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The UK's Use of Armed Drones: The Principle of Distinction between Civilians and Combatants

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Abbreviations

AI	Amnesty International
API	Additional Protocol I
APII	Additional Protocol II
BBC	British Broadcasting Company
CA3	Common Article 3
CCF	Continuous Combat Function
CIL	Customary International Law
DPH	Direct Participation in Hostilities
GCHQ	Government Communications Headquarters
HRW	Human Rights Watch
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	Improvised Explosive Device
IHL	International Humanitarian Law
ISAF	International Security Assistance Force
ISIS	Islamic State of Iraq and Syria
LOAC	Law of Armed Conflict
MoD	Ministry of Defence
NIAC	Non-International Armed Conflict
OHCHR	Office of the High Commissioner for Human Rights
RAF	Royal Air Force
RPA	Remotely Piloted Aircraft
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
USA	United States of America

Contents

I. Introduction

I.i. The Issue

The UK's use of armed drones has been raised in the 2014 report of the United Nations Special Rapporteur on Human Rights and Counter Terrorism, Ben Emmerson.[1] The report concluded by stating that it had identified 'a number of legal issues on which there is currently no clear international consensus'[2] and invited the Member States to express their views. One such issue concerns the principle of distinction under International Humanitarian Law (IHL). The particularly low figures given by the UK for civilian casualties resulting from its drone strikes leads to the question of how the Ministry of Defence classifies "civilians" and "members of armed groups" under international law, and whether this is in line with the principle of distinction in IHL. A narrower definition of "civilian" would lead to a lower figure of civilian casualties.

This question as to the principle of distinction concerns issues such as "direct participation in hostilities" that as yet remain unresolved in IHL. Subsequent to Emmerson's report the Human Rights Council adopted Resolution 25/22[3] which asked states to share their views on the legal ambiguities identified by the Special Rapporteur, and later convened a Panel Discussion on this issue at the 27th Session of the Council.[4] The UK, having voted against the resolution, did not engage in the talks, expressing its view that the Human Rights Council is not the appropriate forum for these discussions.[5] The UK has acknowledged Emmerson's conclusion that 'there is an urgent and imperative need to seek agreement between states on these issues'[6] but stated that 'the UK already has strict procedures updated in the light of experience',[7] and refused to engage further.[8]

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[1] B. Emmerson, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Human Rights Council 25th Session, 10 March 2014) UN Docs A/HRC/25/59.
[2] *ibid*, at para 70.
[3] Human Rights Council, 'Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law' (25th Session, 15 April 2014) UN Docs A/HRC/RES/25/22.
[4] Human Rights Council, Panel Discussion on Drones (28th Meeting 28th Regular Session, 22 September 2014) Available at: <http://webtv.un.org/watch/panel-discussion-on-drones-28th-meeting-28th-regular-session-of-human-rights-council/3798750531001> (accessed 26 June 2015).
[5] *ibid.*
[6] *supra* note 1, at para 71.
[7] UK House of Commons, Mr Francois' Written Answer to Question by Mr Watson (18 November 2013, c706W).
[8] UK House of Commons, Mr Francois' Written Answer to Question by Mr Watson (14 October 2013, c486W).

I.ii. Research Questions

Looking to the UK's drone use, and having identified the potential issue of the classification of civilians in relation to the principle of distinction, two questions posed to States by Emmerson in his report can be examined.

The first question:

"Does the test of "continuous combat function", as elaborated by the ICRC for determining whether a person is a "member" of an armed group reflect CIL? If not, what is the correct test?"[9]

The second question:

"Does the guidance promulgated by the ICRC for "direct participation in hostilities" reflect CIL? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment or logistical support amount to "direct participation in hostilities" for targeting purposes?"[10]

As the UK has not engaged with the UN on these questions, the opportunity exists for an in-depth analysis focused on the classification of civilians and the UK's compliance with this principle of distinction in its use of armed drones. In the course of the analysis it will also be necessary to address another question posed by Emmerson:

"… If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?"[11]

I.iii. The UK's drone use

The UK Government has now confirmed that RAF personnel have used lethal force from armed RPAs in Iraq and Afghanistan.[12] In Afghanistan, in addition to supporting UK troops in Helmand

[9] *supra* note 1, at para 71(f).
[10] *ibid*, at (g).
[11] *ibid*, at (c).
[12] Sir David Omand GCB, 'The Security Impact of Drones: Challenges and Opportunities for the UK' (Birmingham Policy Commission, October 2014) Available at:

Province, RAF Reapers flying from Kandahar Airfield in Southern Afghanistan have been used more widely to assist the NATO-led ISAF mission.[13] Following the conclusion of the ISAF mission in Afghanistan, the UK moved an undisclosed number of its Reapers to operate in Iraq. On 26th September 2014 the UK Parliament approved their use to target ISIS in Iraq,[14] and as of 2nd March 2015 70 strikes had been conducted by Reapers in Iraq.[15] The UK has used Reapers in Syria for surveillance, but states that additional Parliamentary approval would be required for use of force.[16]

I.iv. Civilian Casualties

Emmerson's report focused on one particular incident in March 2011 where four Afghan civilians were killed by a UK drone strike.

The facts of the incident are as follows:

> ***"On 25 March 2011, precision-guided munitions were discharged at two vehicles travelling in the Now Zad district of Helmand Province. Both vehicles were destroyed, killing six people and injuring two others. Remotely piloted aircraft under the control of ISAF (United Kingdom) were involved in the operation. The United Kingdom has confirmed that in addition to killing two men believed to be combatants (who were the targets of the attack) the operation resulted in the deaths of four non-combatants and the infliction of serious injuries on two further non-combatants. Contemporaneous reports suggest that the two identified targets were travelling in the first vehicle, and that the dead included two women and two children who were travelling in the following vehicle."***[17]

<http://www.birmingham.ac.uk/Documents/research/policycommission/remote-warfare/final-report-october-2014.pdf> (accessed 26 June 2015) at 23.

[13] UK House of Commons Defence Committee, 'Remote Control: Remotely Piloted Air Systems - current and future UK use' (Tenth Report of Session 2013-14, 26 June 2014) Available at: <http://www.globalsecurity.org/intell/library/reports/2014/remotely-piloted-air-systems-vol1_uk-hcdc_20140325.pdf> (accessed 26 June 2015) at 19.

[14] BBC, 'UK drone carries out first strike in Iraq' (BBC News, 10 November 2014) Available at: <http://www.bbc.com/news/world-middle-east-29992686> (accessed 26 June 2015).

[15] Ministry of Defence, 'Defence Secretary thanks UK military personnel tackling ISIL' (Gov UK News, 1 March 2015) Available at: <https://www.gov.uk/government/news/defence-secretary-thanks-uk-military-personnel-tackling-isil> (accessed 26 June 2015).

[16] R. Mason, 'UK to fly military drones over Syria' (The Guardian, 21 October 2014) Available at: <http://www.theguardian.com/uk-news/2014/oct/21/uk-to-fly-military-drones-over-syria> (accessed 26 June 2015).

[17] *supra* note 1, at para 39.

In the House of Commons, the Ministry of Defence has since stated on multiple occasions that 'a joint ISAF-Afghan investigation was conducted' but has not disclosed the report as it 'would be likely to prejudice, the capability, effectiveness or security of the armed forces'.[18] Emmerson has called upon the UK to 'declassify and publish the results of the investigation'.[19] Greater detail would be needed about the facts of the March 2011 strike in order to carry out in-depth analysis on this incident, but looking more closely at the MoD responses in the House of Commons a potential issue as to the UK's compliance with the principle of distinction can nevertheless be identified. The Ministry of Defence has stated on multiple occasions that the March 2011 incident is 'the only one in which civilian fatalities are known to have resulted from a UK Reaper strike'.[20] The UK has, however, stated that between 24 March 2011 and 16 June 2014, 371 precision-guided munitions were dropped by its armed RPAs in Afghanistan.[21] As highlighted by the All Party Parliamentary Group on Drones, this significantly low number of civilian casualties caused by UK drone strikes gives rise to a number of questions.[22] Whilst the answer could be that the UK has carried out its attacks with a very high level of precision, another answer could potentially concern its definition of civilians. Another answer could concern its approach to the threshold of doubt that it applies, in terms of its reference to "known" civilian fatalities.

I.v. Approach to the research question

In answering the research question it must first be determined whether the rules of IHL apply to the UK's use of armed drones in Afghanistan and Iraq. Once this is established, Emmerson's two questions concerning the principle of distinction can be examined. Due to a lack of international consensus, the spectrum of positions regarding each of these questions can be set out, and the UK's position in this range can then be pin-pointed. Its position on the spectrum will result in a different standard for the classification of civilians.

[18] UK House of Commons, Nick Harvey's Written Answer to Question by Mr Godsiff (26 June 12, c187W).
[19] *supra* note 1, at para 39.
[20] *supra* note 18.
[21] UK House of Commons, Mr Francois' Written Answer to Question by Angus Robertson (7 July 2014, c138W).
[22] House of Commons Defence Committee, Written evidence from the All Party Parliamentary Group (24 March 2014) Available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/772/772vw16.htm> (accessed 26 June 2015) at para 6-10.

II. Applicable Law

II.i. *Jus ad bellum*

In light of the principle of territorial sovereignty, and the general prohibition of the use of force,[23] RPA operations constituting a use of force may be conducted on another State's territory only in limited circumstances. The UK is justifying its current military activity in Iraq on the basis of consent by the Iraqi government. In a letter on 20th September 2014 the Minister of Foreign Affairs of Iraq sought international assistance 'to strike ISIL sites and military strongholds, with our express consent.'[24] The aim was stated to be 'to end the constant threat to Iraq'.[25] The UK has stated that the prohibition of the use of force 'does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents.'[26] The UK therefore appears to be justifying its use of force under Article 20 of the Articles on State Responsibility[27] which provides that 'valid consent by a State to the commission of a given act by another State precludes wrongfulness of that act'.[28] The USA goes further, relying on self-defence under the UN Charter.[29] It relies on self-defence as giving it authorisation to attack ISIS more generally,[30] rather than within the confines of the territory of Iraq with its consent. There are many legal questions raised in this regard, particularly if the US is invoking its own right of self-defence rather than a collective right derived from the threat posed to Iraq, but the UK has not pursued this argument and thus it does not need examining further in this context.

The UK's previous military involvement in Afghanistan was through the International Security Assistance Force (ISAF), whose use of force was initially authorised under Chapter VII of the UN

[23] Article 2(4), Charter of the United Nations, 24 October 1945, I UNTS XVI.
[24] Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/691> (accessed 26 June 2015).
[25] *ibid.*
[26] Prime Minister's Office, Summary of the government legal position on military action in Iraq against ISIL (25 September 2014). Available at: <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil> (accessed 26 June 2015).
[27] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/19).
[28] *ibid.*
[29] Article 51, *supra* note 23.
[30] Letter dated 23 September 2014 from the Permanent Representative of the USA to the UN addressed to the Secretary-General. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf> (accessed 26 June 2015).

Charter by Security Council Resolution 1386.[31] Given the relatively uncontroversial legal basis for the UK's use of force in Afghanistan this issue does not need further examination.

II.ii. Existence of an armed conflict

Hostilities must qualify as an armed conflict for IHL to apply, otherwise international human rights law is the applicable legal regime. The limitations upon the use of lethal force are greater under human rights law. A practical difference highlighted by Schmitt is that IHL allows for attacks based solely on the status of the target, as a member of the armed forces of a party to the conflict, whereas under human rights law a person can only be subjected to lethal force if it is absolutely necessary to respond to an immediate threat based on their activity at that point in time.[32] As such, Akande has stated that 'the key question in relation to drone warfare is whether we are operating in a time of peace or a time of armed conflict'.[33]

Unlike an international armed conflict (IAC), which is an armed conflict between two or more States, a non-international armed conflict (NIAC) only commences once a certain level of intensity has been reached. Neither Common Article 3 nor APII provide definitive guidance as to the meaning of NIAC. The ICRC, drawing on the ICTY's judgment in *Tadic*,[34] state practice and jurisprudence has defined a NIAC as a 'protracted armed confrontation occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation'.[35] The threshold requirements can therefore be broken down into two criteria:

(1) protracted violence

(2) organised group

[31] UNSC Res 1386 (20 December 2001) UN Docs S/RES/1386.
[32] M. Schmitt, 'Drone Law: A Reply to UN Special Rapporteur Emmerson' (2014) 55 VJILD 13, 22.
[33] D. Akande, 'Drones strikes: ethics and laws of 21st century warfare' (Oxford Martin School Hilary Term seminar series, 27 February 2015). Video available at: <https://www.youtube.com/watch?v=QbLbelvj0H8> (accessed 26 June 2015).
[34] ICTY, *Prosecutor v Dusko Tadic* (Appeal Judgment), 15 July 1999, IT-94-1-A.
[35] ICRC, 'How is the term "Armed Conflict" defined in International Humanitarian Law?' (Opinion Paper, March 2008). Available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (accessed 26 June 2015).

II.ii.a Iraq

Looking first to Iraq, the conflict comprises the US-led coalition and the Iraqi government on the one side, against the armed group calling itself the Islamic State (formerly ISIS or ISIL). The US-led coalition joined the side of the Iraqi Government in August 2014 when it began air strikes in Iraq against ISIS, with the UK carrying out its first strike in November 2014. Thus if an armed conflict exists it would be non-international, to classify as a NIAC and for IHL to apply, it therefore needs to fulfil the above conditions.

Looking first to the intensity requirement of 'protracted violence', lacking a definitive test Article 1(2) APII[36] serves as the lower threshold, excluding 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[37] In *Prosecutor v Limaj*[38] the ICTY undertook an in-depth examination of whether protracted violence was taking place; it focused on the types of weapons, the frequency and intensity of armed clashes taking place, and the number of casualties. Regarding Iraq, whilst the number of deaths is not the sole criterion, the OHCHR's statement that in the first six months of 2014, 5576 civilians were killed, with 1.2 million people being internally displaced[39] certainly points to the intensity of the conflict.

Secondly, in terms of the organised nature of the armed groups the requirements of APII are more stringent than CA3, requiring a 'responsible command and control of a part of the territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[40] CA3 does not require such possession of territory, but the ICRC Commentary to this Article shows that such possession could be strong evidence in favour of their organised nature.[41] International jurisprudence has identified relevant indicative criteria, including the existence of a

[36] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.
[37] *ibid.*
[38] ICTY, *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu*, Judgment of 30 November 2005 (IT-03-66-T).
[39] UNAMI, 'Report on the Protection of Civilians in the Non-International Armed Conflict in Iraq: 5 June - July 2014' (OHCHR, 18 July 2014) Available at: <http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC%20Report_FINAL_18July2014A.pdf> (accessed 26 June 2015) at 8.
[40] *supra* note 36, at Article 1.
[41] Uhler and Coursier, *Commentary on the Geneva Conventions of 12 August 1949: Volume IV* (ICRC, 1958).

command structure, headquarters and the group's ability to plan and carry out military operations.[42] Regarding ISIS, its structure has a chain of command and hierarchy of control, with a leader and his deputy, a "cabinet", and "governors" for each province.[43] ISIS also controls territory in both Syria and Iraq; looking specifically to Iraq, this includes the cities of Kirkuk, Qaim, Falluja and the Mosul Dam area.[44] It can be concluded that ISIS is sufficiently organised such that an armed conflict is taking place and IHL applies.

A pertinent issue here concerns the transnational nature of ISIS. The question is whether geographical boundaries apply to the scope of a NIAC, or whether it can be based solely on the parties to the conflict, in this case whether the same conflict against ISIS, and thus the application of IHL, can stem across both Syria and Iraq. This links to Emmerson's question *"... if it is possible for a State to be engaged in a non/international armed conflict with a non/State armed group operating transnationally, does this imply that a non/international armed conflict can exist which has no finite territorial boundaries?"* The ICRC has noted an absence of clear international consensus on this issue.[45] Whilst the UK drones are currently being used in Syria only for surveillance missions, The Telegraph has reported that 'David Cameron has indicated that an exception would be made if urgent action was needed to prevent a humanitarian crisis, or protect a British national interest, such as a hostage'.[46]

The traditional view is that a NIAC is confined to the State's geopolitical borders; this would significantly limit the application of IHL to future drone operations against ISIS outside the territory of Iraq. A second view is that an armed conflict can spill over across the border into the neighbouring state. It can be argued this notion of spill over conflict is gaining widespread support. The ICRC has in fact subscribed to this view, stating that 'spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an

[42] *supra* note 38, at para 94-134; ICC, *Prosecutor v Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06-2842, Judgment of 14 March 2012, at para 536-538.
[43] Hisham al-Hashimi, 'Revealed: the Islamic State 'cabinet'' (The Telegraph, 9 July 2014) Available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10956193/Revealed-the-Islamic-State-cabinet-from-finance-minister-to-suicide-bomb-deployer.html> (accessed 26 June 2015).
[44] BBC Middle East, 'Battle for Iraq and Syria in maps' (BBC, 7 May 2015) Available at: <http://www.bbc.com/news/world-middle-east-27838034> (accessed 26 June 2015).
[45] P. Maurer, 'The use of armed drones must comply with laws' (ICRC, 10 May 2013). Available at: <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> (accessed 26 June 2015).
[46] B. Farmer, 'British to deploy armed Reaper drones over Syria in battle against ISIL' (The Telegraph, 21 October 2014) Available at: <http://www.telegraph.co.uk/news/uknews/defence/11176406/RAF-Reaper-drones-to-be-used-over-Syria.html> (accessed 26 June 2015).

international border has been crossed'.[47] The recent advice by the Advisory Committee on Issues of Public International Law similarly submitted that 'the applicability of IHL may be extended if the conflict spills over into another state, in cases where some or all of the armed forces of one of the warring parties move into the territory of another state'.[48] Legal arguments in favour of this state, for example, that the Article contains no explicit geographical limitation.[49]

A final view focuses entirely on the parties rather than the geographical borders, such that IHL would apply to the conflict with ISIS wherever that may be. The status of this approach in international law is still doubtful. The US sees itself as in a NIAC with Al-Qaida that is transnational in character, a position that was endorsed by its Supreme Court in *Hamdan v Rumsfeld*[50] and as such the US does not recognise territorial limitations on the armed conflict. Schmitt supports this approach, arguing that as long as the organised and intensity thresholds are fulfilled, a NIAC exists. The US's previous, more general assertions of a 'global war on terror' have however now lost credibility, Sassoli asserts that there is no customary international law in line with this view.[51] Assertions of the possibility of geographically unfocused conflicts, relying on the lack of explicit geographical limitation in CA3 and arguing that it better reflects modern conflicts,[52] now take a more nuanced approach, recommending a case-by-case analysis based on the criteria of intensity and organised nature.[53] But its status in international law is still very uncertain. The ICRC seems to reject it for fear of the consequences for civilians and fear of a 'global battlefield',[54] and the above Advisory Committee guidance also relied on a territorial approach with the possibility of spill over rather than a party-focused approach.[55]

[47] ICRC, 'International Humanitarian Law and the challenges of contemporary armed conflicts' (31st International Conference of the Red Cross and Red Crescent, November 2011) Available at: <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (accessed 26 June 2015).
[48] Commissie Van Advies Inzake Volkenrechtelijke Vraagstukken, Advisory Report on Armed Drones (Report No. 23, The Hague, July 2013) at 8.
[49] M. Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' [2014] 90 Int'l.L.Stud. 1, 12.
[50] US Supreme Court, *Hamdan v Rumsfeld, Secretary of Defence et al.* Judgment of 29 June 2006, (2006) 548 US 67.
[51] M. Sassoli, 'Transnational Armed Groups and International Humanitarian Law' (HPCR, Occasional Paper Series, Winter 2006), at 4.
[52] *supra* note 49, at 15.
[53] *ibid*, at 13.
[54] *supra* note 47, at 22.
[55] *supra* note 48.

The applicable approach affects whether IHL applies to UK activity in Syria against ISIS. In relation to Emmerson's question[56] it can be concluded, based on the discussion above, that the "spill over conflict" notion is now generally accepted, but that "geographically unfocused conflicts" are not. In terms of the UK's approach to this question, Section 15.2 of the Ministry of Defence Manual on Armed Conflict[57] states that the IHL of NIACs applies to two situations: 'internal armed conflicts between the armed forces of a state and one or more armed factions in that state or internal armed conflict between such armed factions' and 'internal armed conflicts between the armed forces of a state and an organised armed faction which have reached the level at which Additional Protocol II comes into operation'. Radin seems to take this distinction as evidence in favour of the view 'that some extraterritorial conflicts may qualify as NIACs despite the fact that such conflicts do not conform to the traditional interpretations limiting the application of LOAC to within a State's own borders'.[58] It is unclear, however, whether Cameron's assertion that armed force could be carried out by the drones in Syria 'if urgent action was needed to prevent a humanitarian crisis, or protect a British national interest, such as a hostage'[59] refers to a belief that only human rights law currently applies to the activity there, thus rejecting a geographically unfocused approach, or whether he is referring to the *jus ad bellum* in terms of a right to self-defence, or instead to domestic law. For now, based on the above analysis it appears that such a spill over conflict as here could fall under IHL. In any event, at the time of writing the UK's current use of force against ISIS remains within Iraq, so the analysis can proceed on the assumption that IHL applies.

II.ii.b Afghanistan

Looking next to Afghanistan, since the election in June 2002, the conflict has been non-international with the Afghan government and the international forces on the one side fighting against non-state armed groups on the other, the Taliban in particular.

In terms of intensity, a pertinent issue concerns the geographical approach to the nature of the conflict which links to the above analysis. If the criterion of intensity is premised upon an assumption of territorial limitation, the question arises whether the violence within Afghanistan alone is sufficiently intense, without including any further violence in Pakistan or Yemen as part of

[56] *supra* note 1, at para 71.
[57] Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004).
[58] S. Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' [2013] 89 Int'l.L.Stud. 696, 699.
[59] *supra* note 46.

the same conflict. This argument has been raised in relation to the US strikes in both Pakistan and Yemen, with commentators such as Mary Ellen O'Connell arguing that if the NIAC threshold of intensity is not met within the geographic boundaries of each specific state then IHL cannot be applied to attacks carried out against groups there.[60] Kevin Heller argues, on the other hand, that whilst there may not be sufficient violence in Pakistan for there to be a NIAC on Pakistan's territory, this does not prohibit the use of force and application of IHL in Pakistan when strikes are carried out there against participants in the armed conflict between the US and al-Qaeda.[61] As seen above, the discussion on the geography of the battlefield is currently evolving and there is not yet a settled international consensus. In contrast to the US, however, in the context of strikes against al-Qaeda and the Taliban the UK has only used armed force in Afghanistan, in relation to which it has been widely acknowledged that the violence within its borders alone reached a sufficient level of intensity.[62]

Secondly, in terms of the organised nature of the armed group, looking specifically to the Taliban, in terms of responsible command, the issuance of a military code of conduct is evidence of its command structure and the existence of disciplinary rules within the group.[63] In terms of control of territory, 'by 2010, the Taliban were said to be holding sway in the south and east of the country, as well as in pockets of the west and north'.[64] It can be concluded that a NIAC thus existed; applicable to the UK's actions are therefore Common Article 3 to the 1949 Geneva Conventions[65] to which the UK is a signatory, the 1977 Additional Protocol II to the Conventions[66] and all other provisions of customary IHL applicable to NIACs.[67]

[60] M.E. O'Connell, 'Unlawful Killing with Combat Drones: A case study of Pakistan 2004-2009', in S. Bronitt, *Shooting to kill: The law governing lethal force in context* (Hart Publishing, 2012).
[61] K. Heller, 'Quick thoughts on UBL's killing - and a response to Lewis' (Opinio Juris, 4 May 2011) Available at: <http://opiniojuris.org/2011/05/04/quick-thoughts-on-ubls-killing-and-a-response-to-lewis/> (accessed 26 June 2015).
[62] A. Bellal, G. Giacca, S. Casey-Maslen, 'International law and armed non-state actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 51.
[63]Al-Jazeera, 'Taliban issues code of conduct' (28 July 2009) Available at: <http://www.aljazeera.com/news/asia/2009/07/%2020097278348124813.html> (accessed 26 June 2015).
[64] *supra* note 62, at 50.
[65] ICRC, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.
[66] *supra* note 36.
[67] ICRC, Customary IHL Database. Available at: <https://www.icrc.org/customary-ihl/eng/docs/home> (accessed 26 June 2015).

II.iii. Article 36 API

There is not currently an International Treaty specifically for remotely piloted aircraft, but Article 36 of Additional Protocol I (API) to the Geneva Conventions requires that Parties, when adopting a new weapon, are under an obligation to determine that its use is not prohibited by rules of international law.[68] The UK has stated that that legal reviews have been conducted, with use being deemed permissible subject to the existing law of Armed Conflict.[69] On this basis, it finds that the RPAs are therefore not illegal *per se*, the legality depends instead on whether their use conforms with the *jus in bello*.

II.iv. *Jus in bello*

The UK states that it operates in accordance with IHL and the UK Rules of Engagement. The Government refuses, however, to publish its Rules of Engagement as to do so 'would, or would be likely to, prejudice the capability, effectiveness or security of our armed forces',[70] stating only that it 'meets the requirements to seek to protect civilians under IHL',[71] and 'follows the principles of distinction, humanity, proportionately and military necessity'.[72]

The principle of distinction seeks to protect those who are not actively participating in armed conflict from its effects, by prohibiting the direct attacking of civilians or civilian objects. In the context of NIACs, Article 13(1) of Additional Protocol II codifies the general principle that 'the civilian population and individuals shall enjoy general protection against the dangers arising from military operations'.[73] The UK's Joint Service Manual of the Law of Armed Conflict similarly states that 'there must be a clear distinction between … combatants and non-combatants'.[74]

APII does not contain a definition of civilians or the civilian population. In recent years there is a trend towards increased civilian participation in hostilities, IHL is responding to this through the

[68] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.
[69] UK House of Commons, Mr Francois' Written Answer to Question by Mr Watson (10 December 2013, c198W).
[70] *ibid.*
[71] UK House of Commons, Mr Dunne's Written Answer to Question by Mr Watson (4 December 2013, c673).
[72] UK House of Commons, Mr Francois' Written Answer to Question by Mr Watson (30 June 2014, c354W).
[73] *supra* note 36.
[74] *supra* note 57, at 2.5.

development of the notions of "direct participation in hostilities" and "continuous combat function". This area of law is, however, far from settled; in 2009 the ICRC published its Interpretive Guidance on Direct Participation Hostilities,[75] which addresses both of these notions. It is pertinent that the final product states that it is tackling 'one of the most difficult, but as yet unresolved issues of IHL'[76] and in fact contains the express caveat that it is 'an expression solely of the ICRC's views'.[77] The issues addressed in the Guidance can be examined to determine the current status of the law, with the UK's position being identified in this regard.

[75] N. Melzer, 'Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law' (ICRC, May 2009). Available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed 26 June 2015).
[76] *ibid*, at 6.
[77] *ibid*, at 6.

III. Continuous Combat Function

III.i. The Issue

"***Assuming that a NIAC exists, does the test of "continuous combat function", as elaborated by the ICRC for determining whether a person is a "member" of an armed group reflect customary international law? If not, what is the correct test?***"[78]

For international armed conflicts the treaty definition of "armed forces" is provided in Article 43(1) API.[79] With the exception of medical and religious personnel, members of the armed forces are subject to direct attack based on their status as a member, regardless of their individual function. Treaty law governing NIACs, however, uses the terms 'armed forces' and 'organised armed groups' without defining them. The Treaty law states only that 'civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities'.[80] The group of experts that wrote the ICRC's Interpretive Guidance in fact created the notion of CCF. The Guidance states that members of "organised armed groups" are targetable at all times, but added the limitation that only those who have a "continuous combat function" (CCF) classify as "members" for this purpose.[81] This criterion is defined as 'whether a person assumes a continuous function for the group involving his or her direct participation in hostilities'.[82] Basing membership on function, rather than status as for armed forces, was stated as being due to the irregular nature of their membership, such that in keeping with the principle of distinction 'membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse.'[83]

The issue is whether the principle of CCF reflects CIL. If the UK takes a broader status-based approach to "members" than the CCF it allows for more people to be targeted, thus leading to the current low number of casualties being classified as "civilians". On the other hand, if the CCF test applies, it would lead to the expectation that a greater number of casualties be identified as "civilians", and even more so if no such status based targeting applies at all, relying instead on the more temporally restricted, treaty-based rule of targeting civilians only for such time as they are

[78] *supra* note 1, at para 71 (f).
[79] *supra* note 68.
[80] *supra* note 36.
[81] *supra* note 75, at 27.
[82] *ibid*, at 33.
[83] *ibid*, at 33.

directly participating in hostilities. Having set out the legal framework this chapter will examine the arguments for and against the ICRC's standard, before identifying the different approaches of States and tribunals. The position of the UK on this spectrum can then be identified to assess where its approach stands in terms of the definition of "civilians" and "members of armed groups", for the purposes of the principle of distinction.

III.i.a. Academic Opinions

The ICRC's CCF requirement has been strongly criticised from both angles. On the one hand, commentators such as Schmitt argue that it creates an incongruous inequality between armed groups and state armed forces, of whom all members may be targeted.[84] For example, state armed forces can include cooks, secretaries and administrative personnel who are unlikely to take a direct part in hostilities but are nevertheless targetable.[85] Boothby, for example, argues that 'by limiting continuous loss of protection to members of organised armed groups with a CCF, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable'.[86] Melzer, however, argues that whilst CCF may be criticised as it results in a narrower (more protective) concept of membership for organised armed groups than for state armed forces, 'the practical relevance of this perceived imbalance should not be overestimated'.[87] He believes this to be the case because 'in reality, personnel assuming non-combat functions for state armed forces are almost always armed, trained and expected to directly participate in hostilities should the need arise' and therefore they must be regarded as assuming a CCF.[88]

On the other hand, others argue that CCF increases the risk of civilian collateral damage by applying an, albeit limited, form of status-based targeting. Special Rapporteur Alston seems to follow this view in his report by stating that it 'raises concern from a human rights perspective',[89]

[84] M. Schmitt, 'The interpretive guidance on the notion of direct participation in hostilities: a critical analysis' [2010] 1 Harv. Nat'l Sec.J 5, 16.
[85] N. Melzer, 'The principle of distinction between civilians and combatants' in Clapham (ed.) *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) at 315.
[86] B. Boothby, '"And for such time as": the time dimension to direct participation in hostilities' [2009-10] 42 N.Y.U.J.Int'l L.&Pol. 741, 743.
[87] *supra* note 85, at 316.
[88] *ibid.*
[89] P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Addendum: Study on targeted killings) (28 May 2010, A/HRC/14/24/Add.6) at para 64.

and warning that in this respect it is 'imperative that the other constituent parts of the Guidance not be diluted'.[90] It is unclear whether Amnesty International and Human Rights Watch dismiss CCF or purely a more expansive approach that goes beyond it; Amnesty International has stated that 'membership in an armed group alone is not a sufficient basis to directly target an individual'.[91] Human Rights Watch has similarly stated that 'individuals who accompany or support an organised armed group, but whose activities are unrelated to military operations, are not lawful military targets under the laws of war. Thus members of an armed group who play a political role or a non-military logistics function cannot be targets on that basis alone… The laws of war … require knowledge about an individual's participation in hostilities.'[92] Melzer, however, argues that the rationale for distinguishing these members from civilians taking a direct part in hostilities is that in functional terms, organised armed groups constitute the armed forces of a non-state party to an armed conflict, and are no longer acting in an unorganised, sporadic or spontaneous manner.[93]He further maintains that the CCF adequately suits the fluctuating, more informal membership structure of armed groups,[94] and that 'in the absence of a formal concept of 'membership' erroneous and arbitrary targeting' is avoided by the guidance tying membership to the actual function assumed.[95]

III.i.b. State Practice and Jurisprudence

The existence of customary international law requires the presence of two elements: state practice, and a belief that such practice is required by international law (*opinio juris*). In terms of state practice, it must be 'both extensive and virtually uniform'.[96] Both physical and verbal acts constitute practice for this requirement, the ICJ has often considered official statements as evidence of state practice.

[90] *ibid*, at para 67.
[91] Amnesty International, '"Will I Be Next?": US drone strikes in Pakistan' (October 2013) at 45.
[92] Human Rights Watch, '"Between a Drone and Al-Qaeda": The civilian cost of US targeted killings in Yemen' (October 2013) at 86 ; it can be argued that AI and HRW err in not having regard to the ICRC DPH Guidance in their comments,(c.f. J. Iverson, 'The Drone Reports: Can Members of Armed Groups be Targeted' (*Opinio Juris*, 6 November 2013) or their stance could be taken as simply disagreeing with the ICRC, whose Guidance on this issue is by no means widely accepted.
[93] *ibid*, at 6.
[94] N. Melzer, 'Keeping the balance between military necessity and humanity' [2009] 42 N.Y.U.J. Int'l & Pol. 831, 845.
[95] *supra* note 85, at 316.
[96] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Judgment of 20 February 1969, at para 74.

In terms of practice, States have generally not yet expressed their position on CCF; whilst the US has not formally announced its interpretation of what constitutes a member of an armed group, its approach is arguably more expansive than the ICRC approach. US military lawyers such as Michael Schmitt, whilst expressing their own opinion, consistently argue that all members of an armed group, apart from medical and religious personnel, are legitimate targets at all times, and that the function of a particular individual within the group is irrelevant.[97] Harold Koh, Legal Advisor of the US Department of State, has commented that 'individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law',[98] without clarifying exactly what being a member of an armed group means. In the case of *Al-Bihani*, the US Government contended that Al-Bihani was an enemy combatant because he was 'part of or supporting Taliban or al Qaeda forces'.[99] The Government did not find it necessary to prove that his function actually involved direct participation in hostilities, Judge Leons similarly ruled that his status 'as a member of the Arab Brigade unit, albeit in a non-front-line capacity, is more than enough'.[100] This was despite the fact that his function was as a cook; Leons concluded that 'faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient "support" to meet this Court's definition'.[101] Similarly, Amnesty International and Human Rights Watch have both identified the US as dismissing the CCF requirement. Amnesty International stated that 'speeches by US officials suggest that the Administration believes that it can lawfully target people based merely on their membership in armed groups'.[102] Human Rights Watch similarly stated that 'US statements and actions indicate that US forces are applying an overly broad definition of "combatant" in targeted attacks, for example by designating persons as lawful targets based on their merely being members, rather than having military operational roles'.[103] Overall, even without explicit explanation from the government itself, it can be concluded that the US takes a more expansive approach than the ICRC.

[97] *supra* note 84.
[98] H. Koh, 'The Obama Administration and International Law' (Speech at Annual Meeting of the American Society of International Law, 25 March 2010) Available at: <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed 26 June 2015).
[99] *Ghaleb Nassar Al Bihani v Barack Obama*, US District Court for the District of Columbia, Judgment 28 January 2009 (Civil Case No. 05-1312(RJL)), Available at: <http://ccrjustice.org/files/2009-01-28AlBihaniv.Obama_MemorandumOpinion.pdf> (accessed 26 June 2015) at 6.
[100] *ibid*, at 8.
[101] *ibid*, at 9.
[102] *supra* note 91, at 45.
[103] *supra* note 92, at 86.

Looking to other bodies, in the *Tadic*[104] case the ICTY referred to 'an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some kind of resistance group';[105] in the view of the Tribunal the decisive element for combatancy appeared to be "membership". As a contrast, the UNAMA uses the CCF requirement, its definition of civilians is 'all persons who are not members of military/paramilitary forces or members of organised armed groups who have a continuous combat function, of a party to a conflict'.[106] It is widely argued, however, that the US-led ISAF targeting rules and definition of civilian differ from that employed by UNAMA, highlighted by the discrepancies in the reported figures.[107] The current ISAF policy is, however, unknown.

III.i.c. UK approach

The UK has not made public its stance on CCF and the MoD's Joint Service Manual of the Law of Armed Conflict does not make reference to it. It simply states that 'the law relating to internal armed conflict does not deal specifically with combatant status or membership of the armed forces'.[108] A parliamentary question was posed to the Secretary of State for Defence in February 2015 which asked whether lethal targeting by UK armed forces in Iraq is limited to ISIL combatants, Mr Mark Francois replied simply that 'it is Ministry of Defence policy not to comment on specific targets for reasons of operational security'.[109]

It is stated in Section 15 of the UK Manual, however, that 'in carrying out attacks, there should be a distinction between those who take an active part in hostilities and those who do not',[110] the Manual clarifies that 'the use of the words 'are taking' emphasises that a potential or future fighter may not be attacked as such'.[111] Whilst in line with the ICRC's approach to civilians directly participating in

[104] *supra* note 34.
[105] *ibid*, at para 639.
[106] United Nations Assistance Mission to Afghanistan, 'Annual report on Protection of Civilians in Armed Conflict 2013' (Kabul, February 2014). Available at: <http://unama.unmissions.org/Portals/UNAMA/human%20rights/Feb_8_2014_PoC-report_2013-Full-report-ENG.pdf> (accessed 26 June 2015) at xv.
[107] A. Ganz, 'The United Nations in Afghanistan: Policy as Protection?' in P. Ambach (ed), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society* (Koninklijke Brill, 2015).
[108] *supra* note 57, at 15.6.1.
[109] UK House of Commons, Mr Francois' Written Answer to Question by Mr Watson (26 February 2015, c9WS).
[110] *supra* note 57, at 15.6.5.
[111] *ibid.*

hostilities, this is not in line with its guidance on the CCF. Regarding members the Guidance stated that 'an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act'.[112] The UK's Manual therefore appears to directly contradict this. Section 15 was updated in 2013, thus post-publication of the ICRC's guidance, but no amendment was made to this clause. This could either be evidence of the UK's rejection of the ICRC's CCF, or simply confirmation that section 15.6.5 refers only to civilians directly participating in hostilities rather than members of armed groups, with the UK not yet wishing to pronounce on its position regarding CCF. Due to this lack of clarity the section cannot be considered reliable evidence of the UK's approach to CCF.

One piece evidence of the UK's approach to the CCF can be taken from the recent case of *Serdar Mohammed v Ministry of Defence*.[113] Mr Eadie QC argued on behalf of the MoD that 'the ability to detain insurgents, whilst hostilities are on-going, is an essential corollary of the authorisation to kill them'.[114] The Ministry of Defence appears to rely on an argument that the person's status as a member of an armed group serves as a legal basis for targeting him. Justice Leggett rejected this argument on the basis that it only justified the arrest of a person who presented an imminent threat and therefore could be lawfully killed,[115] thus rejecting a status-based approach to members of armed groups. The UK's assertion would seem to allow status based targeting, Serdar Mohammed was a suspected Taliban commander. Regardless of whether his account of the facts are true that he was 'irrigating his family's fields near his home in northern Helmand'[116] or whether, as stated by the MoD, he was inside a compound at which a senior Taliban commander had just arrived,[117] the UK appears to be arguing that he ceased to be a civilian for the duration of his membership or CCF and could therefore be subjected to direct attack on the basis of this alone, irrespective of whether he posed an imminent threat at that moment to the British forces or not. Whilst the UK's argument allows for status based targeting it is unclear, however, whether it allows for such targeting only in line with the ICRC's continuous combat function, or a wider approach in line with that of the US military scholars.

[112] *supra* note 75, at 34.
[113] [2014] EWHC 1369 (QB).
[114] *ibid*, at para 252.
[115] *ibid*, at para 253.
[116] *ibid*, at para 9.
[117] *ibid*, at para 10.

III.ii. Nature of the Enemy

A hypothetical question that could be raised is the need to take into consideration the nature of the enemy that the UK is fighting. In Iraq it is fighting ISIS, and in Afghanistan the Taliban and al-Qaeda. Within these groups is there really such a functional divide as the ICRC's guidance presumes? Could a member who serves as a cook not be called to fight on the frontline if needs be? Could a trained and equipped fighter carry out the function of a cook?

It is unclear from the guidance how the ICRC proposes to treat fighters who are performing a non-combat function such as cooking. The Guidance states that operating as a cook or performing another administrative role is not a combat function.[118] But in relation to fighters it states that they 'remain members by virtue of their continuous combat function'[119] and only cease to be members once they 'cease to assume such a function'.[120] Watkin concludes that this 'suggests that someone can be a member and perform a non-combat function at the same time'.[121]

The ICRC in its guidance stated that 'an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act',[122] it furthermore indicates that recruiters, trainers, financiers and propagandists are not members of an organised armed group 'unless their function additionally includes activities amounting to direct participation'.[123] This could be interpreted as allowing the targeting of those members whose primary function is not a combat role, but who nevertheless have a dual-function, or the potential to fight if needs be. For example, Melzer justifies the distinction that the CCF creates between members of armed groups and state armed forces by stating in relation to armed forces that 'in reality, personnel assuming non-combatants functions for state armed forces are almost always armed, trained and expected to directly participate in hostilities should the need arise and therefore must be regarded to be assuming a combat function'.[124] Could the same reasoning be applied to certain armed groups that train and equip all of their members such that they could all be expected

[118] *supra* note 75, at 33.
[119] *ibid*, at 71.
[120] *ibid*, at 17.
[121] Watkin, 'Opportunity lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' [2009-2010] 42 N.Y.U.J.Int'l & Pol. 641, at footnote 117.
[122] *supra* note 75, at 34.
[123] *ibid.*
[124] *supra* note 94.

to fight? Watkin argues, for example, that 'not only are cooks included in the fighting organisation of Mao's scheme, but the Notes for the Table of Organisation of an independent guerrilla company indicate that "if there is an insufficient number of cooks, any member of the company may be designated to prepare food"'.[125] On the inverse, looking to the case of Al-Bihani, whilst his function was as a cook for al-Qaeda, it was found that the US Government had nevertheless sufficiently proved that he had attended the affiliated training camps, and had been assigned a rifle and ammunition.[126]

The UK has not explained its approach on this matter, although the comment in the House of Commons that contrasted the UK's aim of 'protecting the Afghan civilian population' with that of 'the attitude of the insurgents, who use indiscriminate tactics, including suicide bombs and improvised explosive devices, as well as the deliberate and targeted killing of civilians'[127] perhaps hints that it is emphasising the nature of the enemy that it is fighting. Whilst for some armed groups where may be a clear distinction between functions, in others where the distinction is less pronounced it may be possible to make some allowance for nature of the enemy. Taking this interpretation of the guidance could allow the UK to include in their targeting members of armed groups who do not have a strictly continuous combat function at the time.

III.iii. Threshold of Doubt

A question that frequently arises in the context of drones is the issue of precision. One side of the argument is that drones lead to a 'desensitisation'[128] of the use of force, or a "playstation mentality" making it easier to use force more often, and with the potential for civilian casualties that this brings. The other argument asserts that the drones are more precise and accurate than other weapons; their potential to survey areas for a long period of time allows for greater intelligence as to targets and in turn fewer civilian casualties. This is indeed the argument taken by the UK. Mr Robathan has stated in the House of Commons that 'experience in Afghanistan indicates that the ability of UK RPAs to loiter and build up an intelligence picture over long periods enhances the

[125] *supra* note 121, at 676.
[126] *supra* note 99.
[127] UK House of Commons, Mr Robathan's Written Answer to Question by Mr Watson (17 December 2012, c601W).
[128] D. Akande, 'Drones strikes: ethics and laws of 21st century warfare' (Oxford Martin School Hilary Term seminar series, 27 February 2015). Video available at: <https://www.youtube.com/watch?v=QbLbelvj0H8> (Accessed 26 June 2015).

ability of commanders to positively identify legitimate military targets and minimise the risk of civilians',[129] and further that 'regarding psychological considerations, experience of operating the Reaper remotely Piloted Aircraft System suggests that far from being detached form the reality of the situation, Reaper aircrew are just as, if not more, connected to the situation on the ground as compared to operators of other aircraft types'.[130] The UK is keen to distinguish its Reapers from unmanned drones and emphasises that the rules of engagement remain the same as those applied to more traditional aircraft.[131]

A more pertinent question in this regard is therefore what threshold of doubt in terms of the identification and distinction is allowed by the UK's Rules of Engagement that are currently employed for their use of armed drones in Afghanistan and Iraq, and how this stands in relation to the ICRC's guidance and the current legal standpoint on this issue. Even if the UK uses the same definition of civilian as the ICRC, there could be fewer reported casualties if it allows for a greater threshold of doubt in terms of determining whether someone is a civilian or combatant. Indeed, Van der Toorn argues that the ICRC's functional standards create practical difficulties because 'in some circumstances it would be very difficult to objectively determine the purposes of a perpetrator'.[132] For example, the Ministry of Defence has stated in the House of Commons that the March 2011 incident is the 'only one in which civilian fatalities are *known* to have resulted from a UK Reaper strike'.[133] Its use of the word "known" links to the threshold of doubt applied, leading to the need to consider whether a legalistic approach is being taken by the Government such that it simply doesn't "know", to an unknown level of certainty, that fatalities were civilian in other cases.

Firstly, the ICRC Guidance states that 'in practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances'.[134] The UK's Manual similarly states that 'the obligation to distinguish is dependent on the quality of the information available to the commander at the time he makes decisions',[135] and furthermore, when ratifying the Additional Protocol, the UK made a reservation stating that 'military commanders and others responsible for planning, deciding upon, or executing

[129] UK House of Commons, Mr Robathan's Written Answer to Question by Craig Whittaker (6 December 2012, c901W).
[130] *ibid.*
[131] *ibid.*
[132] D. Van der Toorn, '"Direct Participation in Hostilities": a legal and practical road test of the international committee of the Red Cross's Guidance through Afghanistan' [2009] AILJ 7, 25.
[133] *supra* note 18, emphasis added.
[134] *supra* note 75, at 35.
[135] *supra* note 57, at 2.5.3.

attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time'.[136] The UK's position is in line with the ICRC's approach on this issue.

Secondly, the ICRC Guidance states that 'the determination remains subject to all feasible precautions and to the presumption of protection in case of doubt'.[137] In terms of this presumption of civilian status in case of doubt, it can be argued that the UK takes a more restrictive interpretation. When ratifying the Additional Protocol, in relation to Article 50(1) it added a significant qualification by declaring that 'the rule… applies only in cases of substantial doubt still remaining after the assessment referred to.. above has been made, and not as overriding a commander's duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of the Protocol'.[138] This is echoed in the Manual.[139] Schmitt has argued that 'its motivation was … ensuring that the treaty not skew the sensible balance between military necessity and humanity'.[140] He states that 'the statements evidenced concern that the instrument required interpretation with an eye toward military realities. Virtually all of the statements preserved aspects of military practicality, whether at the tactical, operational or strategic level'. [141] Evidence of the UK's application of this more restrictive approach in lieu of the importance of military necessity can perhaps be taken from the 2003 House of Commons debate where UK Secretary of State for Defence Mr Hoon was asked, in relation to the deaths of seven women and children who were killed at a checkpoint, whether the current UK rules of engagement allow for such attacks on civilians. He replied that the circumstances had involved the deaths of four US marines who were killed in a deliberate car bomb attack and noted that 'in such circumstances, it is perhaps perfectly understandable - although I am not excusing it in any sense at all - that soldiers who are having to deal with a difficult situation at a checkpoint and who know that four of their comrades have been killed in that way are perhaps reacting in a way that we might not want them to'.[142] This statement seems to echo the above notions of military necessity, and the commander's duty to protect the safety of his troops, in turn incorporating a wider accommodation of doubt. On the basis of the above analysis it can be argued that the UK is allowing for a greater accommodation of doubt than the ICRC.

[136] UK, Declarations made upon signature of the 1977 Additional Protocol 1, 12 December 1977, §d.
[137] *supra* note 75, at 35.
[138] *supra* note 136.
[139] *supra* note 57, at 5.3.4.
[140] M. Schmitt, *Essays on Law and War at the Fault Lines* (TMC Asser Press, 2012) at 105.
[141] *ibid.*
[142] UK House of Commons, Mr Hoon's Response to Question by Mr Simpson (3 April 2003).

III.iv. Conclusion

In conclusion, it appears that the CCF is not yet established in customary international law, it is not consistently reflected in state practice nor *opinio juris*. In terms of the UK's position, it seems to allow for some status-based targeted but it is unclear whether it takes the more expansive approach of the US, or limits it to those who have a continuous combat function. If the UK interprets the Guidance as including as members those who carry out a dual function, or who have the potential to fight, this may lead to the lower figures of civilian casualties. There is not, however, any evidence currently available to show that it takes into account this nature of the enemy when targeting. It is nevertheless evident that it takes a more expansive approach to the threshold of doubt, which may itself lead to the low numbers of civilian casualties being reported. These questions of threshold of doubt and nature of the enemy may also be applied to the circumstances of civilians taking direct participation in hostilities which must next be considered.

IV. Direct Participation in Hostilities

IV.i. The Issue

"Does the guidance promulgated by the ICRC for "direct participation in hostilities" reflect CIL? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment, or logistical support amount to "direct participation in hostilities" for targeting purposes?"[143]

The concept of direct participation in hostilities refers to conduct which, if carried out by civilians suspends their protection against the dangers arising from military operations. For the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. In the context of NIACs, this limitation is codified by Article 13(3) Additional Protocol II which states that 'civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities'.[144] The ICRC Guidance similarly states that 'all persons who are neither members of the armed forces of a party to the conflict nor participants in a levee en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'.[145] The UK's Joint Service Manual of the Law of Armed Conflict states its understanding of the notion: 'a civilian … is protected from direct attack and is to be protected against dangers arising from military operations. He has no right to participate directly in hostilities. If he does so he loses his immunity'.[146] The issue is what counts as "direct participation", and its temporal limitations.

In terms of the temporal scope, the ICRC guidance uses the phrase 'for such time as'. Boothby criticises that this is narrower than the text of API intended. He states that 'the phrase "for as long as his participation lasts" in the API Commentary text implies a period of time and sits rather uncomfortably with the Interpretive Guidance notion that loss of protection comes and goes with each individual act'.[147] The USA has also rejected the "revolving door" approach, holding instead that a repeat offender may be targetable over a more continuous period.[148] Boothby warns that 'to interpret the time period during which a directly participating civilian is liable to be attacked too

[143] *supra* note 1.
[144] *supra* note 36.
[145] *supra* note 75, at 20.
[146] *supra* note 57, at 5.3.2.
[147] *supra* note 86.
[148] *ibid*, 'based on private correspondence between the author and W. Hays Parks in September and October 2009'.

narrowly risks producing law that will be regarded by states' armed forces as impractical or worse'.[149]

The UK, however, appears to be in line with the ICRC's Guidance on this. The UK Manual states that 'civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack'.[150] The phrase "for so long as" echoes the ICRC's "for such time as" requirement. It further states that 'the use of the words 'are taking' emphasises that a potential or future fighter may not be attacked as such', this seems to emphasise its application of the ICRC's "revolving door" approach to direct participation in hostilities.

Having set out the legal framework the chapter will examine what amounts to direct participation under the ICRC Guidance, and in state practice. It will then locate the UK's position on this spectrum. If the UK applies a strict approach to direct participation fewer people would classify as being targetable for the purposes of the principle of distinction. Given the number of drone strikes recorded, this would again lead to an expectation of a greater number of casualties being recognized as "civilians".

IV.ii. Direct Causation

Neither the Additional Protocol nor the UK Manual set out the criteria for direct participation, the UK Manual simply states that 'taking a direct participation in hostilities is more narrowly construed than simply making a contribution to the war effort'.[151] The ICRC has set out three requirements:[152]

A. Threshold of harm: military harm or harm against protected objects

B. Direct causation: direct causal relationship between the act and the resulting harm

C. Belligerent nexus: harm in support of a party to an armed conflict to the detriment of another party

[149] *ibid.*
[150] *supra* note 57, at 2.5.2.
[151] *ibid*, at 2.5.2.
[152] *supra* note 75, at 46.

Emmerson's question of whether "providing accommodation, food, financing, recruitment or logistical support" can amount to direct participation can be addressed in relation to the second criterion, direct causation.

The ICRC states that the direct causation requirement is necessary to distinguish actual participation from the "general war effort" or "war sustaining activities", it adds that standards such as "indirect causation of harm" or "materially facilitating harm" are too wide to amount to DPH.[153] The Guidance characterizes direct causation as harm that is brought about in one causal step, as distinct from conduct that merely builds up the capacity of a party to harm. In terms of collective activity, however, the Guidance interprets 'direct' as including individual conduct that causes harm only in conjunction with others, if it is sufficiently integrated into a concrete and coordinated tactical operation.[154] Schmitt criticizes the Guidance for excluding support activities,[155] Van der Toorn similarly criticises that in relation to collective activities the requirement that the specific act be integral to a concrete operation is too narrow, and may exclude vital military activities such as operational level planning, general intelligence activities, military logistics and combat instruction.[156] Melzer argues, however, that any relaxation of the direct causation test would result in "excessively broad targeting policies, prone to error, arbitrariness and abuse'.[157] Akande also believes that the ICRC's narrow view of the scope of direct participation is right, arguing that the same approach is suggested by the text and structure of the Additional Protocols which 'speak not of participation in armed conflict but of participation in hostilities, something narrower'.[158] Questions arise as to what the direct participation test specifically involves, drawing on the particular examples in Emmerson's question the analysis will focus on the activities of planning, financing, and recruiting.

[153] *ibid*, at 52.
[154] *ibid*, at 58.
[155] M. Schmitt, 'Deconstructing direct participation in hostilities: the constitutive elements' [2009] 42 N.Y.U.J.Int'l & Pol. 697, 725.
[156] D. Van Der Toorn, '"Direct Participation in Hostilities": A legal and practical road test of the International Committee of the Red Cross's Guidance through Afghanistan' [2009] AILJ 7, 23.
[157] N. Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities' [2009] 42 N.Y.U.J.Int'l & Pol. 831, 868.
[158] D. Akande, 'The UK's Use of Drones in Afghanistan and its Definition of "Civilians"'(EJIL:Talk!, 31 January 2013) Available at: <http://www.ejiltalk.org/the-uks-use-of-drones-in-afghanistan-and-its-definition-of-civilians/> (accessed 26 June 2015).

IV.ii.a. Planning

In terms of planning for collective operations the ICRC Guidance holds that 'where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm'.[159] It gives the examples of identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for execution of a specific military operation.[160]

Looking to jurisprudence and academic opinion, Cassese has stated that 'if a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded'.[161] In *Public Committee against Torture in Israel,*[162] Israel's High Court of Justice held that Cassese had 'rightly stated' the law, but ruled that in relation to a person physically committing a terrorist act, 'those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct'.[163] The Court therefore agreed with Cassese that more general planning or conspiracy cannot be direct participation, but that planning in relation to a specific act, which is thus a 'concrete and coordinated tactical operation that directly causes such harm'[164] may. This is in line with the ICRC's Guidance. The US has similarly held, in relation to Anwar al-Awlaki that he was taking a direct participation in hostilities, such that he could be targeted under IHL, on the basis of his involvement in planning.[165] The Government noted that he planned the specific attack to be carried out by Abdulmullallab, for whom he planned the operation, drafted his statement for his martyrdom

[159] *supra* note 75, at 54.
[160] *ibid*, at 55.
[161] A. Cassese, *International Law* (2nd Edition, 2005), 241.
[162] Supreme Court of Israel, *Public Committee Against Torture v State of Israel*, [2006] HCJ 769/02.
[163] *ibid*, at para 37.
[164] *supra* note 75, at 55.
[165] Office of the Assistant Attorney General, Memorandum for the Attorney General (US Department of Justice, 16 July 2010), see further Office of the Attorney General, Letter to Patrick Leahy Chairman of the Committee on the Judiciary (United States Senate, 22 May 2013).

video, and gave him explicit instructions.[166] The US therefore also holds the same view as the ICRC in this regard.

In relation to the UK, in the House of Lords it was asked what criteria are used to distinguish civilians from insurgents in Afghanistan when assessing deaths. Lord Astor of Hever, Parliamentary Under-Secretary for the Ministry of Defence replied, *inter alia*, that the presumption is 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'.[167] As recognized by Akande, Lord Hever seems to be describing what amounts to direct participation in hostilities rather than giving a statement of who is a civilian.[168] Public Interest Lawyers expressed unease that it '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 on to a jihadist website?'.[169] In terms of DPH, however, the UK's requirement of being "directly involved in immediate… plans" seems to take a narrow approach that is similar to the ICRC. Akande concludes that 'by requiring that persons must be directly involved in immediate… plans to cause harm, the UK seems to be suggesting that those persons must themselves be attempting to cause harm through their acts or must be part of an operation that will itself result in harm to ISAF personnel. This is practice that seems to accord with the ICRC approach'.[170]

It is true, as raised by Public Interest Lawyers, that there is little evidence to show how the UK actually applies this definition in practice.[171] The case of *Noor Khan* concerned the question of the provision of intelligence and direct participation in hostilities; in 2012 the action was launched against UK Foreign Secretary William Hague on behalf of Noor Khan[172] who claimed that his father had been killed in a drone strike in Pakistan in 2011 while presiding over a peaceful council of tribal elders.[173] The case concerned the passing of intelligence by employees of GCHQ to forces of the United States and could have shone light on the UK's approach as to whether and to what

[166] *ibid.*
[167] UK House of Lords, Lord Astor of Hever's Written Answer to Question by Lord Hylton (13 November 2012, c261WA).
[168] *supra* note 158.
[169] Defence Committee, 'Written Evidence from Public Interest Lawyers on behalf of Peacerights' (HC772, 24 March 2014) Available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/772/772vw17.htm> (accessed 26 June 2015).
[170] *supra* note 158.
[171] *supra* note 169.
[172] *R(Noor Khan) v The Secretary of State for Foreign and Commonwealth Affairs*, [2012] EWHC 3728.
[173] *ibid*, at para 7.

extent intelligence-gathering and planning can contribute to direct participation in hostilities as part of collective operations. But the response of the Secretary of State invoked 'the conventional policy of neither confirming nor denying the assertions'[174] and the case was in any event dismissed as the court held that it could not 'sit in judgment on the sovereign acts of a foreign state',[175] here the USA.

It can therefore be concluded that the UK's definition seems to be in line with the ICRC's approach to planning in terms of DPH, but without concrete evidence of the UK's practice in this regard it is difficult to conclusively determine its approach.

IV.ii.b. Providing accommodation, food and finances

The ICRC Guidance generally describes the provision of food and shelter as activities that are typically mere contribution to the general war effort, adding that even though they may be indispensable to harming the adversary they are not designed to cause the required harm.[176] It states that 'the provision of food to the armed forces may be indispensable, but not directly causal to the subsequent infliction of harm',[177] despite the geographic proximity. The ICRC Guidance also classifies financing as indirect support, or as general preparation not entailing loss of protection. As with the provision of food and shelter it acknowledges that financing may be indispensable to harming the adversary but that it is not designed to cause the required harm, rather to support or sustain the general war effort.[178]

The UK Manual does not specifically address this, it does however state that 'working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing'.[179] The most pertinent question is whether it counts the provision of finances as this mere support of the war effort, or as amounting to more direct participation. Whilst some do argue that financing operations counts as direct participation, this has been described as 'definitely a rare minority viewpoint that has not been accepted by the international community'.[180] State practice shows that it has generally been rejected. Israel's Supreme Court for example dismissed the

[174] *ibid*, at para 10.
[175] *ibid*, at para 14.
[176] *supra* note 75, at 52.
[177] *ibid*, at 54.
[178] *ibid*.
[179] *supra* note 57, at 2.5.2.
[180] J. Paust, 'The United States' Use of Drones in Pakistan' (EJIL:Talk!, 29 September 2009) Available at: <http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan/> (accessed 26 June 2015).

notion that financing insurgency can amount to direct participation that displaces a person's immunity from attack.[181]

NATO, however controversially appeared to allow the targeting of drug traffickers in Afghanistan,[182] who were estimated to be providing between $70and $500 million to the Taliban annually;[183] NATO's Supreme Allied Commander in Europe stated that drug traffickers could be treated as legitimate targets and that it was 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker… meets the criteria of being a military objective'.[184] It is widely acknowledged that NATO was 'led on this issue by the US and the UK'.[185] Indeed, the approach was so controversial that a solution was proposed for certain Member States to 'opt out' of these operations, as reported by The Washington Post, which added that it was the US and UK that supported striking drug traffickers, while 'some European countries, including Germany and Spain' questioned it on mandate and policy grounds.[186] On this basis it could be argued that the UK takes a more expansive approach to direct participation in relation to financing than the ICRC. Further evidence of the UK's practice would, however, be required to be able to conclusively assert this.

IV.ii.c. Recruitment and training

The ICRC guidance states that 'although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect', adding that 'only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities'.[187] This is in line with other approaches, the HPCR Manual for example similarly includes as direct participation only 'combat

[181] *supra* note 162.
[182] *c.f.* H. Duffy, *The 'War on Terror' and International Law* (E.M. Meijers Instituut, 2013), at 392.
[183] US Congress, 'Afghanistan's Narco-War: Breaking the Link Between Drug Traffickers and Insurgents', A Report to the US Senate Committee on Foreign Relations, 10 August 2009, at 10.
[184] J. Dempsey, 'General says shoot dealers in Afghanistan' (The New York Times, 30 January 2009) Available at: <http://www.nytimes.com/2009/01/31/world/asia/31nato.html?_r=0> (accessed 26 June 2015).
[185] D. Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?'(EJIL:Talk!, 13 September 2009) Available at: <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/> (accessed 26 June 2015).
[186] P. Finn, 'NATO to Target Afghan Drug Lords Who Aid Taliban' (The Washington Post, 11 October 2008) Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/10/AR2008101001818.html> (accessed 26 June 2015).
[187] *supra* note 75, at 53.

training of aircrews, air technicians and others for specific requirements of a particular air or missile combat operation'.[188]

Looking to the UK, there is little evidence of its approach towards people who recruit or train members of armed groups. One can, however, draw from its own current practice training Syrian rebels in the on-going conflict in Syria. The UK has sent 85 troops to train Syrian rebels, in military camps in Turkey and Jordan.[189] The House of Commons had, however, voted against direct British intervention in Syria, and the Ministry of Defence does not regard the current deployment as contravening this. Indeed, Michael Fallon stated in the House of Commons in February 2015 that 'the House has not given its authorization for military operations to be conducted in Syria at the moment. However, we are preparing plans to help train moderate Syrian opposition forces'.[190] It may be inferred from this that the UK does not regard general training as constituting direct participation in hostilities.

Addressing recruitment, the question arises in relation to religious figures who may recruit or incite fighters for armed groups as the ICRC states that direct participation only includes specific recruitment for 'the execution of a predetermined hostile act'.[191] Looking to state practice, whilst it is true that the US carried out a drone strike to target Anwar al-Awlaki, a senior recruiter for al-Qaeda,[192] it does not seem to go beyond the ICRC's stance towards including more general recruitment. The Memorandum released concerning al-Awlaki's death focuses more on his role as a planner and leader rather than his recruitment activities, for example, it noted that he was 'not just a senior leader of AQAP, he was the group's chief of external operations, intimately involved in detailed planning and putting in place pilots against US persons'.[193] It is therefore unclear whether the US would have targeted him if he had been purely a general recruiter. Furthermore, in relation to Samir Khan, a propagandist also responsible for recruitment and incitement who was killed in the

[188] Program on Humanitarian Policy and Conflict Research at Harvard University, Manual on International Law Applicable to Air and Missile Warfare (Bern, 15 May 2009), Rule 29.
[189] D. Blair, 'Britain sends 85 troops to train Syrian rebels' (The Telegraph, 16 May 2015) Available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11610117/Britain-sends-85-troops-to-train-Syria-rebels.html> (accessed 26 June 2015).
[190] UK House of Commons, Michael Fallon's Spoken Answer to Question by Ian Lucas (23 February 2015, C13).
[191] *supra* note 75, at 53.
[192] D. McElroy, 'Anwar al-Awlaki: Drone kills US-born preacher who inspired lone wolf terrorists' (The Telegraph, 30 September 2011) Available at: <http://www.telegraph.co.uk/news/worldnews/al-qaeda/8800346/Anwar-al-Awlaki-Drone-kills-US-born-preacher-who-inspired-lone-wolf-terrorists.html> (accessed 26 June 2015).
[193] Office of the Attorney General, Letter to Patrick Leahy Chairman of the Committee on the Judiciary (United States Senate, 22 May 2013).

same attack,[194] US officials stated that he 'was not a significant enough target to have been specifically targeted but died because he was accompanying Al-Awlaki'.[195] There is therefore insufficient evidence to conclude that the US is taking a wider approach than the ICRC to the notion of recruitment as direct participation in hostilities. In contrast, however, the decision by the Israel Supreme Court in *PCATI* stated that individuals who are terrorist recruiters directly participate in hostilities.[196] In contrast to the ICRC's Guidance, the decision is interpreted as including all recruiters and trainers, not just those acting towards a specific attack.[197]

Looking to the UK, it has consistently addressed the issue of recruitment through its domestic law, without reference to international humanitarian law. For example, in the case of Munir Farooqi who had previously travelled to Afghanistan to fight alongside the Taliban and upon his return to the UK 'was a dedicated recruiter of others, doing all he could to recruit men to fight with the Taliban and kill allied troops',[198] the Court did not make reference to the law of armed conflict, nor direct participation in hostilities, looking instead to domestic law and in particular the Terrorism Act 2006.[199] It is true that in contrast to the US strike that killed Al-Awlaki, Farooqi was based in the UK at the time rather than in Afghanistan. The recent Nato strike in Afghanistan killing Mullah Abdul Rauf, a recruiter for ISIS[200] could be evidence of the UK's approach as part of the Nato activity in this regard, but whilst confirming the strike Nato has neither confirmed nor identified the intended target, stating only that it resulted 'in the death of 8 individuals threatening the force'.[201] It is therefore not possible to conclude on the current available evidence what the UK's approach is to the question of whether recruitment classes as direct participation in hostilities.

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[194] S. Dehghan, 'Samir Khan named as second US citizen to die in drone strike' (The Guardian, 30 September 2011) Available at: <http://www.theguardian.com/world/2011/sep/30/samir-khan-anwar-al-awlaki> (accessed 26 June 2015).

[195] M. Mazzetti, 'How a US citizen came to be in America's cross hairs' (New York Times, 9 March 2013) Available at: <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html> (accessed 26 June 2015).

[196] Supreme Court of Israel, *Public Committee Against Torture v State of Israel*, [2006] HCJ 769/02, at para 37.

[197] E. Christensen, 'The dilemma of direct participation in hostilities' [2010] 19(2) J of Transnational Law & Policy 281, 307

[198] *R v Munir Ahmed Farooqi and Others* [2013] EWCA Crim 1649, at para 162.

[199] *ibid.*

[200] D. Loyn, 'Afghanistan drone strike 'kills IS commander Abdul Rauf'' (BBC, 9 February 2015) Available at: <http://www.bbc.com/news/world-asia-31290147> (accessed 26 June 2015).

[201] F. Rahim, 'ISIS Commander Abdul Rauf Killed in Afghanistan: Officials' (NBC News, 8 February 2015) Available at: <http://www.nbcnews.com/storyline/isis-terror/isis-commander-abdul-rauf-killed-afghanistan-officials-n302771> (accessed 26 June 2015).

IV.iii. Conclusion

Whilst the UK appears to apply the same temporal scope to the notion of direct participation in hostilities as the ICRC, there is little evidence to show exactly which activities it currently classifies as participation. An important aspect raised by Emmerson is the question of logistical support, for example, whether the driving of an ammunition truck, or the assembling of an improvised explosive device counts as DPH. It was not possible to address this at this time as there is currently no evidence of the UK's approach in this regard, it remains however a crucial issue that needs examining and addressing in the future.

V. Conclusion

The paper has set out to answer Emmerson's questions in relation to the use of armed drones and the principle of distinction. By first setting out the spectrum of positions on these currently developing issues it was then possible to identify the UK's approach. The position that the UK takes to the law on targeting is important because it may affect the number of casualties that are classified as civilians from its drone strikes. Firstly, the UK's approach to the geographical boundaries of NIACs was unclear, but IHL was nevertheless found to apply to its operations both in Iraq and previously Afghanistan. In relation to CCF, the UK certainly advocates some degree of status-based targeting but it is unclear whether this is only to the level of the ICRC's CCF, or if it is more expansive. In terms of civilians taking a direct participation in hostilities, the UK applies the same temporal scope as the ICRC, but in terms of specific activities more evidence is needed to conclusively determine its position. It seems, however, that overall the UK applies a wider threshold of doubt to the classification of civilians during its operations which in itself may account for the low numbers of "known" civilian casualties; the government is taking a legalistic approach in this regard in its answers to this question in the House of Commons.

The issues highlighted in this paper are currently developing theories that States need to urgently address and set out their positions on. As stated by the Special Rapporteur, 'legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter terrorism operations leaves dangerous latitude for differences of practice by states'.[202] He identifies how problematic this is by pointing to the fact that it runs counter to the obligation identified in General Assembly Resolution 68/178[203] paragraph 6(s), that it fails to provide adequate protection for the right to life, that it poses a threat to the international legal order, and runs the risk of undermining international peace and security.

The main challenge for the paper was the lack of evidence provided by the UK Government as to their drone strikes, and their approach to these legal issues. This lack of evidence is an issue that itself needs addressing, in terms of accountability and transparency. Indeed, Emmerson has reiterated that in terms of incidents involving civilian casualties 'the States responsible are under a present and continuing obligation to make public, in as much detail as possible… the results of any fact-finding investigations that have been conducted into the incidents'.[204] The UK also needs to

[202] *supra* note 1, at para 70.
[203] UN General Assembly, Resolution 68/178 (28 January 2014) UN Docs A/RES/68/178.
[204] *supra* note 1, at para 36.

engage in discussions on these issues, Emmerson has highlighted the 'urgent and imperative need to seek agreement between states on these issues'.[205] The conclusions of this paper are therefore premised upon the caveat that they are based upon the evidence currently available; areas highlighted such as the geography of NIACs, and the question of logistical support as direct participation in hostilities will require more analysis in the future in light of further evidence.

[205] *ibid*

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