



**British Institute of
International and
Comparative Law**

'Drones and International Law'

Event Report

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Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- **Professor Dapo Akande**, University of Oxford
- **Kat Craig**, Legal Director, Reprieve
- **Professor Kevin Jon Heller**, SOAS

Chair:

- **Professor Robert McCorquodale**, Director of BIICL



This event was chaired by Professor Robert McCorquodale (Director of BIICL) and the speakers were Professor Dapo Akande (University of Oxford), Professor Kevin Jon Heller (SOAS) and Kat Craig (Legal Director of Reprieve).

Professor Robert McCorquodale

Several terms for drones exist, such as 'unmanned aerial vehicles', with different bodies referring to drones in various ways and, at times, confusingly. Drones can be used in various ways, including for civilian purposes, but the focus here is on their use as weapons systems. While most of these are controlled by humans, there is a development in which they are used without direct human operation. The use of drones, as a weapon, is not itself illegal under international law and they have become a key part of several States' military operations. Over 20,000 drones were used by the US in 2013. They are also used by the UK – as acknowledged last September – as well as Israel and by many NATO States. It has been estimated, for instance, that in Pakistan in the last 10 years, 2,300 people were killed by drones, almost 500 of which were civilians. This evidences the breadth and width of the legal issues that drones raise.

Professor Dapo Akande

One of the key questions here is: why is there so much concern about the use of drones? A significant area of concern is not so much that they are used for targeted killings but that they allow for low level uses of force over a long period of time, and that this can blur the line between war and peace. This is problematic, as it gives rise to uncertainty with regard to the legal framework that applies to the use of drones.

Targeted killings are sometimes described as extra-judicial assassinations. Whether this is correct depends on whether the drone strike takes place in an armed conflict or not. In an armed conflict, the law requires that those using force make a distinction between legitimate targets and those that are protected from targeting (i.e. civilians, who cannot be the object of an attack). Therefore, in one sense, targeted killings in armed conflicts through drones may be moving towards what the law requires in terms of distinction, as targeted killings through drone strikes helps stop indiscriminate killings. However, the same act outside an armed conflict scenario becomes problematic, and the characterisation as an extrajudicial assassination becomes easier to apply.

The crucial issue is thus what legal framework applies to the use of drones. With respect to international law, leaving aside domestic law, we will look first at the *jus ad bellum* (which regulates the use of force between States), then *jus in bello* (international humanitarian law) and also international human rights law. One important point to stress is that all these

frameworks need to be considered. The legality of the use of drones under one of these frameworks does not suffice. This is important because States that use drones often justify the lawfulness of their actions under one framework. For example, in the UK parliamentary debate with respect to Syria, self-defence of the UK was mentioned, therefore merely pertaining to the *jus ad bellum* framework. However, questions arise about international humanitarian law. Even if the legality under one framework is accepted, this does not explain anything about the legality under other frameworks. As another example, the US often says that the use of drones is lawful because it is involved in an armed conflict. While this is relevant for international humanitarian law and, perhaps, for international human rights law, it does not answer the question as to the lawfulness under the *jus ad bellum*. Therefore, all frameworks need to be considered.

Drones are used to respond to terrorist plots, and international law permits self-defence against armed attacks. However, there is a question as to whether acts by individuals would amount to an armed attack or whether they merely constitute criminal activity that should be responded to using criminal law enforcement measures. Is the appropriate paradigm the war/armed conflict paradigm or the law-enforcement or peace time paradigm?

With regard to international humanitarian law, the first question is whether there is an armed conflict. If so, is it an international armed conflict or a non-international armed conflict? Since drones are used against non-state actors I will consider first whether drones are used in the context of a non-international armed conflict. In the test for whether the State is involved in an armed conflict with a non-State group, two criteria are relevant. First, the violence must reach a sufficient intensity of violence and, second, the armed group must be sufficiently organised.

With regard to the most controversial use of drones, the level of violence is the key issue. Drones have been used in some established non-international armed conflicts, such as Afghanistan and Iraq, and their use is not as controversial in these circumstances. More controversial is their use in situations such as Pakistan, Syria, Somalia and Yemen. If the drone strikes are considered in isolation, they do not cross the threshold of intensity of violence required. The intensity of violence between the State using drones and the group in the State where drones are used does in these cases rise to level of a non-international armed conflict.

This raises a question as to whether a State can claim to be involved in a non-international armed conflict with that group, not only in one State, but in a number of States? In other words, can the violence be aggregated amongst various States to establish the necessary threshold? Some take the view that international law does not permit this. In my view however, international law does allow for non-international armed conflicts to stretch across more than one State, and it is fairly easy to demonstrate that proposition. It is almost universally accepted that a non-international armed conflict can exist across borders – i.e. where the State is defending itself against a non-State group, if that group crosses a border, that would still be one non-international armed conflict. Nothing is conceptually distinct, in



legal terms, if an armed conflict crosses only one or more borders, other than the physical ability to launch an attack.

Those that argue against a global non-international armed conflict make the argument primarily as a way of limiting the use of force. It is seen as a dangerous argument to allow States to follow a group into other States. However, this assumes that what limits the geographical spread of conflict is international humanitarian law. But I think that it is the *jus ad bellum* that provides this limit. Even if international humanitarian law applies, States still need to satisfy the requirements under the *jus ad bellum* in every State where it proposes to use force. It is this, rather than *jus in bello*, which limits, or could limit, the spread of conflict.

Having established that you can have a non-international armed conflict that crosses borders, the second criterion is that of organisation. In this regard, only members of the same organisation can be targeted, as only violence that is used by members of the same organisation can be aggregated. This creates some problems with regard to drone strikes. States at times do not only aggregate violence between countries but the allegation has been made that members of disparate or loosely allied groups are members of the same group so that the violence can be aggregated. This is problematic, because a single armed conflict must entail violence between the same parties – a State cannot claim that it is fighting against Group A in country A, and thus can also fight against Group B in Country B. It needs to show that they are part of same group. This leads to the question: what is the test for establishing that members are part of the same armed group? I suggest that, essentially, this comes down to whether there is a command and control link, or some form of hierarchical link between organisations. Thus, one group inspiring another does not suffice in this regard, nor will it suffice that the groups have the same aims.

With regard to international human rights law, the main question is to what extent it applies extraterritorially or not. Whether a State is involved in an armed conflict or not is also important to the application of human rights law as human rights may apply differently in situations of armed conflict. The extraterritorial application of human rights and the relevant European Convention on Human Rights provision depends on whether the situation is within the jurisdiction of the State or, in other words, whether the State can be said to have some form of control over the individual in question.

The key obstacle here for individuals in territory not controlled by the State is the *Bankovic* judgment, which held that States conducting air strikes did not have jurisdiction over the individuals being bombed. However, in regard to the obligation of States to respect rights (i.e. negative obligations) the case law is moving towards imposing obligation on States to respect rights insofar as the State has the ability to violate those rights. Already we have support for such an approach in this country by the High Court in *Al-Saadoon*, and I think that this is the direction of the case law.



Professor Kevin Jon Heller

I want to focus on an empirical issue – whether the increasing availability of drones makes it more likely that States will use force extraterritorially? I will do so by looking at a recent study that does not have as much attention as it deserves. This study seeks to understand how civilians view the casualty minimisation effect of drones, given that many argue that the increasing availability of drones makes it more likely that States will use force, due to the casualty minimisation.

This argument makes three basic assumptions. The first is that civilians are generally sensitive to the number of casualties on their own side during an armed conflict and are thus more likely to support an armed conflict that does not create many casualties; i.e. the fewer casualties, then the more support for the armed conflict. The second assumption is that States increasingly rely on armed drones in a conflict, because this leads to fewer military casualties. The third assumption is that States are more likely to wage an armed conflict when they have the ability to use drones, because there will be less casualties.

The key to this argument is that civilians are generally casualty-averse, which makes intuitive sense. But is it an empirically justified assumption? Two researchers associated with the US Army War College undertook a study (*Drones and the Willingness to Use Force* study) with almost 3,000 participants. They presented a news story involving a planned use of force in Yemen by the US and gave a sense of how many casualties there would be, to see if there was support for this type of attack.

The news story provided in the study varied in two ways. First, with regard to the type of military action contemplated, three alternatives existed: drone strikes (for which it was also explained that there would be no military casualties); air strikes from human-piloted aircraft (for which it was explained that the risk to military personnel was low as the targets did not have surface-to-air missiles required to target the aircraft); and infantry (in relation to which nothing was said about the risks but which are obviously greater than in the other alternatives). Thus, the civilians were aware that it was safer for military personnel if they used drones, and that the risk to military casualties was greater if air strikes were conducted, as well as it was most dangerous where there are 'boots on the ground'.

The second variation was the purpose of the use of force. In this regard, there were four different possibilities: counter-terrorism (against militants who had previously attacked the US); foreign policy restraint (punishing a State that is making it more difficult to ship oil from the Persian Gulf); humanitarian intervention; and an internal political change (trying to forestall a change in government by military activity).

Overall, there were 12 different stories, with about 300 subjects reading each. The study led to four basic findings. Firstly, the use of drones increases the willingness of participants to support the armed conflict. Participants were consistently more likely to support the use of

drones over infantry, regardless of the objective. Secondly, participants were more willing to use drones than targeted aircrafts. This would create fewer casualties, so it was preferable. This was true for all objectives except for humanitarian intervention. In that scenario, there was a preference for air strikes to drones. Thirdly, the principal objective of using force was an important predictor regarding support. The participants were most likely to support the use of force in any manner (infantry, drones, or air strikes) when it was for counter-terrorism. Fourthly, they were much less willing to use force when punishing a foreign policy rival, undertaking humanitarian intervention, or seeking to affect internal political changes. For these, the level of casualties did not really matter, as the fact that casualties could be minimised did not substantially affect support for the use of force (only in counter-terrorism).

The authors reached four conclusions based on these findings. Firstly, that support for an attack increases to the extent that the likelihood of casualties decreases. Secondly, the nature of the weapon system is not an important consideration. The goal is to reduce military casualties, without a commitment to drones or anything else. Any system that would minimize casualties would be preferable, but there was nothing particular about drones. Thirdly, choosing to use drones instead of piloted aircraft will produce a small increase in support among the public for a prospective conflict. Thus, in a situation where popular opinion is fairly narrowly balanced, the use of drones could make the difference in terms of tipping support toward a conflict if the number of casualties would be reduced through the use of drones. The effect of increasing political support through using drones and minimising casualties was not so significant, however that it can substantially affect public opinion. For a really unpopular conflict, military casualties can be reduced effectively to zero without a change in public opinion. Fourthly, the type of conflict does matter. The more immediate the threat to the State, the greater the willingness to support the use of force. In that instance, it does not really matter what the level of expected casualties is.

The authors were surprised by the finding that participants prefer airstrikes to drones in humanitarian intervention, but they did not make much of an attempt to explain this. Maybe it indicates that civilians see humanitarian intervention as such an important political goal that they are willing to use airstrikes, but this would conflict with the basic finding that no matter how few casualties, there is no real support for the use of force in humanitarian intervention. While this remains a puzzle, it is an interesting finding.

This phenomenon – that the use of drones, by minimizing casualties, makes it more likely that States will use force – puts pressure on basic legal categories and can help explain why States develop certain types of arguments with regard to the *jus ad bellum*, the *jus in bello* and international human rights law.



Kat Craig

Reprieve is instrumental in bringing cases for victims of injustice. It represents a large number of individuals in legal actions in the UK, US, Germany, before the ICC, Yemen (until the legal system collapsed) and also in Pakistan. It focusses on the use of drones in non-traditional war zones. She has spent a lot of time travelling to Yemen and Pakistan speaking to victims on the ground, including those who live under drones and experienced the changes in technology and what those developments have allowed to occur in those countries.

It is absurd to have a conversation about the legality of drones without considering the implications for and experience of those that are directly affected. The law is most important where it helps solve problems and helps those affected. So whilst the legal limitations on the use of drones are important, they cannot be discussed in isolation.

Reprieve therefore seeks to bring strategic cases to illustrate the impact of drones on civilian populations. An example of a strategic case for Reprieve is that of Faisal bin Ali Jaber, a Yemeni civil engineer from Hadramout, a province in the east of Yemen, which is an area that has troubles with Al-Qaeda. In August 2012 Faisal was celebrating his son's wedding. His son was the first qualified dentist in their village of Khashamir and its inhabitants were delighted to have that level of medical access. Faisal's brother-in-law, Salim, was also at the wedding, and he was an Imam who preached against Al-Qaeda and faced threats from militants who disagreed with his moderate views. On the Friday before the wedding, Salim gave a sermon asking young men to look towards a peaceful, sustainable way forward and to turn their back on Al-Qaeda. The following Tuesday, he was killed by the US in a drone strike. Faisal, since August 2012 has been looking for answers as well as apologies, and is trying to understand how one of the most powerful countries, with the most sophisticated mechanisms, could make such a fundamental mistake? Why was his brother, a leading person that the US should be working with in the fight against violent Islam, targeted and killed?

When we talk about drones, they are not altogether different from air strikes, although there are practical application issues and implications of using drones. One of the major hallmarks, in the reality of drone warfare, is that they are shrouded in secrecy by every single country that employs them. The amount of information available when drone strikes are carried out is much less compared to air strikes. We do not know who is being targeted, why they are being targeted, how the selection process happens, what checks and balances exist, and whether basic democratic principles and values are being upheld in the course of such decision-making. This uncertainty creates a paralyzing fear for those in affected communities. This creates several long-term problems in communities that are already massively disadvantaged and are facing extreme poverty. There is evidence of an increased use of anti-depressant medication because of such terrible anxiety. Their economic abilities have also been seriously limited. These are all contributing factors to communities in crisis.



In terms of the threshold for an armed conflict, does the use of drones mean that we enter into war more quickly? In practice, many countries engage in conflicts by way of drone where they would be genuinely reluctant to do so in any other manner (e.g. by 'boots on the ground'). There is a myth of surgical precision, being that they only take out those targeted, but that is simply not true. We know that thousands of people died in drone strikes and we do not even know who they are. From leaked documents, we know that every person killed in a drone strike who was not targeted is considered an 'enemy killed in action'. However, many people die, for example, one drone strike 76 children were killed while the target is still believed to be alive.

In practice, the use of drones as a form of weapon is falsely marketed as a silver bullet to complex problems. There is no transparency for the accountability and decision-making process, principles of the rule of law and democracy are not properly upheld and people that States should be partnering with are being killed. As a result, those States are losing their moral authority and there is a general fear that drones make us less, and not more, safe. Thus the questions of whether they are effective, and how people experience drones on the ground, are essential to this discussion.

Professor Robert McCorquodale: When I was interviewed after the UK admitted to the use of drone strikes, it was put to me that we should surely be pleased that terrorists are being killed. Indeed, this is part of what the survey you discussed by showed, but what does the law say? How do we explain all of this in legal terms, as the relevant tests provided under international law takes into account different considerations?

Professor Heller: I think the fact that drones are attractive to militaries because they do not involve military casualties may increase their use. For example, the principle of precautions is at the centre of international humanitarian law. One of the basic requirements of this principle is that, all other things being equal, if the attacker has a choice between two methods, the method which causes less civilian casualties must be chosen. Governments do not like this, as it means they need to increase the risk to themselves in order to reduce the risk to civilians. The more drones become available, the more tempting it also becomes to use ostensibly more accurate drones, as they do not subject their own forces to a real risk.

This also puts more pressure on governments to reduce the content of the principle of precautions. Before drones, there was still an element of exposing military personnel to risks. However, if we now say that international humanitarian law does not permit drones, but only boots on the ground, States will resist this and that resistance will become ever greater where drones can be used. The Geneva Conventions' Additional Protocols were relatively recently adopted, in the aftermath of the Vietnam War. The use of drones could lead to a re-jigging and re-balancing of the relevant interests. Drones can bring changes in this regard and insufficient consideration has been given to that potential.

There is an additional problem with debates in this area, in that States do not reliably follow a positivist methodology to advocate for a change; they merely state their preferred doctrines, even when there is no positivist argument in support of them. With drones, there is a Global North bias – as can be seen, for example, with humanitarian intervention. Although 120 States in the Global South have said that there is no right to use force in these circumstances, this often gets ignored in relevant debates.

Professor McCorquodale: What if the States using drones are not those from NATO? Can those States argue that they can use them to kill anybody in NATO? Would that still follow from the global non-international armed conflict you discussed?

Professor Akande: It follows as matter of international humanitarian law that you can have a non-international armed conflict that straddles boundaries, but there is a limitation in the *jus ad bellum*. States must provide a legal justification for using force in the territory of that other State (self-defence, Security Council authorisation, etc.). The difficulty, it must be admitted, with putting all of the eggs in the *jus ad bellum* basket so to speak, is that when States rely on self-defence, particularly in relation to imminent attacks (as the UK did for example in relation to Syria) it is very difficult, if not impossible, to assess the legality of that. If we accept that States can use force to prevent an imminent attack (which I do), it is very difficult to assess in individual cases whether a State is acting lawfully or not because, by definition, we do not know to what the State is responding. It is this that tempts people to put all their eggs in the international humanitarian law basket, because it is easier to assess. However, this is not where the answer lies, even if that place is more difficult to establish as a matter of evidence.

Professor McCorquodale: In relation to international human rights law, for example in *McCann v The UK*, the Court held that the shoot to kill policy against alleged terrorists was unlawful under the European Convention on Human Rights (ECHR). Does this mean that there cannot ever be a shoot to kill policy? Does this undercut the idea of drones or can this be consistent with the practice of drones?

Professor Akande: With regard to human rights, there are two relevant questions. Firstly, does human rights law apply at all with regard to targeting outside the State using the force? Without a yes to this question, that is the end of the story. At the moment, if we look at some cases of the European Court of Human Rights, the ECHR does apply for States in relation to territory that they do not control. Maybe not in all circumstances at the moment, but the Court is moving that way (and there is case law in this country supporting this) so I am certain that the answer will be yes.

Secondly, if human rights do apply, how do they apply? Is it like in the judgment in *McCann* or some other way? This brings us back to the question of whether it is an armed conflict or not. If so, human rights might apply differently. To be clear, the substantive human rights obligations regarding the right to life might apply differently, although this depends on which human rights treaty we are discussing. It is easier to say under the International Covenant on

Civil and Political Rights that, in an armed conflict, compliance with human rights depends on compliance with international humanitarian law. It is harder to say this with respect to the ECHR. This is only in regard to substantive obligation (i.e. the obligation not to kill). Also, in any case, the obligation of the State is to conduct an investigation. Even if compliance with international human rights law depends on international humanitarian law in an armed conflict scenario, States still have a procedural obligation to investigate. Again this might apply differently in an armed conflict, but the obligation would still exist.

Professor Heller: I am generally sceptical that the nature of technology makes a fundamental difference in terms of law, but this is one area in which it can. There are many reasons for States to prioritise international humanitarian law over international human rights law. One reason is that often they cannot capture their targets and it will be difficult to use force if there is an obligation to capture instead of killing the person as exists under human rights law. This demonstrates why it is so difficult to place everything into the framework of international humanitarian law.

Professor McCorquodale: Is it difficult to bring a claim under international humanitarian law instead of international human rights law? How do you enable victims to bring such claims? To what extent can they be brought against the UK, US or other States for the use of drones that have been affected by?

Ms Craig: It depends on the facts of each case. For example, whether we are dealing with a US drone strike or now, increasingly, a UK drone strike, or whether we're looking at a case for complicity with a US drone strike. An example of this is Reprieve's case against Germany for allowing the US to use a base on German soil for drones. Each jurisdiction offers different obstacles and opportunities.

It is incredibly difficult to ensure an effective remedy through legal mechanisms alone. In the US, it is almost impossible, although we are currently testing this. The US has very overtly immunised itself against these types of claims. If we look at other jurisdictions, for example, the UK, we cannot assess the viability of a case relating to drones on its own. We must also look at how the government defends itself in public and private law cases relating to the war on terror more generally, for example in *Belhaj*, where a Libyan individual was captured and kidnapped in a joint CIA-MI6 operation. What we see in these circumstances, is the government repeatedly raising the spectre of national security to avoid a hearing on embarrassing facts.

While national security is of course a genuine concern, it has been borne out that the government uses secrecy to cover up embarrassing facts. The European Court of Human Rights recently raised this in *Abu Zubaydah v Lithuania*. The global war on terror rhetoric makes it increasingly challenging to bring claims through disclosure mechanisms that exist because of the government's attitude to disclosing information. This undermines the operation of the rule of law. Thus, as a partial solution, we need to identify facts through alternative



means. This is why Reprieve spends so much time on the ground investigating, looking for alternative sources of information because governments vehemently resist disclosure. If we have that, then maybe there is a chance to win in the courts and also in the court of public opinion.

Professor McCorquodale: How can international law make a difference to, for example, the UK government's policy?

Professor Akande: International law makes a difference because in many countries people care about legality. Perhaps not directly, but they care about whether their actions are deemed to be legitimate in this vague sense. If conduct is deemed unlawful or lawful, this affects perceptions. In that sense, international law matters to the public.

International law also matters because in many countries it is embedded into their domestic legal systems in various ways. I agree that it is often difficult to bring such cases, but sometimes some cases can be won or some pressure can be placed.

International law also feeds into the process extra-judicially. Governments have legal advisors who are trying to determine whether a proposed course of conduct is lawful or not. Thus, international law at least makes a difference to people advising the government. Nevertheless, we still need to keep working on the impact of international law.

Professor Heller: It is not an accident that States continuously try to justify their use of force in terms of international law. This reflects the perceived need to justify actions as legal. For me, drone strikes are not so much about the legal characterisation (as in whether they violate international humanitarian or human rights law) but, rather, do we know enough to make a claim about their legality? International humanitarian law does not say anything about the certainty required to categorise persons as combatants. Also in relation to imminence, while we can agree on the standard required, we rarely enough to decide whether there is enough evidence for the standard to be met. These are issues that most disputed and difficult, and the law does not really provide an answer.

Ms Craig: People care about the legality of an issue. The debate as to who decides what the law is, is a fascinating one: which States make the law and which voices are louder in this respect? There is a relevant issue to international humanitarian law. Public opinion is not homogenous or fixed in this context and there has been a real swing. For example, as a result of ISIS, who are undoubtedly a horrific and repugnant entity, there has been a change in the public opinion. When the Prime Minister announced the use of lethal force by drone, it was fascinating to see the backlash and a very different reaction in the public commentary to what it had been in the past.

There is a real risk with the narrative that is often being put forward to justify the use of drones. However, there are also counter-narratives. For example, that this is an over-simplified approach to complex problems, the bringing forward of other stories and

considerations of the efficacy of drones. I cannot stress how often I spoke to people that held their children in their arms when these children were killed by a drone strike. These people, although they could not name the President of the US or point to the US on a map, knew the names of drones as “Predator” and “Reaper”, and when they found out how much such operations cost, they would merely ask – why don’t they do something productive, like spend this money on building basic facilities and infrastructure? Questions have also been raised as to whether drone strikes really work, the reactions of people to them, and whether they are solving a problem.

Question from the audience: Dapo referred to a duty to investigate. Is there any reason why there should not be inquests into those being killed, in particular in the latest Syrian drone strikes? Some of those killed were British citizens and many of those being targeted will also, in the future, be British citizens.

Ms Craig: Given the reluctance of the State to comply with its duty to hold proper inquests in death in custody and other state-killing =related circumstances in a fashion that gave families proper answers, I would not have any expectations about inquests in the use of drones. That doesn’t mean there shouldn’t be inquests and enquiries: the use of drones should be rigorously regulated and scrutinised.

Professor Akande: Whether or not the duty to investigate exists turns on whether international human rights applies. This is where, with respect to the right to life, human rights will make the biggest difference. In international humanitarian law, we might say that there is a duty to investigate but only if there is evidence that war crimes have been committed. This is a more limited duty and the threshold is not clear. International criminal law imposes an obligation to prosecute for war crimes, which must somehow mean some obligation to investigate but it is unclear when this is triggered.

However, international human rights law clearly imposes an obligation to investigate where there might be a violation. Thus, human rights law can make a difference. This is a way of trying to solve this information problem that Kevin talked about, which I agree is a key issue both with regard to *jus in bello* and *jus ad bellum*. How do we know that there is a threat? Who is the person being targeted? Perhaps the best way to solve this is through this procedural obligation. While we cannot expect governments to go to court beforehand to justify their actions, if there is an *ex post facto* process, then at least the person dealing with such decisions at that point in time has some understanding that there may be an investigation afterwards.

Nevertheless, it is difficult to draft an investigatory method that is appropriate or suitable. What kind of investigation will actually suffice (due to sensitive intelligence, etc.)? We need to

try come up with something, like a special investigator who has intelligence clearing, something similar to the role David Anderson plays in relation to terrorist legislation. Something like this might be the answer, but this is a key issue.

Question from the audience: You have been speaking to families of victims and raising issues through litigation. Have you encountered practical difficulties in finding family members of victims that are prepared to deal with the court of public opinion and bring claims? This may be a real practical obstacle to what litigation can achieve. It seems that it is also an issue that, while there are generous rules for ordinary judicial review, there is a much stricter victim test in relation to the Human Rights Act.

Ms Craig: In relation to the families' trauma it may be challenging for them to engage in litigation, but family members are also determined and courageous. They try to overcome such practical difficulties. I also agree with the point about the Human Rights Act and the jurisdiction and standing test, but there are also other real difficulties. For example, there is an ongoing attempt to close doors to court and limit access to justice through changes in legal aid and the residence test which constitute obstacles to legal representation. It is an outrage that access to justice is being limited in this way.

Question from the audience: Thinking about the stress of people who live under drones and the related mental pressure, could that amount to torture and how would that be relevant in the case of international humanitarian law?

Ms Craig: In regard to the injury and trauma caused by drones, I have had discussions with the Special Rapporteur on torture about the impact of those living under drones. This needs further exploration and we should look at bringing claims where possible for psychiatric injury.

Question from the audience: I agree that there are limitations on the applicability of the law and the importance of the details of international humanitarian law that were mentioned. What are your thoughts on the legality and applicability of the International Committee of the Red Cross' (ICRC) continuous combat function to targeting? Considering that many States are ignoring, or not paying much attention to it, does it indicate a trend that people are interpreting international humanitarian law on their own terms?

Professor Heller: With regard to the continuous combat function, if international humanitarian law applies, and if an individual is a member of the relevant organised armed group, they can be targeted anywhere, at any time, using any amount of force. This leads to the question: who is a member subject to this regime? Some people say that no such thing as membership exists and that people can only be targeted when participating in hostilities. The ICRC takes a middle position: if a person consistently engages in hostilities, then they can be targeted. The US and the UK are at the other side of the spectrum, arguing that there is strict parity between how armed forces are defined in an international armed conflict and how armed groups are

defined in non-international armed conflicts (i.e. including all members, such as cooks, cleaners, etc.).

There is not enough to support the last position under a positivist methodology but, beyond that, the ICRC test serves a useful evidentiary function. It seeks to limit targeting, because one can reliably identify those individuals (if somebody is shooting you, then you can shoot them back). Otherwise how will such members be identified, especially if only using drones?

Law aside, practicalities also need to be able to prove that targeted individuals are members, and part of this is to avoid continuous mistakes by drones. It is not just about membership, but also about direct participation in hostilities. The US, for example, wants to be able to target financiers, propagandists etc. who are not traditionally seen as direct participants. Practically, we need to be able to push back on that because of the possibility of catastrophic results of such an approach.

Question from the audience: You referred to the existence of a low-level ongoing conflict as a result of the use of drones, and I wondered about the geographical issue? Is there an argument to be made that some drone strikes are carried out in a non-international armed conflict with the consent of those States, thereby dealing with the *jus ad bellum* issue? In relation to Yemen, there is sufficient intensity, but what about drone strikes by the US in areas that are not actively hostile? What is situation of international humanitarian law in those cases?

Professor Akande: In relation to the question on drone strikes in areas where there are no active hostilities (e.g. Yemen), the question starts from the premise that there is a non-international armed conflict, but the area in which the drone is operating is one where there has not previously been any hostilities. From the perspective of international humanitarian law, this framework clearly applies in such conflicts throughout the territory of the State (as stated in the *Tadić* case). The question then is whether it is the same rules that apply, and this is where the relationship with human rights law comes into play. Some say that we must first look at whether the conduct of hostilities paradigm or the law enforcement paradigm will be used. From the perspective of international humanitarian law, it is the same rules that apply. But from the human rights perspective, this is not yet clear.

If we take what the International Court of Justice said in the *Nuclear Weapons Advisory Opinion* literally, being that if the deprivation of life is arbitrary in the human rights sense it depends on what international humanitarian law says, then the answer to that question is provided by that framework, even for human rights law. However, whether the European Court of Human Rights would be prepared to make the same finding is a different story.

In relation to consent that was mentioned in the question, this only matters for the *jus ad bellum*, but it cannot answer anything for humanitarian or human rights law. A State cannot



consent to something that would be illegal under either of these legal frameworks. The International Law Commission's Articles on State Responsibility makes that very clear.

Professor McCorquodale: if the State does not consent, does this change the nature of the armed conflict from a non-international to an international one?

Professor Akande: Here, there is a difference of views. My own view is that when a State uses force on the territory of another State without its consent, the law of international armed conflicts also comes into play, in addition to the rules on non-international armed conflicts. However, not everybody takes that view.

Professor Heller: I want to add here that the nature of drones does have effects on the development of the law. It is not an accident that we are now seeing a resurgence of arguments that merely using drones against non-State actors does not create an armed conflict. In the pre-drone era, such considerations never really got much traction. This is getting traction now because States are able to use drones precisely enough to say that they are only targeting non-State actors. What is a plausible legal argument depends on what we think about such attacks.

Question from the audience: With regard to the *jus ad bellum* and transparency, since the use of force must be necessary and proportionate, if States are unwilling to provide relevant information, are drones effectively at odds with this law?

Professor Akande: In relation to the *jus ad bellum* question, does it actually impose an obligation of transparency? One clear element of transparency imposed is that if States are invoking self-defence under Article 51 of the UN Charter, they have to notify the Security Council. However, the law does not say anything about what happens after that. Nevertheless, this is an element of transparency. However, the *jus ad bellum* does not provide any procedures for resolving that question. This is the difficulty with anticipatory self-defence – because if it is not clear for all to see, how do you actually challenge it?

Professor Heller: With regard to necessity and proportionality in the *jus ad bellum*, we see that the US (and in particular John Brennan) feels legally obliged to use the *jus ad bellum* analysis the first time they engage in self-defence, but after that are no longer required to consider necessity and proportionality. This is a scary thought. A transnational non-international armed conflict in theory would allow the State to move between States using force without ever considering whether the force becomes disproportionate. While this analysis is still being made, it has nevertheless been argued that such re-assessment may not be necessary.

Professor Akande: That argument (by the US) is clearly wrong. Proportionality, by definition, means that there is a need continuously to re-consider the force being used. In regard to the necessity point, this was also made by the Nuremberg Military Tribunal in relation to the German invasion of Norway. The fact that a State is already engaged in a conflict does not displace the fact that we still need to ask whether we can use force in Norway. It is clearly



established that when force is used in another State, the analysis needs to be made again – i.e. is it necessary to use force in that State?

Question from the audience: With regard to extraterritoriality, if we take the *Bankovic* judgment and if people are killed by air strikes, then human rights obligations do not apply. I was wondering whether there is a difference with drones? Will human rights apply extraterritorially? With regard to the procedural human rights framework, does this need to change in relation to the control tests used by the European Court of Human Rights at the moment?

Professor Akande: On extraterritoriality, if we take *Bankovic*, then it is clear that the ECHR does not apply extraterritorially but, as we know, the Court has moved away from this. There are some cases on the use of force where extraterritoriality was an issue in the facts, but the Court did not really question the ECHR's applicability. Those cases, however, involved very different facts. If we take *Al-Skeini*, the Court in most of its judgment appeared to accept that what is important is that the State agent is exercising control over an individual. In an ending key paragraph however, it suggested that this was in the context of the UK exercising public powers in Iraq. If we take out this last paragraph, what the Court is saying is that human rights obligations apply.

Then the question turns on how the public powers paragraph operates as a limitation? What is significant, in post *Al-Skeini* cases (i.e. *Jaloud*), the Court quotes extensively (two pages) from *Al-Skeini*, but they do not quote the paragraph relating to public powers. This suggests that this paragraph was seen as controversial, even within the Court. The case law is still up in the air and we cannot say at the moment that there is definitely jurisdiction, but the reasoning can go that far (as demonstrated by the High Court in *Al-Saadoon*). As Marko Milanovic points out, it is impossible to see how this reasoning would not apply. If we accept that a State official holding a gun to somebody's head means they are under the control of that State, drawing a line based on the distance of the weapon, no matter where it is drawn, will be arbitrary.

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