

## **PLP CONFERENCE**

### **ARMED DRONES AND JUDICIAL REVIEW**

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#### **I. INTRODUCTION**

1. The UK Government's use of remotely-piloted armed Reaper drones to conduct lethal strikes abroad, without placing the operator at risk of injury or capture, has given rise to considerable concerns of legality, transparency and accountability. Armed drones are not prohibited weapons under international law. However, drone strikes raise serious legal issues, which differ depending on the circumstances in which strikes are carried out: see e.g. Parliamentary Assembly of the Council of Europe Resolution 2051 (2015), at §6.
2. The UK's current fleet of armed drones consists of 10 Reapers. Prior to 2015, it was known that drone strikes had been conducted during military operations against the Taliban in Afghanistan (2008-2014) and against ISIL in Iraq (from 2014). On 7 September 2015, the Prime Minister announced to the House of Commons that a UK drone strike had killed three individuals, two of whom were British nationals, in a operation in Raqqa, Syria on 21 August 2015.
3. The Prime Minister's announcement, coupled with his reference to the strike as a "new departure" and the fact that multiple legal justifications for the use of force were advanced before Parliament and the UN Security Council, crystallised concerns that the use of UK armed drones is not limited to military targeting operations in armed conflict situations, but extends to extra-judicial 'targeted killings' as counter-terrorism measures. Parallels were quickly drawn with the official US position of a global war on terror.

4. In September 2015, Caroline Lucas MP and Baroness Jones of Moulsecoomb sent a pre-action letter threatening judicial review of the Secretary of State’s alleged failure to formulate and publish a ‘Targeted Killing Policy’ outside of armed conflict situations. The Secretary of State has argued that the claim is without merit because it is not justiciable and the putative claimants have no standing.<sup>1</sup>
5. The Prime Minister’s announcement also triggered two forms of Parliamentary oversight. First, the Parliamentary Intelligence and Security Committee announced that it would be scrutinising the intelligence basis for the strike as an “*immediate priority*”. Secondly, the Parliamentary Joint Committee on Human Rights (“the Joint Committee”) launched an inquiry to clarify: (a) the existence and content of a UK policy on the use of drones for targeted killings; and (b) the legal basis under international law for any such policy.
6. Giving evidence before the Joint Committee, the Secretary of State for Defence maintained that the UK has “no policy of targeted killings” outside of armed conflict situations. In its recent report published in May 2016, the Joint Committee disagreed and concluded that: “*[I]t is the Government’s policy to be willing to use lethal force abroad, outside of armed conflict, (in Libya, for example), against individuals suspected of planning an imminent terrorist attack against the UK, as a last resort, when there is no other way of preventing the attack.*”<sup>2</sup>
7. This paper outlines a number of the principal legal issues raised by the possibility of judicial review of the UK’s conduct of, or involvement in, drones strikes abroad. The obvious importance and timeliness of this topic is highlighted by four considerations.
8. First, it is a matter of public record that the number of UK drones strikes has recently increased dramatically. According to the most recent publicly available figures, 258 Hellfire missiles were fired from Reapers during operations against ISIL in Iraq and Syria in 2015 alone.<sup>3</sup>

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<sup>1</sup> In a related development, also in September 2015, Rights Watch (UK) threatened to judicially review the Government’s decision not to publish legal advice said to support the justifications advanced for the August 2015 strike in Syria. That topic is outside the scope of this paper.

<sup>2</sup> For a critical assessment of certain aspects of the Joint Committee’s legal analysis see S. Aughey and T. Tugendhat MP, ‘Why the Joint Committee on Human Rights got the law wrong on drone warfare’, 17 May 2016.

<sup>3</sup> House of Lords written answer on ‘Guided Weapons’, 18 January 2016.

9. Secondly, armed drones are here to stay. In 2014, the House of Commons Defence Committee concluded that armed drones had “*contributed greatly to the effectiveness of military operations*” as “*a key capability which must continue to be supported*”.<sup>4</sup> More recently, in May 2016, the Ministry of Defence announced that a contract had been signed with the US Pentagon for the purchase of 20 second generation Predator aircraft. These are to be renamed “Protector”.
10. Thirdly, in its recent report, the Joint Committee called on the Government to “*reconsider its apparent position that there should be no accountability through the courts for any action taken pursuant to its policy of using lethal force outside areas of armed conflict*” (at §5.38).<sup>5</sup>
11. This is a complex topic. In the space available it is only possible to scratch the surface, thereby exposing issues which must be subjected to careful analysis in the specific context of any particular case. The limits of space and time have necessitated leaving certain questions aside. For example, this paper does not specifically consider the relevance of the international law rules on the use of force in self-defence.

## **II. WHAT IS THE DECISION UNDER CHALLENGE?**

12. In principle, a claimant may seek to challenge the lawfulness of: (a) the Government’s alleged policy (or lack thereof) on drone strikes; (b) the decision to conduct a particular strike; (c) the act of a particular strike; (d) the alleged failure to conduct an (adequate) investigation into deaths resulting from a drone strike; or (e) the provision of intelligence to a foreign State which is conducting strikes. Each of these involves a decision, action or failure to act in relation to the exercise of a public function for the purpose of CPR 54.1. However, they give rise to particular issues especially in relation to jurisdiction and justiciability.

## **III. EVIDENTIAL ISSUES**

13. The highly sensitive details of the UK’s conduct of, and involvement in, drone strikes (or other military operations) abroad are generally not released to the public. As a

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<sup>4</sup> ‘Remote Control: Remotely Piloted Air Systems – current and future UK use’, House of Commons Defence Committee, 11 March 2014, at §24.

<sup>5</sup> For a suggestion that pre-strike authorisation should be subject to judicial oversight see Resolution 2051 (2015) of the Parliamentary Assembly of the Council of Europe, at §6.

result, potential claimants may well face considerable evidential difficulties. In an unreported decision in November 2013, the High Court refused permission to review the alleged involvement of the Serious Organised Crime Agency in identifying targets for US drone strikes in Afghanistan on grounds of lack of evidence. Additional questions concerning public interest immunity and the use of closed material procedures under the Justice and Security Act 2013 are likely to arise.

#### IV. CAN AND/OR SHOULD THE COURT CONSIDER THE CLAIM?

14. Where the potential claimant is a family member of an individual killed in a drone strike, or a highly regarded NGO representing the public interest, disputes around standing are unlikely to become the centre of attention. By contrast, with the exception of cases in which the courts are required by statute to exercise jurisdiction, such as claims under the HRA, complex questions of jurisdiction and justiciability are likely to loom large.
15. First, the courts have consistently held that the conduct of foreign affairs and defence, especially the use of force abroad, are the exclusive responsibility of the Executive, and not the Judiciary. The objection is not that the source of the Executive's powers is found in the royal prerogative, but the subject matter of those powers: see e.g. *R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at §§85 and 106(ii).
16. Two examples will suffice. In *R (Campaign for Nuclear Disarmament) v. Prime Minister* [2002] EWHC 2777 (Admin), the Divisional Court refused to give an advisory opinion on the meaning of Security Council Resolution 1441 (2002) on Iraq. This is a 'forbidden area' and a matter of principle, not a matter of judicial discretion (per Brown LJ at §§47(ii), Maurice Kay J at §50, and Richards J at §§59-60). Similarly, in *R (Thring) v. Secretary of State for Defence* (unreported, 20 July 2000), the Court of Appeal refused permission to claim judicial review of an order of the Secretary of State's to the RAF to fly over Iraqi territory and attack targets in Iraq.<sup>6</sup> Pill LJ refused permission on the ground that "*acts of force committed by the Crown in foreign countries are of no concern of the English courts*".

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<sup>6</sup> Although this is only a permission decision, it was cited by Leggatt J in *Serdar Mohammed v. Ministry of Defence* [2013] EWHC 1369 (QB) at §378.

17. Secondly, where the relevant drone strike is alleged to have been carried out in cooperation or coordination with coalition partners (as is often the case), it will be necessary to consider the applicability of the foreign act of state doctrine. In *R (Noor Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 the Divisional Court and the Court of Appeal rejected, as non-justiciable, a claim that the provision of intelligence by the UK authorities to the US authorities, which enabled a lethal US drone strike in Pakistan, entailed a breach of English criminal law. The Court of Appeal reasoned that, in substance, the court was being asked to condemn the acts of the foreign state officials who carried out the drone strike. The claim was therefore neither justiciable nor to be heard as a matter of discretion save in exceptional circumstances.
18. The application of doctrines which would lead the courts to decline jurisdiction may well be challenged as entailing a violation of the right of access to court under Article 6 ECHR.
19. The Supreme Court's judgments in *Belhaj v. Straw* and *Serdar Mohammed v. Ministry of Defence*, which will examine the rationale and scope of the doctrines of foreign act of state and Crown act of state respectively, are eagerly awaited. Although both sets of proceedings involve civil damages claims, the judgments are likely to have significant implications for judicial review also. In light of my involvement in both of these cases, I refrain from rehearsing the arguments or expressing a personal view on these questions.

## V. INTERNATIONAL HUMANITARIAN LAW

### (1) Does international humanitarian law apply, and who decides?

20. The Government's official position is that the UK's use of armed drones must be in accordance with international humanitarian law ("IHL"). IHL governs the conduct of hostilities in time of war. The content and clarity of the applicable rules of IHL varies depending on the character of the armed conflict.
21. Whereas international armed conflicts occur between sovereign States, non-international armed conflicts arise between States and non-state organised armed groups or between several such non-state groups. While the legal authority to engage

in lethal targeting operations is well-established in the context of international armed conflicts, the position is less clear in the context of non-international armed conflicts.<sup>7</sup>

22. In both cases, an essential precondition for the applicability of IHL is the existence of an armed conflict. An international armed conflict entails resort to armed force between two States. A non-international armed conflict exists once the violence reaches the requisite level of intensity and the non-state party to the conflict displays the requisite degree of organisation: See e.g. *The Prosecutor v. Ljube Boskoski and Johan Tarculovski*, Case No IT-04-82, Judgment, ICTY Trial Chamber, 10 July 2008, §175.
23. The existence of an armed conflict in general terms is necessary but not sufficient. The applicability of IHL depends on the further condition that the relevant drone strike is carried out in the course of an armed conflict. The US understanding of a non-international armed conflict focuses on the parties to the conflict, rather than the geographical scope of the battle space. In other words, the US considers itself to be in a global non-international armed conflict with members of ISIL wherever they may be found. The UK has disavowed this understanding:

*“It is for the Americans to defend or describe their own definition. We would consider on a case-by-case basis, where there is an armed conflict between government authorities and various organised armed groups, and we would look at various factors case-by-case, as I said, such as the duration and intensity of the fighting. Each country probably has a slightly different view of where a non-international armed conflict exists.”*

24. What approach are the courts likely to take to the questions of the existence, character and geographical scope of an armed conflict? In the criminal case of *R v. Mohammed Gul*, the Secretary of State asserted that the question of the nature of the armed conflicts in Afghanistan and Iraq was a “*fact of state*” which may only be determined by the Executive. An FCO certificate was produced stating the view of HMG that both situations involved non-international armed conflicts between the respective States and various organised armed groups. The defendant accepted that the Crown’s view was “*highly persuasive*” but maintained that the character of the conflict was a question of fact for the jury. Although the Court of Appeal agreed that “*the status of an armed*

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<sup>7</sup> For an argument that IHL applicable in non-international armed conflicts does authorise lethal targeting see: S. Aughey and A. Sari, ‘Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence’, 91 *International Law Studies* (2015) 60-118.

*conflict is ultimately a question of fact*”, it expressed the provisional view that the certificate was conclusive.

25. The Court of Appeal’s reasoning may be understandable given the lack of any real attempt by the defendant to go behind the certificate. In principle, however, the existence, nature and geographical scope of a non-international armed conflict are factual questions which should be for the Judiciary to determine, not the Executive. Otherwise, there is a risk that the power may be abused, thereby introducing an expansive definition of non-international armed conflict through the back door. These factual questions are to be distinguished from the actual conduct of the UK’s foreign relations, such as the recognition of foreign states, which is properly a matter for the Executive alone.
26. At the same time, the Executive’s view is likely to be highly persuasive in most circumstances. Courts are unlikely to second guess the official view of the UK, especially where this has been relied upon both by the UK in its rules of engagement and by international allies in the context of multinational operations. However, the courts should be prepared to disagree with the Executive in situations where the certificate is contrary to overwhelming evidence, such as the authoritative view of an international body which is competent to decide the question.
27. If the provisional view in *Mohammed Gul* were to become widely accepted, it is likely that attempts would be made to challenge the relevant FCO certificate by way of judicial review.

## **(2) What are the key rules of IHL?**

28. Given the likelihood of a finding that IHL does apply, potential claimants should seek familiarity with its fundamental rules. This is especially so in light of the Government’s recent announcement of plans to derogate from the ECHR in armed conflict situations. There are two key principles of IHL, which are well established as a matter of both treaty law and customary international law.
29. The first is the principle of distinction, which reflects the difference in status between civilian and military targets. Civilians may not be targeted unless, and for such time as, they directly participate in hostilities: Art 13, APII. The members of organised armed

groups, such as ISIL fighters, do not benefit from this protection. For this reason, when used in the context of armed conflict, the term ‘targeted killing’ is an oxymoron.

30. The second key principle is that of proportionality, pursuant to which it is prohibited to carry out “*an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*”: Art 51(5)(b), APII.
31. Various IHL rules also impose upon the UK an obligation to investigate alleged violations: see e.g. Art 87 API. For example, Rule 158 of the ICRC’s Study on Customary International Humanitarian law provides that: “*States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.*” The MoD’s Manual of the Law of Armed Conflict recognises that: “*Failure by belligerent governments to investigate and, where appropriate, punish the alleged unlawful acts of members of their armed forces can contribute to the loss of public and world support, leading to isolation for the State involved*” (at §16.36).

### **(3) Can a potential claimant rely on international humanitarian law?**

32. In considering the reliance which may be placed on unincorporated rules of IHL, it is important to distinguish between obligations under treaty law and under customary international law.
33. Customary international law “is not a part, but is one of the sources, of English law”. As a result, customary international law ‘is applicable in the English courts only where the constitution permits’: *R v Jones (Margaret)* [2007] 1 AC 136, per Lord Bingham at §§11 and 23. In *Al Haq*, Cranston J explained the principle of non-justiciability referred to above reflects a constitutional principle militating against the incorporation of customary international law (at §§59-60).
34. Limited treaty law rules of IHL have been incorporated into English law. For example, the obligation to investigate under Article 87 API has been incorporated by the Armed Forces Act 2006. A military commander is under a statutory duty to inform the



military police of a 'reasonable' or 'credible' allegation of a violation of IHL, and the military police are required to investigate.

35. The orthodox position is that unincorporated treaties do not form part of English law, and the domestic courts have no jurisdiction to interpret or apply them. However, starting in *R v SSHD, ex p Launder* [1997] 1 WLR 839, the courts have accepted that, while ministers are under no duty to take into account an unincorporated treaty obligation when exercising administrative discretion, an irrationality challenge may lie where the decision-maker has expressly taken that obligation into account and purported to comply with it. The Government's declared position that all drone strikes are carried out in accordance with IHL may open the door to similar irrationality challenges based on alleged violations of IHL treaty law.
36. Potential claimants will need to think carefully before framing a judicial review claim on the ground of irrationality. When considering an irrationality challenge to a decision which purports to have complied with an unincorporated treaty obligation, the meaning of which is disputed, the courts have tended to ask only whether the decision-maker adopted a reasonably tenable view: see Lord Brown in *Corner House* and Lloyd Jones J (as he then was) in two subsequent cases: *R (Badger Trust) v Welsh Ministers* and *R (ICO Satellite v. The Office of Communications)*. It is unclear whether the courts consider that a degree of deference is only appropriate in irrationality cases.
37. In any event, it appears that the courts are generally more willing to subject the Government's understanding of the UK's obligations under customary international law rules to a greater degree of scrutiny. For example, in *Serdar Mohammed*, rather than merely asking whether the Government's view that IHL applicable in non-international armed conflict authorised detention on essential security grounds represented a 'tenable view', the courts sought to determine for themselves the content of IHL.
38. A similar approach was taken, in substance and notwithstanding the margin of appreciation available to the UK in Article 6 ECHR claims, by the Court of Appeal in *Benkharbouche v. Embassy of Sudan* in rejecting the Government's submission that international law recognises that State immunity bars employment claims brought by embassy workers against foreign State employers. However, since neither *Serdar*

*Mohammed* nor *Benkharbouche* are judicial review cases (let alone irrationality cases), and the courts have not yet confronted the apparent inconsistency in their treatment of the Executive's understanding of unincorporated treaty obligations and customary international law, this area should be approached with caution.

## VI. EUROPEAN CONVENTION ON HUMAN RIGHTS

### (1) Does the ECHR apply?

39. Rather than seek to ground a claim on IHL (either alone or at all), a potential claimant may reasonably be expected to prefer to rely on the greater protections available under the ECHR.
40. This month, the Supreme Court prepares to hear detailed argument on the interpretation and application of the right to liberty and security under Article 5 ECHR in non-international armed conflict in *Serdar Mohammed*. In the meantime, the Government has announced plans to derogate from the Convention on the grounds that:

“Our legal system has been abused to level false charges against our troops on an industrial scale. It has caused significant distress to people who risked their lives to protect us, it has cost the taxpayer millions and there is a real risk it will stop our Armed Forces doing their job. This will protect our troops from vexatious claims, ensuring they can confidently take difficult decisions on the battlefield. And it will enable us to spend more of our growing defence budget on equipment for them rather than fees for lawyers.”<sup>8</sup>
41. The details of this intended derogation, including which Convention rights will be affected and whether new legislation will be introduced, remain unclear. Article 15 permits derogation in “time of war or other public emergency threatening the life of the nation” where such derogation is “strictly required by the exigencies of the situation”. No derogation may be made from the right to life under Article 2, except in respect of deaths resulting from lawful acts of war: Article 2(2) ECHR, or from *jus cogens* norms of customary international law.
42. Article 15 ECHR raises serious questions of interpretation. First, the courts are likely to have to revisit the doubts expressed by Lord Bingham in *Al-Jedda v. Secretary of*

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<sup>8</sup> Statement of Defence Secretary Michael Fallon, 4 October 2016, available at <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>.

*State for Defence* [2008] 1 AC 332 as to whether the power to derogate under Article 15 ECHR extends to extra-territorial situations:

“It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could not exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.” (at §38)

43. It is true that Member States have not generally purported to derogate extra-territorially, and that subsequent practice may be taken into account when interpreting Article 15: see earlier *Bankovic*, §62. However, according to the terms of Article 31(3)(b) of the Vienna Convention, the question is whether this “establishes the agreement of the parties regarding its interpretation” i.e. consensus that extra-territorial derogation is either impermissible.
44. Secondly, assuming extra-territorial derogation is permissible as a matter of principle, any purported derogation is likely to be challenged on grounds of non-compliance with the strict requirements of Article 15 ECHR. The courts will be required to determine: (a) whether a particular armed conflict to which the UK is a party, such as the non-international armed conflict against ISIL in Iraq, threatens the life of the nation; and (b) whether the derogation from the relevant specific rights during that conflict is “strictly required by the exigencies of the situation”. Additionally, the purported derogation must not be inconsistent with the UK’s obligations under international law. For this reason, consistent with the approach taken in 1988 with respect to Northern Ireland, the UK will likely seek to make corresponding derogations from the various international human rights treaties to which it is a party, including the ICCPR. In this scenario, the scope of permissible derogations will continue to be conditioned by other branches of international law including, principally, IHL.
45. Leaving aside the existence and validity of derogation, the threshold criterion for the application of the ECHR is that the individual targeted by a drone strike abroad falls within the jurisdiction of the UK. In *Al Skeini v. UK*, the ECtHR reaffirmed that jurisdiction is an “essentially territorial” concept and that extra-territorial jurisdiction is exceptional (at §61). One of the recognised exceptional bases for extra-territorial

jurisdiction is where state agents exercise “physical power and control over the person in question” (at §§136-137). The Supreme Court has held that the English courts should not interpret “jurisdiction” as “reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach”: *Smith v. Ministry of Defence* [2014] AC 52 at §44.

46. In the landmark case of *Bankovic v. Belgium*, the Court rejected the contention that the application of lethal force by NATO aerial bombing during the Kosovo conflict entailed the exercise of the requisite power and control over victims. Although the Strasbourg Court has since departed from certain aspects of its judgment in *Bankovic*, the preferable view is that the essence of that decision has not been overruled. The Court in *Al Skeini* was fully aware of its earlier decision in *Bankovic*, and even cited parts of that judgment with approval.
47. In *Al Saadoon v. Secretary of State for Defence*, the High Court held that an aerial assault and shooting incidents involving UK Armed Forces in Iraq fell within the UK’s jurisdiction. The Court of Appeal disagreed:

“In these circumstances, I am unable to agree with the judge that the effect of *Al-Skeini* is to establish a principle of extra-territorial jurisdiction under Article 1 to the effect that whenever and wherever a state which is a contracting party to the Convention uses physical force it must do so in a way that does not violate Convention rights. ...The concept of physical power and control over a person will necessarily cover a range of situations involving different degrees of power and control. However, for the reasons set out above, I consider that in laying down this basis of extra-territorial jurisdiction the Grand Chamber required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force. The test of physical power and control is inherently imprecise. It may well be that it will be difficult to draw sensible distinctions between different types or degrees of power and control. However, if the logical consequence of the principle stated in *Al-Skeini* is any use of extra-territorial violence is within the acting state’s jurisdiction for this purpose, I believe that that is a conclusion which must be drawn by the Strasbourg court itself and not by a national court.” ([2016] EWCA Civ 811 at §§69-70)

48. Even if a drone strike does fall within the UK’s jurisdiction, it is necessary to consider whether the particular Convention rights relied upon apply. In *Al Skeini v. UK*, the Strasbourg Court accepted the proposition that Convention rights may be divided and tailored. As a result, the UK only has an obligation to ensure protection of those rights

that remain relevant during armed conflict. The reach of this limitation has yet to be tested. The relevance of the character and circumstances of the particular armed conflict situation remain unclear. However, the starting point is that the right to life under Article 2 continues to apply during armed conflict: see *Varnava v. Turkey*, App Nos. 16064/90, which was cited in *Hassan v. UK* at §103.

**(2) Interpretation and application of the ECHR in the context of an armed conflict situation**

49. It is still necessary to consider the relationship between the ECHR and IHL. In *Hassan v. UK*, the Court held that “the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law.” Relying on the principle of treaty interpretation found in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Court reasoned that the ECHR must be interpreted and applied taking into account relevant and applicable rules of IHL. Clarifying its earlier case law, the ECtHR accepted the UK’s submission that the absence of derogations made by a Member State under Article 15 ECHR did not prevent it from relying on the law of armed conflict for the purpose of such harmonious interpretation.
50. Since Article 5 contains a closed list of exhaustively defined grounds for lawful detention, the Court effectively introduced a new judge-made exception. The same logic applies with equal force to Article 2. The ECtHR has also accepted that the manner in which investigations are conducted necessarily varies according to the context: *Isayeva v. Russia*. The substantive content of what is required for an investigation to be independent, effective, prompt and impartial is likely to be determined with reference to IHL.
51. However, there is an important qualification. In the *Hassan* case the Court explicitly confined its reasoning to IHL applicable in international armed conflicts (at §104). As noted above, the legal authority for status-based lethal targeting of insurgents is less well established in the context of non-international armed conflicts. In *Serdar Mohammed* (Supreme Court judgment forthcoming), the High Court and the Court of Appeal held that IHL applicable in non-international armed conflicts recognises but does not authorise detention. If correct, the same conclusion logically applies in

relation to lethal targeting. As matters stand, absent a permissive power to kill/detain under IHL, the Convention rights applicable in the non-international armed conflict situation may be relied upon in their original unmodified form. As a result, the use of lethal force will only be lawful under Article 2 if it is necessary to counter an imminent threat.

## **VII. SECURITY COUNCIL RESOLUTIONS**

52. Where the relevant drone strike is carried out pursuant to a Security Council resolution which authorises the use of force, additional questions will arise as to: (a) whether the conduct is attributable to the UN; (b) whether Article 103 of the UN Charter operates to displace the relevant Convention right, including the principles governing interpretation of Security Council resolutions; and (c) whether the relevant Convention rights should be interpreted and applied in light of the authorisation to use force.