Drones and the European Union
Prospects for a Common Future

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Summary

- The debate over the use of drones is an opportunity for states to identify elements of military practice that their publics find uncomfortable or troubling, and to explain these areas of military operations in context.

- Countries would benefit from working together to identify accountability gaps arising from fundamental elements of military cooperation, including the role of intelligence transfers in joint operations, and the distribution of responsibility for lethal actions in the context of coalition operations.

- Transparency in investigation procedures, as well as devoting sufficient resources towards ensuring that mistakes are identified, will improve the perception of drone use among domestic audiences.

- Identifying and communicating common standards and practices of mitigating complicity should be a priority for countries to ensure that they do not unwittingly become complicit in unlawful lethal operations.

- Although operational safety may hinder the ability of states to be completely transparent, understanding among the general public could be improved through the communication of policies and procedures regarding non-lethal assistance to partner states conducting lethal operations, both inside and outside the context of an armed conflict.

Introduction

The use of armed drones in military operations has become more prevalent as the technology has developed. At present more than 30 nation states possess, or are developing, armed drones for military use.[1] France's decision to begin arming its US-purchased MQ-9 Reaper drones means that it joins a relatively select group of EU states using armed drones.[2] Italy has permission from the US to arm its MQ-9 Reapers though it is unclear whether it has done so.[3] As a small number of EU states are acquiring armed drones, there have been persistent calls by civil society groups[4] and the European Parliament for the EU to adopt a common position on the use of armed drones.[5] This is all the more important because in June 2017 the European Defence Fund announced a new multibillion-euro fund to foster cooperation among member states, including projects that aim to acquire and develop unmanned systems, drone technology and related satellite communications.[6] The possibility of EU states developing this technology without a shared understanding of its lawful use worries civil society groups, which are mindful of its potential to violate international law.[7]

The questions raised by the use of drones for lethal operations are now well established. Analysts, civil society groups and some military professionals are uneasy about the implications of remote forms of killing and the apparent ease with which some states can now conduct extraterritorial lethal operations. In response, the armed forces of states carrying out such operations emphasize that the same law applies to both 'conventional' and 'remote' military activity, and armed forces make no practical distinction in their institutional attitude towards them.[8] A second set of questions raised by campaign groups concerns the circumstances in which states use drones. The US has now used drones to conduct extraterritorial lethal operations for 15 years.[9] While a number of states have long had the capability to conduct long-range bombing campaigns, drones enable sustained surveillance that may facilitate lethal operations in areas where states appear to refrain from the use of manned aircraft due to policy considerations. States' arguments for the lawful basis of drone operations are routinely challenged by civil society groups and lawyers, particularly where drones are used outside areas of armed conflict. In the UK the most prominent example of such controversy arose from the killing of Reyaad Khan, a suspected terrorist, in Syria in 2015 by an RAF-operated MQ-9 Reaper drone.[10] This is the only documented case of the UK using its Reapers for a lethal strike in a state with which the UK was not, at the relevant time, in an armed conflict.

[1] Ewers, E. C., Fish, L., Horowitz, M. C., Sander, A. and Scharre, P. (2017), *Drone Proliferation: Policy Choices for the Trump Administration*, Center for a New American Security, http://drones.cnas.org/wp-content/uploads/2017/06/CNASReport-DroneProliferation-Final.pdf (accessed 23 Jan. 2018).
[2] Reuters (2017), 'France turns to armed drones in fight against Sahel Militants', 5 September 2017, https://www.reuters.com/article/us-france-drones/france-turns-to-armed-drones-in-fight-against-sahel-militants-idUSKCN1BG2K2 (accessed 23 Jan. 2018).
[3] Di Salvo, P. (2017), 'Armed Drones: the European Countries' Interests at Stake', Italian Coalition for Civil Liberties and Rights, 30 May 2017, https://cild.eu/en/2017/05/30/armed-drones-the-european-countries-interests-at-stake/ (accessed 23 Jan. 2018).
[4] Banks, M. (2016), 'MEPs adopt call for action on use of armed drones', *The Parliament Magazine*, 30 June 2016, https://www.theparliamentmagazine.eu/articles/news/meps-adopt-call-action-use-armed-drones (accessed 23 Jan. 2018).
[5] Dorsey, J. and Bonaquisti, G. (2017), *Towards an EU common position on the use of armed drones*, European Parliament: Directorate-General for External Policies, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578032/EXPO_STU(2017)578032_EN.pdf (accessed 23 Jan. 2018).
[6] European Commission (2017), 'A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities', European Commission press release, http://europa.eu/rapid/press-release_IP-17-1508_en.htm (accessed 23 Jan. 2018).
[7] Zwijnenburg, W. (2017), 'Why the EU should uphold human rights in its defence policy', *E!Sharp*, August 2017, https://esharp.eu/opinion/why-the-eu-should-uphold-human-rights-in-its-defence-policy (accessed 23 Jan. 2018).
[8] Ministry of Defence (2017), *Joint Doctrine Publication 0-30.2: Unmanned Aircraft Systems*, UK government, https://www.gov.uk/government/publications/unmanned-aircraft-systems-jdp-0-302 (accessed 23 Jan. 2018).
[9] BBC News (2002), 'CIA "killed al-Qaeda suspects" in Yemen', 5 November 2002, http://news.bbc.co.uk/1/hi/2402479.stm (accessed 23 Jan. 2018).
[10] UN Nations Security Council (2015), 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council', 8 September 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/688 (accessed 23 Jan. 2018).

Although there was an armed conflict in Syria at the time, the UK did not claim to be a party to it when the strike took place. The legal basis for this strike was subsequently investigated by both the UK's Joint Committee on Human Rights[11] and the Intelligence and Security Committee.[12]

Drones make it easier for states to employ extraterritorial force as their use requires fewer resources and removes the risk to personnel, which makes such lethal operations more palatable to politicians.[13] In part these characteristics mean drones are typically perceived as challenging military norms. As a result, by reducing the political risks to states associated with the use of force, drones threaten to upend the existing order through the promise of seemingly risk-free violent solutions to political problems. States defend their use of drones, either non-lethal or lethal, as they would any other exercise of military power. However, the variance regarding military drone use among European states is stark. The UK now routinely uses armed drones in military operations, and has used them for lethal operations justified in terms of self-defence, whereas other states such as Luxembourg and Malta have very small armed forces and no plans to acquire armed drones.

One of the most controversial military issues debated in Europe is the continued reliance of the US on infrastructure located in Europe for its use of armed drones abroad.[14] In order for US pilots to remotely operate platforms over the Middle East and Central Asia from the US, the country uses a satellite uplink located at Ramstein Air Base in Germany.[15] This gives rise to a number of complex legal questions related to a state's responsibility for communications involved in drone strikes that transit its territory, if a strike turns out to be unlawful. Similar issues arise in relation to drone operations launched from an EU member state's territory (e.g. the Sigonella base in Italy), or US reliance on intelligence from another state (e.g. data sharing debates in the Netherlands over complicity in US drone strikes in Somalia).[16]

These issues pose a particular problem for the EU. The US has guaranteed European security since the Second World War, and is essential to the NATO alliance of which most EU states are members.[17] Lethal operations carried out by the US beyond areas of armed conflict has drawn severe criticism, yet these operations often rely on communications infrastructure located in Europe,[18] and likely involve intelligence shared by its close allies.[19]

A common EU standard on the use of armed drones is an important goal both for civil society groups and the EU Parliament,[20] but there are reasons to be sceptical about the possibility of EU states adopting such a standard in the near future. Nonetheless, even if EU states do not agree on a

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[11] Joint Committee on Human Rights (2016), *The Government's policy on the use of drones for targeted killing*, London: House of Lords, House of Commons, Joint Committee on Human Rights, https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf (accessed 23 Jan. 2018).

[12] Intelligence and Security Committee of Parliament (2017), *UK Lethal Drone Strikes in Syria*, London: Intelligence and Security Committee of Parliament, http://isc.independent.gov.uk/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf (accessed 23 Jan. 2018).

[13] Coeckelbergh, M. (2013), 'Drones, information technology, and distance: mapping the moral epistemology of remote fighting', *Ethics and Information Technology*, 15(2): pp. 87–98.

[14] Scahill, J. (2015), 'Germany is the Tell-Tale Heart of America's Drone War', *The Intercept*, 17 April 2015, https://theintercept.com/2015/04/17/ramstein/ (accessed 23 Jan. 2018).

[15] Whittle, R. (2014) Predator: *The Secret Origins of the Drone Revolution*, Macmillan.

[16] Modderkolk, H. and Effting, M. (2015), 'Somali victims of US drone strike take legal action against The Netherlands', *de Volkskrant*, 28 November 2015, https://www.volkskrant.nl/buitenland/somali-victims-of-us-drone-strike-take-legal-action-against-the-netherlands~a4196845/ (accessed 23 Jan. 2018).

[17] Sweden, Austria, Cyprus, Finland, Ireland and Malta are EU members but not members of NATO.

[18] Notably Germany's Ramstein Air Base.

[19] The UK is a member of both the EU and the 'Five Eyes'. Different arrangements involve close intelligence cooperation with numerous EU states such as Italy, France and Germany.

[20] Dorsey and Bonaquisti (2017), 'Towards an EU common position on the use of armed drones'.

single EU standard, convergence of opinions and the debate that this would entail holds inherent value. The EU functions as a political and economic union because it enables unified common positions and it permits political and legal pluralism, which enables quite different types of state to coexist even where key issues, such as foreign policy, may differ in marked respects. This paper explores the value and implications of such a pluralist approach to the use of armed drones in the EU, either as a step towards a common EU standard or as an end-state in itself.

How the EU approaches these issues will define its collective importance in the global development of norms relating to the use of drones. Europe prides itself on its promotion of the rule of law in international affairs, including human rights law. EU states have confronted many of the specific issues that the use of military drones poses to states, and as such they can set standards and expectations for their partners. This is all the more important given that the current liberal world order is likely to face significant challenges in the coming decades. In addition, the current leadership of the US has raised questions about its role as the leading supporter of this international system. Many analysts predict that China will overtake the US as the most powerful economy in the world at some point this century, and it remains to be seen to what extent China will seek to re-shape the existing international rules-based order.

Security challenges associated with the use of military drones

States and non-state actors use improvised, commercial, and military drones for intelligence, surveillance, reconnaissance (ISR) and lethal operations in contemporary conflicts. Improvised and commercial drones are usually small and operated by individuals at short range, providing ground forces with real-time video surveillance capabilities, and, with the addition of explosives, rudimentary precision strike capabilities. State armed forces use purpose-built drones for similar effect, however, they also have access to larger platforms capable of long-distance flights, remote operation, advanced sensors, and guided munitions. Drones therefore provide a significant enhancement in aerial awareness at a tactical level, as well as increasing the vulnerability of individuals and installations to attack. Many describe the intelligence-gathering capability of drones, particularly their ability to continuously observe targets for extended periods, as their most important feature.[21]

At present, drones are mostly used by states against non-state actors, and vice versa. In particular, states currently confine their use of armed drones to permissive airspace, as they are vulnerable to attack and lack defensive features of piloted aircraft. Many of the defining features of armed drones, such as their ability to remain above a target, would not be possible in an environment with functional air-defence systems due to the slow speed of the current generation of military drones. Although it is unclear what equipment Iraqi and coalition forces are using, they have sought to counter ISIS's drone capability with electronic warfare.[22] Similarly, Ukraine's air force has shot down a number of drones of Russian origin over Ukraine, linked with the conflict in the east of the country.[23] The US is able to be selective with its use of extraterritorial lethal operations in part

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[21] Woods, C. (2015), *Sudden Justice: America's Secret Drone Wars*, Oxford University Press.

[22] Pomerleau, M. (2017), 'US coalition battles ISIS with EW, counter-drone ops', *C4ISRNET*, 27 April 2017, http://www.c4isrnet.com/c2-comms/2017/04/27/us-coalition-battles-isis-with-ew-counter-drone-ops/ (accessed 23 Jan. 2018).

[23] Borys, C. (2015), 'Ukrainian forces says two drones shot down over war zone are Russian', *Guardian*, 21 May 2015, https://www.theguardian.com/world/2015/may/21/ukraine-drones-shot-down-russian (accessed 23 Jan. 2018)

because its forces often operate with host-nation consent (thus avoiding the need to suppress air-defence systems) or they operate in areas too remote for air-defence systems.

The number of states that have procured and used drones has to date been relatively small, but this is changing fast. Numerous states are acquiring drone capabilities and developing home-grown drone platforms.[24] Drones have been predominantly used by Western states, and their use has been in line with Western policy decisions, legal interpretations and operational goals.[25] However, this is likely to change, as states are primarily acquiring armed drones from Israel and Chinese exports are increasing. This is in part because US export controls and regulatory regimes currently prevent the export of armed drones to states that China is happy to trade with.[26]

Like the US, EU states are active partners in the regulatory regimes of the global arms trade. There are international agreements regulating the sale and production of certain weapons, such as the Arms Trade Treaty.[27] In addition, regional and national export control arrangements, such as the Consolidated EU and National Arms Export Licensing Criteria, are relevant to the export of armed drones and component parts. Military drones require components that fall under the Missile Technology Control Regime (MTCR), although some experts argue that they should be separated from this regime and considered as aircraft.[28] The MTCR is an important regulatory element of the global defence industry. Although Israel is not a signatory, new Israeli drones are being designed and built with the MTCR in mind.[29]

The US has taken the lead in trying to establish global norms related to the sale and export of armed drones.[30] At the same time, China has been willing to trade with numerous states that the US has not, leading its allies to procure Chinese operating systems.[31] Perhaps in response to this, the current Trump administration is planning to relax restrictions on drone exports to compete against Chinese and Israeli manufacturers.[32] This worries civil society groups, military professionals, and analysts who think states should develop open and transparent international standards on the export and subsequent use of armed drones.[33]

The future use of drones will be determined by their ongoing effectiveness, the ability of states (and others) to acquire them, international treaties regulating their use, and agreements between states

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[24] Horowitz, M. C., Kreps, S. E. and Fuhrmann, M. (2016), 'Separating Fact from Fiction in the Debate over Drone Proliferation', *International Security*, 41(2): pp. 7–42 (accessed 23 Jan. 2018).

[25] McDonald, J. (2017), *Enemies Known and Unknown: Targeted Killings in America's Transnational War*, Oxford University Press.

[26] Ewers, E. C., Fish, L., Horowitz, M. C., Sander, A. and Scharre, P. (2017), *Drone Proliferation: Policy Choices for the Trump Administration*.

[27] Zwijnenburg, W. and van Hoorn, K. (2015), *Unmanned and Uncontrolled: Proliferation of unmanned systems and the need for improved arms export controls*, The Netherlands: PAX, https://www.paxforpeace.nl/publications/all-publications/unmanned-uncontrolled (accessed 23 Jan. 2018).

[28] Scharre, P. (2017), 'Time for US to treat modern drones like aircraft, not missiles', *The Hill*, 14 July 2017, http://thehill.com/blogs/pundits-blog/defense/342071-time-for-us-to-treat-drones-like-aircraft-not-missiles (accessed 23 Jan. 2018).

[29] Opall-Rome, B. (2017), 'Israeli firm to debut MTCR-compliant Heron drone', *Defense News*, 12 February 2017, https://www.defensenews.com/air/2017/02/12/israeli-firm-to-debut-mtcr-compliant-heron-drone/ (accessed 23 Jan. 2018).

[30] Ryan, M. (2015), 'Obama administration to allow sales of armed drones to allies', *The Washington Post*, 17 February 2015, https://www.washingtonpost.com/world/national-security/us-cracks-open-door-to-the-export-of-armed-drones-to-allied-nations/2015/02/17/c5595988-b6b2-11e4-9423-f3d0a1ec335c_story.html?utm_term=.330a8a24bada (accessed. 23 Jan. 2018); Mehta, A. (2016), 'White House Rolls Out Armed Drone Declaration', *Defense News*, 5 October 2016, https://www.defensenews.com/breaking-news/2016/10/05/white-house-rolls-out-armed-drone-declaration/ (accessed 23 Jan. 2018).

[31] Page, J. and Sonne, P. (2017), 'Unable to Buy U.S. Military Drones, Allies Place Orders With China', *The Wall Street Journal*, 17 July 2017, https://www.wsj.com/articles/unable-to-buy-u-s-military-drones-allies-place-orders-with-china-1500301716 (accessed 23 Jan. 2018).

[32] Spetalnick, M. and Stone, M. (2017), 'Exclusive – Game of Drones: U.S. poised to boost unmanned aircraft exports', Reuters, 11 October 2017, https://www.reuters.com/article/us-trump-effect-drones-exclusive/exclusive-game-of-drones-u-s-poised-to-boost-unmanned-aircraft-exports-idUSKBN1CG0F4 (accessed 23 Jan. 2018).

[33] Article 36 (2017), 'The development of international standards on the export and subsequent use of "armed or strike-enabled UAVs"', press release, September 2017, http://www.article36.org/wp-content/uploads/2017/09/FINAL-joint-statement-Sep-17.pdf (accessed 23 Jan. 2018).

relating to the location of their bases, overflight rights and interoperability. Like many other advanced military technologies, most states are likely to acquire their capabilities from leading manufacturers, such as the US, Israel and China. Drone proliferation will be limited by infrastructure constraints as, with the exception of China and Israel, states are unlikely to replicate US production capabilities without US support.[34]

The effectiveness of drones as remote surveillance platforms means that it is likely that an increasing range of actors in conflict areas will utilize them. For example, humanitarian and human rights groups are likely to use drones to enable the targeting and delivery of humanitarian aid, and to identify and track human rights violations respectively. The use of drones, and the concerns that they give rise to from political, legal and ethical points of view, will therefore be very much context dependent.

Lethal uses by non-state actors are likely to be limited to the equivalent of guided small explosive devices. Even so, as recent attacks in Ukraine have demonstrated, these can be devastating against vulnerable targets such as ammunition stores.[35] Initial academic analysis that pointed to the possibility of drones being used for terrorist purposes has now been confirmed with the use of such technology by ISIS to deliver explosives.[36] In future, both states and non-state groups are likely to consider an attack from drones when assessing their own vulnerabilities, and put measures in place to mitigate the threat. International standards on the lawful use of drones would therefore be useful as a benchmark for holding non-state groups to account.

The contemporary use of drones has demonstrated three important contexts for military drone use by states:

- Armed conflict where the benefits of drones include the relative safety of drone pilots compared to crewed platforms, and surveillance capacity, such as to observe and attack fleeting targets, and insurgent or guerrilla forces. The development of wide area surveillance systems like Gorgon Stare is in part driven by the information requirements of this kind of operation.[37] Drones are likely to replicate and augment any role currently performed by traditional aircraft. Wide area surveillance systems will make it resource efficient to monitor large physical spaces and, if such information can be analysed in an efficient manner, greatly enhance the situational awareness of military commanders;

- Lethal operations outside the context of an armed conflict, justified in terms of self−defence, for example, where states claim that it is necessary to use lethal force to prevent or disrupt terrorist plots; and

- Peacekeeping operations in which drones may enable peacekeepers and conflict monitors to heighten their situational awareness. Current use of drones by UN peacekeepers, for instance in

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[34] Gilli, A. and Gilli, M. (2016), 'The Diffusion of Drone Warfare? Industrial, Organizational, and Infrastructural Constraints', *Security Studies*, 25(1): pp. 50−84 (accessed 23 Jan. 2018).
[35] Mendel, I. (2017), 'In Ukraine, a Huge Ammunition Depot Catches Fire', *New York Times*, 27 September 2017, https://www.nytimes.com/2017/09/27/world/europe/ukraine-ammunition-depot-explosion.html (accessed 23 Jan. 2018).
[36] Waters, N. (2017), 'Death From Above: The Drone Bombs of the Caliphate', *Bellingcat*, 10 February 2017, https://www.bellingcat.com/uncategorized/2017/02/10/death-drone-bombs-caliphate/ (accessed 23 Jan. 2018).
[37] Schanz, M. V. (2011), 'The reaper harvest', *Air Force Magazine*, 94(4): pp. 36−39 (accessed 23 Jan. 2018).

the Democratic Republic of Congo, enables UN forces to track irregular armed groups in dense terrain such as forests.[38] If drones are used for this purpose in future, it is likely that UN-mandates will regulate the ways in which drones can be used by peacekeeping forces.

These are not exclusive contexts, and indeed, this is a significant issue for states that do not use drones. For example, counterterrorism operations taking place at the same time and in the same country as coalition counterinsurgency operations may pose a problem or cause a conflict for coalition partners if they are only deployed for counterinsurgency purposes or to support state-building efforts.[39]

Inter-state cooperation on drones: issues of responsibility, complicity, and accountability

In joint operations individual EU states need to maintain the legitimacy of their own military actions. Particularly when working with partners it is vital that control of a state's military forces remains with its elected government. In modern warfare, armed conflicts are increasingly undertaken by states in coalition with one another, for example The Global Coalition Against Daesh. Furthermore, the operation of advanced weapon systems such as armed drones is often distributed between partner states. As such, even when EU states may differ in their implementation of international law, it is a minimum requirement of coalition partnerships that each state's military forces do not go beyond the limits set by their own government and their country's application of the law.

The armed forces of EU states have developed detailed practices and procedures to ensure compliance with the law and the political requirements of individual countries, but drone operations draw attention to the fact that these forms of working together are sometimes poorly understood by the general public and mass media. This is seen in the negative public reactions to news stories that identify the presence of British pilots in US military operations, even though defence correspondents are well aware of, and have explained, the practice.[40] Similarly, the linkages between the military assets that may have contributed to a strike and those that undertook it may often be unclear, such as in the operation that killed Mohammed Emwazi.[41] In this instance, the UK worked hand in glove with the US in a military operation that killed a British citizen, although British forces did not carry out the strike itself.

Long-standing partnerships are a feature of US power projection. In order for US pilots in Nevada to pilot drone platforms in the Middle East, the US currently routes data via partner states, and often relies upon infrastructure of partner states. The US reliance upon Ramstein Air Base in Germany (which contains a satellite uplink for operations in the Middle East), or Naval Air Station Sigonella in Italy (from where it launched the 2011 Libya intervention), is closely tied to the kind of

[38] Charbonneau, L. (2015), 'U.N. panel urges increased use of drones in peacekeeping mission', Reuters, 23 February 2015, http://www.reuters.com/article/us-un-peacekeepers-drones/u-n-panel-urges-increased-use-of-drones-in-peacekeeping-missions-idUSKBN0LR24G20150223 (accessed 23 Jan. 2018).
[39] Naylor, S. (2015), *Relentless Strike: The Secret History of Joint Special Operations Command*, St. Martin's Press.
[40] MacAskill, E. (2015), 'British pilots bombing Isis are just part of a longstanding military exchange', *Guardian*, 17 July 2015, https://www.theguardian.com/uk-news/2015/jul/17/british-pilots-bombing-isis-are-just-part-of-a-historic-military-exchange (accessed 23 Jan. 2018).
[41] BBC News (2016), '"Jihadi John" death: Islamic State says Mohammed Emwazi killed', 19 January 2016, http://www.bbc.co.uk/news/uk-35358101 (accessed 23 Jan. 2018).

relationships it has with partner states in formal military coalitions. In military coalitions, states routinely pass information to one another, often in support of lethal operations. States may also transfer personnel into a partner state's military (e.g. embedding of troops), which is a common practice in NATO states.[42]

Reliance upon partner states means that their cooperation is required for operations to take place, at least without significantly adding to the resource costs of an operation. States retain the sovereign right to determine what kinds of US military operations can, and cannot, take place from their territory. Drone operations may also involve one state handing over operational control of the drone to another state mid-flight, unlike a manned platform that would be flown by a single set of aircrew throughout.

From a legal perspective, these scenarios of cooperation and interoperability raise complex issues of responsibility, and risks of complicity for partner states, where the principal state using the armed drones carries out an act, such as lethal strikes, that could breach international law.[43] In the case of intelligence sharing, it is inherently difficult to determine which particular state can be held responsible for individual strikes. If a state passes information to another state to enable a lethal operation, to what extent is the assisting state responsible for any internationally unlawful act that follows?

Perhaps the most important military practice that drones have highlighted is the means by which states ensure that their operations in military coalitions conform to their national standards through the use of agreed caveats that limit the participation of their forces in some areas.[44] Here, national commanders restrict the contribution of their forces to multilateral operations, either on the express direction of national political leadership, or in anticipation of possible political consequences of operations.[45] In principle, states will be reluctant to assign military assets and units to operations that risk violating international law or their own rules of engagement (which may go further than the strict legal position). But in practice, the issue may be complicated by the fact that partner states may interpret international law differently, for example on questions of imminence that arise in the law on the use of force, or the question of the geographical scope of an armed conflict. The procedural implementation of this kind of negotiation between states at the operational level is known as the 'red card' procedure, which allows states to withdraw their assets from any given operation if they feel that they may contribute to an action that would violate their own standards.[46]

Civil society groups point out that the swapping and sharing of assets allows states to contribute to coalition operations and pass responsibility to their allies without violating national restrictions. Civilian NGOs tracking casualties caused by coalition operations in Iraq and Syria note that

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[42] Joint Chiefs of Staff, *Joint Publication 3–16: Multinational Operations*, Department of Defense, 16 July 2013, https://fas.org/irp/doddir/dod/jp3-16.pdf (accessed 23 Jan. 2018).

[43] Moynihan, H. (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism (accessed 23 Jan. 2018).

[44] Saideman, S. M. and Auerswald, D. P. (2011), 'Comparing Caveats: Understanding the Sources of National Restrictions upon NATO's Mission in Afghanistan', *International Studies Quarterly*, 56(1): pp. 67–84 (accessed 23 Jan. 2018).

[45] Ibid. pp. 70–72.

[46] Kiszely, J. (2008), *Coalition Command in Contemporary Operations*, Whitehall Report, London: Royal United Services Institute, https://rusi.org/sites/default/files/200806_whr_coalition_command_in_contemporary_operations_0.pdf (accessed 23 Jan. 2018).

coalitions can be opaque, particularly when it comes to information that might directly attribute a strike to a state that has not accepted responsibility of its own accord.[47] As recent coalition operations have demonstrated, there is a clear variation between EU states on the amount and type of information that they report on their military activities. There are a number of factors that can explain this – traditional reticence to report operational details, national political sensitivities or expectations, lack of institutional capacity – alongside bad faith explanations predicated upon deceit. Issues of responsibility for the use of drones in the context of military coalitions serve as a proxy for wider issues of responsibility and transparency.

Developing or improving standards of transparency in situations where it is realistic, which may be the case in some interventions as opposed to defensive operations, would likely improve the perceived legitimacy of military operations. The UK-based monitoring organization Airwars noted that the anti-ISIS coalition's 'internal post-strike assessments were on occasion identifying civilian casualties,' but that, 'the wider system was significantly biased against the monitoring, detection and investigation of credible civilian casualty cases.'[48] This complexity and ambiguity has an impact on transparency and accountability around the use of armed drones. While it is possible for monitoring groups to track reports of individual strikes, and to detect potential civilian casualty incidents, identifying responsibility for the use of armed drones requires states to communicate their specific involvement in military operations. While international coalitions often feature a variety of partnered states and varying commitments, the EU could lead in developing shared standards for reporting military actions in coalition operations.

Drone policy: the EU context

Individual states have developed their own drone capabilities and policies in response to their perception of current and future security challenges. This individual development reflects both the changing global security context, and the regional security challenges facing the EU and its member states.

There are now a number of security challenges facing the EU, as well as its individual states, that are likely to involve the use of drones. The primary challenges include potential conflicts, migration and terrorism. Where EU states intervene abroad, the states engaged in military operations are likely to use drones to support military operations, which may require the use of infrastructure present in the EU. For example, operations to stabilize Libya, or support its government, are likely to use aerial assets based in Mediterranean states, notably Italy. In any future conflict involving EU states, be it inter-state or any form of low-intensity operation, EU states are likely to use drones for surveillance and perhaps for strike operations.

Large numbers of people migrating to the EU are fleeing conflict and persecution abroad, in addition to moving for economic reasons. Migration is associated with a number of security challenges. For example, refugees fleeing conflict do not pose a threat, but the networks of people traffickers that form to support and enable their movement, particularly through unstable countries

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[47] Airwars (2016), *Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State*, Oxford: Remote Control, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf (accessed 23 Jan. 2018).
[48] Ibid. p. 9.

such as Libya, funnel money to criminal networks.[49] Since these networks may also engage in activities like drug trafficking, EU states perceive them as a threat. These networks are also likely to increase the instability of weak or fragile states, thus making them a long-term challenge for European security. In this context, drones are likely to prove useful for border monitoring, and the surveillance of migrant populations, though there are significant legal and political issues to consider such as data protection standards, and externalizing border protection to third countries.[50]

The use of drones for strikes against terrorists or militants is likely to continue in future, but most EU states do not possess this kind of capability, and it's likely that in practice, many would be reticent about carrying out such strikes themselves, due to concerns about the legitimacy and legality of such operations. Perhaps more challenging for EU states is the prospect of terrorists using homemade or commercial drones to carry out attacks.[51] The current capabilities of drones (notably the limited amount of weight that they can carry at present) are likely to limit the damage that these attacks can cause. On the other hand, drones increase the range of targets that can be attacked, or reveal novel vulnerabilities in difficult-to-reach targets such as government offices and large modern sporting venues.[52] Such attacks may result in calls for politicians to use force in response, and drones may enable this while reducing further political risk.

EU states have procured a number of different types of drones with a range of capabilities. While some EU states have procured tactical drones that are an adjunct to land operations, others, such as the UK, France and Italy, currently operate MQ-9 Reapers that are capable of remote split operations and lethal strikes. The UK, in particular, has used this platform for self-defence lethal operations and counterterrorism operations. EU drone capabilities currently rely upon foreign manufacturers, particularly the US and Israel, however, production of advanced drones is a priority for many EU states. The UK's development of Taranis, produced by BAE, reflects the UK's priority to retain the skills and defence industry required to produce such craft.[53] This is in addition to a range of joint projects across the EU, including the UK/French Future Combat Air System (FCAS),[54] the German/French Next Generation Weapons System,[55] and Dassault nEUROn, produced by an EU consortium.[56]

US military capabilities are a fundamental guarantee of the integrity of European states, and therefore European security. The election of Donald Trump as US president has shaken the faith of some European states in this guarantee. President Trump's attitude towards the architecture of international order, for example the fundamental collective security premise of the NATO alliance, has raised the question of what the EU would do without US support. Trump's election highlights

[49] Aziz, N. A., Monzini, P. and Pastore, F (2015), *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, New-Med Research Network Report, Istituto Affari Internazionali, http://www.iai.it/sites/default/files/newmed_monzini.pdf (accessed 23 Jan. 2018).
[50] Marin L., and Krajčíková K. (2016), 'Deploying Drones in Policing Southern European Borders: Constraints and Challenges for Data Protection and Human Rights' in Završnik, A. (eds) (2016), *Drones and Unmanned Aerial Systems*, Springer.
[51] Dunn, D. H. (2013), 'Drones: disembodied aerial warfare and the unarticulated threat', *International Affairs*, 89(5): pp. 1237–1246.
[52] Walton, R. (2016), 'Protecting Euro 2016 and the Rio Olympics: Lessons Learned from London 2012', *CTC Sentinel*, 9(6): pp. 1–6.
[53] House of Commons Defence Committee (2007), *The Defence Industrial Strategy: update*, https://publications.parliament.uk/pa/cm200607/cmselect/cmdfence/177/177.pdf (accessed 23 Jan. 2018).
[54] Garrun, D. (2016), 'Future Combat Air System: UK and France move ahead', *Air Force Technology*, 16 May 2016, http://www.airforce-technology.com/features/featurefuture-combat-air-system-uk-and-france-move-ahead-4893221/ (accessed 23 Jan. 2018).
[55] Pocock, C. (2017), 'France and Germany To Develop New Fighter Without UK?', *AINonline*, 2 August 2017, https://www.ainonline.com/aviation-news/defense/2017-08-02/france-and-germany-develop-new-fighter-without-uk (accessed 23 Jan. 2018).
[56] Dassault Aviation (2003), Defense Programme Introduction, https://www.dassault-aviation.com/en/defense/neuron/introduction/ (accessed 23 Jan. 2018).

the importance of EU, US, and NATO relations in European security issues, and the potential negative consequences for the EU of serious change in current arrangements.

Another challenge for the EU is the fact that the UK has voted to leave the EU and is due to exit in 2019. At this point, it is hard to judge what consequences Brexit will have on European security and UK–EU relations, except that the acrimony surrounding the negotiations has undoubtedly worsened the UK's relationships with other EU states. Brexit will not change certain fundamental facts – the UK will remain one of the most powerful military states in Europe and a key member of NATO. According to analysts, Brexit is likely to have negative consequences for the UK, though the severity of these will depend upon its mode of exit, and the extent of its continuing relationships with the EU.[57] The economic consequences of Brexit are likely to diminish the amount of resources that the UK government has to spend on defence, and the headcount of the UK military is already small.

The EU's approach to future security challenges will shape, and be shaped by, the convergence and divergence of EU states on security challenges. Some challenges facing the EU point towards greater convergence of approach. In particular, the challenges of migration require a greater deal of cooperation between EU states. Refugee flows from Syria highlighted the fierce political disputes over responsibility for immigration. Germany's decision to announce that it would accept an unlimited number of refugees infuriated eastern European states.[58] Monitoring and managing migrants in the Mediterranean requires EU states to cooperate.

At the same time, the response of EU states to military challenges is unlikely to converge, or to develop into a common EU military position. There is pressure to converge, for example the joint development and acquisition of military technology under the recently announced European Defence Fund.[59] Yet many EU states routinely engage in military operations outside the EU, and the specific positions of each state, and the sensitive and important nature of these operations, mean that these are likely to remain national priorities.

Procurement

Unless the EU develops its own unified military formations, individual states will continue to be the primary purchasers of drones in Europe. In the past, European states have demonstrated their ability to cooperate in order to produce complex military systems,[60] as well as cooperating to procure shared capabilities, such as Belgium and Luxembourg's binational fleet of A400M military transport aircraft. A key issue for the EU is keeping national and shared capabilities up to date with growing regional security challenges. Further challenges arise from the use of US-made drones as well as the US's reliance upon infrastructure located in the EU for its use of drones. There are numerous restrictions that inhibit the development of EU drone platforms – replicating capabilities available from partner states would require a significant investment of resources and is unlikely to

[57] Busch, B. and Matthes, J. (2016), *Brexit – the economic impact: A meta-analysis*, IW-Report, No. 10, Cologne Institute for Economic Research, https://www.econstor.eu/bitstream/10419/157171/1/IW-Report-2016-10.pdf (accessed 23 Jan. 2018).
[58] BBC News (2015), 'Migrant crisis "a German problem" – Hungary's Orban', 3 September 2015, http://www.bbc.co.uk/news/world-europe-34136823 (accessed 23 Jan. 2018).
[59] European Commission (2017), 'A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities'.
[60] Edwards, J. (2011), *The EU Defence and Security Procurement Directive: a step towards affordability?*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/publications/papers/view/177293 (accessed 23 Jan. 2018).

be cost effective. Therefore the EU is likely to rely upon US capabilities for the near future. That said, the development of EU drones is important, and could boost the EU's defence manufacturing base. Initiatives such as the European Defence Fund are intended to enhance the cooperation of EU states in both defence research and acquisition of military capabilities.

It is unlikely that EU states will change the way they procure drones in future, particularly those for military use. Although private security companies and commercial contractors would likely be able to provide some drone capabilities to a theoretical unified future EU force, armed drones are likely to be purchased by states or as a consortium, even if contractors continue to perform vital support functions like maintenance and take off/landing operations in remote split operations.

Drone scenarios

Chatham House convened a group of military experts and members of civil society groups to discuss the issues in this paper and identify areas of mutual concern. Two workshops featured scenario sessions that were designed to stimulate conversation, as well as to identify differences of approach to the legal and policy issues contained within this report.

The first scenario session explored potential procurement pathways including the possibility of the EU acquiring infrastructure and platforms to replicate current US-developed drone capabilities, as well as the potential use of leased commercial capabilities from private sector companies. This was followed by a session that explored the responsibility for the use of drones under these new procurement models in a potential EU-led humanitarian intervention in North Africa.

The second scenario session tested legal issues associated with operations involving drones. It covered issues associated with unclear armed conflict status in coalition operations, the risks of complicity arising in operations between states, and the issue of coalition partners using force outside the framework of the coalition. In addition to the legal consequences participants looked at the potential public reaction to these decisions.

The most advanced drones are produced by the US, and this is likely to continue despite strong market competition from China and Israel. EU states wishing to develop or procure next generation drones are also likely to require materials, technologies or expertise covered by export control agreements. Like most advanced weapons technologies, the EU will have to keep the US, and dual use control regimes, in mind when developing future drone capabilities. Although China is emerging as a leading exporter of drone technologies, it is highly unlikely that the EU, or EU states, will purchase these platforms from China due to political sensitivities and technological differences.[61] Although Israeli drones are an alternative procurement path, these alone could not match the drone capabilities reliant upon US communications infrastructure.

As it stands, many leading EU states are now reliant on the US not only for drone platforms, but also for the training and infrastructure that enable drone operations. EU states depend upon US military communications networks for extraterritorial operations, and replacing these particularly

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[61] Bitzinger, R. A. (2016), 'China Is Suddenly a Leading Exporter of Armed Drones', *World Politics Review*, 18 January 2016, http://www.worldpoliticsreview.com/articles/17692/china-is-suddenly-a-leading-exporter-of-armed-drones (accessed 23 Jan. 2018).

expensive elements of infrastructure would be expensive.[62] Similarly, the training to fly MQ-9 Reapers is a lengthy process, currently performed in the US. It is not clear what benefit the EU could gain by setting up their own training facilities at this stage in terms of independence that would outweigh the significant resource constraints that such facilities would require. However, bottlenecks in training in the US could force European states to set up sovereign training programmes.[63]

Transparency, accountability and military practice

Controversies surrounding the use of drones demonstrate the changing context of military operations conducted by EU states, in particular the shifts in expectations about transparency and accountability for these operations. In part, these shifting expectations are driven by non-governmental organizations and other groups that are dissatisfied with the way in which governments communicate details of their military operations, or hold their personnel to account for military or intelligence operations. However, it is also important to recognize that some of these changing expectations are due to wider social trends, and changes in communications technology.

Contemporary military operations often take place in the 'goldfish bowl' of public scrutiny,[64] defined by the interaction of social media and mass media that regularly leads to legal challenges in the UK.[65] In Europe, publics expect that their armed forces operate in accordance with international law, and political controversies arise when they are perceived to fall short of these standards. Whereas conflict in previous decades was reported to the public by broadcast networks and professional journalists, contemporary conflict is often recorded by civilians on smartphones or similar devices. Evidence of civilian casualties and war crimes is now routinely recorded and disseminated, by parties to conflicts, by civilian monitoring groups and by civilians themselves.[66] Where armed forces make mistakes, these are emphasized in reporting, often by monitoring groups that can report ahead of internal investigations processes. Armed forces have found it hard to adapt to this environment of constant observation for numerous reasons. It is often difficult to immediately explain individual military actions in detail due to the requirements of operational security and due to the careful processes that must be undertaken in order to ensure accurate investigations. Processes of judicial review, such as the Baha Mousa inquiry,[67] are integral to sustaining the legitimacy of armed forces. However, the prospect of review, even for routine or lawful actions, may act as a constraint upon commanders, curtailing the flexibility of military operations.

The problem for states is that the changing context of military operations often makes it difficult to sustain perceptions of legitimate military force. If military intervention is reported and thus viewed

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[62] Fourteen member states of the European Defence Agency are in the early stages of developing a pooled European satellite network suitable for military use, but legal conditions for the project have yet to be agreed, https://eda.europa.eu/info-hub/press-centre/latest-news/2017/06/16/14-eda-member-states-to-pool-share-govsatcom-capabilities (accessed 23 Jan. 2018).

[63] Tran, P. (2015), 'UK, France Discuss Reaper Pilot Training', *Defense News*, 3 June 2015, https://www.defensenews.com/air/2015/06/03/uk-france-discuss-reaper-pilot-training/ (accessed 23 Jan. 2018).

[64] Smith, R. (2008), *The Utility of Force: The Art of War in the Modern World*, New York: Vintage Books USA.

[65] Boothby, W. H. (2014), *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors*, New York: Springer, Chapter 11.

[66] The Syrian Accountability Project, Syracuse University College of Law, http://syrianaccountabilityproject.org/ (accessed 23 Jan. 2018).

[67] Williams, A. T. (2013), *A Very British killing: The Death of Baha Mousa*, London: Random House; Gage, W. (2011), *The Baha Mousa Public Inquiry Report*, House of Commons, https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report (accessed 23 Jan. 2018).

solely through the lens of mistakes and civilian casualties, then it may become hard to defend. At the same time, the complex nature of operations can demonstrate problems with the institutions designed to ensure accountability. This is particularly apparent in the UK, where campaign groups are concerned that current oversight arrangements cannot reasonably investigate the use of lethal operations outside the context of armed conflict.[68] In the context of drones, this was highlighted by the recent Intelligence and Security Committee (ISC) report into the use of drone strikes in Syria.[69] As the ISC was not provided with submissions made to ministers, or details of the decision-making process that led the 2015 strike that killed Reyaad Khan, its report noted that:

> Oversight and scrutiny depend on primary evidence: without sight of the actual documents provided to Ministers we cannot ourselves be sure – nor offer an assurance to Parliament or the public – that we have indeed been given the full facts surrounding the authorisation process for the lethal strike against Reyaad Khan.[70]

Drone operations highlight oversight problems because they focus attention upon the targeting chain inherent in contemporary military operations. Most areas of drone operations have parallels in conventional air operations, but public attitudes to the novelty of remote piloted aircraft, and civil society expressions of concern with their ultimate use, have resulted in a deeper media discussion of many aspects of military operations. The utility of armed drones for conducting selective lethal operations means that these craft are likely to remain a visible symbol of this form of military activity, notwithstanding that there are numerous similar operations conducted by piloted aircraft and special forces units.

Drone operations also highlight the intricacies of military practice that are necessary to conduct any form of military operation. However, some elements of drone operations arouse public concern, particularly from those unfamiliar with contemporary military operations. Drones have drawn attention to the close connection between surveillance missions and lethal strikes, as well as the ease with which the armed forces and intelligence agencies from different states can pass targeting information to one another, or information that contributes to lethal operations in a more general sense. They also embody issues of sovereignty, and territorial and extraterritorial aspects of military practice, which may have been hitherto unknown to those outside the military – such as the fact that there are operational US bases and intelligence facilities in the UK, that UK pilots can conduct operations from US territory or aboard US platforms, and that officers and pilots are sometimes integrated within the command structure of allied states as a matter of routine practice.

Importantly, the use of drones demonstrates elements of common practice in joint operations and coalitions. Governments have mounted robust defences of the many elements of coalition operations that ensure partnered armed forces can work effectively together, and ensure that a state's military does not overstep its government's imposed limitations or undermine the degree of care taken in targeting.[71] The dissonance between military decision processes in the public

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[68] Moran, J. (2016), *Assessing SOF Transparency and Accountability: The use of Special Operations Forces by the UK, US, Australia, and Canada*, London: Remote Control, http://remotecontrolproject.org/publications/assessing-sof-transparency-and-accountability/ (accessed 23 Jan. 2018).
[69] Intelligence and Security Committee of Parliament (2017), *UK Lethal Drone Strikes in Syria*, House of Commons, http://isc.independent.gov.uk/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf (accessed 23 Jan. 2018).
[70] Ibid.
[71] Boothby, W. H. (2012), *The Law of Targeting*, Oxford University Press.

imagination and contemporary drone operations is large. The contemporary practice of military decision-making, notably in aerial operations, is characterized by procedural constraints, and the distribution of important decisions throughout an organization, where the decisions of dozens of personnel, if not hundreds, may directly contribute to the success, or failure of a given operation. This process can be (and has been) characterized as alienating or dehumanizing,[72] but it reflects the high degree of care that armed forces require of their own conduct.

The international legal framework on drones

The international legal framework regulating the use of armed drones encompasses three different areas of international law: the law on use of force, international humanitarian law (IHL), and international human rights law (IHRL). As such, in order for a particular drone strike to be internationally lawful, it is necessary to consider its legality under each of these three frameworks.[73] In practice, this gives rise to a number of challenges. Sometimes it may be unclear which legal justification a state is relying upon to guide its policy and actions.[74] Where states do provide a justification for lethal strikes, they may not address all relevant branches of the law. For example, the US have in the past argued that lethal drone strikes are lawful because they take place within an armed conflict, but that only addresses the IHL angle, not use of force or international human rights law issues. The picture becomes more complex if states that are jointly involved in such operations offer diverging justifications for them.

As far as the law on the use of force is concerned, states conducting lethal drone strikes usually rely on the doctrine of collective or individual self-defence against an armed attack (as the UK did in relation to the Reyaad Khan strike). The international law on the use of force permits states to use force in self-defence against an armed attack,[75] subject to the fulfilment of certain requirements. In particular, it must be necessary and proportionate to respond with force, and in assessing the application of these conditions, it will be necessary to determine the degree to which the attack is imminent. On any given set of facts, there may be differences between states on what standard of imminence applies, or on what is a proportionate response to the armed attack in question. Even if there is agreement on the relevant standards, the legality of the use of force will be difficult for independent parties to assess in practice without the full facts on the nature of the threat to which the state is responding, and these facts are not usually made available by the state concerned.

State practice since 9/11 suggests that a state may use force in self-defence in another state's territory, where that first state has been the victim of an armed attack by non-state groups operating on the latter's territory, even where that attack is not attributable to the 'host' state.[76] But the law on such a use of force is contested by some and it would still be subject to the other customary law requirements on the use of force in self-defence, including necessity and

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[72] Asaro, P. M. (2013), 'The labor of surveillance and bureaucratized killing: new subjectivities of military drone operators', *Social Semiotics*, 23(2): pp. 196–224.
[73] Heyns, C., Akande, D., Hill-Cawthorne, L., and Chengeta, T. (2016), 'The International Law Framework Regulating the Use of Armed Drones', *International and Comparative Law Quarterly*, 65(4): pp. 791–827.
[74] McDonald (2017), *Enemies Known and Unknown: Targeted Killings in America's Transnational War*.
[75] Article 51 of the UN Charter.
[76] Heyns et al. (2016), 'The International Law Framework Regulating the Use of Armed Drones', p. 803.

proportionality.[77] The necessity condition is only likely to be satisfied if it can be shown that the territorial state itself is either unwilling or unable to prevent continued attacks.[78]

Application of the legal framework in partnered operations

Difficulties in interpretation of when action in self-defence is permissible may pose a problem for the EU. Its members are likely to be closely partnered with other states that may have a more expansive view of what international law allows, notably the US. This has caused problems for EU states operating in Afghanistan under NATO command, while the US conducted parallel counterterrorism missions in the same country under Operation Enduring Freedom. At that time, there was some uncertainty among EU domestic audiences, which had no way of guaranteeing that their intelligence agencies and armed forces were not supporting operations that went beyond their own country's interpretation of what international law permits.

In practice, only a small subset of EU states take a defined, and public, policy position on their interpretation of the relevant international law in this area, and there are some differences in approach.

Given the levels of standardized cooperation and support that are necessary for effective security in the modern context, how can states identify and minimize the risks involved in complicity (in other words, assistance in another state's internationally unlawful act)? States must be mindful of the legal risks inherent in offering long-term support to other states (such as through the leasing of bases), or active participation in lethal operations by providing direct operational support. The international law on complicity consists of a network of different rules relating to states' obligations in respect of the conduct of other actors.[79] This includes Article 16 of the International Law Commission's Articles on State Responsibility, IHL and IHRL. Assistance to another state may also infringe on domestic law.[80] States should take steps to avoid becoming complicit in actions that would be deemed unlawful by their own standards. Basic elements of such mitigation include developing processes and procedures to identify potential areas of legal risk, restricting degrees of assistance to partner states, engaging in legal diplomacy, and monitoring ongoing assistance to partner states.[81]

Where unlawful acts may have been committed, challenges in court may follow at the national or international level. All EU states are party to the European Convention on Human Rights (ECHR), which imposes an obligation on contracting states to undertake specific protective duties in relation to individuals in their jurisdiction. There have been some cases before the European Court of Human Rights holding contracting states responsible for assisting in the unlawful acts of other states, notably the 'El Masri' line of cases, which related to the assistance of certain European states

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[77] Ibid., p. 804.
[78] Ibid.
[79] Moynihan, H. (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, p. 28.
[80] See, for example, *Belhaj and another v Straw & others* [2017] UKSC 3, in which a claim was brought regarding the UK's alleged rendition of the claimant to Libya, where he alleges that he was tortured. The claim was brought on the basis of a number of domestic law grounds including negligence, misfeasance in public office, false imprisonment and conspiracy to injure.
[81] Moynihan (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, pp. 40–43.

to the US in the rendition and detention of terror suspects after 9/11.[82] At the national level, there have been court cases in Germany and the UK regarding the alleged assistance of these states to the US in the context of lethal drone strikes, but so far these have not resulted in any adverse judgment against the states concerned.[83]

Participation in another state's drone strikes also raises the question of the individual responsibility of government officials for activities that could amount to the aiding or abetting of war crimes, so potential liability under international criminal law will need to be considered on the same facts. All EU member states are party to the Rome Statute of the International Criminal Court, which has jurisdiction over war crimes in certain circumstances, including (as from 17 July 2018) the crime of aggression.[84]

EU states may be partnered with states that are not parties to the same international human rights law treaties, or to the Rome Statute of the ICC, and whose actions may be considered human rights violations or war crimes. The commitment of EU states to the rule of law, including international human rights law, means that they must take appropriate measures to ensure that their actions are lawful, including through carrying out due diligence in advance of any cooperation. Each state should proactively review and ensure its compliance with the international and national law by which it is bound.[85] Where states' interpretations differ, it is necessary for each state to ensure that the contributions of its armed forces and other agencies comply with the law as it applies to that state, as interpreted in good faith.

Prospects for developing EU norms on the use of armed drones

The challenge of developing EU norms for the use of drones is that many EU states either do not use military drones, or are unlikely to use them in the circumstances that most concern campaigners. For this reason, there will always be a de facto division between states with direct experience of the policy and legal problems as well as operational realities of drone use, and those whose engagement is largely diplomatic. States particularly targeted by transnational terrorist attacks may interpret the law more permissively than those that are not.

This is not a barrier to some form of common EU position, but it suggests that an alternate approach might be to seek some form of unified understandings between EU states that have used or plan to use military drones. This position might then form the basis of a wider EU approach to drones, or might at least be the starting point for wider EU diplomacy on the subject. Here, the exit of the UK from the EU may enable closer alignment within the EU, given the UK's stated position on the use of drones in self-defence. At the same time, the UK's departure means that potential future EU discussions would lack the viewpoint of the EU state that has the greatest operational

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[82] European Court of Human Rights (2010), 'El-Masri V. the Former Yugoslav Republic Of Macedonia', Application no. 39630/09, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-110887%22]}; see also Al Nashiri v Poland [cite case ref]; Husayn v Poland [cite case ref]; and Moynihan (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, p. 91.

[83] Ross, A. (2012), 'High Court Rejects First UK Challenge to CIA's Drone Campaign', The Bureau of Investigative Journalism, 22 December 2012, https://www.thebureauinvestigates.com/stories/2012-12-22/high-court-rejects-first-uk-challenge-to-cias-drone-campaign (accessed 23 Jan. 2018).

[84] Akande, D. (2017), 'The International Criminal Court gets Jurisdiction over the Crime of Aggression', EJIL Talk! blogpost, 15 December 2017, https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/ (accessed 30 Jan. 2018).

[85] Moynihan (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*.

experience of using drones, and as a result has had to engage with the widest range of legal and policy challenges.

Civil society groups have called for states to discuss and announce a shared set of values and opinions regarding the use of drones and support for drone operations. EU institutions are currently examining this proposal.[86]

An important challenge to developing some form of common EU policy on drone use is the variation in intelligence sharing arrangements across the EU. Intelligence collection, production and dissemination are all secretive activities that are difficult to regulate in an open and transparent manner, due to the nature of intelligence operations. All EU states currently strike their own balance in regulating the activities of their respective intelligence organizations, a balance that reflects their own constitutional arrangements, as well as shared EU values of democracy and openness. It is unlikely that a specific issue, such as policies on the use of drones, will dictate these wider partnerships. However, drone operations do serve as a useful, if contentious, focal point for public debate. States could take the opportunity to explain the strategic importance of their intelligence sharing relationships and partnerships to their respective publics. There is an inherent reassurance value in states publicly explaining and framing the role of intelligence sharing in their national security policies, even when the amount of detail that the state can provide is limited.

European states could work to develop public norms related to a wider investigation into the effects of military operations. States vary in their practices for assessing the existence of civilian casualties in battle damage assessments. Battle damage assessments are an important element of military practice, since they allow armed forces to understand the effects of their own operations, to judge their effectiveness, to determine whether a repeat attack is required and to learn from experience.[87] However, these processes are also resource intensive and armed forces engaged in operations have to balance the resources allotted to conducting such activities with those available to conduct other forms of military activity. It is unclear how committed different states are to the identification of civilian casualties resulting from military operations, including erroneous attacks and weapon systems malfunctions. Since assets for conducting these assessments are drawn from the pool available for coalition operations, it is unclear how states maintain appropriate standards for assessing the effects of military operations.

This is particularly an issue where there are few, if any, ground assets available to investigate sites of operations, or insufficient security to enable investigations to take place. A conventional ground force would encounter the effects of their own operations, or receive assessments from local civilians. This is not the case with aerial operations, and here the use of drones highlights issues that are of fundamental importance to the use of air power in the 21st century. Explaining the limits of battle damage assessment can help states to avoid criticisms that they are trying to 'cover up' mistakes, but it should also serve to inform the public about the realistic limits of conventional armed forces, particularly if their options for using ground forces are constrained due to national, or international, politics.

[86] Directorate-General for External Policies (2017), 'Towards an EU common position on the use of armed drones', European Parliament, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578032/EXPO_STU(2017)578032_EN.pdf (accessed 23 Jan. 2018).
[87] McNeal, G. S. (2013), 'Targeted Killing and Accountability', *The Georgetown Law Journal*, 102: p. 681.

Duties to investigate incidents are, at least in the first instance, the responsibility of the individual states participating in a military operation. States may need to investigate criminal allegations or possible human rights abuses, alongside investigations that support the military requirement for assurance that weapons and systems have operated as intended and expected. Investigations to ensure military assurance may require the investigation of particular operations in which a significant error has occurred or a crime has been committed. But such operational investigations are different from independent investigations into criminal allegations and human rights abuses. If states lack the ability to conduct independent and impartial investigations, then international bodies, such as UN fact finding commissions, may seek to step in.

In practice it may be very difficult in some circumstances to conduct such investigations on the ground due to, for example, the security situation, physical impediments to access, or host state denial of access. There are clear resource implications involved in investigations in terms of equipment, skills and deployment, which need to be addressed on a national and a multinational basis. It is important that where states are proposing to cooperate on drone strikes, they factor these resources for post-strike investigations into any decision to assist. In a multi-state operation, each of the states that participated in a particular operation that has gone wrong will have individual and collective interest to ensure that an investigation takes place. It is in this context that European states could lead the way in the responsible use of drones by demonstrating the value and importance of investigating the consequences of military operations.

Conclusion

As a powerful group of states – with considerable economic and diplomatic influence, as well as two permanent members of the UN Security Council – the EU is well placed to exert influence in the international system, including discussions on compliance with the international legal framework relevant to the use of drones and the setting of standards.

States should approach the controversies that surround the use of drones as an opportunity for dialogue, with their publics and civil society groups, regarding the practicalities of military operations, their role in ensuring national security and public safety, and transparency and accountability issues around these operations. It is clear that there is considerable unease and uncertainty with specific elements of military practice that are highlighted by drone operations, and states would benefit most from engagement on these issues, allowing their citizens to understand the broader context of drone operations, and the continuities between military operations in general and the use of armed drones.

One element of public reassurance clearly relates to military cooperation between states, including coalition operations. Here, states could work towards common standards of communication with the general public in regards to the leasing of bases to partner states, contributions and assistance to military operations, and the sharing of intelligence with partners.[88]

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[88] Moynihan (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*.

From a national perspective, states could share their perceived responsibilities in the context of coalition operations with their publics, including the shared responsibility for joint military operations.

Armed forces tasked with fighting substantial military campaigns, or taking lead roles in military coalitions, are likely to be best placed to identify and explain the practical limits to accountability in military operations. The conduct of hostilities will inevitably determine the likely types of errors and problems that occur in armed conflict. They will also determine the limits to battle damage assessment, and investigations of operations where civilian casualties are reported, or where errors occur. Where possible, states should agree and communicate their standards for investigating military incidents, as well as engage their publics in a broader conversation regarding some of the limits to investigations that armed conflict may entail.

Addressing state interpretations of responsibility and complicity – as well as the processes and practices that a state uses to identify and minimize risks for the operations of partner states – would be a good starting point for wider discussions.[89]

Recommendations

- States should go beyond the 'drone debate' and treat the media attention over the use of armed drones as an opportunity to explain the broader underpinnings of contemporary military operations. This would enhance the legitimacy of military operations involving working practices that have proved controversial in the context of drone operations.

- States should work together to identify accountability gaps relating to drone use. Although accountability mechanisms may vary between states, each is likely to share accountability issues, such as those inherent in intelligence collection, which may be exacerbated by the actions of partner states. The product of inter-state dialogue on accountability could take the form of public documents or standards that communicate common concerns of states, or pathways for future action to monitor or close accountability gaps.

- States should work to communicate their investigations procedures, as well as the resources devoted towards ensuring that mistakes are identified, to improve the perception of drone use among domestic audiences. To the extent that is permitted by operational security, states should work to communicate the importance of context and the complexity of investigations procedures, as well as the outcomes of investigations with the public.

- States should work to identify, and communicate, common standards on both assistance and strategies for mitigating the risks of complicity, to ensure that they do not unwittingly assist in unlawful lethal operations. Public audiences are unlikely to be aware of the degree to which their governments seek to comply with relevant law and policy commitments while providing assistance to partner states. Although it is clear that some states are mindful of the issue of complicity, states could work together to define and agree upon standards for communicating

[89] Ibid.

information related to the mitigation of complicity. This might take the form of open registers of agreements with partner states (leasing agreements, contractor relationships), and/or publicly identifying limits to transparency.

- Recent conflicts have highlighted the problems and legal confusion that can arise from overlapping armed conflicts, as well as state uses of force justified as acts of self-defence. Concerns for operational security may hinder the ability of states to be completely transparent about the nature and degree of assistance in real time. Nonetheless, proactively identifying common standards of assistance would help assisting states to reassure their publics that there are strategies in place to reduce the risk of the assistance contravening international law, or domestic political constraints on the use of force.

About the Author

Jack McDonald is a lecturer in the Department of War Studies at King's College London. His research analyses the relationship between ethics, law, technology and war. His recent book *Enemies Known and Unknown: Targeted Killings in America's Transnational War* (Hurst & Co./OUP, 2017) examines the strategic and legal consequences of US drone use and targeted killings.

Acknowledgments

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Cover image: A Heron drone on the runway at the Castor military camp in Gao, Mali, on 19 May 2017. Members of the German armed forces (Bundeswehr) have been deployed to the region as part of the UN mission named MINUSMA (United Nations Multidimensional Integrated Stabilization Mission in Mali).

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