

## **INTERNATIONAL LAW ASPECTS OF THE USE OF DRONES FOR LETHAL TARGETING**

### **I. Executive Summary**

1 The present submission provides an overview of the rules of international law governing the conduct of lethal drone operations by British armed forces.<sup>1</sup> In particular, it provides an assessment of the key legal aspects of the drone strike carried out by the Royal Air Force (RAF) in Raqqa, Syria, on 21 August 2015, as this strike is of particular interest to the present inquiry. Our key conclusions regarding the Raqqa strike are as follows.

- Although the Government has relied on legal arguments which are not entirely settled, a strong *prima facie* case has been made to justify the strike as a lawful exercise of the right of self-defence.
- The law of armed conflict relating to non-international armed conflict applied to the strike and in this light the operation was conducted in full conformity with the relevant rules.
- The European Convention on Human Rights did not apply to the strike in Raqqa. Even if it did, the better view is that the authority for lethal targeting under the law of armed conflict, including the permissibility of causing incidental civilian loss not in excess of the military advantage anticipated (had this rule been applicable in present case), operates to displace a stringent interpretation of Article 2 ECHR.
- Overall, it appears that the concerns that the Government's legal argument is inconsistent, inadequate or a radically new departure are misplaced.

### **II. The Applicable International Legal Framework**

2 Over the last decade, the use of remotely piloted aircraft systems (RPAS), colloquially known as 'drones', has proliferated. Their extended loitering capability has proven itself particularly useful in a counter-insurgency role, prompting many States, including the UK, to invest in this new technology.<sup>2</sup> The emergence of drone warfare has raised a series of difficult questions under public international law. Despite extensive public and scholarly debate, many of these questions remain unresolved. This is so largely because the applicable law is uncertain and complex. This uncertainty and complexity does not absolve States from their duty to comply with their international obligations in good faith. However, it does mean that there is scope for reasonable disagreement as to what those obligations are and how the tensions between the different applicable legal regimes should be reconciled.

3 A broad consensus exists that the conduct of drone strikes in principle engages three main branches of international law: the rules governing the use of force, the law of armed conflict and international human rights law.<sup>3</sup> Consequently, the principal elements of the international legal framework governing drone operations are perfectly clear. What is less clear, and hence subject to debate, is the mutual relationship of these three branches, the conditions governing their applicability, the constraints they impose on military action and the legal authority they confer on States to conduct

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<sup>1</sup> We do not use the term 'targeted killing' in this submission, primarily because '[i]n a situation qualifying as an armed conflict, the adoption of a pre-identified list of individual military targets is not unlawful', but constitutes 'a paradigm application of the principle of distinction', as pointed out by Ben Emmerson QC in Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc A/68/389, 18 September 2013, para 24.

<sup>2</sup> See Louisa Brooke-Holland, *Overview of Military Drones Used by the UK Armed Forces*, House of Commons Library, Briefing Paper, Number 6493, 8 October 2015.

<sup>3</sup> Michael N Schmitt, 'Narrowing the International Law Divide: The Drone Debate Matures', (2014) 39 *Yale Journal of International Law* 12, 14.

lethal operations. These legal difficulties are neither novel nor uniquely confined to drone warfare. For the most part, the use of drones simply adds fuel to existing legal controversies.<sup>4</sup> These controversies have been covered in great detail elsewhere.<sup>5</sup> In this submission, we concentrate on the main points of contention relevant to the present inquiry, in particular in relation to the drone strike carried out by the Royal Air Force (RAF) in Raqqa, Syria, on 21 August 2015.<sup>6</sup>

### III. The Rules Governing the Use of Force

4 International law prohibits States from using force in the conduct of their international relations.<sup>7</sup> The prohibition is a comprehensive one and there is little doubt that the use of armed drones to conduct lethal strikes in the territory of other States engages it. This is so even in cases where a drone strike is directed against third parties present in the territory of another State, rather than the infrastructure or personnel of the host State itself.<sup>8</sup>

5 The prohibition of the use of force is subject to certain exceptions. If a drone strike falls within one or more of these, it will not constitute an unlawful use of force.<sup>9</sup> Three exceptions are relevant in the present context.<sup>10</sup> First, the territorial State may consent to drone operations within its territory. The consent of the Afghan authorities thus constituted one of the legal bases for the deployment of RAF drones as part of Operation Herrick in Afghanistan between 2008 and 2014. Second, the deployment of drones may be permissible in the implementation of an enforcement mandate issued by the Security Council of the United Nations acting under Chapter VII of the United Nations Charter. Provided that the Security Council has authorised the use of ‘all necessary measures’, the conduct of lethal drone operations is permissible within the scope of the mandate. In a written answer to the House of Lords, Lord Astor of Hever, Under-Secretary of State at the Ministry of Defence, acknowledged that ‘UK personnel flew armed remotely piloted air systems missions against Gaddafi’s forces in Libya in 2011, in support of the NATO humanitarian mission authorised under UNSCR resolution 1973’.<sup>11</sup> Third, drone operations may be permissible in the exercise of the inherent right of individual and collective self-defence.<sup>12</sup> The Government has relied on this third exception to justify the operation carried out in Raqqa on 21 August 2015. In its letter addressed to the Security Council on 7 September 2015, the Government stated that the strike was carried out against a ‘target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom’ and that the use of force constituted a ‘necessary and proportionate exercise of the individual right of self-defence of the United

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<sup>4</sup> As acknowledged in JDN 2/11, *The UK Approach to Unmanned Aircraft Systems*, Development, Concepts and Doctrine Centre, 30 March 2011, 5–1 (‘Most of the legal issues surrounding the use of existing and planned systems are well understood and are simply a variation of those associated with manned systems.’)

<sup>5</sup> E.g. Michael N Schmitt, ‘Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law’, (2013) 52 *Columbia Journal of Transnational Law* 77; Jelena Pejic, ‘Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications’ (2014) 96 *International Review of the Red Cross* 67.

<sup>6</sup> For an overview, see Arabella Lang, *UK Drone Attack in Syria: Legal Questions*, House of Commons Library Briefing Paper, Number 7332, 20 October 2015.

<sup>7</sup> Article 2(4), United Nations Charter. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (Merits) (1986) ICJ Rep 14, paras 187–192.

<sup>8</sup> Whether the mere transit of an armed drone without the consent of the territorial State constitutes a use of force is open to question, but this issue does not need to be settled here. See Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), at 84–92.

<sup>9</sup> Although this would not necessarily prevent it from violating other applicable rules of international law, for instance the law of armed conflict.

<sup>10</sup> In addition to the exceptions discussed here, it should be recalled that the UK Government takes the position that the use of force is also permitted in order to alleviate an overwhelming humanitarian catastrophe. See Chemical Weapon Use by Syrian Regime: UK Government Legal Position, 29 August 2013 (<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>).

However, so far this doctrine has not been invoked to justify individual drone strikes.

<sup>11</sup> *Hansard*, House of Lords, 24 July 2012, col WA140.

<sup>12</sup> Article 51, United Nations Charter.

Kingdom'.<sup>13</sup> In addition, the letter also stated that 'ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.' Despite suggestions to the contrary, there is no logical or legal contradiction between invoking the right of individual and collective self-defence at the same time. An armed attack may be directed against a State and its allies simultaneously. Indeed, it should be recalled that the UK has relied on the right of both individual and collective self-defence in response to the attacks of 11 September 2001.<sup>14</sup>

6 As far as individual self-defence is concerned, it is clear from the letter addressed to the Security Council that the Government invoked the right of self-defence against an attack from ISIL which had not yet materialised. This raises a number of questions. First, to be lawful, military action in self-defence must be directed against an armed attack. In his statement made to the House of Commons on 7 September 2015, Prime Minister David Cameron declared that the ISIL fighters targeted by the Raqqa strike were 'seeking to orchestrate specific and barbaric attacks against the West, including directing a number of planned terrorist attacks right here in Britain, such as plots to attack high profile public commemorations, including those taking place this summer.'<sup>15</sup> The statement makes clear that, if successful, the attacks would have caused loss of life and damage to property in the UK.<sup>16</sup> As such, they would have risen to the level of an armed attack in their scale and effects,<sup>17</sup> thereby satisfying any gravity requirement for lawful self-defence. In recent years, a debate has ensued as to whether self-defence is available only if an armed attack emanates from another State or whether it is also available against non-State actors not acting under the control or the directions of another State. While the International Court of Justice insists that the right of self-defence is limited to cases of 'armed attack by one State against another State',<sup>18</sup> this approach has been rejected as too restrictive.<sup>19</sup> In fact, it does not reflect State practice.<sup>20</sup> The better view is that the right of individual and collective self-defence does extend to attacks originating from non-State actors, such as ISIL.<sup>21</sup>

7 Second, it has been questioned whether military action by the UK in anticipation of an attack which has not yet materialised was justified. The permissibility and conditions governing anticipatory self-defence have been the subject of a long-running debate. It is now broadly accepted that the right of self-defence cannot be so strictly construed as to condemn a victim State to await a debilitating blow,<sup>22</sup> yet it is not authoritatively settled how imminent an anticipated attack must be in order to trigger the right to act in self-defence. At one end, it has been suggested that the use of force is permitted to 'intercept' an armed attack to which the other side has committed itself in an irrevocable way, even though the first shot has yet to be fired.<sup>23</sup> This position is unobjectionable. At the other end, in its National Security Strategy issued in 2002, the United States affirmed its readiness to exercise the right

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<sup>13</sup> 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, UN Doc S/2015/688 (8 September 2015).

<sup>14</sup> Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2001/947 (7 October 2001).

<sup>15</sup> The Prime Minister (Mr David Cameron), *Hansard*, House of Commons, 7 September 2015, col 25.

<sup>16</sup> The Prime Minister specifically stated that the intention of the ISIL fighters targeted was 'the murder of British citizens', *ibid*.

<sup>17</sup> *Nicaragua* (n 6), para 195.

<sup>18</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, para 138.

<sup>19</sup> Sean D Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?' (2005), 99 *American Journal of International Law* 62.

<sup>20</sup> See Christian J Tams, 'The Use of Force against Terrorists', (2009) 20 *European Journal of International Law* 359.

<sup>21</sup> As implied by Security Council Resolutions 1368 of 12 September 2001 and 1373 of 28 September 2001, adopted in response to the attacks of 11 September 2001.

<sup>22</sup> E.g. Michael N Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013), at 64.

<sup>23</sup> Yoram Dinstein, *War, Aggression and Self-defence* (5<sup>th</sup> edn, 2011), at 204–205.

of self-defence by acting ‘preemptively’ against terrorists.<sup>24</sup> Such a broad formulation of the right enjoys little support. The UK Government has adopted an intermediate position, declaring that ‘international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote’.<sup>25</sup> Contrary to what has been suggested by some commentators, the fact that the Raqqa operation was planned for some time does not imply that the requirement of imminence could not have been satisfied. On this point, the debate has focused almost exclusively on the test set out in the famous *Caroline* case, which demands that the necessity for self-defence must be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’.<sup>26</sup> This formula suggests that self-defence against an impending armed attack is permissible only at a point in time when the attack is just about to materialise. This may have been a workable standard in the 19<sup>th</sup> century, but it is too narrow in the present strategic and technological environment. It is now broadly accepted that the requirement of imminence must be assessed not solely with reference to temporal criteria, but in the light of broader circumstances, including the nature of the threat, the capability of the attacker and the ability of the victim State to effectively thwart the attack.<sup>27</sup> Moreover, it must be borne in mind that the planning and preparation of military operations takes time.<sup>28</sup> To insist that action must be ‘instant’ and leave ‘no moment for deliberation’ may not only be impractical for operational reasons, but it may not allow those planning an operation to discharge their duties under the law of armed conflict to take all necessary precautions to avoid incidental loss of civilian life.<sup>29</sup> Bearing in mind these considerations, nothing suggests that the imminence requirement could not have been satisfied in the present case in the face of what was said to be a ‘clear, credible and specific terrorist threat’.<sup>30</sup>

8 Third, since nothing indicates that the Syrian authorities were implicated in the impending attack planned by ISIL, the question arises whether the Government may invoke the right of self-defence to justify the conduct of military operations inside Syria. Even where terrorist and other armed groups operate without State support, they invariably do so inside another State. For practical reasons, military action against such armed groups therefore inevitably involves intervention into the territory of another State. Unless the host State is sufficiently implicated in the illicit activities of the armed group, military action in its territory would be contrary to the prohibition of the use of force. In recent years, some States, in particular the United States of America, have asserted that the use of force in self-defence is permissible in such circumstances where the host State is ‘unable or unwilling’ to effectively address the threat posed by the armed group.<sup>31</sup> The Prime Minister’s statement reveals that the Government relied on this test by implication. According to the Prime Minister, military action in Raqqa was taken ‘because there was no alternative. In this area, there is no government we can work with.’<sup>32</sup> The status of the ‘unable or unwilling’ test as a rule of international law remains uncertain. However, this does not imply that the test is without legal merit. Not only has it been convincingly traced to the law of neutrality,<sup>33</sup> but it is also corroborated by the broad level of international support for Operation

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<sup>24</sup> The National Security Strategy of the United States of America, September 2002, at 6.

<sup>25</sup> The Attorney-General (Lord Goldsmith), *Hansard*, House of Lords, 21 April 2004, col 370.

<sup>26</sup> Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr McLeod, for the Destruction of the Steamboat *Caroline*, March–April 1841 in (1857) 29 BFSP 1840, at 1138.

<sup>27</sup> Elizabeth Wilmshurst, ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’, (2006) 55 *International and Comparative Law Quarterly* 963, at 967–968.

<sup>28</sup> As the Government has pointed out in relation to past incidents: UN Doc S/PV.1109, 7 April 1964, para 23 (‘Defensive measures undertaken by a responsible Government require preparation and the proper approval just as much as any other measure.’)

<sup>29</sup> Article 57, Additional Protocol I and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), Rules 15–24.

<sup>30</sup> The Prime Minister (n 13), col 26.

<sup>31</sup> Remarks of President Barack Obama, National Defense University, 23 May 2013 (<https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>).

<sup>32</sup> The Prime Minister (n 13), col 25.

<sup>33</sup> Ashley S Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense’

Enduring Freedom in its initial stages after the attacks of 11 September 2001.

9 As far as the right of collective self-defence is concerned, reliance on this right by the Government does not remove the need for the victim State, in this case Iraq, to satisfy the requirements of individual self-defence.<sup>34</sup> In the present case, Iraq did so with reference to the attacks perpetrated by ISIL against it from abroad, in particular from eastern Syria.<sup>35</sup> In so far as the use of force against targets in Syria is necessary and proportionate in response to the ongoing attacks against Iraq emanating from Syrian territory as a matter of Iraq's right of individual self-defence, the Government is justified to rely on the right of collective self-defence. Nonetheless, the fact that the Prime Minister conceded that 'the strike was not part of coalition military action against ISIL in Syria'<sup>36</sup> has caused some to query whether the Government may consistently invoke both individual and collective self-defence as a legal justification.<sup>37</sup> This inconsistency is more apparent than real. As will be recalled, Parliament did not endorse UK air strikes in Syria as part of the campaign to assist the Government of Iraq to defend itself against the threat posed by ISIL.<sup>38</sup> Since the aim of the Raqqa strike was to defend the UK, the operation did not overstep this limitation. However, none of this prevents the Government from invoking the right of collective self-defence as an additional ground for establishing the legality of the operation as a matter of international law.

10 Overall, the Government has set out a *prima facie* case for the legality of the drone strike of 21 August 2015 under the law governing the use of force. Although not all of the legal principles it has relied on are settled, it is for the Government to decide, acting in good faith and with due regard to the UK's international obligations and the facts, whether or not on balance a sufficiently strong case exists to justify military action.

#### IV. The Law of Armed Conflict

11 The law of armed conflict, also known as international humanitarian law, governs the conduct of hostilities in times of war. The law falls into two branches. One branch applies in *international* armed conflicts between two or more States, while the other applies in *non-international* armed conflicts between States and non-State actors or between several non-State actors. In both cases, the existence of an armed conflict is a precondition for the applicability of the main body of the law. Accordingly, drone operations are subject to the law of armed conflict whenever they take place in the context of an international or a non-international armed conflict.

12 Responding to a question by the then Leader of the Opposition following his statement to the House of Commons, the Prime Minister accepted that the Raqqa operation was 'a new departure' in so far as it represented 'the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war'.<sup>39</sup> This factor does complicate the operation's classification under the law of armed conflict.

13 As the Prime Minister has pointed out, the UK has carried out lethal drone strikes in Afghanistan and more recently in Iraq. In those cases, the assets involved were deployed in the context of ongoing non-international armed conflicts to which the UK was a party (in the case of Afghanistan)<sup>40</sup> or still is a party (in the case of Iraq)<sup>41</sup> in order to carry out strikes against targets located within the territory of

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(2011–2012) 52 *Virginia Journal of International Law* 483.

<sup>34</sup> *Nicaragua* (n 6), para 195.

<sup>35</sup> See Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/2014/440 (25 June 2014) and Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014).

<sup>36</sup> The Prime Minister (n 13), col 26.

<sup>37</sup> 'UK Envoy Makes New Legal Argument for Drone Killings in Syria', *The Guardian*, 10 September 2015.

<sup>38</sup> *Hansard*, House of Commons, 26 September 2014, cols 1365–1366.

<sup>39</sup> The Prime Minister (n 13), col 30.

<sup>40</sup> GS (Existence of Internal Armed Conflict) Afghanistan [2009] UKAIT 10 ('The Secretary of State concedes that as at 7 January 2009 for the purpose of International Humanitarian Law (IHL) there is an internal armed conflict in Afghanistan extending to the whole of the territory of Afghanistan').

other parties to those conflicts, Afghanistan and Iraq respectively. Because of these factual circumstances, it is beyond doubt that the law of non-international armed conflict applied to the drone operations carried out in these theatres. By contrast, the classification of the Syrian operation is not as straightforward. Two questions must be distinguished.

14 First, did the law of armed conflict apply between the UK and Syria? The answer depends on whether or not an armed conflict arose between the UK and Syria.<sup>42</sup> One school of thought holds that hostilities between two States must reach a certain degree of intensity before they can be classified as armed conflicts and thus trigger the applicability of the law of armed conflict.<sup>43</sup> Another school of thought suggests that no such intensity requirement applies, but that '[a]ny difference arising between two States and leading to the intervention of members of the armed forces' constitutes an international armed conflict'.<sup>44</sup> While the Raqqa strike involved a military intervention by British forces into Syrian territory without the consent of the Syrian authorities, it was not directed against the assets or personnel of the Syrian State. Accordingly, irrespective of whether the strike satisfied any applicable intensity requirements, the applicability of the law of armed conflict between the UK and Syria may be questioned on the grounds that the hostilities did not in fact arise between two States, but between the UK and ISIL. An alternative position suggests that the conduct of hostilities by one State against non-State actors located in the territory of another State without the latter's consent nonetheless amounts to 'resort to armed force between two States',<sup>45</sup> leading to the applicability of the law of non-international armed conflict. However, even if this position is correct and the law of international armed conflict did apply between the UK and Syria, this would be of limited practical import in the present case, since no combat activities actually ensued between British and Syrian forces.

15 Second, did the law of armed conflict apply between the UK and the ISIL fighters targeted in the strike? Three main possibilities must be considered. First, according to one view, in circumstances where one State conducts military operations against non-State actors inside the territory of another State without its consent, the conflict between the intervening and the territorial State and the conflict between the intervening State and the non-State actor are to be classified as a single international armed conflict.<sup>46</sup> On this account, the Raqqa strike was governed by the law of international armed conflict. However, this approach is not convincing, because it is based on the idea that the hostilities between the two States and between the intervening State and the non-State actor are inseparable.<sup>47</sup> This may be true in some situations, but it is certainly not true in the present case, where ISIL is involved in an armed conflict against Syria. The hostilities between the UK and ISIL and between the UK and Syria are therefore clearly separate in nature. Consequently, the possibility that the strike was governed by the law of international armed conflict must be discounted.

16 Second, since the UK is a party to an ongoing non-international armed conflict with ISIL in the territory of Iraq,<sup>48</sup> it is conceivable that the law governing this conflict extended to British operations in Syria. While it is common ground that the law of armed conflict applies in the territory of a State party to a non-international armed conflict,<sup>49</sup> it is less certain under what conditions it may apply beyond its borders. One approach, supported by the International Committee of the Red Cross,<sup>50</sup> suggests that the

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<sup>41</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, UN Doc A/HRC/28/18, 13 March 2015, para 13.

<sup>42</sup> Common Article 2, Geneva Conventions of 1949.

<sup>43</sup> International Law Association, Use of Force Committee, Final Report on the Meaning of Armed Conflict in International Law, at 29–32.

<sup>44</sup> Jean Pictet (ed.) *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (Volume IV) (1958), at 20.

<sup>45</sup> *The Prosecutor v Duško Tadić*, Case No IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, para 70.

<sup>46</sup> Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (2012) 32, 70–79.

<sup>47</sup> *Ibid*, at 77.

<sup>48</sup> See n 38.

<sup>49</sup> *Tadić* (n 36), paras 69–70.

law may extend to ‘spill-over’ conflicts, in other words to situations where an existing non-international armed conflict between government forces and rebel groups spills over into the territory of a neighbouring State.<sup>51</sup> To the extent that the Raqqa strike was carried out in support of the Iraqi authorities in their fight against ISIL, a strong case can be made that it was covered by the law applicable to that conflict. A second approach focuses on the parties to the conflict, rather than the geographical reach of the active battlefield. It suggests that once applicable, the law of armed conflict regulates the relationship between the parties to the conflict irrespective of their geographical location.<sup>52</sup> This is so because the status of a combatant, fighter or civilian does not change depending on his or her location. Consequently, if the persons targeted in the Raqqa strike were to be regarded as ISIL fighters and legitimate targets under the law of armed conflict when located in Iraq, they must be regarded as ISIL fighters and legitimate targets when present in Syria. Indeed, any other conclusion would lead to the absurd situation that ISIL fighters located in Syria constitute legitimate military objectives for the United States and other coalition members engaged in the non-international armed conflict against ISIL across Iraq and Syria, but not for the UK, despite being a member of that coalition and a party to that same non-international armed conflict. Consequently, both the spillover and the status-based approach lead to the conclusion that the Raqqa strike was covered by the law of non-international armed conflict. This conclusion also implies that the strike did not represent quite such a novel departure as has been suggested. What is novel about the Raqqa strike is the fact that it involved the deployment of British aerial assets in the territory of a State in which the UK does not also deploy ground troops. However, the more important factor is that the strike was carried out against individuals who belong to an opposing party in a non-international armed conflict to which the UK was already a party.

17 Third, at first sight, the Prime Minister’s statement that ‘the strike was not part of coalition military action against ISIL in Syria’<sup>53</sup> appears to undermine the conclusions reached in the preceding paragraph. The statement may be understood to suggest that the Government does not consider the Raqqa strike to be part of an existing non-international armed conflict between the UK and ISIL. This could mean one of two things. First, it could imply that the Government takes the view that no armed conflict pertained between the UK and ISIL in Syria and that the law of armed conflict therefore was not applicable to the Raqqa operation at all. However, this not only seems counter-intuitive, but also overlooks the fact that in describing the legal aspects of the operation, the Prime Minister clearly did invoke the law of armed conflict.<sup>54</sup> Second, it could imply that the Government considers the Raqqa strike to have triggered a new and separate non-international armed conflict just between the UK and ISIL. It is generally accepted that a non-international armed conflict under Common Article 3 of the Geneva Conventions of 1949 comes into existence provided that the parties display a certain level of organisation and that the hostilities between them reach a certain level of intensity.<sup>55</sup> While ISIL is an organised armed group which clearly meets the requirement of organisation, a single drone strike killing three individuals and destroying a vehicle does not satisfy the requisite degree of intensity to cross the threshold of a non-international armed conflict.<sup>56</sup> Ultimately, however, these considerations are misplaced. The thrust of the Prime Minister’s statement is to underline that the UK undertook the Raqqa strike unilaterally, rather than as part of coalition action in Syria. This does not place the operation outside the context of the non-international armed conflict between the coalition and ISIL. Despite its unilateral nature, the strike clearly benefitted Iraq and its coalition partners in their fight against ISIL by weakening the latter. Moreover, although the relevant details have not been released, it is safe to

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<sup>50</sup> See ICRC, *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Presented to the 32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015, at 15.

<sup>51</sup> Michael N Schmitt, ‘Charting the Legal Geography of Non-International Armed Conflict’, (2014) 90 *International Law Studies* 1, 11–12; Pejic (n 4), 80–81.

<sup>52</sup> Schmitt (n 43), 12–18; Pejic (n 4), 102.

<sup>53</sup> The Prime Minister (n 13), col 26.

<sup>54</sup> In particular, he referred to the principles of proportionality and military necessity, to targeting and the need to minimise the risk of civilian casualties: The Prime Minister (n 13), col 26.

<sup>55</sup> *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, Case No IT-04-82, Judgment, ICTY Trial Chamber, 10 July 2008, para 175.

<sup>56</sup> Nor would a single strike satisfy the requirement for ‘protracted’ violence. See Dinstein (n 19), 32–34.

presume that the strike was carried with the support of British assets and personnel already engaged in the conflict against ISIL. Given this close nexus to the broader non-international armed conflict,<sup>57</sup> the Raqqa strike is properly characterised as a spillover operation or simply as part of the non-international armed conflict spanning Iraq and Syria, despite its unilateral character. Accordingly, the Prime Minister's statement that the operation was not part of coalition military action in Syria does not weaken the conclusion reached earlier that the law of non-international armed conflict applied to the strike.

18 The law of non-international armed conflict permits the lethal targeting of members of organised armed groups and civilians directly participating in hostilities.<sup>58</sup> Whereas members of organised armed groups may be targeted at all times, provided they are not *hors de combat*,<sup>59</sup> civilians lose their immunity from direct attack only for such time as they directly participate in hostilities. The Prime Minister described the three individuals killed in the strike as ISIL fighters, adding that there were no civilian casualties. This suggests that the Government considered all three men to be members of an organised armed group and therefore subject to lethal targeting based on their status. The publicly available information about the intended target of the strike, Reyaad Khan, and the second British national killed, Ruhul Amin, suggests that both carried out a continuous combat function within the meaning of the International Committee of the Red Cross' *Interpretative Guidance on Direct Participation in Hostilities*.<sup>60</sup> Accordingly, both men were legitimate military objectives. No information has been revealed about the third individual killed in the strike. There are no reasons to doubt the Prime Minister's statement that this individual was not a civilian either. However, it is worth noting that even if it were established that the third individual was not an ISIL fighter or a civilian directly participating in the hostilities, in the present case the loss of civilian life would not have exceeded the military advantage anticipated from the strike.<sup>61</sup> Accordingly, it is safe to conclude that the Raqqa strike was conducted in full compliance with the law of armed conflict.

## V. International Human Rights Law

19 The UK is subject to an extensive set of human rights obligations, both in its capacity as a party to key international human rights instruments and under customary international law. Today, it is well-established that international human rights instruments continue to apply in times of armed conflict and that they may also apply outside the national territory of their signatories.<sup>62</sup> Consequently, the UK's human rights obligations may be applicable to overseas military deployments, including drone operations carried out by British forces. However, the applicability of international human rights law to extra-territorial military deployments is a matter of considerable controversy. In the UK, this controversy has focused primarily on the European Convention on Human Rights (ECHR). Three questions in particular have generated debate: the circumstances in which the Convention is applicable in an extra-territorial manner, the extent to which it applies in these circumstances and its relationship with the rules of the law of armed conflict. We will address these questions in turn.

20 The key concept establishing the applicability of the ECHR in pursuance of Article 1 ECHR is not 'territory', but 'jurisdiction'.<sup>63</sup> Whilst the concept is intrinsically linked to territory, it is not restricted to the territory of the Contracting Parties. Indeed, although the Court seemed to indicate in *Bankovic* that the Convention could not apply outside the *espace juridique* of the Contracting Parties,<sup>64</sup> it has accepted

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<sup>57</sup> See Noam Lubell and Nathan Derejko, 'A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict' (2013) 11 *Journal of International Criminal Justice* 65, 77.

<sup>58</sup> Pejic (n 4), 88–92.

<sup>59</sup> Article 41, Additional Protocol I.

<sup>60</sup> ICRC, *Interpretative Guidance on Direct Participation in Hostilities* (2009), 33–34.

<sup>61</sup> As required under Article 57(2)(a)(ii), Additional Protocol I.

<sup>62</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 266, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, paras 101–106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep, para 261; Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc A/HRC/14/24, 20 May 2010, para 43.

<sup>63</sup> *Bankovic et al v Belgium et al.*, Application No 52207/99, 12 December 2001, para 73.



its application abroad, beyond the borders of Europe.<sup>65</sup> However, extra-territorial jurisdiction remains exceptional.<sup>66</sup> Underpinning the extraterritorial application of the ECHR is the issue of whether the State is exercising ‘authority’ or ‘effective control’. With regard to military operations conducted abroad, this exercise of authority or effective control can be divided into three models of application: (1) personal control, (2) area or spatial control and (3) ‘assumption of authority’ combined with a jurisdictional link. In the case of *Al-Skeini*,<sup>67</sup> the Court offered a principled summary of its case-law on extra-territorial jurisdiction and explicitly recognised the two former models. However, in *Al-Skeini* and subsequent cases,<sup>68</sup> the Court actually applied a third model, an ‘assumption of authority’ (stressing the exercise of public powers<sup>69</sup>) combined with a jurisdictional link test.<sup>70</sup> It is so far unclear whether this model spells out a new test or whether it is a way for the Court to combine the first two models, when the State is not in full control of either the person or the territory. Indeed, neither the ‘assumption of authority’ nor the jurisdictional link element of the test amounts to effective control and thus neither of them would cross the jurisdictional threshold independently.

21 The personal control test relates to the State authority over an individual: ‘[w]hat is decisive [...] is the exercise of physical power and control over the person in question’.<sup>71</sup> It is not immediately clear whether a person targeted in a lethal drone strike would fall within the ‘physical power and control’ of the State conducting the operation, thereby satisfying the personal control test. This question may be answered from two perspectives: a principled approach and with reference to the existing case-law. First, if ‘power’ is understood to involve the application of coercive force, then the conduct of lethal strikes by airborne weapons system clearly amounts to an exercise of power. However, it is questionable whether such strikes also amount to an exercise of ‘control’, as required by the test. This is so because a relationship of control implies some form of mutual interaction between the State and the person or entity it controls. Not only must the State assume control by issuing instructions or express its will through other means, but the controlled person or entity must receive those instructions and act upon them.<sup>72</sup> It is not the purpose or effect of lethal drone strikes to establish such a relationship. Indeed, since the individuals targeted by drone operations are mostly unaware of the fact that they are being targeted, there is no mutual interaction between them and the drone operating State at all. Consequently, as a matter of fact, lethal drone operations do not entail the exercise of control over their intended target and it is questionable whether they are actually capable of doing so. Second, the paradigmatic example of the personal authority and control test under the ECHR is the arrest and/or detention of individuals by agents of the State.<sup>73</sup> Arrest and detention involves direct and close interaction between the detainee and the agents of the State. By contrast, lethal drone operations lack that element of direct interaction and proximity. In fact, the most relevant precedent in the present context is the case of *Bankovic*, where the Court accepted that the conduct of air strikes by manned aircraft does not bring the individuals targeted or affected within the jurisdiction of the State concerned.

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<sup>64</sup> *Bankovic* (n 63), para 80.

<sup>65</sup> Application in Iran: *Mansur Pad and others v Turkey*, Application No 60167/00, 28 June 2007; Application in Iraq: *Al Saadoon and Mufdhi v UK*, Application No 61498/08, 2 March 2010; *Al-Skeini and others v UK*, Application No 55721/077, 7 July 2011; *Al Jedda v UK*, Application No 27021/08, 7 July 2011; *Hassan v UK*, Application No 29750/09, 16 September 2014; *Jaloud v the Netherlands*, Application No 47708/08, 20 November 2014.

<sup>66</sup> *Bankovic* (n 63), para 71; *Al-Skeini* (n 65), para 131; *Jaloud* (n 65), para 139 (reiterating *Al Skeini*).

<sup>67</sup> *Al-Skeini* (n 65), paras 149–150.

<sup>68</sup> *Hassan* (n 65), para 75; *Jaloud* (n 65), para 149–152.

<sup>69</sup> *Al-Skeini* (n 65), para 149 (‘public powers normally to be exercised by a sovereign government’).

<sup>70</sup> See Marko Milanović, ‘Al-Skeini and Al-Jedda in Strasbourg’ (2012) 23 *European Journal of International Law* 131 and, in greater detail, Aurel Sari, ‘Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?’ (2014) 53 *Military Law and the Law of War Review* 287.

<sup>71</sup> *Al-Skeini* (n 65) para 136.

<sup>72</sup> Cf *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) (2007) ICJ Rep 15, para 400.

<sup>73</sup> Eg *Al Saadoon* (n 65); *Al-Skeini* (n 65); *Al Jedda* (n 65).

The same principle must also apply to strikes carried out by unmanned aerial weapons systems. Although in a small number of subsequent cases the Court has accepted that close-range shooting incidents may amount to an exercise of jurisdiction for the purposes of the ECHR,<sup>74</sup> these cases involved ground operations in territory to which the Convention was already applicable or in an area controlled by the forces conducting the operation. These features clearly distinguish these cases from *Bankovic* and from aerial operations generally. Further, it must be recalled that the Court has consistently held that the ECHR does not admit of cause-and-effect jurisdiction, meaning that causing harm to individual, absent an exercise of power and control, is insufficient to trigger its applicability.<sup>75</sup> For these reasons, lethal drone operations on their own do not amount to an exercise of control and thus do not engage the applicability of the ECHR.

22 Pursuant to the spatial control test, the State has to exercise effective control over an area or foreign territory. The significance of this test is that if a State is found to be in effective control of foreign territory, individuals present within that territory fall within its jurisdiction even in the absence of direct contact between those individuals and the agents of the State.<sup>76</sup> Such a situation usually arises when a State is occupying or administering a territory, directly or via a third party such as a local administration.<sup>77</sup> If drone attacks were to be carried out on a territory occupied or administered by the UK, then such attacks would fall within the purview of the ECHR. Likewise, if the UK were to administer foreign territory via a third party and this third party were to conduct drone attacks, the UK may be held responsible for such attacks. In recent cases, the Court has widened its understanding of effective control over territory by accepting that influence by and dependence on another State as evidence of jurisdiction.<sup>78</sup> Based on this more relaxed standard, the UK could be held in violation of the ECHR if drone attacks were carried out by a State which depends on the UK or whose decisions the UK can influence. It is worth recalling, however, that the Court has never found the UK to be exercising effective control under the spatial control test in Iraq.<sup>79</sup> Drone attacks currently carried out by the UK in Iraq do not fall within the purview of the ECHR under this test.

23 The Court seems to be moving away from the high threshold of the ‘effective control’ terminology under the spatial and personal control tests and to prefer using a combination of ‘assumed authority’ threshold combined with a personal/jurisdictional link.<sup>80</sup> The Court has so far dealt with two examples of situations of ‘assumption of authority’ or ‘assumption of exercise of public powers’. In the first one, such authority was based on the law of belligerent occupation;<sup>81</sup> in the second, it was based on a United Nations Security Council Chapter VII mandate.<sup>82</sup> Even if the ‘assumption of authority’ threshold is crossed, a jurisdictional link needs to be established. Based on this line of cases, provided that the UK has assumed authority for the exercise of public powers over the area of operations either as a matter of the law of belligerent occupation or a Chapter VII mandate, and British forces use lethal forces against an individual within that area, this may suffice to trigger the applicability of the European Convention, irrespective of whether or not the UK exercised effective control over the territory or over the

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<sup>74</sup> See eg *Issa and Others v Turkey*, Application No 31821/96, 16 November 2004; *Andreou Papi v Turkey*, Application No 16094/90, 22 September 2009.

<sup>75</sup> *Bankovic* (n 63), para 75; *Medvedyev and others v France*, Application No 3394/03, 29 March 2010, para 64.

<sup>76</sup> *Cyprus v Turkey*, Application No 25781/94, 10 May 2001, para 77; *Catan et al v Moldova and Russia*, Applications No 43370/04, 8252/05 and 18545/06, 19 October 2012, para 149.

<sup>77</sup> See eg *Loizidou v Turkey* (merits), Application No 15318/89, 18 December 1996, para 52; *Cyprus v Turkey* (n 76), para 77; *Loizidou v Turkey*, Application No 15318/89, 23 March 1995; *Ilascu et al v Moldova and Russia*, Application No 48787/99, 8 July 2004; *Catan* (n 76).

<sup>78</sup> *Ilascu* (n 77), paras 192–193; *Catan* (n 76), paras 120–121.

<sup>79</sup> In *Al Skeini*, the Court did not discuss whether the UK exercised effective (military) control although it was an occupying force (*Al-Skeini* (n 65)). Later, in *Hassan*, it explained that the evidence ‘tended to demonstrate that the United Kingdom was far from being in effective control of the south-eastern area which it occupied’ (para 5) and thus the Court ‘invented’ a new test based on assumed authority (*Hassan* (n 65)).

<sup>80</sup> *Jaloud* (n 65), paras 149–150 and 152.

<sup>81</sup> *Al-Skeini* (n 65), paras 146 and 148.

<sup>82</sup> *Jaloud* (n 65), paras 144–148.

individual in question. However, the Court's jurisprudence in this area has so far only established the necessary jurisdictional link in situations where ground troops have been involved and where the troops acted in close proximity to the targeted individual.<sup>83</sup> Bearing in mind the continued relevance of *Bankovic*, it is not clear whether lethal drone strikes do actually fall within the scope of the Court's jurisprudence on the 'assumption of authority' text. What can be stated with reasonable certainty is that drone attacks will be subject to the ECHR if they are carried out in a territory which is under the effective control of the UK, ie that the UK is occupying or administering, directly or via a third party.. This was not the case in the operation in Raqqa. Nor did the UK assume authority over the area of operations under the law of belligerent occupation of Chapter VII of the UN Charter. Accordingly, the ECHR did not apply to the drone strike in Raqqa under this model of jurisdiction.

24 Even if jurisdiction is established and the ECHR were to apply, the question arises as to which of its provisions are applicable. In its more recent case-law, the Court has accepted that the Convention can be divided and tailored depending on the circumstances of the extraterritorial act.<sup>84</sup> Where the ECHR is applicable, lethal drone attacks clearly engage the right to life under Article 2 ECHR.<sup>85</sup> Whether and to what extent other provisions of the Convention are engaged is less certain.<sup>86</sup> This submission will therefore focus on the substantive and procedural aspects of Article 2 ECHR as the UK would need to comply with both aspects.<sup>87</sup>

25 The UK must prove that pursuant to Article 2(1) ECHR there is a legal framework to safeguard the lives of those within its jurisdiction and that the deprivation of life is 'absolutely necessary',<sup>88</sup> ie proportionate to the achievement of one of the aims listed in Article 2(2) ECHR<sup>89</sup> and indispensable. Article 2(1) ECHR requires States to set up an appropriate legal and administrative framework regulating the use of force.<sup>90</sup> Whilst a vague and general domestic legal framework constitutes a violation of Article 2(1) ECHR,<sup>91</sup> regulations 'setting out exhaustive lists of situations in which [state agents] could make use of firearms [are] compatible with the Convention.'<sup>92</sup> Applied to drone strikes, this would require the UK to adopt a legal framework laying down the criteria for lethal targeting and the procedures for authorising such strikes. This would be in line with requests by international bodies

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<sup>83</sup> *Al-Skeini* (n 65), para 150 ('British soldiers carried out a patrol in the vicinity of the applicant's home'); *Jaloud* (n 65), para 152 ('asserting authority and control over persons passing through the checkpoint.')

<sup>84</sup> *Al-Skeini* (n 65), para 137. See a contrario *Bankovic* (n 63), para 75.

<sup>85</sup> *Isayeva v Russia*, Application No 57950/00, 24 February 2005, para 175; *Isayeva, Yusupova and Bazayeva v Russia*, Applications Nos 57947/00, 57948/00 and 57949/00, 24 February 2005, para 171.

<sup>86</sup> It is conceivable that Article 3 be also triggered. In *Makaratzis* as the Court found a violation of Article 2 ECHR no separate issue arose under Article 3. *Makaratzis v Greece*, Application No 50385/99, 20 December 2004, para 83. In *Bulut* the Court examined an Article 3 ECHR complaint following the use of force by police forces against an individual. *Necdet Bulut v Turkey*, Application No 77092/01, 20 November 2007.

<sup>87</sup> In the context of military operations carried out by Russia in Chechnya the Court clearly explained that as '[no martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention [...] the operation in question therefore has to be judged against a normal legal background'. *Isayeva* (n 85), para 191.

<sup>88</sup> See *McCann and others v UK*, Application No 18984/91, 27 September 1995, para 149; *Aksoy v Turkey*, Application No 21987/93, 18 December 1996, para 148; *Isayeva* (n 85), para 173.

<sup>89</sup> *McCann* (n 88), paras 146–148.

<sup>90</sup> *Makaratzis* (n 86), paras 56–59 ('policing operations must be sufficiently regulated by [national law], within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force') para 58. *Nachova and others v Bulgaria*, Applications Nos 43577/98 and 43579/98, 6 July 2005, paras 93 and 99–100. See also *Giuliani and Gaggio v Italy*, Application No 23458/02, 24 March 2011, paras 209–210 reviewing the Court's case-law. It may *mutadis mutandis* be argued that administrative practice alone is not sufficient and that precise statutory provisions or case-law is required. *Hilda Hafstendóttir v Iceland*, Application No 40905/98, 8 June 2004, para 46

<sup>91</sup> *McCann* (n 88), para 151.

<sup>92</sup> *Bakan v Turkey*, Application No 50939/99, 12 June 2007, para 51.

on the European<sup>93</sup> and international level.<sup>94</sup> In the context of drone attacks, Article 2(2)(a) ECHR, ie ‘in defence of any person from unlawful violence’, is the most likely justification for depriving an individual of his/her life<sup>95</sup> as it allows for neutralising the threat posed by the ‘targeted’ individual to other individuals. The Court has found deprivation of life lawful when it was the honest belief at the time of the killing that the individual posed such a threat.<sup>96</sup> The bulk of cases before the Court relates to situations where there was a direct and imminent threat to the lives of those at the scene,<sup>97</sup> seemingly requiring an element of proximity as the action is otherwise not ‘absolutely necessary’. However, in the context of military operations the Court has accepted in *Isayeva et al* that an attack or risk of attack by ‘illegal insurgents’ can fall within the meaning of Article 2(2)(a) if the air strike is a legitimate response to the attack.<sup>98</sup> The lack of discussion on the imminence of the attack may however be due to the particular circumstances of the *Isayeva et al* case. It is thus possible that the Court would accept that the drone attacks are legitimate since they are in defence of a multitude of persons from unlawful violence though it is unclear whether the Court would view a pre-emptive strike as lawful. Further, Article 2 ECHR obliges the UK ‘to take appropriate steps to safeguard the lives of those within its jurisdiction’,<sup>99</sup> in particular if it ‘knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party’.<sup>100</sup> This means that the UK could argue that it was reasonably expected to take measures (ie drone attack against an individual) to avert the risk it was aware of (ie risk to lives of individuals in the UK).

26 Where deliberate lethal force is used, the Court will not only examine the actions of the State agents, but also the surrounding circumstances and in particular the planning and control of the operation,<sup>101</sup> above all ‘whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life’.<sup>102</sup> In particular, the Court will assess whether there was a possibility to arrest the individual.<sup>103</sup> In *McCann*, the Court also examined the kind of training given to the military forces in a law enforcement context<sup>104</sup> and, in *Makaratzis*, stressed the need for a clear chain of command.<sup>105</sup> Additionally, when an aircrew uses ‘targeted’ lethal force upon orders from its commanders, the Court requires that these commanders gather enough information so as to make an informed decision before authorising the strike.<sup>106</sup> This means that the UK would need to demonstrate that it has *inter alia* verified the identity of the target and established the presence of civilians in the vicinity. If the UK follows such a procedure, it is unlikely to breach its substantive duties under Article 2 ECHR.

27 Additionally the UK must comply with the procedural aspects of Article 2 ECHR, notably the obligation to investigate the attack resulting in the death of an individual.<sup>107</sup> The Court has stressed that

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<sup>93</sup> See also Parliamentary Assembly of the Council of Europe, Resolution 2021(2015), 23 April 2015, paras 8.2 and 8.5.

<sup>94</sup> Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc A/68/382, 13 September 2013, para 98.

<sup>95</sup> See also PACE Resolution 2021(2015) (n 93), para 6.4.

<sup>96</sup> *Makaratzis* (n 86), para 66; *McCann* (n 88), para 200; *Andronicou and Constantinou v Cyprus*, Application No 86/1996/705/897, 9 October 1997, para 185.

<sup>97</sup> *Makaratzis* (n 86), para 66; *McCann* (n 88), para 200.

<sup>98</sup> *Isayeva et al* (n 85), para 181.

<sup>99</sup> *Osman v UK*, Application No 87/1997/871/1083, 28 October 1998, para 115.

<sup>100</sup> *ibid*, para 116.

<sup>101</sup> *McCann* (n 88), paras 146–150; *Khatsiyeva and others v Russia*, Application No 5108/02, 17 January 2008, para 129.

<sup>102</sup> *Makaratzis* (n 86), para 60. See also *Isayeva* (n 85), para 174.

<sup>103</sup> *McCann* (n 88), para 213; *Makaratzis* (n 86), para 64. See also PACE Resolution 2021(2015) (n 93), para 6.3.

<sup>104</sup> *McCann* (n 88), paras 211–212.

<sup>105</sup> *Makaratzis* (n 86), para 68.

<sup>106</sup> *Khatsiyeva* (n 101), para 136.

<sup>107</sup> *McKerr v the United Kingdom*, Application No 28883/95, 4 May 2001, para 111. On the general obligation to investigate, see also European Parliament, Resolution 2014/2567(RSP), 25 February 2014, para C; PACE

this obligation also applies ‘in difficult security conditions, including in a context of armed conflict’<sup>108</sup> though some leeway is granted.<sup>109</sup> As Heyns, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, notes, ‘the human rights law obligation to investigate violations of the right to life continues to apply during armed conflict albeit interpreted, during the conduct of hostilities, with reference to the complementary principles of international humanitarian law.’<sup>110</sup> The investigation must be effective, ie able to determine whether the force used was or not justified in the circumstances, and if not, to identify and punish those responsible,<sup>111</sup> prompt<sup>112</sup> and independent.<sup>113</sup> More specifically, it involves an obligation to ‘secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death’.<sup>114</sup> This is a duty of means, not of result.<sup>115</sup> It should not be impossible to comply with these procedural requirements in circumstances where the UK exercises effective control over the area or territory in which it carried out a drone strike. However, it is difficult to see how the UK could comply with these obligations if its jurisdiction was based on the ‘assumption of authority’ and jurisdictional link test, since this model implies the absence of effective control over the territory and person targeted.

28 Should the ECHR be found applicable to drone operations, in principle the UK may rely on Article 15 ECHR in order to derogate from its obligations under the Convention to the extent ‘strictly required by the exigencies of the situation’.<sup>116</sup> In this respect, it should be recalled that Article 15(2) specifically allows derogations for ‘deaths resulting from lawful acts of war’. Even in cases where no derogation was made, the Court has accepted the need to accommodate the rules of the law of armed conflict.<sup>117</sup> In the *Hassan* case, the Court clearly stated that ‘the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law.’<sup>118</sup> In other words, the Court accepted that it must take into account the law of armed conflict when interpreting and applying Article 5 ECHR.<sup>119</sup> Even though *Hassan* pertains to Article 5 ECHR, the same principle also extends to Article 2, all the more as the Court relied on *Varnava*,<sup>120</sup> an Article 2

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Resolution 2021(2015) (n 93), paras 6.4 and 8.4.

<sup>108</sup> *Al-Skeini* (n 65), para 164 as reiterated in *Jaloud* (n 65), para 186; *Ergi v Turkey*, Application No 66/1997/850/1057, 28 July 1998, para 85.

<sup>109</sup> *Al-Skeini* (n 65), para 165 as reiterated in *Jaloud* (n 65), para 186. See also *Jaloud* (n65), para 226.

<sup>110</sup> Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc A/70/304, 7 August 2015, para 28.

<sup>111</sup> *Hugh Jordan v UK*, Application No 24746/94, 4 May 2001, para 128; *Al-Skeini* (n 65), para 166; *Jaloud* (n 65), para 200.

<sup>112</sup> *Makaratzis* (n 86), para 74.

<sup>113</sup> The requirement of independence is mentioned in several cases including *Al-Skeini* (n 65), para 167.

<sup>114</sup> *Al-Skeini* (n 65), para 166.

<sup>115</sup> *Makaratzis* (n 86), para 74; *Al-Skeini* (n 65), para 166.

<sup>116</sup> Due to space constraints we are not elaborating on the conditions for the applicability of the derogations under Article 15 ECHR and on whether such a claim would be successful in an extraterritorial context. Suffice is to say that the extra-territorial applicability of Article 15 ECHR is not settled. See Written Evidence from Dr Aurel Sari to the House of Commons Defence Committee, November 2013 (<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931we13.htm>).

<sup>117</sup> The way the Court has accepted to introduce the law of armed conflict into the Convention virtually amounts to an application of the *lex specialis* doctrine. For a discussion on this doctrine, see eg William A Schabas, ‘Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict and the Conundrum of Jus ad Bellum’ (2007) 40 *Israel Law Review* 592-613; Juliet Chevalier-Watts, ‘Has Human Rights Law Become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?’ (2010) 14(4) *International Journal of Human Rights* 584-602.

<sup>118</sup> *Hassan* (n 65), para 104.

<sup>119</sup> *Hassan* (n 65), para 103.

ECHR case, to justify its interpretative approach in *Hassan*. A more difficult question is whether and to what extent the principle of accommodation is available in non-international armed conflicts. In *Hassan*, the Court expressly limited the principle to international armed conflicts, given that the legal basis for interment in a non-international armed conflict is contested.<sup>121</sup> A similar problem arises in relation to lethal targeting, since the legal authority to engage in such operations is well-established in the context of international armed conflicts, but less so in the setting of a non-international armed conflicts. However, practice suggests that States regard themselves entitled in non-international armed conflicts of a transnational character to target civilians taking a direct part in the hostilities on the basis of the military contribution they make to the adversary and to target and members of organised armed groups based on the basis of their membership in the organisation alone, rather than on any immediate threat to life these individuals may present.<sup>122</sup> This strongly suggests that the authority to conduct such operations in a non-international armed conflict must be accommodated with Article 2 ECHR. Consequently, even in circumstances where the ECHR applies and no derogations have been adopted, the law of armed conflict may authorise the UK to conduct lethal drone operations beyond the confines of the ECHR in a non-international armed conflict.

## VI. About the Authors

[Dr Noëlle Quénivet](#) is an Associate Professor in International Law at the Faculty of Business and Law of the University of the West of England (United Kingdom). Her research focuses on international humanitarian law, human rights law, international criminal law, post-conflict reconstruction, and gender and children in armed conflict. She has co-edited two books, one on the relationship between international humanitarian law and human rights law and another on international law in armed conflict.

[Dr Aurel Sari](#) is a Senior Lecturer in Law at the University of Exeter and a Fellow of the Allied Rapid Reaction Corps. His research interests lie in the field of public international law, with a particular focus on the legal aspects of military operations. He has published widely in leading academic journals on status of forces agreements, peace support operations, the law of armed conflict and other questions of operational law. He is writing in a personal capacity.

Dr Noëlle Quénivet and Dr Aurel Sari are currently working on a research project, funded by the British Academy, which explores the impact of international human rights law, in particular the European Convention on Human Rights, on overseas military operations.

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<sup>120</sup> *Varnava and Others v Turkey*, Applications Nos 16064/90 et al, 18 September 2009.

<sup>121</sup> See International Committee of the Red Cross, *Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflict*, Background Paper, Regional Consultations 2012–2013.

<sup>122</sup> See discussion in Sean Aughey and Aurel Sari, ‘Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence’ (2015) 91 *International Law Studies* 60.