

Written evidence submitted by Professor Robert McCorquodale (DRO0008)

Executive Summary

1. It is important that the UK seeks to comply with international law as part of its commitment to the rule of law.
2. International humanitarian law allows targeted killings in very specific circumstances: where there is a military object or a combatant in an international armed conflict; and those who are directly participating in hostilities in a non-international (internal) armed conflict. If the UK is not a party to an armed conflict then it is likely to be considered that it cannot rely on this aspect of international humanitarian law. In any event, the action taken must be proportionate and necessary, and cannot aim to kill civilians.
3. International human rights law applies in peace and armed conflict situations. It prohibits arbitrary killings, including by drones. It applies to situations where the UK has effective control and, possibly, where the UK has control of the person operating the drone.
4. Drones are not illegal weapons *per se* under international law, though legal liability issues will arise when they become fully automated. Their operators might not have immunity from prosecution for murder or other offences in the case of the use of drones in a non-international armed conflict.
5. The UK policy should make clear that the UK can only use drones for targeted killings when it is a party to an armed conflict, whether an international or a non-international armed conflict. It can only use these drones when it complies with both IHL and IHRL. The UK government should issue clear guidance to all its officials as to their responsibilities and liabilities, and allow its military leaders to make public statements about the UK approach to the use of drones so as to distinguish itself from the US approach.

Introduction

6. This evidence is provided by Professor Robert McCorquodale in his personal capacity. I am the Director of the British Institute of International and Comparative Law in London, Professor of International Law and Human Rights at the University of Nottingham, and a Barrister at Brick Court Chambers, London. I have undertaken research on the use of drones and given talks on these issues.
7. I was also on the legal team in the case of *Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24. That case concerned the targeted of civilians in Pakistan killing by drones controlled by the US government (through the CIA). The case was brought in a UK court on the basis of reliable reports that UK intelligence officials were providing information to the CIA about who to target in Pakistan. The UK government pleaded that it neither confirms nor denies this position. It was brought as judicial review seeking the UK government to provide information as to the warnings that they were giving their officials as to the risks that they may be prosecuted for assisting in a murder under the Serious Crimes Act or the International Criminal Court Act. The Court of Appeal did not order judicial review.

International Law

8. The UK government, in its letter to the UN dated 7 September 2015, justified its targeting and killing of three people who were engaged in hostilities as part of the 'Islamic State' forces, by relying on international law. This is appropriate, as compliance with international law is in the interest of long-term peace and security in the UK and in the international community, and it upholds the commitment to the rule of law in international affairs maintained by successive UK governments.
9. This is an important commitment to uphold international law, especially in a situation where other States, and, possibly, non-State armed groups, will use drones. This could have a significant impact on the international rule of law if States like the UK did not confirm its importance.
10. There are three parts of the international legal system that are relevant to targeted killings by drones:
 - a. International law on the use of force, which deals with the legality of, for example, the intervention by a State in another State's territory;
 - b. International humanitarian law, which concerns the lawfulness of force once the armed conflict commences, including what type of weapons are used; and
 - c. International human rights law, which applies in both times of peace and in armed conflict to protect individuals and groups.
11. The UK government's main international legal justification for its actions was that it was on the basis of self-defence and/or collective self-defence under the international law on the use of force. While there is considerable debate about the extent of the right of self-defence under this law and whether it can be used in relation to non-state actors (such as those who allegedly fight as part of Islamic State), it is impossible to know at this time if the UK's government's view is justifiable or sustainable, as the full facts are not known. Therefore, I will focus on the other two parts of international law.

International Humanitarian Law

12. Under international humanitarian law (IHL), there are two types of armed conflict in international law that must be distinguished: an international armed conflict; and a non-international (or internal) armed conflict. This distinction is set out in the Geneva Conventions 1949 (and 1977 Protocols) establishing the rules regarding the use of force within a conflict, to which the UK is a party. Most of these rules would be considered legally binding on all States and applicable to every armed conflict.
13. An 'international armed conflict' (IAC) describes situation of armed force between States (Common Art 2 of the Geneva Conventions) and would also include belligerent occupation. An example of an IAC would be the armed conflict between the UK and its allies in the first Gulf War in 1990-1991.
14. A 'non-international armed conflict' (NIAC) - more often termed an 'internal armed conflict' - is where there is armed conflict between a State and a non-State armed group or between

non-State armed groups within a territory of a State. In both types of NIAC, the violence used must be protracted, it must last for a long period and it must reach a certain level of intensity. If it does not, then it is a matter of ordinary law and order in a State and so IHL does not arise.

15. Some NIACs can become IACs because they affect international peace and security (and not simply national security). In most instances the UN Security Council will have passed a Resolution that indicates this change, such as with the Rwandan conflict in 1994. If another State joins an existing NIAC (internal armed conflict) on the side of the territorial State, that does not make it an IAC. It is still an internal armed conflict. For example, when Saudi Arabia joined the government of Yemen in using force against non-State armed groups in 2015 it remained an internal armed conflict in Yemen.
16. If an internal armed conflict spills over into another State so that the other State has the armed conflict on its border, it does not automatically make it an IAC. For example, the fact that there is an internal armed conflict in Syria that has led to some action on Turkish territory does not make it an IAC. Similarly, once the armed conflict in Afghanistan ceased being an IAC (which was certainly before 2006 – as confirmed by the US Supreme Court in *Hamad v Rumsfeld* (548 US 547 (2006))), it did not become an IAC when some parts of the internal conflict ‘spilled over’ into the territory of Pakistan. It remained an internal conflict, and it also did not make any insecurity in Pakistan into an internal armed conflict.
17. There are a number of issues that arise in IHL with the use of drones to target individuals. I will concentrate on three: if IHL allows the targeting of individuals; if a drone is an illegal weapon; and the consequences for those who use a drone to target an individual.

Targeting under IHL

18. IHL has a principle of distinction. This requires that parties to an armed conflict must at all times distinguish between civilians and those persons taking a direct part in hostilities; and between civilian objects and military objectives. Typical civilian objects include school buildings, hospitals, and private property. Parties are prohibited from attacking civilians and civilian objects. As a consequence, IHL only allows the killing of combatants in an IAC and of those ‘directly participating in hostilities’ in a NIAC. While there is some uncertainty as to what is a ‘direct participation in hostilities’, the International Committee of the Red Cross’ *Interpretive Guidance on Direct Participation in Hostilities* (2009) requires, *inter alia*, a ‘belligerent nexus’ between the harm caused and a party to the conflict for there to be a direct participation in hostilities. So if a State is not a party to the NIAC (and hence not participating in hostilities) then it is difficult to claim that it can target an individual. This could be the case with the UK in relation to the Syrian conflict.
19. IHL also has requirements about proportionality and necessity, so that the method of targeting of an individual is relevant. There may also be civilians killed by the drones, as the death of civilians who are near to drones attacks continue to occur. There is also the consequent impact on civilian lives by the use of drones generally, even if not all of them are

able to release weapons (see the report by Stanford and NYU, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (2012)).

Drones as Weapons

20. There are many types of drones and names for them. They have been called Unmanned Aerial Vehicles (UAVs), Unmanned Aircraft Systems (UAS) and Remotely Piloted Aircraft Systems (RPAS). The Ministry of Defence now tends to refer to them as UAS internally but RPAS in the media. There are also Autonomous Weapons Systems (AWS) and Lethal Autonomous Robotics (LARs), which are autonomous in the sense of not being piloted remotely but are programmed in advance to deploy missiles. In these cases there is no direct human involvement in the final decision of the weapon deployment. These are still in development and the latest report by the UK military - the Joint Doctrine Note 2/11 - notes that level of technology needed is not yet achievable (para 206). However, they will raise issues of legal responsibility which, in my view, are likely to have liability being with the manufacturer.
21. Drones are not a missile in themselves but a platform or system for surveillance or for deploying missiles and other weapons. While there is clearly an issue of privacy and other rights in relation to surveillance drones, the focus here is on those that deploy weapons. There have been remotely controlled weapons for many decades, including some German ones in the Second World War, the difference now is the level of technology and sophistication, especially the physical distance between the remote pilot and the drone. Drones are not specifically referred to in any international agreement, though, the President of the International Committee of the Red Cross (ICRC), has stated that their use in armed conflict is subject to the rules of IHL as is the use of any other weapon system (ICRC, 2014). While drones are not illegal per se, unless a national law outlaws them, it is their use in certain circumstances that gives rise to issues of illegality in international law.

Consequences for Operators

22. If a drone is used in an IAC then the operator is protected by combatant immunity. Thus a soldier in an IAC cannot be charged with murder as they have immunity. The immunity is a domestic law rule in most States, including the UK, which is applicable internationally, and is why those in military persons are not prosecuted for murder when killing combatants from other States. However, this combatant immunity probably does not apply if the drone operator is not in the military, such as a member of the CIA or a civilian.
23. Combatant immunity would not apply to a situation where there are no 'combatants'. In a NIAC (an internal armed conflict) the 'combatant' status does not exist, as most States in an internal armed conflict do not want to give any sense of legal legitimacy to the armed non-State group they are fighting. Hence, the use of the concept of 'direct participation on hostilities' in NIACs as considered above. If there is no combatant immunity then it is murder. Indeed, in the case of *Noor Khan* referred to above, the Court of Appeal accepted (at paragraph 19) 'that it is certainly not clear that the defence of combatant immunity

would be available to a UK national who was tried in England and Wales with the offence of murder by drone strike'. So it is arguable that if a UK intelligence operative assists a US drone operator by providing information that they know might be used to target someone in an internal armed conflict then UK intelligence person will have no combatant immunity.

International Human Rights Law

24. The UK is a party to all the major global and regional human rights treaties that are relevant to the issues raised in this Inquiry.
25. International human rights law (IHRL) applies at all times, including in an armed conflict, as was confirmed by the International Court of Justice in *Democratic Republic of Congo v Uganda* (2005) and in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004). The only time it may be excluded is if a State has expressly declared a 'state of emergency' within its own jurisdiction and then it can only limit its obligations in relation to some human rights, and it cannot exclude its obligations with regard to many human rights (such as the prohibition on torture).
26. IHRL and IHL usually reinforce each other, such as they both prohibit torture. IHRL can help clarify what is an 'arbitrary detention' and IHL may have the supervisory bodies to bring an IHL claim. In an armed conflict then IHL will only have precedence over IHRL if it has a specific rule relating to an issue.
27. IHRL prohibits arbitrary killing. This means that it does not allow the targeting of individuals in order to kill them except in strictly limited circumstances. This was confirmed by the UN Special Rapporteur on Arbitrary Killings in his *Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (2013), where (at paragraph 60 – emphasis added) he states:

*International human rights law prohibits arbitrary killing. This prohibition is reflected in specific treaty obligations and forms part of customary international law. Outside situations of armed conflict, the use of deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an immediate threat to life and if there is no other means of preventing the threat from materializing. It follows that **lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict**, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.*

This statement is consistent with the decision of the European Court of Human Rights (ECtHR) in *McCann v UK* (1995), which concerned the UK security forces' shoot to kill policy in relation to alleged IRA terrorists in Gibraltar. The Court held that these actions violated the European Convention on Human Rights (ECHR), at least because the UK's forces could have taken alternative action instead of killing them.
28. The fact that the targeted killing occurs in another State does not mean that the UK has no IHRL obligations. Even if there had been consent by the other State to the UK action, no State can give consent to a violation of human rights by another State. Further, here have been a series of cases that have decided that the UK's obligations under the Human Rights

Act (in its application of the ECHR) continue to apply to situations where the UK has effective control or jurisdiction, such as in its detention centres in Iraq and Afghanistan - for example, the Court of Appeal's decision in *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843.

29. An issue as to whether IHRL applies might be a requirement that the UK has effective control over the territory where the drone strike occurred. Earlier cases before the ECtHR indicated that an overflight of military planes may not be enough to have effective control (see *Bankovic v Belgium* (2001)). However, the more recent case law has seen that there are obligations on a State in relation to its actions violating human rights outside its territory, on the basis of the perpetrator being a State agent rather than about the effective control by a State of an area (see *Hassan v UK* (2014) and *Jaloud v The Netherlands* (2015)). In those latter cases, there was some limited territorial link in the relevant State due to the presence of on the ground military forces.
30. While it may be possible to argue that a lack of territorial link with the UK is important, it may also be possible to argue that, if the UK has control over the person who operates the drone, then the UK has IHRL obligations. Those obligations include not to undertake arbitrary killing and to ensure a fair trial.

UK Policy

31. UK policy should make clear that the UK can only use drones for targeted killings when it is a party to an armed conflict, whether an international or a non-international armed conflict. It should make clear that it can only use these drones when to do so would comply with both IHL and IHRL. It should also issue clear guidance to all its officials as to their responsibilities and liabilities in the use of drones to target individuals.
32. From my discussions with UK military and from my understanding of US activity in this area, while the US tends to use CIA or other non-military personnel to pilot the drones, the UK uses experienced pilots to do so. This is an important distinction, as it means that the UK is using people who understand the reality of armed conflict on the ground and in the air. If the UK military leadership was to make public statements about the UK approach to the use of drones, such as using trained pilots to operate drones, this would assist to distinguish itself from the US approach.
33. The increasing technology on drones should mean that the UK government could produce regulations on their manufacture, including clarifying the liability of those involved with autonomous drones.

November 2015