BEFORE THE ALL PARTY PARLIAMENTARY
GROUP ON DRONES INQUIRY
'THE USE OF ARMED DRONES: WORKING WITH PARTNERS'

WRITTEN EVIDENCE ON BEHALF OF RIGHTS WATCH (UK)

Introduction and Executive Summary

1. Rights Watch (UK) ('RW(UK') welcomes the opportunity to provide evidence to the All Party Parliamentary Group in respect of its necessary and important inquiry into the ways in which the United Kingdom works with allies with regard to the use of armed drones. While the use of armed drones for the purpose of targeted killing has grown markedly in recent years, and while the United Kingdom's participation in the deployment of those armed drones by key allies (particularly the military and security services of the United States) is now well-known, RW(UK) is concerned that there has been minimal transparency as to the legal and policy basis for such participation, and that oversight of the UK's actions has been insufficient. Accordingly, RW(UK) supports the work of this Committee in conducting the present Inquiry to seek to clarify and assess the government's conduct in this increasingly important field of defence policy.

2. RW(UK) is a non-government organization which works to promote, protect, and monitor human rights, especially in the context of the UK's engagement in conflict and counter-terrorism measures. RW(UK) seeks to ensure that the decisions taken in purported pursuit of national security and national defence always conform with the United Kingdom government's obligations at international and domestic law: obligations which have been breached in past conflicts, and of which we must always be vigilant.

3. RW(UK) will confine its evidence to the questions relating to 'Law' in this Inquiry's Terms of Reference. In relation to the question of the legal framework applying to the position of the United Kingdom as a participant in the deployment of armed drones by the United States, RW(UK) will:

    3.1. Set out the legal frameworks applicable to armed drone strikes themselves, which determine how and in what circumstances those strikes will be lawful;

3.2. Set out the position, at international law, on the attribution of responsibility for any such unlawful drone strike carried out by a primary State, such as the United States, of a State, such as the United Kingdom, which participates in the primary State's conduct. In this regard, four different bases of responsibility for assistance will be considered, namely:

3.2.1. Responsibility for aiding or assisting another State in knowledge of the circumstances of the unlawful act, as set out in Article 16 of the International Law Commission's ('ILC') Articles on the Responsibility of States for Internationally Wrongful Acts ('the ASR'),[1] which reflects customary international law;

3.2.2. Responsibility for rendering aid or assistance in maintaining a situation by which another State commits a serious breach of a *jus cogens* norm of international law and/or failure to cooperate to bring to an end such breach, as set out in Articles 40 and 41 ASR, which reflect customary international law; and

3.2.3. Responsibility for an unlawful act of aggression under customary international law, the unlawful act being the practical assistance provided by the United Kingdom allowing another State to use British territory for the perpetration of acts of aggression; and

3.2.4. Responsibility under international human rights law for actions taken which expose individuals to a foreseeable real risk of breaches of their human rights, even if those breaches are carried out by other States outside the territorial jurisdiction of the UK; and

3.3. Consider these rules in light of the information currently available with respect to the United States' conduct of armed drone strikes, and the UK's knowledge of, and participation in, the same.

Applicable International Legal Frameworks

[1] United Nations General Assembly, UNGA Resolution No 56/83 on the Responsibility of States for Internationally Wrongful Acts (28 January 2002), UN Doc. A/RES/56/83 ('ASR').

4. The lawfulness of any action taken by the United Kingdom in participating in, and providing assistance to, other States' armed drone programmes obviously depends, in large part, upon the lawfulness of those States' use of drones. While there is no absolute prohibition on the use of armed drones in international law, as noted by the then United Nations Secretary General, Ban Ki-Moon, *'the use of armed drones – like any other weapon – should be subject to long-standing rules of international law*.'[2] Those long-standing rules comprise the overlapping frameworks of:

    4.1. The law on the use of force (the *jus ad bellum*), which governs the use of force by States outside their own territories;

    4.2. International humanitarian law (the *jus in bello*), which governs conduct within the scope of an armed conflict; and

    4.3. International human rights law, which applies where public authorities take action which has an impact on the rights of individuals (including targets and civilians in conflict).

Law on the Use of Force

5. The starting point with respect to the use of force by a State outside its own territory is that such action is unlawful, subject to narrow exceptions. This principle, part of customary international law,[3] is set out in Article 2(4) of the Charter of the United Nations,[4] ratified by the United States and the UK. Article 2(4) of the Charter provides that *'[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations*.'

Consent

6. As the prohibition is expressed in terms of a restriction on the threat or use of force *'against the territorial integrity or political independence*' of another State, it has long been recognized that the prohibition will *not* apply in circumstances where one State *consents* to the use of force by another within its territory, since action consistent with that consent conforms with, rather than goes against, the consenting State's integrity and independence. As the draft report of the

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2 Ban Ki-Moon, UN Secretary General, Speech at National University of Science and Technology, Islamabad, Pakistan (13 August 2013), cited in Amnesty International, *Will I Be Next? US Drone Strikes in Pakistan* (October 2013).

3 See the statement of the Permanent Court of International Justice that *'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State*:' *The Case of the SS Lotus (France v Turkey)* 1927 PCIJ (ser A) No 10, p18.

4 United Nations, Charter of the United Nations (1945) 1 UNTS XVI ('UN Charter'), Article 2(4).

International Law Association's Use of Force Committee notes, consent is to be distinguished from categories of *'excused violations*' of sovereignty (such as self-defence and actions authorized by the UN Security Council under Chapter VII of the UN Charter), since *'consent involves no violation of State sovereignty* ab initio.'[5] The basic principle that the valid consent by a State to an action which would, but for the consent, have been unlawful is also recognized in the ASR, Article 20 of which provides that:

> *'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent*.'[6]

7. The ILC Commentary on Article 20 notes that this is a *'basic international law principle*,'[7] and consent has certainly been relied upon to justify the use of force on many occasions following the Second World War without international condemnation, suggesting that the rule forms part of customary international law.[8] As the ILC Commentary notes, however, there are a series of factors which affect the question of whether, in a given case, *'valid consent*' as required has been provided by a State with respect to an otherwise unlawful act. These include: whether the agent giving consent was authorized to do so on behalf of the State (which involves a consideration of the legitimacy of the government giving consent);[9] whether the consent was vitiated by coercion;[10] whether the use of force is within the limits of the consent;[11] and whether the act is of a type that can never validly be consented to, such as the breach of a preemptory norm.[12]

8. RW(UK) notes that, with respect to armed drone strikes carried out by the United States in recent years, the governments of Pakistan, Yemen, and Somalia all originally provided consent to the intervention of the United States. But the consent of Pakistan has since been withdrawn, and

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5 International Law Association, Committee on the Use of Force, Draft Report on Aggression and the Use of Force (Washington Conference, 2014), [B.4].

6 ASR, Article 20.

7 International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001-II(2)] *Yearbook of the International Law Commission* ('ILC Commentary'), ILC Commentary on Article 20, [1].

8 See: Gray, *International Law and the Use of Force* (3rd ed, 2008), pp84-87, which refers to State practice in respect of interventions by France in Gabon (1964), Chad (1968), Côte d'Ivoire (2002), by the United Kingdom in Tanganyika, Uganda, and Kenya (1964), and Senegal in Guinea-Bissau (1998).

9 ILC Commentary to Article 20, [5].

10 For example, the Austrian consent to the *Anschluss* of 1938, which even if consented to, would have been coerced under the threat of annexation. See the consideration of this issue by the Nuremberg Tribunal, 'International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, Judgment' reprinted in (1947) 41(1) *American Journal of International Law* 172, 192-194. See also, ILC Commentary to Article 20, [4].

11 See: *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda*), ICJ Rep (2005) 168 *('DRC v Uganda*'), [105].

12 ILC Commentary to Article 20, [7].

given the fragility of government control in both Yemen and Somalia, the consent of those regimes does not provide a firm basis[13] for the lawfulness of the United States' intervention in those States by way of armed drone strikes.[14] Any reliance by the United States on the consent of Pakistan, Yemen, and Somalia as the lawful basis for its use of armed drones in the territories of those States needs to be treated with scepticism, and the United Kingdom must be aware that, where it provides assistance to such strikes, it may well be assisting in actions which do not conform with international law.

Self-defence

9. Absent consent of the State in whose territory the use of force occurs, there are two exceptions to the prohibition on the use of force: action taken in self-defence; and action taken pursuant to authorization by the UN Security Council. As for self-defence, Article 51 of the UN Charter provides that:

> *'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*.'[15]

10. As the International Court of Justice confirmed in the *Nicaragua* case, the reference in Article 51 to the *'inherent right*' of self-defence indicates that *'customary international law continues to exist alongside treaty law*.'[16] While it would be wrong to consider the matter conclusively settled at international law, there is a significant body of legal opinion which relies on this *inherent right* to claim that States have a right to self-defence not only in circumstances where an attack *has already occurred*, but also a right to anticipatory self-defence where an armed attack is *imminent*. Indeed, the United Nations High-Level Panel on Threats, Challenges, and Change, in considering Article 51 in 2004, concluded that *'a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate*.'[17] Both the United States and the United Kingdom have

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13 There is little clarity at international law on the question of whether *de jure* or *de facto* control is the determining factor of the legitimacy of a government: see, for instance, Gray, above n 8, p99.

14 See Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia, and Yemen' (2016) 3 *Journal on the Use of Force and International Law* 97.

15 UN Charter, Article 51.

16 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep (1986) 14 (*'Nicaragua* case'), [176].

17 Report of the High-Level Panel on Threats, Challenges, and Change addressed to the Secretary-General (1 December 2004), UN Doc. A/59/565 ('High-Level Panel Report'), [188].

long maintained this position.[18] In the UK, the then Attorney-General, Lord Goldsmith QC, stated in 2004 that *'international law permits the use of force in self-defence against an imminent attack*,'[19] a position reiterated by the current government in its response to the report of Parliament's Joint Committee on Human Rights on the government's policy on the use of drones for targeted killing.[20] Despite the agreement of the United States and United Kingdom and a number of other countries,[21] there remains serious debate internationally as to whether or not States are entitled, even in principle, to use force in self-defence in anticipation of an imminent armed attack.[22] Prof Crawford[23] has described the divide between the proponents and opponents of anticipatory self-defence as a *'long-standing controversy*.'[24] Eminent publicists are divided on the point,[25] and the ILC's ASR, when setting out circumstances which preclude wrongfulness on the part of a State, refers at Article 21 to actions taken in self-defence *'in conformity with the Charter of the United Nations*,' without expressly acknowledging actions being taken in *anticipation* of an armed attack. While recognizing that controversy, RW(UK) acknowledges that United Kingdom government policy will always proceed on the basis that anticipatory self-defence is lawful. But RW(UK) considers that, given the uncertainty at international law as to the lawfulness of such action even in principle, it is always necessary for actions taken in such a vein to be subject to close scrutiny.

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18 For the United States position, see: Office of the President of the United States, 'United States National Security Strategy' (September 2002), 15; and William Taft IV (the then State Department Legal Adviser), (2004) *Digest of United States Practice in International Law* 971.

19 Hansard, House of Lords, 21 April 2004, cols 369-371 (Lord Goldsmith QC); and Lord Goldsmith QC, 'Attorney-General's Advice on the Iraq War: Resolution 1441' (2005) 54(3) *International and Comparative Law Quarterly* 767.

20 House of Lords, House of Commons, Joint Committee on Human Rights, 'The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-2016,' Fourth Report of Session 2016-17 (HL Paper 49, HC 747) (19 October 2016) ('JCHR Report on Government Response to Targeted Killing Report'). The Government's response to the original report is included as Appendix 1.

21 See, for instance, the statements of countries on the Secretary-General's 'In Larger Freedom' report, which endorsed anticipatory self-defence as lawful: Australian Statement, Plenary Exchange on the Secretary-General's Report 'In Larger Freedom' (7 April 2005); Israeli Ministry of Foreign Affairs, 'United Nations Reforms – Position Paper of the Government of Israel' (1 July 2005); and the Press Statement of the Japanese Ministry of Foreign Affairs (27 September 2002).

22 See, generally: Gray, *International Law and the Use of Force* (3rd ed, 2008), p160-165; and Brownlie, *Principles of Public International Law* (Crawford ed, 8th ed, 2012), p750ff.

23 Currently Judge of the International Court of Justice, and formerly Whewell Professor of International Law, University of Cambridge, and Challis Professor of International Law, University of Sydney.

24 Brownlie, above n 22, p750.

25 In favour, see: Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1633-64; Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (1974), p3; Franck, 'When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?' (2001) 5 *Washington University Journal of Law & Policy* 68; Jennings and Watts, *Oppenheim's International Law* (9yj ed, 1992), Vol 1, p421; and Bowett, *Self-Defence in International Law* (1958), pp187-192. Against, see: Brownlie, *International Law and the Use of Force by States* (1963), pp257-61, 275-8, 366-7; D'Amato, *International Law: Process and Prospect* (1987); Lauterpacht, *Oppenheim's International Law* (7th ed, 1952), p156; Jessup, *A Modern Law of Nations* (1948), pp166-7; Rifaat, *International Aggression* (1974), p126; and Simma (ed), *The Charter of the United Nations: A Commentary* (2002), pp803-4.

11. Assuming that action taken in anticipation of an imminent armed attack is lawful, it is typically held that the criterion of *imminence* derives from the agreement between the United States and Great Britain in 1838-1842 as to the legal principles governing the British seizure and destruction of the vessel *Caroline* in American territory. According to the *Caroline* definition, action in anticipatory self-defence requires *'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*.'[26] Roberto Ago, writing as the Special Rapporteur on State Responsibility in 1980, also described imminence in terms of temporal emergency, commenting: *'a State acting in self-defence … acts in response to an imminent danger – which must … be serious, immediate and incapable of being countered by other means*.'[27] It is also instructive to note the International Court of Justice's approach to the criterion of *'imminent peril*,' which forms part of the international legal principle of *necessity*:[28] a principle which, in the non-military context, justifies action in response which would otherwise be unlawful. The Court considered the meaning of *'imminent peril*' in the *Gabcíkovo-Nagymaros Project* case, and stated that *'"imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility." As the International Law Commission emphasized in its commentary [to the ASR], the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time*."'[29]

12. But while the criterion of *imminence* has traditionally been understood to require that an attack is temporally proximate, in recent years the United States and United Kingdom governments have openly questioned whether any temporal pressure is required at all.[30] Both governments have suggested instead that, when it comes to engagement with terrorists and non-State actors, other factors, such as the theoretical probability of an attack, the likely scale of injury, and the absence of other opportunities to take effective action, may be relied upon (to the exclusion of temporal factors) to designate attacks as imminent and thus may be relied upon to justify the anticipatory use of force in self-defence.[31] While a full discussion of the matter falls outside the scope of these submissions, RW(UK) notes that any use of force which is purportedly justified as an act of anticipatory self-defence, but where the attack against which it seeks to respond is not proximate

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26 *British and Foreign State Papers, 1840-1841* (1857), Vol 29, p1129.

27 Ago, Special Rapporteur of the International law Commission on State Responsibility, Eighth Report on State Responsibility, Addendum, UN Doc. A/CN.4/318/Add.5-7, [88].

28 Under ASR, Article 25.

29 *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep (1997) 7, [54].

30 See: Rt Hon Jeremy Wright QC MP, 'The Modern Law of Self-Defence' (Speech delivered to International Institute for Strategic Studies, London) (11 January 2017), available at: http://www.ejiltalk.org/the-modern-law-of-self-defence/

31 These factors, and others, were proposed in the seminal article by Sir Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right to Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) 106 *American Journal of International Law* 770.

in time (and thus is not *imminent* in the traditionally-understood sense), ought to be treated with a high degree of caution.[32] This is especially so where the United States, as part of the theory of global conflict, arrogates to itself the right to respond against non-State groups even where the actions of those groups merely form a generalized threat, rather than specific organized military activities of the sort which most readily fit the paradigm of an imminent armed attack justifying a necessary and proportionate armed response. There is simply no firm basis to conclude that a drone strike by the United States which was justified on a basis other than responding to a temporally-proximate specific threat would be lawful at international law. As a result, the United Kingdom faces the considerable risk that, where it assists in such an activity, it assists in a violation of international law.

Specific Authorization

13. Turning to the second permissible basis for the use of force at international law, no United Nations Security Council authorization has been provided pursuant to Chapter VII of the UN Charter with respect to the use of armed drones. For the avoidance of doubt, as noted by the Joint Committee on Human Rights in its Report,[33] the UN Security Council Resolution 2249 (2015) on Islamic State in Iraq and the Levant ('ISIL')/Da'esh in Iraq and Syria is not a resolution made pursuant to Chapter VII and does not purport to authorize the use of force, whether by way of armed drone or otherwise.[34]

International Humanitarian Law

14. International humanitarian law ('IHL'), also known as the 'law of war' or the 'law of armed conflict,' applies within the context of an existing armed conflict. A qualifying armed conflict may be classified as either an *international* armed conflict (between two or more States) or a *non-international* armed conflict (a protracted period of armed violence between a State and one or more organized[35] non-State armed group).[36] For clarity, these definitions relate purely to the character of the participants in the conflict, rather than the territorial question of where the conflict is taking place: it may well be the case that a *non-international* armed conflict occurs in

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32 Noting, as has been pointed out in a response to Bethlehem's article by Elizabeth Wilmshurst and Sir Michael Wood, that not even Sir Daniel himself considered that the principles he proposed reflect the current state of international law. See: Wilmshurst and Wood, 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013) 107(2) *American Journal of International Law* 390, 392.

33 House of Lords and House of Commons Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing' (Second Report of Session 2015-16) (HL Paper 141, HC 574) ('JCHR Targeted Killing Report'), Annex 1, [12].

34 United Nations Security Council, Resolution 2249 (2015), UN Doc. S/RES/2249 (20 November 2015).

35 See the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Haradinaj et al (Appeal Judgment)*, IT-04-84-A (19 July 2010), [60].

36 See the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Dusko Tadic (Appeal Judgment)*, IT-94-1-A (15 July 1999), [70].

territory which crosses State boundaries, but it is not rendered an *international* armed conflict unless a second State begins to take part.

15. As observed by the Joint Committee on Human Rights in its report on the government's policy on the use of drones for targeted killing, the United States has long maintained in the years since 9/11 that there exists a global non-international armed conflict with initially Al Qaida and latterly the ISIL/Da'esh, the reach of which extends across multiple territories.[37] This position is very controversial and has been widely criticized, with many, including the International Committee of the Red Cross ('ICRC'), taking the view that the disparate and poorly co-ordinated nature of terrorist groups carrying out attacks worldwide since 9/11 fail to display the degree of unified organization required to indicate a single party involved in a global non-international armed conflict.[38] The United Kingdom government has clarified that it does *not* adopt the United States position. In response to questioning in the Joint Committee hearings, the Secretary of State for Defence, the Rt Hon Sir Michael Fallon MP confirmed that the United Kingdom considers itself to be in a non-international armed conflict with ISIL/Da'esh *'in Iraq and Syria*' alone, and not in a *'generalized state of conflict*' more broadly (in for instance Yemen, Somalia, or Libya).[39] The Joint Committee welcomed the government's *'disavowal of the controversial US position [of a] global non-international armed conflict*,' concluding that this clarification of the United Kingdom position *'goes some way towards meetings concerns*' that the UK's willingness to use force internationally may be too broad.[40]

16. If the special rules of IHL do *not* apply to a set of actions, the actions are governed purely by international human rights law and the relevant domestic criminal law. The key distinction is, of course, that IHL allows much greater latitude for the use of fatal force than either international human rights law or any nation's domestic criminal law.

17. But IHL itself contains important limits to the use of force. Rules of IHL relevant to the use of drone strikes in a *non-international* armed conflict include the fundamental principle of distinction. That principle requires that a distinction be observed between military and civilian targets, and that civilians and civilian objects *must not be targeted* unless they *directly participate*

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37 JCHR Targeted Killing Report, [3.50]-[3.51].

38 International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,' 31st International Conference of the Red Cross and Red Crescent (October 2011), 31IC/11/5.1.2, pp10-11.

39 JCHR Targeted Killing Report, [3.52].

40 JCHR Targeted Killing Report, [3.53].

in hostilities, and only during the period in which they so participate.[41] In addition to being part of States' Geneva Conventions treaty commitments, the principle of distinction in targeting is also accepted as part of customary international law.[42] According to the ICRC, a three-stage test applies to determine whether a civilian is *directly participating in hostilities*, thus exposing them to legitimate targeting.[43] Those three stages are: (a) that the act carried out must be likely to adversely affect either the military operations of a party to the armed conflict or persons or objects protected against attack; (b) that there must be a direct causal link between the act and the harm likely to result from the act; and (c) that the act must be specifically designed to directly cause the required harm in support of one party to the conflict or to the detriment of another.

18. While civilians who have (and can be demonstrated to have) formally joined an armed group such as ISIL/Da'esh would, under international humanitarian law, qualify as legitimate targets, the difficult questions at international law relate to those civilians who merely participate *from time to time* in ISIL/Da'esh activities, and what degree of causal link is required between the civilian's actions and the harm occurring. On these points, the approach advocated by the ICRC is restrictive: if civilians are not formally and continuously members of a belligerent group, those civilians only lose their immunity from attack *'for the duration of each specific act amounting to direct participation in hostilities*' and not more generally;[44] and *'direct causation should be understood as meaning that the harm in question must be brought about in one causal step*.'[45] On the ICRC view, the consequence of such rules is that, for example, persons involved only in *training* or *logistical support* for a non-State armed group are *not* legitimate targets for attack, nor are civilians who *have* directly participated in an attack, but have ceased to do so for the time being.

19. There is an element of controversy about those boundaries at international law,[46] but what can be said with safety is that, in launching drone strikes against potentially civilian targets, States must exercise a great degree of caution in proceeding and must do so only on compelling evidence of

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41 See: Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts ('Additional Protocol II') (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Articles 13(2)-(3).

42 See: Boothby, *The Law of Targeting* (2012), p60-62 and pp441-442.

43 International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) ('ICRC Interpretive Guidance'), p46.

44 ICRC Interpretive Guidance, p70.

45 ICRC Interpretive Guidance, p53.

46 See, for instance: Watkin, 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42(3) *NYU Journal of International Law and Policy* 641; and Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42(3) *NYU Journal of International Law and Policy* 697.

direct participation of those civilian targets in hostilities.[47] Prof Heyns (the former United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) and Prof Akande[48] have recently argued that, where drones are used, there may be an even greater burden for a State to establish with certainty that a target in a *non-international* armed conflict is military rather than civilian:

> *'because the technology and the way in which it is used in many cases make long-term surveillance possible. This means that more information is available about targets and more information can be made available than might otherwise be possible.*'[49]

20. RW(UK) accordingly submits that, where the United States uses drone strikes it is obliged, by the rules of IHL, to ensure with the requisite degree of certainty that any strikes are only directed at non-civilian targets, and that there is a very low margin of error on this front, given the surveillance capacity that drone warfare affords them. Even assuming that drone strikes carried out by the United States are carried out subject to IHL (a contention which, outside the context of Iraq and Syria has no international support), for those strikes lawfully to observe the principle of distinction, they will need to be based on rigorous evidence as to the military nature of the targets which allows clear conclusions to be drawn that the target crosses the high threshold of direct participation in hostilities.

21. Against this standard, one of the controversial tactics long employed by the United States drone programme – '*signature strikes*' – raises serious concerns. *Signature strikes* – so named because they are targeted not at persons known to be participants in hostilities, but rather persons whose movements, location, or appearance/age bear the *'signature*' of typical participants in military activity – were first launched by during the George W Bush presidency, and continued throughout the Obama administration. These strikes have been subject to consistent criticism on the basis that the limited information on which they are based provides no guarantee that civilian casualties are avoided, as required under the IHL principle of distinction.[50] There are grounds therefore to conclude that the United States drone programme does not always adhere to standards of lawful targeting, something which, as well as violating the laws of war and illegally putting civilians at risk, raises substantial legal risks for its international partners, such as the UK.

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47 Boothby, above n 42, p158.

48 Professor of Public International Law, University of Oxford.

49 Heyns, Akande, Hill-Cawthorne, and Chengeta, 'The International Law Framework Regulating the Use of Armed Drones,' (2016) 65(4) *International and Comparative Law Quarterly* 791, 813.

50 See: Ackermann, 'US to Continue "Signature Strikes" on People Suspected of Terrorist Links,' *The Guardian* (1 July 2016), available at: https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths

22. Further, even if the targeting is lawful in principle, it must also be proportionate. IHL prohibits attacks which *'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*'[51] This principle also requires all feasible precautions to be taken to gather information relating to possible casualties and military gains and to prevent or minimize incidental loss of civilian life,[52] an obligation which, again, becomes more acute where, as in drone warfare, a State has relatively greater information-gathering capacity than when involved in a firefight on the ground.

23. In light of these principles, United States drone strikes would only be lawful where IHL applies where it can be demonstrated that the United States has engaged in a searching examination of the relative risk to military and civilian objects in each instance. It is difficult to be conclusive as to the lawfulness of the drone strikes programme of the United States in circumstances where only minimal information is typically released about such strikes, hampering proportionality assessments. Certainly, though, prominent figures such as Ben Emmerson QC (the United Nations Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism)[53] and Prof O'Connell,[54] considering such information as is available, have concluded that the number of civilian casualties of the drone programme are *prima facie* disproportionate and call for detailed justification.

International Human Rights Law

24. Whether a situation is classed as an armed conflict governed by IHL or not, international human rights law will apply. The International Court of Justice has confirmed this on numerous occasions.[55] International human rights law sets out a general prohibition on the arbitrary deprivation of the right to life, both as enshrined in Article 6(1) of the International Covenant on

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51 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I') (adopted 8 July 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 51(5)(b). See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004, reprinted 2010) ('UK Manual'), [5.23.3].

52 Additional Protocol I, Article 57.

53 See: Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (10 March 2014), UN Doc. A/HRC/25/59 ('Emmerson Report').

54 Professor of Law, University of Notre Dame Law School. See: O'Connell, 'Lawful Use of Combat Drones,' evidence presented to Congress of the United States, House of Representatives, Subcommittee on National Security and Foreign Affairs, Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting (28 April 2010).

55 See: *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion*) ICJ Rep (1996) 226 ('*Nuclear Weapons* opinon'), [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Rep (2004) 136 (*'Wall* opinion'), [106]; and *DRC v Uganda*, [216].

Civil and Political Rights ('ICCPR'),[56] and as part of customary international law (which binds all States and is not subject to the jurisdictional limitations contained in specific human rights treaties).[57]

25. Further, the European Convention on Human Rights[58] also protects the right to life, but in a manner more stringent than the ICCPR. While the ICCPR bars *arbitrary* deprivation of life,[59] meaning that any action demonstrated to be non-arbitrary would be lawful, the European Convention approaches the issue from the other direction, prohibiting intentional deprivation of life and then providing only a limited list of lawful grounds for the deprivation of life. Those grounds are: *'the execution of a sentence of a court following … conviction of a crime for which this penalty is provided by law'*[60] and *'the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action taken for the purpose of quelling a riot or insurrection.'*[61]

26. This difference is of some import. Where IHL and international human rights law *both* apply, the question of whether a deprivation of life is *'arbitrary'* or not will, as the International Court of Justice noted in the *Nuclear Weapons* advisory opinion, likely depend only on compliance with the requirements of IHL.[62] But logic suggests that the more stringent European Convention requirements cannot simply be disregarded if IHL applies and is complied with.[63] Obviously, the European Convention does not bind the United States, but its provisions bind the United Kingdom in all that it does, even where that lies in providing assistance to the United States (as set out in relation to complicity below).

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56 United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

57 United Nations Human Rights Committee, *General Comment 24* (2 November 1994), UN Doc. CCPR/C/21/Rev.1/Add.6, [10]. See also: ICRC, Online Database of Customary International Humanitarian Law, Rule 89, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule89

58 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 ('ECHR').

59 ICCPR, Article 6(1).

60 ECHR, Article 2(1). The death penalty is specifically endorsed as a non-arbitrary grounds for the deprivation of life also in ICCPR, Article 6(2).

61 ECHR, Article 2(2).

62 *Nuclear Weapons* opinion, [25].

63 See: Heyns et al, above n 49, 821-822. It is worth noting, however, that the European Court expressed deference to IHL requirements over European Convention requirements in the separate, but analogous, context of a violation of the prohibition on arbitrary detention in the case of *Hassan v United Kingdom* [2014] ECHR 1162 (Grand Chamber).

27. While there is controversy as to whether all human rights treaty obligations apply outside the territories of State signatories to those treaties, RW(UK) submits that the better view is that the prohibition on arbitrary deprivation of life – recognized at customary international law and not depending for its force on specific treaties – applies without territorial restriction.[64] RW(UK) submits that the United States is bound to avoid arbitrary deprivations wherever in the world it may be responsible for them. As a result, where the use of drones by the United States results in the killing of civilians who have not taken direct part in hostilities, RW(UK) submits that such action ought to be taken to be an arbitrary deprivation of life and thus a violation of a fundamental tenet of international human rights law.

Domestic criminal law

28. Finally, of course, the actions of persons directing drone strikes do not take place purely at the international level. They are conducted by individuals (giving orders and executing them) who, unless a special legal regime applies to clothe them with immunity, are potentially liable in criminal law for killing others. While participation in an armed conflict affords members of the armed forces the right of *combatant immunity* from criminal liability under IHL,[65] if IHL does not apply it is important to bear in mind that the United States agents responsible for any drone strike, and the United Kingdom agents aiding and abetting that strike, are potentially liable for murder or other crimes under their domestic law, unless they have the benefit of a domestic legal defence such as self-defence or necessity. While the details of domestic criminal law is outside the scope of the current inquiry, it is worth observing that domestic law observes stringent requirements of imminence to justify proportionate self-defence actions. Only very clear examples of drone strikes addressing obvious and imminent threats would qualify.[66]

29. Even within IHL, only those entitled to combatant status have the right of immunity from liability for their actions in the conflict. This point was raised in the case of *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*, in which the Court of Appeal held that it could not, as an English domestic court, rule on the lawfulness or otherwise of the United States' drone strike programme. But nonetheless, with respect to the provision of information by non-military United Kingdom agents (such as members of GCHQ), the Master of the Rolls noted that *'it is not clear that the defence of combatant immunity would be available to a UK national who was tried in*

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64 Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), pp209-11.

65 UK Manual, [4.1]; the defence of combatant immunity is recognized in English law: *R v Gul (Mohammed)* [2012] 1 WLR 3432 (CA), [30] (Sir John Thomas P).

66 See the concerns raised about the UK's own drone strike in Syria in August 2015 from the point of view of domestic criminal law in Gardner, 'The Domestic Criminal Legality of the RAF Drone Strike in Syria in August 2015' [2016] 1 *Criminal Law Review* 35.

England and Wales with the offence of murder by drone strike.'[67] Accordingly, RW(UK) notes that, if it is not clear that IHL applies to a particular drone strike carried out by the United States with assistance (such as location intelligence) provided by the United Kingdom, there are potentially very serious domestic criminal law implications for the United Kingdom agents involved.

Attribution of Responsibility for Participating in the Wrongful Conduct of Another State

30. In light of the background set out above, there are various ways in which an action taken by a State such as the United States in conducting an armed drone strike may be wrongful as a matter of international law. Where that is the case, the focus turns to how another State (such as the UK) which participates in, assists, or facilitates that wrongful act to some degree may *itself* be subject to liability at international law.

31. Insofar as matters have been publicly confirmed, it appears likely that the United Kingdom participates in the drone programme of the United States in two main ways. First, GCHQ appears to provide intelligence to the United States which is used in the drone programme.[68] And second, the United Kingdom allows its territory to be used by the United States to house American military and air force bases (such as the joint Menwith Hill base and the American base at RAF Croughton)[69] which appear themselves to participate in the United States drone strikes programme.[70] The question is whether that sort of assistance, and the circumstances in which it is provided, would give rise to liability on the part of the United Kingdom for the actions carried out by the United States.

32. The rules which govern the responsibility of one State for wrongful acts committed by another State are not set out in the UN Charter or expressly specified in any other treaty: they are instead matters of customary international law. Much of customary international law in the area of State responsibility is summarized and encapsulated in the ILC's ASR. The ILC is a subsidiary body of

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67 *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (CA), [19] (Lord Dyson MR, with whom the Court agreed).

68 See, for instance: Ross and Ball, 'GCHQ Documents Raise Fresh Questions Over UK Complicity in US Drone Strikes,' *The Guardian* (24 June 2015), available at: https://www.theguardian.com/uk-news/2015/jun/24/gchq-documents-raise-fresh-questions-over-uk-complicity-in-us-drone-strikes

69 See: Milmo, 'Unknown Territory: America's Secret Archipelago of UK Bases,' *The Independent* (24 January 2014), available at: http://www.independent.co.uk/news/uk/home-news/unknown-territory-america-s-secret-archipelago-of-uk-bases-9084129.html

70 See: Reprieve Report, available at: http://www.reprieve.org.uk/press/uk-bases-used-targeting-secret-us-drone-war-documents-indicate/. See also: Gallagher, 'Inside Menwith Hill: The NSA's British Base as the Heart of US Targeted Killing,' *The Intercept* (6 September 2016), available at: https://theintercept.com/2016/09/06/nsa-menwith-hill-targeted-killing-surveillance/

the United Nations General Assembly,[71] comprising experts (both academic and practitioner) drawn from legal systems worldwide and tasked with the codification and progressive development of international law.[72] Within its mandate of codification, the ILC works to formulate and promulgate *'rules of international law in fields where there already has been extensive State practice, precedent and doctrine*.'[73]

33. After a long period of development, the ASR were granted a second reading in the General Assembly in 2001, and the UN General Assembly has repeatedly commended the ASR to governments for formal adoption.[74] While not yet formally agreed as a treaty, it is generally agreed that the key provisions of the ASR reflect customary international law binding upon all States. The significant provisions of the ASR relating to the liability of one State for assisting another are: (a) responsibility for aiding or assisting another State in knowledge of the circumstances of the unlawful act, as set out in Article 16; and (b) responsibility for rendering aid or assistance in maintaining a situation by which another State commits a serious breach and/or failure to cooperate to bring such a breach to an end, as set out in Articles 40 and 41.

Article 16

34. Article 16 of the ASR provides that:

> *'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
> *(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
> *(b) the act would be internationally wrongful if committed by that State*.'[75]

35. Article 16 enjoys wide acceptance as reflecting customary international law. The International Court of Justice affirmed this in the *Bosnia Genocide* decision,[76] a fact noted (without any adverse comment) by Mr Justice Leggatt in the High Court in *R (Al-Saadoon) v Secretary of State for Defence*.[77] The rule has also been taken to reflect customary international law by the World Trade

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71 Statute of the International Law Commission 1947, adopted under United Nations General Assembly Resolution No 175(II) on the Establishment of an International Law Commission (21 November 1947), UN Doc. A/RES/175(II).
72 Ibid., Article 1(1).
73 Ibid., Article 15.
74 Most recently in United Nations General Assembly Resolution No 68/104 on the Responsibility of States for internationally wrongful acts (18 December 2013), UN Doc. A/RES/68/104.
75 ASR, Article 16.
76 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Rep (2007) 42, [420].
77 *R (Al-Saadoon) v Secretary of State for Defence* [2015] 3 WLR 503 (Admin), [193] (Leggatt J).

Organization Panel[78] and the Federal Constitutional Court of Germany.[79] The United Kingdom government has also consistently stated that it considers Article 16 to reflect customary international law binding on the UK: it set out its position first in the reply to the report of the Joint Committee on Human Rights regarding allegations of United Kingdom complicity in torture,[80] and recently confirmed this in its response to the Joint Committee on Human Rights report regarding the government's use of drones for targeted killing.[81] Further, in February 2017 RW(UK), together with other leading NGOs, intervened in litigation in the High Court which raised the potential liability of the United Kingdom under Article 16 for assisting in breaches of international law conducted by the Kingdom of Saudi Arabia in the context of the conflict in Yemen.[82] In the course of that litigation, it was *not* suggested on behalf of the government that Article 16 either *did not* correctly reflect the boundaries of the concept of liability for assistance at public international law, or *did not* apply to the United Kingdom government.

36. The rule of responsibility under Article 16 can be considered to entail three main conditions, drawn from the wording of the Article itself, together with the ILC's Commentary on it. Those conditions are:

    36.1. That the assisting State, when it provides assistance, has *'knowledge of the circumstances of the internationally wrongful act*' carried out by the assisted State;[83]

    36.2. That the assistance provided by the State as a matter of fact contributes to the commission of the unlawful act to the requisite degree;[84] and

    36.3. That the contemplated act *'must be such that it would have been wrongful had it been committed by the assisting State itself*.'[85]

Knowledge

37. The interpretation of the knowledge requirement is not straightforward. The question has been explored by a range of leading international law academics,[86] and recently discussed at length in

78 *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, [9.42]-[9.43].
79 *Al-M* (5 November 2003) 2 BVerfG 1506/03, [47].
80 HM Government, 'Allegations of UK Complicity in Torture: The Government Reply to the Twenty-Third Report from the Joint Committee on Human Rights,' Cm774, p2.
81 JCHR Report on Government Response to Targeted Killing Report, p17.
82 *R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation, and Skills* (CO/1306/2016). Judgment awaited.
83 ASR, Article 16(a); and ILC Commentary on Article 16, [4].
84 This requirement does not appear expressly within the text of Article 16. It is set out within the ILC Commentary on Article 16, [5] and [10].
85 ASR, Article 16(b); and ILC Commentary on Article 16, [4].

the November 2016 Research Paper published by Chatham House.[87] There are three key questions:

37.1. What the assisting State must know;

37.2. What the degree of knowledge the assisting State must have; and

37.3. Whether there is a separate requirement that the assisting State must have *intended* to facilitate the wrongful act.

38. With regard to the first question, the decision of the International Court of Justice in the Bosnian Genocide case is instructive. In that case, Article 16 was considered and applied to the alleged complicity of the Federal Republic of Yugoslavia ('FRY') in the commission of genocide by Republika Srpska forces. The Court applied Article 16 of the Articles on State Responsibility by analogy in order to determine the meaning of *'complicity in genocide*' under Article III(e) of the Genocide Convention.

39. The Court considered that liability on the basis of Article 16 requires that the State providing aid or assistance *'acted knowingly, that is to say, in particular, was aware of the specific intent* (dolus specialis) *of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity*' (emphasis added).[88] The assisting party must have more than a hunch or speculative opinion as to what the assisted party is about to do. And, as the ILC Commentary makes clear, the assisting State will not be *presumed* to be aware of the use to which that assistance will be put by a receiving State:

> *'A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid money may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, in bears no international responsibility*.'[89]

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86 See: Crawford, *State Responsibility: The General Part* (2013); Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Kokusaihō gaikō zasshi* [*Japanese Journal of International Law and Diplomacy*] 1; Jackson, *State Complicity in International Law* (2015); Aust, *Complicity and the Law of State Responsibility* (2011); Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016).

87 Moynihan, 'Aiding and Assisting: Changes in Armed Conflict and Counterterrorism,' *Chatham House Research Paper* (November 2016).

88 *Bosnia Genocide* case, [420].

89 ILC Commentary, Article 16(4).

40. It is important to clarify that the characterization of the assisted State's conduct as internationally wrongful is an objective matter: there is neither any requirement of prior determination to that effect by a Court, nor any requirement that the assisting State must subjectively appreciate that the conduct of the assisted State is wrongful. What is required is that the assisting State has knowledge, to the required degree, of the facts which constitute the elements of the assisted State's wrongful conduct.

41. Importantly, the pertinent facts will depend upon the nature of the assisted State's conduct. The *Bosnia Genocide* case itself is an extreme example, since the underlying wrongful conduct of the Republika Srpska was the specific war crime of genocide, which is a crime of specific intent. As set out in the Genocide Convention, the commission of genocide requires *not only* the carrying out of the immediate intentional acts of, *inter alia*, killing, causing serious bodily or mental harm, and/or forced sterilization, *but also* that, in doing so, the perpetrator acts in pursuit of a general objective of intending *'to destroy, in whole or in part, a national ethnical, racial or religious group, as such*.'[90] Against that exacting standard, a finding of liability for aiding and assisting will be necessarily difficult to achieve: the majority of the International Court of Justice held that, while the FRY knew that the Republika Srpska intended to carry out massacres, the evidence did not establish that the FRY was aware that the Republika Srpska held the addition *mens rea* condition of intending, by those massacres, to destroy a group *'as such*.'

42. But it is important to bear in mind that very few internationally wrongful acts require specific intent: the vast majority of breaches of public international law which might be entailed by a State conducting a drone strike do not require proof of the State's *motivation* as well as their factual conduct.[91] Accordingly, the facts which an assisting State must know in most cases are purely matters of objective circumstance: what the assisted State is doing, or has plans to do. On that point, the reference in the *Bosnia Genocide* judgment to *'massacres underway*' illustrates that there may be situations where the aid and assistance does not just relate to some potential future breach by the assisted State, but to dynamic situations. This is recognized in the academic material:

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90 United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Article II. The definition is rehearsed in Article 2(2) of the Statute of the International Criminal Tribunal for Rwanda. See: United Nations Security Council, Resolution 955 (8 November 1994), UN Doc. S/RES/955, Annex, Article 2(2).

91 See: Crawford, 'Second Report on State Responsibility,' 51st Session of the International Law Commission (1999), UN Doc. A/CN.4/498, p50.

'[w]hen the situation is dynamic, there will be a need for the assisting State to keep an ongoing watch on its own liability as the facts, and its level of knowledge, develop. Where the breach of the primary rule is continuing, the presumption that the assisting State knows about the breach is likely to increase.'[92]

43. As to the second question, the *degree* of knowledge required, it appears that *constructive* knowledge is not sufficient as a matter of international law. During the negotiations on the text of Article 16, the Netherlands specifically suggested that the Article should provide for responsibility where a State *'knows or should have known the circumstances of the internationally wrongful act*,'[93] but that suggestion was not adopted by the members of the International Law Commission. In the absence of specific guidance in the Articles themselves, from international State custom, or relevant case law, the dominant view of eminent academics[94] is that Article 16 requires a more stringent degree of knowledge.

44. Clearly *actual* knowledge of the relevant facts would be sufficient. In this regard, leading academics argue that *'near certainty*' or *'practical certainty*' of the facts is sufficient to make out *actual* knowledge.[95] There is also strong support for a *'willful blindness*' standard in the absence of *actual* knowledge itself. Prof Lowe QC[96] has argued that it is *'unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner*.'[97] Dr Jackson[98] endorses that view, noting: *'This is almost certainly correct as a matter of law and principle – willful blindness, narrowly interpreted, is a justified extension to the category of legal knowledge*.'[99] Further, the recent Chatham House Research Paper takes a similar position:

'[Willful blindness] might be defined as a deliberate effort by the assisting State to avoid knowledge of illegality on the part of the State being assisted, in the face of credible evidence of present or future illegality …where the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a

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92 Moynihan, above n 87, [57]; and Lanovoy, above n 86, p21.
93 Statement of the Netherlands, [2001] *Yearbook of the International Law Commission*, Vol II(1), p52; and see Crawford, above n 86, p406.
94 A source of international law pursuant to Article 38(1)(d) of the Statute of the International Court of Justice (18 April 1946) 33 USTS 993.
95 Moynihan, above n 87, [39]; Jackson, above n 86, pp160-162.
96 Chicele Professor of International Law, All Souls College, University of Oxford.
97 Lowe, above n 86, 10.
98 Departmental Lecturer in International Law, University of Oxford.
99 Jackson, above n 86, pp160-162.

state cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence … [I]f a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye.'[100]

45. Turning to the third question, the separate criterion of the assisting State's *intention*, it is worth noting that the text of Article 16 itself does not include any explicit requirement of *intention*. However, the ILC Commentary on Article 16 states that the aid or assistance must be given *'with a view to facilitating the commission of that [wrongful] act, and must actually do so*.'[101] The ILC Commentary explains this requirement as limiting the application of the rule *'to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct*' and then notes that a State will not be responsible for aid or assistance *'unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct*.'[102]

46. The question of what suffices to make out the assisting State's *intent* in this context must be treated with some care. What is required is that the assisting State intends to provide the means by which the perpetrator may realize its own intent to commit an unlawful act. There is no additional requirement that the assisting State must itself *share the assisted State's intent*. Were it otherwise, as Judge Bennouna observed in his declaration in dissent in the *Bosnia Genocide* case, that *'would be tantamount to equating an accomplice with a co-principal*,'[103] an illogical outcome if any distinction between primary liability and assisting liability for an internationally wrongful act is to be observed. The ILC's reference in the Commentary on Article 16 to intention makes it clear that no State may be liable on a strict liability basis purely because assistance rendered to another State has been, for instance, unexpectedly diverted to wrongful or prohibited ends.[104] States which addressed the issue in their comments on drafts of Article 16 clearly wished to avoid such a wide reading.[105] RW(UK) considers that the function of the intention requirement is chiefly to avoid a State being fixed with liability in circumstances where it cannot be held to have consciously supported or facilitated the actions taken by the State to which it provides assistance. But that does *not* mean that the intention requirement may be used by States as a means to shield themselves from liability in circumstances where they are fully aware of the use to which their

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100 Moynihan, above n 87, p14.
101 ILC Commentary on Article 16, [5].
102 Ibid.
103 *Bosnia Genocide*, Declaration of Judge Bennouna, p359, p361.
104 See the example given by Graefrath of aid being directed towards unlawful ends which, although foreseeable, are specifically prohibited by the aid-providing State as a condition of the grant: Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 *Revue Belge de Droit International* 371, 373; and the discussion of the same in Crawford, above n 86, p407-408.
105 See the statements of: United Stated, UN Doc. A/C.4/515, p52; United Kingdom, UN Doc. A/C.4/515, p52. And see Aust, above n 86, p238.

assistance will be put and of the actions the receiving State will take, but where the assisting State subjectively does not consider that the course of action amounts to an internationally wrongful conduct.

47. That position is supported by Prof Lowe, who has argued:

> *'It is, I think, clear that Article 16 does not require proof that the aiding State actually desires or intends that the receiving State should use the aid for the commission of an internationally wrongful act. There is no persuasive evidence in State practice of a requirement that a State giving aid or assistance must not merely know of the manner in which it is to be used, but must in addition intend or desire that it should be so used. And as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts. The fact that the unlawful conduct is foreseen, or foreseeable, as a sufficiently probable consequence of the assistance must surely suffice.*'[106]

48. In a similar vein, Prof Crawford has suggested that intention, for the purposes of satisfying this aspect of Article 16, may be imputed from a sufficiently certain degree of foresight:

> *'If aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed. It is thus wrong to suggest that the complicit state must be in common cause with the principal in order for … Article 16 to apply*.'[107]

49. Judged against the proper standard, then, RW(UK) considers it clear that the United Kingdom has the requisite knowledge of the drone strike programme carried out by United States to satisfy the knowledge standard under Article 16. While the specific details of individual drone strikes are typically not released, the details of the United States armed drone programme as a whole are well documented: RW(UK) notes for instance Annex 4 of the Joint Committee on Human Rights report on the policy of targeted killing,[108] reports from international NGOs such as Amnesty International,[109] the reports of two separate United Nations Special Rapporteurs,[110] and statements made by United States government representatives including Prof Koh[111] and John Brennan[112]

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106 Lowe, above n 86, 8.
107 Crawford, above n 86, p408.
108 JCHR Targeted Killing Report, Annex 4.
109 Amnesty International, above n 2.
110 Emmerson Report; and Cristof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions (1 April 2014), UN Doc. A/HRC/26/36.
111 The Legal Advisor to the Department of State from 2009 to 2013.
112 The Deputy National Security Advisor for Homeland Security and Counterterrorism from 2009 to 2013, and subsequently the Director of the Central Intelligence Agency from 2013 to January 2017.

acknowledging the use of drones for targeted killing of persons who are only in the planning, rather than execution, phase of any potential armed attack.[113] From that information alone, RW(UK) submits that the United Kingdom must have known the true nature of the United States drone programme and key facts such as that it failed to conform with the international position on how imminent a threat must be before it may justify action in self-defence, and the fact that the civilian casualties were apparently disproportionate.

Material contribution

50. The second criterion of a factual contribution to the unlawful act is relatively straightforward. There is some debate as to how much contribution is required to fix a State with responsibility under Article 16.[114] On the one hand, the ILC Commentary sets out that the aid or assistance must have *'contributed significantly to*' the internationally wrongful act of the receiving State,[115] but on the other the ILC Commentary goes on to state the assistance *'may have been only an incidental factor in the commission of the primary [wrongful] act, and may have contributed only to a minor degree, it at all, to the injury suffered*.'[116] The eminent academics Prof Crawford and Prof Lowe both prefer a *de minimis* threshold of at least *'material*' contribution.[117] This approach is in keeping with the approach adopted by the ILC's first reading commentary on an earlier draft of Article 16.[118]

51. On any measure, RW(UK) submits that the United Kingdom's involvement in the United States drone programme qualifies. Location intelligence provided by GCHQ, and other intelligence provided and relayed from bases located within the United Kingdom, appears, from the available evidence, to be directly used in United States drone strikes. RW(UK) submits that the requisite level of material contribution is likely made out on the part of the United Kingdom.

Intent

52. The final element of the test requires that a State providing assistance may only be liable at international law where the wrongful act committed with its assistance is an act which would have been wrongful if committed by the assisting State directly. Thus if the United Kingdom assists the United States in breaching an obligation the United States owes to Canada by virtue of a bilateral treaty between those two States, the United Kingdom does not incur responsibility pursuant to the

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113 See: Gray, above n 8, pp7-20.
114 See the discussion in Crawford, above n 86, pp402-403.
115 ILC Commentary on Article 16, [5].
116 ILC Commentary on Article 16, [10].
117 See: Crawford, above n 88, [180]-[182] and [188]; and Lowe, above n 86, 5.
118 Which was then known as Article 27: International Law Commission, 'Report of the International Law Commission on the Work of Its Thirtieth Session 8 May-28 July 1978,' 1978 *Yearbook of the International Law Commission*, Vol II(2), p104, [17].

Article 16 rule, since the United Kingdom is not itself bound by the provisions of that treaty. In the context of the provision of assistance for United States drone strikes, the relevant provisions of international law binding upon the United States (namely the prohibition on the use of force exception where justified by consent or self-defence, and the IHL and human rights protections on the right to life) bind the United Kingdom just as directly.

Articles 40 and 41

53. Article 16 sets out a general rule of responsibility which applies in all circumstances of internationally wrongful conduct, however serious. Articles 40 and 41 of the ASR, on the other hand, provide a more narrowly-focused rule which applies only in circumstances where *jus cogens* (or 'preemptory') norms of international law are concerned. Accordingly, some academics have termed Articles 40 and 41 as providing for *'aggravated responsibility*' at the international level.[119]

54. Articles 40 and 41 apply to *'the international responsibility which is entailed by a serious breach by a State of an obligation arising under a preemptory norm of general international law*.'[120] And Article 40(2) establishes that:

> *'A breach of [an obligation arising under a preemptory norm] is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation*.'[121]

55. Within that defined scope of *'serious*' – that is to say *'gross or systemic*' – breaches of *jus cogens* or preemptory norms, Article 41 provides, *inter alia*, that:

> *'2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render air or assistance in maintaining that situation.*'[122]

56. As to the status of this rule, like Article 16 above, there is considerable support for the conclusion that this rule of international responsibility also reflects customary international law. The International Court of Justice, in its *Palestine Wall* advisory opinion, affirmed the principle that, in light of *'the character and the importance of the rights and obligations involved*' in that case, *'all States are under an obligation not to recognize the illegal situation*' and *'are also under an obligation not to render aid or assistance in maintaining the situation created by such*

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119 See: Aust, above n 86, Chapter 7, pp319-375.
120 ASR, Article 40(1).
121 ASR, Article 40(2).
122 ASR, Article 41(1)-(2).

construction.'[123] While not referring to Articles 40 and 41 by number, the Court's judgment clearly endorses the rule set out in those Articles as the correct statement of international law. The rule has also been accepted in domestic courts. Lord Bingham referred to Article 41 in its decision in *A and others v Secretary of State for the Home Department (No 2)*.[124] The Italian Corte di Cassazione also relied upon Articles 40 and 41, in this case explicitly, in its decision in *Ferrini v Federal Republic of Germany*,[125] as did the Federal Constitution Court of Germany in a decision relating to claims for compensation arising from expropriations in the Soviet zone in 1945-1949.[126]

57. Most significant in terms of the status of Articles 40 and 41, the United Kingdom government placed reliance on those articles during the High Court phase of the case of *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* as demonstrating the proper boundaries of the principle of aggravated responsibility,[127] something accepted by the Court (and not disrupted in the subsequent appeals).[128] Further, the Joint Committee on Human Rights, in its report on Allegations of United Kingdom Complicity in Torture, based its reasoning expressly upon Article 41(2) in concluding that the practice of the United Kingdom in receiving information obtained through torture was *'likely to be in breach of the UK's international law obligation not to render aid or assistance to other States which are in serious breach*' of preemptory norms.[129]

58. The rule set out in Articles 40 and 41 refers to *jus cogens* or preemptory norms of international law. Those terms denote, as the Vienna Convention on the Law of Treaties sets out, a rule of international law which is *'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*.'[130]

59. A number of features of this rule of State responsibility need to be considered. The first is the

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123 *Wall* opinion, [159].

124 *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 (HL), 263 (Lord Bingham).

125 English translation available in: *Ferrini v Repubblica Federale di Germania*, Decision No. 5044/04 (2004) 128 ILR 658.

126 Cases No. 2 BvR 955/00, 1038/01, Decision of 26 October 2004. A partial English translation is available in: United Nations Secretary General, Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments (9 March 2007), UN Doc. A/62/63, [33]-[40].

127 *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin) ('*R (Al-Rawi*)'), [69]. Leading counsel for the government was the now International Court of Justice judge, Sir Christopher Greenwood QC).

128 *R (Al-Rawi*), [70].

129 House of Lords, House of Commons, Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture,' Twenty-Third Report of Session 2008-9 (HL Paper 152, HC 230) (4 August 2009), [42].

130 United Nations, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 53.

range of *jus cogens* or preemptory norms potentially relevant to the actions of the United States in conducting drone strikes. The foremost example of such a norm, as the International Court of Justice recognized in the *Nicaragua* case, is the prohibition on the use of force.[131] The ILC, elsewhere in its Commentary on the ASR,[132] also lists the prohibitions on *'genocide, slavery, racial discrimination, crimes against humanity and torture*'[133] as *jus cogens* norms, together with the *'right to self-determination*,'[134] to which should be added the basic rules of IHL, which were termed *'intransgressible*' in character by the International Court of Justice in the *Nuclear Weapons* advisory opinion.[135] Further, as the ILC has observed, that list *'may not be exhaustive*' and does not prevent the emergence of new rules of international law generally accepted by States as having a *jus cogens* character.[136] At present, the rules relevant to drone strikes are the prohibition on the use of force and the basic rules of IHL.

60. The second key consideration in approaching the rule of *'aggravated responsibility*' under Articles 40 and 41 of the ASR is the meaning of the specific criteria of *'systematic*' or *'gross*' breaches. The ILC Commentary provides the following guidance:

> *'To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims*.'[137]

61. Importantly, while the *intent* of a State to violate a preemptory norm is a relevant factor in the assessment of whether or not a particular violation will be *'gross*,' enlivening the *'aggravated responsibility*' regime under Articles 40 and 41, what is clear is that *intent* is not a necessary precondition to liability in every case. The rationale for this appears to be that, while a limiting

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131 *Nicaragua* case, [190]; see also ILC Commentary on Article 40, [4].
132 ILC Commentary on Article 26, [5].
133 See also the discussion at: ILC Commentary on Article 40, [5].
134 See, for example, the recognition of the right by the International Court of Justice in: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion*) ICJ Rep (2010) 403, [79] and [82]; and *Case Concerning East Timor (Portugal v Australia)* ICJ Rep (1995) 90, [29].
135 *Nuclear Weapons* opinion, [79].
136 ILC Commentary on Article 40, [6].
137 ILC Commentary on Article 40, [8].

factor such as an intention to assist may be acceptable in Article 16 where violations *other than* gross violations are at issue, the more serious subject matter of Articles 40 and 41 demand a higher degree of vigilance on the part of all States.[138]

62. Against the background of the subject matter to which Articles 40 and 41 are directed, Article 41 clarifies the type of conduct which is prohibited. The most relevant aspects are in Article 41(2), which prohibits any State from either *'recogniz[ing] as lawful a situation created by a serious breach*' or *'render[ing] aid or assistance in maintaining the situation [of any serious breach]*.'[139]

63. With respect to the first circumstance – recognition, the ILC Commentary explains that this *'obligation of collective non-recognition by the international community as a whole*' not only refers to *'formal recognition of these situations, but also prohibits acts which would imply such recognition*.'[140] That rule is supported by clear State practice at the international level, such as the non-recognition by States of the Japanese annexation of Manchuria in 1931, the Iraqi annexation of Kuwait in 1990, and the unlawful actions of the racist Rhodesian and South African governments in the 1960s and 1970s.[141]

64. With respect to the second circumstance – aid or assistance in maintenance – the ILC Commentary explains:

> *'This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by Article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation [of serious breach]. It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one*.'[142]

65. As the Joint Committee on Human Rights observed in the context of the receipt by the United Kingdom of information gained through torture by other States, *'aid or assistance*' provided after the fact of a breach may take many forms. In that context, even passive receipt of that information *'creates a market for the information produced by torture*,' thus encouraging the maintenance of

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138 See: Aust, above n 86, pp341-342.
139 ASR, Article 41(2).
140 ILC Commentary on Article 41, [5].
141 ILC Commentary on Article 41, [6]-[9].
142 ILC Commentary on Article 41, [11].

the situation in which other States carry out torture.[143] In the context of drone strikes carried out by the United States, RW(UK) submits that, if a United States drone strike constitutes a serious violation of international law, then, regardless of any United Kingdom involvement with or before that drone strike itself, anything done by the United Kingdom *after* that drone strike which expressly or impliedly *recognizes* that United States action as lawful or renders *aid or assistance* to the maintenance of an unlawful United States drone strike policy, will mean that the United Kingdom has violated its own international obligations set out in Articles 40 and 41 of the ASR.

66. On the recognition front, actions by the United Kingdom such as failing to recall, in protest, embedded agents, failing to cut off ongoing co-operation arrangements, failing to deny landing rights to United States air force assets involved would all likely violate the principle of non-recognition in the view of RW(UK). In respect of aid or assistance after the fact, RW(UK) considers that the United Kingdom keeping in place information-sharing or other agreements which mean that the United States is not put to the task of sourcing co-operation from other States instead would also likely qualify as assistance sufficient to render the United Kingdom liable.

Complicity in Aggression

67. In addition to the provisions of the ASR, which are of general application to a variety of different violations of international law, there is a specific additional rule of international law which provides that a State *must not* allow its territory to be used as the launching pad for acts of aggression by other States. This rule is codified in Article 3(f) of the United Nations General Assembly's resolution on the Definition of Aggression, which provides that *'[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State*.'[144] As to the status of the rule, while the fact that it is contained in a resolution of the General Assembly provides a meaningful indication of its international acceptance, that is not conclusive from the perspective of customary international law. Eminent academics have argued that the contents of key aspects of the General Assembly definition of aggression reflect customary law,[145] and the International Court of Justice in the *Nicaragua* case has certainly specifically endorsed another sub-article of the definition (Article 3(g) on what constitutes as *'armed attack*') as doing so.[146] Moreover, the full General Assembly definition – including liability for allowing territory to be used by other States for aggressive purposes – has now been adopted as the standard for the crime of aggression

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143 Allegations of UK Complicity, [42]. See also: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (2009), p85.

144 United Nations General Assembly, Resolution 3314 (XXIX) on the Definition of Aggression (1974), Article 3(f).

145 Jackson, above n 86, p143.

146 *Nicaragua* case, [195].

for the purposes of the International Criminal Court.[147]

68. In contrast to the more complex elements of the rules on responsibility set out in the ASR, the principle of liability for complicity in aggression where territory is placed at another State's disposal is relatively straightforward. The rule is only enlivened where physical territory (understood in international law as extending to land, airspace, and territorial sea)[148] is provided, and where that territory is at least under the *effective control* of the providing State.[149] Further, as a species of aggression, the provision of territory only gives rise to liability under this rule if the other State launches from that territory an act of *aggression* (that is, an act in violation of the prohibition on the use of force), rather than simply any act which breaches international law.

69. The other crucial ingredient of liability under this rule is that the complicit State must have *'placed*' the territory at the disposal of the other State. The territory being *'at the disposal*' of the other State clearly conveys that the receiving State has the power to act for its own purposes on that section of territory, as is the case with the analogous situation of State organs or officials being temporarily *'placed at the disposal*' of other States.[150] But the use of construction *'which it has placed*' demonstrates that the complicit State must have actively decided to afford that assistance: it will not be sufficient if, for instance, a part of a State's territory is used in a clandestine fashion by another State.[151]

70. The provision of territory by the United Kingdom to other States in breach of this rule has occurred previously. In 1986, the United Kingdom (in marked contrast to France and Spain) permitted the United States to fly airstrikes against Libya from United Kingdom onshore airbases. The United Nations General Assembly condemned the airstrikes, although the relevant resolution did not explicitly mention the United Kingdom's role in them.[152]

71. Similarly, RW(UK) notes that, insofar as the United Kingdom is currently allowing the United States to make use of any bases within the United Kingdom to provide intelligence for, and plan,

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147 The original Rome Statute of the International Criminal Court did not include a definition of aggression. The decision to adopt the General Assembly definition was finally agreed at the 2010 Kampala Review Conference, which provided that the Court would be entitled to exercise jurisdiction over the crime of aggression once thirty States ratified the amended definition, and the Assembly of States Parties to the ICC Statute decided to allow jurisdiction to be exercised. The thirtieth State ratification occurred on 26 June 2016 with the ratification by Palestine of the Kampala amendments, but the Assembly is yet to decide that jurisdiction may be exercised.

148 Jackson, above n 86, p140.

149 Brownlie, above n 22, p105.

150 See: ASR, Article 6; and ILC Commentary to Article 6, [1]-[9].

151 Jackson, above n 86, p141.

152 United Nations General Assembly, Resolution 41/38 (20 November 1986), UN Doc. A/RES/41/38.

armed drone strikes which violate international law, then the United Kingdom would again itself be liable at international law for that particular manifestation of complicity in aggression.

State Responsibility in Human Rights Law

72. Just as the rule regarding liability for complicity in *aggression* through the provision of territory fixes States with liability in respect of their assistance in a specific class of internationally wrongful conduct, particular complicity rules have emerged within the context of another specific class of internationally wrongful conduct – namely, violations of international human rights. The jurisprudence of the European Court of Human Rights recognizes a series of obligations on States to refrain from activities which place individuals at the risk of harm committed by other States in certain contexts.

73. The most well-known obligation of this type is the principle of *non refoulement*:[153] a State party to the European Convention is obliged, as part of its own obligation to secure the protection of Article 3 of the Convention (the prohibition on torture or inhuman or degrading treatment or punishment), not to remove an individual to another State where that individual faces a real risk of ill treatment. In the case of *Soering v United Kingdom*, concerning an individual in custody in the United Kingdom but facing extradition to the United States to face capital murder charges in Virginia, the Court held that, as the extradition to the Virginia authorities *'would expose [the prisoner] to a real risk of treatment going beyond the threshold set by Article 3*' the United Kingdom decision *'to extradite [him] to the United States would, if implemented, give rise to a breach of Article 3*.'[154] The same principle has been affirmed by the international human rights tribunals, the United Nations Human Rights Committee[155] and the Convention Against Torture Committee.[156]

74. Indeed, at international human rights law, the principle has been broadly to extradition leading to any real risk of rights violations, whatever may be those rights. The United Nations Human Rights Committee stated in the seminal case of *Kindler v Canada*:

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153 The European Convention concept of *non refoulement* derives from the equivalent principle in the context of asylum law set out in the United Nations General Assembly, Convention Relation to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Article 33.

154 *Soering v United Kingdom* (1989) 11 EHRR 439; [1989] ECHR 14, [111].

155 See: Human Rights Committee, *General Comment 31* (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, [12]; *Pillai v Sri Lanka* (25 March 2011), UN Doc. CCPR/C/101/D/1763/2008, [11.4] and Individual Opinion of Keller, Motoc, Neuman, O'Flaherty, and Rodley, pp21-22; *Munaf v Romania* (21 August 2009), UN Doc. CCPR/C/96/D/1539/2006, [14.2]; and *C v Australia* (13 November 2002), UN Doc. CCPR/C/76/D/900/1999, [3.2] and [8.5].

156 See, for instance: *Arkauz Arana v France* (5 June 2000), UN Doc. CAT/C/23/D/63/1997; *Khan v Canada* (15 November 1994), UN Doc. CAT/C/13/D/15/1994; and *Jahani v Switzerland* (23 May 2011), UN Doc. CAT/C/46/D/357/2008.

'If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.'[157]

75. But despite the apparent breadth of that formulation, the principle has in fact only been relied upon before the Human Rights Committee in cases relating to risks of violation of the right to life[158] and the prohibition against torture.[159]

76. In the European Convention context, the principle has been extended to the context of Article 5 (the right to liberty and security and protection from arbitrary detention) in the case of *El Masri v Macedonia*,[160] and reaffirmed in the two cases establishing the liability of Poland for transferring terror suspects into CIA secret detention despite the *'foreseeable serious risk*' of ill-treatment contrary to Articles 3 and 5 of the Convention.[161]

77. While the case law relates to situations where a State is on the verge of taking one particular type of action – the extradition of a prisoner – there is some academic support for the argument that there is a more general rule in human rights law which applies to other ways in which a State might facilitate torture carried out by another State. Dr Jackson suggests that cases like *Soering v United Kingdom*:

'should be read as establishing what can be seen as a narrow preventive complicity rule. It prohibits States from engaging in a very specific form of complicity in torture – the provision to the principal State of the person of the potential victim. It is preventive because it arises where there is a real risk of the principal wrong occurring.

Understood in this way… that there is no good reason to confine its application to one very specific form of complicity. The ways that a State might facilitate torture carried out by another State are manifold – the sharing of intelligence, sale of equipment, or provision of technical support. No matter the form of complicity, what should matter is the degree to which it contributes to the principal wrong. This is how doctrines of

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157 *Kindler v Canada* (30 July 1993), UN Doc. CCPR/C/48/D/470/1991, [13.2].
158 See, for instance: *Yin Fong v Australia* (23 November 2009), UN Doc. CCPR/C/97/D/1442/2005; and *Israil v Kazakhstan* (31 October 2011), UN Doc. CCPR/C/2013/D/2024/2011.
159 See above n 155.
160 *El Masri v Macedonia* (2013) 57 EHRR 25; [2012] ECHR 2067 (Grand Chamber).
161 *Nashiri v Poland* (2015) 60 EHRR 16; [2014] ECHR 833,[517]-[519] and [530]-[532]; and *Husayn v Poland* [2014] ECHR 834, [512]-[514] and [524]-[526].

complicity ordinarily operate in municipal criminal law, municipal private law, international criminal law, and the law of State responsibility.'[162]

78. Given that the *Soering v United Kingdom* bar against extradition to face torture has already been extended within human rights jurisprudence to apply to extradition to face other human rights violations – in particular violations of the right to life – RW(UK) submits that there is no barrier in principle to suggest that a rule of complicity in human rights law may exist where State A is prohibited from taking any action (whether it be by extradition, by provision of intelligence, by provision of landing rights, etc) which facilitates a violation of human rights by State B (whether the rights violated be the prohibition on torture, the right to life, the freedom from arbitrary detention, etc) in circumstances where a real risk of that violation is foreseeable to State A. Under this rule, were the United Kingdom to have foresight that the actions of the United States posed a real risk of violation of the human right to life, RW(UK) notes that the United Kingdom would itself be liable for violation of the right to life at international human rights law.

Conclusions as to the United Kingdom's Liability

79. As set out above, there are stringent international standards applying to the United States drone strike programme. Those strikes, constituting a *prima facie* violation of the territorial sovereignty of the States they hit, will only be lawful if conducted with the consent of those States (something which appears absent at present) or in self-defence (and the standards applied by the United States to judge self-defence, particularly the approach taken to the 'imminence' criterion is out of step with international law). Accordingly, those strikes are likely to violate public international law.

80. Further, those strikes, insofar as they are not in fact necessary to deal with imminent military threats, fail to distinguish between civilian and military targets, or are disproportionate, will constitute serious violations of IHL. On the basis of the limited information publicly available to make an assessment, it appears that such violations are made out. Given the failure to comply with IHL, drone strikes by the United States would also appear to violate international human rights law, and participants would appear to be exposed to criminal liability as well.

81. Thus the United Kingdom is likely supporting a programme whereby the United States commits unlawful acts with regularity. The support provided by the United Kingdom, which currently appears to be by way of GCHQ providing location intelligence and the government allowing the United States military and spy agencies to use bases located within the United Kingdom for

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[162] Jackson, 'Freeing *Soering*: The ECHR, State Complicity in Torture, and Jurisdiction' (2016) 27(3) *European Journal of International Law* 817, 826.

activities supporting the drone programme, constitutes the provision of material assistance to a State apparently violating international law.

82. As the United Kingdom knows of the United States' breach, and must be taken to intend that the drone strikes go ahead, the United Kingdom is responsible under Article 16 of the ASR for aiding and assisting the wrongful conduct of the United States. Further, and alternatively, given that the United States appears to be violating fundamental *jus cogens* principles of international law, even if the United Kingdom could plead ignorance of lack of intention in assisting strikes before they occur, the United Kingdom's failure to withdraw the system of assistance provided amounts to recognition of a situation of serious breach of international law, and assistance in the maintenance of that breach, contrary to the *'aggravated responsibility*' standard set out in Articles 40 and 41 of the ASR.

83. In addition, the fact that the United Kingdom appears on the available information to allow the United States to run part of the system supporting drone strikes from United Kingdom territory likely renders the United Kingdom complicit in the United States' aggression. And finally, given that the drone strikes appear to violate the right to life of those killed, the United Kingdom has failed to comply with its human rights obligations under the ICCPR and/or European Convention to not assist other States where a real risk of human rights violation can be foreseen.

84. RW(UK) considers that, on the basis of the limited information currently available, the applicable legal frameworks appear to lead to one conclusion: that the United Kingdom is liable at international law for the unlawful conduct of the United States. In the circumstances, RW(UK) considers that there is a heavy burden on the United Kingdom government if it is to demonstrate that, despite the apparent position, it has in fact put in place systems to guarantee that it does not assist in the commission of violations of international law.