly participating in hostilities. Religious personnel, Taliban supporters and many others deemed to be 'Taliban' by the US and UK should not be targeted.

7.3. Human rights obligations, on the other hand, know of no distinction between combatants, civilians and persons participating in hostilities. They impose even greater limitations on when drones may be used. They may prevent

their use completely, certainly in the case of ‘targeted killing’. Even attacks during ‘battle’ will only comply with the standard when “absolutely necessary” for the purposes of self-defence. This is a high standard indeed any civilian death is clear evidence of breach.

7.4. The ECHR is capable of application to the UK’s use of drones. The convention must apply, and evolve, as modes of warfare evolve, as the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions deems the ICCPR to apply to US strikes. The Grand Chamber’s principled, purposive and fact-sensitive approach to ECHR jurisdiction in *Al-Skeini* strongly supports this conclusion. Human rights accountability and the rule of law require it.

7.5. The over 350 killings by UK drones strongly suggest that the above legal standards have not been observed, particularly in light of the suggestion that only four civilians have been killed. This is to be approached with a high degree of scepticism in light of the other available evidence. Moreover, there is virtually no evidence that the UK is complying with its positive human rights obligations to prevent loss of life, investigate arguable breaches and provide reparation to victims.

7.6. There is therefore a strong presumption that the UK’s drones programme is in breach of international law.

7.7. We have also concluded that whilst drones are not illegal *per se* under international law, the use of autonomous armed drones would be. We have also pointed to the transparency deficit regarding the UK’s drones programme. Serious questions are raised regarding the rules of engagement that the UK is applying and its analysis of the legal constraints highlighted in this opinion. These concerns are even greater given the UK’s close cooperation with the US in the operation of its drones programme and the likely harmonization of rules of engagement across theatre.

7.8. International humanitarian lawyers must interpret the IHL principles proactively to form a bulwark against the prolific use of drones and the advent of autonomous weaponry. IHL should not be a form of self-regulation, in which victims have no voice and the rules are written in consultation with military legal advisers and rarely tested in the courts. It is a body of law that protects civilians and civilian lawyers are entitled to, and must, influence this body of law in a much more proactive way. Purposive interpretations of the IHL principles must be adopted.

7.9. IHL is a much more stable body of law, being propelled by victims, incorporated into domestic law, tested in the courts regularly and having the benefit of a global jurisprudence.

7.10. Finally, the urgency of this debate must not be diminished by claiming that drones are a mere incremental step, that they are not weapons in themselves, that they are no different to aircraft. This is to bury one's head in the sand. The road to oblivion is paved with incremental changes. Existing law must meet the challenge of this new technology or new law will be required. We suggest that both approaches be pursued in parallel. That will require a concerted effort by lawyers, governments and civil society (including peace and protest movements) alike.

Phil Shiner

Dan Carey

Public Interest Lawyers

Birmingham

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