

The Overseas Operations Act, Drone Strikes, and the Presumption of Lawfulness

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The Overseas Operations Act, which recently became law, aims to limit the exposure of members of the armed forces to prosecution for crimes committed in the course of armed conflict. Unsurprisingly its passage through Parliament was fraught with controversy. In addition, the Parliamentary debate surrounding the Act highlighted that government thinking around the use of armed drones continues to rely on problematic presumptions and tropes. In its response to questions raised in Parliament, the government has betrayed its underlying view that drone warfare is inherently lawful and clean.

With the aim of limiting 'vexatious claims and prosecution of historical events' that emerge from the 'uniquely complex environment of armed conflict overseas', the Act is divided into two substantive parts. Part 1 creates a new framework of hurdles to be overcome before members of the armed forces can be prosecuted for crimes committed more than five years ago during overseas operations. These prosecutions will now only go ahead in 'exceptional cases'. Part 2 reduces the time period within which civil and human rights claims can be brought against the Ministry of Defence or armed forces. Additionally, the Act seeks to place a duty on the government to consider derogating from (i.e. suspend) aspects of the European Convention on Human Rights in relation to 'significant' overseas operations. Unsurprisingly, the Act has been subject to a great deal of criticism. It has been described as a 'significant barrier to justice', contrary to

the rule of law, and likely to hamper the training of soldiers.

Beyond this, the passage of the Act has incidentally allowed insight into the government's thinking around the use of drones, and lethal autonomous weapon systems (LAWS). In a House of Lords debate on 11 March 2021 Lord Browne of Ladyton tabled an amendment which would have required the government to produce a report into the increasing use of artificial intelligence (AI) for military purposes. Lord Browne's reason for tabling this amendment was his belief that the Act is based on incorrect perceptions of the future of war, focusing on traditional 'boots on the ground' operations, and ignoring the increasing use of remote and autonomous technology.

This belief came from the fact that the Act applies only to members of the armed forces who commit a potential offence when 'deployed on overseas operations', meaning 'outside the British Islands' (per Section 1(2) and (6) of the Act). One of the questions Lord Browne posed was:

If a UAV operator works from a control room here in the UK, in support of troops on the ground in a country beyond the British Isles, are they deployed on overseas operations for the purposes of this legislation?

For Lord Browne, the legislation fails to keep pace with the 'forward-facing nature' of government military policy, as evidenced by the emphasis on modernising defence in the recent Integrated Review. Ultimately the amendment was withdrawn, but with the promise from Lord Browne that it may return in some form.

Lord Browne's concerns are important, particularly where they betray a lack of joined up thinking by the government in relation to technology and war. However, it is the government's response that is most interesting.

In a letter on 25 March 2021, Baroness Goldie, the Minister of State for Defence, wrote to Lord Browne to address his concerns. Baroness Goldie said, among other things, that it was right to leave drone crews out of the scope of the Act for two main reasons. First, they are not at risk of actual or threatened personal attack or violence, unlike soldiers in the field. Secondly, there are not the same 'difficulties of recording decisions and retaining evidence' as there are for personnel deployed overseas.

Drone operators are therefore excluded from the remit of this protective legislation (i.e. they will be more open to prosecution than personnel overseas) because they are perceived to be removed from immediate threats. This appears to be based on the old presumption that drone strikes are inherently less likely to be unlawful than other types of warfare because of the characteristics of the weapon system. The suggestion is that because drones allow more consideration before a strike is taken, and because they carry precision munitions, their attacks must be lawful. Because of this, drone crews do not need protection – why would they if what they do is always lawful?

No doubt this articulation of the underlying assumptions would be rejected by the government, and it may not consciously be held by anyone, but nonetheless the presumption seems to be there, and its implications are very dangerous indeed. It may lead to a failure to investigate strikes that have potentially violated the law, as the view becomes ever more entrenched that drone strikes are beyond reproach. There is evidence to suggest this is already the case in relation to some strikes carried out within Operation Shader (though in fact the refusal to investigate civilian harm in Operation Shader applies to all strikes, not just those carried out with drones).

Perhaps more problematically, the presumption supports the notion that drone strikes are clean, and can be used quickly

and efficiently, without unintended consequences. This has been a common thread in the US discourse – drones have been presented as being ‘surgical’, and having ‘laser-like precision’. The presumption risks accelerating the proliferation of drone use, particularly as the UK moves towards a policy of ‘persistent engagement’ and readiness for warfighting, as set out in the Integrated Review.

It has been demonstrated on numerous occasions that drone strikes are not clean, nor do they avoid collateral damage. US drone strikes in Pakistan, Afghanistan, Yemen and Somalia are estimated to have killed up to 2,200 civilians. UK drones in Iraq and Syria are reputed to have killed a number of civilians, despite continued insistence by the Ministry of Defence that there has been only one unintended casualty.

The pervasive presumption that drone warfare is inherently lawful and clean has real world consequences upon the lives of those living beneath them. It is sad though unsurprising that this presumption persists within government. Of course, it is not my intention to call for the expansion of the protections under the Act to be extended to include drone pilots – my view is that the Act should never have been passed, for the many problems that have been highlighted by critical commentators. Nevertheless, the passage of the Act has demonstrated the continued presence of harmful presumptions around the use of drones. Lord Browne has demonstrated that the government’s Act is stuck in the past with its unrealistic notions of what warfare looks like. The response to his comments shows that the government continues to hold similarly outdated and inaccurate views regarding the reality of drone warfare.