The Application of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy

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Contents

Declaration

No portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of any other university or other institution of learning. Full acknowledgment has been given for all sources used.

List of Frequent Abbreviations

UK – United Kingdom
JCHR – Joint Committee on Human Rights
ECHR – European Convention on Human Rights
UN – United Nations
NSA – Non-State Actor
US – United States
IHL – International Humanitarian Law
IAC – International Armed Conflict
NIAC – Non-International Armed Conflict
ECiHR – European Commission on Human Rights
ECtHR – European Court of Human Rights
VCLT – Vienna Convention on the Law of Treaties
ICJ – International Court of Justice
ISC – Intelligence and Security Committee

Abstract

In August 2015, the United Kingdom (UK) utilised an armed drone to carry out the targeted killing of Reyaad Khan, an ISIS member, as he was travelling in a car near Raqqa, Syria. Subsequently, the Joint Committee on Human Rights (JCHR) launched an inquiry to establish whether the killing of Reyaad Khan was a 'one-off' or represented the first instance of a UK Targeted Killing Policy to neutralise extraterritorial terrorist threats.

The JCHR inquiry concluded that the UK has adopted a targeted killing policy within its counterterrorism framework. From a European perspective, the UK's embrace of targeted killing was ground-breaking and provides a fresh setting for examining the application of the European Convention on Human Rights (ECHR or Convention). This research is focused on examining the application of the ECHR to the UK Policy, which requires consideration of two broad issues that are separate but interrelated: the *applicability* and the *application* of the ECHR to the UK Policy. After assessing the preliminary issue of the extraterritorial applicability of the Convention to drone operated targeted killings, the research turns to considering the application of the right to life in the various contexts envisaged by the UK Policy.

Throughout this research, the UK's understanding of its obligations under the ECHR in relation to its policy, as articulated during the JCHR inquiry, will be analysed. Where misunderstanding or ambiguities arise, recommendations will be provided to safeguard the UK from violating the Convention when carrying out targeted killings. Though the thesis provides a comprehensive examination of the application of the ECHR to the UK Policy, the legal analysis will be relevant to any Contracting Parties that follow the precedent set by the UK. Moreover, the research contributes to discussions on a range of contentious legal questions that are pertinent to the use of armed drones for counterterrorism, but also relevant whenever states parties conduct military operations overseas.

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Introduction

On 21 August 2015, the United Kingdom (UK) deployed an armed drone, to kill Reyaad Khan, an ISIS[1]fighter who sought to orchestrate terrorist attacks against the UK.[2]Pronouncing the drone strike to Parliament, then-Prime Minister David Cameron explained that a decision had been agreed between senior members of the National Security Council to use military force against Khan, if the opportunity presented itself.[3]The intentional and premeditated lethal operation against Khan constituted a targeted killing, as the term is generally understood within international law.[4]

Responding to a question about whether the strike against Khan was a one-off,[5] the Prime Minister affirmed that he would be prepared to repeat military action to prevent a direct threat to the British people.[6]Thus, the UK appeared to incorporate a policy of targeted killing within its counter-terrorism framework. On 29 October 2015, the Joint Committee on Human Rights (JCHR), a select committee of both the House of Commons and the House of Lords tasked with considering human rights issues in the UK, launched an inquiry into the UK Government's policy on the use of drones for targeted killing.[7]A key conclusion of the JCHR inquiry was that the UK does have a targeted killing policy for counterterrorism purposes.[8]

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[1] ISIS, also known as ISIL or IS. For consistency, the term ISIS will be used throughout except for quotations. For an explainer of the various ISIS variants see R.Sanchez, 'ISIL, ISIS or Islamic State?' (*CNN*, 25 October 2017) <https://edition.cnn.com/2014/09/09/world/meast/isis-isil-islamic-state/index.html>

[2] P.Wintour & N.Watt, 'UK Forces Kill British ISIS Fighters in Targeted Drone Strike on Syrian City' (*The Guardian,* 7 September 2015) <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria>

[3] HC Deb 7 September 2015, vol. 599, col 26. (Henceforth, HC Deb 7 September 2015)

[4] The term 'targeted killing' will be defined in section 1(1).

[5] HC Deb 7 September 2015, col 29. Harriet Harman (acting leader of the opposition) 'Will the Prime Minister tell the House whether this action by our military was an isolated action, or is he saying that the Government are likely to repeat action of this sort in the future?'

[6] Ibid, col 31.

[7] 'UK Policy on Use of Drones for Targeted Killing Inquiry' (29 October 2015) <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/91579/uk-policy-on-use-of-drones-for-targeted-killing-inquiry/>

[8] Joint Committee on Human Rights, *The Government's Policy on the Use of Armed Drones for Targeted Killing*, (2015-16, HL 141, HC 574) p37, para 2.39. (Henceforth, JCHR Report)

This research focuses on examining the application of the European Convention on Human Rights[9] (ECHR or the Convention) to the UK Targeted Killing Policy (UK Policy). It seeks to determine the legal standards that the UK must observe to ensure the utilisation of targeted killing does not contravene the Convention. Additionally, where the UK's legal position differs from the applicable legal standards or there is ambiguity about the Convention's application to the UK Policy, recommendations will be provided to mitigate the risk that the UK will violate the ECHR when utilising targeted killing.

1.Background

1(1) Defining Targeted Killing

International law does not provide a universal definition of targeted killing.[10]However, in his authoritative book on the topic, Nils Melzer, former United Nations (UN) Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, defined targeted killing as the 'use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.'[11] Notably, this definition was endorsed within Philip Alston's study on targeted killings as the then-UN Special Rapporteur on extrajudicial, summary or arbitrary executions.[12]

Melzer's definition of targeted killing contains five cumulative elements. The first element is the self-evident requirement of lethal force, though there is no restriction on the methods that may be employed for targeted killing.[13]Secondly, a targeted killing involves lethal force directed against individually selected persons. This requirement distinguishes targeted killing from action directed against

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221. (Henceforth, ECHR)
[10] UNCHR 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston', (28 May 2010) A/HRC/14/24/Add.6, p4, para 7. (Henceforth, P.Alston, 'Study on Targeted Killings')
[11] N.Melzer, *'Targeted Killing in International Law'* (OUP, 2008) pp3-5.
[12] P.Alston, 'Study on Targeted Killings' (n10) p5, para 9.
[13] N.Melzer, (n11) 3.

collective, unspecified or random targets.[14]Collateral deaths resulting from action against individually selected persons are not categorised as targeted killings. Thus, the deaths of Ruhul Amin and Abu Ayman al-Belgiki, who were incidentally killed in the drone strike that targeted Reyaad Khan,[15]were not targeted killings.

The third element of Melzer's definition is the requirement of intent, pre-meditation and deliberation, which differentiates targeted killing from unintentional, accidental or reckless killings, or those made without conscious choice.[16]Melzer postulates that the element of deliberation requires the death of the targeted person to be the actual aim of the operation and not the incidental result of an operation pursuing other aims.[17]

The penultimate element of targeted killing is that those specifically targeted are not within the physical custody of the perpetrator, which distinguishes targeted killing from custodial executions, such as the death penalty.[18]Finally, Melzer posits that, for a targeted killing to be relevant under international law, it must be attributable to a subject of international law,[19]which is primarily states, but non-State actors (NSAs) may also, in certain situations, be subject to international law. Consequently, Melzer's definition does not confine the perpetration of targeted killing to states. Alston shares this view, as exhibited by his acknowledgment that between 2005-2008, Sri Lankan governmental forces and the separatist group of the Liberation Tigers of Tamil Eelam (LTTE) conducted targeted killings of individuals identified by each side of collaborating with the other.[20]

The constitutive elements of targeted killings demonstrate that they are a distinctive type of killing. In the context of counterterrorism, targeted killing has gained notoriety, as a growing number of states have justified targeted killing

[14] Ibid 4.
[15] JCHR Report, (n8) p13, para 1.1
[16] P.Alston, 'Study on Targeted Killings' (n10) p5, para 9.
[17] N.Melzer, (n11) p4.
[18] Ibid 4.
[19] N Melzler, (n11) p4.
[20] P.Alston, 'Study on Targeted Killings' para 7 citing UNCHR 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Phillip Alston', (14 May 2008) A/HRC/8/3/Add.3, p6, para 12.

policies as a legitimate response to terrorist threats.[21]Unlike other forms of counterterrorism, such as surveillance or interrogation, which focus on monitoring the actions of terrorists or extracting information from them, targeted killing simply seeks to eliminate a terrorist: it is the most coercive counterterrorism tactic.[22]

1(2) Targeted Killing and Counterterrorism

Historically, states have resorted to targeted killing to dispose of individuals considered to be private or public enemies.[23]Yet, commonly, whenever states conducted targeted killing or had a *de facto* policy, this was unofficial and usually denied.[24]For instance, the UK consistently refuted the accusations by Amnesty International of utilising targeted killings in Northern Ireland.[25]Furthermore, Israel denied for 24 years that it had conducted the targeted killing of Khalil al-Wazir,[26]which was particularly striking considering that, just nine days after the operation, the United Nations Security Council (UNSC) passed a resolution condemning Israel for the killing.[27]

In the 21st century, the term 'targeted killing' gained prominence following Israel's open pursuit of a targeted killing policy of alleged terrorists in the Occupied Palestinian Territories.[28]After the failure of the Camp David accords in the summer of 2000 and Ariel Sharon's visit to Temple Mount in late September, Palestinian terrorist organisations unleashed a violent revolt against Israel,[29]which included

[21] P.Alston, 'Study on Targeted Killings' (n10) p3, para 2.
[22] G.Blum & P.B.Heymann, 'Laws, Outlaws and Terrorists: Lessons from the War on Terrorism' (MIT Press, 2010) 71.
[23] N.Melzer, (n11) 9.
[24] P.Alston, 'Study on Targeted Killings' (n10) p5, para 11.
[25] According to Amnesty International, between 1976 and 1992, soldiers from the British Army's Special Air Services (SAS) regiment killed 37 reported members of the Irish Republican Army. See 'Political Killings in Northern Ireland' (*Amnesty International*, 9 February 1994) <https://www.amnesty.org/download/Documents/180000/eur450011994en.pdf> 5.
[26]'Israel Acknowledges Killing Palestinian Deputy in 1988 Raid' (*The Guardian*, 1 November 2012) <https://www.theguardian.com/world/2012/nov/01/israel-acknowledges-killing-palestinian-deputy>
[27] UNSC Res 611 (25thApril 1988) UN Doc S/RES/611.
[28] P.Alston, 'Study on Targeted Killngs' (n10) p4, para 7; S.David, 'Israel's Policy of Targeted Killing' (2003) 17(1) *Ethics &International Affairs* 111, 111. (Henceforth, 'S.David, 'Israel's Policy of Targeted Killing')
[29] S.David, 'Fatal Choices: Israel's Policy of Targeted Killing' (2002) 51 *Mideast Security and Policy Studies* 1, 5. (Henceforth, S.David 'Fatal Choices')

thousands of terrorist attacks targeting Israeli civilians.[30]In response, Israel identified, located and then killed alleged Palestinian terrorists with helicopter gunships, fighter aircraft, drones, car bombs, booby traps and bullets.[31]The majority of the Israeli targeted killings were utilised in Area A, a part of the West Bank under the control of the Palestinian Authority.[32]Between 2002 and May 2008, the Israeli Information Center for Human Rights in the Occupied Territories alleged that 232 Palestinians were victims of targeted killing.[33]

Israel's utilisation of targeted killing was not novel, but it had not formerly embraced targeted killing as an official state policy.[34]In 2002, the Israeli Defense Force Judge Advocate General issued a legal opinion (part-published) on the conditions under which Israel considered targeted killings to be legal.[35]Furthermore, in 2006, the Israeli Government defended the legality of its targeted killing policy at the Israeli Supreme Court,[36]a stark contrast to its previous vehement denials,[37] which included a claim that there has never been, nor will there ever be an Israel Defence Force policy of intentional killing.[38]

Russia deployed Joint Special Groups during the Second Chechen War, tasked with conducting 'seek and destroy' operations to kill insurgents.[39]There are numerous examples that indicate the 'concerted effort' made by Russia to kill specific individuals belonging to the leadership of Chechen and Islamic insurgents

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[30] A.Guiora, 'Targeted Killing as Active Self-Defense' (2004) 36(2) *Case Western Reserve Journal of International Law* 319, 320.
[31] S.David, 'Israel's Policy of Targeted Killing' (n28) p111.
[32] O.Ben-Naftali and K.R.Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' 2003 36(2) *Cornell International Law Journal* 234, 247.
[33] 'Fatalities before Operation "Cast Lead" *(B'Tselem)* <https://www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event>
[34] O.Ben-Naftali and K.R.Michaeli (n32) p240.
[35] P.Alston, 'Study on Targeted Killings' (n10) pp5-6, para 13.
[36] Supreme Court of Israel, High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel*, et al. Case No. HCJ 769/02, Judgment of 13 Dec 2006.
[37] O.Ben-Naftali and K.R.Michaeli (n32) pp239-240.
[38] N.Yashuvi, 'Activity of the Undercover Units in the Occupied Territories' (*B'Tselem*, May 1992) <https://www.btselem.org/sites/default/files/sites/default/files2/activity_of_the_undercover_units_in_the_occupied_territories.pdf> 110.
[39] M.Morehouse, 'The Claws of the Bear: Russia's Targeted Killing Program' (2015) 28(2) *Journal of Slavic Military Studies* 269, 269; S.Saradzhyan, 'Russia's System to Combat Terrorism and Its Application in Chechnya' in R.W Orttung and A Makarychev, *National Counter-terrorism Strategies*: *Legal, Institutional, and Public Policy Dimensions in the US, UK, France, Turkey and Russia* (IOS Press, 2006) 184.

in the North Caucasus.[40]In April 2002, an FSB[41]agent killed the Chechen rebel commander Omar Ibn al Khattab with a poisoned letter.[42]On 8 March 2005, Russian forces killed Aslan Maskhadov, the leader of the Chechen separatist movement[43]before killing his successor, Abdul Khalim Sadulyev, in June 2006.[44]A month later, Russia conducted a targeted killing against Shamil Basayev, who was at the time Russia's most-wanted man and a high-profile Chechen warlord whose terrorist attacks included the Beslan school siege.[45]

The FSB did not hesitate to assume responsibility for high-profile targeted killings such as Khattab, Maskhadov and Basayev,[46]with senior governmental figures, including President Putin, openly praising such operations.[47]However, for targeted killings conducted extraterritorially, Russia has refused to accept responsibility. For example, Russia dismissed allegations of any involvement in the murder of Alexander Litvinenko, despite a UK Home Office inquiry concluding that President Putin probably approved the killing with polonium-210.[48]Russia maintained its denial of responsibility for killing Litvinenko before the ECtHR in 2021, though the Court did find that the killing was attributable to Russia.[49]Additionally, no Russian government agency would admit to killing the vice president of Chechnya's self-proclaimed separatist government, Zelimkhan Yandarbijev, in Qatar in 2004.[50]As well as refusing to acknowledge responsibility for the killing of Yandarbijev, Russia also refused to cooperate with any investigation or

[40] M.Morehouse Ibid.
[41] The FSB (Federalnaya Sluzhba Bezopasnosti) is the federal security service of the Russian Federation.
[42] 'Russia 'kills' Chechen Warlord' (*BBC News*, 25 April 2002) <http://news.bbc.co.uk/1/hi/world/europe/1950679.stm>
[43] N.Paton Walsh, 'Chechen Rebel Leader Killed in Russian Assault' (*The Guardian*, 9 March 2005) <https://www.theguardian.com/world/2005/mar/09/chechnya.russia1>
[44] M.Morehouse (n39) 270; M.Hirst, 'Chechnya's Rebel Leader Killed by Pro-Russian Forces' (*The Telegraph*, 18 June 2006) <https://www.telegraph.co.uk/news/worldnews/europe/russia/1521625/Chechnyas-rebel-leader-killed-by-pro-Russia-forces.html>
[45] 'Chechen Rebel Chief Basayev Dies' (*BBC News*, 10 July 2006) <http://news.bbc.co.uk/1/hi/5165456.stm>
[46] S.Saradzhyan (n39)185.
[47] President Putin described the killing of Shamil Basayev as "deserved retribution". See (n41).
[48] 'Alexander Litvinenko: Profile of Murdered Russian Spy' (*BBC News*, 21 January 2016) <http://www.bbc.co.uk/news/uk-19647226>
[49] *Carter v. Russia* App no 20914/07, 21 September 2021.
[50] S.Saradzhyan (n39) 185.

prosecution.[51]Extraterritorially, the Russian Government seeks to evade responsibility for targeted killings, which contrasts with its preparedness to acknowledge domestic operations.

The United States (US) also has a targeted killing policy. For decades, the US Government condemned targeted killings, characterising them as assassinations or extrajudicial killings.[52]However, after 9/11, the US embraced targeted killing. Within the armed conflicts in Afghanistan and Iraq, the US utilised targeted killings to weaken the terror threat posed by members of Al Qaeda and associated forces.[53]Since 2001, the number and geographical scope of US targeted killings has expanded.

For targeted killings conducted outside Iraq and Afghanistan, the US justified operations on the basis that those targeted posed an ongoing terrorist threat to the US whilst located in so-called 'safe havens', which refers to territory that is ineffectively or substantially ungoverned.[54]The US contends that within 'safe havens', terrorists are able to organise, plan and operate in relative security due to the territorial state's inadequate governance, lack of political will to combat terrorists, or both.[55]Due to ineffective governance in 'safe havens', the suppression of terrorism through conventional law enforcement, such as arrest or detention, is either unavailable or deemed unlikely to be effective. In this context, the US regards targeted killing as necessary for frustrating terrorist activities.[56]The US has primarily relied on armed drones for carrying out targeted killing operations,[57]which have

[51] A.McGregor, 'The Assassination of Zelimkhan Yandarbiyev: Implications for the War on Terrorism' (2004) 2(14) *Terrorism Monitor* <https://jamestown.org/program/the-assassination-of-zelimkhan-yandarbiyev-implications-for-the-war-on-terrorism-2/>

[52] J.Jaffer, 'The Drone Memos: Targeted Killing, Secrecy, and the Law (The New Press, 2016) 3.

[53] P.Alston, 'Study on Targeted Killings' (n10) p7, para 18; J.Dehn, 'Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations' (2013) 54 *Harvard International Law Journal* 84, 85; N.Melzer (n11) 42.

[54] J.Dehn Ibid 85.

[55] U.S. Department of State, Bureau of Counterterrorism and Countering Violent Extremism, '*Country Reports on Terrorism 2015, Chapter.5: Terrorist Safe Havens (Update to 7120 Report)*' (2015) <https://www.state.gov/j/ct/rls/crt/2015/257522.htm>

[56] G.Blum & P.B.Heymann, (n22) 71.

[57] A.Dworkin, 'Europe's New Counter-Terror Wars' (*European Council on Foreign Relations Policy Brief* , 21 October 2016) <https://www.ecfr.eu/publications/summary/europes_new_counter_terror_wars7155> 2; J.Rochester, *'The New Warfare: Rethinking Rules for an Unruly World'* (Routledge, 2016) 69; In Afghanistan, the US Special Forces have also frequently conducted kill or capture raids. The killing

facilitated the targeting of terrorists in areas that are either inaccessible or lack US ground presence. Compared to other aircrafts, the technological capabilities of armed drones are particularly suited to targeted killing. Specifically, US drones can fly, fully loaded with munitions, for up to 14 hours at slow speeds and "loiter" over an area.[58]These features facilitate the careful identification and verification of targets prior to engagement. In comparison, aircraft fighter pilots have 'mere seconds' to identify and verify targets prior to launching a targeted strike.[59]

Under the Bush administration, an estimated 50 targeted killing drone strikes took place across Pakistan, Yemen and Somalia.[60]The majority of these strikes targeted Al-Qaeda/Taliban leaders believed to be hiding in the Federally Administered Tribal Areas of Pakistan.[61]Under the Obama administration, the utilisation of targeted killing expanded dramatically[62]with an estimated 500 strikes conducted away from the conventional hostilities in Iraq and Afghanistan.[63]Not only did the Obama administration conduct targeted killings more regularly, but the location of drone strikes extended to Syria and Libya. In comparison to his predecessors, President Trump had an even greater strike tempo.[64]

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of Osama bin Laden, which occurred in Pakistan, provides an example of a kill or capture raid. See P.Alston, 'The CIA and Targeted Killings Beyond Borders' (2011) 2 *Harvard National Security Journal* 283, 285. (Henceforth, 'P.Alston, 'The CIA and Targeted Killings Beyond Borders')

[58] M.Horowitz et al, 'Separating Fact from Fiction in the Debate over Drone Proliferation' (2006) 41(2) *International Security* 7, pp21-22.

[59] L.David et al, *'Armed and Dangerous? UAVs and U.S. Security'* (Rand Corporation, 2014) pp11-12.

[60] M.Zenko, 'Reforming U.S. Drone Strike Policies' (*Council on Foreign Relations Special Report No.65*, January 2013) <https://www.cfr.org/report/reforming-us-drone-strike-policies> 8.

[61] J.Rochester (n57)109.

[62] President Obama ordered more drone strikes in Pakistan during his first year in office than in the entire Bush presidency. See J.Serle, 'Naming the Dead: Shining a Light on the US Drone War' (*The Bureau of Investigative Journalism*, 16 April 2018) <https://www.documentcloud.org/documents/4438377-NTD-REPORT-18-April-2018.html> 9.

[63] Columbia Law School Human Rights Clinic & The Sana'a Center for Strategic Studies, 'Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force' (*Report*, 2018) <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/out_of_the_shadows.pdf> 23.

[64] R.Stohl, 'An Action Plan on US Drone Policy: Recommendations for the Trump Administration' (*Stimson Center Report* June 2018) <https://www.stimson.org/sites/default/files/file-attachments/Stimson Action Plan on US Drone Policy.pdf> 7; M.Zenko, 'The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama' (*Council on Foreign Relations,* March 2, 2017) <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama>

Despite the spiralling use of targeted killing, the US failed to acknowledge targeted killings that were conducted away from Iraq and Afghanistan, even when the killings where virtually incontestable.[65]By contrast, the US was more accepting of responsibility for targeted killings within Afghanistan and Iraq. For example, US Defence Secretary Donald Rumsfeld declared that US Forces had carried out the targeted killing of Abu Musab al-Zarqawi in 2006, the leader of Al-Qaeda in Iraq.[66]The first credible report of a US targeted killing outside of Afghanistan or Iraq was in 2002 when Qaed Senyan al-Harithi, an alleged Al-Qaeda leader responsible for the USS Cole bombing, was targeted in Yemen.[67]Yet, it was not until 2013, following years of pressure and lawsuits brought by the American Civil Liberties Union (ACLU) and others, that the basic contours of the US lethal force programme came to light.[68]On 23 May 2013, President Obama released a 'Fact Sheet' which briefly outlined the policy standards and procedures for US counterterrorism operations outside of Iraq and Afghanistan.[69]According to the 'Fact Sheet', often referred to as the Presidential Policy Guidance (PPG), the US will only use lethal force to prevent terrorist attacks against US persons, and even then, when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. Furthermore, the PPG set out specific preconditions that must be met before lethal force will be used. One such precondition is that lethal force will only be used against terrorists posing a continuous, imminent threat to US persons.[70]For

[65] N.Melzer (n11) 42.
[66] Ibid.
[67] G.Blum and P.B.Heymann (n22) 74.
[68] B.Kaufman & A.Diakun, 'United States Targeted Killing Litigation Report' in 'Litigating Drone Strikes: Challenging the Global Network of Remote Killing' (*European Centre for Constitutional and Human Rights*, 2017) <https://www.ecchr.eu/fileadmin/Publikationen/Litigating_Drone_Strikes_PDF.pdf> pp126-130.
[69] 'Fact Sheet: US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities' (*White House Press release*, May 23 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (Henceforth, 'PPG 2013'); In 2016, President Obama released a more substantial declassified version of the PPG <https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf> ; Additionally, in 2016, President Obama released a report on the legal and policy principles that guide US national security operations. Although this report covers a broad range of issues, it is also relevant to drone operated targeted killing. See 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (2016) <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf>
[70] PPG 2013.

over a decade, US targeted killing operations away from Afghanistan and Iraq were cloaked in secrecy. However, in 2013, the release of the PPG confirmed that the US had adopted a targeted killing policy whereby lethal force will be used to target specific members of terrorist organisations, wherever the threat emanates and whenever the relevant governmental authorities cannot or will not address the threat to US persons.

The covert nature of targeted killing has contributed to its stigmatisation and perceived illegitimacy. However, Melzer argues that targeted killing is going through a process of legitimisation.[71]Even if we accept Melzer's suggestion, states have embraced targeted killing with hesitancy. Notably, it took over a decade for the US to acknowledge targeted killing operations that were conducted away from its conventional hostilities in Iraq and Afghanistan. Furthermore, Russia has refused to accept responsibility for the use of targeted killing abroad. Moreover, the UK conducted a targeted killing against Reyaad Khan and is willing to intentionally kill pre-identified individuals for counter-terror purposes. Yet, the UK Government is reluctant to describe this is as the adoption of a targeted killing policy. We will now turn our attention to the circumstances whereby the UK would be prepared to utilise armed drones for the targeted killing of terrorists.

2.The UK Policy Framework

Unlike the US, the UK does not have a published policy document. Nonetheless, the framework of the UK Policy can be deduced from Governmental statements, the majority of which were made during the JCHR inquiry itself. However, comments prior and subsequent to the inquiry have also helped to confirm the UK's preparedness to conduct targeted killings whilst clarifying the circumstances whereby the UK would be willing to resort to targeted killing. Before referring to the JCHR inquiry in greater detail, it is necessary to return to former Prime Minister David Cameron's announcement of the Reyaad Khan strike to contextualise the JCHR inquiry.

[71] N.Melzer (n11) p9.

2(1) Announcement of the Targeted Killing of Reyaad Khan

Prime Minister David Cameron justified the killing of Reyaad Khan on the basis that the unilateral strike was the only way of preventing the terrorist threat posed by Khan. Due to his location in Raqqa, Syria, an area under ISIS control at the time, Cameron claimed that there was no Government that the UK could have worked with; no military on the ground to detain Khan; nor was there anything to suggest that Khan would leave Syria or desist from his desire to murder citizens in the UK.[72]The Prime Minister informed Parliament that the targeted killing operation was not part of coalition military action against ISIS in Syria,[73]which Parliament had previously voted against,[74]unlike its approval of air strikes against ISIS in Iraq.[75]Although the UK had used armed drones in Afghanistan and Iraq, Cameron regarded the Khan strike as a 'new departure' because it was the first time in modern times that the UK had conducted a strike in a country where it was not involved in war.[76]

Confusingly, responding to a letter from two parliamentarians, Caroline Lucas MP and Baroness Jones of Moulescoomb, who had threatened to bring judicial review proceedings against the Government for its Targeted Killing Policy,[77]the Government's lawyers proclaimed that the Reyaad Khan strike was part of the armed conflict against ISIS in Iraq, which had crossed into Syria.[78]The Government's inconsistency about whether the Reyaad Khan operation occurred within an armed conflict obfuscated the Government's position on targeted killings where the UK is not involved in war.

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[72] HC Deb 7 September 2015, cols 25-26.
[73] Ibid, col 26.
[74] Parliament voted 285 to 272 against the motion proposing UK military action against ISIS in Syria. See HC Deb, 29 September 2013, vol 566, col 1551.
[75] On 26 September 2014, Parliament voted 524 to 43 to approve UK air strikes in Iraq against ISIS. See, HC Deb 26 September 2014, vol 585, col 1360.
[76] HC Deb 7 September 2015, col 30.
[77] Leigh Day letter to RT Hon Michael Fallon MP on behalf of Caroline Lucas MP and Baroness Jones of Moulsecoomb, 23 September 2015 <https://www.parliament.uk/documents/joint-committees/human-rights/Leigh_Day_letter_to_Defence_Secretary_230915.pdf>
[78] Letter from Government Legal Department to Leigh Day, 23 October 2015 <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/?type=&session=27&sort=false&inquiry=2449> paras 20-21.

Due to the ambiguity surrounding the Government's use of armed drones for counterterrorism, the JCHR launched an inquiry that sought, *inter alia,* to clarify the Government's policy and its legal basis.[79]In particular, the inquiry sought to establish whether the killing of Reyaad Khan was the first application of a UK policy to use targeted killing as a means of neutralising extraterritorial terrorist threats, even in countries where the UK is not engaged in armed conflict.[80]

2(2) The JCHR Inquiry

In a memorandum provided to the inquiry, the Government outlined that it would take action to counter an identified threat to UK or British interests abroad but that lethal action will always be a last resort, when there is no other option and no other means to detain, disrupt or otherwise prevent those plotting acts of terror.[81]During the oral evidence sessions of the inquiry, Michael Fallon, the then-Secretary of State for Defence, provided some important clarifications about the UK Policy. First, the Defence Secretary explained that the Prime Minister's declaration that the UK was not involved in war in Syria, must be read in the context of the recently developed constitutional convention to consult Parliament prior to using military force abroad. Accordingly, the House of Commons should have the opportunity to debate a proposed use of military force,[82]although, in exceptional cases, the Prime Minister acknowledged that unauthorised action may be justified, such as when military force is urgently required to prevent human catastrophe or to protect a critical British national interest.[83]The Cabinet Manual confirms the development of the convention that, except when it would be inappropriate to debate action beforehand, Parliament should have the opportunity to deliberate the use of military force.[84]Therefore, when

[79] JCHR Report, (n8) p16, para 1.10.
[80] Ibid p30, para 2.8.
[81] JCHR Report, (n8), p35, para 2.32. Full Memorandum available at <https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf>
[82] JCHR Report, (n8), pp32-33, para 2.20.
[83] HC Deb 26 September 2014, vol 585, col 1265.
[84] 'The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government' (*The Cabinet Office*, October 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf> para 5.38.

the Prime Minister insisted that the UK was not involved in war in Syria, this was an acknowledgment that Parliament had not approved military action in Syria.

The Prime Minister's description of the drone strike in Syria being 'the first contemporary example of the UK deploying military force in a country where it was not involved in war'[85]was not entirely accurate because the UK had used force in Libya in 2011 and Mali in 2013 without prior parliamentary debate.[86]Yet, the House of Commons had explicitly rejected the use of military force in Syria in 2013[87]and in 2014, the motion proposing military action against ISIS in Iraq contained an explicit reference to force in Syria requiring a separate Parliamentary vote.[88]Therefore, although the killing of Reyaad Khan was *not* the first time that the UK had used military action in a country without prior parliamentary approval, in accordance with the recently developed constitutional convention, it *was* the first time that the UK had used force in a country where Parliament had explicitly rejected military action.[89]

In light of the Defence Secretary's explanation, the Prime Minister's claim that the UK was not involved in war in Syria was an acknowledgment that Parliament had not authorised military action there. Yet, despite this, the drone strike in Syria did not contravene the recently developed domestic constitutional convention on the use of force because it was in response to an emergency situation that impacted British national security interests. The JCHR welcomed this clarification and accepted that the Prime Minister's description of the Khan strike as a 'new departure' was to be read in the context of the aforementioned domestic constitutional convention.[90]Nevertheless, the assertion that the killing of Reyaad Khan in Syria was connected to the ongoing armed conflict against ISIS in Iraq-setting aside for now the validity of this statement-raised questions about the UK's willingness to deploy armed drones for targeted killing outside of warzones.

[85] HC Deb 7 September 2015, col 30.
[86] C Mills, 'Parliamentary Approval for Military Action' (*House of Commons Library Briefing Paper 7166*, 8 May 2018) pp4-5.
[87] HC Deb 29 August 2013, vol 566, col 1551.
[88] HC Deb 26 September 2014, vol 585, col 1255.
[89] JCHR Report, (n8) pp33-34, para 2.23.
[90] Ibid pp34-35, para 2.28.

In response to a direct question on the UK's policy of targeted killing outside recognised areas of conflict, the Defence Secretary declared that 'there is no policy of targeted killing.'[91]However, when asked whether the UK approach to lethal force for counterterrorism would apply 'anywhere where there is no recognised Government, where there is a vacuum',[92] as was the case in Syria, the Defence Secretary stated that:

> If there is a direct and imminent threat to the United Kingdom and there is no other way of dealing with it–it is not possible to interdict that threat or to arrest or detain the people involved in that threat–then of course as a last resort we have to use force.[93]

Subsequently, the Defence Secretary hypothesised that had the Government been aware that 30 UK citizens were going to be murdered on the beach in Sousse, Tunisia and that it was known that the attack was being directly planned from a training camp in Libya, then they would have been justified in taking action to forestall that attack, if there were no other means of preventing the attack due to a lack of political authority in Libya.[94]At the time, the UK was not engaged in an armed conflict with ISIS in Libya and the JCHR interpreted the hypothetical situation envisioned by the Defence Secretary as evidence of the Government claiming a right to use lethal force against suspected terrorists *outside* of armed conflict, when there is a direct and immediate threat to the UK which cannot be averted in any other way.[95]This conclusion is corroborated by the Prime Minister's statement to the House of Commons that he would be prepared to take action to prevent a threat, whether it emanated from 'Libya, from Syria or from anywhere else'.[96]

The JCHR concluded that the Government does have a policy that contemplates the use of targeted killing to counter terrorist threats. Despite the

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[91] Ibid p36, para 2.33.
[92] JCHR Inquiry, Oral evidence: The UK Government's policy on the use of drones for targeted killing, 16 December 2015, Question 20. Full transcript of oral session available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.html>
[93] JCHR Report, (n8) p36, para 2.35.
[94] Ibid p36, para 2.36.
[95] JCHR Report, (n8) pp36-37, para 2.37.
[96] HC Deb 7 September, col 25.

Government's reluctance to label its policy as such, the JCHR recognised that the aforementioned policy contemplates intentional and pre-meditated lethal action against previously identified individuals.[97]Considering the operation against Reyaad Khan constituted a targeted killing and the Government demonstrated its willingness to repeat similar drone strikes in the future, the conclusion reached by the JCHR, that the UK does have a targeted killing policy, is well-founded. Moreover, the Prime Minister's claim that the UK would counter threats wherever they emanate demonstrates that the UK Policy is not geographically constrained. Additionally, the oral evidence provided by the Defence Secretary during the JCHR inquiry also confirms that the UK Policy is not contextually confined to armed conflict situations.

Interestingly, the Ministry of Defence's Joint Doctrine on Unmanned Aerial Systems, published in September 2017, referred to the UK's practice of targeting terrorists outside of armed conflict. However, the UK Government revised its drone doctrine in December 2017 and January 2018, omitting any reference to targeting outside conflict zones.[98]Yet, Gavin Williamson, who succeeded Michael Fallon as Defence Secretary in 2017, claimed that the Government would continue to hunt down British members of ISIS '[...] as they disperse across Syria, Iraq and other areas [...]'.[99]Therefore, although the Government could be more explicit about its position, the aforesaid statements confirm that the Government is willing to utilise targeted killing as a means of mitigating terrorist threats, wherever they originate and irrespective of the existence of an armed conflict.

2(3) UK Policy Summary

Despite the absence of a published targeted killing policy, governmental statements and submissions to the JCHR inquiry reveal the framework of the UK Policy. The UK has demonstrated that it is prepared to lethally target terrorists posing a direct

[97] JCHR Report, (n8) p37, para 2.39.
[98] Ministry of Defence, 'Joint Doctrine Publication 0-30.2 Unmanned Aircraft Systems' (12 September 2017) <https://bit.ly/2tQz7Vc>. Note, this version was the most recent publication before being withdrawn on 16 November 2022. See also J.Doward, 'MoD 'in chaos' over drone use outside of war zones' (*The Guardian*, 3 February 2018) <https://www.theguardian.com/world/2018/feb/03/drones-gavin-williamson-mod-isis>
[99] 'Terrorists Have Nowhere to Hide, says Defence Secretary' (*BBC News*, 7 December 2017) <https://www.bbc.co.uk/news/uk-42260814>

and imminent threat to the UK or British interests abroad, wherever they may be located. However, the UK asserted that lethal action is a last resort that will only be utilised when there are no other means to disrupt or prevent those plotting acts of terror. When these circumstances materialise, the UK has demonstrated a preparedness to deploy armed drones within or outside the context of an armed conflict.

The circumstances that compelled the UK to lethally target Reyaad Khan, and the hypothetical Libyan example posited by the Defence Secretary, indicate that the UK envisages the need for targeted killing arising when terrorists are located within territory where there is a political vacuum and UK armed forces personnel are not present. In this context, the use of lethal force is deemed necessary to mitigate the terrorist threat because the territorial state is either unwilling or unable to due to a lack of governmental authority and British military personnel are not located within the vicinity of the suspected terrorist to apprehend them. The UK's policy justification for targeted killing bears a resemblance to that offered by the US. As previously discussed,[100]the US regards targeted killing as necessary to mitigate terrorist threats posed by those located in ineffectively or substantially ungoverned territories. In these 'safe havens', terrorists can operate relatively freely as the lack of effective governance means that their activities are unlikely to be suppressed through conventional law enforcement. Therefore, it is likely that the circumstances compelling the UK to utilise targeted killing will materialise when suspected terrorists are operating in so-called 'safe-havens'.

2(4) Distinctiveness of the UK Policy

European States have facilitated US targeted killing operations by gathering and sharing intelligence on the whereabouts of targets and by permitting the US to use their air bases or air spaces.[101]Yet, the use of armed drones to lethally target specific terrorists remained outside the scope of their wide-ranging extraterritorial counter-

[100] See footnotes 53-55 and accompanying text.
[101] C.Paulussen, J.Dorsey & B.Boutin, 'Towards a European Position on the Use of Armed Drones? A Human Rights Approach' (*International Centre for Counter-Terrorism* , October 2016) <https://www.icct.nl/sites/default/files/import/publication/ICCT-Paulussen-Dorsey-Boutin-Towards-a-European-Position-on-the-Use-of-Armed-Drones-October2016-2.pdf> pp13-14.

terrorism actions.[102]At the time of the killing of Reyaad Khan, the UK was the only European nation that possessed armed drones. Therefore, the UK's embrace of drone operated targeted killing amounted to the adoption of unprecedented conduct from a European perspective.[103]

The UK is no longer isolated in its embrace of targeted killing. In 2016, Turkey began conducting armed drone strikes against the Kurdistan Worker's Party (PKK) within Turkey and also in northern Syria and Iraq.[104]Turkish drone strikes have also included targeted killing operations against high-profile targets such as Ismail Ozden who was one of Turkey's most wanted men and allegedly controlled PKK operations in Sinjar, northern Iraq.[105]

Armed drone proliferation is accelerating in Europe. France utilised armed drones for the first time at the end of 2019 to target militants in Mali[106]whilst Ukraine and Serbia also possess armed drones.[107]There are other states that either seek to acquire armed drones or are considering this possibility. For instance, in 2015, the US approved Italy's request to arm its drones in 2015[108]but budget problems have so far delayed this process. Moreover, the Netherlands has acquired four MQ-9 Reaper drones and although their armament is not currently planned, the Secretary of State for Defense has recognised the operational benefits of armed drones.[109]Additionally, Germany has agreed to lease Heron drones, which are

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[102] For an overview of the counter-terror activities of main European actors see, A.Dworkin (n57) pp5-10.
[103] N.Bhuta, 'On Preventive Killing' (*EJIL:Talk!*, 17 September 2015) <https://www.ejiltalk.org/on-preventive-killing/>
[104] U.Farooq, 'The Second Drone Age: How Turkey Defied the US and Became a Killer Drone Power' (*The Intercept*, 14 May 2019) <https://theintercept.com/2019/05/14/turkey-second-drone-age/>
[105] Ibid.
[106] A.Charlton & K.Larson, 'France Says it Carried Out First Armed Drone Strike in Mali' (*Associated Press*, 23 December 2019) <https://apnews.com/article/91857c92f04187ce48ad5bf26ea3d4af - :~:text=PARIS (AP) — France's defense,drones, including the United States>
[107] Country profiles of Ukraine and Serbia provided by the European Forum on Armed Drones at <https://www.efadrones.org/countries/>
[108] A.Shalal, 'US Government Approves Italy's Request to Arm its Drones' (*Reuters*, 4 November 2015) <https://www.reuters.com/article/us-italy-usa-drones/u-s-government-approves-italys-request-to-arm-its-drones-idUSKCN0ST1VI20151104>
[109] Letter from the Secretary of State of Defense to the President of the House of Representatives of the States General (*Parliamentary Paper 30806 No.52,* 31 January 2020) <https://zoek.officielebekendmakingen.nl/kst-30806-52.html>

capable of carrying missiles, but it remains unclear whether Germany will utilise armed drones.[110]

The UK broke new ground when it incorporated drone operated targeted killing within its counterterrorism framework. Subsequently, Turkey has followed in the footsteps of the UK. As armed drone proliferation intensifies across Europe, it is plausible that other states may view targeted killing as an effective counterterrorism measure.

3. Research Scope

There are three branches of international law applicable to extraterritorial targeted killing.[111]The use of military force abroad engages the rules relating to the recourse to force, otherwise known as the *jus ad bellum*. Accordingly, the UN Charter[112]prohibits states from using unilateral force on the territory of another state[113]except when action is authorised by the UNSC[114]or constitutes an act of self-defence pursuant to Article 51.[115]Utilising armed drones to lethally target individuals also raises questions about a state's adherence with its obligations under international human rights law (IHRL). Additionally, where a targeted killing is conducted within the context of an armed conflict, international humanitarian law (IHL) would be applicable. The focus of the current research endeavour is to examine how the UK's international human rights obligations interact with extraterritorial targeted killing operations. In particular, the legal analysis is concentrated on the UK's obligations under the ECHR. This focus does not exclude consideration of the other branches of international law previously outlined. However, they will only be discussed in so far as they are relevant to the application of the ECHR.

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[110] S.Sprenger, 'Israeli Air Force Starts Training German Heron TP Drone Pilots' (*Defense News*, 29 January 2019) <https://www.defensenews.com/global/europe/2019/01/29/israeli-air-force-starts-training-german-heron-tp-drone-pilots/>

[111] If a breach of international law occurs, this could also trigger the applicability of International Criminal Law.

[112] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16. (Henceforth, UN Charter).

[113] Article 2(4), UN Charter.

[114] Article 42, UN Charter.

[115] Article 51, UN Charter.

The scope of the research is justified on the basis that, as the JCHR itself recognised, the taking of life to counter terrorist threats in order to protect the lives of others raises human rights issues of profound importance.[116]The most relevant human right impacted by the UK Policy is the right to life, which is protected by Article 2, ECHR. However, the UK's right to life obligations are not sourced solely from the ECHR. The UK is also a party to the International Covenant on Civil and Political Rights (ICCPR),[117]which also protects the right to life.[118]There are two key reasons why the forthcoming analysis focuses on the UK's right to life obligations under the ECHR. First, unlike the ICCPR, individuals can bring complaints against the UK under the ECHR.[119]Not only can litigation be brought to challenge UK actions at the European Court of Human Rights (ECtHR) in Strasbourg but since the Human Rights Act incorporates the ECHR into UK law, the Convention is directly enforceable against public authorities in UK Courts.[120]Second, by incorporating extraterritorial targeted killing within its counterterrorism framework, the UK has embraced conduct that was previously outside the scope of European measures to tackle terrorism, which provides a new context for examining the application of the Convention.

The use of armed drones for extraterritorial targeted killing raises a myriad of legal questions. The preliminary issue arising from the UK Policy concerns the Convention's extraterritorial applicability. Despite a rich body of jurisprudence on this topic, it cannot always be ascertained whether a state's obligations under the Convention are applicable to conduct that takes place abroad or has an impact on individuals located abroad. The forthcoming analysis will evaluate whether the UK's obligations under the ECHR extend to the victims of its targeted killing operations.

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[116] JCHR Report, (n8) pp14-15, para 1.7.
[117] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. (Henceforth, ICCPR)
[118] Article 6, ICCPR.
[119] The Human Rights Committee may consider individual communications alleging violations of the ICCPR by States parties to the Optional Protocol to the ICCPR. However, the UK is not a party to the optional protocol. For the ratification status of the Optional Protocol to the ICCPR see <https://indicators.ohchr.org/>
[120]Section 7, Human Rights Act 1998.

After examining the Convention's applicability to the UK Policy, the research will investigate how the right to life applies to targeted killing. Generally, this involves scrutinising the requirements that targeted killing operations must satisfy to comply with the right to life. As the UK Policy contemplates force within and outside armed conflict, it is necessary to consider when the targeting of individual terrorists occurs during an armed conflict and whether this context alters the Convention's application. Furthermore, although the Defence Secretary stated during the JCHR inquiry that the UK had no plans to derogate from the ECHR,[121]he subsequently endorsed derogation in relation to the UK's extraterritorial military activities.[122]Therefore, it is possible that the UK may seek to derogate when conducting targeted killing operations, which necessitates an examination of the impact that derogation has on the application of the right to life and when, and under what circumstances, a derogation for targeted killing operations would be permissible.

The JCHR inquiry conducted a broad investigation of the legal issues arising from the UK Policy. This included engagement with many of the legal questions that the forthcoming analysis will address. However, although the JCHR inquiry, and subsequent report, provides a general overview of the application of the ECHR to targeted killing, it lacks crucial detail in places. A specific example of this vagueness is the recognition during the inquiry that the UK may derogate from the Convention for targeted killing operations without discussing the requirements of a valid derogation.[123]Moreover, the JCHR inquiry was primarily concerned with the application of the Convention to targeted killings that occur outside of armed conflict and only skims over the application of the right to life to targeted killing during armed conflict. This research will provide a more comprehensive analysis of the UK's obligations under the ECHR when utilising targeted killing.

[121] JCHR Report, (n8) pp52-53, para 3.61.
[122] The UK's intention to derogate from the ECHR during extraterritorially military operations will be outlined in Chapter Three.
[123] JCHR Report, (n8) p53, para 3.62.

4.Structure and Methodology

This research addresses two broad issues that are separate but interrelated: the *applicability* and the *application* of the ECHR to the UK Policy. The first part of the research examines the extraterritorial applicability of the ECHR to drone operated targeted killings. Subsequently, the second part of the research focuses on the application of the ECHR to intentional lethal force. Specifically, it will be examined whether, and if so, when targeted killing may be permitted by the Convention. As will be demonstrated, the application of Article 2 is fact and context dependent. Therefore, the upcoming analysis will consider the different contexts in which the UK contemplates conducting targeted killing operations.

Throughout this research, the UK's stance on the legal basis for targeted killing, as evidenced during the JCHR inquiry, will be scrutinised. Any misunderstandings or ambiguities that arise will be addressed with recommendations provided to safeguard the UK from violating the Convention when carrying out targeted killing operations. In the concluding chapter, the key findings and recommendations of the preceding chapters will be summarised. During this research, the circumstances of the UK Policy will be referred to throughout. The UK Policy framework has been outlined above and suffices for a general analysis.[124]However, at times, more specificity is required to rigorously assess the relevant legal issues. Therefore, where appropriate, references will be made to the circumstances of the Reyaad Khan operation, an archetypal targeted killing.

5.Terminology

Targeted killings are frequently described using other terms.[125]Often, the expressions utilised are indicative of the user's political preference or their perception of the legality of targeted killing. For example, targeted killings have been referred to as 'assassinations' or 'extrajudicial killings',[126]expressions which clearly

[124] See Section 2(3).
[125] N.Melzer, (n11) 6.
[126] In 2004, Amnesty International condemned Israel's 'assassination' of Sheikh Yassin in Gaza. Within the press release, the expressions 'assassinations' and 'extrajudicial killings' were used interchangeably to describe Israeli operations. See 'Israel/Occupied Territories: Amnesty International Strongly Condemns Assassination of Sheikh Yassin' (*Amnesty International*, 22

suggest illegality.[127]However, positive terminology has been used by those seeking to promote the perceived benefits of targeted killing. For instance, the Israeli Military Intelligence Directorate argued that Israeli targeted killings should be termed 'preventative killing', in reflection of them being 'acts of self-defence and justified on moral, ethical and legal grounds.'[128]This research will solely use the term targeted killing, as this term avoids the 'semantic baggage'[129]associated with other expressions, which is appropriate for an objective analysis.

March 2004) <https://www.amnesty.org.uk/press-releases/israeloccupied-territories-amnesty-international-strongly-condemns-assassination>

[127] P.Alston, 'The CIA and Targeted Killings Beyond Borders' (n57) 298.

[128]A.Kasher & A.Yadlin, 'Assassination and Preventive Killing' (2005) 25(1) *SAIS Review of International Affairs* 41, 56.

[129] S.David 'Fatal Choices' (n29) 2.

Part One

Extraterritorial Applicability of the ECHR

This part of the research contributes to the ongoing discussion on the Convention's extraterritorial reach with a focus on the applicability of the ECHR to drone operated targeted killings. Article 1 of the ECHR states that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms…of [the] Convention'.[1]Therefore, the applicability of the ECHR extends to the circumstances whereby the signatory states exercise jurisdiction.

Jurisdictional clauses are common features of human rights treaties that circumscribe the obligations undertaken by the states parties.[2]The exercise of jurisdiction is a prerequisite for a state to be held accountable for acts or omissions imputable to it, which give rise to an alleged violation of the Convention.[3]Thus, the exercise of jurisdiction and the attribution of conduct to a state are two separate and distinct admissibility conditions that must be satisfied for an individual to invoke the Convention's provisions against a Contracting State.[4]The attributability of a targeted killing operation to the UK would be incontestable. Therefore, the key issue in relation to the Convention's applicability to the UK Policy is whether the victim of a targeted killing operation would be 'within the jurisdiction' of the UK.

Article 1 does not define jurisdiction. Rather, the interpretation of this term has been reserved for the ECtHR and the now defunct European Commission on Human Rights (ECiHR or the Commission). The ECtHR has consistently articulated that the jurisdictional competence of the Contracting States is 'primarily

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[1] Article 1, ECHR.

[2] Article 2, ICCPR; Article 1, American Convention on Human Rights (adopted 27 November 1969, entered into force 18 July 1978) 1144 UNTS 123. (Henceforth, ACHR). However, the African Charter contains no jurisdiction clause. See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. (Henceforth, ACHPR)

[3] *Ilascu and Others v. Moldova and Russia* [GC], no.48787/99, §311, ECHR 2004-VII; *Catan and Others v. Moldova and Russia* [GC], nos.43370/04, 8252/05 and 18454/06, §103, ECHR 2012-V. (Henceforth, *Catan*)

[4] *Banković and Others v. Belgium and Others* (dec.) [GC], no.52207/99, §75, ECHR 2001 X-II (Henceforth, *Banković*); *Georgia v. Russia (II)* [GC], no.38263/08, 21 January 2021, §134.

territorial'.[5]However, our focus is on establishing when states exercise jurisdiction extraterritorially.[6]Questions concerning the Convention's extraterritorial applicability are not a modern phenomenon but European participation in various military campaigns across the world has transformed the question of the Convention's extraterritorial scope into an issue with profound and very real political and legal ramifications.[7]

In the forthcoming chapter, Strasbourg's jurisprudence will be examined to untangle the circumstances whereby states exercise extraterritorial jurisdiction. Subsequently, it will be evaluated whether the deployment of an armed drone for targeted killing would create a jurisdictional link between the UK and those killed, triggering the applicability of the UK's obligations under the Convention.

[5] See for example: ***Banković*** §§61 and 67; *Catan* §104; *Al-Skeini and Others v. United Kingdom*, [GC], no.55721/07, §131, ECHR 2011-IV.
[6] Though British drone operations are conducted from a Royal Air Force base in Nottinghamshire, England- the pertinent issue for the jurisdictional assessment is the location of the victim.
[7] S.Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20(4) *European Journal of International Law* 1223, p1224.

Chapter One

Examining the Applicability of the ECHR to Extraterritorial Targeted Killing

1.Introduction

There is a rich tapestry of jurisprudence that addresses the Convention's extraterritorial reach. Mallory identifies that the Court's jurisprudence fits within three distinct periods of evolution.[1]The first evolutionary period spans from the Convention's inception in 1953 up to the judgment of *Banković and Others v. Belgium and Others*[2] in December 2001, where the Grand Chamber of the ECtHR delivered its 'watershed authority' on the Convention's extraterritorial applicability.[3] *Banković* ushered in the second evolutionary period, which lasted a decade before the Grand Chamber provided in *Al-Skeini and Others v. UK*[4] what is now regarded as the leading judgment on the extraterritorial applicability of the Convention. *Al-Skeini* and the Court's jurisprudence in the last ten years -culminating in the Grand Chamber's judgment in the inter-state case of *Georgia v. Russia (II)*[5]- represent the third period of evolution in relation to extraterritorial jurisdiction.

The forthcoming examination will analyse the key cases throughout each period to establish how the term jurisdiction has been interpreted and to reveal the circumstances that Strasbourg has recognised as extending a state's Convention obligations to conduct that either takes place abroad or has extraterritorial effect. It will be demonstrated that the Court has often interpreted jurisdiction inconsistently, its jurisprudence suffers from striking contradictions, ambiguity surrounds the circumstances triggering a state's extraterritorial obligations and arbitrary distinctions exist between situations that fall within the scope of the Convention and those outside of its reach. Subsequently, we will consider why the

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[1] C.Mallory, *'Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights'* (OUP, 2020) p13.
[2] *Banković and Others v. Belgium and Others* (dec.) [GC], no.52207/99, ECHR 2001 X-II. (Henceforth, *Banković*)
[3] *R (Al-Skeini) v. Secretary of State for Defence* [2004] EWHC 2911 (Admin), §267. [Lord Brown] (Henceforth, *Al-Skeini* (HC))
[4] *Al-Skeini and Others v. United Kingdom*, [GC], no.55721/07, §131, ECHR 2011-IV. (Henceforth, *Al-Skeini*)
[5] *Georgia v. Russia (II)* [GC], no.38263/08, (21 January 2021). (Henceforth*, Georgia v Russia (II*))

interpretation of jurisdiction has proven such a difficult task for the Court before evaluating whether force pursuant to the UK Policy would engage the Convention.

1(1) Preliminary Clarification

Initially, it is necessary to distinguish cases containing an element of extraterritoriality from those concerning the exercise of extraterritorial jurisdiction. O'Boyle has identified that 'extraterritorial element' cases can be placed into three specific categories.[6]The first category relates to the extradition or deportation of individuals to another country. For example, in *Soering v. UK,* the ECtHR considered whether the extradition of the applicant to the US would violate Article 3 of the Convention.[7]The second category focuses on state responsibility under the Convention for implementing judicial decisions of other states. This situation arose in *Pellegrini v. Italy*, when Italy was found to have breached the applicant's right to a fair trial by enforcing a marriage annulment made by the Roman Rota without satisfying themselves that the proceedings under canon law gave the applicant a fair trial.[8] The final category of 'extraterritorial element' cases concerns the application of state immunity by national courts in litigation brought against another state. In *Al-Adsani v. UK,* the ECtHR considered whether the UK's dismissal of the applicant's private legal claim against the Kuwaiti Government on state immunity grounds violated the applicant's right to a fair trial under Article 6.[9]

In the 'extraterritorial element' cases, the alleged violations- the proposed extradition, the enforcement of a decision of a foreign Court, and the rejection of litigation on state immunity grounds-all occurred domestically. Thus, these cases fail to clarify when Contracting States exercise jurisdiction extraterritorially and are excluded from the forthcoming analysis.

2. The Interpretation of Article 1 Jurisdiction in Extraterritorial Circumstances

2(1) First Evolutionary Period

[6] M.O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Banković'' in F.Coomans and M.Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) pp126-127.
[7] *Soering v. United Kingdom* (1989) Series A no 161, §2.
[8] *Pellegrini v. Italy*, no.30882/96, §47, ECHR 2001-VIII.
[9] *Al-Adsani v. United Kingdom* [GC], no.35763/97, ECHR 2001-XI; For a more comprehensive assessment of *Al-Adsani*, see: E.Bates, 'The 'Al-Adsani' Case, State Immunity and the International legal Prohibition on Torture' (2003) 3(2) *Human Rights Law Review* 193.

The first case involving the interpretation of extraterritorial jurisdiction was *X v. Federal Republic of Germany*.[10]The case concerned a dispute between the German Consul in Casablanca and the Secretary of the Consulate in Tangiers, which the applicant alleged had resulted in his deportation, loss of property and his wife's unemployment.[11]The Commission dismissed the case as manifestly ill-founded but established that Convention obligations are not territorially confined by recognising that the applicant could have fallen within West German jurisdiction on the basis that the performance of certain duties by a state's diplomatic and consular representatives over its nationals abroad could make the state liable in respect of the Convention.[12]

Subsequently, the Commission articulated that diplomatic and consular agents bring individuals within their jurisdiction 'to the extent that they exercise their authority' over them.[13]However, the Commission did not view the exercise of extraterritorial jurisdiction as exclusive to the acts of diplomatic and consular agents. In the inter-state case of *Cyprus v. Turkey*, which stemmed from the Turkish invasion of Northern Cyprus, the Commission referred to the decision in *X v. Federal Republic of Germany* and asserted that:

> The High Contracting Parties are bound to secure the said rights and freedoms [of the Convention] to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad. …The Commission further observes…that authorised agents of a State, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[14]

In *Cyprus v. Turkey*, jurisdiction was understood as referring to the 'actual authority and responsibility' of a state. The Commission accepted that, in addition to diplomatic and consular agents, armed forces personnel could bring persons located abroad within a state's jurisdiction by subjecting them to their 'authority', which was construed as acts or omissions that 'affect' individuals. Subsequently, in *Stocké v. Germany*, the Commission proclaimed that jurisdiction would arise

[10] *X v. Federal Republic of Germany*, no.1611/62, (Commission Decision, 25 September 1965) (Henceforth, *X v. Federal Republic of Germany*).
[11] Ibid.
[12] Ibid.
[13] *X v. United Kingdom*, (1977) 12 DR 73, p73. (Henceforth, *X v. UK*)
[14] *Cyprus v. Turkey* (1975) 31 DR 125, p136.

wherever State agents exercise 'authority' over individuals.[15]Thus, the exercise of extraterritorial jurisdiction was not restricted to a particular class of state agent.

The Commission's interpretive approach was endorsed by the ECtHR in *Drozd and Janousek v. France and Spain*-[16]its first consideration of extraterritorial jurisdiction. The Court held that jurisdiction was 'not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory'.[17]Orakhelashvili asserts that *Drozd and Janousek* suggests that the Convention's extraterritorial applicability was considered a normal consequence of Article 1, applying by virtue of state conduct having extraterritorial effect.[18]

The previous cases concerned the exercise of jurisdiction over persons by state agents. This basis for extraterritorial jurisdiction was repeatedly affirmed by the Commission, adopted by the Court and would later be branded as 'personal' jurisdiction.[19]Strasbourg has also recognised that states can exercise jurisdiction over a geographical area outside of their territory, which the Court would subsequently label 'spatial' jurisdiction.[20]This basis for extraterritorial jurisdiction developed in cases arising from the Turkish invasion of Northern Cyprus. The first of these cases was the admissibility decision in *Loizidou*.[21]The applicant was a Cypriot who lived near the border of Turkish-occupied Cyprus and owned land within the northern part of the island.[22]In March 1989, the applicant was stopped and detained by Turkish forces after marching across the border.[23]Although released shortly thereafter, the applicant alleged that the treatment amounted to various Convention violations.[24]While Turkey and Cyprus were parties to the ECHR, Turkey argued that the alleged violations occurred, not in Turkey or Cyprus but in the

[15] *Stocké v. Germany*, no.11755/85, (Commission Report, 12 October 1989) §166.
[16] *Drozd and Janousek v. France and Spain* (1992) Series A no 240. (Henceforth, *Drozd and Janousek*)
[17] Ibid §91.
[18] A.Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in Recent Jurisprudence of the European Court of Human Rights' (2003) 14(3) *European Journal of International Law* 529, p545.
[19] *Georgia v. Russia (II)* §115.
[20] Ibid §115.
[21] *Loizidou v. Turkey*, (1995) Series A no 310 (preliminary objections). (Henceforth, *Loizidou* (preliminary objections))
[22] Ibid §11.
[23] Ibid §12-13.
[24] Ibid §34.

'Turkish Republic of Northern Cyprus' (TRNC).[25] At the preliminary objections stage, the Court held that:

> [T]he responsibility of a Contracting Party may […] arise when as a consequence of military action-whether lawful or unlawful- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[26]

The Court added that the alleged violations stemmed from the occupation of Northern Cyprus by Turkish troops and the establishment of the TRNC and, consequently, such acts were capable of falling within Turkish jurisdiction under Article 1.[27]

At the merits stage, the Court considered it obvious from the large number of Turkish troops stationed in Northern Cyprus (an estimated 30,000) that the Turkish army exercised effective control of the occupied area.[28]Through this control, the Court held that Turkey was responsible for the policies and actions of the TRNC and those affected by the conduct of the TRNC came within its jurisdiction.[29]Subsequently, in the inter-State case of *Cyprus v. Turkey,* the Court considered that, by exercising effective control of Northern Cyprus, Turkey had an obligation to respect and secure the entire range of Convention rights.[30]Additionally, the Court acknowledged that the inability of Cyprus to secure the rights of the Convention to those living in the occupied part of the country amounted to a 'regrettable vacuum in the system of human rights protection'.[31]As the Convention was an 'instrument of European public order',[32]Abdel-Monem notes that the Court viewed it as necessary for the Convention to apply to the inhabitants of a nation party to the Convention otherwise they would have no other recourse to secure their rights.[33]

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[25] T.Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights' (2004-2005) 14(2) *Journal of Transitional Law and Policy* 159, p[180].
[26] *Loizidou* (preliminary objections) §62.
[27] Ibid §63-64.
[28] *Loizidou v. Turkey,* [GC], no.15318/89, §56, ECHR 1996-VI. (Henceforth *Loizidou* (Judgment))
[29] Ibid.
[30] *Cyprus v. Turkey* [GC], no.25781/94, §§77-78, ECHR 2001-IV. (Henceforth *Cyprus v. Turkey* (GC))
[31] Ibid §78.
[32] Ibid.
[33] T.Abdel-Monem (n25) p182.

During the first evolutionary period, jurisdiction was understood as the exercise of authority or control over persons (personal jurisdiction) or territory (spatial jurisdiction). Within this period, jurisdiction was interpreted so that the extraterritorial applicability of the Convention was a normal consequence of state action that either took place or had effect abroad. However, the case of *Banković* would result in a significant departure from the jurisprudence of the first evolutionary period.

2(2) Second Evolutionary Period

a. *Banković and Others v. Belgium and Others*

The *Banković* case concerned a NATO airstrike on 23rd April 1999, which hit one of the buildings of the *Radio Televizije Srbije* (RTS) in Belgrade, in the Former Republic of Yugoslavia (FYR). The NATO bombing caused the death of 16 persons and serious injuries to another 16.[34]Subsequently, claims were brought against the 17 members of NATO that were also parties to the Convention, alleging violations of Articles 2 (the right to life), 10 (freedom of expression) and 13 (right to an effective remedy).[35]As the alleged violations occurred extraterritorially, the Grand Chamber of the Court, the most senior judicial body in the Convention system, was able to stamp its authority on the interpretation of Article 1. Initially, we will recall the Court's interpretive approach before examining the Court's application of its jurisdictional concept to the aerial bombardment.

Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that terms within a treaty shall be given their 'ordinary meaning'.[36]Accordingly, the Grand Chamber sought to ascertain the ordinary meaning to be given to the phrase 'within their jurisdiction'.[37]From the standpoint of public international law, the Court asserted that the jurisdictional competence of a State is primarily territorial.[38]Yet, the Court recognised that international law permits the exercise of extraterritorial jurisdiction in specific circumstances, which are based on the following principles:[39]

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[34] *Banković* §11.
[35] Ibid §28.
[36] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. (Henceforth, VCLT)
[37] *Banković* §56.
[38] Ibid §59
[39] *Banković* §59.

- The nationality principle-accordingly, a State may act to regulate the conduct of its nationals abroad (active personality jurisdiction)
- The passive personality principle-which enables a State to regulate the criminal activities of individuals overseas that affect the interests of the State or its nationals (passive personality jurisdiction)
- The protective principle-according to which, a State may punish persons who seek to harm its most vital interests
- The universality principle-which enables a State to criminalise particularly serious international crimes (universal jurisdiction)[40]

The principles that the Court referred to derive from the 'classical' concept of jurisdiction in public international law, which concern the extent of each state's right to regulate conduct or the consequence of events.[41]By focusing on the regulation of criminal conduct, it is demonstrable that the exercise of jurisdiction incorporates three distinct legal powers.[42]First, there is prescriptive jurisdiction, which relates to the State's creation of legal rules. By exercising prescriptive jurisdiction, a State criminalises certain conduct. Second, there is enforcement jurisdiction, whereby States enforce its previously prescribed rules, which may include arresting persons for alleged crimes. The final legal power is adjudicative jurisdiction, which is exercised when individuals are subject to the state's judicial processes.

The 'classical' concept of jurisdiction does not focus on the exertion of legal power itself but whether a state possessed the *authority* to regulate a particular situation. Except in specific and narrow circumstances, such as cases of diplomatic immunity,[43]states generally have free reign to make, apply, and enforce legal rules within their territory.[44]Thus, jurisdiction is an aspect of a state's sovereignty, which

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[40] These principles are articulated in Harvard Research Group, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International*, 439; S.Kavaldjieva, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?' (2006) 37(3) *Georgia Journal of International Law* 507, pp511-512; I.Brownlie, *'Principles of Public International Law'* (6th Edition, OUP, 2003) p301; W.Estey, 'The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality' (1997) 21 *Hastings International and Comparative Law Review* 177, p181.

[41] R.Jennings and A.Watts (eds), *'Oppenheim's International Law'* (9th edition, CUP, 1992) p456.

[42] R.O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 *Journal of International Criminal Justice* 735, p736.

[43] For an overview of immunities from national jurisdiction, see M.Dixon et al, '*Cases & Materials on International Law'* (6th Edition, OUP, 2016) p311; J Klabbers, *'International Law'* (2nd Edition, CUP, 2017) p99.

[44] N.Lubell, *'Extraterritorial Use of Force Against Non-State Actors'* (OUP, 2010) p208.

refers to its legislative, administrative and judicial competence.[45]As Klabbers summarises, within its territory, a state 'can legislate as they please, they can prosecute anyone who violates their laws, and they can lock up anyone who commits a crime.'[46]Inevitably, a state's attempt to regulate conduct in another state would impact upon the territorial state's ability to exercise its own legal power. Therefore, extraterritorially, a state's right to exercise their judicial, legislative, and administrative competence is constrained by the equal rights and sovereignty of other States.[47]Milanovic notes that, 'just as international law delimits the territories of States, so it delimits the spheres of their municipal law through the doctrine of jurisdiction'.[48]As states have an almost unlimited right to regulate conduct within its territory, the 'classical' notion of jurisdiction in public international law is almost entirely concerned with the exceptions to territoriality.[49]

In *Banković,* the Court referred to the commonly recognised exceptions permitting the exercise of prescriptive jurisdiction.[50]In such situations, a State is granted the authority to assert its domestic law extraterritorially due to a connecting factor,[51]such as its nationals abroad or because the state is striving to regulate conduct pertaining to vital interests.[52]However, as the Court articulated, a state cannot exercise their enforcement jurisdiction on the territory of another state without its consent, as this would violate that state's sovereignty.[53]For example, although §9 of the *Offences Against the Persons Act* is a legitimate exercise of prescriptive jurisdiction, granting the UK the right to punish its nationals that commit murder or manslaughter abroad,[54]it would be an illegitimate exercise of enforcement jurisdiction for British Police to unilaterally enter another State to arrest a British citizen for this crime. Subsequently, the Court asserted that Article 1 jurisdiction

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[45] I.Brownlie, '*Principles of Public International law'* (OUP, 2003) p297.
[46] J Klabbers (n43) p99.
[47] F.Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 3 *Rd*C 9, p20.
[48] M.Milanovic, *'Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy'* (OUP, 2011) p25. (Henceforth, M.Milanovic, *'Extraterritorial Application of Human Rights Treaties'*)
[49] Milanovic notes that 'the entire point of having a law on jurisdiction is precisely to regulate the exceptions to territoriality'. See Ibid p22.
[50] *Banković* §59.
[51] V.Lowe, 'Jurisdiction' in M Evans (ed.), *International Law* (6th Edition, OUP 2006) p342.
[52]S.Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20(4) *European Journal of International Law* 1223, p1231.
[53] *Banković* §60.
[54] Offences Against the Person Act 1861, § 9.

must reflect this '[…] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.[55]

The Court then proceeded to set out the exceptional circumstances that acts of Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction. Citing *Loizidou* and *Cyprus v. Turkey*, the Court recognised the exercise of extraterritorial jurisdiction when:

> […] the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[56]

Furthermore, the Court accepted that States could exercise jurisdiction extraterritorially in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag, of that State.[57]The Court noted that 'diplomatic'[58]and 'flag State'[59]jurisdiction are recognised bases for extraterritorial jurisdiction under international law.[60]

In terms of the applicability of the Convention to the aerial bombardment, the applicants argued, *inter alia*, that the airstrike itself was sufficient to bring the victims within the jurisdiction of the respondent States.[61]Therefore, the applicants claimed that the respondent States had exercised jurisdiction on a 'personal' basis. Unlike 'spatial' jurisdiction, which requires a State to secure the entire range of Convention rights, the applicants asserted that the establishment of 'personal' jurisdiction would only result in States being responsible for the rights within their control.[62]The applicants rationalised this distinction on the basis that it was appropriate for a State possessing territorial control to secure the entire range of rights provided by the Convention but this may be impossible to achieve when States exercise less control

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[55] *Banković* §61.
[56] Ibid §71.
[57] Ibid §73.
[58] See Article 31(1), Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.
[59] See Article 92(1), United Nations Convention on the Law of the Sea (UNCLOS)(adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[60] *Banković* §73.
[61] Ibid §46.
[62] Ibid §47.

in a particular situation.[63]Rick Lawson, a legal advisor to the applicants in *Banković,* argued:

> […] the very bombing of the RTS building had brought [the victims] 'within the jurisdiction' of the NATO Member States. It would go too far to expect the respondent States to secure all the rights and freedoms included in the ECHR, but at the very least one could expect these States to refrain from acts that endangered their right to life and their freedom to impart information.[64]

The Court rejected this argument, considering it as amounting to a "cause-and-effect" notion of jurisdiction whereby '[…] anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State…'.[65]Further, the Court held that Article 1 fails to provide any support for the claim that the rights of the Convention could be 'divided and tailored' in accordance with the circumstances of the extraterritorial act in question.[66]Therefore, the Court considered that either the entire rights of the Convention were applicable to a situation or none.

Moreover, in rebutting the applicants' assertion that the failure to find the respondent States responsible would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in human rights protection,[67]the Court insisted that the Convention operates in a regional context, notably in the legal space *(espace juridique)* of the Contracting States, which did not include the FYR.[68]The Court acknowledged that the desire to avoid a vacuum in human rights protection had previously been relied on in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[69]Therefore, as the FYR was not a party to the ECHR, the Convention's inapplicability would not result in a gap in human rights protection. This contrasts the Northern Cyprus cases, where the inhabitants would have found themselves 'excluded from the benefits of the Convention safeguards

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[63] Ibid.
[64] R.Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights', in F.Coomans and M.Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) p107.
[65] *Banković* §75.
[66] Ibid.
[67] Ibid §51 and §79.
[68] Ibid §80.
[69] Ibid.

and system which they had previously enjoyed',[70]unless it was found that, following the invasion, Turkey exercised jurisdiction in Northern Cyprus.

In the absence of the respondent States exercising 'effective control' of the area subject to aerial bombardment, the Court was unpersuaded that a jurisdictional link between the deceased and the respondent States existed.[71]Consequently, the Court regarded the application inadmissible.[72]

b. Departures from First Evolutionary Jurisprudence

During the first evolutionary period, extraterritorial jurisdiction was viewed as normal. Yet, in ***Banković,*** the Grand Chamber held that extraterritorial jurisdiction was 'exceptional and requiring special justification'.[73]Moreover, in ***Banković,*** the Grand Chamber asserted that Article 1 jurisdiction must be interpreted to reflect the 'classical' concept under public international law. Therefore, jurisdiction was viewed as the exercise of legal authority. However, prior to ***Banković,*** extraterritorial jurisdiction was not restricted to the exercise of legal authority, as evidenced by the extrajudicial transfer of suspected criminals from a state, which is not a party to the Convention, to face trial in the territory of a Contracting State being a 'recurring example'[74]of extraterritorial jurisdiction recognised during the first evolutionary period.[75]

Despite claiming that Article 1 jurisdiction must be interpreted in line with the 'classical' concept, the Court affirmed the 'spatial' basis for extraterritorial jurisdiction, which had 'absolutely nothing to do' with the assertion of legal authority.[76]Rather, it was Turkey's *factual power* exerted over the lives of the inhabitants through territorial control that created a jurisdictional connection between Turkey and those within Northern Cyprus.[77]Recalling the cases arising from the Turkish invasion of Northern Cyprus, Milanovic notes:

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[70] Ibid §80.
[71] Ibid §82.
[72] Ibid §85.
[73] Ibid §61.
[74] S.Wallace, *'The Application of the European Convention on Human Rights to Military Operations'* (CUP, 2019) p45.
[75] See *Freda v. Italy* (1980) 21 DR 254; *Reinette v. France* (1989) 62 DR 192; *Sanchez Ramirez v. France* (1996) 86-B DR 155.
[76] M.Milanovic, '*Extraterritorial Application of Human Rights Treaties'* (n48) p53; S.Miller (n52) p1231.
[77] M.Milanovic, Ibid p28.

> [Turkey] did not, for example, say that the Turkish Criminal Code applied to Cyprus, and that the inhabitants of Cyprus were bound, as a matter of law, to obey these rules of conduct. On the contrary, Turkey created a puppet regime, the Turkish Republic of Northern Cyprus, which it (and it alone) recognised as an independent State. Turkey did not even *claim* to have jurisdiction in the classical sense.[78]

By recognising a basis for extraterritorial jurisdiction unconnected to the exercise of legal authority, the Court contradicted the key principle that underpinned its entire judgment.

Within the *Banković* judgment, there were two other significant principles posited that were pertinent to the Convention's extraterritorial reach. First, the Court expressed that the Convention operates in a regional context, notably in the legal space *(espace juridique)* of the Contracting States.[79]The *espace juridique* reference implied a geographical limit on the scope of the ECHR, transforming it into a regionally restricted Convention on European human rights.[80]Second, the Court held that the deployment of lethal force abroad does not bring those killed within the jurisdiction of the responsible state. Given NATO's military action in FYR was predicated on the protection of human rights abroad, it was ironic that the respondent States explicitly argued that they had no legal obligation to observe human rights themselves.[81]

The *Banković* decision was widely criticised, though not unanimously.[82]Despite disapproval of the Court's exclusion of *Banković* from its purview, much of the condemnation focused on the Court's reasoning and the implications of its interpretation of jurisdiction upon the Convention's extraterritorial applicability.[83]In particular, though 'personal' jurisdiction could arise from state

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[78] Ibid pp27-28. (Original emphasis)
[79] *Banković* §80.
[80] Kavaldjieva (n40) p522.
[81] E.Roxstrom *et al*, 'The NATO Bombing Case (Banković et al. v. Belgium et al) and the Limits of Western Human Rights Protection' (2005) 23 *Boston University International Law Journal* 55, pp62-63.
[82]For an endorsement of the *Banković* judgment, see M.O'Boyle (n6) p135; D.McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in F.Coomans and M.Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) p41.
[83] For general criticism of the decision in *Banković*, see R.Lawson (n64); M.Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) *The European Journal of International Law* 121. (Henceforth, M.Milanovic, *'Al-Skeini and Al-Jedda in Strasbourg'*); M.Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *Netherlands Law Review* 349; T.L.W. Scheirs, 'European Court of

conduct that produced effects or were performed abroad,[84]this was limited to conduct that had a legal basis, such as the activities of diplomatic or consular agents abroad or onboard vessels flying the flag of the state.[85]Therefore, unlawful extraterritorial action would not fall within the Convention's scope,[86]which opened up the possibility of Contracting States causing immense suffering abroad without accountability under the Convention. ***Banković*** was a regressive step for human rights protection and contrasted the jurisprudence of the first evolutionary period but the key principles of the ***Banković*** judgment would be gradually chipped away.

c. Post-Banković Case-Law

A noteworthy starting point for examining the post-***Banković*** jurisprudence is *Issa and Others v. Turkey,* where the applicants alleged that Turkish forces had detained and killed shepherds in the hills of northern Iraq.[87]The applicants had failed to establish the required proof for their claims but the Court considered that the victims may have been brought within the jurisdiction of Turkey, had the allegations been proven.[88]Though Turkey did not exercise 'effective control' of the area in question,[89]the Court opined:

> a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's *authority and control through its agents* operating-*whether lawfully or unlawfully*-in the latter State.[90]

Issa contains two notable diversions from ***Banković.*** First, the Court acknowledged that Turkey could exercise jurisdiction in Iraq, outside the *espace juridique* of the Contracting States. Second, jurisdiction was not considered as the exercise of legal authority. Rather, whether State agents exercised authority and control over individuals required a factual assessment that was not influenced by

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Human Rights Declares Application Against NATO Member States Inadmissible' (2002) 18 *International Law Enforcement Reporter* 154.

[84] ***Banković*** §69.

[85] Ibid §73.

[86] M.Happold, '***Banković v Belgium*** and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77, p81.

[87] *Issa and Others v. Turkey*, no.31821/96, 16 November 2004, §§12-24. ECHR-2004. (Henceforth, *Issa*)

[88] Ibid §81.

[89] Ibid §75.

[90] Ibid §71. (Emphasis added)

legal basis of the extraterritorial act in question. Similarly, in *Isaak and Others v. Turkey*,[91] which concerned an individual that was beaten to death by Turkish Cypriot police in the UN buffer zone between the "TRNC" and Cyprus, the Court considered that the deceased was brought within Turkey's jurisdiction due to the *factual* authority and control that its agents exerted over him.[92]

A striking departure from *Banković* occurred in *Pad and Others v. Turkey,*[93]which concerned Iranian nationals that were killed by Turkish helicopter fire during an alleged attempt to illegally cross the border. It was disputed whether the killing took place on the Turkish or Iranian side of the border but in its jurisdictional assessment, the Court reiterated *Issa* and held that:

> While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction …the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives…[94]

Again, the Court permitted the Convention's application outside the *espace juridique* of the Contracting States. Additionally, the Court held that those killed were within Turkey's jurisdiction-regardless of the 'exact location of the impugned events'-because Turkey had accepted responsibility for the killings.[95]This implied that lethal force alone brought the deceased within Turkey's jurisdiction, irrespective of their location; which is incompatible with *Banković*.

In *Andreou v. Turkey,*[96]the Court explicitly recognised that forcible action establishes a jurisdictional link between the State and those subject to its effects. Like *Isaak*, *Andreou* resulted from disturbances near the UN buffer zone between the "TRNC" and Cyprus. The applicant was shot whilst located in the southern part of the Island, therefore outside Turkish controlled Northern Cyprus. Nonetheless, the Court observed that:

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[91] *Isaak and Others v. Turkey* (dec.), no.44587/98, 28 September 2006. (Henceforth, *Isaak* (admissibility))
[92] Ibid Section, The Law A.2.(b)(ii).
[93] *Pad and Others v. Turkey* (dec.), no.60167/00, 28 June 2007. (Henceforth, *Pad*)
[94] Ibid §§53-54.
[95] Ibid §71.
[96] *Andreou v. Turkey* (dec.), no.45653/99, 3 June 2008. (Henceforth, *Andreou* (admissibility))

the opening of fire on the crowd from close range, which was the direct and immediate cause of [the applicant's] injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey…'.[97]

In the case-law that followed *Banković*, there were various departures from the Grand Chamber's previous interpretation of Article 1 jurisdiction. Notably, by accepting that the Convention could apply to alleged violations in Iran and Iraq, the Court disregarded the *espace juridique* restriction on the applicability of the ECHR. Moreover, the recognition of jurisdiction arising from State agents exercising *de facto* authority and control over individuals deviated from *Banković,* where 'personal' jurisdiction required the exercise of legal authority. The most significant divergence between *Banković* and the ensuing jurisprudence occurred in *Isaak*, *Andreou* and *Pad*, where the Court considered killing or life-threatening force as a trigger for extraterritorial jurisdiction. Yet, in *Medvedyev and Others v. France,*[98] the Grand Chamber reaffirmed *Banković.*

The *Medvedyev* case concerned the capture and rerouting of a Cambodian ship, the *Winner*, by the French navy on the high seas. The Court held that France exercised full and exclusive *de facto* control over the *Winner* and its crew from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, which brought the crew of the ship within French jurisdiction.[99]The Court noted that this contrasted the 'instantaneous extraterritorial act' in *Banković*, such situations being excluded from constituting the exercise of jurisdiction.[100]Though the Court sought to rationalise the contrasting admissibility decisions in *Medvedyev* and *Banković*, it made no attempt to reconcile *Banković* with the obviously conflicting jurisdictional assessments in *Isaak*, *Andreou* and *Pad.* The conflicting decisions in *Banković* and *Pad* are particularly incomprehensible considering the deaths in both cases occurred from aerial missile fire.[101]

The second evolutionary period was a disorderly phase. In *Banković,* the Grand Chamber interpreted Article 1 jurisdiction as the exercise of legal authority. Yet, by endorsing the 'spatial' basis for extraterritorial jurisdiction, which had nothing to do with the exertion of legal power, the Grand Chamber was unfaithful to the

[97] Ibid, The Law A.3.(c).
[98] *Medvedyev and Others v. France*, [GC] no.3394/03, ECHR 2010-III. (Henceforth, *Medvedyev*)
[99] Ibid §67.
[100] Ibid §64.
[101] M.Milanovic, *'Al-Skeini and Al-Jedda in Strasbourg'* (n83) p131.

principles of its own jurisdictional concept. Moreover, in subsequent jurisprudence, the exercise of jurisdiction was accepted where *de facto* authority and control had been exercised, which obfuscated the conceptual foundations of Article 1 jurisdiction. Additionally, this period saw jurisdiction applied erratically. In ***Banković,*** the Grand Chamber held that the use of lethal force by a State Party was not sufficient to bring affected individuals abroad within its jurisdiction and implied that the Convention's applicability was geographically confined to the territories of the Contracting States. However, in the jurisprudence that followed, the Convention's applicability beyond Europe was accepted and the use of lethal force or potentially lethal force was deemed to constitute the exercise of jurisdiction. The cases of *Isaak*, *Andreou* and *Pad* appeared to overrule the jurisdictional assessment in ***Banković*** only for the Grand Chamber to endorse ***Banković*** in *Medvedyev*.

The enduring authority of ***Banković*** was evident in *Al-Skeini,* which was one of numerous cases arising out of the British invasion of Iraq that were brought before UK Courts. Initially, the case went to the High Court,[102]followed by the Court of Appeal[103]and then to the House of Lords (now known as the UK Supreme Court).[104]The case was brought by six applicants, relatives of five Iraqis who were killed by British troops in Basrah during the course of security operations, and of one Iraqi, Baha Mousa, who was mistreated and killed by British troops in a British detention facility.[105]Each domestic court failed to find a jurisdictional link between the UK and those killed during security operations but recognised that the sixth applicant, Baha Mousa, was within the jurisdiction of the UK. For practical reasons, attention will be drawn to the specific decision of the House of Lords to demonstrate the influence that ***Banković*** had on the Court's judgment.

The House of Lords justified the inapplicability of the Convention to the five applicants killed during security operations on the basis that the 'spatial' model of jurisdiction does not apply outside the *espace juridique* of the Contracting States. Therefore, even if the Court assumed that the UK had effective control of Basrah,

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[102] *Al-Skeini* (HC).
[103] *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2005] EWCA Civ 1609. (Henceforth, *Al-Skeini* (CA))
[104] *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26. (Henceforth, *Al -Skeini* (HL))
[105] Al-Skeini §§33-71.

which it did not,[106]the UK could not exercise 'spatial' jurisdiction in Iraq.[107]Furthermore, in regards to the 'personal' model of jurisdiction, the House of Lords recalled that ECtHR was clear in ***Banković*** that killing was not sufficient in itself to bring individuals within the jurisdiction of a State.[108]The House of Lords did not dismiss the case law that followed ***Banković*** but stated that it was for Strasbourg to expressly depart from ***Banković***, which had not yet happened.[109]With respect to the admissible application, Baha Mousa was regarded as being within the jurisdiction of the UK on the bizarre basis that a military prison has a special status in international law comparable to an embassy.[110]

The applicants in *Al-Skeini* then pursued their case in Strasbourg, which presented an opportunity for the Grand Chamber to address its contradictory jurisprudence and provide much needed certainty to its jurisdictional concept. A decade after ***Banković,*** the judgment in *Al-Skeini* became the leading authority on extraterritorial jurisdiction.

2(3) Third Evolutionary Period

a. Al-Skeini and Others v. UK

In *Al-Skeini*, the Grand Chamber outlined the general principles relevant to Article 1 jurisdiction. The Court began by reiterating that a State's jurisdictional competence is primarily territorial but, exceptionally, States can exercise their jurisdiction extraterritorially.[111]Subsequently, recalling its case-law, the Court outlined the exceptional circumstances capable of giving rise to extraterritorial jurisdiction. The Court's jurisprudence was separated into two strands, one relating to 'spatial' jurisdiction and the other to 'personal' jurisdiction. The latter was subsumed under the heading 'State agent authority and control'.

With respect to 'spatial' jurisdiction, the Court reiterated that extraterritorial jurisdiction arises when a Contracting State exercises effective control of an area

[106] It was posited that the UK did not have effective control of Basrah, see *Al-Skeini* (HL) §[83]. [Lord Rodger]
[107] Ibid §§78-79. [Lord Rodger]
[108] Ibid§70. [Lord Rodger]
[109] Ibid §69. [Lord Rodger]
[110] Ibid §97. [Lord Carswell]; Ibid §132. [Lord Brown]
[111] *Al-Skeini* §131.

outside its national territory.[112]In such circumstances, the State is obliged to secure within the area under its control, the entire range of Convention rights.[113]Additionally, the Court added that whether 'effective control' is exercised is a question of fact and in making such a determination, the Court will primarily reference the strength of the State's military presence in the area.[114]

For jurisdiction arising under 'State agent authority and control', the Court recognised that a Contracting State's jurisdiction may extend to the acts of its authorities, which produce effects outside its own territory.[115]Acknowledging the broadness of this principle, the Court sought to define more clearly when extraterritorial acts bring affected individuals within the jurisdiction of the State.[116]The Court recognised three situations whereby jurisdiction can be exercised on a 'personal' basis. First, the acts of diplomatic and consular agents may constitute the exercise of jurisdiction when they exert authority and control over others.[117]Secondly, the Court accepted that a Contracting State exercises jurisdiction when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government.[118]Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.[119]Finally, the Court posited that the extraterritorial use of force by state agents may bring the affected individuals under their control and within the State's jurisdiction. The Court cited the cases of *Issa and Medvedyev* to demonstrate this principle's application where an individual is detained by state agents abroad. In these cases, the decisive factor

[112] Ibid §138, citing *Loizidou* (preliminary objections) §62; *Cyprus v. Turkey* [GC] §76; *Banković* §70; *Ilascu and Others v. Moldova and Russia* [GC], no.48787/99, §§314-316, ECHR 2004-VII. (Henceforth, *Ilascu*); *Loizidou* (judgment) §52.
[113] *Al-Skeini* §138, citing *Cyprus v. Turkey* §76-77.
[114] Ibid §139, citing *Loizidou* (judgment) §16 and §56; *Ilascu* §387.
[115] Ibid §133.
[116] Ibid.
[117] Ibid §134, citing *Banković* §73; *X v. Federal Republic of Germany*, pp158 and 169; *X v. UK*; *WM v. Denmark*, no. 17392/90, (Commission Decision, 14 October 1993).
[118] Ibid §135, citing *Banković*, §71.
[119] *Al-Skeini* §135, citing *Drozd and Janousek* §91; *Gentilhomme and Others v. France*, nos.48205/99, 48207/99 and 48209/99, 14 May 2002; *X and Y v. Switzerland*, nos.7289/75 and 7349/76, (1977) 9 DR 57.

was the exercise of *'physical power and control'* over the individuals in question and not the control exercised over the location in which they are held.[120]

Concluding its assessment of 'personal' jurisdiction, the Court noted that whenever State agents exercises authority and control over an individual, it is obliged to secure the rights and freedoms of the Convention that are relevant to the situation of that individual.[121]Therefore, the Court accepted that the Convention rights can be "divided and tailored".[122]Furthermore, with reference to the cases of *Öcalan*, *Issa*, *Al Saadoon and Mufdhi*, and *Medvedyev* the Court posited that there is no geographical restriction that limits the application of the ECHR to the *espace juridique* of the high contracting parties.[123]

Applying the general principles to the circumstances of the case, the Court focused on the fact that, as an occupying power, the UK obviously exercised elements of governmental authority, which it established formally, by reference to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq.[124]The Court concluded that:

> [f]ollowing the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom...[125]

Unanimously, the Grand Chamber held that the applicants were within the UK's jurisdiction and that the UK had breached its procedural obligation under Article 2 of the Convention to carry out an effective investigation into five of the deaths.[126]The Court acknowledged that a full, public inquiry was nearing completion

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[120] Ibid §136. (Emphasis added).
[121] Ibid §137.
[122] Ibid.
[123] Ibid §142.
[124] Ibid §§144-148.
[125] Ibid §149.
[126] Ibid §177.

into the death of the sixth applicant's son and that he was no longer a victim of any procedural breach.[127]

In its general assessment of the principles relevant to Article 1 jurisdiction, the Grand Chamber retained the view from *Banković* that jurisdiction is 'primarily territorial', and that extraterritorial jurisdiction is 'exceptional'.[128]However, *Al-Skeini* also confirmed several divergences from *Banković.* Notably, the endorsement of *Issa* as an example of the exercise of *'physical power and control'* demonstrates that 'personal' jurisdiction is not contingent on the exercise of legal authority. Additionally, the Court accepted that the ECHR could be "divided and tailored".[129]

The Grand Chamber also confirmed that the Convention was not geographically confined to the territories of the Contracting States, which Ryngaert claimed was an abandonment of the *'espace juridique'* concept.[130]However, it is submitted that it was never the Court's intention in *Banković* to geographically circumscribe the Convention's applicability. The Court's *espace juridique* reference was in response to the applicants' assertion that any failure to accept they were within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the system of human rights convention.[131]This was an intriguing argument posited by the applicants because in *Loizidou*, the Court provided this very reason as necessitating the establishment of a jurisdictional link between Turkey and those in Northern Cyprus. Countering this argument, the Court highlighted the importance of the Convention for European public order, designed to apply in an essentially regional context, notably the *espace juridique* of the Contracting States.[132]Thus, the Court was simply dismissing the applicants' specific argument by emphasising the Convention's special role within Europe. However, as clarified in *Al-Skeini*, the importance of establishing jurisdiction in cases such as *Loizidou, '*[d]oes not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States.'[133]

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[127] Ibid §176.
[128] Ibid §131.
[129] Ibid §137, compare with *Banković* §75.
[130] C.Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights' (2012) 28 *Utrecht Journal of International and European Law*, 57, p59
[131] *Banković* §§79-80.
[132] Ibid §80.
[133] *Al-Skeini* §142.

The general principles articulated by the Grand Chamber in *Al-Skeini* have been reiterated in subsequent jurisprudence[134]and, undoubtedly, the judgment is now the 'starting point' for considering the extraterritorial applicability of the Convention.[135]*Al-Skeini* placed the doctrine of extraterritorial jurisdiction 'on a sounder footing than ever before'[136]and provided some important clarifications about the Convention's extraterritorial applicability. Moreover, the admissibility decision makes clear that a jurisdictional link arises from the use of lethal force during the exercise of '*public powers'*. However, despite these clarifications, *Al-Skeini* was unable to eradicate all ambiguities concerning the Convention's extraterritorial applicability. In relation to 'spatial' jurisdiction, the Court did not consider whether military occupation equated to the 'effective control' of territory, an issue that was pertinent in *Al-Skeini*. Yet, it should be noted that the Court's description of the chaotic circumstances of the area occupied by the UK, suggests that it did not consider the area as being under its 'effective control'.[137]With respect to 'personal' jurisdiction, the Court did not confirm whether state agents can exercise *'physical power and control'* over individuals outside of detention scenarios. Furthermore, the Court only vaguely set out what '*public powers'* are and did not expand on the circumstances whereby authority and control is exerted over individuals in this context.

A crucial area where *Al-Skeini* failed to provide clarity is the direct relationship between killing or life-threatening force abroad and the Convention's applicability. In *Al-Skeini*, a jurisdictional link was established due to the exceptional circumstances of the deaths occurring during the exercise of *'public powers'* by British soldiers. Thus, killings alone were not deemed sufficient to establish a jurisdictional link and that the inadmissibility decision in ***Banković*** remained perfectly correct in its result.[138]Subsequently, the UK High Court in *Al Saadoon and Others v. Secretary of*

[134] See *Jaloud v. Netherlands* [GC], no. 47708/08, §139, ECHR 2014-VI. (Henceforth, *Jaloud)*; *Hassan v. United Kingdom*, [GC], no.29750/09, §74, ECHR 2014-VI. (Henceforth, *Hassan*); *Georgia v. Russia (II)* [GC], no.38263/08, 21 January 2021, §81. (Henceforth*, Georgia v. Russia (II*))

[135] *Al-Saadoon and Others v. Secretary of State for Defence* [2016] EWCA Civ 811 §31 [Lloyd Jones LJ] (Henceforth *Al-Saadoon* [CA])

[136] *Al-Skeini*, Concurring Opinion Judge Bonello §3.

[137] Ibid §161 - the Court described Basrah as suffering from endemic violence and crime, with the British military and police victims of over a thousand attacks in a 13 month period.

[138] M.Milanovic, *'Al-Skeini and Al-Jedda in Strasbourg'* (n83) p130.

State for Defence viewed killing as a jurisdictional trigger.[139]Justice Legatt posited that, once the principle was established that the exercise of '*physical power and contro*l' by state agents brings affected individuals within the state's jurisdiction, it would be impossible for killing not to do so as 'using force to kill is indeed the ultimate exercise of physical power and control over another human being'.[140]Yet, when *Al Saadoon* was appealed, the principle that killing equates to the exercise of jurisdiction was quashed. The Court of Appeal held that the Grand Chamber in *Al-Skeini* required a '[…] greater degree of power and control than that represented by the use of lethal or potentially lethal force alone'.[141]The different approaches by the British Courts derive from the indeterminacy of the Convention's applicability to extraterritorial killing. The Court of Appeal provided a more accurate reading of *Al-Skeini* because if it was the intention of Strasbourg to equate killing with the exercise of jurisdiction, the Grand Chamber could have simply found a jurisdictional link on the basis of *'physical power and control'* without reference the UK's *'public powers'* in Iraq.[142]The Grand Chamber's focus on the exceptional circumstances of the UK assuming authority and responsibility for security in south-east Iraq, implies that the Court did not wish to conflate killing with the exercise of jurisdiction. After *Al-Skeini*, the relationship between extraterritorial killing and Article 1 jurisdiction remained indeterminate.

b. Post-Al-Skeini Jurisprudence

The cases of *Jaloud v. Netherlands* and *Pisari v. Moldova and Russia*[143]provide further evidence of the Court's indecisiveness about the applicability of the Convention to extraterritorial killing. *Jaloud* concerned the death of the applicant's son, who was killed when the vehicle he was travelling in was fired upon at a checkpoint in Iraq that was under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of the SFIR[144]mission, under UNSC Resolution 1483, to restore conditions of stability

[139] *Al-Saadoon and Others v. Secretary of State for Defence* [2015] EWHC 715 (Admin). (Henceforth, *Al-Saadoon* [HC])
[140] Ibid, §95.
[141] *Al-Saadoon* [CA] §69.
[142] For an endorsement of the Court of Appeal's decision in *'Al-Saadoon'*, see H.Evans , 'Keeping it in Bounds: Why the UK Court of Appeal was Correct in its Cabining of the Exceptional Nature of Extraterritorial Jurisdiction in *Al-Saadoon',* (2017) 59 *Harvard International Law Journal*, 38.
[143]*Pisari v. Republic of Moldova and Russia*, no.42139/12, 21 April 2015. (Henceforth, *Pisari*)
[144] Stabilisation Force in Iraq (SFIR).

and security conducive to the creation of an effective administration in Iraq.[145]The Court considered that Netherlands exercised its 'jurisdiction' within the limits of the SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.[146]

Similarly, in *Pisari,* the Court had to assess whether Vadim Pisari, who was shot after failing to stop at a checkpoint on the Dniester River in Moldova, manned by a combination of Russian, Moldovan and Transdniestrian soldiers,[147]was within the jurisdiction of Russia.[148]The Court noted:

> the use of force by a State's agents operating outside its territory may bring the individual… within the State's Article 1 jurisdiction. This may include the exercise of extraterritorial jurisdiction when, in accordance with custom, treaty, or other agreement, its authorities carry out executive functions on the territory of another State. In the present case, the checkpoint in question, situated in the security zone, was manned and commanded by Russia soldiers in accordance with the agreement putting an end to the military conflict in the Transdniestrian region of Moldova. Against this background, the Court considers that, in the circumstances of the present case, Vadim Pisari was under the jurisdiction of the Russian Federation.[149]

In *Jaloud* and *Pisari*, the Court did not explicitly state the basis upon which jurisdiction was established. Haijer and Ryngaert contend that *Jaloud* could be interpreted as the Court acknowledging that individuals are brought within the jurisdiction of a state on the sole basis of targeted force.[150]Yet, they also consider that jurisdiction may have arisen on the basis that the Netherlands exercised *'public powers'* in Iraq.[151]Recently, in *Georgia v. Russia (II)*, the Grand Chamber confirmed that jurisdiction had been established in *Jaloud* on similar grounds to *Al-Skeini.*[152]Therefore, it was the use of lethal force in conjunction with the exercise of *'public powers'* that created a jurisdictional link in *Jaloud*, which must have also been the case in Pisari, given the similarities between both cases. Moreover, the

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[145] *Jaloud* §152.
[146] Ibid.
[147] *Pisari* §9.
[148]Originally, the application was brought against Russia and Moldova by the parents of the deceased. Subsequently, the applicants decided not to pursue their case against Moldova because they considered Moldova had done everything reasonable to investigate the circumstances of their son's death. See Ibid §§34-35.
[149] Ibid §33.
[150] F.Haijer & C.Ryngaert, 'Reflections on *'Jaloud v. the Netherlands'* Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 *Journal of International Peacekeeping* 174, p180.
[151] Ibid pp180-181.
[152] *Georgia v. Russia (II)* §119.

judgment in *Pisari* strongly implies that the use of lethal force was not itself sufficient to bring the deceased within the jurisdiction of Russia. The Court's assertion that the use of force *may* establish a jurisdiction link between the acting State and the deceased suggests that lethal force does not always amount to the exercise of jurisdiction. Additionally, Russia had accepted that the killing was within its jurisdiction.[153]Therefore, it is peculiar that the Court felt compelled in its jurisdictional assessment to discuss the background circumstances to the killing. It is posited that the Court sought to emphasise that the killing alone did not bring the victim within Russia's jurisdiction. Rather, it was the combination of the shooting and the control exerted by Russian soldiers over a checkpoint, in accordance with a peace agreement, that amounted to the exercise of jurisdiction.[154]

In *Hassan v. UK,* the Grand Chamber cemented the Convention's extraterritorial applicability where Contracting State agents arrest and detain persons abroad. The Court held that the UK exercised *'physical power and control'* over Tarek Hassan during the period of his detention.[155]The UK accepted *'physical power and control'* as a basis for extraterritorial jurisdiction but submitted that it should not apply in the active hostilities phase of an international armed conflict (IAC).[156]The Court did not find this argument persuasive,[157]which makes its subsequent jurisdictional assessment in *Georgia v Russia (II)* particularly intriguing.

In January 2021, the Grand Chamber delivered its judgment concerning alleged Russian human rights violations during and in the immediate aftermath of its armed conflict with Georgia in South Ossetia and Abkhazia. For the first time since *Banković*, the ECtHR was required to examine the question of jurisdiction in relation to military operations conducted during an IAC.[158]Recounting the general principles established in its jurisprudence concerning Article 1 jurisdiction, the Grand Chamber acknowledged that its concept had evolved since *Banković* but the exercise of extraterritorial jurisdiction remained exceptional.[159]Moreover, a State's responsibility could not be engaged in respect of an 'instantaneous extraterritorial

[153] *Pisari* §33.
[154] Wallace proposes that the context in which force was utilised appeared decisive for the Court. See S.Wallace (n74) p60.
[155] *Hassan* §80.
[156] Ibid §76.
[157] Ibid §77.
[158] *Georgia v. Russia (II)* §113.
[159] Ibid §114.

act' as Article 1 did not admit of a 'cause and effect' notion of jurisdiction.[160]The Court then expressed that the obligation which Article 1 imposes on Contracting States to secure to everyone within their jurisdiction the rights guaranteed by the Convention is closely linked to the notion of "control", whether it be "State agent authority and control" over individuals (personal jurisdiction) or "effective control" over territory (spatial jurisdiction).[161]

Applying these general principles to the facts of the case, the Court made a temporal distinction between the five days of active hostilities (8-12 August 2008) and the occupation phase following the cessation of hostilities. During active hostilities, the Court held that very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos precludes jurisdiction arising on a 'spatial' basis.[162]Additionally, the Court regarded the 'context of chaos' as excluding any form of "State agent authority and control" over individuals. Therefore, not only did the Court find that the events during this period as outside Russian jurisdiction, but it also dismissed the possibility of the Convention applying to the active hostilities phase of an IAC, which directly contradicts *Hassan*.

With respect to the events that occurred after the ceasefire, the Grand Chamber found the Convention applicable due to Russia exercising "effective control" over South Ossetia, Abkhazia and the "buffer zone".[163]In reaching its finding, the Court referenced Russia's substantial military presence in the region and the economic and political support that Russia provided South Ossetia and Abkhazia.[164]Subsequently, the Court commented on the relationship between "occupation" under international humanitarian law (IHL) and "effective control", which it had previously ignored in *Al-Skeini*. In the Court's view, "occupation" requires "effective control". Therefore, where a State occupies territory, it exercises "effective control". However, the Court noted that "effective control" is broader and covers situations that do not necessarily amount to "occupation".[165] The Court's equation of "occupation" with "effective control" seems at odds with its jurisdiction

[160] Ibid §124.
[161] Ibid §136.
[162] Ibid §126.
[163] Ibid §174-175.
[164] Ibid §165-173.
[165] Ibid §196.

assessment in *Al-Skeini,* where the Court did not consider that the UK exercised "spatial" jurisdiction despite being an occupying power. In fact, as previously discussed, the Court implied that the UK did not exercise "effective control" by referencing the chaotic circumstances that prevailed in south-east Iraq.[166]Nevertheless, the Grand Chamber has now confirmed that a State's obligations under the Convention will extend to occupied territories.

Despite asserting that Russia did not exercise jurisdiction during the five days of active hostilities, the Court did not consider events within this period as completely outside its purview. For instance, the Court held that Russia violated Article 5 by arbitrarily detaining Georgian civilians.[167]Though the Georgian civilians were "mostly" detained after the cessation of hostilities and fell within the jurisdiction of Russia, the Court also made explicit reference to the detention of elderly Georgian citizens prior to August 12 in the basement of the "Ministry of Internal Affairs of South Ossetia".[168]Therefore, *all* detained civilians were within Russia's jurisdiction, even those detained before the ceasefire. Similarly, the Court found Russia responsible for acts of torture that Georgian prisoners of war (POWs) were subjected to.[169]The Court observed that the Georgian POWs were detained from 8-17August and given that they were detained, *inter alia*, after the cessation of hostilities, they fell within Russian jurisdiction.[170]The use of *'inter alia'* indicated that the jurisdictional link existed for the duration of the POWs detention and not just the period following the conclusion of hostilities. Additionally, the Court held that Russia was required to investigate allegations of alleged war crimes committed during the active phase of hostilities[171](which it failed to adequately discharge)[172]due to the 'special features' of the case, which included Russia's obligations under IHL and domestic law to investigate alleged war crimes, the steps taken by Russia's prosecuting authorities to investigate those allegations, Russia's control of the territories in question shortly after the cessation of hostilities, and that all potential suspects among the Russian service personnel were located either in Russia or territories under its control, which

[166] See footnote 137 and accompanying text.
[167] Al-Skeini §§253-256.
[168] Ibid §§238-239.
[169] Ibid §§272-281.
[170] Ibid §§268-269.
[171] Ibid §332.
[172] Ibid §337.

prevented Georgia from carrying out an adequate and effective investigation into the allegations.[173]

The Court's approach to events during the active phase of hostilities was more protective than its jurisdictional assessment appeared to allow. The key issue that the Court viewed as outside the Convention's reach potential violations of the substantive limb of Article 2 resulting from the armed attacks, bombing, and shelling conducted during the active phase of hostilities. Milanovic notes that the accountability gap in *Georgia v Russia (II)* is the same that existed in *Banković*; the Convention does not extend to extraterritorial uses of lethal force during an IAC.[174]

Despite finding that alleged substantive breaches of Article 2 between 8-12 August fell outside Russia's jurisdiction, the Court did comment on the relationship between the lethal force and extraterritorial jurisdiction. The Court cited the cases of *Isaak*, *Andreou* and *Pad* as examples of the application of the concept of *'physical power and control'* outside the context of arrest or detention scenarios.[175]However, the Court then added that these cases concerned isolated and specific acts involving an element of proximity,[176]which contrasted the active phase of hostilities in *Georgia v. Russia (II).*[177]Therefore, the Court accepts that the use of lethal or potentially lethal force can constitute the exercise of jurisdiction but only in relation to 'isolated and specific acts involving an element of proximity'.

The Grand Chamber's jurisdictional assessment in *Georgia v. Russia (II)* was peculiar. In terms of the general principles relating to extraterritorial jurisdiction, the Grand Chamber reaffirmed *Al-Skeini* but added that the chaotic circumstances prevalent during active hostilities in an IAC precluded the Convention's applicability. Therefore, the Court appeared to undertake a dramatic departure from its position in *Hassan* that the Convention could apply in such circumstances. Yet, confusingly, the Grand Chamber *did* consider Russia responsible for some violations that

[173] Ibid §331.
[174] M.Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Banković in the Contexts of Chaos' (EJIL:Talk!, 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>
[175] *Georgia v. Russia (II)* §131.
[176] Ibid §132.
[177] Ibid.

occurred during the so-called ‘context of chaos’ (arbitrary detention, torture and inadequate investigations into alleged war crimes).

The Grand Chamber’s consideration of the applicability of the Convention to fatalities during the active phase of hostilities was bizarre. Russia was held responsible for failing to effectively investigate alleged war crimes, but the Court did not regard Russia’s substantive right to life obligations applicable. The independent application of the procedural obligation under Article 2 is not unique to *Georgia v. Russia (II)*. In *Güzelyurtlu and Others v. Turkey*, where the principle was established that the procedural limb of Article 2 can be considered as a detachable obligation, the Grand Chamber recognised that Turkey had an obligation to effectively investigate the murder of three Turkish Cypriots that occurred in the part of the island controlled by Cyprus after the suspects had fled into the TRNC.[178]Though the killings took place in the south of the island, the Court recognised the initiation of an investigation by the authorities of the TRNC *and* the ‘special features’ of Turkey’s occupation of northern Cyprus, which effectively prevented Cyprus from pursuing its own criminal investigation in fulfilment of its Convention obligations once the suspects had fled to the TRNC, as establishing a jurisdictional link in respect of the procedural limb of Article 2.[179]In *Güzelyurtlu*, it was logical for the Court to recognise the requirement for Turkey to conduct an effective investigation otherwise there was a risk, which the Court rightly identified, of creating a safe haven in the TRNC for murderers fleeing the territory controlled by Cyprus.[180]The issue in *Georgia v. Russia (II)* was not that the procedural obligation applied but that the substantive limb of the right to life did not. It is difficult to see a sound reason why the Court held Russia accountable for shoddily investigating alleged war crimes whilst turning a blind eye to the killings under investigation.

It is appropriate at this moment to briefly depart from the current analysis to mention the case of *Hanan v. Germany*,[181]which was decided by the Grand Chamber a month after *Georgia v. Russia (II)* and provides another example of the Court recognising ‘special features’ triggering a jurisdictional link in relation to the procedural limb of Article 2. The case concerned an airstrike that was ordered by a

[178] *Güzelyurtlu & Others v. Turkey* [GC], no.36925/07, §195, 29 January 2019.
[179] Ibid §196.The Grand Chamber noted that the initiation of the investigation *and* the ‘special features’ present were sufficient for the procedural obligation to arise.
[180] Ibid §195
[181] *Hanan v. Germany* [GC], no.4871/16, 16 February 2021.

German colonel that occurred near Kunduz, Afghanistan in 2009, which resulted in more than 100 casualties, including two of the applicant's sons.[182]The applicant complained *exclusively* under the procedural limb of Article 2, which required the Court to decide whether Germany had a duty under the Convention to investigate the airstrike.[183]

Recalling *Güzelyurtlu*, the Court noted that a jurisdictional link could exist in relation to a death which occurs outside the territory of the Contracting State in respect of which the procedural obligation under Article 2 was said to arise.[184]Yet, in contrast to *Güzelyurtlu*, the Court noted that the institution of a domestic criminal investigation or proceedings into a death abroad does not *in itself* establish the procedural obligation as this would excessively broaden the scope of the Convention.[185]Therefore, the initiation of an investigation into the airstrike by German authorities had not established the procedural obligation. However, the Court recognised the existence of 'special features', notably Germany's obligation under IHL and domestic law to investigate the airstrike as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime, which did trigger the investigative duty under Article 2.[186]

Collectively, the cases of *Georgia v. Russia (II)* and *Hanan* demonstrate that even in the absence of a jurisdictional link in relation to substantive right to life obligations, the Court appears prepared to require Contracting States to conduct Article 2 compliant investigations into allegations of war crimes.

Returning now to the jurisdictional assessment in *Georgia v. Russia (II)*, the Grand Chamber endorsed *Pad*, *Isaak* and *Andreou,* where killing or potentially lethal force amounted to the exercise of jurisdiction, whilst rejecting those killed by Russian military operations as falling within Russia's jurisdiction. The Grand Chamber did try and rationalise its approach, articulating that *Pad, Isaak and Andreou* concerned isolated and specific acts with an element of proximity. However, the Grand Chamber's distinction between killings within its purview and those outside the scope of the Convention was completely arbitrary. Why should the Convention's

[182] Ibid §§66-69.
[183] Ibid §132. Unfortunately, the Court did not consider the existence of a jurisdictional link in relation to the substantive limb of Article 2 which could have been directly relevant to the UK Targeted Killing Policy.
[184] Ibid.
[185] Ibid §135
[186] See Ibid §§137-142 for the Court's consideration of the 'special features' that were present.

protection against serious state violence depend on the distance between the affected individuals and the responsible state agents or whether they were subject to an isolated act rather than widespread harm? Tan and Zwanenburg are right to acknowledge note that it is in cases of widespread harm that the protection of the Convention is *more* urgent.[187]Moreover, Longobardo and Wallace recognise that if the more widespread and indiscriminate a state's attack is, the less likely it is that the lethal force will engage the Convention, the Court is inadvertently *encouraging* states to violate the right to life more extensively to avoid accountability.[188]Additionally, it is also odd that the Grand Chamber did not classify the helicopter fire in *Pad* and the shooting in *Andreou* as an 'instantaneous extraterritorial act', which apparently cannot engage a State's responsibility under the Convention.

Georgia v. Russia (II) brought the third evolutionary period to a close. In the last decade, the Court's jurisdictional concept entered a 'period of stability',[189]as the term 'jurisdiction' was consistently interpreted to mean 'control'. The case law during this period confirmed that 'control' could be exerted on a factual basis or through the assertion of legal authority over individuals (personal jurisdiction) or territory (spatial jurisdiction). At the beginning of the third evolutionary period, *Al-Skeini* clarified that the applicability of the Convention is not geographically confined to the *espace juridique* of the Contracting States. Moreover, the Grand Chamber also accepted that Convention obligations can be 'divided and tailored' when a state exercises 'personal' jurisdiction, whereas the entire range of Convention rights must be observed when a state exercises 'spatial' jurisdiction.

In the last decade, the ECtHR has provided some important clarifications about the Convention's extraterritorial reach. Notably, when State agents arrest or detain individuals abroad, this constitutes the exercise of *'physical power and control'* that brings apprehended persons within the State's Article 1 jurisdiction. Furthermore, when a State occupies territory abroad, this crosses the threshold for 'spatial' jurisdiction. However, despite conceptual certainty, the principles

[187] F.Tan & M.Zwanenburg, 'One Step Forward, Two Steps Back? *Georgia v Russia (II)*, European Court of Human Rights, Appl No 38263/08' (2021) 22 *Melbourne Journal of International Law* 1, p7.
[188] M.Longobardo & S.Wallace, 'The 2021 ECtHR Decision in Georgia v Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) 55(2) *Israel Law Review* 145, p176.
[189] C.Mallory (n1) p198.

concerning extraterritorial jurisdiction are not always easy to apply to concrete situations. For instance, the relationship between the deployment of lethal or potentially lethal force abroad and the Convention's applicability remains unclear. Moreover, the Grand Chamber's judgment in *Georgia v. Russia (II)* complicates assessments on the Convention's applicability to military operations during an IAC. On the one hand, the Grand Chamber was clear that the chaotic circumstances prevailing during hostilities precluded the exercise of 'control' over persons or territory. Yet, the Court *did* find Russian violations during the period of active hostilities, implying the existing of a jurisdictional link. Subsequently, the Grand Chamber's admissibility decision in the inter-state case of *Ukraine and the Netherlands v. Russia* explicitly acknowledged the existence of jurisdiction in *Georgia v. Russia (II)* with respect to the detention and treatment of civilians and prisoners of war during the period of active hostilities.[190]Moreover, the Grand Chamber emphatically declared that 'there can be no doubt that a State may have extraterritorial jurisdiction in respect of complaints concerning events which occurred while active hostilities were taking place.'[191]Therefore, it appears that the Court has already abandoned the principle that it established in *Georgia v. Russia (II)*, although one it did not stringently apply, that the exercise of jurisdiction is excluded during the active hostilities phase of an armed conflict.

Though there remains lingering ambiguities concerning the extraterritorial applicability of the Convention, the Court has established and cemented foundational principles on extraterritorial jurisdiction that can be developed in future case-law.[192]In particular, the Grand Chamber has an opportunity at the merits stage of the *Ukraine and the Netherlands v. Russia* case to provide much needed clarity on the interaction between lethal force and the concept of 'personal' jurisdiction. At the admissibility stage, the Court held that Russia exercised 'spatial' jurisdiction of the territory in eastern Ukraine under separatist control as a result of the military, political and economic support provided to the separatist entities.[193]Consequently, all complaints concerning events wholly within the controlled territory were within

[190] *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos.8019/16, 43800/14 and 28525/20, §558, 30 November 2022. (Henceforth, *Ukraine and the Netherlands v. Russia*)
[191] Ibid.
[192] Mallory describes the *Al-Skeini* judgment as a categorisation of extraterritorial jurisdiction that provided the makings of a skeleton from which a body could be grown. See C.Mallory (n1) p166.
[193] *Ukraine and the Netherlands v. Russia* §§684-697.

Russia's jurisdiction.[194]Yet, Ukraine's complaint also referred to harm inflicted upon individuals and property located in Ukrainian controlled territory from artillery attacks.[195]Therefore, as the victims and property were outside Russia's 'spatial' jurisdiction, the Court noted that it would be necessary to examine, with reference to the exceptions identified in *Georgia v. Russia (II),* whether the acts of shelling constituted the exercise of 'personal' jurisdiction. However, as the Court considered this matter so closely connected to the merits of the case, it decided to address this issue at a later date.[196]Hopefully, the Grand Chamber does not miss the opportunity to provide much needed certainty on the relationship between extraterritorial lethal force and the Convention's applicability.

2(4) Summary

Within this section, the key cases from each evolutionary period of the Court's jurisprudence on the Convention's extraterritorial applicability were examined to understand how the term 'jurisdiction' has been interpreted and to identify the circumstances whereby a State's Convention obligations extend to conduct that either takes place abroad or has extraterritorial effect.

In the first evolutionary period, jurisdiction was understood as the exercise of authority or control over persons (personal jurisdiction) or territory (spatial jurisdiction). The second evolutionary period was tumultuous as the concept of extraterritorial jurisdiction became muddled. In *Banković*, the Grand Chamber viewed Article 1 jurisdiction as synonymous with the 'classical' concept under public international law and interpreted it as the exercise of legal authority. However, in *Banković,* the Court endorsed the 'spatial' basis for extraterritorial jurisdiction that developed during the first evolutionary period in cases arising from Turkey's factual control over Northern Cyprus. Additionally, in the cases that followed *Banković*, the

[194] Ukraine alleged numerous Convention violations arising from the abduction and transfer to Russia of three groups of children and accompanying adults (see Ibid §374) and pleaded an administrate practice committed by Russia in eastern Ukraine contrary to various Convention rights (see Ibid §373). The Netherlands complaint related to the downing of flight MH17 and the failure to investigate it, which was argued to amount to violations of Articles 2,3 and 13 of the Convention (see Ibid §§376-382).
[195] Ibid §699.
[196] Ibid §700.

exercise of jurisdiction was recognised when *de facto* control was exerted over individuals.

The second evolutionary period also saw key principles relating to the extraterritorial applicability of the Convention being applied in an inconsistent and irreconcilable manner. In *Banković,* the use of lethal force abroad was not viewed as sufficient to trigger the Convention's application and the Grand Chamber implied that the Convention's applicability was geographically confined to the territories of the Contracting States. However, in the jurisprudence that followed, the Convention's applicability beyond Europe was frequently accepted and the use of lethal or life-threatening force was deemed to constitute the exercise of jurisdiction. Yet, despite the concept of jurisdiction espoused in *Banković* appearing to be dismantled in subsequent jurisprudence, the Grand Chamber in *Medvedyev* reaffirmed its *Banković* judgment. In *Al-Skeini,* Judge Bonello was scathingly critical of the Court's previous attempt to define the Convention's extraterritorial reach, describing the Court's Article 1 case-law as 'bedevilled by an inability or unwillingness to establish a coherent and axiomatic regime…'[197]and noted that 'a considerable number of different approaches to extra-territorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction.'[198]Furthermore, Judge Bonello commented on the energy squandered by Strasbourg in attempting to 'reconcile the barely reconcilable' jurisprudence.[199]

The case of *Al-Skeini* ushered in the third evolutionary period, where the Court established a relatively stable jurisdictional concept underpinned by clear principles. The Court now considers Article 1 'jurisdiction' as synonymous with 'control', which a State may exercise on a 'spatial' or 'personal' basis, which resembles the interpretation of jurisdiction posited by Strasbourg during the first evolutionary period.

In the last decade, the Court has provided important clarifications about the circumstances whereby the Convention applies abroad, the scope of the applicable obligations and the geographical reach of the ECHR. The doctrine of extraterritorial jurisdiction is now built upon solid foundational principles. Yet, despite the flaws in

[197] *Al-Skeini*, Concurring Opinion, Judge Bonello, §4.
[198] Ibid §7.
[199] Ibid.

the Court's interpretation of jurisdiction diminishing, they have not gone away. Though extraterritorial jurisdiction is viewed as synonymous with 'control' over territory or persons, the Court has not comprehensively set out when states exercise 'control' abroad. Moreover, the Court continues to apply its jurisdictional concept inconsistently. Notably, in *Georgia v. Russia (II)*, the Court asserted that hostilities during an IAC provided a 'context of chaos' that precludes the exercise of jurisdiction whilst holding Russia responsible for violations during this period. Furthermore, there are glaring contradictions in the Court's jurisprudence. An obvious example of this is the Grand Chamber's proclamation in *Hassan* that the safeguards of the Convention apply even in situations of IAC, only for the same Court to subsequently claim in *Georgia v. Russia (II)* that such situations are a vacuum for the Convention's applicability before seemingly swiftly abandoning this stance in *Ukraine and the Netherlands v. Russia*. Additionally, there remains arbitrary distinctions between situations that constitute the exercise of jurisdiction and those that fall outside the scope of the Convention. For instance, with respect to the relationship between lethal force abroad and extraterritorial jurisdiction, there is no logical reason why the protection of the Convention extends to isolated killings involving an element of proximity but seemingly excludes mass killings or lethal force conducted remotely.

Unmistakeably, the task of articulating the extraterritorial scope of the ECHR has proven difficult for the judicial organs in Strasbourg. This raises questions as to why the Court has struggled to develop a coherent and easily applicable concept of extraterritorial jurisdiction and why its jurisprudence is riddled with inconsistencies. Before evaluating the applicability of the Convention to the force envisaged by the UK Policy, we will consider why the interpretation of Article 1 jurisdiction has troubled the Court so greatly. The next section will reveal that the flaws in the Court's jurisdictional concept are self-induced and emanate from its weighing up of policy considerations pertinent to the Convention's extraterritorial applicability.

3. Factors Influencing Strasbourg's Interpretive Approach

The preamble of the ECHR sets out the aim of 'securing the universal and effective recognition and observance of the rights therein declared.'[200]It is the tension

[200] ECHR, Preamble.

between the objective of securing universal *and* effective human rights protection that has played out in the Court's jurisprudence on extraterritorial jurisdiction.

The principle of universality holds that human rights are inalienable, self-evident, and applicable to all human beings.[201]Human rights, in their literal sense, are understood to be the rights that one has simply because one is human. Consequently, human rights are held universally by all human beings.[202]In its purest form, a universal system of human rights imposes direct and enforceable obligations on states *vis-à-vis* all individuals in the world.[203]Considering the foundational principles of international human rights are based explicitly on the intrinsic dignity and worth of individual human beings irrespective of their geographic location,[204]why should an individual be unprotected from the arbitrary exercise of State power due to their location?[205]As Ryngaert summarises, for those who brandish human rights, it is difficult to accept that States may do abroad what they are unable to do inside their borders.[206]Milanovic asserts that universality establishes a default position: it is the *denial* of the extraterritorial applicability of human rights obligations, rather than the *extension* of those rights, that must be justified.[207]

There is an obvious moral appeal to a human rights system based on pure universalism. However, such a system could also be described as 'hopelessly utopian'[208]due to the practical challenges that would hinder effective human rights protection. Notably, states would face an impossible task in fulfilling their global obligations and those bodies tasked with monitoring compliance and ensuring accountability for violations could be overwhelmed. When considering Article 1 jurisdiction, the Court's appreciation of the practical challenges that would arise from

[201] J.Donnelly, *'Universal Human Rights in Theory and Practice'* (2nd Edition, Cornell University Press, 2002) p10.
[202] J.Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) *Human Rights Quarterly* 281, pp282-283.
[203] M.Milanovic, *'Extraterritorial Application of Human Rights Treaties'* p56.
[204] C.Keitner, 'Rights Beyond Borders' (2011) 36(1) *Yale Journal of International Law* 55, p113.
[205] M.Milanovic, *'Extraterritorial Application of Human Rights Treaties'* p55.
[206] Ryngaert (n130) p60.
[207] M.Milanovic, *'Extraterritorial Application of Human Rights Treaties'* p56.
[208] Ibid.

the Convention's extraterritorial applicability has influenced its interpretive approach.

Many of the flaws in the Court's concept of extraterritorial jurisdiction derive from *Banković*, where it is proposed that practical concerns were at the forefront of the Court's jurisdictional assessment. Decided in the aftermath of 9/11 and at the beginning of the Afghanistan war, when the Court suffered from considerable procedural delays,[209]the Grand Chamber was aware that an expansive approach to the Convention's applicability would have enabled millions of individuals across the world to mount challenges that would strain its already stretched resources to breaking point.[210]This concern is evident from the speech of the Court's President, Judge Wildhaber, who specifically referenced *Banković* and proclaimed :

> [t]he Convention was never intended to cure all the planet's ills and indeed cannot effectively do so; this brings us back to the effectiveness of the Convention and the rights protected therein. When applying the Convention we must not lose sight of the practical effect that can be given to those rights.[211]

It is suggested that, to avoid exacerbating the pressure on the Court's strained resources, the Grand Chamber sought to make the Convention's extraterritorial applicability exceptional.[212]The Court's desire for the Convention to extend abroad only in exceptional circumstances did not stem solely from resource concerns but also its apprehensiveness about the type of cases it would be tasked to resolve. In *Banković*, the respondent states made specific submissions alerting the Court that finding the case admissible would render it competent to review the participation of Contracting States in military missions all over the world.[213]Not only would this require the Court to get involved with remote conflicts that are politically sensitive,[214]the Court would also have to engage with other relevant bodies of international law, such as IHL. O'Boyle and McGoldrick, who endorsed the *Banković* judgment, questioned whether a human rights court was the appropriate forum to

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[209] C.Ryngaert (n130) p60.
[210] S.Miller (n52) p1235.
[211] Registry of the European Court of Human Rights, 'Annual Report 2001' <https://www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf> See pp22-23.
[212] Mallory contends that the Court sought to prevent a 'deluge' of cases arising out of overseas conflict situations. See C Mallory (n1) p99.
[213] *Banković* §43. Moreover, the respondent states also suggested that international humanitarian law and the International Criminal Court exist to regulate conduct during armed conflict.
[214] G.Cohen-Jonathan, 'La Territorialisation de la Jurisdiction de la Cour Européenne de Droits de L'homme', (2002) 52 *RTDH* 1070, p1082.

address questions on the application of IHL.[215]Moreover, McGoldrick contended that a more expansive jurisdictional approach would have diverted the Court from its primary focus of the application of the Convention within the territories of States Parties.[216]

Loucaides contends that the arguments put forward by O'Boyle and McGoldrick only reinforces the view that the absence of jurisdiction in *Banković* resulted from the difficulties of the case rather than purely legal considerations.[217]It is true that the acceptance of jurisdiction in *Banković* would have posed difficulties for the Court. A more expansive interpretation of jurisdiction would have put pressure on the Court's strained resources, whilst the application of the Convention to extraterritorial military operations would require the Court to engage with other areas of international law, notably IHL, which the Court may not have had the required expertise, or perhaps confidence, to do. Loucaides posits that in 2001, the Court was not ready to face these challenges.[218]

In *Banković,* the Court did not wish to address the politically sensitive and legal complexities arising from the aerial bombardment and was conscious of its resource challenges. Therefore, with several Contracting States participating in the war in Afghanistan, the Court wished to limit the Convention's extraterritorial applicability and shield itself from similarly complex and politically controversial cases that may have been on the horizon. To satisfy its policy objectives, the Court found *Banković* inadmissible and held the exercise of extraterritorial jurisdiction as exceptional. To rationalise the exclusion of *Banković* from its purview, the Court conflated Article 1 jurisdiction, which is concerned with the circumstances in which a state is expected to comply with its Convention obligations, with the 'classical' notion under international law that is concerned with a state's right to regulate conduct. Though the Court achieved its desired result in *Banković* by mixing two entirely different notions of jurisdiction,[219]the consequence was the introduction of conceptual uncertainty into its interpretation of Article 1.

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[215] M.O'Boyle (n6) 135; D.McGoldrick (n82) p41.
[216] D.McGoldrick Ibid.
[217] L.Loucaides, '*The European Convention on Human Rights-Collected Essays'* (Martin Nijhoff Publishers, 2007) p94.
[218] Ibid. Similarly, Mallory posits that the Court sought at the time to avoid being dragged into discussions on the interplay between human rights law and IHL. See C Mallory (n1) pp99-100.
[219] The conflation of two different jurisdictional concepts was recognised by the UK Court of Appeal in *Al-Saadoon* [CA] §27.

Subsequently, the Court was prepared to permit a more expansive application of the Convention, as demonstrated by the recognition of a jurisdictional link in *Issa*, *Isaak, Andreou and Pad*. In *Issa*, the Court explained its jurisdictional assessment by paraphrasing the conclusion of the Human Rights Committee in *Lopez Burgos v Uruguay*, claiming that:

> Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own.[220]

Therefore, the Court invoked the principle of universality as justification for a more expansive interpretation of Article 1. However, the admissibility decisions in *Issa*, *Isaak, Andreou and Pad* directly contradicted *Banković* and the recognition of a jurisdictional link in those cases was incompatible with the principle espoused in *Banković* that 'personal' jurisdiction was contingent on the exercise of legal authority. The Grand Chamber in *Al-Skeini* had the chance to clarify the conceptual uncertainty that emerged during the second evolutionary period and address the clash between the jurisdiction assessments in *Banković* and the cases of *Issa*, *Isaak, Andreou and Pad*. By recognising the exercise of 'personal' jurisdiction based on *'physical power and control'*, the Grand Chamber clarified that Article 1 jurisdiction did not rely on the exercise of legal authority. However, the Grand Chamber passed over the perfect opportunity to set out the Convention's applicability to the use of lethal force abroad by failing to engage with the decision in *Banković* and the cases that immediately followed it. Similarly, in *Jaloud* and *Pisari,* the Court also shirked the chance to set out when extraterritorial killing constitutes the exercise of jurisdiction by engaging directly with *Issa*, *Isaak, Andreou and Pad.* In *Georgia v. Russia (II),* the Grand Chamber finally sought to rationalise the distinction between the jurisdiction assessments in the aforementioned cases and the admissibility decision in *Banković.* Yet, the Grand Chamber's general jurisdictional assessment and its consideration of the applicability of the Convention

[220] *Issa* §71.

to extraterritorial killing was undeniably influenced by considerations of effectiveness.[221]

The key headline from the Grand Chamber's jurisdictional assessment in *Georgia v. Russia (II)* was that the reality of armed confrontation and fighting between enemy forces during the active hostilities phase of an IAC equates to a 'context of chaos' that precludes the exercise of jurisdiction. This conclusion clearly contradicts *Hassan*, where the Grand Chamber held that the UK exercised jurisdiction during this period. Moreover, in *Hassan*, the Grand Chamber rejected the argument posited by the UK that the exercise of '*physical power and control'* should not apply as a ground for jurisdiction in the active hostilities phase of an IAC, when the conduct of the State would instead be subject to the requirements of IHL.[222]The Court added that to accept this argument would be inconsistent with the jurisprudence of the International Court of Justice (ICJ), which has held that international human rights law and IHL may apply concurrently.[223]In *Hassan*, the Court observed that the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.[224]However, in *Georgia v. Russia (II)*, the Grand Chamber's interpretation of jurisdiction would, in practice, exclude the Convention's applicability to hostilities during an IAC, which is not harmonious with the jurisprudence of the ICJ. This raises the question as to why the Grand Chamber's sought an interpretation of jurisdiction that contradicted its own jurisprudence and conflicts with other rules of international law. It is proposed that the Court considered that the benefits of the Convention's applicability were outweighed by the challenges that would flow from recognising the exercise of extraterritorial jurisdiction.

In reaching its conclusion that the events during the active phase of hostilities did not fall within Russia's jurisdiction, the Grand Chamber referenced the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominately regulated by legal norms other than those of the

[221] Tan & Zwanenburg and Longobardo & Wallace note that the decision in Georgia v. Russa (II) was influenced by non-legal considerations. See F.Tan & M.Zwanenburg (n187) p19 and M.Longobardo & S.Wallace (n188) pp174-177.
[222] *Hassan* §§76-77.
[223] Ibid §77, referencing §§35-37.
[224] Ibid §77.

Convention (notably IHL).[225]Here, the Court explicitly recognised the genuine practical challenges that would arise from the Convention's applicability to inter-state hostilities whilst also pointing out that IHL imposes obligations in such circumstances. Essentially, the Grand Chamber is justifying the Convention's inapplicability, in less than subtle fashion, on the basis that it is not best placed to assess large scale acts of violence during an IAC and that other fora would provide a more appropriate avenue for accountability. The Court's justification is unconvincing and Dzehtsiarou notes that it can be argued that justice is being denied to multiple victims of violations of the most fundamental human rights as it is more convenient for the Court to avoid dealing with the alleged violations because they are too demanding or complex.[226] Nevertheless, just like *Banković,* the Court wanted to avoid the difficulties that the Convention's applicability would bring and interpreted Article 1 jurisdiction in a way that would enable it to declare the events during the active phase of hostilities inadmissible. To achieve this, the Court contradicted its previous jurisprudence and introduced arbitrariness into the Convention's applicability abroad.

The Court's case-law on the Convention's applicability abroad is inconsistent and plagued by contradictions. Moreover, the concept of extraterritorial jurisdiction developed by the Court fails to clearly set out when State obligations extend beyond their territory. The flaws in the interpretation of Article 1, which emerged during the second evolutionary period, are a consequence of the Court's struggle to manage the tension between the objectives of securing universal and effective human rights protection. Since *Banković*, the Court has frequently used the preliminary issue of jurisdiction to shield itself from having to address legally complex and politically contentious cases and to avoid the practical challenges that admissibility would bring.

The challenges that the Court has tried to avoid or mitigate are legitimate and most acute in the context of hostilities during an IAC. Therefore, it is unsurprising that the Court's most controversial judgments (*Banković* and *Georgia v. Russia (II)*) concern events within this context. Since *Banković*, there is a noticeable trend within the Court's jurisprudence of gradually expanding the Convention's reach, which has

[225] *Georgia v. Russia (II)* §141.
[226] K.Dzehtsiarou, 'Georgia v. Russia (II), Merits. App. No 38263/08' (2021) 115(2) *The American Journal of International Law* 288, p293 (note).

included the Court involving itself on the adjudication of British and Dutch military action in Iraq. Yet, *Georgia v. Russia (II)* is a stark reminder that despite the moral appeal of universalism, considerations of effectiveness continue to influence the Court's interpretation of jurisdiction and constrain the extraterritorial applicability of the ECHR. In future jurisprudence, the Court's interpretation of jurisdiction is likely to continue to be shaped by universalist aspirations and an understanding that the Convention 'cannot effectively cure all the planet's ills'.

4. Evaluating the Applicability of the ECHR to Drone Operated Targeted Killings

Determining the applicability of the Convention to extraterritorial state killing is complicated by the failure of the ECtHR to clearly set out the interplay between the use of lethal force abroad and the exercise of extraterritorial jurisdiction. Though individuals can be brought within a state's jurisdiction based on killing alone, the Court's case-law is clear that utilising lethal force does not always equate to the exercise of jurisdiction. Consequently, some extraterritorial killings conducted by Contracting States may occur in a legal 'black hole', in so far as the ECHR is concerned.[227]This section examines whether the use of armed drones for targeted killing would engage the UK's obligations under the Convention.

4(1) The Perceived Inapplicability of the ECHR to Extraterritorial Drone Strikes

The Court's jurisprudence is clear that a state's obligations under the Convention extend to persons detained by its agents or located in territory under its effective control. However, armed drones enable the utilisation of lethal force without exercising territorial control or apprehending those targeted. Where a state uses armed drones to target individuals in territory not subject to its control, which the UK Policy envisages, questions arise as to whether those killed are brought within the responsible state's jurisdiction.[228]Admittedly, there is not an obvious jurisdictional basis in such circumstances. However, some scholars have gone further by expressing doubt that lethal targeting with armed drones, absent territorial control where the strike occurs, triggers the Convention's applicability.

The perceived inapplicability of the ECHR to extraterritorial drone strikes is influenced by the admissibility decision in *Banković.* Ryngaert contends that a

[227] R.Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' [2004-2005] 26 *Michigan Journal of International Law* 739, p804.
[228] C.Heyns *et al*, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 *International and Comparative Law Quarterly* 791, p824,

Banković-like situation may still lead to a finding of inadmissibility, which implies that victims of drone strikes do not fall within the acting state's jurisdiction.[229]Similarly, Milanovic notes that the Court's continued endorsement of *Banković* suggests that firing missiles from an aircraft does not equate to the exercise of jurisdiction. Thus, drone operations would be just as excluded from the purview of the Convention as the aerial bombardment in *Banković*.[230]With specific reference to the targeted killing of Reyaad Khan, McCorquodale regards the drone strike as comparable to NATO's aerial bombardment of Belgrade, which would make the Convention's applicability to the killing "unlikely".[231]

Valid comparisons can be made between drone strikes and the circumstances of *Banković* with both situations involving the use of aerial force. However, it could also be argued that the deployment of armed drones for the targeted killing of terrorists is distinguishable from the aerial bombardment in *Banković.* Notably, a targeted killing requires comprehensive intelligence and substantial surveillance to identify and track a specific individual prior to utilising lethal force. In *Banković,* the 16 deaths that resulted from the NATO bombing were incidental; those killed were not personally selected nor were their deaths the objective of the aerial bombardment. Rosen postulates that the acts that produced *Banković* are simply hard to compare to situations where drones have been utilised for enduring the close-up monitoring of persons.[232]Consequently, Rosen is sceptical that the judgment in *Banković* provides the "yardstick" for a jurisdictional assessment of drone operated targeted killing.[233]

Regardless as to whether one considers the utilisation of targeted killing through armed drones as comparable or operationally distinguishable from the aerial bombardment in *Banković*, the Grand Chamber's jurisdictional assessment in *Georgia v. Russia (II)* provides a fresh insight into *Banković*, which it is posited has implications for assessing the applicability of the Convention to the force envisaged by the UK Policy. In *Georgia v. Russia (II),* the Grand Chamber noted that it was, for

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[229] C.Ryngaert (n130) p60. Ryngaert reiterated his scepticism about the Convention's applicability to drone strikes in F.Haijer & C.Ryngaert (n150) pp181-182.
[230] M.Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg'* (n83) p130.
[231] R.McCorquodale, 'Human Rights and the Targeting by Drone' (EJIL:Talk!, 18 September 2015) <https://www.ejiltalk.org/human-rights-and-the-targeting-by-drone/>
[232] F.Rosen, 'Extremely Stealthy and Incredible Close: Drones, Control and Legal Responsibility', (2014) 19(1) *Journal of Conflict and Security Law* 113, p118.
[233] Ibid.

the first time since the *Banković* case, required to examine the question of jurisdiction in relation to military operations in the context of an IAC.[234] The Court held that the very reality of armed confrontation and fighting between enemy forces created a 'context of chaos' that precluded the exercise of jurisdiction.[235]Thus, the deaths that resulted from armed attacks, bombing and shelling during the active phase of hostilities were outside the reach of the Convention. The key takeaway from the *Georgia v. Russia (II)* decision was that killing during an IAC could not constitute the exercise of jurisdiction, regardless of the method. Consequently, recalling *Banković*, what was decisive was the context in which the deaths occurred and not the method by which lethal force was undertaken. Consequently, it is proposed that the *Banković* decision may be misleading when examining the jurisdiction question in circumstances involving aerial force outside the context of an IAC.

The UK is prepared to utilise targeted killings within and outside the context of an armed conflict. However, as will be demonstrated in Chapter Four, the UK's resort to targeted killing is unlikely to occur during an IAC. Rather, where a targeted killing against a terrorist is deployed during an armed conflict, this would be in the context of a NIAC. Therefore, the force envisaged by the UK Policy is contextually distinguishable to the airstrike in *Banković.* Consequently, targeted killings pursued by the UK should not be labelled as a '*Banković*-like' situation and it would be premature to dismiss the applicability of the Convention by invoking *Banković*.

There is not an obvious jurisdictional link between a state that utilises remote lethal force in a territory that it does not control and those subject to life-threatening harm. However, the following sections will examine two potential avenues that could lead to the recognition of a jurisdictional connection between the UK and victims of its targeted killing policy.

4(2) Re-evaluating the Applicability of the ECHR to the UK Policy

a. Targeted Killing as a Form of Counterterrorism: The Exercise of 'Public Powers'?

The ECtHR has not set out in detail what *'public powers'* entail. Therefore, we will begin by outlining the development of *'public powers'* and examine how the ECtHR

[234] *Georgia v. Russia (II)* §113.
[235] Ibid §137-144.

has applied this concept. This will demonstrate the requirements for this jurisdictional exception to arise. Subsequently, we will consider whether force pursuant to the UK Policy could constitute the exercise of *'public powers'*.

The term *'public powers'* debuted in *Banković* where the Court, citing *Loizidou*, recognised the exercise of extraterritorial jurisdiction

'…when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, *exercises all or some of the public powers normally to be exercised by that Government*.'[236]

Intriguingly, the reference to *'public powers'* in *Banković* was in connection with 'spatial' jurisdiction and the judgment in *Loizidou* did not refer to *'public powers'* at all. Therefore, in *Banković*, the Court 'silently modified' the *Loizidou* judgment by saying things that were previously unsaid by the Court.[237]Subsequently, *'public powers'* was referenced in cases citing *Banković*, albeit in passing as the concept was not defined or applied in those cases.[238]However, *'public powers'* was discussed in more detail in *Behrami and Behrami v. France, Saramati v. France and Others,*[239]where the applicants alleged that the respondent States were responsible for the removal of landmines and security detention in Kosovo. In determining whether the case was admissible, the Court had to establish whether the applicants were within the jurisdiction of the respondent States, who had contributed forces to the UN-led administration of Kosovo. The Court held that Kosovo was under the effective control of the international presences located there and that it was those bodies, rather than the individual contracting States, which exercised *'public powers'* in Kosovo, described by the Court as legislative, executive and judicial powers.[240]

The description of *'public powers'* as incorporating legislative, executive and judicial powers was reiterated in *Al-Skeini*, the first case in which *'public powers'* was explicitly applied as a standalone basis for extraterritorial jurisdiction. The Court held that the UK exercised some of the *'public powers'* normally to be exercised by a sovereign government, which were established in very formal terms, by reference

[236] *Banković* §71 (emphasis added).
[237] R.Lawson (n64) p11.
[238] *Treska v. Albania and Italy* (dec.), no.26937/04, ECHR 2006-XI; *Kalogeropoulou and Others v. Greece and Germany* (dec.), no.59021/00, ECHR 2002-X.
[239] *Behrami and Behrami v. France, Saramati v. France, Germany and Norway* (dec.) [GC], nos.71412/01 & 78166/01, 2 May 2007.
[240] Ibid §70. (Emphasis added)

to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq (CPA),[241]the effective administration of Iraq during the transitional period following the removal of Saddam Hussein's Ba'ath regime. The CPA was vested with all legislative, executive, and judicial authority which conferred upon members of the CPA, governmental powers in Iraq.[242]As a leading partner in the CPA, four of Iraq's 18 regional provinces were put under the responsibility and control of the UK.[243]Thus, the UK was vested with legislative, executive and judicial authority in these areas. The Court equated these functions with the UK exercising *'public powers'* in Iraq, whilst making a specific reference to UK assuming responsibility for the maintenance of security in south-east Iraq. To fulfil this responsibility, the UK conducted a variety of security operations, such as village patrols,[244]perimeter patrols of an air base[245]and house raids.[246]In *Al-Skeini*, the deaths occurred during or contiguous to the *'public powers'* carried out by British forces created a jurisdictional link between the UK and the deceased.[247]

Following *Al-Skeini*, the *'public powers'* basis for extraterritorial jurisdiction was applied, albeit implicitly, in *Jaloud* and *Pisari.* In *Jaloud*, the Court considered that the use of lethal force in conjunction with the control of a checkpoint brought the deceased within jurisdiction of the Netherlands.[248]The checkpoint had been set up in the execution of the SFIR mission, under UNSC Resolution 1483, to restore conditions of stability and security conducive to the creation of an effective administration in Iraq.[249]Consequently, the Court considered that the manning of a checkpoint equated to Netherlands assuming the exercise of some elements of governmental authority in Iraq.[250]Therefore, the Netherlands exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting 'authority and control' over persons passing through the checkpoint. In *Pisari*, the Court decided the jurisdictional question in similar fashion to *Jaloud*. The Court

[241] *Al-Skeini* §§143-148.
[242] Ibid §12.
[243] Ibid §13.
[244] Ibid §36.
[245] Ibid §49.
[246] Ibid §40.
[247] Ibid §149-150.
[248] *Jaloud* §152.
[249] Ibid §152.
[250] A.Sari, Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions? (2014) 52 *Military Law and the Law of War Review* 287, 293.

acknowledged that state force may constitute the exercise of jurisdiction when its authorities carry out executive functions on the territory of another State.[251]Since the use of lethal force occurred in the context of Russian soldiers controlling a peacekeeping security checkpoint in the Transdniestrian region of Moldova, the victim was brought within Russia's jurisdiction.[252]

The jurisprudence of the ECtHR demonstrates that *'public powers'* encompass legislative, executive or judicial functions. However, a jurisdictional link does not arise through the exercise of *'public powers'* alone. Rather, it is the exercise of 'authority and control' over persons during the performance of *'public powers'* that establishes a jurisdictional connection. Therefore, *'public powers'* is a hybrid concept that is a mix between the 'spatial' (governmental responsibility) and 'personal' (authority and control over individual) jurisdiction models.[253]

There are uncertainties about the precise scope of the *'public powers'* exception.[254]For example, the description of *'public powers'* as legislative, executive and judicial functions, only provides a vague starting point for determining which activities could be construed as *'public powers'*. Moreover, the auxiliary prong of this jurisdictional basis, the exertion of 'authority and control' over individuals, is indistinct. *Al-Skeini, Pisari* and *Jaloud* demonstrate that, contingent to the exercise of *'public powers'*, killing equates to the exertion of 'authority and control'. However, besides killing, it is unclear what other conduct equates to 'authority and control' in the *'public powers'* context. Nevertheless, the use of lethal force during the exercise of *'public powers'* does create a jurisdictional link between the acting state and the deceased. Therefore, the key issue for the present analysis is to consider whether the force envisaged by the UK Policy could be regarded as the exercise of *'public powers'*.

It is posited that the lethal targeting of terrorists could be viewed as the utilisation of *'public powers'*. As a starting point, it is worth reiterating that the *raison d'etre* of the UK Policy is to counter terrorism. Further to this, it is important to acknowledge that States have not only an obligation to '[…]refrain from […]

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[251] *Pisari* §33.
[252] Ibid.
[253] S.Miko, *Al-Skeini v. United Kingdom* and Extraterritorial Jurisdiction under the European Convention for Human Rights (2013) 35(3) *Boston College International and Comparative Law Review* 63, p77; M.Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg'* (n83) p131.
[254] I.Park, '*Right to Life in Armed Conflict'* (OUP, 2018) p84.

acquiescing in organized activities within its territory directed toward the commission of [terrorist] acts',[255]but also a duty to prevent non-State actors from carrying out terrorism from within their territories.[256]Consequently, the prevention of terrorism is primarily the responsibility of the state where a particular threat emanates and that state is obliged to adopt measures to counter terrorist threats stemming from within its territory. Therefore, the enactment of counterterrorism measures could be regarded as *'public powers normally exercised by a sovereign Government'*. This position is supported by *Al-Skeini,* when anti-terrorist operations were included within the governmental functions that the UK assumed to maintain security in south-east Iraq.[257]Targeted killing would be an extreme response to address a terrorist threat but would nonetheless be an act of counterterrorism. Therefore, it is proposed, that if the UK executes an extraterritorial targeted killing operation due to the territorial state's inability or unwillingness to mitigate the threat facing the UK, it is assuming the responsibility of the territorial state to prevent terrorism. Thus, the UK conducts *'public powers'* by assuming this responsibility and performing functions that would normally be reserved for the territorial state.

Accepting that targeted killing could fall within the scope of *'public powers'*, two potential obstructions for force pursuant to the UK Policy giving rise to a jurisdictional connection on this basis remain. First, in *Al-Skeini*, the Court stated that jurisdiction arises where '[…]through the consent, invitation or acquiescence of the Government of that territory, [a State] exercises all or some of the public powers normally to be exercised by that Government'.[258]Therefore, unilateral targeted killings, such as the Reyaad Khan operation, could be precluded from constituting the exercise of jurisdiction under the *'public powers'* model.

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[255] Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations UNGA Res 2625 (XXV) (24 October 1970); The ICJ has described the provisions of the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations as principles of customary international law. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005*,* pp226-227, §162.

[256] Following the terrorist attacks of 9/11, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1373 (2001) (binding upon all UN members) which decided that all States shall 'prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens'. See UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; For the obligations of States to prevent international terrorism, see K.Trapp, *'State Responsibility for International Terrorism: Problems and Prospects'* (OUP 2011).

[257]*Al-Skeini* §21.

[258] Ibid §135.

It is submitted that the absence of consent should not prohibit the *'public powers'* jurisdictional basis arising. Consent, or the lack thereof, is a relevant consideration in assessing whether a state acting extraterritorially has a legal basis for its incursion onto the territory of another state. The existence or absence of consent is pertinent to the inter-state rules on the use of force, but human rights law is concerned with the regulation of state conduct *vis-à-vis* individuals. It would be illogical if the applicability of human rights law relied on the state's legal basis for the extraterritorial act in question. It would be even more perverse if a Contracting State were obliged to respects its obligations under the Convention when acting lawfully on a foreign territory but not when acting unlawfully.

The Court's jurisprudence appears to deem the legality of extraterritorial action as irrelevant for determining the Convention's extraterritorial scope. When assessing whether a State has exercised territorial control, the legal basis for the State's extraterritorial act has not been determinative. Rather, the Court has evaluated the existence of extraterritorial jurisdiction based on the factual circumstances of the case.[259]Similarly, in *Issa*, the Court acknowledged that State agents can exercise jurisdiction over persons abroad regardless of whether they operated 'lawfully or unlawfully' overseas.[260]Therefore, it would be inconsistent for '*public powers'* to be precluded due to the illegality of the extraterritorial action. In fact, such a finding would even be a divergence from *Al-Skeini* because the UK did not assume *'public powers'* in Iraq with the 'consent, invitation or acquiescence' of the Iraqi Government because there was no government at the material time.[261]Therefore, as Park notes, it is more likely that jurisdiction *vis-à-vis 'public powers'* is determined by a factual assessment of whether a State is 'exercising some or all of the public powers normally exercised by the government'.[262]

So far, the ECtHR has recognised a jurisdictional link when *'public powers'* have been bestowed upon the acting State under the law of belligerent occupation,[263]a UNSC Resolution[264]or assumed under a peace

[259] Ibid §139 - "It is a question of fact whether a Contracting State exercises effective control of an area outside its own territory".
[260] Issa §71.
[261] I.Park (n234) p79.
[262] Ibid.
[263]*Al-Skeini* §142.
[264] *Jaloud* §152

agreement.[265]Wallace infers that the Court may require *'public powers'* to have a discrete legal basis to give rise to a jurisdictional connection.[266]If this is correct, the type of unilateral force envisaged by the UK Policy could not equate to the exercise of *'public powers'* as the UK would not have been legally conferred with the responsibility to counter terrorism. However, British Courts have read *'public powers'* as not requiring a legal basis. In *Al-Saadoon*, the High Court considered the test of whether *'public powers'* have been exercised as factual and not determined by their legal basis or legitimacy.[267]The High Court applied the factual test to conclude that British soldiers were exercising *'public powers'* when they controlled the supply of rationed fuel to civilians, which would normally be the prerogative of the Iraqi police force,[268]even though the UK was not an 'occupying power' at the time[269]and acted without the consent of the Iraqi Government or authorisation from the UN.[270]This interpretation of *'public powers'*, according to the Court, stems from the judgment in *Jaloud*, where the Grand Chamber held that the status of 'occupying power' was not determinative in assessing whether the Netherlands exercised *'public powers'*.[271]Rather, of importance to the Court '[…]was the practical situation on the ground in terms of the powers which the Netherlands was actually purporting to exercise and not the legality or legal basis of its operations'.[272]Therefore, the legal basis for a state's assumption of governmental tasks does not appear decisive but could be indicative that *'public powers'* were utilised.

To summarise, states have a positive obligation to counteract terrorist threats emanating from within their borders. Consequently, counterterrorism measures could reasonably be construed as 'public powers normally exercised by a sovereign

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[265] See *Pisari* §§30-31 for detail on the peace agreement between Russian and Moldova that put an end to the military conflict in the Transdniestrian region of Moldova.
[266] S.Wallace (n74) p60.
[267] *Al-Saadoon* [HC] §74.
[268] Ibid §83.
[269] Within the litigation, there was one case, the death of Atheer Kareem Khalaf, which occurred during the 'invasion period' of the Iraq war (29 April 2003), prior to the formal declaration of the completion of major combat operations (1 May 2003). The UK argued that their soldiers did not exercise 'public powers' during the 'invasion period' as they were fighting against Iraqi forces. Yet, the Court accepted that whether 'public powers' were exercised is not conclusively answered by identifying the date combat operations were formally declared complete. The Court acknowledged that actual war fighting had ceased some time prior to the UK's formal declaration and that the UK was effectively acting as a police force in Basra. See, *Al-Saadoon* [HC] §§77-83.
[270] The High Court's interpretation of the *'public powers'* model was endorsed by the Court of Appeal. See, *Al-Saadoon* [CA] §54.
[271] *Jaloud* §142.
[272] *Al-Saadoon,* [HC] §75.

government'. Thus, it is posited that the UK's utilisation of extraterritorial targeted killing could be construed as the exercise of *'public powers'* because the UK assumes responsibility for counterterrorism, which is normally the prerogative of the state where the threat originates.

The previous analysis has also addressed some of the potential impediments to unilateral targeted killing being regarded as the exercise of *'public powers'*. Firstly, the jurisprudence of the ECtHR is clear that the legality or illegality of the extraterritorial act, with respect to the laws regulating the inter-state use of force, does not impact upon the jurisdictional assessment. Therefore, even if a unilateral targeted killing operation is not a legitimate exercise of self-defence, this would not preclude the strike equating to the exercise of *'public powers'*.[273]Secondly, although a state may be formally vested with *'public powers'* by, for example, a UNSC resolution or peace agreement, a specific legal basis is not a requirement to assume *'public powers'*. Rather, whether a State assumes these functions is to be determined with reference to the factual power a state purports to exercise. Consequently, even if the UK does not exercise *de jure 'public powers'*, as it did during the occupation of Iraq, the exercise of *de facto 'public powers'* would suffice for this jurisdictional basis to arise.

It should be acknowledged that the cases of *Pisari*, *Jaloud* and *Al-Skeini* possess material differences to the force envisaged by the UK Policy. Notably, they all involved military personnel operating extraterritorially whose presence and authority derived from a clear legal basis. Therefore, although the UK Policy is not precluded from equating to the exercise of *'public powers'*, the Court may determine that a unilateral targeted killing does not equate to the exercise of *'public powers'* due to a lack of territorial presence and/or a legal basis. However, If the ECtHR were to accept that the lethal targeting of individual terrorists constituted the exercise of *'public powers'* then those killed would be brought within the jurisdiction of the UK. We will now consider whether the UK Policy could be considered as the exercise of *'physical power and control'*.

b. Drone Operated Targeted Killing & the Exercise of 'Physical Power and Control'

[273] Although, this is a necessary consideration for determining whether a particular targeted killing operation violates the sovereignty of the state where it occurs.

In *Al-Skeini*, the arrest or detention of individuals abroad was considered the exercise of *'physical power and control'* exerted over those apprehended.[274]However, the concept of *'physical power and control'* is not confined to arrest or detention scenarios with extraterritorial targeting of persons potentially amounting to the exercise of *'physical power and control'* over those affected.[275]However, the Grand Chamber noted that the cases where lethal or life-threatening force was viewed as the exercise of *'physical power and control'* concerned isolated and specific acts involving an element of proximity.[276]Moreover, the Grand Chamber reiterated that a state's responsibility could not be engaged in respect of an 'instantaneous extraterritorial act'[277]and that the active hostilities phase of an IAC provides a 'context of chaos' that precludes the exercise of extraterritorial jurisdiction.[278]Therefore, though extraterritorial killing can constitute the exercise of jurisdiction, this is conditional on the death resulting from a non-instantaneous act outside the context of an IAC that is specific, isolated and proximate. We will now consider how these conditions could apply to the force envisaged by the UK Policy.

First, as previously mentioned,[279]UK targeted killing operations are unlikely to occur in the context of an IAC.[280]Therefore, such operations are unlikely to be barred from equating to the exercise of jurisdiction on this basis. Although, it remains to be seen whether the Court would recognise the existence of a 'context of chaos' during an extraterritorial NIAC or in violent confrontations that fall short of armed conflict.

Second, it is proposed that the Court could view targeted killings as a non-instantaneous act due to the extensive intelligence and surveillance required to identify and track a target prior to utilising lethal force. Unlike ***Banković,*** where the only link between the respondent States and the deceased was the instantaneous act of killing,[281]the deployment of an armed drone for targeted killing is the final part of a protracted and multifaceted military mission. Such operations require

[274] *Al-Skeini* §136.
[275] *Georgia v. Russia (II)* §131.
[276] Ibid §132, citing *Issa*; *Isaak* (admissibility); *Pad*; *Andreou* (admissibility); *Solomou and Others v. Turkey,* no.36832/97, 24 June 2008.
[277] *Georgia v. Russia (II)* §124.
[278] Ibid §137.
[279] See Section 4(1).
[280] See Chapter Four.
[281] *Medvedyev* §64.

comprehensive intelligence and substantial surveillance to identify and track a target prior to utilising lethal force. With respect to the killing of Reyaad Khan, the UK security agencies had acquired at least 25 intelligence reports on the terrorist threat posed by Khan. The first of the intelligence reports was produced in November 2014, nine months prior to lethal force being deployed against Khan.[282]

In *Georgia v Russia (II),* the Grand Chamber did not illuminate when an extraterritorial killing is categorised as isolated, specific, and proximate. Nevertheless, if we recall the use of force in *Banković*, the bombing of the RTS building was not an isolated act, it was one of 24 targets hit that night in the FYR,[283]during an aerial bombing campaign by NATO that lasted 12 weeks.[284]Moreover, the deaths that resulted from the bombing of the RTS building were incidental as those killed were not specifically subject to lethal force. In contrast, the use of drones for targeted killings can be viewed as an isolated and specific act as, by its very nature, the operation is solely focused on the specific targeting of a pre-identified individual.

The condition that UK targeted killing operations are unlikely to satisfy is proximity. In *Carter v. Russia*, which concerned the poisoning of the former Russian spy Aleksandr Litvinenko, the Court reflected on this condition. Recalling *Georgia v. Russia (II)*, the Court noted that the cases cited as examples of '*physical power and control'- Issa, Isaak, Pad, Andreou and Solomou*- concerned the actions of the respondent states' armed forces on or close to their borders.[285]Therefore, the Court considered proximity to be assessed with reference to the distance between the affected person and the responsible state's territory. Although, confusingly, the Court considered the poisoning of Litvinenko as a 'situation of proximate targeting'[286]that equated to the exercise of '*physical power and control'*,[287]despite the considerable distance between the UK and Russia. Therefore, proximity can relate to either the geographical proximity of the targeted person and the responsible state's territory or the distance between the state's agents and the victim when force is administered. On the latter reading, the remote location of drone operators would

[282] Report of the Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria*, (2016-2017, HC 1152), p8 para 20.
[283] *Banković* §11.
[284] The NATO bombing campaign lasted from 24 March – 8 June 1999.
[285] *Carter v. Russia,* no.20914/07, 21 September 2021, §130.
[286] Ibid §161.
[287] Ibid §170.

preclude targeted killings being regarded as proximate. For the former, targeted killings would only be proximate when the victim is close to the UK border, which is unrealistic.

The direct relationship between lethal force and the Convention's extraterritorial applicability remains at best, perplexing and at worst, utterly unintelligible. In *Georgia v Russia (II)*, the Grand Chamber confirmed that killing can establish a jurisdictional link when lethal force satisfies a range of imprecise conditions. Setting aside their ambiguity, it is completely arbitrary for the Convention's applicability to hinge on such factors.[288]After acknowledging that lethal force abroad *can* constitute the exercise of jurisdiction, the Court will inevitably be confronted with the challenge of rationalising the exclusion of the Convention's applicability to *any* extraterritorial killing conducted by States Parties. It is proposed that Strasbourg will struggle to justify how one killing equates to the exercise of '*physical power and control',* but another does not. The ECtHR may attempt to maintain arbitrary distinctions between different types of lethal force to avoid the genuine difficulties that would inescapably flow from equating killing to the exercise of jurisdiction. However, the Court should move away from its ad hoc approach to the Convention's applicability to extraterritorial killing and embrace an approach that is guided by clear principles that can be easily applied to concrete situations. It is suggested that the Court should take inspiration from the Human Rights Committee's (HRC) interpretation of the right to life under the ICCPR.

In its *General Comment No.36*, the HRC articulated the circumstances whereby a State Party exercises its jurisdiction with respect to the right to life. The HRC considered that '[a]ll persons over whose enjoyment of the right to life [a State] exercises power or effective control' are subject to its jurisdiction.[289]This formulation of jurisdiction included individuals located within areas under the effective control of the State and those arrested or detained by the State,[290]which resembles the Strasbourg approach to Article 1 jurisdiction. Additionally, the HRC regarded individuals '[w]hose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner' as being subject to a

[288] See Section 3(2)
[289] UN Human Rights Committee, 'General Comment no.36, Article 6 (Right to Life)' (3 September 2019) (UN Doc CCPR/C/GC/35) para 63.
[290] Ibid.

state's jurisdiction.[291]Therefore, where there is a tenuous or indirect link between a state's conduct and the impact on an individual's enjoyment of the right to life, for example, the imposition of economic sanctions or the revocation of aid programmes, the ICCPR does not extend extraterritorially. However, the HRC's *General Comment No.36* makes it clear that intentional killing brings victims within the jurisdiction of the responsible state.

The HRC's interpretation of extraterritorial jurisdiction in the context of the right to life clearly delineates the relationship between intentional lethal force abroad and the applicability of the ICCPR. It would, undoubtedly, be favourable for the ECtHR to follow the HRC's approach, which would not be entirely inconsistent with Strasbourg's jurisprudence on extraterritorial jurisdiction. For instance, in *Andreou*, the Court recognised the extraterritorial applicability of the Convention on the basis that shooting into a crowd from close range was the direct and immediate cause of the victim's life-threatening injuries.[292]

5. Conclusion

This chapter examined Strasbourg's vast jurisprudence on Article 1 jurisdiction and unpicked the circumstances whereby the Convention applies extraterritorially to evaluate whether the UK's obligations would extend to victims of its targeted killing policy. The analysis of the Court's case-law demonstrated the existence of striking contradictions and revealed Strasbourg's inconsistent interpretive practice. Notably, the second evolutionary period was tumultuous as the Court's jurisdictional concept became unprincipled. However, during the third evolutionary period, the Court established a relatively stable jurisdictional concept by considering Article 1 'jurisdiction' as synonymous with 'control' over territory (spatial jurisdiction) or individuals (personal jurisdiction). Yet, in practice, the 'spatial' or 'personal' bases for extraterritorial jurisdiction cannot easily be applied to concrete situations.

Unmistakeably, the judicial organs in Strasbourg have struggled to develop a coherent and intelligible concept of extraterritorial jurisdiction. It has been proposed that the flaws in the Court's interpretation of jurisdiction derive from a tension between universal aspirations and considerations of effective human rights

[291] Ibid.
[292] *Andreou v Turkey*, no.45653/99, 27 October 2009, §25, citing the admissibility decision. See *Andreou* (admissibility).

protection, which has resulted in the Court, at times on a case-by-case basis, moulding its jurisdictional concept to strike what it perceives is an appropriate balance between the objectives of universalism and effectiveness.

The Court has failed to set out the Convention's applicability to the overseas use of lethal force by States Parties. The Court's jurisprudence clarifies that the killing of detained individuals abroad or persons within an area under the effective control of the responsible State or during the exercise of *'public powers'* would engage the Convention. However, outside of these circumstances, it is not clear whether lethal action would engage the Convention. In *Georgia v. Russia (II)*, the Grand Chamber confirmed that killing can constitute the exercise of jurisdiction when it results from an isolated and specific non-instantaneous act involving an element of proximity. Yet, these imprecise conditions fail to provide clear guidance to ascertain whether a State's extraterritorial killing comes within the scope of the Convention.

Given the UK Policy envisages remotely targeting terrorists in 'safe havens', it was acknowledged that there is no immediately apparent basis for a jurisdictional link between the UK and victims of targeted killing operations. Yet, attention was also given to the scholarly perception that drone operated targeted killings would be outside the purview of the Convention, which derives from the inadmissibility of the aerial bombardment in *Banković*. It was proposed that the decisive factor for the absence of a jurisdictional link in *Banković* was the context in which the killing occurred and not the method deployed to kill. Therefore, as *Banković* concerned lethal force during an IAC and the UK Policy relates to force outside of this context, it would be premature to invoke *Banković* dismiss the applicability of the Convention to UK targeted killings.

Subsequently, it was considered that the UK's utilisation of targeted killing could be construed as the exercise of *'public powers'*, which would result in those targeted being brought within the jurisdiction of the UK. It was also evaluated whether force pursuant to the UK Policy could equate to the exercise of *'physical power and control'* over those targeted. However, UK targeted killings are unlikely to satisfy all the imprecise conditions set out by the Grand Chamber in *Georgia v Russia (II)*, notably the requirement of proximity. Yet, it was also proposed that Strasbourg will struggle to uphold the arbitrary conditions that it has used to justify

how one killing constitutes the exercise of *'physical power and control'* whilst another may not.

It is proposed that the Court should exercise oversight when Contracting States utilise lethal force abroad. Therefore, it would be a positive development if the Court held that force pursuant to the UK Policy constituted the exercise of extraterritorial jurisdiction whether that was due to targeted killings being regarded as the assumption of *'public powers'* or the exertion of *'physical power and control'* over those killed. Yet, it would be preferable for the Court to establish a jurisdictional link by recognising intentional lethal force as the exercise of *'physical power and control'*. At the earliest opportunity, the ECtHR should dispense with the ill-defined and arbitrary conditions that it articulated in *Georgia v. Russia* as bringing an extraterritorial killing within a state's jurisdiction. The interpretative approach taken by the HRC in relation to jurisdiction and the right to life clearly delineates the relationship between intentional lethal force abroad and the obligations of states parties under the ICCPR and should be followed by Strasbourg.

Though the ECtHR *could* view UK targeted killing in the context of counterterrorism as the exercise of *'public powers'* and *should* regard intentional killing as the exertion of *'physical power and control'* over the deceased, the Court's inconsistent interpretive practice and conflicting jurisprudence renders any prediction of its decision-making speculative. In correspondence to the JCHR, the then-Defence Secretary Michael Fallon asserted that the Convention was not applicable to the type of force considered by the inquiry,[293]which was influenced by the Court of Appeal's judgment in *Al-Saadoon*.[294]As *Georgia v. Russia (II)* confirmed, the Grand Chamber does not currently consider killing abroad as necessarily constituting the exercise of extraterritorial jurisdiction. Nevertheless, although victims of lethal force are not always brought within the jurisdiction of the responsible state, it would be premature and potentially hazardous for the UK Government to assume the inapplicability of the Convention to its targeted killing policy.[295]Disregarding the Convention's regulation of targeted killing operations may

[293] Joint Committee on Human Rights, *The Government's Policy on the Use of Armed Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015-2016* (2016-2017, HL 49, HC 747) p8, para 22. (Henceforth, JCHR Report: Government Response)
[294] See footnotes 139-142 and accompanying text.
[295] The JCHR shared this view, noting that the Government's assertion that the Court of Appeal's judgment in *Al-Saadoon* confirmed the Convention's inapplicability to extraterritorial drone strikes was overstated. See, JCHR Report: Government Response p8, para 23.

lead the UK to not consider the relevant standards that would apply if the Convention were applicable. Thus, if it is subsequently held that the ECHR is applicable, there is a danger that the UK will fail to uphold its Convention obligations that arise from utilising targeted killing.

Amos acknowledges that States often amend laws, policies and procedures to ensure compliance with the Convention and to avoid being held accountable for violations by the ECtHR.[296]Similarly, Mallory posits that the existence of obligations renders States conscious of the legal implications of their actions and influences behavioural changes towards compliance.[297]Though the applicability of the Convention to targeted killing is unresolved, it is posited that the UK should be conscious of the Convention's *potential* application to targeted killing to ensure its operations comply with the ECHR. Rather than act with the presumption that the Convention is inapplicable, the UK should utilise its policy with its potential obligations in mind. This approach would reduce the risk of the UK violating its Convention obligations *if* they were subsequently deemed to be applicable. Therefore, we will now proceed to analysing Convention's application to the force envisaged by the UK Policy.

[296] M.Amos, 'The Value of the European Court of Human Rights to the UK' (2017) 28(3) *European Journal of International Law*, 763, pp771-772.
[297] C.Mallory, (n1) p34.

Part Two

Application of the Right to Life to Targeted Killing

The right to life is protected by every major human rights instrument.[1]The ECtHR has described the right to life '[a]s one of the most fundamental provisions in the Convention…it also enshrines one of the basic values of the democratic societies making up the Council of Europe.'[2] Under the ECHR, the right to life is protected by Article 2, which provides that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[3]
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2(1) prohibits the intentional deprivation of life,[4]but deaths resulting from force that is 'no more than absolutely necessary' for achieving one of the aims enumerated in Article 2(2) do not contravene this prohibition. Furthermore, the Court

[1]Article 6, ICCPR; Article 2, ECHR; Article 4, ACHPR; Article 4, ACHR; Article 3, Universal Declaration of Human Rights. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). (Henceforth, UDHR).

[2] See, *McCann and Others v. UK,* (1995), Series A 324, §147 (Henceforth, *McCann*); *Abdulkhanov and Others v. Russia*, no.22782/06, 3 October 2013, §51; *Andreou v. Turkey*, no.45653/99, 27 October 2009, §47. (Henceforth, *Andreou*)

[3] Since the Convention was drafted, Protocol No.13 abolished the death penalty in all circumstances. The Protocol has been signed by all Council of Europe Member States (except Russia and Azerbaijan) and ratified by every State except Armenia. The Court has observed that State compliance with the moratorium on capital punishment strongly indicates that Article 2 has been amended to prohibit the death penalty. See *Al-Saadoon and Mufdhi v. the United Kingdom*, no.61498/08, §120, ECHR-2010-II.

[4]The scope of this prohibition extends beyond intentional killing. In *McCann*, the Court recognised that the exceptions in Art 2(2) do not define the circumstances where it is permissible to intentionally kill,but describes the situations where the 'use of force' is permitted, which may result, as an unintended outcome, in the deprivation of life. See *McCann*, §148 and *Andreou*, §48.

has held that Article 2 implicitly contains a procedural obligation requiring States to investigate when individuals are killed by its agents.[5]Furthermore, Article 2(1) also obliges States to protect the right to life. The Court has interpreted this provision as requiring States to deter life-threatening behaviour through criminalisation and utilise its law enforcement machinery to prevent, suppress and sanction breaches of the law.[6]Additionally, States are required to take the appropriate steps available to safeguard the lives of those within its jurisdiction.[7]Moreover, where State agents are entrusted with utilising life-threatening force, the Convention demands that force is adequately regulated to guard against arbitrariness and abuse.[8]

This part of the research focuses on the application of the right to life to the UK Policy. Consideration will be given to the application of the Convention to three contexts in which the UK anticipates utilising targeted killings. The first context to be examined is the application of the right to life to operations conducted outside of armed conflict. Although the Convention applies during armed conflict, it was initially developed to primarily regulate conduct during 'peacetime'.[9]In Chapter Two, the application of Article 2 to targeted killings conducted during 'peacetime', the Convention's 'normal legal background',[10]will be assessed.

The second context to be scrutinised is the application of the right to life to targeted killings subject to derogation. Article 15(2) of the Convention permits derogation from Article 2 '…in respect of deaths resulting from lawful acts of war'. During the JCHR Inquiry, the former Defence Secretary stated that the UK had no intention to derogate from the right to life.[11]However, subsequently, the UK has indicated its intention to derogate from the Convention during extraterritorial military operations, which could encompass targeted killings. In Chapter Three, the

[5] *McCann* §161. The procedural obligation is not confined to the deployment of lethal force by State agents. For example, the procedural obligation has been triggered by 'suspicious deaths' (See *Iorga v. Moldova*, no.12219/05, 23 March 2010, §26); 'disappearances' (see *Tahsin Acar v. Turkey* [GC], no.26307/95, §226, ECHR-2004-III); 'domestic violence' (see *Opuz v. Turkey*, no.33401/02, §150, ECHR-2009-III); 'inter-prison violence' (see *Paul and Audrey Edwards v. United Kingdom*, no.46477/99, §69, ECHR-2002-II)
[6] *Osman v. UK* [GC], no.23452/94, §115, ECHR-1998-VIII.
[7] Ibid
[8] *Makaratzis v. Greece* [GC], no.50385/99, §58, ECHR-2004-XI; *Giuliani and Gaggio v. Italy* [GC], no.23458/02, §209, ECHR-2011-II.
[9] *McCann* §147.
[10] *Isayeva v. Russia*, no.57950/00, 24 February 2005, §191.
[11] JCHR Report, pp52-53, para 3.61.

requirements for derogation will be examined and the impact that derogation has upon the application of Article 2 will be assessed.

Chapter Three will demonstrate that the term ‘lawful acts of war’ limits derogation from the right to life to lethal action during armed conflict that complies with IHL. Chapter Four will establish when the targeted killing of terrorists occurs within the context of an armed conflict and examine the applicable targeting rules. Collectively, the analysis in Chapters Three and Four will clarify the impact of derogation upon the application of the right to life and address the key requirements that the UK must satisfy, and the circumstances that must be present for derogation from Article 2.

The final context to be examined will be the application of the right to life to lethal action that takes place during armed conflict but is not subject to derogation. Chapter Five will consider whether, and to what extent, the prevailing circumstance of an armed conflict alters the application of the right to life from the ‘peacetime’ standards discussed in Chapter Two.

Chapter Two

The Application of Article 2 in 'Peacetime'

1.Introduction

This chapter examines the application of the right to life to targeted killing operations deployed during 'peacetime'. Initially, consideration will be given to the substantive right to life obligations and their application to intentional lethal force. This will enable an analysis of the standards that the UK must observe when utilising targeted killing. Moreover, where a State deploys deadly force, the procedural obligation to conduct an effective investigation is triggered. Therefore, after outlining the standards for an effective investigation, it will be examined how these standards relate to investigations of extraterritorial drone strikes.

2. Application of the Substantive Obligations under Article 2

The language of Article 2 is imprecise, but there is an abundance of case-law that has provided important detail on the application of the substantive right to life obligations. With respect to lethal action, the jurisprudence of the Commission and the Court has laid down three broad legal requirements. Accordingly, force must be 'no more than absolutely necessary' for the achievement of a permitted aim under Article 2(2), planned and controlled to minimise, to the greatest extent possible, the recourse to lethal force and incidental loss of life, and subject to an appropriate regulatory framework.

2(1) Requirement that Force must be 'No More than Absolutely Necessary' for the Achievement of a Permitted Aim Under Article 2(2)

Article 2(1) prohibits the intentional deprivation of life. However, killing does not violate this prohibition when the administration of lethal force is 'no more than absolutely necessary' for the purpose of protecting individuals from unlawful violence, effecting an arrest, or restoring order during a riot or insurrection.[1]Initially, a general consideration of this requirement will occur before looking more closely at its application to counterterrorism. Subsequently, it will be analysed when targeted killing would be regarded as 'no more than absolutely necessary'.

a. Overview

[1] Article 2(2)(a)-(c), ECHR.

When determining whether force is 'no more than absolutely necessary', the Court considers the necessity *and* proportionality of the action taken.[2]Within human rights law, intrusions upon the enjoyment of a right must be necessary for the achievement of a legitimate objective.[3]For instance, paragraph 2 of Articles 8-11 of the Convention allow for interference, limitations or restrictions that are 'necessary in a democratic society'. The Court has noted that the term 'absolutely necessary' within Article 2 indicates that a stricter and more compelling test of necessity must be employed.[4]With reference to the jurisprudence of the ECtHR, Melzer identifies that absolute necessity comprises of three different components; qualitative, quantitative and temporal necessity.[5]Qualitative necessity requires that force is needed to achieve one of the legitimate aims listed in Article 2(2). Quantitative necessity calls for the degree of force deployed to be no more hazardous to life than required to achieve the aim. Finally, the temporal element requires force to be necessary at the time it is administered.

It is only when force is qualitatively, quantitatively and temporally necessary that it meets the standard of absolute necessity.[6]There are three questions that must be affirmatively answered for force to be qualitatively, quantitatively and temporally necessary. First, was the use of forcible measures required to achieve one of the legitimate aims enumerated in Article 2(2)? If the State could have resorted to non-forcible measures to achieve its pursued aim, the use of force cannot be qualitatively necessary. Secondly, if force was qualitatively necessary, did the State use the least coercive means of force available? It is only when the minimal level of force is utilised that quantitative necessity is satisfied. Thus, if an individual is erratically brandishing a knife, police officers may need to use an electronic taser to temporarily immobilise and restrain the individual. However, this would make the use of a firearm excessive. The third question is whether, at the moment force is utilised, it remained necessary for the achievement of a legitimate aim? It may be the case that the circumstances of

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[2] I.Park, *'Right to Life in Armed Conflict'* (OUP, 2018) p35; The Court has repeatedly asserted that the term 'no more than absolutely necessary' requires force to be strictly proportionate in the circumstances. See *McCann and Others v. United Kingdom,* (1995), Series A 324, §149 (Henceforth, *McCann*). See also *Nachova and Others v. Bulgaria* [GC], nos.43577/98 and 43579/98, §94, ECHR-2005-VII. (Henceforth, *Nachova*).

[3] N.Lubell, *'Extraterritorial Use of Force Against Non-State Actors'* (OUP, 2010) p173.

[4] *McCann* §149; *Giuliani and Gaggio v. Italy* [GC], no.23458/02, §176, ECHR-2011-II. (Henceforth, *Giuliani and Gaggio*)

[5] N.Melzer, *'Targeted Killing in International Law'* (OUP, 2008) p116; I.Park (n2) p35.

[6] N.Melzer Ibid.

an operation develop in a way that obviates the need to use force. For example, if a violent individual is immobilised by force, further forcible action becomes unnecessary.

The elements encompassing absolute necessity impose different requirements for lawful force. Temporal necessity requires continuous reflection on the need for force, considering any circumstantial changes during the course of an operation. The qualitative and quantitative elements impose a 'graduated' approach to forceful action.[7]At one end of the scale is non-forcible measures such as warnings or negotiations and at the other end is lethal force. Consequently, killing is only compatible with Article 2 as a last resort, when other means of achieving a permitted aim have been exhausted or would be ineffective.[8]Should the situation warrant it, a State may sidestep graduated measures and employ fatal force.[9]This requirement reflects the widely accepted international standards within the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which the Court has explicitly referred to in its judgments.[10]According to Principle 4:

> Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.[11]

For force to be 'no more than absolutely necessary', the Court also examines whether action is proportionate. The Court undertakes a proportionality assessment with reference to the degree of force utilised, the type of force deployed, and the incidental harm that resulted from it. The Court will regard state action as disproportionate when the degree of force exceeds what the situation requires.[12]This proportionality requirement is implied by the text of Article 2 providing that force must be '*no more than* absolutely necessary'.[13]However, this element of the proportionality assessment overlaps with quantitative and qualitative necessity, which requires the minimum level of force for achieving a permitted aim.

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[7] D.Murray, *'Practitioners' Guide to Human Rights Law in Armed Conflict'* (OUP, 2016) p125; H.Russell, *'The Use of Force and Article 2 in Light of European Conflicts'* (Hart Publishing, 2017) p23.
[8] H.Russell Ibid; S.Wallace, *'The Application of the European Convention on Human Rights to Military Operations'* (CUP, 2019) p75.
[9] D.Murray (n7) p125.
[10] *Makaratzis v. Greece* [GC], no.50385/99, §59, ECHR-2004-XI (Henceforth, *Makaratzis*); *Simsek and Others v. Turkey,* nos.35072/97 and 37194/97, 26 July 2005, §105. (Henceforth, *Simsek*)
[11] United Nations Committee on Crime Prevention Control, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (U.N. Doc. A/CONF.144/28/Rev.1, 7 September 1990).
[12] I.Park (n2) p35.
[13] H.Russell (n8) p23.

The Court also considers whether the type of force deployed is proportionate to the objective sought by weighing up the aim pursued, and the means employed to achieve it.[14]In *Nachova*, the Court stated that potentially lethal force cannot be justified where it is known that an individual does not pose a concrete threat to life or limb or is evading arrest for a violent offence.[15] *Nachova* concerned two army conscripts who had escaped from short-term imprisonment. They were unarmed, had no history of violence and showed no signs of threatening behaviour when they encountered the arresting officers.[16]Consequently, the Court considered that the resort to potentially lethal force was prohibited by Article 2, regardless of any risk that the fugitives may escape.[17]The Court viewed the use of firearms to secure the arrest of the two conscripts as grossly excessive and incompatible with Article 2.[18]*Nachova* demonstrates that lethal force cannot be utilised against individuals that either do not pose a severe threat to others or are seeking to escape arrest for a violent offence. Thus, even if potentially lethal force is qualitatively, quantitively and temporally necessary to prevent, for example, a petty thief escaping arrest or to break up a mild skirmish, the severity of the force would be disproportionate and precluded from meeting the standard of absolute necessity.[19]

The proportionality of force is also assessed with reference to its incidental effects. To avoid contravening Article 2, the harm resulting from forcible measures must not outweigh the benefits sought.[20]The jurisprudence of the Court is clear that the Convention does not prohibit collateral deaths. In *Finogenov and Others v. Russia,* the Court addressed, *inter alia*, whether the use of an opiate gas to rescue hostages taken by Chechen separatists in the Dubrovka theatre was proportionate. The hostages were held at gunpoint, the theatre was booby-trapped and amongst the terrorists were 18 suicide bombers. During the course of the rescue mission, 730 hostages were saved but 125 hostages died from exposure to the gas. The Court

[14] *Gülec v. Turkey*, no.21593/93, §71, ECHR-1998-IV.
[15] *Nachova* §95, §103 and §107; See also *Solomou and Others v. Turkey,* no.36832/97, 24 June 2008, §78.
[16] *Nachova* §106.
[17] Ibid §107.
[18] Ibid§109.
[19] Ibid §95, citing *Streletz, Kessler and Krenz v. Germany* [GC], nos.34944/96, 35532/97, and 44801/98, §87, §96 and §97, ECHR-2001-II.
[20] I.Park (n2) p35.

acknowledged that the use of gas was dangerous but proportionate in the circumstances.[21]

For state action to be regarded as proportionate, it must not do more harm than good.[22]The level of permissible collateral harm depends on the severity of the threat being addressed. As will be addressed below,[23]linked to the proportionality requirement is the obligation to minimise incidental loss of life when deploying life-threatening force. Therefore, even where incidental harm is proportionate, States must plan their operations in a way that reduces such harm. In *Finogenov*, though the deaths resulting from the use of the opiate gas were proportionate, the Court identified that the Russian authorities had failed to take adequate precautions to minimise fatalities.

To summarise, where death results from action seeking to effect an arrest, protect individuals from unlawful violence or quell a riot or insurrection, the force must be 'no more than absolutely necessary' to comply with the right to life. To satisfy this requirement, force must be absolutely necessary and proportionate. The standard of absolute necessity comprises qualitative, quantitative and temporal elements. Intentional killing will only meet this standard as a last resort when less than lethal measures are unavailable or would be ineffective for achieving the aim pursued. However, disproportionate force is precluded from being 'no more than absolutely necessary'. *Nachova* demonstrates that lethal force is only proportionate when utilised against individuals that are either seeking to avoid arrest for a violent crime or pose a life-threatening danger to others. Force can also be rendered disproportionate on the basis that it causes excessive incidental harm.

b. Counterterrorism and the Legality of Lethal Force

A prerequisite for lawful force under the Convention is the pursuit of a legitimate aim under Article 2(2). In *McCann*, the ECtHR's first consideration of the application of the right to life, the Court recognised that force used to protect persons from terrorist violence comes within the ambit of Article 2(2)(a).[24]Additionally, the Court accepted that the intentional killing of three IRA terrorists by British soldiers to prevent the

[21] *Finogenov and Others v. Russia*, nos.18299/03 and 27311/03, §§232-236, ECHR-2011-VI. (Henceforth, *Finogenov*)
[22] Ibid §233.
[23] See Section 2(2).
[24] *McCann* §200. Reaffirmed in *Finogenov* §226.

detonation of a car bomb was not contrary to Article 2.[25]Therefore, killing can be a proportionate measure to address life-threatening terrorist violence. In fact, in exceptional circumstances, Article 2 may *require* not simply permit the use of lethal force. The Court recognised in *Osman* that States must take reasonable measures to protect individuals from life-threatening harm posed by the acts of a third party, when they knew or ought to have known of such a threat.[26]Therefore, where lethal force is the only way to prevent the occurrence of a known terrorist attack, States may be required to kill to fulfil its positive obligation to protect the right to life. The Court acknowledges the "fundamental dilemma" that terrorism poses States, that must protect its citizens from terrorist violence whilst refraining from inflicting a deprivation of life upon those harbouring violent intent.[27]These obligations are not contradictory but must be reconciled. To avoid killing in contravention with Article 2, the objective underpinning lethal action must be the protection of individuals from death or life-threatening harm.[28]Consequently, labelling an individual as a terrorist does not justify fatal force, nor can killing be used as a form of punishment, revenge, deterrence or risk prevention.[29]

The Court has recognised within its jurisprudence that those subject to lethal force must pose a concrete danger, interchangeably referred to as a real danger.[30]Von der Groeben describes concrete dangers as being based on the circumstances of a specific case whereas abstract danger is characterised by the inherently dangerous nature of behaviour.[31]The distinction between concrete and abstract danger can be demonstrated with reference to *McCann.* The three individuals killed by British forces in Gibraltar were generally dangerous due to their active support for the IRA. However, this did not equate to a concrete danger. Rather, the prospect that each terrorist possessed a concealed device that could be activated to instantaneously detonate a car bomb constituted a specific threat to life that justified intentional lethal action. It transpired that the terrorists were unarmed and there was no car bomb.[32]Nonetheless,

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[25] Ibid, *McCann.* Though the planning and control of the operation led to a violation of the right to life, see (n58) and accompanying text.
[26] *Osman v. United Kingdom* [GC], no.23452/94, §116, ECHR-1998-VIII. (Henceforth, *Osman*)
[27] *McCann* §192.
[28] E.Wicks, *'The Right to Life and Conflicting Interests'* (OUP, 2010) p149.
[29] C.von der Groeben, *'Transnational Conflicts in International Law'* (Institute for International Peace and Security Law, 2014) p122; E.Wicks Ibid.
[30] *McCann* §188; *Finogenov* §220.
[31] C.von der Groeben (n29) p118.
[32] *McCann* §198.

the Court acknowledged that lethal force could be justified where it is based on an honest belief, which is perceived, for good reasons to be valid at the time but which subsequently turns out to be mistaken.[33]

When addressing a concrete danger, compliance with Article 2 is also contingent on killings being absolutely necessary. When assessing the absolute necessity of the deployment of lethal force, the Court has frequently considered whether State agents were responding to an immediate danger.[34]As discussed above, Article 2 limits lethal force to an act of last resort.[35]The immediacy of danger is an important factor to consider when determining whether less coercive measures were available and/or would have been effective for protecting individuals from unlawful violence. Ordinarily, killing will only be viewed as a last resort when deployed immediately before an act of violence is perpetrated because non-lethal alternatives would likely remain available outside of this narrow timeframe. In *Dimov and Others v. Bulgaria*, the Court held that lethal force was unwarranted because the police officers had time to cordon off the house where the armed and dangerous individual was located, make arrangements to prevent his escape and prepare carefully for his arrest.[36]However, when confronted with an immediate threat of harm, such as a terrorist placing their finger on a detonator, drawing a weapon out in public or purposely driving towards pedestrians, state agents must makes split-second decisions about the course of action required. Therefore, time-pressure would 'lend urgency to the use of force',[37]but also makes it likelier that lethal action is the sole way to protect persons from harm. This is evidenced in *McCann,* where the Court accepted that fatal shooting was the only means available to immobilise the IRA terrorists after they had made sudden movements, which were perceived as an attempt to detonate a bomb.

The legality of lethal force is not conditional on the existence of an immediate or imminent danger. Rather, the key issue is whether the recourse to lethal force was a last resort. Normally, this will only be the case when confronting an immediate danger. However, exceptionally, killing may be the only way to defend persons from

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[33] Ibid §200.
[34] D.Murray (n7) p125; *Dimov and Others v. Bulgaria*, no.30086/05, 6 November 2012, §78. (Henceforth, *Dimov*); *Finogenov* §§225-226. In *Giuliani and Gaggio* §216, the Court considered whether the danger was 'imminent' rather than 'immediate'.
[35] See Section 2(1)(a).
[36] *Dimov* §78.
[37] Ibid.

violence but the opportunity to deploy lethal force falls outside the narrow timeframe immediately before the violent act occurs. In these circumstances, a prohibition on lethal action would be irreconcilable with the positive obligation to protect the right to life. If killing is the only way that the State can defend persons from potentially fatal violence, the State would not have to forego this option to comply with Article 2. Yet, it should also be noted that the wider the gap between a state's counterterrorism operation and the prospective attack, the less likely it will be that lethal action was the only way to protect persons from the potential harm.

The Court's jurisprudence confirms that killing can be justified to protect persons from life-threatening terrorist violence but killing is only absolutely necessary when utilised as a last resort, which ordinarily requires the existence of an immediate danger. However, exceptionally, killing may be permissible outside the immediate moments before an impending attack. Additionally, even when force is absolutely necessary to address a specific terrorist attack, the incidental effects of force must not exceed the harm that it seeks to prevent. The following section will examine the application of these requirements to the force envisaged by the UK Policy.

c. Extraterritorial Targeted Killing and the Requirement for Force to be 'No More than Absolutely Necessary'

Since the Convention does not absolutely prohibit fatal force as a form of counterterrorism, the targeted killing of terrorists does not *ipso facto* violate Article 2. The UK Policy, which seeks to target those orchestrating attacks against the UK or British interests abroad, brings operations within the scope of Article 2(2)(a). However, to prevent terrorist violence, where it is known how and when an attack will occur and who will carry it out, it is improbable that targeted killing can meet the absolute necessity standard.

Those involved in planning terrorist attacks cause harm indirectly whereas operatives, who conduct acts of terror, directly endanger life. Therefore, to protect individuals from unlawful violence, the focus of a state's counterterrorism measures should be directed towards operatives. If such measures would successfully prevent an attack coming to fruition, there would be no justification for killing individuals involved in its planning. Yet, even if a State is unable to prevent an attack with measures directed against operatives, it is unlikely that killing those organising attacks would be effective. Consequently, targeted killing would not be qualitatively necessary

for the purpose of protecting individuals from unlawful violence. However, where the specificities of an attack are unclear, the resort to targeted killing is more likely to be justifiable under Article 2.

Instantaneous global communication technology over the internet assists the recruitment, guidance and instruction of terrorist operatives. Those seeking to instigate acts of terrorist violence are able plan numerous attacks simultaneously, which can develop rapidly and be launched remotely without warning.[38]For example, Reyaad Khan,[39]prolifically planned and incited attacks against the UK,[40]actively recruited operatives and provided them with guidance to commit attacks, such as construction plans for improvised explosive devices.[41]Undoubtedly, Reyaad Khan posed a 'very serious threat to the UK' and was connected to at least one of seven major plots thwarted in the UK in 2015.[42]Due to the volume and speed at which attacks can be coordinated with modern technology, it may not always be possible for the state to identify the specific target of an attack or the operatives entrusted with carrying it out. As a result, to successfully disrupt attacks, it may be necessary stop them at source by taking direct action against those orchestrating acts of terrorism. Thus, where the UK identifies individuals planning terrorist attacks, but it is unclear where, when and how an attack will be carried out, targeted killing *may* be qualitatively necessary. However, to demonstrate that those subject to lethal force posed a concrete danger, it would then be incumbent upon the UK to provide evidence of their integral role in planning specific terrorist attacks.

To be deemed quantitively necessary, targeted killing can only be utilised when less than lethal measures are unavailable or would be ineffective. The UK expressed during the JCHR inquiry that it envisages the need for targeted killing arising when terrorists are planning attacks from so-called 'safe havens', which refers to territory that lacks governmental authority and where there is no British military presence. In these circumstances, lethal action is likely to be the only way to specifically counter the threat posed by an individual planning attacks against the UK because non-lethal

[38] The JCHR inquiry acknowledges this. See JCHR Report, p19, para 1.26
[39] Following the killing of Reyaad Khan, the Intelligence and Security Committee of Parliament (ISC) launched an investigation into the intelligence basis and the assessment of the threat he posed the UK. Report of the Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria*, (2016-2017, HC 1152) p1, para 5. (Henceforth, ISC Report)
[40] Ibid p7, para 18.
[41] Ibid pp7-8, para 19.
[42] Ibid p9, para 21.

measures are unavailable. For instance, when Reyaad Khan was targeted in Raqqa, the Syrian government had lost control of the area to ISIS and the UK did not have any soldiers in the region. Therefore, killing Reyaad Khan was arguably the only way that the UK could address the threat he posed because neither the Syrian government nor British forces could arrest Khan.

Without knowing when an attack may materialise, it could be suggested that targeted killing would not be a response to an immediate threat and could be viewed as a premature response to an unspecified attack. With time, it is arguable that the State's intelligence agencies may be able to uncover more detail about evolving attacks which may bring non-fatal measures against operatives into play. However, if an individual is persistently planning attacks, which develop rapidly and can be launched instantaneously without warning, they could be seen as posing a continuously imminent danger. It is posited that the Court, which is "acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence and recognises the complexity of this problem",[43]is likely to adopt the latter position. In the context of counterterrorism, the Court has afforded States a certain amount of discretion when assessing whether fatal force was compliant with Article 2. In *McCann*, the Court did not regard the mistaken belief that the IRA members sought to detonate a car bomb as rendering lethal action unlawful because it was based on an 'honest' belief.[44]Furthermore, the Court has accepted the use of lethal force where the state 'reasonably' considers, but is not certain, that there was an attack or a risk of an attack.[45]This standard of reasonable necessity is a departure from the normal standard of absolute necessity.[46]

To be lawful, targeted killing operations must not cause excessive incidental harm. Where an operation seeks to prevent an unspecified attack, it is not precisely known the level of harm that a targeted killing seeks to negate, which complicates the proportionality assessment. However, when targeting individuals that are prolific in planning attacks, previously foiled acts of terrorism can indicate the scale of the threat

[43]*Finogenov* §212; *Tagayeva and Others v. Russia,* nos.26562/07, 14755/08, 49339/08, 51313/08,21294/11 & 37096/11, 13 April 2017, §481. (Henceforth, *Tagayeva*)
[44] *McCann* §200.
[45] *Finogenov* §221; *Isayeva, Yusupova and Bazayeva v. Russia*, nos.57947/00, 57948/00 & 57949/00, 24 February 2005, §181.
[46] S.Wallace (n8) p80; C.Landais and L.Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97 *International Review of the Red Cross* 1295*,* pp1300-1301.

posed. For example, the UK knew that Reyaad Khan had orchestrated attacks that would have led to the murder of large numbers of British citizens. This information can feed into the proportionality assessment when a targeted killing operation results in collateral harm.

In summary, UK targeted killing operations would come within the scope of Article 2(2)(a). However, lethal action against individuals planning attacks is unlikely to meet the standard of absolute necessity when it is known when and how an attack will occur or who will carry it out because the threat could be addressed without taking direct lethal action. Where the specificities of an attack are unknown, there is greater need to neutralise terrorist threats at source. Targeted killing operations will be qualitatively necessary when those subject to lethal force are known to be coordinating numerous attacks, which develop rapidly and can be launched without warning. Furthermore, when individuals are residing in 'safe havens', less than lethal measures are unlikely to be available. Therefore, in such circumstances, targeted killing will be deemed 'no more than absolutely necessary', provided operations do not cause excessive incidental harm.

Article 2 only permits killing in exceptional circumstances. However, there is significant discrepancy in the UK's interpretation of the legal standards applicable to targeted killing operations in 'peacetime'. During the JCHR inquiry, the Defence Secretary asserted that compliance with the law of armed conflict will be sufficient to meet any obligations the UK may have under human rights law.[47]The inquiry requested a clarification on this issue but the Government simply insisted that the application of the law of armed conflict to lethal operations outside of armed conflict is a 'hypothetical question'.[48]Nonetheless, the Government expressed that it considers that in relation to military operations, IHL is likely to be regarded as an important source in considering the applicable principles.[49] However, the application of IHL is confined to armed conflict situations and is irrelevant during 'peacetime'.[50]IHL provides a more permissible legal framework than the ECHR and if the UK conducts targeted killing operations pursuant to IHL, this will likely contravene the more stringent standards of Article 2.

[47] JCHR Report, p51, para 3.54.
[48] JCHR Report: Government Response, p6, para 18
[49] Ibid, Appendix: Government Response.
[50] In Chapter Four, it will be considered when a targeted killing operation occurs within the context of an armed conflict.

2(2) Requirement to Plan and Control Operations in a Manner that Minimises Recourse to Lethal Force and Incidental Loss of Life

When determining the compatibility of lethal force with the Convention, the ECtHR examines the utilisation of force itself, but also its surrounding circumstances.[51]Specifically, the Court scrutinises whether the State has planned and controlled operations in a manner that minimised, to the greatest extent possible, the recourse to lethal force and incidental loss of life.

The Court will examine the events leading up to a killing when considering whether a State minimised the recourse to lethal force. In *McCann*, the Court questioned why, if the British authorities believed the terror suspects were on a bombing mission, were they not arrested at the border rather than allowed to enter Gibraltar.[52]The UK argued that there may have been insufficient evidence to warrant the detention and trial of the suspects[53]but the Court considered that the possible consequences of unjustifiable detention were outweighed by the threat posed to the population of Gibraltar.[54]The decision not to arrest the suspects was held to be a 'serious miscalculation by those responsible for controlling the operation'.[55]Rather than minimise the recourse to lethal force, the failure of the British authorities to arrest the terrorist suspects, in light of the threat they posed, set the scene in which the fatal shooting became a 'foreseeable possibility if not a likelihood'.[56]Though the administration of force did not contravene the right to life, the inadequate planning of the arrest operation made lethal action 'unavoidable'.[57]Consequently, the Court was unpersuaded that the force was 'absolutely necessary' and found that a violation had occurred.[58]

McCann demonstrates that the administration of fatal force, even if 'no more than absolutely necessary' when deployed, will be deemed unlawful if preceded by a failure to minimise the recourse to lethal force. Yet, in *McCann*, the violation of Article 2 stemmed from the 'serious miscalculation' made by the British authorities in deciding not to arrest the terrorist suspects at the border crossing, which made the subsequent

[51] *Gül v Turkey*, no.22676/93, 14 December 2020, §84.
[52] *McCann* §203.
[53] Ibid §204.
[54] Ibid §205.
[55] Ibid §205.
[56] Ibid §205.
[57] Ibid §210.
[58] Ibid §214.

killings ‘unavoidable’. Thus, it may be that a State only errs in this requirement when serious operational flaws significantly increase the probability of fatal force ensuing.

As well as minimising the recourse to lethal force, States must plan and control operations in a way that minimises incidental loss of life. To fulfil this obligation, States are required to consider and implement adequate precautions to shield individuals from the incidental effects of forcible measures. In *Isayeva v. Russia*, the Court held that the aerial bombardment of Chechen fighters in the village of Katyr-Yurt had not been planned and executed with the requisite care for the lives of the civilian population.[59]The use of indiscriminate airborne bombs was viewed by the Court as flagrantly contrasting the aim of protecting the villagers from the heavily armed and well-trained rebel group.[60]The obligation to take adequate operational precautions also applies to the protection of individuals from private violence. In *Ergi v. Turkey*, the applicant’s sister was killed when Turkish forces ambushed a village to capture members of the PKK. Though the Court failed to establish that the deceased was killed by Turkish security forces, it considered whether the ambush had been planned and conducted to minimise the risk to villagers, including from PKK force.[61]In light of the failure of the Turkish authorities to adduce direct evidence on the planning and conduct of the ambush, the Court held that it can be reasonably inferred that sufficient precautions had not been taken to protect the lives of the villagers. [62]

Where life-threatening incidental harm cannot be avoided, States must ensure that post-operational precautions are taken to mitigate harm. In *Finogenov*, the Court did not regard the use of dangerous gas during a hostage rescue mission as violating the right to life.[63]However, upon examining whether the Russian authorities took adequate precautions to minimise the effects of the gas on the hostages, the Court identified various shortcomings.[64]For instance, the mass evacuation of hostages occurred over an hour after they were first exposed to the gas, which increased the mortality rate. The Court received no explanation for this delay.[65]Consequently, the Court held that the insufficient preparation of the rescue operation breached the

[59] *Isayeva v. Russia*, no.57950/00, 24 February 2005, §200. (Henceforth, *Isayeva*)
[60] Ibid §191.
[61] *Ergi v. Turkey*, no.23818/94, §79, ECHR-1998-IV. (Henceforth, *Ergi*)
[62] Ibid S§81-86.
[63] *Finogenov* §236.
[64] Ibid §252.
[65] Ibid §258.

obligation to protect the right to life.[66]Because the Russian authorities had two days to reflect on the hostage situation and make specific preparations for the rescue operation and that, in contrast to the events occurring *within* the theatre, the authorities had control of the situation *outside*, where the majority of the rescue efforts took place, the Court subjected the planning and control of the rescue operation to 'closer scrutiny'.[67]In general, States will have a greater burden to minimise the incidental loss of life where operations are not spontaneous, and the surrounding circumstances of the situation are within its control.

The requirement to minimise the recourse to lethal force and incidental loss of life apply to varying degrees in the context of extraterritorial targeted killing. It is difficult to envision how the UK could minimise the recourse to lethal force against terrorist located in 'safe havens' overseas but the application of the requirement to minimise incidental loss of life is more predictable. The technological capabilities of armed drones facilitate the identification and elimination of targets with precision.[68]Nevertheless, given the power of their missiles, individuals located near a target will inevitably be put in life-threatening danger. To minimise incidental loss of life, the UK should conduct drone strikes at a time when targets are in sparsely populated areas. The UK complied with this requirement by targeting Reyaad Khan as he travelled in a rural area, described as the 'optimum time to minimise the risk of civilian casualties'.[69]It may not always be possible to select an opportune moment to conduct a drone strike. Yet, where the option between a strike in an urban or rural area arises, the Convention would require the latter to be selected. As the UK anticipates targeting individuals in areas where they lack territorial presence, there is little that can be done after a drone strike has taken place to mitigate its effects, such as providing medical assistance on the ground. This would likely prompt the Court to scrutinise more closely whether the UK attempted to reduce incidental loss of life by selecting an opportune moment to conduct a drone strike.

2(3) Adequate Regulation of the Use of Force by State Agents

Article 2(1) enjoins States parties not to only refrain from the intentional deprivation of life, but also to take appropriate steps within its internal legal order to protect the lives

[66] Ibid §266.
[67] Ibid §243.
[68] J.Rochester, '*The New Warfare: Rethinking Rules for an Unruly World'* (Routledge, 2016) p69.
[69] HC Deb 7 September 2015, vol. 599, col 26.

of those within its jurisdiction.[70]This includes a requirement to strictly control and limit, in line with Convention standards, the circumstances in which a person may be killed by its agents.[71]Furthermore, States are required to provide appropriate training, instruction and briefing to those agents entrusted with using lethal force.[72]

Arbitrary State action is incompatible with effective respect for human rights.[73]Therefore, States must ensure that force is regulated by a framework that adequately safeguards against arbitrariness and abuse.[74]In *Makaratzis*, the Court recognised that an antiquated law failed to provide the Greek police with clear guidelines and criteria governing the use of force. Consequently, law enforcement officials enjoyed greater autonomy to take unconsidered initiatives than would otherwise have been the case had they benefitted from proper training and instruction. Consequently, the applicant, who was shot during a chaotic arrest operation, had been the victim of an Article 2 violation because the Greek authorities had failed to regulate force in a way that minimised the risk to his life.[75]

The requirement to adequately regulate force applies to action taken by military personnel.[76]For aerial operations, the UK targeting process is regulated by NATO's *'Allied Joint Publication'*,[77]which is 'detailed and comprehensive' and contains the safeguard that legal advisors must be consulted prior to engaging a target.[78]However, the '*Allied Joint Publication'* makes no reference to human rights law. Similarly, the UK's *Joint Doctrine Publication on Unmanned Aerial Systems*, which, *inter alia,* provides guidance to military personnel on the legal issues arising from the use of drones, fails to consider the application of human rights law to lethal targeting.[79]

Currently, the UK's framework regulating aerial targeting is focused on adherence with IHL, which does not apply to lethal action during

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[70] *Makaratzis* §57.
[71] Ibid §59.
[72] *McCann* §151.
[73] *Makaratzis* §58; *Andreou v Turkey*, no.45653/99, 27 October 2009, §50; *Şimsek* §104.
[74] *McCann* §150; *Makaratzis* §58; *Nachova* §97.
[75] *Makaratzis* §§56-72.
[76] D.Murray (n7) pp162-163.
[77] North Atlantic Treaty Organization 'Allied Joint Doctrine for Joint Targeting AJP 3-9' (November 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628215/20160505-nato_targeting_ajp_3_9.pdf>
[78] I.Park (n2) p129.
[79] Ministry of Defence, 'Joint Doctrine Publication 0-30.2 Unmanned Aircraft Systems' (12 September 2017) <https://bit.ly/2tQz7Vc> p41. Note, this version was the most recent publication before being withdrawn on 16 November 2022.

'peacetime'.[80]Moreover, the UK's targeting framework fails to either acknowledge the potential applicability of the Convention or consider its application to lethal targeting. Undoubtedly, lawyers at the Ministry of Defence will advise on the applicability and application of the Convention when consulted prior to the deployment of aerial force. However, at present, by failing to consider the application of the right to life to lethal targeting during 'peacetime', it is posited that the UK framework that regulates aerial operations is arguably inadequate for protecting the right to life. Nevertheless, the UK could easily remedy this deficiency by explicitly recognising within its targeting doctrines that it is Article 2 of the ECHR, rather than IHL, that must be complied with during 'peacetime' and detailing the application of this framework to lethal targeting.

2(4) Summary

To avoid violating the Convention, the UK should only utilise targeted killing against terrorists when it is the only way to protect individuals from life-threatening harm. Moreover, where appropriate, the UK is obliged to take preventative measures to avoid the need for targeted killing arising. When targeting specific terrorists with armed drones, the UK must also ensure that any incidental harm that arises is not excessive and that precautions to minimise collateral damage are taken. Though the legality of lethal operations must be assessed on a case-by-case basis, it will only be in exceptional circumstances that targeted killings conducted during 'peacetime' will comply with Article 2.

3. Application of the Procedural Obligation under Article 2

Article 2 contains no explicit reference to the investigative duty. However, in *McCann*, the Court established that States are required to conduct 'some form of effective official investigation' when individuals are killed by its agents.[81]The Court added that the procedural obligation is implicitly required since a general prohibition on arbitrary killing by State agents would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of force by State authorities.[82]The requirement to conduct an effective investigation provides an avenue for scrutinising the actions of state agents to determine whether their conduct was justified in the circumstances.[83]

[80] The scope of the applicability of IHL is considered in Chapter Four.
[81] *McCann* §161.
[82] Ibid.
[83] *Kaya v Turkey*, no.22729/93, §78, ECHR-1998-I. (Henceforth, *Kaya*)

The essential purpose of the procedural obligation is to ensure accountability for deaths occurring under the responsibility of State agents.[84]However, the investigative duty also extends to deaths occurring in suspicious circumstances, even if private individuals, rather than State officials, are responsible.[85]In this context, the procedural obligation is connected to the positive obligation to protect the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person.[86]

States are obliged to investigate deaths attributable to its agents. Consequently, the utilisation of targeted killing would trigger the UK's investigative duty under Article 2. Once the procedural obligation is activated, it is a separate and autonomous duty that arises independently of a substantive breach of Article 2.[87]Therefore, claims of a procedural right to life violation can be brought even where there is no allegation of a substantive infringement[88] or when such an allegation has been dismissed.[89]Moreover, the ECtHR has recognised that the presence of 'special features' in a case can engage a state's procedural obligation even where the alleged victim is not deemed to be within its jurisdiction in relation to the substantive limb of the right to life.[90]

The following section sets out the requirements of an Article 2 compliant investigation. Subsequently, we will consider how the UK can ensure investigations into targeted killings comply with the procedural limb of Article 2.

3(1) Requirements of an Article 2 Compliant Investigation

The mere knowledge of a killing attributable to State agents gives rise *ipso facto* to the procedural obligation.[91]Subsequently, the State must act on its own motion to investigate the death.[92]The Court has noted that the nature and degree of scrutiny

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[84] *Al-Skeini and Others v. United Kingdom*, [GC], no.55721/07, §163, ECHR 2011-IV. (Henceforth, *Al-Skeini*); Schabas refers to accountability for deprivations of life as the 'core' of the procedural obligation. See W.Schabas, *'The European Convention on Human Rights: A Commentary'* (OUP, 2015) p134.

[85] *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no.24014/05, 14 April 2015, §171. (Henceforth, *Mustafa Tunç*)

[86] *Osman* §115.

[87] *Šilih v. Slovenia* [GC], no.71463/01, 9 April 2009, §159. (Henceforth, *Šilih*)

[88] See *Hanan v. Germany* [GC], no.4871/16, 16 February 2021, §132 where the applicant complained exclusively under the procedural limb of Article 2. (Henceforth, *Hanan*)

[89] W.Schabas (n84) p134; *Al-Skeini* §151; *Šilih* §158; *Brecknell v. United Kingdom*, no.32457/04, 27 November 2007, §53.

[90] *Güzelyurtlu & Others v. Turkey* [GC], no.36925/07, §§191-197, 29 January 2019; *Hanan* §§137-142; *Georgia v. Russia (II)* [GC], no.38263/08, §§331-332, 21 January 2021.

[91] *Ergi* §82.

[92] *Tahsin Acar v. Turkey,* no.26307, ECHR-2004-III, §221. (Henceforth, *Tahsin Acar*)

required to satisfy the investigative duty depends on the circumstances at hand. Thus, where the facts of an incident are undisputed, the investigation will require minimum formality, whereas a contentious killing will demand a more comprehensive examination.[93]

The Court has acknowledged that the requirements of an Article 2 compliant investigation cannot be codified in a simplified list,[94]as investigations may take various forms.[95]Yet, though there is flexibility in the way that the procedural obligation may be carried out, investigations must observe the 'cardinal' principle of effectiveness.[96]An investigation is effective when it is capable of establishing the facts surrounding a death and, if a violation of the Convention has occurred, enable the identification and punishment of those responsible.[97]However, an investigation that fails in respect of these objectives does not necessarily constitute a violation as the investigative duty is an obligation of means rather than result.[98]Nevertheless, the Court has expressed that any fault in an investigation which undermines its ability to establish the cause of death or those responsible will fall foul of the standard of effectiveness.[99]

The effectiveness of an investigation is considered with reference to several essential parameters: the adequacy of the investigative measures utilised, independence, transparency, and promptness.[100]These elements, taken separately, do not amount to an end, they are criteria which, taken jointly, enable the degree of the effectiveness of the investigation to be assessed.[101]

a. <u>Adequate Investigative Measures</u>

To clarify the circumstances surrounding a killing, States must take the reasonable steps available to obtain the evidence relevant to the incident. This will include, *inter alia*, eye-witness testimony, forensic evidence and an autopsy that provides a record

[93] K.Reid, *'Practitioner's Guide to the European Convention on Human Rights'* (4th Edition, Sweet & Maxwell, 2012) p755; *Velikova v. Bulgaria*, no.41488/98, §80, ECHR-2000-VI.
[94] W.Schabas (n84) p135.
[95] *Tahsin Acar* §221.
[96] S.Borelli, 'Jaloud v. Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad' (2015) 2 *Questions of International Law* 25, p31.
[97] *Finogenov* §269; N.Quenivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) *Netherlands Quarterly of Human Rights* 119, p137.
[98] *Al-Skeini* §166.
[99] Ibid.
[100] *Mustafa Tunç* §225.
[101] Ibid.

of injuries and establishes a cause of death.[102]Furthermore, investigations must be conducted thoroughly which requires investigators to make a serious attempt to find out what happened and not rely on hasty or ill-founded conclusions to close their investigations or as the basis of their decisions.[103]Moreover, investigations should not overlook potentially relevant issues as the failure to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and identify those responsible.[104]Additionally, once the circumstances of a killing are established, an investigation's conclusion must be based on a thorough, objective and impartial analysis of all the relevant elements of the investigation.[105]

b. Independence

Those responsible for carrying out an investigation must be independent from those implicated in the events.[106]This requirement facilitates an effective investigation by safeguarding against undue influence or bias.[107]Additionally, as independent and impartial investigators are less likely to have an interest in conducting a botched investigation,[108]independence reduces the risk of cover-ups and impunity whilst enhancing public confidence in the integrity of the investigative process.[109]

The independence requirement has hierarchical, institutional and practical elements.[110]In *Hugh Jordan* and *McKerr*, the Court noted that the investigations into killings by the Royal Ulster Constabulary (RUC) were headed and carried out by RUC officers.[111]The hierarchical link between the investigating officers and those under investigation was a flaw that contributed to the finding of a violation of the procedural obligation.[112]Institutional independence relates to the ability of investigators to act

[102] *Al-Skeini* §166.
[103] *Finogenov* §271.
[104] *Kolevi v Bulgaria*, no.1108/02, 5 November 2009, §201. (Henceforth, *Kolevi*)
[105] *Finogvenov* §272.
[106] *Tagayeva* §496.
[107] *McKerr v. United Kingdom*, no.28883/95, §128, ECHR-2001-III. (Henceforth, *McKerr*)
[108] H.Russell (n8) p147.
[109] *McKerr* §§127-128; A.Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51(2) *International and Comparative Law Quarterly* 437, p440.
[110] *Al-Skeini* §167; Reiterated in *Jaloud v. Netherlands* [GC], no. 47708/08, §186, ECHR 2014-VI. (Henceforth, *Jaloud*)
[111] *Hugh Jordan v. United Kingdom*, no.24746/94, 4 May 2001, §120 (Henceforth, *Hugh Jordan*); *McKerr* §128.
[112] *Hugh Jordan* §§142-145; *McKerr* §§157-161.

without interference.[113]In *Al -Skeini,* the Court held that the Special Investigation Branch (SIB), part of the Royal Military Police responsible for investigating serious crimes committed by British forces personnel while on service,[114]was not sufficiently independent from the soldiers under investigation.[115]The Court noted that it was generally the Commanding Officer of the unit implicated in an incident that decided whether the SIB should commence an investigation. Though the SIB could instigate investigations on its own initiative, the Commanding Officer could halt them.[116]Therefore, the SIB lacked institutional independence as it was not always free to decide when to start or cease investigations.[117]

Practical independence concerns the nature of the relationship between investigators and those under investigation. In particular, a personal or professional nexus should be avoided.[118]In *Jaloud*, the applicant questioned whether the investigation's independence was compromised by the close proximity in living arrangements between the Royal Military Constabulary (RMC) unit that undertook the investigation and the Royal Army personnel that were subject to investigation.[119]The Court acknowledged that close relations between investigators may call into question the independence of an investigation,[120]but did not find any reason to suggest that the quality of the RMC's investigation had been impaired by its proximity to those under investigation.[121]

Practical independence has also been considered as requiring investigators to be self-reliant in gathering and evaluating the evidence obtained during their inquiries.[122]To be practically independent, Mowbray contends that investigative authorities should not 'automatically accept the veracity and accuracy of reports or statements by State agents without conducting further relevant inquiries.'[123]Therefore, practical independence ensures that an investigation is conducted thoroughly and without bias. In *Ergi*, the Court was struck by the public prosecutor's dependence on

[113] I.Park (n2) p56.
[114] *Al-Skeini* §28.
[115] Ibid §172
[116] Ibid §30
[117] Ibid §172.
[118] I.Park (n2) p56.
[119] *Jaloud* §187.
[120] Ibid §188.
[121] Ibid §189.
[122] A.Mowbray (n109) p440.
[123] Ibid.

the incident report of the Turkish security forces and the failure to verify its conclusions.[124]Moreover, based on the aforementioned incident report, the public prosecutor deemed certain avenues of investigation unnecessary.[125]The Court regarded this as a failure to consider all the circumstances surrounding the death in question, which compromised the investigation's effectiveness.[126]

c. Transparency

Transparency requires that investigative proceedings and outcomes must be subject to public scrutiny.[127]The degree of public scrutiny required can vary but the next-of-kin of the victim must be involved in the investigation to the extent necessary to safeguard their legitimate interests.[128]The Court has recognised that this includes, *inter alia*, a right to be kept informed of developments in the investigation.[129]In certain situations, States can limit the access that a victims' family has to an investigation and conceal information from the public domain. In *McKerr* and *Hugh Jordan*, the Court noted that it cannot be regarded as an automatic requirement under Article 2 for the police to disclose or publish reports and investigative materials that 'may involve sensitive issues with possible prejudicial effects to private individuals or other investigations'.[130]It is in the context of counterterrorism investigations that the Court has been most willing to afford states discretion in limiting the information that they disclose or publish. Park posits that the Court recognises the need to safeguard operationally sensitive information that would undermine a state's ability to effectively counter terrorist activity in the future.[131]In *Finogenov*, the Court recognised the 'need to keep certain aspects of security operations secret'[132]and acknowledged that there may be legitimate reasons that justified the Russian authorities withholding information about the type of gas used in the rescue operation.[133]

[124] *Ergi* §§83-84.
[125] Ibid §83.
[126] Ibid §85.
[127] In *McKerr*, the Court considered the failure of the Royal Ulster Constabulary to publish, in full or extract, its findings precluded public scrutiny of its investigation. See *McKerr* §141.
[128] Ibid §115.
[129] *Estamirov and Others v. Russia,* no.60272/00, 12 October 2006, §92.
[130] *McKerr* §129; *Hugh Jordan* §121.
[131] I.Park (n2) p53.
[132] *Finogenov* §266.
[133] Ibid §200.

Once an investigation has concluded, states must inform the victim's family of the outcome. In *Isayeva*, the Court held that Russia did not adequately communicate its decision to close the investigation. The Russian authorities had provided a list of names to the regional government and requested for those listed to be informed of the investigation's closure. Other than names, the Russian authorities did not provide any additional information of those that needed to be contacted and there was no indication that the Government of Chechnya complied with the Russian request.[134]As well as informing the next of kin of an investigation's outcome, states must explain any action it has taken as a consequence of the investigation. For instance, if the State finds that a killing did not give rise to a potentially criminal offence meriting prosecution, it must provide information to support this decision.[135]A certain level of detail is required, and it would not suffice for the State to simply claim that there is insufficient evidence or provide general reasons for its decision.[136]The Court has recognised that the failure to provide this information would prevent the family of the victim from legally challenging the decision.[137]

Transparency grants the family of individuals killed by the State access to investigative proceedings and allows them to challenge their findings. More broadly, public scrutiny secures accountability 'in practice as well as theory',[138]which is indispensable for maintaining public confidence that State authorities are adhering to the rule of law[139]and helps addresses legitimate concerns that may arise when State agents utilise lethal force.[140]

d. Promptness

Promptness requires investigations to commence without undue delay and be conducted with reasonable expedition. The Court has recognised that a prompt investigation is '[e]ssential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful

[134] *Isayeva* §222.
[135] *Hugh Jordan* §124.
[136] F.Leverick, 'What has the ECHR Done for Victims? A United Kingdom Perspective' (2004) 11 *International Review of Victimology* 177, 188.
[137] *Hugh Jordan* §123.
[138]*Esmukhambetov and Others v. Russia*, no.23445/03, 29 March 2011, §118. (Henceforth, *Esmukhambetov*)
[139] *Kolevi* §194.
[140] *McKerr* §160.

acts.'[141]Promptness is also practically important as '[T]he passage of time will inevitably erode the amount and quality of the evidence available…'.[142]In *Bazorkina v. Russia,* the Court held that delays had 'compromised the effectiveness of the investigation and could but not had had a negative impact on the prospects of arriving at the truth.'[143]Thus, commencing and conducting an investigation promptly safeguards the investigation's effectiveness by enhancing the prospect that the circumstances surrounding a death will be clarified. The Court has not specifically detailed what constitutes the prompt commencement of an investigation or reasonable expedition, implying that this is determined by the facts of each case.[144]This is a pragmatic approach as some investigations will inevitably be more time consuming than others due to their complexity or scope.

e. Flexible Interpretation of the Procedural Obligation

The Court has shown a willingness to flexibly interpret the elements comprising an effective investigation. With respect to transparency, the Court has granted States scope to reduce the level of public scrutiny investigations are subjected to by withholding access to information relating to sensitive issues or national security.[145]Moreover, in *Bazorkina*, the Court accepted that the security situation in Chechnya would inevitably delay the investigation's commencement and progress. The Court was willing to afford some flexibility in assessing whether an investigation was carried out expeditiously, cognisant that there may be 'obstacles or difficulties' that delay an investigation.[146]Nevertheless, the Court viewed the 17-month delay before the investigation began and the four years it took to interview key witnesses as clearly excessive.[147]

With respect to positive obligations, the Court has sought to avoid imposing an impossible or disproportionate burden on State authorities.[148]The Court's application of the procedural obligation mirrors this pragmatic approach. Aware of the inherent practical challenges of investigative work, which are exacerbated in difficult security

[141] *Esmukhambetov* §117.
[142] *Paul and Audrey Edwards v. United Kingdom*, no.46477/99, §86, ECHR-2002-II.
[143] *Bazorkina v. Russia*, no.69481/01, 27 July 2006, §121.
[144] H.Russell (n8) p127 & p129.
[145] See Section 3(1)(c).
[146] *Bazorkina* §119.
[147] Ibid §121.
[148] *Osman* §116.

environments, the Court considers that the procedural obligation 'must be applied realistically' to take into account the problems confronting investigators.[149]However, the Court has been accused of, at times, paying 'lip-service' to the idea of flexible interpretation by failing to make concessions when States have confronted practical challenges.[150]In *Kaya v. Turkey*, the Court recognised that the post-mortem and forensic examination were conducted in an area prone to terrorist violence, which may have may made it extremely difficult to comply with standard practices.[151]The Court then proceeded to provide a 'incongruous'[152]critique of the autopsy and crime scene investigation, which contributed to a finding that Turkey had not conducted an Article 2 compliant investigation.[153]

In *Jaloud*, the Court noted the difficulties facing Dutch investigators in Iraq and indicated its preparedness to make reasonable allowances for these practical challenges.[154]However, Borelli contends that the Court then applied the Convention in a relatively stringent and undiluted fashion.[155]Once again, the Court criticised the quality of the autopsy, which was performed by an Iraqi physician.[156]The Netherlands asserted that the autopsy was as effective as it could have been in the circumstances[157] but the Court disagreed and bemoaned the failure of the Netherlands to consider arranging for the autopsy to be conducted by a pathologist from a coalition partner (the Netherlands did not have the facilities themselves) or to have a qualified official in attendance when the autopsy was carried out.[158]In their Concurring Opinion, Judges Casadevall, Berro-Lefevre, Śikuta, Hirvelä, López Guerra, Sajó, and Silvis noted regret that the investigation was scrutinised in a 'painstaking' manner that appeared to disregard the obstacles facing investigators.[159]With reference to the autopsy, they expressed that there was no indication that the Dutch authorities had a legal right to claim control over the body and that it was, allegedly, the Iraqi authorities that prevented Dutch officials observing the autopsy. They also acknowledged that the

[149] *Al-Skeini* §168.
[150] S.Wallace (n8) p122.
[151] *Kaya* §89.
[152] S.Wallace (n8) p130.
[153] *Kaya* §92.
[154] *Jaloud* §226.
[155] S.Borelli (n96) p32.
[156] *Jaloud* §213.
[157] Ibid §212.
[158] Ibid §§212-216.
[159] Ibid, Concurring Opinion of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis, para 8.

autopsy was inadequate in comparison to the “state of the art” examinations that would occur domestically but suggested that the circumstances in Iraq constituted concrete constraints that should have compelled the Court to accept the use of less effectives measures of investigation.[160]Noting that the procedural obligation is one of means and not results, Quenivet echoes the critique of the concurring judges and expresses frustration that the autopsy in *Jaloud* was regarded as deficient, despite Netherlands making a reasonable attempt to secure its adequacy.[161]

Arguably, in both *Kaya* and *Jaloud*, the Court demanded an unreasonably high standard of autopsy. However, the autopsies were but one of numerous investigative failures identified by the Court. Perhaps the Court’s rigidity stemmed from a frustration that the investigations, as a whole, were ineffective. Alternatively, Quenivet identifies that the Court has been prepared to grant concessions for shortcomings in an investigation’s independence, transparency or promptness but unwilling to accept inadequate investigative measures.[162]Quenivet explains that this approach may be influenced by the importance of adequate investigative measures for an effective investigation. Though independence, transparency and promptness contribute towards an investigation’s effectiveness, shortcomings with respect to these elements do not necessarily render investigations ineffective. Conversely, inadequate investigative measures are more likely to directly undermine an investigation’s effectiveness.[163]

The Grand Chamber’s recent decision in the case of *Hanan* provides a clear example of the Court’s preparedness to afford flexibility in respect of investigative deficiencies when it considers that adequate investigative measures were taken. In *Hanan*, the ECtHR was required to assess the effectiveness of a German criminal investigation into a NATO airstrike in Kunduz, Afghanistan that was ordered by a German Colonel (Colonel K.) which killed many civilians, including the applicant’s two sons.[164]The Court acknowledged the challenges and constraints for the investigating authorities given the fact the deaths occurred in active hostilities during an extraterritorial armed conflict.[165]The Court proceeded to identify various shortcomings

[160] Ibid para 6.
[161] N.Quenivet (n97) p136.
[162] Ibid p137.
[163] Ibid.
[164] *Hanan* §§9-70 for the facts of the case.
[165] Ibid §200.

with the investigation conducted by the Federal Prosecutor General, such as Colonel K's direct involvement,[166]a delay of six months before the opening of the formal criminal investigation[167]and the lack of access to the investigation file for the applicant's lawyer prior to the Federal Prosecutor General closing the investigation.[168]However, the Grand Chamber also identified that the Federal Prosecutor General 'could rely on a considerable amount of material from different sources concerning the circumstances and the impact of the air strike'[169] and that the facts surrounding the killing of the applicant's two sons were established in a 'thorough and reliable manner'.[170]Despite the investigative deficiencies, the Grand Chamber held that that Germany effectively discharged its procedural obligation in compliance with Article 2.[171]It is clear that the Grand Chamber attached significant weight to the adequacy of the investigative measures deployed, which made up for some imperfections with respect to the promptness, independence and transparency of the investigation.

When investigators are confronted with practical difficulties, the Court has acknowledged that the procedural obligation must be applied realistically. However, the Court has been accused of not always delivering on its promise of flexibility. Though the Court has granted concessions in relation to the independence, transparency and promptness of investigations, the Court has been reluctant to compromise on the adequacy of investigative measures, despite asserting that obstacles facing investigators in challenging environments may compel the use of less effective measures of investigation.[172]However, the decision in *Hanan*, which was unanimous, suggests that the Court is willing to afford states significant wriggle room in complying with the requirements of independence, promptness and transparency when adequate investigative measures have been utilised.

3(2) Extraterritorial Targeted Killing Operations and the Requirement to Conduct an Effective Investigation

[166] Ibid §225.
[167] Ibid §229.
[168] Ibid §230.
[169] Ibid §214.
[170] Ibid §219.
[171] Ibid §236.
[172] *Al-Skeini* §164.

An ‘effective’ investigation into a targeted killing operation must examine its compliance with the substantive element of Article 2. Therefore, the investigation must consider the following questions:

- Did the targeted individual seek to inflict life-threatening violence?
- Was the utilisation of an armed drone the only way to prevent this harm materialising?
- If incidental harm resulted from the drone strike, was the damage caused proportionate to the injury and death averted?
- If incidental harm occurred, were precautions taken to minimise collateral damage?

To answer these questions, the investigation would need to examine the deployment of the armed drone and the decision-making process preceding the targeted killing. By scrutinising the targeted killing operation, the investigation should seek to ascertain the level of incidental harm caused, which is crucial for the proportionality assessment, whilst also assessing whether precautions were taken to minimise harm. By examining the events leading up to the utilisation of lethal force, the investigation can review the intelligence that informed the decision to resort to targeted killing and assess whether the terrorist threat posed called for lethal action and, if so, whether this was the only way to protect persons from terrorist violence.

As the UK envisages targeting individuals in inaccessible regions, some conventional investigative measures will be unavailable. Notably, the UK would be unable to perform an autopsy on the deceased or collect witness statements from those located in the vicinity of the strike location, which would normally be an important step in establishing the facts surrounding a killing. Yet, the remote nature of an investigation into a targeted killing does not preclude its effectiveness. After all, autopsies provide little evidential value when the cause of death is obvious.[173]Moreover, UK drone operations, are recorded, which enables the circumstances surrounding a targeted killing to be established by reviewing the video footage.[174]

Since drone operations are recorded and the decision to resort to targeted killing is pre-meditated and intelligence based, there should be no barrier to

[173] I.Park (n2) p154.
[174] Ibid p153.

establishing the facts of a targeted killing operation and assessing its lawfulness. Though adequate investigative measures are an integral part of an investigation's effectiveness, an investigation must also be prompt, independent and transparent to be deemed 'effective' for the purpose of Article 2. Therefore, it is not enough to simply consider *what* an investigation into targeted killing must examine, it is necessary to also contemplate *how* the investigation should be carried out.

With respect to the requirement of promptness, there would be no justification for delay as the UK's possession of the intelligence material and footage of drone strikes should allow investigations to be carried out expeditiously. To ensure that targeted killing investigations are commenced promptly, the UK could replicate the procedure that is followed when lethal force is deployed by police officers, where killings are automatically referred for investigation.[175]

Given the sensitivity of intelligence-based military counterterrorism operations, the UK would likely seek to withhold certain aspects of its targeted killing operations from the public domain. Notably, it is unlikely that detailed intelligence information would be published as this could compromise future attempts to identify terrorist threats and potentially endanger those providing valuable information to British intelligence agencies. In the context of counterterrorism, the Court has been willing to afford States discretion to withhold the disclosure of sensitive information. Thus, the UK would be able to conceal aspects of an investigation into targeted killing without violating the procedural obligation. However, transparency demands, as a bare minimum, that the UK openly acknowledges that a targeted killing has occurred and to publish its investigative findings. Additionally, though the next-of-kin of the deceased is normally involved in the investigative process, considering the sensitivity of intelligence-based counterterrorism operations, it is unlikely that, if identifiable, the family of the victim of a targeted killing would be involved in the process.

Investigative transparency helps to address concerns that the public may have when the State utilises lethal force. Where concessions are afforded with respect to transparency, the importance of an investigation's independence is enhanced for maintaining public confidence that the authorities are not attempting to cover up unlawful conduct. In the UK, where an individual dies a violent or unnatural death, a

[175] Where police officers deploy lethal force, the killing is automatically referred to the Independent Police Complaints Commission.

coroner is duty bound to investigate the death as soon as practicable.[176]Commonly, coroner investigations are how the UK fulfils its procedural obligation under Article 2. However, a coroner's inquest would be inappropriate for extraterritorial targeted killings. Setting aside the issue that a coroner's investigative duty does not extend abroad,[177]coroners are not security-cleared and cannot effectively examine intelligence-based lethal operations. As the JCHR inquiry identified,[178] the Intelligence and Security Committee (ISC) would be best suited to carrying out investigations into targeted killings since its membership, comprising of nine individuals from the House of Commons and the House of Lords, have the relevant security clearance to review sensitive intelligence material. Following the targeted killing of Reyaad Khan, the ISC investigated and reported on the threat that he posed the UK.[179]This demonstrates the suitability of the ISC for reviewing intelligence-based counterterrorism operations.

The ISC may be an appropriate body for examining the severity and nature of the terrorist threat posed by a victim of a targeted killing, but it does not currently possess the power to review the deployment of an armed drone. According to the Memorandum of Understanding (MoU) between the ISC and the Prime Minister, general military operations are outside the scope of the ISC's oversight powers.[180]Therefore, for targeted killings, the ISC's investigative role would be limited to reviewing the intelligence that led to the decision to utilise lethal force, which is clearly a major restriction on the ISC's ability to comprehensively investigate the lawfulness of targeted killing operations. The JCHR called for an updated MoU between the ISC and the Prime Minister, which expands the ISC's remit to the examination of the operational stage of a drone strike.[181]Yet, the JCHR's call for an updated MoU has not been answered. Nevertheless, the UK can comply with the procedural limb of Article 2 by utilising various actors to investigate the different aspects of a targeted killing operation. There is no requirement that an effective

[176] Coroners and Justice Act 2009, §1(1)-1(2)
[177] Ibid §1(1).
[178] JCHR Report p69, para 5.13.
[179] See ISC Report
[180] Intelligence and Security Committee of Parliament, *Annual Report* (2013–14, HC 794), Annex A. See footnote 9, which provides that "in respect to operational matters […] general military operations conducted by the MOD are not part of the ISC's oversight responsibilities."
[181] JCHR Report pp71-72, paras 5.24-5.28.

investigation must be conducted *entirely* by one actor.[182]Therefore, the ISC could be responsible for examining the intelligence that informed the decision to utilise targeted killing, whilst the operational stage of the targeted killing could be investigated by the Royal Air Force (RAF) itself. The suggestion that the RAF could investigate targeted killings conducted by the RAF, inevitably raises questions about compliance with the independence requirement, which will now be considered.

Currently, following a death involving the UK armed forces, there is a mandatory requirement to conduct a serious incident report, which consists of a brief statement of the facts as perceived by the military unit involved. The commander of the unit involved will then decide whether the next stage of the investigatory process, a shooting incident review, should proceed.[183]The discretion of commanders to determine whether a shooting incident review should proceed is potentially problematic. In *Al-Skeini*, the Grand Chamber, in finding a procedural violation by the UK, noted that the Special Investigative Branch (SIB) of the Royal Military Police was not operationally independent because the Commanding Officer of the units implicated in killings generally decided whether the SIB commenced an investigation.[184]However, where civilians may have been killed or injured, the threshold for a shooting incident review will be met.[185]For lethal force operations in situations short of armed conflict, there is no distinction between civilians and enemy forces so targeted killings would *always* meet the threshold for a shooting incident review. Therefore, in practice, there is no discretion for commanders to determine whether a shooting incident review should commence in the context of targeted killing operations during 'peacetime', which mitigates the independence concern.

With respect to the shooting incident review, those entrusted with conducting the review are hierarchically independent from the incident under consideration and are empowered to take statements from those involved and review all other evidence in relation to it,[186]which ensures practical independence. In the context of targeted

[182] For example, the UK discharged its procedural obligation with respect to the sixth applicant in *Al-Skeini* in the form of a full investigation by the Special Investigative Branch, which lead to the bringing of criminal charges, and a public inquiry. See *Al-Skeini* §157 and §176.
[183] Operations in Afghanistan- Defence Committee-Written Evidence from the Ministry of Defence, (6 July 2011) <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/554/554we02.htm> para 19.3.
[184] *Al-Skeini* §172.
[185] I.Park (n2) p144.
[186] Ibid p145.

killing operations, officers responsible for the shooting incident review should take statements from drone operators to confirm the scale of incidental harm caused by a strike and question whether precautions were taken to minimise such harm. Subsequently, footage of the drone strike and audio-recordings of discussions between drone pilots can be reviewed to corroborate the statements collected.

It is important to reflect on the Grand Chamber's analysis in *Hanan*, which is directly relevant to compliance with the procedural obligation in the context of the UK Policy. As previously noted, *Hanan* concerned the effectiveness of a German criminal investigation into a NATO airstrike in Kunduz, Afghanistan that was ordered by a German Colonel (Colonel K.) which killed many civilians, including the applicant's two sons. The Court acknowledged some deficiencies with the investigation's independence, including that Colonel K. should not have been involved in the investigation given it concerned his own responsibility for ordering the airstrike.[187]Despite this significant infringement upon the investigation's independence, the Grand Chamber did not consider that the involvement of Colonel K. rendered the investigation ineffective. The Court's reasoning was that the investigation's conclusion was primarily based on evidence in relation to the ordering of the airstrike that could not be tampered with (audio recordings of the radio traffic between the command centre and the aircraft pilots and the thermal images from the aircraft's infrared cameras) and that there was no risk that this decisive evidence could become contaminated and unreliable.[188]Moreover, the Grand Chamber noted that *Hanan* was significantly different from *Jaloud* and *Al-Skeini* where the circumstances surrounding the deaths were unclear.[189]

It can be deduced from *Hanan* that where the events surrounding a death are clear and the key evidence cannot be compromised, it would take significant shortfalls in relation to an investigation's independence to undermine its effectiveness. As a premeditated operation, the circumstances of a UK targeted killing should not suffer from uncertainty. Moreover, drone footage can provide conclusive evidence of collateral harm resulting from a targeted killing operation and the precautions taken to minimise harm. Therefore, although it is proposed that the shooting incident review

[187] *Hanan* §225.
[188] Ibid §§226-227.
[189] Ibid §227.

process is adequately independent, any minor deficiencies are unlikely to undermine the effectiveness of the UK's investigations into targeted killings.

To conclude the independence analysis, the ISC is a body with sufficient independence to investigate the intelligence and operation stages of a targeted killing. However, its remit does not currently cover military operations. If the ISC is not granted oversight powers of military operations, either through an updated MoU or by receiving ad hoc permission from the Defence Secretary, the operational stage of the investigation could be conducted by the RAF itself and the shooting incident review process will enable the deployment of an armed drone to be investigated with adequate independence.

As expressed previously, investigations into targeted killings must be subject to public scrutiny. Therefore, the UK would be required to publish its investigative findings into targeted killing operations. Satisfying this requirement, in practice, will depend on how the investigation is carried out. For instance, if the ISC investigate the intelligence *and* operational phases of a targeted killing, then it could publish a single report to Parliament on the lawfulness of a targeted killing operation, which is within the scope of its powers.[190]However, if the ISC's role is confined to reviewing the intelligence that culminated in lethal force and the UK armed forces retain responsibility for examining the deployment of an armed drone, this may result in either a joint publication or two separate publications. Nevertheless, the key issue is not the way that an investigation is published but the content of the publication.

For a targeted killing, the investigative findings should outline the severity of the threat posed by the deceased, whether the resort to lethal force was the only way to protect life and whether the scale of incidental harm was proportionate to the threat faced and adequate precautions were taken to reduce collateral damage. As previously noted, the UK would likely seek to avoid publicising sensitive information about targeted killing operations, such as intelligence reports. Though the Court has demonstrated a willingness to afford States discretion to withhold such information from the public domain, particularly in the counterterrorism context, it can be questioned whether an investigation can be deemed 'effective' if information that is crucial in evaluating the legality of lethal action is not disclosed. For example, if the UK conceals information relating to the terrorist threat posed by the victim of a targeted

[190] Justice and Security Act 2013, §3(2).

killing, does this preclude an assessment as to whether the resort to fatal action was absolutely necessary? It is posited that the UK can conduct an 'effective' investigation into targeted killings without damaging national security interests. The ISC Report into the threat posed by Reyaad Khan reveals the UK's ability to publicly disclose the terrorist threat posed by an individual whilst, at the same time, redacting specific information that is considered sensitive. Therefore, for future investigations, national security concerns should not prevent the UK from demonstrating, as part of an 'effective' investigation, the absolute necessity of its resort to targeted killing. Moreover, where certain aspects of a targeted killing operation are not publicly disclosed, such as detailed intelligence information, the UK could then release the recorded footage of a drone strike, which has occurred occasionally,[191]to enhance transparency with respect to the precautions that were taken to minimise or avoid incidental harm.

There is an additional issue linked to the UK's potential reluctance to disclose sensitive intelligence information that requires a brief consideration. Pursuant to Article 38 of the Convention, states are required to furnish all necessary facilities to the Court when evaluating an application, which includes complying with evidential requests.[192] Article 38 complements the right of individual petition under Article 34, which may otherwise be thwarted by a state's reluctance to assist the Court's examination of all circumstances relating to an alleged violation, for example, by failing to produce evidence which the Court considers crucial to establish the facts of the case.[193] Therefore, the UK should be mindful, if an alleged violation for targeted killing is brought before the Court, that it complies with requests for evidentiary material, which would inevitably include intelligence assessments of the terrorist threat posed by the deceased.

If the UK were to advance national security considerations as justification for a failure to produce requested evidence, the Court would assess whether there existed reasonable and solid grounds for treating the material as secret.[194]If there exists legitimate security concerns preventing the disclosure of evidence, the Court will also

[191]J.Ensor, 'RAF drone footage shows the moment missile stops Isil carrying out a public execution'(*Telegraph*, 20 September 2017) <https://www.telegraph.co.uk/news/2017/09/20/raf-drone-footage-shows-moment-missile-stops-public-execution/>
[192] *Janowiec and Others v. Russia*, [GC], nos.55508/07 and 29520/09, §208, ECHR-2013-V. (Henceforth, *Janowiec)*
[193] Ibid §209.
[194] Ibid §205.

consider whether the UK could have addressed those concerns by editing out particularly sensitive information or by providing a summary of the evidence.[195] Moreover, the Court has demonstrated its preparedness to accommodate legitimate national security concerns in its proceedings, such as by including restricted access to sensitive documents.[196]As a result of the Court's flexibility, it is posited that the UK should be able to comply with any requests for evidence in relation to targeted killings, ensuring that the Court can effectively examine any alleged violations, without compromising national security interests.

3(3) Summary

Following a targeted killing operation during 'peacetime', the UK would be obliged to initiate, on its own motion, an investigation. It can only be assessed on a case-by-case basis whether an investigation meets the requisite standard to comply with Article 2. Despite some practical challenges arising from conducting a remote investigation, such as an inability to interview witnesses at the scene of a drone strike, the UK should have no difficulty in reviewing the lawfulness of a targeted killing. As a pre-meditated operation, the UK will possess the intelligence to establish the severity of threat posed by the victim of a targeted killing and assess whether the deployment of an armed drone was the only way to prevent this threat materialising. Furthermore, recorded footage of a drone strike is easily reviewable for evaluating whether an operation has resulted in excessive incidental harm and to identify whether precautions were taken to minimise it.

Though the UK would have recourse to adequate investigative measures, compliance with the procedural obligation also requires an investigation to be conducted promptly, independently and transparently. By possessing the intelligence relating to the terrorist threat posed by the targeted individual and the footage of the drone strike, there is no reason why the UK should not carry out an expeditious targeted killing investigation. However, to ensure the investigation begins promptly, the UK could introduce an automatic referral process so that the ISC commences an investigation without delay following the deployment of an armed drone for targeted killing. In terms of transparency, the Court has demonstrated a flexible approach when States are investigating events that concern national security. Therefore, the UK is

[195] *Nolan and K v. Russia*, no.2512/04, §56, 12 February 2009.
[196] *Janowiec §215.*

likely to be afforded discretion to exclude sensitive information from the public domain and limit the involvement in the investigation by the family of the deceased, assuming they are identifiable. However, to ensure public accountability, the UK would be required to publish its investigative findings.

4. Conclusion

This chapter sought to identify the relevant obligations applicable to lethal force and ascertain the standards that the UK would need to meet to ensure that the resort to targeted killing during 'peacetime' does not contravene the right to life.

Article 2 does not absolutely prohibit state killing. Rather, the right to life obliges states to refrain from the intentional deprivation of life. The use of lethal force will not be considered as contravening the right to life when it is 'no more than absolutely necessary' for the purposes enumerated in Article 2(2), which includes the defence of persons from unlawful violence. Therefore, the use of targeted killing to neutralise terrorist threats does not *ipso facto* violate the right to life. However, targeted killing will only meet the standard of absolute necessity when utilised as a last resort and where there is no other effective way to protect individuals from life-threatening terrorist violence. Furthermore, the absolute necessity requirement prohibits excessive incidental harm and would require the UK to take precautions to minimise collateral damage and preventative measures, where available, to avoid the need for targeted killing arising. Only in exceptional circumstances will targeted killings conducted during 'peacetime' comply with Article 2. As well as imposing upon States a negative obligation to refrain from the deprivation of life, Article 2 includes a positive obligation for States to strictly control and limit, in line with Convention standards, the circumstances in which a person may be killed by its agents. Consequently, the UK would have to ensure that its targeted killing operations are adequately regulated.

Article 2 also contains an implied procedural obligation that requires States to conduct an 'effective' investigation when its agents deploy lethal force. Accordingly, the UK's utilisation of targeted killing would trigger the procedural obligation to carry out an 'effective' investigation. An investigation's effectiveness is considered with reference to the adequacy of the measures utilised to establish the circumstances of a killing and its independence, transparency, and promptness.

It can only be assessed on a case-by-case basis whether a targeted killing operation and its subsequent investigation is conducted in compliance with Article 2. Yet, there are reasons to doubt that the UK will comply with its obligations when

conducting targeted killing operations during ‘peacetime’. In response to the JCHR inquiry, the UK expressed that IHL would be an important legal consideration for targeted killing operations in ‘peacetime’. Though the UK would conduct targeted killings using military means, the IHL would not apply to lethal force outside of armed conflict. The UK’s legal position is unquestionably problematic as utilising targeted killings in accordance with the permissive regime of IHL is unlikely to meet the strict standards required by Article 2. Furthermore, it is posited that the UK does not adequately regulate the use of armed drones during ‘peacetime’ as its targeting rules completely overlook the application of Article 2.

The stringent regulation of State killing reflects the status of the right to life as one of the most fundamental provisions in the Convention.[197]Yet, Article 15(2) of the ECHR permits a deviation from the strict standards of Article 2 through the mechanism of derogation. The next chapter will consider the UK’s ability to derogate from Article 2 for targeted killings and assess how derogation would alter the application of the right to life.

[197] *Giuliani and Gaggio* §174.

Chapter Three

Derogation from the Right to Life

1.Introduction

Derogation is 'the legally mandated authority of States to allow suspension of certain individual rights in exceptional circumstances of emergency or war'.[1]International human rights instruments often contain specific provisions enabling States parties to derogate from their obligations.[2]Article 15 is the derogation clause within the ECHR.

Public emergencies can confront States with threats to the security, safety, and general welfare of their peoples.[3]To address these threats, States may be pressured to restrict individual liberties.[4]Thus, public emergencies present States with a grave challenge of overcoming a crisis whilst respecting human rights.[5]International human rights treaties acknowledge this challenge by authorising States to 'escape temporarily'[6]or depart from the full extent of their obligations[7] through the mechanism of derogation. However, derogations are subject to restrictions and some rights are non-derogable. Under the ECHR, the non-derogable rights are the prohibition of torture, the prohibition of slavery and forced labour, and freedom from punishment without law.[8]In limited circumstances, States may derogate from the right to life.

During the JCHR inquiry, the Government asserted that there was no plan to derogate from the right to life for targeted killing operations.[9]However, subsequently, the Government has indicated a broader desire to introduce a presumptive derogation for overseas military operations.[10]To date, this has not been implemented.

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[1] O.Gross and F Ni Aolain, *'Law in Times of Crisis: Emergency Powers in Theory and Practice'* (CUP, 2006) p257.
[2] See Article 4, ICCPR; Article 27, ACHR.
[3] J.Oraá, *'Human Rights in States of Emergency in International Law'* (OUP 1992) p221; M.M El Zeidy, 'The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations' (2003) 4(1) *San Diego International Law Journal* 277, p278.
[4] E.M Hafner-Burton et al, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 *International Organization* 673, p674.
[5] M.M El Zeidy (n3) p278.
[6] E.M Hafner-Burton et al (n4) p674.
[7] M.Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in N.Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP, Oxford 2016) p55.
[8] Article 15(2), ECHR 'No derogation…from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision'.
[9] JCHR Report, pp52-52, para 3.61.
[10] UK Ministry of Defence, 'Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations' (4 October 2016) <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>; Prime Minister Theresa May, Speech to the Conservative Party Conference, Birmingham, 5 October 2016.

Nevertheless, the UK has repeatedly raised the prospect of derogating from the Convention for extraterritorial military activities conducted abroad. Notably, the Overseas Operations Bill sought to impose a duty upon the Defence Secretary to consider the appropriateness of derogating from the Convention when engaging in military operations abroad.[11]Though this duty was removed from the legislation, its initial inclusion demonstrates that derogation from the Convention during overseas military action is under consideration by the UK. This raises the possibility of the UK invoking a derogation for targeted killing operations. Consequently, this chapter examines the conditions to be satisfied for derogation, assess whether there are any obstacles that may preclude derogation and analyse how derogation alters the application of the right to life.

2.Permissibility of Extraterritorial Derogation

States have invoked derogations in response to internal conflicts, terrorist threats and the COVID-19 pandemic.[12]Moreover, in 2015, Ukraine derogated from the Convention in response to fighting between its armed forces and Russian backed separatists in the Donetsk and Luhansk oblasts.[13]Following Russia's full-scale invasion, Ukraine expanded its derogation to cover the entirety of its territory, whilst Moldova submitted a derogation in response to national security threats arising from Ukrainian territory. However, as of yet, no state has sought to derogate from their Convention obligations extraterritorially. Therefore, the permissibility of extraterritorial derogation requires examination.

The text of Article 15 does not impose a territorial limit on derogating measures, but state practice, or the lack thereof, could suggest that such a limitation exists. However, the absence of extraterritorial derogations is likelier a consequence of the Convention's limited extraterritorial applicability obviating the need for derogation, rather than an understanding that such derogations are unavailable.

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[11] However, during its passage through parliament, the bill was amended to remove this duty. See Overseas Operations (Service Personnel and Veterans) Act 2021.

[12] *Hassan v. United Kingdom*, [GC], no.29750/09, §101, ECHR 2014-VI. (Henceforth, *Hassan*); For an historical collection of derogations under the Convention, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dhOtxCVh>

[13] Ukraine's derogation was submitted on 5 June 2015. See Council of Europe, 'Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.005)' <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0>; For further information on Ukraine's derogation, see T.Mariniello, 'Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise its Immunity System' (2019) 20 *German Law Journal* 46, pp52-53.

With respect to the UK's lack of derogation in Iraq, Park explains that this was based on a litigation strategy to deny the Convention's applicability in Iraq, which derogation may have undermined.[14]Yet, this 'litigation strategy' is falsely predicated on the notion that derogation equates to accepting the Convention's applicability. There is nothing contradictory in asserting that the Convention is inapplicable whilst also seeking to amend its application *if* it were applicable. In this context, the invocation of a derogation can be viewed as a pre-emptive amendment of the Convention's *application* in the event that the Court later decides that the Convention was *applicable*. Nonetheless, as the Convention's reach continues to grow, States participating in extraterritorial military operations are likely to give derogation greater thought, as evidenced by the UK's consideration of presumptive derogations. Rather than focus on denying the Convention's extraterritorial applicability, which is becoming an increasingly untenable position,[15]it is foreseeable that States will turn their attention to *amending* the Convention's application through derogation.

The Court has also indicated that derogation is not territorially confined. In *Al-Jedda v. UK*, the Court noted that the UK did not purport to derogate from the Convention to justify internment in Iraq,[16]which implicitly suggests derogation was an option. Subsequently, in *Hassan v. UK*, the Grand Chamber considered whether, in the absence of a formal derogation, the UK could rely on International Humanitarian Law (IHL) to justify internment in Iraq.[17]Notably, at no point did the Court assert that extraterritorial derogation was prohibited. On the contrary, the partially dissenting judges explicitly stated that derogation was 'legally available'.[18]

Though Article 15 neither expressly authorises nor prohibits extraterritorial derogation, the Court implied in *Hassan* and *Al-Jedda* that extraterritorial derogation is permitted. Consequently, the location of those subject to targeted killing should not be a barrier to the UK derogating from the right to life. Yet, there are questions about

[14] I.Park, *'Right to Life in Armed Conflict'* (OUP, Oxford, 2018) p198.See also H.Krieger, 'After *Al-Jedda*: Detention, Derogation and an Enduring Dilemma' (2011) 50 *Military Law and the Law of War Review* 420, p436.
[15] Though the applicability of the Convention to all overseas military excursions cannot be assumed.
[16] *Al-Jedda v. UK* [GC], no.27021/08, §100, ECHR-2011-IV.
[17] *Hassan* §103.
[18] Ibid, Partially Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, §9. Wallace notes that the Court seemed 'open to the idea of states derogating extraterritorially'. See S.Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform' (2020) 20 *Human Rights Law Review* 769, p789. (Henceforth, S.Wallace, *'Derogations from the European Convention on Human Rights: The Case for Reform'*)

the application of Article 15 abroad. So far, States have invoked derogations across their territory or to specific regions therein.[19]However, extraterritorial jurisdiction under Article 1 is not territorially focused as the Court has recognised that a state can exercise its jurisdiction overseas on a 'personal' basis. Therefore, we must consider how a 'territory-centric derogation scheme'[20]interacts with the Convention's extraterritorial applicability, which is increasingly decoupled from territory.[21]

In principle, there is no reason to suggest that the invocation of a derogation is prohibited by a state's extraterritorial obligations arising from the exercise of 'personal' jurisdiction. It is proposed that Wallace's suggestion-that it would be logical for a state's capacity to derogate to be commensurate with the scope of its jurisdiction-is correct.[22]Any other finding may lead to the odd situation whereby Article 15 would apply inconsistently with respect to a Convention obligation simply on the basis of how the obligation was triggered. For example, it would be bizarre if a state had the possibility to derogate from Article 5 when detaining individuals within an area under its territorial control ('spatial' jurisdiction) but prevented from doing so for the exact same conduct because the only jurisdictional link between the state and the detainees is the exercise of physical power and control ('personal' jurisdiction).

A characteristic of territory-centric derogation regimes is that the scope of the state's derogating measures are geographically circumscribed. However, the UK is prepared to deploy its targeted killing policy against terrorists posing a direct and imminent threat to the UK or British interests abroad, *wherever they may be located*.[23] Therefore, would a UK derogation for targeted killings be geographically unbound or could it be defined to a particular area? It is proposed that the UK could invoke a territory-centric derogation in relation to its targeted killing policy. Recalling the UK Policy justification, the utilisation of targeted killings was deemed necessary to address a threat from terrorists residing in 'safe havens', which is territory that is ineffectively or substantially ungoverned.[24]Thus, though the UK Policy is territorially unrestricted, it will be deployed in identifiable areas. For example, if the UK would have

[19] In response to terrorist threats, the UK has derogated in Northern Ireland and Turkey has invoked a derogation in its south-east region.
[20] S.Wallace, *'Derogations from the European Convention on Human Rights: The Case for Reform'* p790.
[21] Ibid.
[22] Ibid.
[23] See Chapter One, Section 2(3).
[24] Ibid.

derogated when utilising lethal force against Reyaad Khan, the derogation could have specified its applicability to the ISIS controlled territory within Syria. Therefore, it is posited that the UK could specify that any prospective derogation for targeted killing applies across the 'safe haven' in which the operations are being utilised.

3.Substantive Requirements for Derogation

All derogations are subject to three substantive criteria contained within Article 15(1). First, derogation is only available in a 'time of war or other public emergency threatening the life of the nation'. Second, a state may only take derogating measures 'to the extent strictly required by the exigencies of the situation'. Third, derogating measures must not contravene a state's other obligations under international law. For the right to life, Article 15(2) further limits the availability of derogations to 'deaths resulting from lawful acts of war...'.

3(1) 'Deaths Resulting from Lawful Acts of War'

As of yet, the ECtHR has not articulated what an 'act of war' is nor explained how to determine whether such acts are 'lawful'. Moreover, there is nothing in the Convention's drafting history of Article 15 that provides interpretative assistance.[25]It is unclear what the Convention's reference to the 'archaic'[26]concept of 'war' means.[27]Within IHL, the term 'war' has been superseded by the factual term of 'armed conflict'[28] which encompasses international armed conflict (IAC) and non-international armed conflict (NIAC).[29]However, it is questionable whether the drafters of the Convention envisaged 'war' as incorporating both IAC and NIAC. Wallace acknowledges that, at the time that the Convention was drafted, 'war' was associated

[25] W.Schabas, *'The European Convention on Human Rights: A Commentary'* (OUP, 2015) p601.
[26] A.Greene, Written Evidence to the Joint Committee on Human Rights inquiry on *'The Government's proposed derogation from the ECHR'* (2017) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49456.html> p8.
[27] S.Wallace, *'The Application of the European Convention on Human Rights to Military Operations'* (CUP, 2019) p200. (Henceforth, S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'*)
[28] M.Sassoli, *'International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare'* (Edward Elgar Publishing, 2019) p172; J.Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96(893) *International Review of the Red Cross* 67, p78; C.Greenwood, 'Scope of Application of International Humanitarian Law' in D Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, 1995) p43.
[29] M.Milanovic (n7) p66.

with IAC, but the regulation of NIAC was sparse.[30]Milanovic identifies three possible approaches that the ECtHR could take for interpreting 'war':[31]

(1) As a reference to the technical legal concept of 'war' as it existed in classical international law;[32]
(2) As a reference to the modern concept of IAC, which is like 'war' inter-state in nature but is objective and factual, and was indeed meant as a replacement for 'war', with perhaps the addition of belligerent occupation as a sub-species of IAC;
(3) As a reference to any type of armed conflict regulated by contemporary IHL, including both IAC and NIAC, as well as occupation.

The first interpretative approach would make derogations rare, as 'war' in the classical sense is exceptional today. Although the second option would possess the advantage of clarity due to the factual nature of the IAC threshold and alignment with contemporary IHL, it would exclude the vast majority of contemporary conflicts, which are non-international in nature.[33]Therefore, the third option would provide the most expansive recourse to derogation.

Generally, the term 'war' is understood as referring to armed conflict, with IAC and NIAC falling under the umbrella of 'war'.[34]Consequently, lethal force will equate to an 'act of war' when conducted within the context of either an IAC or NIAC. Logically, the lawfulness of lethal force during armed conflict will be determined by IHL, which was established to regulate both NIAC and IAC.[35]Therefore, the specific requirement for derogation from the right to life contained within Article 15(2) will be satisfied when a killing is conducted during an armed conflict and in accordance with IHL. As Article 15(2) precludes derogation for killings conducted outside the context of an armed

[30] S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations*' p200.
[31] M.Milanovic (n7) p67.
[32] See H Lauterpacht, *'Volume 2 of International Law: A Treatise. Disputes, War and Neutrality by L Oppenheim'* (7th Edition, Green & Co, 1952) pp202-203; where 'war' is described as "a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such condition of peace as the victor pleases".
[33] M.Milanovic (n7) p67.
[34] W.Schabas (n25) p594; D.Murray, *'Practitioners' Guide to Human Rights Law in Armed Conflict'* (OUP, 2016) pp104-105; I.Park (n14) p204; S. Wallace '*The Application of the European Convention on Human Rights to Military Operations*' p202.
[35] W.Schabas (n25) pp601-602; I.Park (n14) p204.

conflict, the UK would be unable to derogate for targeted killing operations conducted during ‘peacetime’.

Before turning our focus to the general substantive requirements for derogation, we will briefly consider whether the legality of the recourse to extraterritorial force is a relevant consideration for assessing the legality of an ‘act of war’. Roxstrom *et al* regard derogation as unavailable for killings that result from extraterritorial action that contravenes the prohibition on the use of force under the UN Charter.[36]Schabas endorses this view, holding that a *jus ad bellum* violation renders the ‘act of war’ unlawful, thereby preventing derogation from Article 2.[37]Whether *jus ad bellum* violations invalidate derogations will be assessed in more detail below.[38]However, it will be demonstrated that the Court has sought to insulate itself from the politically challenging question of the legality of a state’s recourse to extraterritorial force. Therefore, it is likely that the Court will determine the lawfulness of an ‘act of war’ with sole reference to IHL. The question of when the targeted killing of terrorists constitutes a ‘lawful act of war’ will be examined in the next chapter.

3(2) ‘In Time of War or other Public Emergency Threatening the Life of the Nation’

The requirement of a war or other public emergencies threatening the life of the nation imposes a threshold for the invocation of a derogation. The specific requirement of ‘war’ within Article 15(2) overlaps with the general threshold under Article 15(1). However, it is necessary to consider whether a ‘war’ must also constitute a threat to the life of the nation to enable derogation. The existence of this requirement would be contingent on how the terms ‘war’ and ‘other public emergency threatening the life of the nation’ are read.

A disjunctive reading only requires a ‘public emergency’ to threaten the life of the nation. Accordingly, any ‘war’ surpasses the threshold for derogation.[39]Consequently, targeted killings classified as ‘lawful acts of war’ would meet the general threshold for derogation. However, Greene regards a disjunctive reading as a fundamental misinterpretation of Article 15 because ‘war’ is not just an illustrative example of a public emergency threatening the life of a nation; it is a ‘core’ or paradigmatic

[36] E.Roxstrom *et al*, ‘The NATO Bombing Case (Banković et al. v. Belgium et al) and the Limits of Western Human Rights Protection’ (2005) 23 *Boston University International Law Journal* 55, p118.
[37] W.Schabas (n25) p602.
[38] See Section 3(4).
[39] A.Greene (n26) p7.

example.[40]The inclusion of the phrase 'public emergency' expands Article 15 to situations outside the context of 'war', such as natural disasters. Notwithstanding, as a 'paradigmatic' example of a 'public emergency', Greene argues that 'war' cannot be separated from the phrase 'other public emergency threatening the life of the nation'. With the possibility that the Court may opt for a conjunctive reading, consideration must be given to what constitutes a 'threat to the life of the nation'.

In *Lawless v. Ireland*, the Court described a 'threat to the life of the nation' as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed'.[41]In the *Greek Case*, the Commission articulated that any 'crisis or danger should be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate'. [42]These statements appear to set a high threshold for a 'threat to the life of a nation'. However, the Court has never rejected a state's claim that such a threat exists.[43]In practice, the Court has deferred to the assessment of the relevant domestic authorities in relation to the existence of an 'emergency situation'.[44]The deferential approach is guided by a belief that national authorities have greater insight to assess the severity of an emergency, which also explains the Court's tendency to grant national authorities a wide margin of appreciation on this issue.[45]

The deferential approach is evident in *A and Others v. UK,*[46]where the Court assessed the validity of the UK's derogation from Article 5(1) to detain indefinitely without trial, pending deportation, non-UK citizens suspected of terrorist related activity.[47]The ECtHR accepted that domestic courts were better placed to assess the evidence in relation to the existence of an emergency and endorsed the view of the

[40] Ibid, p9. In Contrast, Habteslasie considers that the existence of a 'war' always surpasses the threshold for a derogation. See A.Habteslasi, 'Derogation in Time of War: The Application of Article 15 of the ECHR in Extraterritorial Armed Conflicts' (2016) 21(4) *Judicial Review* 302, p303 para 6.
[41] *Lawless v. Ireland (no 3)*, (1961), Series A 3, §28. (Henceforth *'Lawless'*)
[42] *Denmark, Norway, Sweden and the Netherlands v. Greece*, (1969) 25 DR 92, §113. (Henceforth, the *'Greek Case'*)
[43] A.Greene (n26) p4.
[44] Ibid.
[45] *Ireland v. United Kingdom,* (1978)*,* Series A 25, §207. (Henceforth *Ireland v. UK*). For a criticism of the deferential approach and its origins in *Lawless* see O.Gross and F.Ní Aoláin, '"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale International Law Journal* 465.
[46] *A and Others v. United Kingdom* [GC], no.3455/05, §11, ECHR-2009-II. (Henceforth *'A and Others'* [GC])
[47] Anti-Terrorism, Crime and Security Act 2001, §23.

House of Lords[48]that, in the aftermath of 9/11, there was a public emergency threatening the life of the UK.[49]The deferential approach grants states significant scope to designate a situation as a 'threat to the life of the nation'. Consequently, the phrase bears little resemblance to its literal meaning.[50]Additionally, UK derogations with respect of the activities of the IRA, demonstrate that any 'threat to the nation' does not necessarily have to threaten the entire population, given that IRA terrorism predominately concerned Northern Ireland.[51]

To date, the ECtHR has considered the phrase 'threat to the life of a nation' in the domestic context. In *Al-Jedda v. UK,* Lord Bingham doubted whether this threshold could be met during overseas operations, since no matter how dangerous a situation was, the derogating state could withdraw.[52]In *Serdar Mohammed,* Justice Legatt proposed that the required threat could be interpreted to apply, in the context of an international peacekeeping operation, war or other emergency, to the nation on whose territory the relevant conduct occurs.[53]Therefore, if State B is facing a severe threat, State A would be able to derogate from the Convention when providing assistance to State B. This approach has clear benefits, for instance, if Contracting States were unable to derogate from the Convention when assisting another state during a crisis, this may discourage participation in peacekeeping operations around the globe. Additionally, Park notes that contemporary extraterritorial conflicts often pose a 'threat to the life of the nation' at home.[54]For instance, the *de facto* Taliban government in Afghanistan were able to facilitate terrorist attacks against Western states. Similarly, ISIS were able to control large parts of Syria and Iraq whilst orchestrating acts of terrorism across the globe. Therefore, in such circumstances, though State A may be operating in State B, the withdrawal of its armed forces does not necessarily remove the danger posed by the terrorist group based in State B.

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[48] This view was not unanimous. See *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, §§86-97. [Lord Hoffman]. (Henceforth, *A and Others* [HL])
[49] *A and Others* [GC] §§180-181.
[50] A.Greene (n26) p5.
[51] Similarly, Turkish derogations in respect of the PKK is further evidence of this point as the PKK were largely active in South-East Turkey.
[52] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, §38. Greene also doubts that UK operations in Afghanistan, Iraq, Libya or Syria can be regarded as responding to a threat to the life of the UK. See A.Greene (n26) p6.
[53] *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) §156.
[54] I.Park (n14) p201.

Wallace claims that it would be unjust for States to be unable to derogate extraterritorially for the reasons provided by Lord Bingham.[55]Moreover, given how 'liberally' the Court has interpreted a threat to the life of a nation,[56]it seems unlikely that it would refuse derogations where a State assists another during an emergency or seeks to counter direct threats emanating from abroad. In response to terrorist threats, the Court has been particularly receptive to derogations. In *Lawless,* the Court accepted that low level terrorist violence justified derogation.[57]Moreover, in *A and Others*, the prospect of terrorist attacks was enough for the Court to acknowledge the existence of a 'threat to the life' of the UK. With this in mind, it is submitted that a terrorist group seeking to orchestrate terrorist attacks against the UK would pose the requisite threat to justify derogation. Therefore, even if the Court adopts a conjunctive reading of the requirement for a 'war or other public emergency threatening the life of the nation', the UK would be able to derogate when deploying targeted killing operations against terrorists, where they belong to a group that the UK is engaged in an armed conflict.

3(3) Strictly Required by the Exigencies of the Situation

As previously noted, the Court affords states a wide margin of appreciation to determine the existence of an emergency situation. However, this deference also extends to the determination of the nature and scope of derogating measures necessary to avert the emergency situation.[58]Yet, states 'do not enjoy an unlimited power in this respect' as derogating measures must not go beyond the 'extent strictly required by the exigencies' of the emergency situation.[59]

In considering whether derogating measures have gone beyond what is strictly required, the Court will consider the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.[60]Simply put,

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[55] S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'* p205.
[56] M.M.El Zeidy (n3) pp284-285.
[57] *Lawless* §29. The terrorist activities of the IRA had resulted in approximately six deaths over six years. See S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'* p203. However, Bates argues that the Court's broader concern was the possibility that the activities of the IRA could lead to civil war in the Republic of Ireland or an armed conflict between the UK and Ireland. See E.Bates, 'A 'Public Emergency Threatening the Life of the Nation'? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the 'A' case' (2005) 76(1) *British Yearbook of International Law* 245, pp301-304.
[58] *Ireland v. UK* §207.
[59] Ibid.
[60] *Brannigan and McBride v. UK,* (1993), Series A no.285-B, §43 (Henceforth, **'***Brannigan and McBride'); A and Others v. UK* [GC] §173. See also, M M El Zeidy (n3) p286.

the Court will consider whether the State's derogating measures were necessary and proportionate. Typically, this has been the Court's main focus in terms of assessing the validity of a derogation.[61]

The Council of Europe has enunciated more specific criteria based on the judgments of the ECtHR, which outlines the Court's key considerations when determining the necessity and proportionality of State's derogating measures. The criteria are as follows:[62]

1. whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;[63]
2. whether the measures are a genuine response to an emergency situation;[64]
3. whether the measures were used for the purpose for which they were granted;[65]
4. whether the derogation is limited in scope and the reasons advanced in support of it;[66]
5. whether the need for the derogation was kept under review;[67]
6. any attenuation in the measures imposed;[68]
7. whether the measures were subject to safeguards;[69]
8. the importance of the right at stake, and the broader purpose of judicial control over interferences with that right;[70]
9. whether judicial control of the measures was practicable;[71]
10. the proportionality of the measures and whether they involved any unjustifiable discrimination;[72]

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[61] E.Bates (n57) p297.
[62] European Court of Human Rights, 'Guide on Article 15 of the European Convention on Human Rights: Derogation in time of Emergency' (31 August 2022) <https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf> para 21. (Henceforth, *Guide on Article 15*)
[63] *Lawless* §36; *Ireland v. UK* §212.
[64] *Brannigan and McBride* §51.
[65] *Lawless* §38.
[66] *Brannigan and McBride* §66.
[67] Ibid §54.
[68] *Ireland v. UK* §220.
[69] *Ireland v. UK'* §§216-219; *Lawless* §37**;** *Brannigan and McBride* §§61-65; *Aksoy v. Turkey*, no.21987/93, §§79-84, ECHR-1996-VI. (Henceforth, *Aksoy*)
[70] *Aksoy* §76.
[71] *Aksoy* §78; *Brannigan and McBride* §59.
[72] *A and Others* [GC] §190.

11. whether the measure was “lawful” and had been affected “in accordance with a procedure prescribed by law”;[73]
12. the views of any national courts which have considered the question.[74] If the highest domestic court in a Contracting State has reached the conclusion that the measures were not strictly required, the Court will be justified in reaching a contrary conclusion only if satisfied that the national court has misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article, or reached a conclusion which was manifestly unreasonable.[75]

If a state adopts measures that are deemed unnecessary or disproportionate, the derogation will be nullified, and the state will be liable for violations incurred. In *A and Others*, the ECtHR accepted that the UK faced the requisite level of threat to justify derogation. However, in agreement with the assessment of the House of Lords, the Grand Chamber viewed the derogation as invalidated by the UK’s disproportionate detention measures that discriminated between British nationals and non-nationals.[76]As Baroness Hale summarised, if it was not necessary to lock up British nationals that posed a terrorist threat, it could not be necessary to indefinitely detain foreign nationals posing an equivalent threat.[77]

For derogations for targeted killings to be regarded as strictly required by the exigencies of the situation, the adoption of a targeted killing policy itself *and* the utilisation of targeted killing operations must be necessary and proportionate. With respect to the former, the UK Policy has been adopted to counter terrorist threats but will only be utilised as a last resort when there are no other means to disrupt or prevent those plotting acts of terror.[78]Therefore, the UK’s adoption of a targeted killing policy would likely be regarded as necessary (to address terrorist threats) and proportionate (as there are no other measures available to mitigate the threat of terrorism).

In terms of the deployment of armed drones for targeted killing, it is submitted that lethal force that constitutes a ‘lawful act of war’ would not be regarded as

[73] *Mehmet Hasan Altan v. Turkey,* no.13237/17, 20 March 2018, §§140 and 213. (Henceforth, *Mehmet Hasan Altan)*; *Sahin Alpay v. Turkey*, no.6538/17, 20 March 2018, §§119 and 183. (Henceforth, *Sahin Alpay*)
[74] *Mehmet Hasan Altan* §§93 and 140; *Sahin Alpay* §§77 and 119.
[75] *A and Others* [GC] §174.
[76] Ibid §190.
[77] *A and Others* [HL], §§230-231. [Baroness Hale]
[78] See Chapter One, Section 2(3).

excessive. As previously noted, killings will only be regarded as such when conducted in accordance with IHL, which has the principles of necessity and proportionality as its central tenets.[79]Therefore, deaths resulting from 'lawful acts of war' would simultaneously be regarded as 'strictly required' by the exigencies of the prevailing armed conflict. Thus, if a targeted killing is conducted during an armed conflict in compliance with IHL, the resort to intentional deadly force would not be viewed as an excessive measure.

The Court has previously considered whether a derogation was kept under review when assessing if it was 'strictly required'. Wallace recommends that states should be required to introduce independent review mechanisms to scrutinise the threat justifying a derogation and the measures adopted in response. Moreover, Wallace suggests that the independent review mechanism could take the form of a parliamentary committee, such as the JCHR.[80]For prospective derogations when utilising its targeted killing policy, it is submitted that the UK should incorporate a review by the JCHR. This would be a welcome development to enhance domestic scrutiny. Moreover, a determination by the JCHR that a derogation from the Convention was a necessary and proportionate response to a terrorist threat facing the UK would increase the likelihood that the Court would reach the same assessment that the derogation was not 'strictly required'.

3(4) Measures are Not Inconsistent with a State's other Obligations under International Law

Article 15 prohibits States from taking derogating measures that are inconsistent with its other obligations under international law. Van der Sloot labels this as a requirement of 'conformity', which is included within Article 15 to secure a minimum standard of fundamental freedoms when a derogation is successfully invoked.[81]

The interpretation of the term 'other obligations under international law' is not guided by the Convention's *travaux préparatoires.*[82]Moreover, Van der Sloot notes

[79] See Chapter Four, Section 4(1).
[80] S.Wallace*, 'Derogations from the European Convention on Human Rights: The Case for Reform'* p787.
[81] B.Van der Sloot, 'Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR' (2014) 53(2) *Military Law and the Law of War Review* 319, p334.
[82] European Commission of Human Rights, 'Preparatory Work on Article 15 of the European Convention on Human Rights' (22 May 1956) https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf para 43. (Henceforth, *Travaux Préparatoires*) Anna-Lena Svensson-McCarthy, '*The International Law of*

that the most interesting fact about the case law outlining the meaning of this term is its absence.[83]Therefore, there is ambiguity about which international obligations fall within the remit of the 'conformity' clause.[84]However, in the context of an armed conflict, 'other obligations under international law' would include IHL,[85]which must be complied with as a prerequisite for derogation from Article 2. Furthermore, In *Brannigan and McBride v. UK*, the only case in which the 'conformity' requirements has been discussed substantively,[86]the Grand Chamber considered whether the UK's derogation was compliant with its obligations under the ICCPR, more specifically the requirement under Article 4 that a state of emergency must be 'officially proclaimed'.[87]Thus, with respect to lethal force, compliance with the right to life under the ICCPR would also be required. Yet, in General Comment No.36, the Human Rights Committee (HRC) noted that lethal force consistent with IHL is, in general, not 'arbitrary'.[88]

For extraterritorial conduct, adherence with obligations deriving from the UN Charter could also be relevant. If so, violations of the *jus ad bellum* could invalidate a derogation. The *travaux préparatoires* of the Convention reveals that the drafters viewed the principles of the UN Charter as part of 'international law' for the purposes of Article 15(1).[89]Milanovic opposes the ability of States that violate the rules on the inter-state use of force being able to liberalise their human rights obligations to suit their interests because the object and purpose of human rights treaties is 'inseparable from the Charter regime and its mission to preserve international peace and security'.[90]However, Milanovic acknowledges that 'other obligations under international law'

Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs' (Martinus Nijhoff 1998) p630.

[83] B.Van Der Sloot (n81) p334. In *Lawless*, the Court appeared to address this condition but mistakenly addressed the procedural requirement for derogation under the heading 'As to whether the measures derogation from the Convention were "inconsistent with … other obligations under international law". See *Lawless*, p31.

[84] *Georgia v. Russia (II)* [GC], no.38263/08, 21 January 2021, Concurring Opinion of Judge Keller, §22.

[85] A.Habteslasie (n40) p306, para 19; *Georgia v. Russia (II)* [GC], no.38263/08, 21 January 2021, Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, §18. (Henceforth, *Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia*)

[86] In other cases where the 'conformity' requirement has been briefly discussed, such as *Ireland v. UK,* it has only been to conclude that there is nothing to suggest that the State invoking a derogation disregarded its obligations. See B.Van Der Sloot (n81) p335

[87] *Brannigan and McBride* §§67-74

[88] UN Human Rights Committee, 'General Comment no.36, Article 6 (Right to Life)' (3 September 2019) (UN Doc CCPR/C/GC/35) para 64. (Henceforth, *General Comment no.36*)

[89] *Travaux Préparatoires* para 43.

[90] M.Milanovic (n7) p85.

could refer to the derogating measures themselves rather than the wider context in which they are implemented. Thus, if a State invades and occupies the territory of another State, any subsequent derogating measures would not be invalidated by the illegality of the initial invasion.

With respect to the ICCPR, the HRC embraced the convergence of human rights law and the *jus ad bellum* within its recent General Comment No.36. Accordingly, killings resulting from aggressive wars are *ipso facto* arbitrary and violate the right to life under Article 6 of the ICCPR.[91]Consequently, lethal action that complies with IHL may not, in and of itself be regarded as arbitrary, but if the armed conflict stemmed from an act of aggression, the resulting loss of life *will* be deemed arbitrary. Although, Lieblich notes that aggression 'is the most serious and dangerous form of the illegal use of force'[92]and the specific reference to aggression in the General Comment may imply that killings resulting from less severe forms of unlawful force may not, in and of themselves, violate Article 6.[93]Nevertheless, for deaths resulting from a *jus ad bellum* violation, the Court could reject any prospective derogation on the grounds that the measures would be inconsistent with the derogating State's obligations under the UN Charter *and/or* the ICCPR.

Incorporating *jus ad bellum* considerations within the assessment of a derogation's validity would bring significant challenges to the Court. MacDonald identifies how the *jus ad bellum* is 'intrinsically political',[94]a view echoed by Harris who considers this issue as best left for the UNSC as evaluating the legality of the recourse to force would 'raise enormously complicated problems of fact-finding and intricate legal questions' for the Court.[95]So far, the ECtHR has 'done its best' to avoid considering the politically controversial and legally complex issues relating to the *jus ad bellum*.[96]For example, in the 'Northern Cyprus' cases, the Court did not consider whether Turkey's 'effective control' was obtained lawfully or unlawfully under the *jus ad bellum.*[97]Additionally, in *Hassan,* the Grand Chamber did not consider the legal

[91] *General Comment no.36*, para 70.
[92] E.Lieblich, 'The Humanisation of the Jus ad Bellum: *Prospects and Perils*' (2021) 32(2) *European Journal of International Law* 579, 601. Citing the Definition of Aggression, G.A. Res. 3314 (XXIX), 14 December 1974, Article 3(g), preamble.
[93] E.Lieblich, Ibid.
[94] R.MacDonald, 'Derogations Under Article 15 of the European Convention on Human Rights' (1998) 36 *Columbia Journal of Transitional* Law 225, p247.
[95] D.Harris *et al*, *'Law of the European Convention on Human Rights'* (2nd Edition, OUP, 2009) p638.
[96] M.Milanovic (n7) p86.
[97] See Chapter One, Section 2(1).

basis of the UK's invasion of Iraq as a relevant consideration in the case.[98]The Court's previous avoidance of *jus ad bellum* issues suggests that it is unlikely to include a State's obligations *vis à vis* other States when assessing the consistency of a State's derogating measures with its other obligations under international law.

As of yet' the 'conformity' requirement has played a 'very marginal role' in the Court's consideration of the validity of derogations.[99]Therefore, with respect to extraterritorial targeted killing, adherence to IHL, which is a prerequisite for derogation from Article 2, is likely to ensure that UK operations are regarded as consistent with its other obligations under international law.

4.Procedural Requirements for Derogation

As well as adhering to the various substantive requirements, the submission of a derogation must follow certain procedural rules. According to Article 15(3):

> Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate, and the provisions of the Convention are again being fully executed.

The Council of Europe has elaborated on Article 15(3) by articulating specific requirements in respect of the submission of derogations:[100]

- Contracting States must keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them.[101]
- In the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent State.[102]
- The requirement to notify the Secretary General of the measures taken and the reasons therefore is usually met by writing a letter and attaching copies of the legal texts under which the emergency measures will be taken, with an

[98] The *'Relevant International and Domestic Law and Practice'* was outlined between §§33-42 but there was no reference to the legality of the incursion into Iraq.
[99] B.Van Der Sloot (n81) p335.
[100] *Guide on Article 15* paras 33-40.
[101] *Mehmet Hasan Altan* §89; *Sahin Alpay* §73.
[102] *Cyprus v. Turkey*, (1983) 31 DR 72, §§66-68.

explanation of their purpose.[103]If copies of all relevant measures are not provided, the requirement will not be met.[104]

- The notification of derogation does not need to be made before the measure in question is introduced. However, delays in notification being received by the Secretary General shall not be excessive.
- There is an implicit requirement of permanent review of the need for emergency measures.[105]
- States must inform the Secretary General when the requirement for derogation has ceased.

To ensure derogation from the right to life for targeted killing is procedurally sound, the UK must ensure that there is an official and public notice of its derogation. It may not be necessary for the UK to submit a derogation for each targeted killing operation conducted within the context of an armed conflict. The invocation of a general derogation from the right to life during a particular conflict could apply to all targeted killings utilised within the armed conflict.

Recalling the Reyaad Khan strike, the UK waited over two weeks before publicly confirming the targeted killing. Consequently, any derogation for a specific targeted killing is likely to be submitted retroactively. This would not be a barrier to derogation as the Convention does not impose any time limit for depositing a notice for derogation. However, the Court's jurisprudence indicates that procedural delays could nullify a derogation. In *Lawless*, the Court found that the notification twelve days after the measures entered into force was adequate.[106]Contrastingly, in the *Greek Case*, the three-month period between the derogating measures and the notification was deemed too long and not justified by administrative delays resulting from the alleged emergency.[107]Thus, the UK should be conscious that any retroactive derogation is not unjustifiably delayed.

5. Impact of Derogation on the Application of the Right to Life

Since no state has derogated from the right to life, the Court has not had the opportunity to define the impact that derogation has upon the application of Article 2.

[103] *Lawless* §47.
[104] *Greek Case* §§81(1) and 81(2).
[105] *A and McBride* §54.
[106] *Lawless* §47.
[107] *Greek Case* §45.

Nevertheless, there is a general understanding that the invocation of a valid derogation aligns the application of Article 2 with IHL. This view was espoused by Judges Yudkivska, Pinto de Albuquerque and Chantiu in their partly dissenting opinion in *Georgia v. Russia (II)*.[108]Therefore, for deaths resulting from a 'lawful act of war', the derogating state will not violate the substantive element of the right to life.[109] Consequently, the application of Article 2 during armed conflict mirrors the application of the right to life under other international human rights treaties. The ICCPR, the ACHPR and the ACHR all prohibit the arbitrary deprivation of life.[110]During armed conflict, arbitrariness is contextually interpreted, and killings conducted in accordance with IHL are not 'arbitrary'.[111]

In terms of the investigative duty, derogation narrows the scope of the procedural limb of the right to life by requiring an 'effective investigation' only where there is a potential violation of IHL. This approach replicates the investigative duty under IHL, which only arises when a suspected violation has occurred.[112]To identify potential IHL violations, States would be required to undertake a preliminary assessment of fatal action. Moreover, States must be cognisant of reports of alleged non-compliance with IHL from external sources, such as NGOs. Where a State identifies or is informed of death or life-threatening injury resulting from potential violation of IHL, this would trigger the procedural obligation.[113]It would then be within the locus of the Court to consider the effectiveness of the investigation.[114]

As outlined in Chapter Two,[115]the Court is mindful of the practical problems facing investigators in challenging security environments and has, albeit inconsistently, flexibly interpreted the standards for compliance with the procedural obligation. The principles of an effective investigation, primarily crafted by the Court in

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[108] *Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia* §15.
[109] I.Park (n14) p205; E.Wicks, *'The Right to Life and Conflicting Interests'* (OUP, 2010) p82; S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'* p194.
[110] Article 6(1), ICCPR; Article 4(1), ACHR; Article 4, ACPHR.
[111] See General Comment no.36, para 64; African Commission on Human and Peoples' Rights, General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), para 32; T.M.Antkowiak and A.Gonza, *'The American Convention on Human Rights: Essential Rights'* (OUP, 2017) pp86-89.
[112] J-M Henckaerts and L.Doswald-Beck, 'International Committee of the Red Cross: Customary International Humanitarian Law' (Volume 1, CUP, 2005), Rule 158, p607; D.Murray (n34) pp330-331; I.Park (n14) p116; S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'* p119.
[113] S.Wallace, Ibid p116.
[114] I.Park (n14) pp205-206.
[115] Section 3.

relation to situations arising during 'peacetime', are extremely demanding and arguably 'ill-suited' to the realities of armed conflict.[116]The practical challenges impacting a State's capacity to undertake investigations during armed conflict include, *inter alia,* the inevitable danger facing investigators, a lack of access to the scene of a fatality when the area is controlled by the enemy, uncooperative or dispersed witnesses, the destruction of evidence caused by hostilities and the absence of forensic experts near the battlefield.[117]Compared to 'peacetime', when the State is able to rely on extensive institutional support from forensic investigators and law-enforcement officials, a State's ability to conduct investigations during armed conflict is less robust.[118]This will almost certainly compel the Court to grant States some leeway when assessing whether they have adequately discharged the investigative duty in this context.

The *raison d'etre* of derogation clauses is to grant States some flexibility in fulfilling their human rights obligations when full compliance is challenging. During armed conflict, it would be extremely difficult for States to observe the normal 'peacetime' application of the right to life. It would be unrealistic to demand military personnel to obey the stringent standards for lethal force in the context of an armed conflict. Moreover, as killing is a common feature of armed conflict, the requirement to investigate each deployment of lethal force would be an overwhelming resource burden at a time when a State's investigative resources are limited.[119]Additionally, the practical obstacles facing investigators during armed conflict would only aggravate the onerous procedural obligation.

The inclusion of a specific derogation provision for Article 2 is a tacit acknowledgment that times of 'war' necessitate a departure from the 'peacetime' application of the right to life. Therefore, derogation needs to accommodate the challenges preventing full compliance with the right to life and avoid the imposition of a disproportionate burden upon States. Aligning the application of Article 2 with IHL would serve this purpose. Rather than requiring lethal force to be 'no more than absolutely necessary', legality would be judged by the more permissible standard

[116] M.Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31, p55; N.Quenivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) *Netherlands Quarterly of Human Rights* 119, p134.
[117] M.Schmitt Ibid, p54; N.Quenivet Ibid pp125 and 134.
[118] M.Schmitt (n116) p54.
[119] N.Quenivet (n116) p137.

under IHL.[120]Furthermore, narrowing the scope of the procedural obligation ensures that States can focus their investigative resources where there is a suspected violation of IHL. If lethal force contravenes IHL, this will invalidate any derogation. Inevitably, given its more stringent regulation of force, a violation of IHL will concurrently violate Article 2. However, where a valid derogation is submitted and lethal action is utilised in accordance with IHL, the acting State will comply with Article 2. Therefore, where targeted killing operations are subject to a derogation and comply with IHL, the UK would conform with its right to life obligations.

6. Conclusion

This chapter has examined the requirements for derogation from the right to life and analysed their application to the UK Policy. Article 15(2) provides that the right to life is non-derogable except for deaths resulting from a 'lawful act of war'. This requirement limits derogations from Article 2 to lethal action deployed during an armed conflict that complies with IHL. Consequently, the UK is unable to derogate from the right to life for targeted killings conducted during 'peacetime'.

Article 15(1) imposes a general threshold for derogations and requires derogating measures to be necessary and proportionate, and in accordance with the derogating state's obligations under international law. When lethal force is utilised in the context of an armed conflict, it is proposed that the threshold for a derogation will be met. Moreover, in this context, when lethal force complies with IHL, which is a prerequisite for derogation from the right to life, this would likely be regarded as in conformity with the derogating state's other obligations under international law and a necessary and proportionate measure because IHL has necessity and proportionality as central tenets. Therefore, when targeted killings constitute a 'lawful act of war', this will go a long way towards meeting the substantive requirements for a derogation. However, the UK's adoption of a targeted killing policy, not simply its utilisation, would need to be considered necessary and proportionate for a valid derogation. Yet, it is submitted that the UK's adoption of a targeted killing policy to address terrorist threats, which is to be utilised as a last resort, would be considered necessary and proportionate. Therefore, a valid derogation would rely on adherence to the procedural rules under Article 15(3). To derogate for targeted killing operations, the UK would be

[120] S.Wallace, '*The Application of the European Convention on Human Rights to Military Operations'* p209.

compelled to make an official and public notice of its derogation without unjustifiable delay.

This chapter has also considered the impact that derogation has upon the application of the right to life. It has been shown how derogation alters the application of Article 2 from the stringent standards discussed in Chapter Two to a more permissible standard under IHL.[121]Therefore, so long as targeted killings comply with IHL, which is a prerequisite for derogation, the UK would not fall foul of its right to life obligations. Undoubtedly, the key issue with respect to prospective derogations from Article 2 is whether lethal action constitutes a 'lawful act of war', which will now be examined.

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[121] The regulation of lethal force under IHL will be discussed in Chapter Four.

Chapter Four

Targeted Killing as a 'Lawful Act of War'

1.Introduction

Derogation from the right to life is only permissible for deaths resulting from a 'lawful act of war', which limits derogations to State killings conducted during an armed conflict that comply with international humanitarian law (IHL). This chapter will examine when the UK would become engaged in an armed conflict with a terrorist group and how IHL would regulate the resort to lethal force. This will reveal when UK targeted killings would be regarded as a 'lawful act of war'. For targeted killings to be classified accordingly, the existence of an armed conflict is a prerequisite. Therefore, we will begin by considering the preliminary issue of the threshold that must be met for an armed conflict to arise.

2.Armed Conflict Threshold

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed the 'most authoritative' definition of armed conflict.[1]Accordingly:

> '[…] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[2]

This definition incorporates the two traditional categories of armed conflict, international armed conflict (IAC) and non-international armed conflict (NIAC). The threshold for the emergence of an armed conflict differs depending on its classification. Consequently, it is necessary to identify whether the force envisaged by the UK Policy would likely occur within an IAC or a NIAC before examining the relevant threshold.

2(1) International Armed Conflict

[1] Y.Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' (2012) 88 *International Law Studies* 399, p404.
[2] *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) §70. (Henceforth, *Tadić Interlocutory Appeal*)

In addition to customary IHL, the conventional rules applicable to IAC include the 1907 Hague Regulations,[3]the 1949 Geneva Conventions (excluding Common Article 3(CA3)),[4]and the 1977 Additional Protocol (I) to the Geneva Conventions (AP I).[5]Common Article 2 to the four Geneva Conventions provides that the Conventions apply to 'all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognised by one of them'. Therefore, the applicability of IHL of IAC is not dependant on a formal declaration of war.[6]As States are the sole signatories of the Geneva Conventions,[7]IACs are considered to be conflicts between two or more opposing States.[8] Consequently, as the UK Policy does not envisage deploying lethal force against members of another State's armed forces, targeted killing operations would not occur within an IAC.

In the *Targeted Killings Case,*[9]the Israeli Supreme Court held that the geographical scope, rather than the status of the engaged parties, was determinative of a conflict's classification.[10] The Court posited that "an armed conflict of international

[3] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277. (Henceforth, Hague Convention (IV))

[4] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31. (Henceforth, GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August, entered into force 21 October 1950) 75 UNTS 85. (Henceforth, GC II); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135. (Henceforth, GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. (Henceforth, GC IV).

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3. (Henceforth, AP I)

[6] C.Greenwood, 'Scope of Application of International Humanitarian Law' in D Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, 1995) p43. M.Sassoli, *'International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare'* (Edward Elgar Publishing, 2019) p172.

[7] Similarly, Article 2, Hague Convention (IV) states that its provisions only apply between Contracting Powers, which is restricted to States.

[8] Common Article 2 to the Geneva Conventions 1949 also applies the rules of an IAC 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. Likewise, Article 1(3), AP I recognises that IHL of IACs also applies to belligerent occupation.

[9] Supreme Court of Israel, High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel*, et al. Case No. HCJ 769/02, Judgment of 13 Dec 2006. (Henceforth, *Targeted Killings Case*)

[10] Similarly, the US originally viewed its armed conflict against Al-Qaeda as an IAC due to its geographical scope. See J.R.Schlesinger, 'Final Report of the Independent Panel to Review DoD Detention Operations' (August 2004) <https://apps.dtic.mil/sti/pdfs/ADA428743.pdf> Appendix C, 2(c). (Henceforth, Schlesinger Report)

character [is] […] one that crosses the borders of a state".[11]This approach to conflict classification undermines a key motivation for creating and maintaining the distinction between IAC and NIAC, the avoidance of any recognised status or right to fight for rebels and insurgents.[12]In NIAC, members of non-state parties to the conflict, otherwise referred to as a non-State actor (NSA) or organised armed group (OAG), cannot obtain prisoner of war status, which enables States to prosecute those that take up arms against it.[13]However, if the geographical scope of a conflict determined its categorisation, the crossing of a border would establish an IAC, allowing members of a NSA to acquire prisoner of war status and immunity for their attacks against State forces.[14]

There are some exceptional situations whereby an armed conflict between a State and a NSA is categorised as an IAC. Article 1(4) of AP I provides a 'narrow doorway'[15]for the application of the law of IAC to armed conflicts in which peoples are fighting against colonial domination, alien occupation or against racist regimes in the exercise of their right of self-determination.[16]However, these exceptions are not pertinent to the circumstances of the UK Policy. Additionally, a State's forcible measures against a NSA are governed by the law of IAC when the actions of the NSA are attributable to another State, giving rise to an IAC by proxy.[17]Citing the US military campaign in Afghanistan, Lubell contends that it is plausible to argue that at some point during the hostilities, Al-Qaeda members were fighting within the structure and chain of command of the Taliban-the *de facto* government at the time. Consequently, those fighters would have become embroiled in the IAC between the US and the Taliban.[18]

Attributing the actions of a NSA to a State is difficult. Legally, it is accepted that the conduct of a NSA is only attributable to a State that exerts 'control' over a NSA.

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[11] *Targeted Killings Case* §18.
[12] J.Pictet (ed), *'Commentary on First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field'* (ICRC, 1952) pp43-44. (Henceforth, J.Pictet, *Commentary on GC I 1952*)
[13] N.Lubell, *'Extraterritorial Use of Force Against Non-State Actors'* (OUP, 2010) pp102-103.
[14] Ibid p103.
[15] Ibid p96.
[16] Article 1(3), AP I articulates that the Protocol supplements the Geneva Conventions and applies to situations referred to in Common Article 2. Subsequently, Article 1(4) confirms that the situations covered in the preceding paragraph include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination…'.
[17]M.Sassoli, (n6) p173.
[18] N.Lubell, (n13) p98.

Yet, the requisite level of 'control' is disputed. The ICJ has insisted that the military activities of a NSA are only attributable to a State that exerted 'effective control' over operations,[19]which the Trial Chamber of the ICTY endorsed.[20]However, the Appeals Chamber of the ICTY subsequently posited a lower threshold of 'overall control' for attribution.[21]Setting aside the requisite level of 'control' for attribution, it is also a practical challenge ascertaining whether a State does in fact exert 'control' over the activities of a NSA. Recalling the situation in Afghanistan, Al-Qaeda did fight, at times, alongside the Taliban but it is disputed whether Al-Qaeda was subject to Taliban control. Wright claims that the relationship between Al-Qaeda and the Taliban was neither 'harmonic nor one of subordination'.[22]The political reality that States are likely to deny their 'control' of a NSA exacerbates the practical challenge of attributing the activities of a NSA to a State.[23]

Though the UK may target a member of a NSA under the 'control' of a State, this is not envisioned by its targeted killing policy. Rather, the UK anticipates utilising force to kill terrorists when the State where they are located is 'unable or unwilling' to prevent the terrorist threat. A State's inability or unwillingness to prevent terrorism does not equate to 'control' over a NSA. The use of force on the territory of a non-consenting State may give rise to a separate IAC between the territorial and the attacking State.[24]However, this a separate issue to the one currently under consideration.

2(2) Non-International Armed Conflict

NIACs are governed by customary IHL and, most notably, the conventional rules contained within CA3 and the 1977 Additional Protocol (II) to the Geneva Conventions (AP II).[25]As states are parties to IACs, it can be deduced from the dichotomous

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[19] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, I.C.J Reports 1986, p14, §115.
[20] *Prosecutor v. Duško Tadić* (Opinion and Judgment) ICTY-94-1 (7 May 1997) §§584-588. (Henceforth, *Tadić Trial Chamber Judgment*)
[21] *Prosecutor v. Duško Tadić* (Judgment) (Appeal) ICTY-94-1-A (15 July 1999) §131; This lower threshold for attribution posited by the Appeals Chamber has also been endorsed by the ICRC. See, ICRC, *'Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of the Prisoners of War'* (CUP, 2020) para 306. (Henceforth, GC III Commentary 2020).
[22] L.Wright, *'The Looming Tower: Al Qaeda and the Road to 9/11'* (Penguin, 2006) p325.
[23] M.Sassoli (n6) p176.
[24] See D.Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmhurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2012) p32.
[25] Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. (Henceforth, AP II)

categorisation of armed conflicts that NIACs occur between a State and a NSA or between multiple NSAs.[26]Initially, the rules of NIAC sought to regulate internal conflicts within a State.[27]Notably, the ICRC pursued the insertion of provisions into the Geneva Conventions that specifically addressed civil wars.[28]Occasionally, the terms 'non-international armed conflict' and 'internal armed conflict' are used synonymously, which is symptomatic of the perception that NIACs are confined to a state's own territory.[29] Given the extraterritorial nature of the UK Policy, we should consider whether NIACs are limited to internal hostilities.

Extraterritorial confrontations between a State and a NSA can take different forms. A State may fight a NSA on its own territory, which subsequently extends into a neighbouring State. In this situation, the hostilities can be described as internal and external. Alternatively, hostilities could be purely external when fighting occurs on the territory of another State. The aforesaid situations have been described variously as 'transnational', 'cross-border' and 'spill over'.[30]The term 'transnational' is the most appropriate descriptor because each of the confrontations involve an external element. However, the terms 'spill over' and 'cross-border' appropriately describe conflicts that spread from one State to another but are ill-suited to confrontations that are confined to a single foreign territory. Thus, the term 'transnational armed conflict' encompasses all hostilities between a State and a NSA that contain an external element and will be used when assessing whether such situation can be classified as a NIAC.

The taxonomy of 'transnational armed conflicts' is an issue which has gained prominence following the enhanced militarisation of counterterrorism since 9/11.[31]As neither a purely 'internal' armed conflict or one involving States, the relevant hostilities

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[26] A NIAC could also involve multiple states against a NSA or multiple NSAs against a state.
[27] M.Schmitt *et al*, '*The Manual on the Law of Non-International Armed Conflict'* (International Institute of Humanitarian Law, 2006) p2 (Henceforth, M.Schmitt *et al*, '*The Manual on the Law of Non-International Armed Conflict'*);ICRC, *'Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field'* (CUP, 2016) para 455. (Henceforth, GC I Commentary 2016)
[28] J.Pictet, *Commentary on GC I 1952,* p41.
[29] L.Moir, '*The Law of Internal Armed Conflict'* (CUP, 2007)- the title of the book is clearly indicative of the perceived internal nature of NIAC. Moreover, Wallace describes NIACs as restricted to a single State. S.Wallace, *'The Application of the European Convention on Human Rights to Military Operations'* (CUP, 2019) p8. Additionally, the Appeals Chamber in *Tadić* referred to 'internal and international armed conflict.' See *Tadić Interlocutory Appeal* §67.
[30] GC Commentary I 2016, para 472.
[31] However, Sivakumaran provides various examples to demonstrate that transnational armed conflicts are not a modern phenomenon. See S.Sivakumaran, *'The Law of Non-International Armed Conflict'* (OUP, 2012) p230

cannot be classed as an IAC and it has been questioned whether they can be branded as NIACs.[32]There have been suggestions that 'transnational armed conflicts' fall into a third category of armed conflict, which is neither a NIAC or an IAC.[33]However, the author endorses the view of Sivakumaran that, legally speaking, 'transnational armed conflicts' are a subset of NIACs.[34]It may appear paradoxical to suggest that conflicts described by CA3 as 'not of an international character' can include 'transnational armed conflicts'. However, this apparent contradiction stems from a misconception. The phrase 'not of an international character' does not describe the geographical scope of NIACs. Rather, the term differentiates NIACs from IACs with Zegveld positing that the decisive factor distinguishing such conflicts is the parties involved and not their geographical scope.[35]

Recent State practice and international jurisprudence supports the existence of extraterritorial NIACs. For example, in addition to 'internal' conflicts, the Danish,[36] German,[37]New Zealand[38]and Norwegian[39]military manuals either implicitly or explicitly recognise that a state can be involved in a NIAC abroad. The UK also shares this view,

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[32] In respect of the US war in Afghanistan, the difficulty in categorising the armed conflict was demonstrated within a legal memorandum focused on the applicable international treaties and federal laws to the treatment of individuals detained by US Armed Forces. The memorandum asserted that the hostilities with Al-Qaeda could not be incorporated within the framework of IAC as such conflicts involve States. Additionally, the cross-border nature of the armed conflict precluded the conflict's categorisation as a NIAC. J.S.Bybee, 'Memorandum for Alberto R Gonzales Counsel to the President, and William J Haynes II General Counsel of the Department of Defense, Re: Application of Treaties and Laws to Al-Qaeda and Taliban Detainees' (*US Department of Justice, Office of Legal Counsel,* 22 January 2002) <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>

[33] See R.S.Schöndorf, 'Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?' (2004) 37 *New York University Journal of International Law and Politics* 61; C.Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15(2) *Journal of Conflict and Security Law* 245.

[34] S.Sivakumaran (n31) p229.

[35] L.Zegveld, *'Accountability of Armed Opposition Groups in International Law'* (CUP, 2002) p136.

[36] The Danish military manual explicitly accepts 'transnational armed conflicts' as a type of NIAC. See Danish Military of Defence, 'Military Manual on International Law Relevant to Danish Armed Forces in International Operations' (2016) <https://www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf> p47.

[37] The German military manual identifies that NIACs are 'normally carried out on national territory', thereby implicitly recognising that NIACs can also occur extraterritorially. See Bundesministerium der Verteidigung, 'Law of Armed Conflict Manual' (May 2013) <https://usnwc.libguides.com/ld.php?content_id=5616055> para 210.

[38] The New Zealand military manual acknowledges that any armed conflict that does not involve a clash between nations can be categorised as a NIAC. See: New Zealand Defence Force, 'Manual of Armed Forces Law: Law of Armed Conflict' (2019) <https://usnwc.libguides.com/ld.php?content_id=47364407> Section 5.4.2.

[39] The Norwegian military manual recognises that armed conflicts between a State and a non-state group operating in another State are categorised as NIACs. See: Norwegian Ministry of Defence, 'Manual of the Law of Armed Conflict' (2013) <https://usnwc.libguides.com/ld.php?content_id=47416967> para 1.40

evinced by the then-Secretary of State for Defence's proclamation during the JCHR inquiry that the UK considered itself a party to a NIAC with ISIS in Syria and Iraq.[40]With respect to international jurisprudence, the Statute for the International Criminal Tribunal for Rwanda (ICTR) pronounced that the Tribunal had jurisdiction over persons responsible for serious violations of IHL committed in Rwanda or those committed by Rwandan citizens in 'neighbouring States'.[41]By empowering itself to prosecute serious violations of CA3 and AP II in 'neighbouring States', the Tribunal accepted that the civil war had transcended the Rwandan border. The broader implication of the Tribunal's declaration of its jurisdictional competence is its recognition that NIAC incorporates 'transnational armed conflicts'.[42]Additionally, the US Supreme Court in *Hamden v. Rumsfeld*[43]held that the US was involved in a NIAC with Al-Qaeda.[44]Moreover, the Supreme Court directly addressed the description of NIAC as conflicts 'not of an international character' -which had previously influenced the US Government's decision to classify its armed conflict with Al-Qaeda as an IAC[45]stating that the phrase is to be read "in contradistinction to a conflict between nations".[46]

The perception that NIACs are internal is a consequence of the misleading descriptive term 'conflicts not of an international character'. However, this term distinguishes NIAC from IAC and does not limit the category of NIAC to situations of 'internal' hostilities. Considerable State practice and international jurisprudence supports the incorporation of 'transnational armed conflicts' within the category of

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[40] JCHR Inquiry, Oral evidence: The UK Government's policy on the use of drones for targeted killing, 16 December 2015, Question 22. Full transcript of oral session available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.html>

[41] Article 1, Statute of the International Criminal Tribunal for Rwanda. Established by UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

[42] Peculiarly, in *Musema*, the Trial Chamber articulated that NIACs are between 'the government of a single State and one or more armed factions within its territory'. See *Prosecutor v. Alfred Musema* (Judgment) ICTR-96-13-T (27 January 2000) §247. (Henceforth, *Musema Trial Chamber Judgment*). This could give the impression that the Tribunal is unsure on the precise scope of NIACs. However, the accused was indicted for serious violations of IHL that occurred solely in territory of Rwanda. See *Prosecutor v. Alfred Musema* (Amended Indictment) ICTR-96-13-I (29 April 1999) §2. Consequently, the previously mentioned portion of the judgment was concerned with establishing that the alleged offences occurred within the context of a NIAC and the Tribunal's failure to recognise 'external' NIACs is likely due to their irrelevance in the particular case.

[43] *Salin Ahmed Hamdan v. Donald H. Rumsfeld et al*, (2006) United States Supreme Court, 548 US 557. (Henceforth, *Hamdan v. Rumsfeld*)

[44] *'Hamdan v Rumsfeld'* p69, 'Common Article 3, then, is applicable here…'

[45] See Schlesinger Report, Appendix C, 2(c).

[46] *Hamdan v. Rumsfeld*, p68.

NIAC. Therefore, if a State is embroiled in an armed conflict with a NSA located abroad, this would not preclude its categorisation as a NIAC. Thus, if the UK is engaged in an armed conflict with a terrorist group located in a foreign territory, this would be categorised as a NIAC. We will now turn to the examination of the threshold for a NIAC to materialise by dissecting its constitutive elements.

3.The Constitutive Elements of a NIAC

Within the definition of armed conflict provided by the ICTY Appeals Chamber in *Tadić*, the part pertaining to NIAC is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[47]When the Trial Chamber came to apply the Appeals Chamber's definition, it observed that the test used for determining the existence of a NIAC '[f]ocuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties' and that it was these two aspects that differentiated a NIAC from internal tensions and disturbances.[48]Although the *Tadić* definition was articulated in 1995, the dual concepts of intensity and organisation were of longstanding origin.[49]Yet, the distinctiveness of the ICTY definition was the brief encapsulation of the core elements that were often present within earlier definitions of NIAC.[50]More importantly, according to Sivakumaran, the *Tadić* definition was enunciated by an eminent authority and 'caught on', as evidenced by its adoption by the Special Court for Sierra Leone,[51]the International Criminal Court (ICC),[52]and national courts.[53] Moreover, the formulation devised in *Tadić* has been recited by the International Law Commission,[54]State military manuals,[55]and the ICRC.[56]

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[47] *Tadić Interlocutory Appeal* §70.
[48] *Tadić Trial Chamber Judgment* §562.
[49] S.Sivakumaran (n31) p166.
[50]ICRC, 'Humanitarian Aid to the Victims of Internal Conflicts: Meeting of a Commission of Experts in Geneva' (*ICRC*, 1963) <https://international-review.icrc.org/sites/default/files/S0020860400015072a.pdf> pp82-83; J.Pictet (ed), '*Commentary on Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*' (ICRC, 1958) pp35-36. (Henceforth, J.Pictet, *Commentary on GC IV 1958*).
[51] *Prosecutor v. Issa Hassan Sesay et al* (Judgment) SCSL-04-15-T (2 March 2009) §95.
[52] *Prosecutor v. Thomas Lubanga Dyilo*, (Decision on the Confirmation of Charges) ICC-01/04-01/06, (29 January 2007) §233. (Henceforth, *Lubanga Decision on the Confirmation of Charges*)
[53] *HH and Others v. Secretary of State for the Home Department* [2008] UKAIT 22.
[54] ILC, 'First Report on the Effects of Armed Conflicts on Treaties' (22 March 2010 & 21 April 2011), UN Doc A/CN.4/627, para 30.
[55] UK Ministry of Defence, *'The Manual of the Law of Armed Conflict'* (OUP, 2004) p29.
[56]ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (*ICRC Opinion Paper*, March 2008) <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> p4. (Henceforth, ICRC Opinion Paper, Defining "Armed Conflict")

Though the requisite criteria for a NIAC are unequivocal, they are not clearly defined. Consequently, classifying a violent situation as a NIAC can be a contentious matter.[57]Nonetheless, the jurisprudence of the ICC and the ad hoc Tribunals has recognised factors that can be considered when determining whether violence is sufficiently intense, and the participants are adequately organised.

3(1) Intensity

An IAC arises whenever a disagreement between two States leads to the intervention of armed forces, regardless of how long the conflict lasts or how much slaughter takes place.[58]In contrast, violence between a State and a NSA (or between opposing NSAs) must pass a threshold of intensity.

In *Tadić*, the Appeals Chamber defined NIACs as requiring 'protracted armed violence' and referred to the duration of fighting between the various entities within the former Yugoslavia as evidence of the existence of an armed conflict.[59]The Appeals Chamber's approach suggests that the duration of hostilities is the principal determining factor for the existence of a NIAC.[60]The Statute of the ICC also embraced 'protracted armed violence' as a constitutive factor of NIACs that distinguished from 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence'.[61]

The significance attached to the duration of violence appears to suggest that hostilities must be prolonged *and* intense before a NIAC arises. This would exclude short-term or isolated military operations from triggering a NIAC. Yet, in assessments of the existence of a NIAC, the temporal factor has not been decisive. In *Tadić*, the Appeals Chamber considered the protraction and scale of the military operations as cumulative elements that pushed the hostilities beyond the intensity threshold.[62]Moreover, the *Tadić* Trial Chamber regarded duration as associated with

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[57] N.Lubell (n13) p105.

[58] J.Pictet, *Commentary on GC IV 1958,* p20; ICRC Opinion Paper, Defining "Armed Conflict" p1; GC I Commentary 2016, paras 217-219. However, the International Law Association's Report on the Use of Force identified a number of exchanges between States that were not regarded as amounting to an IAC, which, it argued, supports the view that an IAC also has an 'intensity' threshold. See, International Law Association, '*Use of Force Committee: Final Report on the Meaning of Armed Conflict in International Law'* (*The Hague Conference*, 2010) <https://www.ila-hq.org/en_GB/documents/conference-report-the-hague-2010-12> pp26-27. (Henceforth, ILA, Use of Force Report).

[59] *Tadić Interlocutory Appeal* §70.

[60] S.Sivakumaran (n31) p167.

[61] Article 8(2)(f), Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[62] *Tadić Interlocutory Appeal* §70.

the intensity requirement rather than as a standalone criterion.[63]Subsequent case law, as summarised in *Haradinaj,*[64]reveals that 'protracted armed violence' has been interpreted by the ICTY as referring to the intensity of the violence. Thus, the duration of hostilities is pertinent for assessing the intensity of hostilities but not decisive. Consequently, short-term military confrontations may surpass the intensity threshold. In the *Abella* case, the Inter-American Commission on Human Rights held that clashes between government forces and individuals who had attacked the La Tablada military base constituted a NIAC, despite the confrontation lasting for approximately 30 hours.[65]

Though the international criminal tribunals have focused on the duration of violence in assessing its intensity,[66]there are a range of other factors that have been considered. These factors have included the number and level of violent confrontations,[67]the weapons used,[68]the geographical scope of hostilities,[69]and the resulting deaths, injuries and damage caused.[70]Logistical factors, such as the mobilisation of individuals and the distribution of weapons, have also been considered relevant in assessing the intensity of violence.[71]Moreover, other factors indicating the existence of an armed conflict have included the involvement of third parties, such as

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[63] *Tadić Trial Chamber Judgment* §562.
[64] *Prosecutor v. Ramush Haradinaj et al* (Judgment) ICTY-04-84 (3 April 2001) §§39-49. (Henceforth, *Haradinaj Trial Chamber Judgment*)
[65] *Juan Carlos Abella v. Argentina,* case 11.137, Report No 55/97, Inter-American Court of Human Rights, §§155-156. (Henceforth, *Abella*)
[66] *Tadić Trial Chamber Judgment* §566*; Prosecutor v. Delalic et al* (Judgment) ICTY-96-21 (16 November 1998) §186 (Henceforth, *Delalic Trial Chamber Judgment*); *Prosecutor v. Slobodan Milosevic*, (Decision on Motion for Judgment of Acquittal) ICTY-02-54-T (16 June 2004) §28. (Henceforth, *Milosevic Decision on Motion for Judgment of Acquittal*); *Prosecutor v. Limaj et al* (Judgment) ICTY-03-66 (30 November 2005) §168 (Henceforth, *Limaj Trial Chamber Judgment*); *Haradinaj Trial Chamber Judgment* §49.
[67] *Tadić Trial Chamber Judgment* §§565-6; *Delalic Trial Chamber Judgment* §189; *Milosevic Decision on Motion for Judgment of Acquittal* §28; *Limaj Trial Chamber Judgment* §§135-67; *Haradinaj Trial Chamber Judgment* §49; *Prosecutor v. Boškoski et al* (Judgment) ICTY-04-82 (10 July 2008) §§216-34 (Henceforth, *Boškoski Trial Chamber Judgment*); *Prosecutor v. Boškoski et al* (Appeal Judgment) ICTY-04-82-A (19 May 2010) §22. (Henceforth, *Boškoski Appeal Judgment*); *Lubanga Decision on the Confirmation of Charges* §235.
[68] *Milosevic Decision on Motion for Judgment of Acquittal* §31; *Limaj Trial Chamber Judgment* §§135-67; *Haradinaj Trial Chamber Judgment* §49; *Boškoski Trial Chamber Judgment* §§213-222; *Boškoski Appeal Judgment* §22.
[69] *Milosevic Decision on Motion for Judgment of Acquittal* §29; *Boškoski Trial Chamber Judgment* §§216-34; *Boskoski Appeal Judgment* §22.
[70] *Tadić Trial Chamber Judgment* §§565-6; *Limaj Trial Chamber Judgment* §§135-167; *Lubanga Decision on the Confirmation of Charges* §235.
[71] *Delalic Trial Chamber Judgment* §188; *Milosevic Decision on Motion for Judgment of Acquittal* §30; *Limaj Trial Chamber Judgment* §§135-167.

the UNSC,[72]the conclusion of ceasefire and peace agreements,[73]the prosecution of offences only applicable in armed conflicts,[74]and the granting of amnesties.

The above indicia of 'intense' hostilities are not individually decisive. The absence of any factor does not prevent a situation surpassing the threshold required for a NIAC. To assess the intensity of a confrontation, the presence and absence of the aforementioned indicia must be weighed up against one another. The assessment of the intensity of the violence by Inter-American Commission on Human Rights in the *Abella* case is demonstrative of this 'weighing up' process. The Commission held:

> What differentiates the events at the La Tablada base from [internal disturbances] are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective- a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.
>
> The Commission concludes therefore that, despite its brief duration [agreed by the parties to be approximately 30 hours], the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.[75]

Notwithstanding the brief confrontation, the aggregation of other factors, notably the concerted nature of the attack against a quintessential military objective and the military response from governmental armed forces, rendered the violence sufficiently intense. Accordingly, when assessing the intensity of hostilities, the absence of any of the aforesaid criteria-or if a criterion is present but to a low degree-can be offset by another factor which is more prevalent.[76]

There is a broad spectrum of violent situations that could constitute a NIAC. This could include fleeting military confrontations, such as the *Abella* case, or long-term military campaigns involving a coalition of States, such as the war against Al-

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[72] *Boškoski Trial Chamber Judgment* §243; *Tadić Trial Chamber Judgment* §567; *Delalic Trial Chamber Judgment* §190; *Boškoski Appeal Judgment* §22; *Lubanga Decision on Confirmation of Charges* §235.
[73] *Boškoski Trial Chamber Judgment* §§232-4 and §243; *Boškoski Appeal Judgment* §22.
[74] *Boškoski Trial Chamber Judgment* §243 and §247; *Boškoski Appeal Judgment* §22.
[75] *Abella* §§155-6.
[76] ILA, Use of Force Report, p30.

Qaeda in Afghanistan. Therefore, assessments on the intensity of a confrontation must consider the specificities of the violence.

Of relevance to the UK Policy is that a solitary drone strike cannot surpass the threshold requirement. The *Tadić* definition of a NIAC speaks of violence between two or more parties, which precludes one-sided violence establishing an armed conflict.[77]Lubell and Derejko analogise that; like a tango, it takes two to war.[78]Though an isolated targeted killing fails to trigger a NIAC, a drone strike can be incorporated within an ongoing NIAC, which may have materialised either as a result of the State's own hostilities with a NSA or by intervening in support of another State in its pre-existing NIAC. When a State requests another State to support it militarily against a NSA, the intervening State becomes a Party to the NIAC when their activities "have a direct impact on the *opposing* Party's ability to carry out military operations".[79]There are many recent examples of States assisting other States embroiled in NIAC. For instance, France became a party to the NIAC between the Malian armed forces and various NSAs,[80]the international coalition led by Saudi Arabia is a party to the conflict between the Yemeni government and Houthi rebels,[81]and Russia is a party to the NIAC between Syria and an array of NSAs fighting within Syria.[82]

On 26 September 2014, following the request of the Iraqi government, the UK became a party to the NIAC between Iraq and ISIS.[83]Though the UK's utilisation of targeted killing against Reyaad Khan, did not, in and of itself, satisfy the intensity threshold for a NIAC to emerge between the UK and ISIS in Syria, it will be considered in due course whether this operation was connected to the prevailing NIAC that the UK was already a party to in Iraq.[84]

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[77] C.Schaller, 'Using Force Against Terrorists 'Outside Areas of Active Hostilities' – The Obama Approach and the Bin Laden Raid Revisited' (2015) 20(2) *Journal of Conflict and Security Law* 195, p218; M.Brookman-Byrne, 'Drone use outside 'areas of active hostilities': An Examination of the Legal Paradigms Governing US Covert Remote Strikes' (2017) 64(3) *Netherlands International Law Review* 3, pp19-20.

[78] N.Lubell & N.Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11(1) *Journal of International Criminal Justice* 65, p78.

[79] GC I Commentary 2016, para 446. (original emphasis)

[80] Geneva Academy, 'Mali: Several Non-International Armed Conflicts with Various Insurgent Groups' (RULAC Geneva Academy, 2019) <http://www.rulac.org/news/mali-several-non-international-armed-conflicts-with-various-insurgent-group>

[81]Geneva Academy, 'Non-International Armed Conflicts in Yemen' (RULAC Geneva Academy, 2022) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord>

[82] Geneva Academy, 'Non-International Armed Conflicts in Syria' (RULAC Geneva Academy, 2022) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>

[83] HC Deb, 26 September 2014, vol. 585, cols 1365-66.

[84] Section 5(2)(ii)

3(2) Organisation

An armed conflict implies a minimum of two opposing parties.[85]To be a party to an armed conflict, a level of organisation is required,[86]which State's armed forces presumptively possess.[87]Therefore, when considering the organisation of parties to a potential NIAC, it is only necessary to assess the organisation of the NSAs involved. Like the intensity element, the jurisprudence of the ICTY reveals certain indicia that can be drawn on to determine whether a NSA is sufficiently organised. Conveniently, the Trial Chamber in ***Boškoski*** collated these indicia into five broad categories that demonstrate the attributes of an 'organised' NSA.[88]

The first characteristic of an 'organised' group identified by the Trial Chamber is the presence of a command structure,[89]which can be evinced by the existence of headquarters[90]and the establishment of a general staff or high command[91]that organises the weapons supply,[92]authorises military action[93] and assigns tasks to individuals in the organisation.[94]Secondly, the Trial Chamber considered a group's ability to carry out organised operations as indicative of the group's overall organisation.[95]In determining whether a group can undertake organised operations, the Trial Chamber examined the group's ability to determine a unified military strategy and conduct large scale operations,[96]in addition to the group's capacity to control territory.[97]The third characteristic of an organised group is logistical capacity,[98]which a group can exhibit by recruiting new members,[99]providing military training, supplying and using uniforms,[100]and possessing communication equipment that links headquarters with units or between units themselves.[101]The penultimate characteristic

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[85] N.Lubell (n13) p109.
[86] ICRC Opinion Paper, Defining "Armed Conflict" p3.
[87] S.Sivakumaran (n31) p170.
[88] *Boškoski Trial Chamber Judgment* §§199-203.
[89] Ibid §199.
[90] *Milosevic Decision on Motion for Judgment of Acquittal* §§23-24; *Limaj Trial Chamber Judgment* §104; *Haradinaj Trial Chamber Judgment* §65.
[91] *Limaj Trial Chamber Judgment* §94; *Haradinaj Trial Chamber Judgment* §60 and §§65-68.
[92] *Limaj Trial Chamber Judgment* §100; *Haradinaj Trial Chamber Judgment* §60.
[93] *Limaj Trial Chamber Judgment* §46.
[94] Ibid.
[95] *Boškoski Trial Chamber Judgment* §200.
[96] *Limaj Trial Chamber Judgment* §129; *Prosecutor v. Mile Mrkšić et al* (Judgment) ICTY-95-13/1-T (27 September 2007) §410 & §417; *Haradinaj Trial Chamber Judgment* §65.
[97] *Limaj Trial Chamber Judgment* §158; *Haradinaj Trial Chamber Judgment* §§70-75.
[98] *Boškoski Trial Chamber Judgment* §201
[99] *Limaj Trial Chamber Judgment* §118; *Haradinaj Trial Chamber Judgment* §§83-85.
[100] *Limaj Trial Chamber Judgment* §123.
[101] Ibid §124.

of organisation is a group's discipline and ability to abide by the rules of IHL.[102]The Trial Chamber referred to the existence of internal regulations[103]and the establishments of disciplinary rules and mechanisms[104]when considering whether a group possesses this characteristic. The final characteristic of organisation is a group's ability to speak with one voice.[105]The Trial Chamber identified a group as possessing a unified voice when it is able to represent members in external relations, such as negotiations with international organisations and States,[106]and capacity to negotiate and conclude agreements, such as cease fires or peace accords.[107]

Like the intensity criterion, the indicia for organisation are cumulative and not individually indispensable. Although the characteristics of an organised group are clear, the precise degree of organisation that the NSA must display is opaque.[108]Specifically, this ambiguity exists with respect to the organisation threshold in a NIAC regulated exclusively by CA3. For conflicts to be governed by the more detailed rules of AP II, there are additional characteristics that the hostilities must possess.[109]Notably, an armed group, under responsible command, must exercise territorial control so as to facilitate sustained and concerted military operations and to implement the provisions of the protocol.[110]Because a high degree of organisation is needed to meet the aforesaid characteristics, any NSA that succeeds in doing so would be sufficiently organised.

For CA3 conflicts, which are governed by comparatively basic humanitarian protections, the degree of the armed group's organisation does not need to reach the level for a conflict regulated by AP II.[111]Yet, there is uncertainty about the degree of organisation that grants a NSA the status of a party to the conflict. Nonetheless,

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[102] *Boškoski Trial Chamber Judgment* §202.
[103] *Limaj Trial Chamber Judgment* §110.
[104] *Ibid* §§113-117; *Haradinaj Trial Chamber Judgment* §69.
[105] *Boškoski Trial Chamber Judgment* §203
[106] *Limaj Trial Chamber Judgment* §§125-129.
[107] *Prosecutor v. Sefer Halilović* (Judgment) ICTY-01-48-T (16 November 2005) §164; *Prosecutor v. Enver Hadžihasanović et al* (Judgment) ICTY-01-47-T (16 November 2005) §20 & §23; *Haradinaj Trial Chamber Judgment* §88.
[108] S.Sivakumaran (n31) p170.
[109] In practice, the relevance of the distinction between a NIAC regulated exclusively by CA3 and those also regulated by AP II is rendered largely irrelevant as customary law has transposed most, if not all of the rules under AP II to CA3 conflicts. See: M.Milanovic & V.Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in N White *et al* (eds) *Research Handbook on International Conflict and Security Law* (Edward Elgar, 2012) p28; J.Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye*'* (2011) 93(881) *International Review of the Red Cross* 189, p191. (Henceforth, J.Pejic, *'*The Protective Scope of Common Article 3')
[110] Article 1(1), AP II.
[111] *Boškoski Trial Chamber Judgment* §197.

jurisprudence has suggested that armed groups need to be 'organized to a greater or lesser extent',[112]have 'some degree of organization',[113]or be 'relatively organized'.[114]Moreover, commentators have posited that the 'necessary degree of organization must not be 'exaggerated'[115]and that armed groups must exhibit a 'minimum amount of organisation'.[116]Therefore, although it is difficult 'to pinpoint precisely the necessary minimum requirements of organization to be met',[117]the threshold for organisation does not appear to be 'all that high'.[118]

Though it may be challenging to determine whether a NSA is adequately organised to be a party to a NIAC, clearly at its peak between 2014 and 2016, during which the targeted killing of Reyaad Khan took place, ISIS satisfied the organisation threshold. It is worthwhile to specify the organisation characteristics that ISIS possessed, to elucidate when a group passes the organisational threshold.

First, ISIS exerted significant territorial control across Iraq and Syria. In April 2015, this totalled approximately 138,000 square kilometres, which was populated, before violence erupted, by an estimated 8 million people.[119]In Syria, of 5771 territorial zones monitored by the Carter Center in January 2015, ISIS occupied 1477 (26%).[120]Within this territory, ISIS exhibited governmental levels of control by establishing, *inter alia,* a judiciary, policing, and an elaborate taxation programme.[121]The group's territorial control only began to rapidly decrease from 2016 onwards, once the sustained international military campaign against ISIS began.[122]

The acquisition of large swathes of territory through military force simultaneously demonstrates the group's ability to conduct large scale operations. Particularly, this capability is exhibited by the sustained four-month attack on the

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[112] *Musema Trial Chamber Judgment* §248.
[113] *Limaj Trial Chamber Judgment* §89; Reiterated in *Prosecutor v. Naser Orić* (Judgment) ICTY-03-68-T (30 June 2006) §254.
[114] *Abella* §152.
[115] C.Kreß, 'The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes' (2002) 13(4) *Criminal law Forum* 409, p416.
[116] D.Schindler, 'The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols' (1979) 163 *Receuil De Cours* 121, p147.
[117] C.Kreß (n115) p416.
[118] S.Sivakumaran (n31) p170.
[119]J.Jefferis, 'ISIS Administrative and Territorial Organization' (2016) *European Institute for the Mediterranean Yearbook* 241, p244.
[120] G.Bhatia *et al* 'How Islamic State Lost Syria' (*Reuters*, March 15 2019) <https://graphics.reuters.com/MIDEAST-CRISIS-ISLAMIC%20STATE/0100913M1H0/index.html>
[121]J.Jefferis (n119) p243.
[122] The Carter Center, 'A Review of ISIS in Syria 2016-2019: Regional Differences and an Enduring Legacy' (March 2019) <https://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/isis-review-2016-2019.pdf> p4.

Syrian town of Kobani,[123]the concurrent surprise offensive on Kirkuk,[124]and the rapid seizure of Mosul.[125]Moreover, ISIS proved itself skilled as a battlefield scavenger,[126]amassing an arsenal to sustain long-term operational capabilities.[127]On top of an impressive array of weaponry, ISIS possessed a large number of fighters. Estimates in 2015 varied from between 20,000-30,000[128]up to 200,000.[129]Considering ISIS were assessed to have 15,000 foreign fighters in November 2015, the lower estimate of their overall number is conservative.[130]Additionally, the number of fighters, especially foreign fighters, demonstrated the group's recruitment capability. Furthermore, ISIS operated training camps throughout its controlled territory, in an attempt to professionalise its recruited fighters.[131]In terms of organisation composition of ISIS, it is possible to identify a command structure with discernible areas of responsibility for prominent officials.[132]Also, the upper echelons of the leadership possessed military or intelligence experience, through their previous roles under Saddam Hussein.[133]Thus, not only did ISIS possess a recognisable command structure, those in leadership positions had skills that enhanced the group's military capability.

3(3) Summary

The existence of an armed conflict is a prerequisite for lethal force to be regarded as an 'act of war'. An armed conflict between a state and a NSA, such as a terrorist group, would be categorised as a NIAC. For a NIAC to arise, a threshold of 'intense' violence must be surpassed between a State and an 'organised' NSA. There are a wide range of factors to be considered when assessing the intensity of a violent confrontation and

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[123] R.Barrett, 'The Islamic State' (*The Soufan Group*, November 2014) <https://ciaotest.cc.columbia.edu/wps/tsg/0032688/f_0032688_26581.pdf> p35.
[124] J.Fromson & S.Simon, 'ISIS: The Dubious Paradise of Apocalypse Now' (2015) 57(3) *Survival: Global Politics and Strategy* 7, p13.
[125] C.Lister, 'Profiling the Islamic State' (*Brookings Doha Center Analysis Paper*, November 2014) <https://www.brookings.edu/wp-content/uploads/2014/12/en_web_lister-1.pdf> p18.
[126] J.Fromson & S.Simon (n124) p10.
[127] C.Lister (n125) pp16-17.
[128] In testimony to US Congress, Director of National Intelligence James Clapper made this estimation. See, Global Terror Threats: Senate Armed Services Committee (26 February 2015) <http://www.c-span.org/video/?324556-1/ director-national-intelligence-james- clapper-testimony-worldwide-threats>
[129] P.Cockburn, 'War with ISIS: Islamic Militants Have Army of 200,000, Claims Senior Kurdish Leader' (*Independent,* 16 November 2014) <https://www.independent.co.uk/news/world/middle-east/war-with-isis-islamic-militants-have-army-of-200000-claims-kurdish-leader-9863418.html>
[130] R.Barrett (n123) p16.
[131] C.Lister (n125) p17.
[132] R.Barrett, (n123) p24.
[133] J.Fromson & S.Simon (n124) p10.

the organisation of the NSA involved. Therefore, as stressed by the ad hoc tribunals, evaluating the existence of an armed conflict can only take place on a case-by-case basis since the assessment is so reliant on the factual circumstances of the military confrontation in question.[134]

Notably for the UK Policy, a solitary drone strike, even against an adequately organised NSA, would not give rise to a NIAC without bilateral hostilities. Therefore, to be an 'act of war', the utilisation of targeted killing must take place within the context of a pre-existing NIAC. For the UK, a NIAC may materialise through its own hostilities with a NSA or, alternatively, the UK may be a party to a NIAC by supporting another State that is already engaged in an armed conflict with a NSA. The existence of a NIAC obviates the need to assess whether violence is intense, or the parties involved are adequately organised since these requirements have already been fulfilled. However, an assessment would still be required as to whether a targeted killing operation was connected to the prevailing conflict to be regarded as an 'act of war', and whether the applicable rules of IHL had been complied with to designate the lethal force as 'lawful'. The following sections will consider these legal issues.

4. The Regulation of Lethal Force in Armed Conflict

The use of lethal force in armed conflict is only lawful if it complies with the fundamental principles of distinction, proportionality and precaution. Additionally, the perpetrator of fatal force must not employ means or methods that are forbidden by IHL. These four principles are cumulative, the failure to adhere to any one of them will render an attack as contravening IHL. Each of these principles will now be briefly outlined before considering in greater detail the regulation of lethal targeting in armed conflict. Attention will be given to the targeting rules applicable in NIAC as this is the category of armed conflict that prospective UK operations may occur within. Although the customary law of NIAC is largely the same as IAC,[135]there remains significant distinctions between the two categories of armed conflict which will be subsequently made apparent.

4(1) Fundamental Targeting Principles in Armed Conflict

[134] *Limaj Trial Chamber Judgment* §90.

[135] J-M Henckaerts and L.Doswald-Beck, *'International Committee of the Red Cross: Customary International Humanitarian Law'* (Volume 1, CUP, 2005) (Henceforth, *ICRC Study on Customary International Humanitarian Law*). The *ICRC Study on Customary International Humanitarian Law* identified 161 rules of customary international humanitarian law, out of which at least 136 were considered to apply to both IACs and NIACs. See also M.Sassoli, (n6) p46**.**

a. Distinction

Distinction has been recognised by the ICJ as the first 'cardinal' principle of IHL, which is aimed at protecting the civilian population and civilian objects during armed conflict.[136]Pursuant to the principle of distinction, parties to an armed conflict must distinguish between all objects and people military from all objects and persons civilian.[137]Consequently, IHL prohibits attacks directed against civilians and civilian objects.[138]This principle is codified in Article 48 of AP I[139]and applies as customary IHL in both IACs and NIACs.[140]

By limiting attacks to military objects, IHL reflects the understanding that violence is only lawful if militarily necessary.[141]This position is of longstanding origin with the Saint Petersburg Declaration of 1868 recognising that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the *military forces* of the enemy'.[142]The purpose of IHL is to protect the lives and dignity of those affected by an armed conflict whilst also recognising that weakening the enemy is a legitimate aim of the conflict. Therefore, as Sassoli summarises, the distinction principle should be viewed as a compromise between the competing principles of humanity and military necessity inherent in IHL.[143]Yet, although IHL prohibits direct attacks against civilians and civilian objects, the law does not insulate them entirely from the effects of an armed conflict.

b. Proportionality

As a rule of customary law applicable in both IACs and NIACs, attacks which are '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' are prohibited.[144]Consequently, parties to a

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[136] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, p226, §78. (Henceforth, *Advisory Opinion on Nuclear Weapons*)
[137] N.Lubell (n13) p135.
[138] M.Sassoli, (n6) p347.
[139] Article 48, AP I. 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.
[140] *ICRC Study on Customary International Humanitarian Law*, Rule 1, p3.
[141] M.Sassoli, (n6) p347.
[142] Declaration Renouncing the Use, in Time of War, of Expensive Projectiles under 400 Grammes Weight, Saint Petersburg, 29 November/ 11 December 1868. (emphasis added) (Henceforth, St Petersburg Declaration)
[143] M.Sassoli, (n6) p347.
[144] *ICRC Study on Customary International Humanitarian Law*, Rule 14, p46.

conflict must ensure that any incidental impact upon the civilian population resulting from their attacks is not disproportionate to the military advantage projected. Thus, the principle of proportionality requires parties to weigh up the predicted military advantage to be gained from an attack with the effect likely to be borne by the civilian population. Any attack which is disproportionate violates IHL.

c. Precaution

In the conduct of hostilities, constant care must be taken to spare the civilian population and civilian objects from the effects of military operations. Customary IHL applicable to both IACs and NIACs require all feasible precautions to be taken to avoid and, in any event, minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.[145]The precaution principle is multifaceted, requiring the application of a range of steps to avoid or minimise the impact upon civilians during the commencement of military operations.[146]Effectively, the precautionary principle can transform an operation that otherwise adheres to the distinction and proportionality principles into an unlawful act due to a failure to minimise its effects upon civilians. For example, Rule 21 of the ICRC's '*Customary Rules Study'* requires that when faced with multiple targets expected to produce a similar military advantage, the attacking party to a conflict must select the target which is expected to cause the least danger to civilians.[147]

d. Prohibition of Specific Means and Methods of Warfare

In addition to the previous principles that seek to protect the civilian population, IHL also limits the means (weapons) and methods (tactics) that a party to a conflict may utilise, even if attacking legitimate targets.[148]Certain weapons may be prohibited on the basis that they are incapable of distinguishing between civilian and military targets or because their effects cannot be limited as required by IHL.[149]For example, biological weapons may lead to the spread of contagious diseases that would be difficult to contain and would not spare civilians.

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[145] *ICRC Study on Customary International Humanitarian Law*, Rule 14, p51.
[146] J.Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96(893) *International Review of the Red Cross* 67, p87. (Henceforth, J.Pejic, 'Extraterritorial Targeting')
[147]*ICRC Study on Customary International Humanitarian Law*, Rule 21, pp65-67.
[148] M.Sassoli, (n6) p348.
[149] *ICRC Study on Customary International Humanitarian Law*, Rule 71, p244; *Advisory Opinion on Nuclear Weapons* §78.

It is important to distinguish between weapons that may be used indiscriminately from those that are incapable of being used in compliance with IHL. Dinstein accurately asserts that the indiscriminate use of weapons does not 'stain them with an indelible imprint of illegality', since in other operations they may be employed within the framework of IHL.[150]Yet, even if a weapon is capable of being used in a manner that distinguishes between civilians and combatants, it may be prohibited on the basis that it causes 'superfluous injury or unnecessary suffering'.[151]The ICJ identified the prohibition of unnecessary suffering to combatants as the second 'cardinal' principle of IHL,[152]which is set forth in numerous treaties, including early instruments of IHL.[153]It is a long-standing principle of IHL that States do not have unlimited freedom of choice of means and methods of warfare. Therefore, in assessing the legality of a military operation, it is necessary to consider permissibility of the weapons and tactics deployed.

4(2) Distinction in NIAC: Who is a Legitimate Target?

Though the forthcoming analysis is focused on the application of the distinction principle to lethal targeting in NIAC, it is helpful to begin by looking at the law of IAC, which clearly delineates between those that are legitimate targets for attack and those that are protected. Accordingly, combatants, defined as members of the armed forces of a party to the conflict (excluding medical and religious personnel),[154]may be targeted at any time during the hostilities, provided they are not *hors de combat* (captured, shipwrecked, sick or wounded).[155]Therefore, in an IAC, individuals may be targeted based on their combatant status, which is a drawback to being a combatant. However, this status also brings benefits, notably the entitlement of prisoner of war status upon capture[156]and a right to take part in hostilities.[157]

In an IAC, civilians are immune from attack. Although not subject to a descriptive definition, civilians are defined by negation: anything which does not meet

[150] Y.Dinstein, *Law of Non-International Armed Conflict* (3rd Edition, CUP, 2016) p72.
[151] Article 35(2), AP I; *ICRC Study on Customary International Humanitarian Law*, Rule 70, p230.
[152] *Advisory Opinion on Nuclear Weapons* §78.
[153] For example, St Petersburg Declaration; Article 23(e), Hague Convention (IV).
[154] Article 43(2), AP I; *ICRC Study on Customary International Humanitarian Law*, Rule 3, p11.
[155] Articles 12 and 13, GC I; Articles 12 and 13, GC II; Article 4 and 13, GC III; Article 4, Hague Convention (IV).
[156] Article 4, GC III; Article 44, AP I.
[157] Article 43(2), AP I.

the definition of military is civilian.[158]Thus, in an IAC, anyone that is not a combatant is regarded as a civilian and cannot be attacked. Although, as Article 51(3) of AP I stipulates, civilians only benefit from this protection 'unless and for such time as they take a direct part in hostilities'. This principle, which is regarded as customary law,[159]also applies in NIACs.[160]

In a NIAC, it is a more complex task to determine who may be subject to attack due to the absence of combatant status. As previously noted, States refused to afford combatant status to non-State parties to a NIAC on the basis that it would legitimise insurgents, grant them prisoner of war status and immunity from prosecution for taking up arms against the State.[161]Though civilians may engage in hostilities, in most cases, State parties to a NIAC will target members of the NSA.[162]Therefore, identifying when it is permissible to target members of NSAs is of fundamental importance in NIAC.

According to a restrictive viewpoint, the absence of combatant status leads to the conclusion that everyone except a State's armed forces are civilians, including members of a NSA, who may only be attacked when directly participating in hostilities.[163]However, there is also an argument that the protections granted to civilians by the conventional law of NIAC implies that there must also be 'non-civilians'.[164]This interpretation has initiated arguments that members of NSAs are 'non-civilians'. One view posits that members of NSAs should be viewed as 'quasi combatants', targetable as if they were combatants but without the benefits of combatant status.[165]This expansive position also finds support in the commentary of AP II, which states that those belonging to armed groups may be attacked at any time.[166]

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[158] N.Lubell (n13) p139; Article 50, AP I; *ICRC Study on Customary International Humanitarian Law*, Rule 5, p18.
[159] *ICRC Study on Customary International Humanitarian Law*, Rule 6, pp19-20.
[160] The notion of direct participation in hostilities is addressed below. See Section 4(2)(a)
[161] Section 2(1)
[162] N.Lubell (n13) p147.
[163] M.Sassoli (n6) p358.
[164] D.Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) *European Journal of International Law* 171, p197.
[165] M.Hakimi, 'A Functional Approach to Targeting and Detention' (2012) 110 *Michigan Law Review* 1365, p1379; N.Lubell (n13) p147. See also M.Schmitt *et al*, '*The Manual on the Law of Non-International Armed Conflict'* p4, where the term 'fighter' is used to describe members of a NSA. However, the 'Manual' endorses the position that fighters are legitimate targets for attack. D.Kretzmer, *Ibid,* p198.
[166]ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary of 1987' (IHL Databases, 1987) < https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-13/commentary/1987?activeTab=undefined> para 4789 (Henceforth, AP II Commentary 1987)

There are clearly discernible advantages and disadvantages associated with each position. The restrictive approach stipulates that a State may only target individuals in a NIAC based on their conduct, which rejects the notion of status-based targeting. A perceived benefit of this approach is that it prevents States from adopting expansive formulations of 'membership' to justify targeting anyone loosely affiliated or supportive of a NSA.[167]Furthermore, members of NSAs often do not differentiate themselves from the civilian population.[168]Therefore, status-based targeting could endanger civilians as it is difficult to distinguish between them and members of a NSA.[169]

On the other hand, there are various drawbacks to the restrictive approach. Notably, categorising everyone other than the armed forces of a State party to a NIAC as civilians disregards the reality that non-State parties are an organised group capable of intense hostilities and not simply comprised of ad hoc fighters. By failing to distinguish between civilians and members of the NSA, the restrictive approach blurs the fundamental principle of distinction.[170]Furthermore, practically speaking, it is 'militarily unrealistic'[171]to expect a State's armed forces to only engage clearly identifiable fighters of a NSA whilst they directly participate in hostilities since this would prevent a State from taking preventative action to weaken a NSA.[172]Also, as civilians regain immunity from attack once they are no longer directly participating in hostilities,[173]the restrictive approach would enable the NSA to launch attacks and then shield itself from counter-attacks by retreating from the zone of hostilities, which

[167] Kleffner argues that a 'membership approach' to targeting, regardless of the function the person performs is 'unduly broad' and that the 'membership approach' should only apply to members of the NSA who assume fighting functions on an ongoing basis. See J.Kleffner, 'From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities-On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference' (2007) 54(2) *Netherlands International Law Review* 315, pp333-334; For similar concerns about a broad membership approach, see G.Blum & P.B.Heymann, *'Laws, Outlaws and Terrorists: Lessons from the War on Terrorism'* (MIT Press, 2010) p80; For a discussion on the risk that a 'membership' approach to targeting may lead to a reduction in civilian protection, see N.Melzer, 'Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report' (*ICRC*, 2005) <https://www.icrc.org/en/doc/assets/files/other/direct_participation_in_hostilities_2005_eng.pdf> pp53-57. (Henceforth, Third Expert Meeting on Direct Participation in Hostilities)

[168] M.Sassoli, (n6) p359

[169] Ibid; Third Expert Meeting on Direct Participation in Hostilities p53.

[170] N.Lubell (n13) p150; D.Kretzmer (n164) p198.

[171] M.Sassoli, (n6) p359.

[172] J.Kleffner (n167) p332-333; M.Sassoli, (n6) p359; N.Lubell (n13) p149.

[173] Civilians are not immune from arrest or prosecution for their participation in hostilities. See *ICRC Study on Customary International Humanitarian Law*, Rule 6, p21.

disadvantages the State party to the NIAC.[174]Additionally, because civilian protection can be lost and regained depending on an individual's participation or disengagement from hostilities, this 'revolving door' of protection creates an imbalance between members of a State's armed forces, who are targetable at all times provided they are not *hors de combat,* and members of a NSA, who may only be targeted whilst directly participating in hostilities.[175]

An advantage of the approach that regards members of a NSA as 'quasi-combatants' is that the practical issues associated with the restrictive approach are eased. If 'quasi-combatants' are targetable at all times provided they are not *hors de combat,* States would be permitted to take preventive action to weaken NSAs and their members would be unable to shield themselves from counterattacks by reclaiming their civilian status. Additionally, as members of NSAs would be targetable based on their status, this resembles the circumstances when the armed forces of the State party may be targeted, which addresses the imbalance that the restrictive approach produces. Moreover, as well as alleviating the practical flaws of the restrictive approach, categorising members of a NSA as 'non-civilians' ensures a distinction is made between civilians, that may participate in hostilities on an ad hoc basis, and members of a NSA, whose role in the group is to use armed force and inflict death and injury upon the opposing party to the conflict. Yet, the expansive approach necessitates a determination as to who is and is not a 'member' of a NSA. Moreover, as previously stated, if membership is conceived of broadly, this would give States significant scope to target enemies, even if their role in the prevailing hostilities is minimal or non-existent.

The categorisation of members of armed opposition groups, as either civilians or something akin to 'quasi-combatants', was a key consideration of the ICRC's *'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law'.*[176]The *Interpretive Guidance*, published by the ICRC following a five-year expert led process between 2003 and 2008, is the leading authority on the classification of members of NSAs in NIAC. For the purposes of the principle of distinction in NIAC, the *Interpretive Guidance* provides that civilians are all

[174] M.Sassoli, (n6) p359; N.Lubell (n13) p149.
[175] *ICRC Study on Customary International Humanitarian Law*, Rule 6, p21.
[176] N.Melzer, '*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law'* (ICRC, 2009). (Henceforth, *Interpretive Guidance*)

individuals that are not members of the State's armed forces or organised armed groups of a party to a conflict.[177]Thus, the *Interpretive Guidance* distinguishes between civilians and members of a NSA engaged in a NIAC. However, the status of membership is confined to those assuming a continuous function for the group involving their direct participation in hostilities, otherwise referred to as a 'continuous combat function'.[178]Therefore, individuals may be affiliated with, accompany or support a NSA, but, unless their function involves direct participation in hostilities, they are not members of that group, as the term is understood within IHL.[179]Instead, these individuals remain civilians,[180]who are protected from direct attack unless and for such time as they directly participate in hostilities. In contrast, members of a NSA are not granted this protection and may be targeted until they no longer assume a 'continuous combat function'.[181] Consequently, in NIAC, the ICRC endorsed targeting based on an individual's status as a member of a non-State party to the conflict. However, an individual's membership is contingent on their conduct equating to a 'continuous combat function'. Therefore, the targeting of members of a NSA is based on their unique conduct derived status.

Regarding the classification of members of a NSA, the ICRC embraced a middle ground between the restrictive and expansive approaches previously outlined. The *Interpretive Guidance* distinguished members of a NSA from civilians but does not treat the NSA in the same way as a State's armed forces during a NIAC.[182]According to the ICRC, it is only the organised armed forces of the NSA, its military wing, and those that are members of it, that lose their civilian protections. By formulating a middle ground approach, the ICRC has avoided many of the pitfalls associated with the expansive and restrictive approaches.

The membership concept espoused by the ICRC is not void of criticism. For instance, individuals may have support or logistical roles in the NSA without possessing a 'continuous combat function', and therefore retain their status as civilians. Sivakumaran notes, if those same individuals operated on the side of the State party, they would be regarded as members of its armed forces and subject to

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[177] *Interpretive Guidance*, p36.
[178] Ibid p33.
[179] Ibid p34.
[180] Ibid.
[181] Ibid p72.
[182] K.Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *International Law and Politics* 641, p690.

attack.[183]Thus, the *Interpretive Guidance* produces a lack of equivalence between the State and NSAs in a NIAC.

Nevertheless, the ICRC has helped to clarify whom may be targeted in a NIAC. Civilians are legitimate targets when they directly participate in hostilities, with the caveat that their civilian protection is reinstated once their participation ceases. Moreover, members of a NSA may be targeted at any time, but their membership derives from the assumption of a 'continuous combat function' in the military wing of the NSA.[184]Consequently, those that support the NSA but do not assume a 'continuous combat function' are classed as civilians and are only legitimate targets whilst they directly participate in hostilities. However, a civilian can become a member of a NSA through repeated acts of direct participation in hostilities, as this would constitute the assumption of a 'continuous combat function'.

Whether a civilian loses their protection from direct attack, or an individual possesses the status of a 'member' of a NSA hinges on the concept of direct participation in hostilities, which is a cornerstone of IHL on the conduct of hostilities.[185]

a. Direct Participation in Hostilities

The notion of direct participation in hostilities comprises two elements, that of "hostilities" and that of "direct participation".[186]Whilst "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,[187]"participation" relates to an individual's involvement in the hostilities.[188]The concept of direct participation in hostilities evolved from the phrase "taking no active part in the hostilities" deployed in CA3. Although the Additional Protocols use the term "active participation",[189]the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities,[190]as evidenced by the equally authentic French texts, which consistently use the phrase '*participent directement'.*[191]

[183] S.Sivakumaran (n31) p362. See also K.Watkin Ibid p694.
[184] This formulation was also endorsed by the then-UN Special Rapporteur for Targeted Killing. See UNCHR 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston', (28 May 2010) A/HRC/14/24/Add.6, p20-21, para 65.
[185] M.Sassoli, (n6) p356.
[186] *Interpretive Guidance* p43.
[187] Ibid.
[188] Ibid, citing Articles 43(1), 45(1), 45(3), 67(1)(e) AP I and Article 13(3), AP II.
[189] Articles 43(2), 51(3) and 67(1)(e), AP I; Art 13(3), AP II.
[190] *Interpretive Guidance* p43.
[191] M.Sassoli, (n6) p356.

The *Interpretive Guidance* concludes that the following criteria must be cumulatively satisfied to classify a specific act as equating to direct participation in hostilities:

1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attacks (threshold of harm), and
2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[192]

For an individual to possess a 'continuous combat function', and subsequently acquire membership status within the non-State party to a NIAC, their role within the NSA must be to continuously prepare, execute, or command acts or operations that would amount to the direct participation in hostilities.[193]Practically, in terms of the loss of protection from attack, the distinction between civilians that directly participate in hostilities and members of a NSA is a temporal issue which will be addressed below.[194]However, the current focus is on the constitutive elements of direct participation in hostilities.

i) Threshold of Harm

An act may surpass the necessary threshold of harm in two ways; either it causes harm of a specifically military nature or inflicts death, injury or destruction on persons or objects protected against direct attack.[195]In both contexts, the harm need not materialise to qualify as direct participation in hostilities so long as it would have been a reasonably expected result of the act in question.[196]

Harm of a military nature is not restricted to the infliction of death, injury or destruction of military personnel or objects but also encompasses any consequence

[192] *Interpretive Guidance* p46.
[193] Ibid p34.
[194] See Section 4(2)(b)
[195] *Interpretive Guidance* p47.
[196] Ibid p47.

adversely affecting the military operations or capacity of a party to the conflict.[197]Examples of conduct recognised by the *Interpretive Guidance* as 'adversely affecting' a party to the conflict include sabotage or other activities restricting or disturbing deployments, logistics and communications.[198]In the absence of military harm, an act must be likely to cause at least death, injury, or destruction to objects or persons protected from direct attack, such as civilians, to qualify as direct participation in hostilities.[199]The *Interpretive Guidance* provides the specific examples of sniper attacks against civilians and the bombardment or shelling of civilian villages or urban residential areas as acts that would exceed the threshold of harm for direct participation in hostilities.[200]

ii) Direct Causation

The term 'direct participation' implies that participation in hostilities can also be 'indirect'. The *Interpretive Guidance* recognises that activities contributing towards the general war effort or helping to sustain the war are distinguishable from hostilities. Although the general war effort and war-sustaining activities may lead to requisite level of harm for direct participation in hostilities, they 'merely maintain or build up the capacity to cause such harm' rather than bring about the materialisation of the required harm.[201]Thus, the construction of infrastructure or the production of military equipment, which is indispensable for the armed forces, does not amount to direct participation in hostilities.

For an act to be categorised as direct rather than indirect participation in hostilities, there must be a sufficiently close causal relation between the act and the resulting harm.[202]The *Interpretive Guidance* explains that the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.[203]Therefore, conduct which indirectly causes harm, such as scientific research and design, production and transport of weapons and equipment, and the recruitment and training of personnel is excluded from the concept of direct participation in hostilities.[204]

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[197] Ibid p47.
[198] Ibid p48.
[199] Ibid p49.
[200] Ibid pp49-50.
[201] Ibid p52.
[202] Ibid. See also AP II Commentary 1987, para 4787.
[203] *Interpretive Guidance* p52.
[204] Ibid p53.

iii) Belligerent Nexus

An individual can have a direct role in conduct that causes death or injury exceeding the requisite threshold of harm, but the conduct may not take place in the context of an armed conflict. For instance, mass shootings can result in significant deaths and injuries without any relation to hostilities. Conduct unconnected to an armed conflict cannot amount to direct participation in hostilities. An act will be regarded as connected to hostilities when it is specifically designed to support a party to an armed conflict to the detriment of another.[205]This connection is referred to in the *Interpretive Guidance* as the 'belligerent nexus'.[206]

b. Temporal Scope of the Loss of Protection

Civilians that directly participates in hostilities and members of a NSA are legitimate military targets. Yet, whether an individual is classified as a civilian directly participating in hostilities or a member of a NSA alters the temporal scope of the loss of protection from direct attack. Civilians that directly participate in hostilities do not cease to be part of the civilian population, but their protection is suspended for as long as they directly engage in hostilities. Once participation ends, their protection from direct attack is reinstated.[207]On the other hand, members of a NSA are deprived of their protection from attack for as long as they retain their membership status.[208]Consequently, until a member of a NSA ceases to possess a 'continuous combat function', they do not regain their protection from direct attack.

c. Restrictions on Utilising Lethal Force against Legitimate Targets

Though an individual may be unprotected from direct attack, this does not necessarily grant States an unconstrained right to kill. The *Interpretive Guidance* recommends that the kind and degree of force which is permissible against persons not entitled to protection against direct attack *must not exceed* what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.[209]The ICRC recognises that, in certain situations, it may be possible to neutralise a military threat through non-lethal means and that 'it would defy basic notions of humanity to kill an

[205] Ibid p58.
[206] Ibid.
[207] Ibid p70.
[208] Ibid p72; M.Sassoli, (n6) p214.
[209] Ibid p77 (emphasis added).

adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.'[210]

A notable critic of the ICRC view is US Colonel Hays Parks, who posits that IHL contains no explicit restriction on the targeting and killing of legitimate targets.[211]However, the position of the ICRC is based on the interplay between the competing principles of military necessity and humanity 'which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted'.[212]

Even if it is accepted that States must minimise the recourse to lethal force against legitimate targets, the ICRC does not envisage that the principles of military necessity and humanity limits lethal action in all circumstances. In classic large-scale military confrontations, the *Interpretive Guidance* acknowledges that the aforementioned principles are unlikely to restrict the use of force against legitimate targets beyond what is required by specific provisions of IHL.[213]Rather, the restraining principles of necessity and humanity increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted.[214]The *Interpretive Guidance* recognises that such considerations are likely to become relevant where a party to the conflict exercises effective territorial control.[215]

d. Application of the Distinction Principle to the Targeted Killing of Terrorists

The lethal targeting of terrorists during a NIAC will only comply with the principle of distinction if those targeted are classified as civilians directly participating in hostilities or members of the non-State party engaged in the armed conflict. When utilising targeted killing during a NIAC, the UK must assess whether the victim of lethal force is directly participating in hostilities, or a member of the terrorist group engaged in a NIAC. Central to this assessment is the concept of direct participation in hostilities. Conduct will constitute direct participation in hostilities when it cumulatively satisfies the requirements of a threshold of harm, direct causation, and belligerent nexus.

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[210] Ibid p82.
[211] W.Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 72 *International Law and Politics* 769, p799
[212] *Interpretive Guidance* p78, citing Y.Sandoz *et al (*eds.), *'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949'* (ICRC, 1987) §1389.
[213] *Interpretive Guidance* p80.
[214] Ibid
[215] Ibid p81.

In terms of the threshold of harm, terrorist attacks can clearly surpass the requisite level of harm by causing substantial death and injury to civilians. Recalling the killing of Reyaad Khan, the operations orchestrated by him were intended to murder large numbers of citizens in the UK.[216]The fact that seven major plots connected to Reyaad Khan were thwarted[217]does not disqualify them as surpassing the threshold of harm because the materialisation of harm is not necessary.[218]Thus, individuals that plan attacks in the UK or against UK interests abroad would satisfy the threshold of harm requirement.

It is self-evident that those that execute acts of terrorism cause direct harm. However, if we reflect on Reyaad Khan's role within ISIS, the threat he posed to the UK did not derive from him personally carrying out attacks against the UK.[219]Rather, he facilitated others to conduct terrorist attacks by providing instructions for producing improvised explosive devices, identifying specific targets[220]and recruiting operatives.[221]Therefore, it could be questioned whether such conduct can satisfy the requirement of direct causation.

The *Interpretive Guidance* recognises that specific recruitment and training for the execution of a predetermined hostile act is an integral part of the act and amounts to a direct causal link between the act and the resulting harm.[222]Therefore, in assessing the causal link, the *Interpretive Guidance* distinguishes between general recruitment and the recruitment of individuals for specific acts. In the former, although recruitment is crucial for the military capacity of a party to the conflict, the link between the recruiter and the conduct of those recruited is indirect. However, in the latter, there is a direct link between the recruitment and the harm caused by the perpetrator of the predetermined conduct. Therefore, as Reyaad Khan allegedly identified and selected specific targets to be attacked, this would constitute an integral part of a concrete and coordinated attack according to the *Interpretive Guidance*.[223]Consequently, although recruiting operatives and selecting targets for attacks does not directly cause harm itself, this type of conduct would be regarded as providing a sufficiently close causal

[216] Report of the Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria*, (2016-2017, HC 1152) p10, para 28. (Henceforth, ISC Report)
[217] Ibid p9, para 22.
[218] See Section 4(2)(a)(i)
[219] ISC Report p16, para 41.
[220] Ibid p9, para 22.
[221] Ibid p8, para 19.
[222] *Interpretive Guidance* p53.
[223] Ibid pp54-55.

relation between the act and the resulting harm.[224]Considering the UK Policy contemplates extraterritorial force to prevent the materialisation of terrorist attacks within the UK, it is necessary to note that the causal relationship between conduct and the ensuing harm is not affected by temporal or geographical proximity.[225]Thus, although Reyaad Khan was directly linked to at least seven attacks thwarted by the UK, the distance between Khan's location in Syria and the planned harm in the UK did not preclude his direct participation in hostilities.

Acts of terrorism can be carried out as part of hostilities, as evidenced by the acknowledgment of the ICTY in *Boskoski* that terrorist attacks can be considered when assessing the 'intensity' of hostilities.[226]For an act of terrorism to satisfy the belligerent nexus requirement, it must be specifically designed to support a party to the conflict to the detriment of another. Therefore, terrorist attacks perpetrated by a NSA against a State party to the NIAC is a method of 'injuring the enemy' and activities facilitating these attacks would possess the requisite 'belligerent nexus' to the prevailing hostilities. If an individual has a direct role in the commission of terrorist attacks on behalf of a NSA engaged in a NIAC with the UK, they would be regarded as directly participating in the hostilities. This would certainly have been the case for Reyaad Khan.

The previous assessment demonstrates that those that either seek to carry out or orchestrate acts of terrorism can be regarded as directly participating in hostilities, even if their terrorist attack does not materialise. For those facilitating terrorist attacks to be regarded as directly participating in hostilities, they must play a key role in its planning, such as the recruitment of specific individuals to carry it out or the identification and selection of a particular target. Reyaad Khan's role in the planning of attacks against the UK on behalf of ISIS is an illustrative example of the requisite level of involvement in terrorism to constitute direct participation in hostilities. Nonetheless, even if an individual's contribution to the commission of terrorist attacks does not amount to direct participation in hostilities, they may directly participate in hostilities in other ways. For example, in addition to his key role orchestrating acts of terrorist violence, Reyaad Khan also boasted on his social media about 'executing many prisoners' and posted images of bloody corpses, which he said had belonged to

[224] Ibid p54.
[225] Ibid p55.
[226] *Boškoski Trial Chamber Judgment* §185.

a group whom he and other militants captured and executed.[227]Therefore, Khan's direct participation in hostilities was not confined to the organisation of terrorist attacks.

The prevention of terrorism is the justification that the UK has provided for utilising targeted killing. However, in determining whether the victim of a targeted killing would be unprotected from lethal force, the UK should consider the entirety of their conduct, not solely their role in planning or conducting acts of terrorism. However, if there is any doubt an individual's direct participation in hostilities or membership within the NSA, the *Interpretive Guidance* requires States to assume that the relevant individual retains their protection from direct attack.[228]Moreover, even where an individual is not protected from direct attack, this does not necessarily grant States an unconstrained right to deploy lethal force. The ICRC propose that where a military objective can be achieved through non-lethal means, it would defy notions of humanity to kill an adversary or refrain from providing an opportunity to surrender. The ICRC proposal is contested but even if it were accepted, the ICRC acknowledges that the restraining principles of necessity and humanity increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted.[229]Therefore, as the UK contemplates utilising targeting killing as a last resort, when those targeted cannot be detained or arrested due to their location in territory that is ineffectively governed, the ICRC position is unlikely, in practice, to add additional restraints on the UK's utilisation of targeted killing.

4(3) Proportionality

Though civilians cannot be directly targeted, except for when they directly participate in hostilities, IHL does not offer civilians or civilian objects absolute protection from the effects of armed conflict. Therefore, civilian deaths or damage to civilian objects resulting from a drone strike does not render a targeted killing as unlawful under IHL. However, if the effects on the civilian population are excessive in comparison to the military advantage anticipated from it, a targeted killing will be deemed to contravene IHL.

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[227] E.MacAskill, 'Briton Killed in Drone Strike on ISIS 'Posed Serious threat to UK' (*Guardian*, 26 April 2017) <https://www.theguardian.com/uk-news/2017/apr/26/briton-killed-in-drone-strike-on-isis-posed-serious-threat-to-uk-reyaad-khan>

[228] *Interpretive Guidance* p74.

[229] Ibid.

Assessing whether an attack adheres to the principle of proportionality requires the weighing up of the concrete and direct military advantage anticipated from the attack and the loss of civilian life, injuries to civilians, damage to civilian objects, or a combination of these effects, that resulted from the military operation. There is no precise formula for assessing the excessiveness of civilian harm against the expected military advantage to be gained from a particular attack.[230]Though, the more valuable a target is, the greater the justification will be for the incidental harm caused to the civilian population. Conversely, the less valuable a target is, the more difficult it becomes to argue that the civilian harm caused by a military operation is permissible.

Weighing up whether the advantage gained from an attack is proportionate to the civilian harm causes is described by Pejic as 'one of the most operationally challenging issues in the conduct of hostilities'[231]and inevitably involves subjective value judgments.[232]As the circumstances of each military attack differs, assessing an operation's compliance with the principle of proportionality must be made on a case-by-case basis. This approach would be necessary for each targeted killing operation deployed by the UK. Returning to the killing of Reyaad Khan, the drone strike also killed British citizen Ruhul Amin and Belgian citizen Abu Ayman al-Belgiki.[233]Announcing the operation to Parliament, former Prime Minister David Cameron described all killed as 'fighters' for ISIS and not civilians.[234]Although 'fighter' is a descriptive rather than legal term within IHL, clearly, the then-Prime Minister was implying that those killed were legitimate targets. As the previous section concludes, Reyaad Khan was likely a legitimate target based on his ISIS membership. Similarly, the publicly available information on Ruhul Amin suggests that he was also targetable based on his possession of a 'continuous combat function' within ISIS.[235]There is scant public information about Abu Ayman al-Belgiki, which precludes any substantial evaluation of his role within ISIS. Therefore, we must presume that al-Belgiki was a civilian.[236]Yet, even if we assign al-Belgiki civilian status, the strike would have killed

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[230] J.Pejic, 'Extraterritorial Targeting' p86.
[231] Ibid.
[232] M.Sassoli, (n6) p362.
[233] JCHR Report, p13, para 1.1.
[234] HC Deb 7 September 2015, vol. 599, col 25.
[235] In 2014, Amin featured in a recruitment video for ISIS and gave an interview to a British news programme admitting his involvement in combat and his desire to continue to stay and fight until the caliphate was established. See <https://www.itv.com/news/update/2014-07-07/british-isis-fighter-admits-i-miss-my-parents/>
[236] *Interpretive Guidance* p74.

two legitimate targets and one civilian, which does not appear to be excessive compared to the military advantage gained from the strike. Therefore, it is proposed that the targeted killing of Reyaad Khan was proportionate.[237]Furthermore, if the operation was indeed the 'only feasible means of effectively disrupting [terrorist] attacks' against the UK,[238]as the Prime Minister contested, this would have enhanced the military advantage gained by the strike.

4(4) Precaution

An attacking party is obligated to take constant care to avoid or minimise the effects on the civilian population during an armed conflict.[239]The precautionary principle is a rule of customary IHL applicable in both IACs and NIACs.[240]Recent treaty law applicable to NIAC also makes explicit reference to the requirement of precautions in attack.[241]The precautionary measures an attacking party must take are outlined in Article 57 of AP I which regulates IAC but applies to NIAC through custom. Accordingly, those who plan or decide upon an attack shall do everything feasible to verify that the intended attack is directed at a military target;[242]choose means and methods to avoid or minimise harm to civilians;[243]provide an effective warning to civilians threatened by an attack, if circumstances allow; and, when it is possible to choose among several objectives conferring a similar military advantage, the objective expected to cause the least danger to civilians must be chosen.[244] Additionally, the principle of precaution requires attacks to be cancelled if it is expected to cause excessive harm to civilians[245]or it becomes apparent that the objective is not a

[237] A.Sari & N.Quenivet, Written Evidence to the Joint Committee on Human Rights Inquiry on *'The Government's Policy on the Use of Drones for Targeted Killing'* (2015) <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/written/24475.html> p8.
[238] HC Deb 7 September 2015, col 26.
[239] Parties to the conflict must also take measures to protect civilians under their control from the effects of attack. See *ICRC Study on Customary International Humanitarian Law*, Rules 22-23, pp68-76.
[240]Ibid, Rules 15-21, pp51-74.
[241]Article 3(10), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996) (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93; Article 7, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172.
[242] Article 57(2)(a)(i), AP I.
[243] Article 57(2)(a)(ii), AP I.
[244] Article 57(3), AP I.
[245] Article 2(a)(iii), AP I.

legitimate target.[246]This provision appears redundant, given that indiscriminate attacks and excessive civilian harm are proscribed elsewhere.[247]Yet, planners of military operations are not necessarily the same individuals that execute an attack. Therefore, this provision imposes a special and personal obligation on all armed forces personnel to cancel or suspend an attack when information, which may call into question the legality of an attack, comes to light that was not available at the planning stage.[248]

The requirement to take precautionary measures to verify the legitimacy of an intended target and to select means and methods of attack to avoid or minimise civilian harm facilitates an attacking party's adherence to the principles of distinction and proportionality. However, as previously stated, despite its connection to these principles, the requirement to take precautionary measures is an independent aspect that must be satisfied throughout a military operation. This point is demonstrated by the possibility that a discriminate and proportionate attack could still contravene the precaution principle, for instance, when a less harmful target was available and not selected. In practice, precautionary measures can incorporate a broad range of steps to be taken by an attacking party prior to a military operation. These may include the use of precision-guided munitions instead of dumb bombs; attacking rural rather than urban areas or choosing a weapon that is likely to cause less collateral damage, such as sniper fire rather than an explosive missile. However, what constitutes a precautionary measure is heavily reliant on the context in which a military attack is conducted. Clearly, an aerial attack against a military target located in a highly populated area would require more substantial and varied precautionary measures than a conventional battlefield confrontation in a remote region. Therefore, assessments of an operation's compliance with the principle of precaution must take place on a case-by-case basis and consider the unique circumstances of each attack.

Notably, an attacker has an obligation to take "feasible" precautions, described as measures that are 'practicable or practically possible taking into account all circumstances that are ruling at the time, including humanitarian and military

[246] Article 2(b), AP I.
[247] J-F.Quéguiner, 'Precautions under the Law Governing the Conduct of Hostilities' (2006) 88(864) *International Review of the Red Cross* 793, p803.
[248] Ibid.

considerations'.[249]Thus, the duty to take precautionary measures is not absolute[250]and what is deemed feasible is influenced by military and humanitarian factors.[251]For instance, if there is a small window of opportunity to strike a target that would be expected to produce a substantial military advantage, it is unrealistic to expect an attacking party to take the same precautions as it would when there is a greater time-frame to consider the full ramifications of an attack. Additionally, if a significant military target is identified in a particular area, it would be illogical for a warning to be delivered to civilians in the area prior to a military attack, as this may alert the target of the imminent operation and enable them to evade the attack. Nonetheless, unless the planning and decision-making processes of a particular operation are shared, which is rarely the case, it is difficult to know what information the attackers knew prior to an operation and whether alternatives were available.[252]

The publicly available information about the Reyaad Khan operation suggests that the UK took adequate precautions prior to the targeted killing. Then-Prime Minister David Cameron proclaimed that the strike occurred as no alternative to direct action was available.[253]By referencing the lack of Syrian governmental authority in the area where Khan was located and the absence of British troops on the ground, the then-Prime Minister's statement implies that the UK considered whether the threat posed by Khan could be mitigated by detention, either by the Syrian authorities or British armed forces. The subsequent Intelligence and Security Committee inquiry into the operation also confirms that the UK considered the possibility of Khan leaving Syria and was prepared to seek an international arrest warrant and begin extradition proceedings to achieve a criminal justice outcome.[254]Moreover, it is self-evident that the UK took extensive steps to verify the identity of Khan. Furthermore, the drone strike occurred whilst Khan was travelling in a rural area near Raqqa, which corroborates with the UK suggestion that the optimal time to strike was chosen to spare the civilian population from its effects.[255]

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[249] Article 3(10), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996
[250] W.Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia' (2001) 12(3) *European Journal of International Law* 489, p501.
[251] M.Sassoli, (n6) p366.
[252] Ibid p367.
[253] HC Deb 7 September 2015, cols 25-26.
[254] ISC Report p17, para 43.
[255] HC Deb 7 September 2015, col 26.

For future targeted killing operations, it will be necessary to assess on a case-by-case basis whether adequate precautions were utilised. However, it must be recognised that the technological capabilities of armed drones facilitate adherence to the principle of precaution. Notably, the cameras and sensors onboard drones, combined with the ability to loiter over targets for extended periods, enhances the capacity of drones to track and verify a target.[256] Moreover, drones can fly for longer periods than other aircraft, providing drone operators a larger window of opportunity to launch an attack. Consequently, the timing of an attack could be chosen to allow for the greatest chance of hitting a target whilst preventing or minimising civilian harm.[257]Additionally, because drone pilots operate remotely, it can be argued that they are placed in a comparatively less stressful combat situation than those located in the vicinity of a battlefield facing physical danger and, consequently, in a better position to calmly assess the situation and make targeting decisions.[258]Finally, the precision missiles attached to drones can ensure that attacks strike their intended target, minimising the risk of collateral harm. Although, it must also be noted that the power of such missiles makes their use in densely populated areas problematic with respect to the precautionary principle. Interestingly, given the capabilities of armed drones could lead to greater protection for civilians, Rosen posits whether there may well be an obligation to employ drone technology instead of other weapons platforms, when drones are available.[259]

4(5) Prohibition of Specific Means and Methods of Warfare

IHL imposes limitations on the means and methods that a party to a conflict may utilise. In relation to the UK Policy, there are two issues that must be assessed when considering the permissibility of drone-operated targeted killing under IHL: the lawfulness *per se* of armed drones and the legality of targeted killing.

[256] C.Markham & M.Schmitt, 'Precision Air Warfare and the Law of Armed Conflict' (2013) 89 *International Law Studies* 669, p689; J.Pejic, 'Extraterritorial Targeting' pp69-70.
[257] M.Sassoli, (n6) pp515-516; C.Markham & M.Schmitt Ibid; J.Pejic Ibid p70.
[258] M.Sassoli Ibid p516; C.Markham & M.Schmitt Ibid. Note, this analysis does not seek to suggest that drone pilots are unaffected by the psychological effects of armed conflict. For an example of the trauma experienced by drone pilots, see S McCammon, 'The Warfare may be Remote but the Trauma is Real' (*NPR*, April 2017) <https://www.npr.org/2017/04/24/525413427/for-drone-pilots-warfare-may-be-remote-but-the-trauma-is-real>
[259] F.Rosen, 'Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility' (2014) 19(1) *Journal of Conflict and Security Law* 113, pp125-130.

Presently, there is no specific treaty or rule of custom that bans armed drones.[260]This is unsurprising because the technological capabilities of armed drones can facilitate compliance with the principles of distinction, proportionality and precaution. It is proposed that in terms of ensuring respect for IHL, armed drones could be a *preferred* weapons platform in certain operations.[261]Nonetheless, bans on the use of certain weapons, such as chemical or biological weapons or the use of cluster munitions, continue to apply when deployed from a drone. However, in this context, it is the way a drone is used, rather than utilisation of drone technology, which raises legal issues. Like any other weapon, armed drones can be used in contravention of IHL, but their use is not prohibited in armed conflict.

The analysis of the operation against Reyaad Khan demonstrates that targeted killings can be conducted in compliance with IHL. The intentional, deliberate and pre-meditated killing of pre-identified individuals is an extreme example of the distinction principle put into practice. Moreover, targeting specific individuals would also require extensive target verification in line with the precaution principle. Whether a targeted killing operation complies with the principles of distinction, proportionality and precaution must be assessed on a case-by-case basis, but there is nothing inherently illegal about this tactic under IHL.

4(6) Summary

For lethal force to be 'lawful' under IHL, the killing must obey the principles of distinction, proportionality, and precaution. Additionally, lethal force must not be administered by banned weapons or through prohibited means. The use of armed drones is not illegal under IHL, nor is targeted killing forbidden. Therefore, assessing the legality of UK targeting killing operations under IHL requires consideration of the following questions:

- Was the victim a legitimate military target?
- If collateral harm was caused, was this excessive?
- Were feasible precautionary measures taken to prevent or minimise civilian harm?

[260] J.Pejic, 'Extraterritorial Targeting' p69.
[261] I.Henderson & B.Cavanagh, 'Unmanned Aerial Vehicles: Do They Pose Legal Challenges?', in H Nasu & R McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, (Springer, 2014) pp203–204; F.Rosen (n259) pp127-131.

In NIAC, civilians lose their protection from being targeted whilst they directly participate in hostilities. Furthermore, members of a non-State party to a NIAC (those who possess a 'continuous combat function'), whose status derives from repeated acts of direct participation in hostilities, are legitimate military targets. The UK Policy seeks to neutralise terrorist threats and those that either seek to carry out or orchestrate acts of terrorism can be regarded as directly participating in hostilities, even if their terrorist attack does not materialise. For those that facilitate terrorist attacks to be regarded as directly participating in hostilities, they must play a key role in its planning, such as the recruitment of specific individuals to carry it out or the identification and selection of a particular target, which was the role Reyaad Khan possessed for ISIS.

When assessing whether an individual is a legitimate military target, the entirety of their conduct should be considered. Though the UK Policy seeks to prevent terrorism, compliance with the distinction principle under IHL requires the targeted person to either directly participate in hostilities or be a member of the non-State party to the NIAC, which need not necessarily arise through committing or organising acts of terrorism. However, where there is uncertainty about whether an individual is protected from being targeted, the UK should assume lethal force is prohibited.

The proportionality of a targeted killing operation can only be assessed by weighing up the civilian harm caused, and the military advantage gained. There is no precise formula for determining the excessiveness of collateral harm, but assessments must be based on a case-by-case basis considering the circumstances of each military operation differs. For UK targeted killings, the terrorist threat that operations seek to neutralise would need to be balanced against any collateral harm caused. The greater the severity of the terrorist threat that the UK aims to address through targeted killing, the more collateral harm that would be tolerated.

The precautionary principle requires feasible measures to be taken to prevent or minimise civilian harm. There are a wide range of precautionary measures that could be utilised, and their availability will depend on the nature of the military operation in question. Thus, like the proportionality principle, assessments on compliance with the precautionary principle must be made on a case-by-case basis. Yet, it should be noted that the technological capabilities of armed drones facilitate the utilisation of precautionary measures that can minimise or prevent civilian harm. For instance, the enhanced ability of drones to fly for longer period than other aircraft and

loiter over a target provides a larger window of opportunity to select the optimum moment to deploy lethal force, which could be when the target is in a rural area or civilians are not nearby. Moreover, the cameras and sensors on armed drones, in addition to their loitering capability, can enhance target verification to ensure that civilians are not erroneously targeted.

The previous sections demonstrate that there are a range of legal issues that must be considered on a case-by-case basis when assessing the compliance of a drone-operated targeted killing operation with the law of NIAC. However, it is proposed that the killing of Reyaad Khan was 'lawful' under IHL. Yet, though the UK was engaged in an armed conflict with ISIS in Iraq by answering the request for support from the Iraqi Government, Reyaad Khan was killed in Syria. This raises the question as to whether lethal force in Syria can be incorporated within the prevailing armed conflict in Iraq. This issue will be addressed in the next section, where we will examine the geographical scope of the law of NIAC.

5. The Scope of the Law of Armed Conflict

Section 3 considered the requirements for an armed conflict to arise between a state and a NSA, the existence thereof being a prerequisite for the applicability of the law of NIAC. Subsequently, Section 4 examined how the law of armed conflict regulates lethal force during NIAC, which demonstrated the principles that must be obeyed for killing to be 'lawful' under IHL. However, we have not yet considered when conduct occurs within the context of an armed conflict so as to be regarded as an 'act of war'. The following section will examine the scope of the law of NIAC to establish when conduct, in particular lethal force, is incorporated within an ongoing NIAC. Initially, we will consider the applicability of the law of NIAC throughout the territory where the conflict originates. After considering the 'internal' scope of the law of NIAC, we will assess its 'external' applicability by examining whether, in what circumstances and to what extent, the law of NIAC applies beyond the territory where the conflict materialised.

5(1) The 'Internal' Applicability of the Law of NIAC

Conventional IHL does not specifically delineate the geographical boundaries of conflict.[262]Nonetheless, international jurisprudence has made a pivotal contribution in defining the scope of the law of NIAC. In *Tadić*, the ICTY noted that the law of NIAC applies throughout '…the whole of the territory under the control of a party, whether or not actual combat takes place there.'[263]Subsequently, the ICTR in *Akayesu* opined that IHL '…must be applied to the whole State engaged in the conflict.'[264]In *Rutaganda*, the ICTR amended its *Akayesu* formulation by dispensing with the requirement that a State must be engaged in the conflict, holding that IHL "…extends throughout the territory of the State where the hostilities are occurring…"[265]

Undoubtedly, IHL applies to hostilities, otherwise referred to as the 'zone of combat',[266] 'theatre of war'[267]or 'battlefield',[268]which refers to "the (collective) resort by the parties to the conflict to means and methods of injuring the enemy."[269]In NIAC, there is a tendency for hostilities to be circumscribed to limited and identifiable areas.[270]However, the ad hoc tribunals endorsed the extension of the law of NIAC beyond the 'battlefield' to the borders of the State where hostilities occur. This interpretation of the scope of the law of NIAC to 'internal' hostilities has also been adopted within the recent updated commentary on GC III.[271]

Unsurprisingly, the ad hoc tribunals expansively interpreted the scope of IHL. After all, the go-to defence for an alleged war crime is to deny that the relevant conduct occurred within an armed conflict, which would preclude the alleged wrongdoing being a 'war crime', rendering it outside the jurisdiction of the tribunal.[272]Thus, by defining the geographical scope of IHL on a territorial basis, the ad hoc tribunals ensured that parties could not evade their criminal responsibility under IHL by acting or locating themselves away from the 'battlefield'.[273]Yet, at the same time, the ad hoc tribunals

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[262] L.R Blank, 'Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat' (2010) 39(1) *Georgia Journal of International and Comparative Law* 1, p11.
[263] *Tadić Interlocutory Appeal* §70.
[264] *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) §§635-636.
[265] *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Judgment) ICTR-96-3-T (6 December 1999) §102.
[266] Article 5(2)(c), AP II; Article 19, GC III.
[267] H Lauterpacht, *'Volume 2 of International Law: A Treatise. Disputes, War and Neutrality by L Oppenheim'* (7th Edition, Green & Co, 1952) p237; L R Blank (n262).
[268] L R Blank Ibid; N.Lubell & N.Derejko (n78) p85.
[269] *Interpretive Guidance* p43.
[270] N.Lubell & N.Derejko (n78) pp70-71.
[271] GC3 III Commentary 2020, para 493.
[272] This argument was posited by the Appellant in *Tadić Interlocutory Appeal* §66.
[273] N.Lubell & N.Derejko (n78) pp74-75.

recognised that not all acts within the territory where hostilities are occurring will be regulated by the law of NIAC and restricted the application of IHL to conduct possessing a 'nexus' to the armed conflict.

For the ICTY, an act possesses a 'nexus' to the armed conflict whenever the armed conflict plays a substantial part in a perpetrator's ability to commit an act, their decision to commit it, the manner in which it was committed or the purpose for which it was committed.[274]Simply put, if a perpetrator has 'acted in furtherance of or under the guise of the armed conflict',[275]their conduct is connected to it. Yet, the current assessment is not seeking to determine the applicability of IHL for the purposes of establishing whether a targeted killing constitutes a war crime.[276]Rather, we are concerned with identifying when the targeting rules of the law of NIAC are applicable to lethal force so that we can then consider whether such rules have been complied with. The applicability and the application of IHL are two separate issues. However, in the context of lethal operations, the issues are linked by the concept of direct participation in hostilities.

As set out previously, a constitutive element of direct participation in hostilities is the 'belligerent nexus'.[277]The 'belligerent nexus' concept, which presupposes a close relation to not only an armed conflict but also to the hostilities between the parties to that conflict,[278]is narrower than the general 'nexus' concept developed by the ad hoc tribunals. The general 'nexus' concept is broader and can link conduct that is unconnected to actual hostilities to the prevailing armed conflict, such as hostage-taking and the ill treatment and summary execution of persons in physical custody.[279]Therefore, all conduct possessing a 'belligerent nexus' retains a general 'nexus' to the conflict. Consequently, the targeting rules of NIAC will apply to persons that directly participate in hostilities, even if they are participating remotely. This is a logical approach because, though an individual's physical location on the 'battlefield'

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[274] See *Prosecutor v. Dragoljub Kunarac et al* (Appeals Chamber Judgment) ICTY-96-23 & IT-96-23/1-A (June 12, 2002) §58 (Henceforth, *Kunarac Appeals Chamber Judgment*); See also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, (Appeals Chamber Judgment) ICTR-96-3-A (26 May 2003) §570.
[275] *Kunarac Appeals Chamber Judgment* §58.
[276] Whether an act amounts to a war crime would need to be assessed in relation to its adherence to the relevant provisions of IHL.
[277] See section 4(2)(1)(iii).
[278] N.Melzer, 'Fourth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report' (*ICRC*, 2006) <https://www.icrc.org/en/doc/assets/files/other/2006-03-report-dph-2006-icrc.pdf> p35.
[279] *Interpretive Guidance* p62.

facilitates participation in hostilities, locating oneself away from the 'battlefield' does not preclude participation. For instance, a commander can plan and orchestrate military operations remotely via radio communication.[280]

To summarise, the law of NIAC regulates all conduct that possesses a 'nexus' to the armed conflict. For lethal force, the targeting rules of NIAC will apply to persons subject to fatal force that directly participate in hostilities, due to their possession of a 'belligerent nexus' to the conflict. Therefore, if the UK is engaged in a NIAC in State A, targeted killing operations will be regarded as an 'act of war' when utilised against persons that directly participate in hostilities, wherever they may be located within State A. We will now consider whether the law of NIAC that applies throughout State A can spread beyond the territory and apply externally. This analysis will shed light on whether the targeted killing of Reyaad Khan in Syria could have been incorporated within the NIAC that the UK was a party to against ISIS in Iraq.

5(2) The 'External' Applicability of the Law of NIAC

There are numerous examples where a NIAC has been recognised, as a matter of fact, as spreading beyond the State where it originated.[281]We are concerned with whether the applicability of the law accompanies the spread of the conflict, in what circumstances this occurs and if there is any geographical restriction that confines the applicability of the law of NIAC beyond State A.

a. Rejecting the Restriction of the Law of NIAC to the Territory of a Single State

There is a narrow interpretation of CA3 which views its applicability as confined to NIACs within a single state.[282]This view is supported by a plain reading of the language employed in CA3,[283]which refers to NIAC as "occurring in the territory of *one* of the High Contracting Parties".[284]AP II contains a similar territorial clause with Article 1(1) providing that the Protocol applies to NIAC that 'take place in the territory of *a* High Contracting Party'.[285]Like CA3, this language could be interpreted as precluding the 'external' applicability of AP II.

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[280] N.Lubell & N.Derejko (n78) p85.
[281] See M.Milanovic, 'The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts' in A Clapham *et al* (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, 2015) pp42-46, referencing various 'spill-over' conflicts such as the Colombian Armed Forces and the Revolutionary Armed Forces of Colombia (FARC) into Ecuador; N.Melzer, *'Targeted Killing in International Law'* (OUP, 2008) pp259-260 (citing a range of spill over situations).
[282] J.Pictet, *Commentary on GC IV 1958*, p36.
[283] J.Pejic, 'The Protective Scope of Common Article 3' p199.
[284] Emphasis added.
[285] Article 1(1), AP II. (emphasis added)

The language of the conventional law of NIAC appears to support a narrow reading of its geographical scope. However, there is nothing in the drafting history of CA3 that indicates that the terminology utilised excluded its application to NIACs involving the territory of more than one State.[286]In 1946, the Preliminary Conference of National Red Cross Societies proposed the application of CA3 '(i)n the case of armed conflict within the borders of a State'[287]and the accompanying report similarly referred to civil wars 'within the frontiers of a State'.[288]However, this formulation was rejected and in 1948, the ICRC submitted a draft text to the International Conference of the Red Cross in Stockholm, which was approved and put to the Diplomatic Conference of 1949, which provided that:

> In all cases of armed conflict not of an international character, especially cases of civil war, colonial conflicts or wars of religion, which may occur on the territory of *one or more* of the High Contracting Parties, the implementing principles of the Convention shall be obligatory on each of the adversaries.[289]

Sivakumaran argues that the language of the draft text is a direct response to the earlier formulations, which sought to restrict the application of the Convention to wholly internal violence.[290]Yet, the wording approved at the Stockholm Conference differed from that adopted at the Diplomatic Conference. No longer did the treaty text refer to NIACs as occurring 'on the territory of *one or more* of the High Contracting Parties' but to '*one* of the High Contracting Parties'.[291]

The change in wording from the Stockholm Conference to the Diplomatic Conference may suggest that the drafting States sought to impose a geographical restriction on the application of CA3. However, Pejic states that nothing from the Diplomatic Conference reveals that States had an express intention to limit the application of CA3 to the territory of a single State.[292]Instead, the focus of negotiations at the Diplomatic Conference was the extent of regulation to which NIACs should be

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[286] N.Melzer (n281) p258.
[287] ICRC, 'Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Convention and of various Problems relative to the Red Cross (Geneva, 26 July-3 August 1946' (1947) p15.
[288] Ibid.
[289]Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol. II-B (1950-1951) p122 (emphasis added). (Henceforth, *Final Record of the Diplomatic Conference of Geneva of 1949*)
[290] S.Sivakumaran (n31) p229.
[291] Emphasis added.
[292] J.Pejic, 'The Protective Scope of Common Article 3' p12.

subject.[293]The two options available to States were that either the entirety of the Geneva Conventions would be applicable to a limited range of NIACs or that a narrow set of protections would apply to all NIACs.[294]States were concerned that the extension of the Geneva Convention protections to non-state adversaries would be viewed as a sign of legitimisation, whilst they also opposed granting prisoner of war status to captured rebels.[295]Therefore, States adopted the second option, resulting in the content of CA3 that exists today, a "miniature Convention"[296]codifying a limited number of protections applicable to every NIAC.

Though the focus of the debate during the Diplomatic Conference was 'elsewhere' and not concerned with the geographical scope of CA3,[297]the territorial clause remained within the treaty text. Melzer explains that because CA3 does not require the participation of a Contracting State as a party to the conflict, it is only logical that this criterion is replaced by the prerequisite of a territorial link to a Contracting State.[298]Melzer adds that the novelty of CA3 is that each Contracting State established binding rules for itself but also for non-state parties that were not involved in the legislative process. The authority to do so derives from the Contracting State's domestic legislative sovereignty, as a result of which a territorial requirement was incorporated into CA3. Yet, Melzer posits that this requirement does not mean that a conflict governed by CA3 cannot take place on the territory of more than one Contracting State. Rather, from the perspective of a newly drafted treaty text, it appears more appropriate to interpret the phrase in question simply as emphasising that CA3 could only apply to conflicts taking place on the territory of states that had already ratified the conventions.[299]Therefore, the purpose of the territorial clause was included within CA3 to indicate that the treaty provisions could only apply to and within the territory of State parties.[300]Given the universal ratification of at least one of the

[293] Ibid.
[294] *Final Record of the Diplomatic Conference of Geneva of 1949*, p122.
[295] J.Pictet, *Commentary on GC IV 1958,* p31.
[296] *Final Record of the Diplomatic Conference of Geneva of 1949,* p.326; L.Cameron *et al* 'The Updated Commentary on the First Geneva Convention – A New Tool for Generating Respect for International Law' (2015) 97(900) *International Review of the Red Cross* 1209, p1217.
[297] J.Pejic, 'The Protective Scope of Common Article 3' p12.
[298] N.Melzer (n281) p258.
[299] Ibid.
[300] M.Sassoli, (n6) pp180-181.

Geneva Conventions, a NIAC cannot take place anywhere other than on the territory of a 'High Contracting Party',[301]making the territorial reference within CA3 redundant.

With respect to AP II, which 'develops and supplements' CA3,[302]it is logical that the territorial reference should be viewed as having the same function. As the ratification of AP II is not universal, in determining its applicability to a NIAC, it is necessary to consider whether the conflict occurs on the territory of a 'High Contracting Party'. Moreover, unlike CA3, the application of AP II contains the additional requirement that the hostilities take place between the armed forces of a State Party and a NSA that controls a part of *its* territory.[303]Nevertheless, despite the non-universal ratification of AP II and the additional requirements for its application, the Protocol is not purely 'internal'.

Additionally, it should also be noted that if States had intended to impose a restriction on the geographical scope of NIACs, the language adopted by CA3 and AP II could have simply referred to conflicts fought within a *single* High Contracting Party or within the territory of one High Contracting Party *alone.*[304]It is submitted, the absence of such explicit language can be construed as further evidence that no such limitation was intended. Moreover, Pejic proclaims that, even if one contends that the original formulation of the treaty law of NIAC restricted their application to conflicts within a single State, its provisions could be evolutively interpreted to apply to any NIAC, regardless of the geographical scope of the hostilities.[305]

It is submitted that the law of NIAC should have 'external' application to prevent a situation whereby IHL regulates NIACs within a single territory but isolated or sporadic acts of violence that take place across the border, which do not meet the intensity threshold to establish an independent NIAC, are excluded from its purview. This 'regulatory gap'[306]would clearly disregard the intentions of the ICRC, which held that CA3 'should be applied as widely as possible'.[307]Moreover, as Jinks alludes to, there is no principled rationale for the basic protections afforded by CA3 applying to 'internal' hostilities occurring within a single territory but not to those transcending the

[301] Ibid; N.Lubell (n13) pp101-104; N.Melzer (n281) p259; S.Sivakumaran (n31) p230.
[302] Article 1(1), AP II.
[303] Ibid (emphasis added)
[304] S.Sivakumaran (n31) p 230.
[305] J.Pejic, 'The Protective Scope of Common Article 3' p11.
[306]D.Jinks, 'September 11 and the Laws of War' (2003) 28(1) *Yale Journal of International Law* 1, pp40-41.
[307] J.Pictet, *Commentary on GC IV 1958*, p50.

border.[308]Therefore, given the object and purpose of CA3, to afford minimum protections to those not, or no longer actively participating in hostilities between a State and a NSA, it is logical that these protections continue to apply when the armed conflict spans across the territory of more than one State.[309]In such circumstances, the conflict endures and so does the need to protect those affected by the hostilities. Therefore, humanitarian considerations favour the 'external' applicability of the protections afforded by IHL[310]and it would be 'artificial' to discontinue the application of IHL because a conflict has spread across a border.[311]

There is now a 'growing acceptance' that the law of NIAC has 'external' application.[312]Numerous academics have rejected the restriction of the law of NIAC to hostilities within a single territory.[313]There is also State practice[314]and international jurisprudence[315]endorsing the 'external' application of CA3. Notably, the UK claimed during the JCHR inquiry that the law of armed conflict applied to the targeted killing of Reyaad Khan in Syria as a spill over from the conflict in Iraq.[316]Moreover, the recent commentary on GC III acknowledges that CA3 can apply to NIACs that cross borders,[317]which is evidence of the 'evolutive approach' in action because the previous commentary confined the application of CA3 to hostilities within a single territory.[318]

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[308]D.Jinks (n306) p41.
[309] GC Commentary III 2020, para 501.
[310] J.Pejic, 'The Protective Scope of Common Article 3' p15.
[311] M.Sassoli, (n6) p189.
[312] M.Schmitt, 'Charting the Legal Geography of NIAC' (2013) 52(1) *Military Law and the Law of War Review* 93, p102. (Henceforth, M.Schmitt, 'Legal Geography')
[313] See J.Pejic, 'The Protective Scope of Common Article 3'; N.Lubell and N.Derejko (n78); M.Milanovic & V.Hadzi-Vidanovic (n109); S.Sivakumaran (n31) p233; M.Schmitt, 'Legal Geography'; R.Goodman, 'Why the Laws of War Apply to Drone Strikes Outside "Areas of Active Hostilities" (A Memo to the Human Rights Community)' (*Just Security*, 4 October 2017) <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/>; J.Paust, 'Self Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan' (2010) 19(2) *Journal of Transnational Law and Policy* 237, pp274-5.
[314]Netherlands, Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague, July 2013, p3. Controversially, since 9/11 the US has claimed to be in a global armed conflict against multiple NSAs. See, for example: *The National Security Strategy of the United States of America* (2002), preamble; *The National Security Strategy of the United States of America* (2010)*, p19; The National Security Strategy of the United States of America* (2015), p9.
[315] See previous discussion in Section 2(2) on the Statute of the ICTR, established by UNSC Resolution 955 (1994), which empowered the Court to prosecute violations of CA3 and AP II in the States neighbouring Rwanda.
[316] JCHR Report: Government Response, p31, para 2.11
[317] GC Commentary III 2020, para 504.
[318] J.Pictet, *Commentary on GC IV 1958*, p36.

There is significant support for the 'external' applicability of the law of NIAC. Therefore, the narrow interpretation of the law of NIAC, which limits its applicability to a single state, can be rejected. Acknowledging that the law of NIAC can extend beyond the territory of the conflict's origin now necessitates a consideration of when 'external' applicability occurs.

b. Circumstances Resulting in the 'External' Applicability of the Law of NIAC

The clearest example whereby the law of NIAC applies externally is the continuation of hostilities, such as when government forces penetrate the territory of a neighbouring State to engage a NSA operating in the border regions.[319]In this situation, the ICRC has proclaimed that:

> Spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.[320]

Thus, if hostilities in State A 'spill over' into neighbouring State B, the law of NIAC will continue to apply. However, there is also an acceptance of the 'external' application of the law of NIAC in the absence of 'spill over' hostilities. During Operation Enduring Freedom in Afghanistan, Al-Qaeda and the Taliban used the mountainous tribal areas of Pakistan as a safe haven and springboard for their raids and attacks against US forces in Afghanistan.[321]Frequently, the US responded with armed drones to target Al-Qaeda and Taliban militants in Pakistan.[322]There is recognition, markedly from Amnesty International, that these operations could represent a continuation of the NIAC in Afghanistan and be regulated by IHL.[323]

It is posited that the 'external' applicability of the law of NIAC, even in the absence of hostilities, is favourable. If the applicability of the law was contingent on the 'spill over' of hostilities, a NSA engaged in a conflict in State A could establish a

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[319] M.Schmitt, 'Legal Geography' p103.
[320]ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report of the 31st International Conference' (2011) pp9-10.
[321] C.Schaller (n77) p223; J.Paust (n313) p237.
[322] M.Milanovic & V.Hadzi-Vidanovic (n109) p37; The majority of US Drone Strikes occurred between 2008 and 2010, see J.Serle, 'Naming the Dead: Shining a Light on the US Drone War' (*The Bureau of Investigative Journalism*, 16 April 2018) <https://www.documentcloud.org/documents/4438377-NTD-REPORT-18-April-2018.html> p32; M.Brookman-Byrne (n77) p19.
[323] Amnesty International, '"Will I Be Next?": US Drone Strikes in Pakistan' (2013) <https://www.amnesty.org/en/wp-content/uploads/2021/06/asa330132013en.pdf> pp44-45. See also M.Brookman-Byrne Ibid pp14-17; N.Lubell & N.Derejko (n78) p83.

base in an inaccessible region of neighbouring State B to train their fighters, store weapons and launch cross-border attacks in State A. Consequently, in the absence of confrontations between the NSA and the armed forces of State A in the vicinity of the base, the inapplicability of the law of NIAC would enable the NSA to exploit the geographical limitation to shield itself from the robust targeting regime of IHL. Not only is this an advantage for the NSA but it is also a disadvantage to the State party, which would be restricted to targeting the NSA for such time as they are located within its territory. It would be perverse if critical military infrastructure and those conducting cross-border attacks could be regarded as outside the reach of the law of NIAC, despite playing an integral role in the armed conflict, simply due to their location across the border of the State where the conflict emerged.

When Reyaad Khan was killed on 21 August 2015, ISIS operated as a single entity across Iraq and Syria. In 2014, the UK joined a coalition of States in support of Iraq in their NIAC with ISIS. At the same time, in response to ISIS controlling large swathes of territory across Iraq and Syria, the US led coalition began an aerial campaign against ISIS in Syria, spreading the hostilities from Iraq into Syria. The JCHR inquiry accepted that the operation was connected to the NIAC against ISIS that the UK was a party to in Iraq, which had spilled into neighbouring Syria.[324] Therefore, the operation remained a part of the wider armed conflict previously outlined because it clearly benefitted Iraq and its coalition partners in their fight against ISIS by weakening the terrorist group.[325]

c. Geographically Unbound: The Global Applicability of the Law of NIAC

The focus of this section is to examine the geographical scope of the law of NIAC's 'external' applicability. There are two strands to this examination. First, we will consider the scope of the law of NIAC to a territory where hostilities 'spill over'. Second, we will assess whether, in the absence of 'spill over' hostilities, there is a geographical limit to the reach of the law of NIAC.

With respect to the first issue, 'questions remain' about how far the law of NIAC extends into a territory affected by 'spill over' hostilities.[326]In an 'internal' NIAC, the law can apply throughout the entire State. However, it is unsettled whether the scope of the law's applicability in State B, would mirror that in State A. It is proposed that the

[324] JCHR Report: Government Response, p4, para 6.
[325] A.Sari & N.Quenivet, (n237) p7.
[326] GC III Commentary 2020, para 510.

law of NIAC should apply throughout State B when there is a continuation of hostilities from State A. Yet, the applicability of the law of NIAC will be limited to places, conduct or persons that are connected to the 'spill over' hostilities. Thus, a 'nexus' to the continuation of the armed conflict would be necessary for IHL to apply. Limiting the applicability of the law of NIAC to the area where hostilities occur in State B would be inconsistent with the law's application in State A. Moreover, individuals in State B are just as capable of remotely participating in hostilities as those in State A. It would be undesirable to enable those that take part in hostilities in State B to absolve themselves of their obligations under IHL and acquire immunity from direct attack by locating themselves away from the area where hostilities are occurring.

The incorporation of US drone operations in Pakistan within the armed conflict in Afghanistan, despite the absence of hostilities in Pakistan, necessitates a consideration as to whether there is any limit to the reach of the law of NIAC. The US drone strikes in Pakistan took place in North Waziristan, a mountainous region that borders Afghanistan. However, could the targeting of Al-Qaeda and Taliban militants located 50,100 or even 200 kilometres away from the border be regarded as occurring within the scope of the NIAC in Afghanistan?

When a US raid killed Osama bin Laden in a compound in Abbottabad in 2011, an area which had not seen any active combat and is closer to the India than the Afghanistan border, scholars considered whether the operation could be incorporated within the armed conflict in Afghanistan.[327]In assessing the application of IHL to the killing of Osama bin Laden, the fundamental issue was whether bin Laden remained actively involved in Al-Qaeda operations in Afghanistan whilst residing in the Abbottabad compound.[328]Thus, the applicability of the law of NIAC was viewed as depending on whether bin Laden retained a 'belligerent nexus' to the hostilities in Afghanistan.

If we assume that bin Laden retained a key role in the hostilities in Afghanistan and that, as a result, the US raid was regulated by the law of NIAC, which would have been the case if the operation took place in the border regions of Pakistan, would the law of NIAC have applied wherever the raid took place? Hypothetically, if the military

[327] C.Schaller (n77) p223; S.Sivakumaran (n31) p251; APV.Rogers and D.McGoldrick, 'Assassination and Targeted Killing-The Killing of Osama Bin Laden' (2011) 60(3) *International and Comparative Law Quarterly* 778.
[328] C.Schaller Ibid p224.

leadership of a NSA is directing hostilities in State A from State B, which does not border or lie adjacent to State A, is the applicability of the law of NIAC precluded? In such circumstances, the only reason for limiting the reach of NIAC is remoteness. Yet, Lubell and Derejko note that the distance between an individual and the location of hostilities does not necessarily negate their direct participation in the hostilities.[329]Moreover, in an age of drone and cyber warfare, which facilitates attacks far from any conventional battlefield, Goodman argues that it is not viable to geographically circumscribe IHL to States that either neighbour or are adjacent to a prevailing conflict.[330]Sivakumaran also describes the imposition of such a limitation as an arbitrary constraint on the application of IHL and proposes that a better approach for determining the applicability of the law is to require a 'nexus' between the conduct in question and the NIAC.[331]

There is growing academic support for an approach that focuses on persons, objects and conduct rather than geography when determining the scope of the law of NIAC. Accordingly, the law of NIAC is geographically unbound and applies wherever there is a 'nexus' to the conflict.[332]Consequently, the use of lethal force would be regulated by the law of NIAC whenever those targeted possess a 'belligerent nexus' to the armed conflict, wherever they may be located.

It is submitted that a nexus-based approach to determining the scope of the law of NIAC is appropriate. However, the ICRC has rejected a geographically unlimited approach to the applicability of IHL on the basis that it would lead to the acceptance of a "global battlefield".[333]It is important to note that the "global battlefield" referred to should not be conflated with the much maligned 'global war on terror' embraced by the US after 9/11.[334]According to successive US governments, the US was in a global NIAC with 'Al-Qaeda, as well as the Taliban and associated forces'.[335]This amorphous

[329] N.Lubell & N.Derejko (n78) p85.
[330] R.Goodman (n313); M.Sassoli, (n6) p190.
[331] S.Sivakumaran (n31) p251.
[332] See S.Sivakumaran (n31) p251; M.Sassoli, (n6) p190; C.Schaller (n77) p217; R.Goodman (n313); N.Lubell & N.Derejko (n78) pp86-87; M.Schmitt, 'Legal Geography' p104; M.Milanovic & V.Hadzi-Vidanovic (n109) p32; M.Milanovic (n281) p59.
[333]ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report of the 32nd International Conference' (2015) p15. (Henceforth, ICRC, Report of the 32nd International Conference); J.Pejic, 'Extraterritorial Targeting' pp102-103.
[334] The ICRC has rejected the legal concept of a "war against terrorism". See ICRC, Report of the 32nd International Conference, p19.
[335] H Koh, 'The Obama Administration and International Law' (*Speech at the Annual Meeting of the American Society of International Law*, 25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>

armed conflict integrates various Islamic extremist groups, which may share similar aspirations but do not operate within a shared organisational structure, as a single entity and belligerent party.[336]Consequently, the US views IHL as the applicable legal regime that governs all of its counterterrorism operations, regardless of their location.

Though proponents of the 'nexus' approach accept that the law of NIAC is geographically unrestricted, the extension of the law is contingent on persons, object or conduct possessing a 'nexus' to the armed conflict. Therefore, it would be inaccurate to suggest that it is the 'nexus' approach that extends the global scope of the law of NIAC. Rather, the 'nexus' approach merely recognises when an armed conflict has spread and ensures that the law follows accordingly. Thus, whilst the US 'global war on terror' created a "global battlefield" whereby all counterterrorism operations were viewed as regulated by IHL, the 'nexus' approach accepts that, hypothetically, a NIAC could *potentially* spread to anywhere across the globe. Therefore, the 'global battlefield' emanating from the 'nexus' approach is a different and narrower concept than the one posited by the US.

The potential global reach of a NIAC could have significant consequences for civilians and civilian objects within States that are not party to the armed conflict. For example, targeting an individual directly participating in hostilities from a non-belligerent State that results in the incidental loss of civilian life would not violate the law of NIAC if the deaths are proportionate to the military advantage gained. Therefore, a certain amount of 'collateral damage' of the civilian population would be permitted, considerably diminishing the protection of populations in non-belligerent States.[337]However, the *jus ad bellum* regime prohibits unilateral force on the territory of another state[338]unless conducted as an act of self-defence[339]or pursuant to a UNSC Resolution.[340]Consequently, even if the 'nexus' approach was accepted, this would not grant States *carte blanche* to use military force wherever it wished.

Advocates for the 'nexus' approach acknowledge that the application of the law of NIAC should be tailored to take into account situations when individuals are located

[336] C.Schaller (n77) p218; J.Pejic, 'Extraterritorial Targeting' pp82-83; M.Milanovic & V.Hadzi-Vidanovic (n109) p47.
[337] GC III Commentary 2020, para 514; J.Pejic, 'Extraterritorial Targeting' p104; M.Schmitt, 'Legal Geography', p107.
[338] Article 2(4), UN Charter.
[339] Article 51, UN Charter.
[340] Article 42, UN Charter.

far away from hostilities.[341]Thus, although distance is not viewed as negating the operation of IHL, it may affect the substance of a rule.[342]With respect to lethal targeting, there is an acceptance that more restrictive targeting principles should apply the further away from the "battlefield" a strike occurs.[343]Sivakumaran proposes that in relation to direct attacks against those far removed from the core area of hostilities, fatal action should only be utilised when it is 'absolutely necessary'. Therefore, the application of the targeting rules of the law of NIAC would resemble the regulation of lethal force under human rights law, where killing is only permissible as a last resort, when it is the only way to achieve the military objective pursued.[344]

The *jus ad bellum* regime and the stringent regulation of lethal operations away from the core area of hostilities should assuage concerns that the 'nexus' approach will undermine the protection of civilian populations. Nevertheless, despite growing support for the 'nexus' approach in academic circles, there is scant state practice or *opinio juris* endorsing a potential 'global battlefield'. In contrast, there is broad acceptance that IHL follows the 'spill over' of a pre-existing conflict into neighbouring or adjacent territories. This 'spill over' may occur through spread of actual hostilities but could also include people, places or conduct that are connected to the prevailing conflict.

As the law stands, the 'external' applicability of the law of NIAC appears limited to neighbouring or adjacent States. Yet, it is arbitrary to impose a geographical constraint on the scope of the law of NIAC since the effects of an armed conflict or its participants are not confined to any specific location. Therefore, it is proposed that a nexus-based approach is more appropriate for determining the scope of the law of NIAC. Yet, despite accepting that a NIAC can 'spill over' into neighbouring or adjacent States, the ICRC has rejected the potential 'global battlefield' that the nexus-based approach could enable.[345]The advancement of technology that facilitates remote participation in hostilities ensures that the geographical scope of the law of NIAC will remain a pertinent issue in contemporary armed conflicts. Inevitably, the ICRC will be required to clarify the geographical limit on the applicability of the law of NIAC between

[341] S.Sivakumaran (n31) p251.
[342] Ibid p252.
[343] M.Sassoli, (n6) p190; D.Murray, *'Practitioners' Guide to Human Rights Law in Armed Conflict'* (OUP, 2016) p124.
[344] S.Sivakumaran (n31) p251; See also N.Lubell & N.Derejko (n78) p88.
[345] ICRC, 'Report of the 32nd International Conference' p19.

the ‘spill over’ it accepts and the ‘global battlefield’ it rejects.[346]Yet, in the recently updated commentary on GC III, the ICRC was less dismissive of the “global battlefield”, noting that the ‘relationship of a particular military operation to an existing armed conflict has to be assessed on a case-by-case basis.’[347]

5(3) Summary

When an armed conflict arises, not every act, person or place comes within the scope of IHL. In NIAC, the law applies ‘internally’ throughout the State where the conflict emerged to conduct, persons or places that have a ‘nexus’ the conflict. For lethal operations, those that directly participate in hostilities, either continuously or on an isolated basis, possess a ‘belligerent nexus’, which brings them within the scope of the targeting rules of NIAC. Consequently, targeted killings against persons that directly participate in the hostilities within the state where the NIAC originated, will be regarded as an ‘act of war’.

Though the law of NIAC may apply ‘externally’, the circumstances whereby the law extends beyond the territory where the conflict materialised, and the extent of its geographical reach are not settled. Yet, there is a broad acceptance that the law of NIAC follows ‘spill over’ hostilities in neighbouring or adjacent states and to regions utilised to launch cross-border military operations. However, to constitute an ‘act of war’, those targeted in neighbouring or adjacent states must possess a ‘nexus’ to the ‘spill over’ hostilities or to cross-border attacks. With the advancement of technology that facilitates the remote participation in hostilities, it is proposed that it is arbitrary to put a geographical limitation on the scope of the law of NIAC. Rather, when considering the reach of the law of NIAC, a better approach would be to focus on the connection (‘nexus’) between places, persons or conduct and the armed conflict. However, there is currently little state support or *opinio juris* in favour of a geographically unbound approach to the determination of the scope of the law of NIAC.

At the time of the Reyaad Khan killing, the UK was engaged in a NIAC with ISIS in Iraq. However, those hostilities had spread into Syria when the US coalition began an aerial campaign against ISIS there. Though the UK did not have parliamentary approval for conducting airstrikes in Syria alongside the coalition, ISIS operated as a

[346] M.Sassoli, (n6) p190.
[347] GC Commentary III 2020, para 516.

single entity across both territories and the military operations in Iraq and Syria were a part of the same NIAC. As Reyaad Khan directly participated in hostilities in Syria, the UK's targeted killing was an 'act of war' as the operation was connected to the NIAC against ISIS that the UK was a party to.

The targeted killing of Reyaad Khan serves as an illustrative example of the circumstances whereby lethal force deployed beyond the territory where a NIAC materialised can be regarded as within the scope of IHL. However, when utilising its Targeted Killing Policy, the UK should be cognisant that in the absence of an independent NIAC, it is only likely to be in neighbouring or adjacent states that the law of NIAC can apply 'externally' and that those subject to lethal force must possess a 'nexus' to the armed conflict.

6.Conclusion

This chapter examined when the targeted killing of terrorists would be regarded as a 'lawful act of war' and may be subject to derogation under the Convention. The existence of an armed conflict is a prerequisite for any conduct to be considered as an 'act of war'. An armed conflict between the UK and a NSA, such as a terrorist group, would be categorised as a NIAC, which requires 'intense' hostilities and an adequately 'organised' NSA to arise. There are a great deal of factors that must be considered when assessing the level of organisation that a NSA possesses and the intensity of a violent confrontation between a State and a NSA. However, an isolated drone strike cannot meet the threshold for a NIAC to arise due to the requirement of bilateral hostilities. Therefore, to be an 'act of war', the utilisation of targeted killing must take place within the context of a pre-existing NIAC, which may emerge because of the UK's own intense hostilities with an adequately organised NSA or, alternatively, the UK may become a party to a pre-existing NIAC in support of another State against a terrorist group.

Neither targeted killing nor the use of armed drones is prohibited under IHL. Therefore, whether a targeted killing is 'lawful' under IHL must be determined by assessing compliance with each of the principles of distinction, proportionality, and precaution. In NIAC, adherence to the distinction principle requires lethal force only to be directed at civilians that directly participate in hostilities or members of the NSA, whose membership status derives from the possession of a 'continuous combat function', evidenced by repeated acts of direct participation in hostilities.

The objective of the UK Policy is to combat terrorist threats and those that either seek to carry out or orchestrate acts of terrorism can be regarded as directly participating in hostilities, even if their terrorist attack does not materialise. For the organisers of terrorist attacks to be regarded as directly participating in hostilities, they must play a key role in its planning, such as the recruitment of specific individuals to carry it out or the identification and selection of a particular target. However, when considering whether the potential victim of a drone strike is a legitimate military target, the entirety of their conduct should be considered as they may directly participate in hostilities in ways that go beyond planning or conducting acts of terrorism.

The proportionality principle prohibits excessive civilian harm arising from the pursuit of a military advantage. Therefore, UK targeted killing operations must not cause collateral damage that exceeds the terrorist threat that the drone strike seeks to neutralise. Moreover, where targeted killing operations are likely to result in proportionate civilian harm, compliance with the precautionary principle will require feasible measures to be taken to minimise harm to civilians.

Though the existence of an armed conflict is a precondition for conduct to amount to an ‘act of war’, a state’s participation in an armed conflict does not mean that all its conduct becomes an ‘act of war’. The law of NIAC applies throughout the territory where the conflict materialised to conduct, persons or places with a ‘nexus’ to the armed conflict. Consequently, the lethal targeting of persons that directly participate in hostilities, whether that be sporadically or continuously, throughout the territory where the armed conflict emerged will be regarded as an ‘act of war’. This is because those that directly participate in hostilities possess a ‘belligerent nexus’, which is a narrower concept than the ‘general’ nexus. The law of NIAC can extend beyond the territory of the conflict’s origin. Yet, the extent of the law’s ‘external’ applicability is one of the most contentious issues in contemporary IHL. Nevertheless, there is broad acceptance that the law of NIAC can spread into neighbouring and adjacent States through the ‘spill over’ of hostilities or when those states are used as a springboard to execute cross-border attacks. However, if a targeted killing is deployed in a state that neighbours or is adjacent to where the conflict originated, those targeted must possess a ‘nexus’ to the conflict for the killing to be an ‘act of war’.

In broad terms, there are three issues that must be considered when assessing whether a UK targeted killing operation is a ‘lawful act of war’. The first issue to be examined is whether the UK is engaged in a NIAC with a terrorist group. If so, it must

then be contemplated whether the lethal force occurred within the context of the NIAC and in compliance with the targeting rules of the law of NIAC. Though the applicability of IHL and its application are two separate issues, the concept of direct participation in hostilities is central to determining whether the targeting rules of the law of NIAC apply to a targeted killing and whether the victim of fatal force was entitled to protection from direct attack.

Establishing whether a targeted killing operation constitutes a 'lawful act of war' can only be conducted on a case-by-case basis because the legal analysis relies on the factual circumstances of drone strike in question. Yet, it is proposed that the targeted killing of Reyaad Khan could be categorised as such. Though the drone strike against Reyaad Khan did not establish a NIAC between the UK and ISIS in Syria, the UK was already a party to a NIAC with ISIS in Iraq, which had spread into Syria. Reyaad Khan, through organising specific acts of terrorism and executing prisoners, directly participated in hostilities and the UK's drone strike, as a result, was incorporated within the wider armed conflict against ISIS that it was already engaged, which the JCHR inquiry acknowledged. Moreover, through direct participation in hostilities, Reyaad Khan was not protected from lethal force, the drone strike did not cause excessive civilian harm and by opting to target Khan whilst travelling in a remote area, the UK appeared to take adequate precautions to minimise collateral damage.

Had the UK derogated from the Convention when targeting Reyaad Khan, it is proposed that as a 'lawful act of war', the killing would have complied with the right to life under the ECHR. Yet, the targeted killing was not subject to derogation, which raises the question as to whether, and to what extent, the prevailing circumstance of an armed conflict alters the application of the right to life from the 'peacetime' standards discussed in Chapter Two. We will now move on to considering the concurrent applicability of the right to life during armed conflict.

Chapter Five

The Application of the Right to Life during Armed Conflict: Examining the Concurrent Application of the ECHR and IHL

1.Introduction

IHL and the Convention both regulate the use of lethal force, but there are marked differences in their approaches. Under the Convention, Article 2 prohibits all lethal force that is not 'absolutely necessary' to achieve one of the aims enumerated in Article 2(2).[1]Only exceptionally will killing be conducted in accordance with the right to life. In comparison, IHL affords a more expansive recourse to lethal force because combatants or members of a non-State party to an armed conflict may be targeted at any time except when their intention to surrender has been accepted or when *hors de combat.* [2]

During armed conflict, IHL and the ECHR apply concurrently.[3]Therefore, killing is regulated by two legal regimes with different and, at times, conflicting standards. Due to its comparatively permissive framework, there will be killings that comply with IHL but fall below the strict standards set out in Article 2. Pauwelyn describes this situation as a relationship of conflict between two norms, whereby adherence to one norm may lead to the contravention of another.[4]The consequence of a norm conflict is that the legality of a particular act depends on the framework through which lawfulness is assessed.[5]

In international law, there is a strong presumption against normative conflict and the duty to avoid or mitigate conflict extends to adjudicators.[6]To prevent the materialisation of a norm clash between IHL and Article 2 during armed conflict, states could bring the application of the right to life in line with IHL through derogation.[7]However, in the absence of a derogation, it would be incumbent on the Court to address any norm conflict that arises.

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[1] See Chapter Two, Section 2.
[2] See Chapter Four, Section 4.
[3] Assuming the jurisdictional threshold of Article 1 has been met.
[4] J.Pauwelyn, *'Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law'* (CUP, 2003) p272.
[5] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 p245, para 483. (Henceforth, ILC, 'Fragmentation of International Law')
[6] ILC, 'Fragmentation of International Law' p25, para 37.
[7] See Chapter Three, Section 5.

It is the position of the UK that Article 2 imposes no greater constraints on the effective pursuit of military activity than are clearly imposed by IHL.[8]Therefore, even without derogation, the UK regards compliance with IHL as satisfying its obligations under the right to life. To date, the ECtHR has not explicitly addressed the interaction between the regulation of lethal force under Article 2 and IHL. Notwithstanding, the Court has been confronted with norm conflicts throughout its jurisprudence. By scrutinising the cases where norm conflicts existed, this chapter seeks to identify a pattern within the Court's approach that will indicate how it would likely reconcile the divergent regulatory approaches of Article 2 and IHL. This will facilitate an assessment of the validity of the UK position that lethal operations that conform with IHL will not violate the right to life.

2.Norm Conflict Resolution

The existence of norm conflicts is not unique to the relationship between the Convention and IHL; they are a phenomenon that pervade international law. Norm conflicts can be either 'genuine' or 'apparent' and their categorisation alters the response needed to settle them.[9]An 'apparent' conflict arises where the content of two norms appear contradictory, but their incompatibility can be interpreted away.[10]A 'genuine' conflict cannot be avoided through interpretation but may be resolved by prioritising the application of one norm over another.[11]

The International Law Commission has detailed three maxims for establishing a priority between conflicting rules.[12]These maxims are *lex posterior derogate lege priori* (later law supersedes earlier law),[13]*lex superior derogate lege inferiori* (superior law supersedes inferior law),[14]and *lex specialis derogate legi generali* (specific law supersedes general law).[15]We will now consider the extent that the ECtHR has utilised these maxims to resolve norm conflicts within its jurisprudence.

2(1) Lex Posterior Derogate Lege Priori

[8] JCHR Report: Government Response p17.
[9] M.Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14(3) *Journal of Conflict & Security Law* 459, p465. (Henceforth, M.Milanovic, 'Norm Conflict')
[10] Ibid
[11] M.Milanovic Ibid; ILC, 'Fragmentation of International Law' pp24-25, para 36
[12] ILC Ibid.
[13] Ibid, pp116-117, para 225.
[14] Ibid, p166, para 324.
[15] Ibid, pp34-35, para 56.

In *Slivenko v. Latvia,*[16]it appeared that the Court embraced the *lex posterior* maxim.[17]*Slivenko* concerned the Latvian Government's deportation of the wife and daughter of a retired military officer of the USSR, pursuant to a Russian-Latvian Treaty of 1994 permitting the expulsion of certain former members of the USSR and their families from Latvian territory.[18]The applicants contended that their expulsion constituted a violation of their right to private and family life under the Article 8 of the Convention,[19]which Latvia had ratified three years after the bilateral treaty.

At the admissibility stage, the Latvia submitted that they had assumed at the time of ratifying the Convention that the bilateral treaty did not conflict with the ECHR. Consequently, Latvia claimed that its obligations under the Convention in relation to the bilateral treaty would be subject to a 'quasi-reservation' precluding the Court from examining the conformity of the Convention with any measures taken in accordance with the treaty.[20]The Court rejected this assertion and stated that:

> Ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention […] the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions.[21]

This statement could be interpreted as either giving 'precedence' to the Convention or a general confirmation that statutes enacted prior to the ratification of the ECHR are not exempt from the Court's scrutiny.[22]It is submitted that the latter is a more accurate reading because the Court did not utilise the *lex posterior* approach to *prioritise* the application of the Convention over the earlier treaty. Rather, the Court rejected Latvia's attempt to prioritise the bilateral treaty *over* the ECHR, claiming that the treaty '[c]annot serve as a valid basis for depriving the Court of its power to review whether there was an interference with the applicant's rights and freedoms under the

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[16] *Slivenko and Others v. Latvia* (dec.) [GC], no.48321/99, §59, ECHR-2002-II (Henceforth, *Slivenko* (*admissibility)*)
[17] S.Wallace, *'The Application of the European Convention on Human Rights to Military Operations'* (CUP, 2019) p143.
[18] The facts of the *Slivenko* (admissibility) case can be found between §§5-37; ILC, 'Fragmentation of International Law' p126, para 246.
[19] The complaints in the *Slivenko* (admissibility) case can be found at §§42-52.
[20] *Slivenko* (admissibility) §59.
[21] Ibid §§60-61.
[22] S.Wallace, (n17) p144; ILC, 'Fragmentation of International Law' p127, para 248.

Convention…'[23]At the merits stage, the Court found that the deportation was a violation of Article 8 but did not regard the bilateral treaty as *ipso facto* contrary to the Convention.[24]Thus, setting aside the Court's specific reasoning for finding a violation, the Convention was not prioritised over the bilateral treaty. Instead, the Convention guided how the earlier adopted treaty should be interpreted and applied by the relevant national authorities.[25]

In *Al-Adsani v. UK*, the Court was faced with another 'apparent' norm conflict. The applicant alleged that the English courts had denied access to a court in violation of Article 6 by barring civil proceedings against Kuwait on grounds of sovereign immunity,[26]which had prevented the pursuit of compensation from the Kuwaiti government for alleged torture. Therefore, the right to access a court under Article 6 seemed to clash with the customary international law principle of sovereign immunity, which emerged prior to the adoption of the Convention.[27]The ECtHR could have prioritised the Convention and found that the UK had violated the applicant's rights under Article 6. However, instead, the Court interpreted Article 6 in light of the relevant rules of international law and determined that the doctrine of State immunity did not constitute a disproportionate restriction on the right of access to a court pursuant to Article 6(1).[28]

Though the Court has not utilised the *lex posterior* maxim within its jurisprudence, its suitability in the international context is disputed. Milanovic posits that domestically, the *lex posterior* approach is apt for resolving conflicts between newer and older statutes on the basis that a single, uniform legislature would not intend to issue contradictory commands to its citizens.[29]However, international law does not possess a single legislative body and cannot be viewed as analogous to domestic legal systems.[30]Additionally, with specific reference to IHL and IHRL, Milanovic highlights the unsuitability of the *lex posterior* approach given that the development of these regimes has occurred in several temporal waves.[31]

2(2) Lex Superior Derogate Lege Inferiori

[23] *Slivenko* (admissibility) §62.
[24] *Slivenko v. Latvia* [GC], no.48321/99, §122, ECHR-2003-X. (Henceforth, *Slivenko* (merits))
[25] ILC, 'Fragemtnation of International Law' p126, para 246.
[26] *Al-Adsani v. United Kingdom* [GC], no.35763/97, §3, ECHR 2001-XI. (Henceforth, *Al-Adsani*)
[27] S.Wallace, (n17) p144.
[28] *Al-Adsani* §§ 55-56.
[29] M.Milanovic, 'Norm Conflict' p467.
[30] Ibid p468.
[31] Ibid.

As a tool for resolving norm conflicts, the *lex superior* maxim relies on a hierarchy of norms. However, normative hierarchy is not a significant feature of international law.[32]Yet, there are some elements of superiority in the international legal framework. Article 53 of the VCLT provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm (*jus cogens*) of general international law.[33]So far, the Court has never employed *jus cogens* to resolve a norm conflict[34]and it is difficult to envisage a scenario in which this method could resolve a conflict between the Convention and IHL.

Aside from *jus cogens*, Article 103 of the UN Charter provides a quasi-hierarchical rule of norm conflict resolution[35]with obligations under the Charter prevailing over conflicting obligations under any other international agreement. Article 103 elevates the Charter to the standing of a superior international treaty and, simultaneously, the obligations arising from the Charter are granted an enhanced hierarchical status.[36]In contrast to *jus cogens*, the application of Article 103 does not invalidate a conflicting obligation, which continues to apply once the countervailing UN obligation has ceased.[37]By virtue of Article 25 of the Charter, which requires States to comply with UNSC decisions, Article 103 extends to State obligations arising from Security Council Resolutions (SCR).[38]Therefore, if measures taken to comply with a SCR conflict with human rights obligations, the application of Article 103 should lead to the prioritisation of the former.[39]However, the case law of the ECtHR reveals a reluctance to subordinate the Convention provisions to the coercive effect of Article 103.[40]

In *Saramati v France, Germany and Norway*,[41]the applicant alleged that his arrest and 15-month period of extrajudicial detention by UN peacekeeping forces in

[32] Ibid p466.
[33] Article 53, Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[34] S.Wallace, (n17) p151.
[35] M.Milanovic, 'Norm Conflict' p466.
[36] J.Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E de Wet and J.Vidmar (eds), *Hierarchy in International Law* (OUP, 2012) pp18-19.
[37] S.Wallace, (n17) p146.
[38] M.Milanovic, 'Norm Conflict' p466; A.Tzanakopolous, 'Collective Security and Human Rights' in E de Wet and J.Vidmar (eds), *Hierarchy in International Law* (OUP, 2012) p49.
[39] A.Tzanakopolous, ibid pp51-52.
[40] S.Wallace, (n17) p146.
[41] *Saramati v France, Germany and Norway* (dec.) [GC], nos.71412/01 & 78166/01, 2 May 2007. (Henceforth, *Saramati*)

Kosovo contravened Article 5 of the Convention.[42]The peacekeeping force claimed that the applicant represented a threat to them and those residing in Kosovo and that they had the legal authority to preventatively detain individuals under SCR 1244.[43]The case, brought against Norway and France, since the detention order was issued by French and Norwegian commanding officers,[44]gave rise to a conflict between the SCR, which appeared to authorise security detention, and Article 5 of the Convention, which does not justify depriving an individual of their liberty for this purpose.

On the basis that the alleged conduct was attributable to the UN, an organisation that was not bound by the Convention, the Court found the application inadmissible because the complaints were incompatible *ratione personae* with the Convention.[45]Consequently, the Court avoided tackling the clash between the obligations deriving from SCR 1244 and Article 5, which it was reluctant to do.[46]Milanovic and Papic criticised the Court's judgment but also empathised with the difficult position that the Court found itself in. On the one hand, the Court was reluctant to authorise members of the UNSC displacing the ECHR, a constitutional instrument of European public order. At the same time, prioritising the Convention would antagonise numerous powerful States and interfere with peacekeeping and, more broadly, the system of SCRs under Chapter VII of the Charter.[47]Thus, the admissibility decision was an understandable, albeit unsatisfactory, outcome of the two competing policy considerations.[48]In subsequent cases, the Court's desire to avoid prioritisation remained.

In *Al-Jedda v. UK*,[49]the applicant alleged that his internment by British forces in Iraq from October 2004 to December 2007[50]violated Article 5.[51]The UK claimed that its authority under SCR 1546 to detain preventatively prevailed, by virtue of Article

[42] Ibid §62.
[43] Ibid §11.
[44] Ibid §68. Originally, allegations were also brought against Germany, but the Court struck out this complaint upon the request of the applicant. See §§64-65.
[45] Ibid §141.
[46] M.Milanovic and T Papić, 'As Bad as it Gets: The European Court of Human Rights's "Behrami and Saramati" Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267, p293; Similarly, Wallace asserts that the Court was eager to avoid addressing the conflict. S.Wallace, (n17) p147.
[47] M.Milanovic and T Papić Ibid.
[48] Ibid p293.
[49] *Al-Jedda v. UK* [GC], no.27021/08, ECHR-2011-IV. (Henceforth, *Al-Jedda*)
[50] The facts of *Al-Jedda* can be found between §§9-15.
[51] *Al-Jedda*, §59.

103, over the contrary prohibition in the Convention.[52]This case presented a similar conflict as *Saramati,* but its admissibility required the Court to address the merits of the case. The Court acknowledged that Article 24(2) of the Charter requires the UNSC, in discharging its duties, to act in accordance with the purposes and principles of the UN, which include promoting and encouraging respect for human rights and fundamental freedoms.[53]With this in mind, the Court considered that:

> In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[54]

Within the previous statement, the Court establishes an interpretative presumption that SCRs do not compel States to act contrary to their human rights obligations. To rebut this presumption, SCRs must contain clear and unambiguous language indicating a desire to release States from their human rights obligations.[55]Although SCR 1546 mentioned the use of internment, it was one of numerous options available for maintaining the security and stability in Iraq[56]and not viewed by the Court as imposing an obligation to intern.[57]Moreover, the Court referenced the human rights concerns raised by the Secretary-General about the use of internment in Iraq, as evidence that States were still required to comply with their human rights obligations in Iraq.[58]

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[52] Ibid §60.
[53] Ibid §102.
[54] Ibid.
[55] M.Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) *The European Journal of International Law* 121, p138. (Henceforth, M.Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg')
[56] UNSC Resolution 1546 provided that 'the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution…'. The letters referred to were sent to the Council by then US Secretary of State, Colin Powell and then interim prime minister of Iraq Dr. Ayad Allawi. Powell's letter outlined the tasks the multinational force would undertake which included, *inter alia*, 'internment where this is necessary for imperative reasons of security'. UN Doc S/RES/1546 (5 June 2004), para 10 and annex.
[57] *Al-Jedda* §105.
[58] Ibid §§105-106.

Without SCR 1546 establishing an obligation to intern, the Court dismissed the existence of a conflict between the SCR and Article 5. Consequently, the provisions of the Convention 'were not displaced' by the SCR and the internment of the applicant constituted a violation of Article 5.[59]Noticeably, the Court was silent on the fundamental question as to the possibility that SCR 1546 could have displaced the Convention if it had contained an obligation to intern.[60]

In *Nada v. Switzerland,*[61]the applicant was subject to sanctions imposed by numerous SCRs administered by UN Member States,[62]which included asset freezes and travel restrictions. The applicant alleged that Switzerland's enforcement of the sanctions resulted in numerous human rights violations.[63]In particular, the applicant argued that by preventing him from entering or transiting through Switzerland, the Swiss authorities had violated Article 5. SCR 1390 expressly required States to prevent those subjected to sanctions from entering or transiting through their territory. The Court regarded this as imposing an obligation to take measures capable of breaching human rights, rebutting the interpretative presumption established in *Al-Jedda.*[64]Nonetheless, the Court found the complaint under Article 5 as manifestly ill-founded,[65] discharging the need to address the conflict between the obligation to comply with the SC Resolution and Article 5.

Additionally, the applicant alleged that by prohibiting him entering or transiting through Switzerland, the Swiss authorities violated Article 8 of the Convention, the right to respect for private and family life.[66]The Court acknowledged that domestic authorities had some discretion in implementing the sanctions, which the Swiss authorities did not exercise in light of the applicant's very specific situation, notably his location in Campione d'Italia, an enclave surrounded by the Swiss canton of Ticino.[67]Consequently, the Court found that Switzerland could:

> Not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual

[59] Ibid §§109-110.
[60] M.Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' p138.
[61] *Nada v. Switzerland* [GC], no.10593/08, ECHR-2012-V (Henceforth, *Nada*)
[62] Notably UNSC Resolutions 1267 (1999), 1333 (2000), 1373 (2001), 1390 (2002).
[63] See *Nada* §149, §200, §215 and §§235-237 for the alleged violations of Articles 8,13,5,3 and 9.
[64] *Nada* §172.
[65] The Court also deemed the allegations under Article 3 and 9 as inadmissible. See Ibid §§235-237.
[66] Ibid §163.
[67] Ibid §195.

situation. That finding dispenses the Court from determining the question […] of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court's view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent.[68]

The Court found a violation of Article 8 had occurred[69]but did not regard the obligation to implement the sanctions pursuant to SCR 1390 as incompatible with Article 8 due to the discretion Swiss authorities had in their implementation. Once again, the Court sidestepped determining whether obligations arising from SC Resolutions were hierarchically superior to the Convention.[70]

The Court's approach in *Nada* was mirrored in *Al-Dulimi v. Switzerland*,[71]where the applicants alleged that the procedure for the confiscation of their assets, pursuant to SCR 1483, breached Article 6(1) of the Convention.[72]The Court held that there was nothing contained within SCR 1483 'that explicitly prevented the Swiss courts from reviewing in terms of human rights protection, the measures taken at national level'.[73]Consequently, the Court assessed that it was not required to address any potential hierarchy between Convention obligations and those deriving from the SCRs because Switzerland was not confronted with conflicting obligations. As the Swiss authorities had not adequately discharged their duty to ensure that the listing of individuals by the sanctions committee was not arbitrary, prior to implementing the sanctions,[74]the Court found that a violation of Article 6(1) had occurred. *Al-Dulimi* provides further evidence of the Court's eagerness to go to 'great lengths' to avoid accepting the supremacy of UN measures over the Convention.[75]

2(3) Lex Specialis Derogate Legi Generali

When a situation is regulated by a general and specific rule, the *lex specialis* maxim endorses prioritising the application of the specific rule.[76]Traditionally, this principle

[68] Ibid §196-197.
[69] Ibid §199.
[70] S.Wallace, (n17) p149.
[71] *Al-Dulimi and Montana Management Inc v. Switzerland* [GC], no.5809/08, 21 June 2016.
[72] Ibid §81
[73] Ibid §143.
[74] Ibid §150.
[75] S.Wallace, (n17) p150.
[76] ILC, 'Fragmentation of International Law' pp34-35, para 56; N.Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40(2) *Israel Law Review* 356, p367.

was viewed as a conflict resolving tool[77]but it can also be used to inform the interpretation of a general rule in light of a more specific rule.[78]In this context, the *lex specialis* can be invoked as the more specific norm that supplements the general rule without contradiction, resulting in an accumulation of the *lex specialis* and the *lex generalis*.[79]Thus, the *lex specialis* maxim can be utilised to either displace or modify the application of the *lex generalis.*

The doctrine of *lex specialis* is often cited as guiding the relationship between IHL and international human rights law (IHRL).[80]Prud'homme identifies that the *lex specialis* principle has been touted as a tool for prioritising conflicts between IHL and IHRL *and* utilised for interpreting human rights in light of IHL.[81]For now, our attention will fixate on *lex specialis* as a mechanism for resolving clashes between norms of IHRL and IHL and whether the ECtHR has embraced this approach.

Previously, the application of IHRL during armed conflict was questioned on the basis that IHL was specifically developed to regulate armed conflict whereas IHRL was the law of peacetime.[82]Applying the *lex specialis* approach to these distinct legal frameworks would give primacy to IHL, effectively displacing IHRL from the arena of armed conflict. Though not unanimously supported,[83]states, international organisations, and international and regional judicial and quasi-judicial bodies, including the ECtHR,[84] have endorsed the continued application of IHRL during armed

[77] N.Prud'homme Ibid, p369.
[78]C.Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90(871) *International Review of the Red Cross* 501, p524; N.Prud'homme Ibid.
[79] J.Pauwelyn, (n4) p410.
[80] N.Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40(2) *Israel Law Review* 648, p655; For an examination of the relationship between IHL and IHRL through the *lex specialis* model, see N.Prud'homme, (n76); Droege's analysis is focused on determining in which situations either IHRL or IHL is more specific, see C.Droege (n78); The International Court of Justice has also referred to the doctrine of *lex specialis* when considering the relationship between IHL and IHRL. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, p226, §25 (Henceforth, *Advisory Opinion on Nuclear Weapons*) & *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J Reports 2004, p136, §106.
[81] N.Prud'homme, (n76) pp369-370.
[82] N.Lubell (n80) p649.
[83] For an argument in favour of IHL displacing IHRL see, M.Dennis, 'Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict' (2007) 40(2) *Israel Law Review* 453.
[84] For an overview of the endorsement of the continued application of IHRL during armed conflict, see C.Droege, (n78) pp503-509.

conflict, which has entrenched the existence of a normative relationship between IHL and IHRL.[85]

The convergence of IHRL and IHL necessitates an approach that addresses the divergences between the two legal frameworks. Though the application of *lex specialis* to entirely displace IHRL in favour of IHL has been rejected, the maxim has been cited as a means for addressing specific norm conflicts arising between IHL and IHRL. While IHL was developed to regulate armed conflict, there are specific situations when IHRL either fills a gap or provides more detailed regulation than IHL. For example, the right to a fair trial has more detailed and developed rules under IHRL than IHL, which provides a general requirement in Common Article 3 that trials must afford 'all the judicial guarantees which are recognized as indispensable by civilized peoples'.[86]Similarly, investigative obligations under IHRL are more detailed than the requirements imposed by IHL.[87]Thus, the *lex specialis* approach does not presuppose the prioritisation of IHL over IHRL and its application may result in norm conflicts between IHL and IHRL being resolved in favour of IHRL.

There is a general scepticism about the ability of the *lex specialis* doctrine to provide a coherent and principled solution to potential conflicts between norms.[88]For instance, it can be difficult to determine which norm is the *lex specialis* and which is the *lex generalis.*[89]Unfortunately, the maxim does not provide guidance for distinguishing between special and general rules, which is problematic for its practical application.[90]

As of yet, the ECtHR has never explicitly subordinated the Convention to IHL. Though, in the case of *Cyprus v. Turkey,*[91]the judgment of the Commission hinted at the primacy of IHL. Following the Turkish invasion of Northern Cyprus and the detention of individuals as Prisoners of War (POWs), the Commission addressed whether the detention was compatible with Article 5. The Commission did not find it

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[85] I.Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14(3) *Journal of Conflict and Security Law* 449, p452.
[86] M.Milanovic, 'Norm Conflict' p476; N.Prud'homme, (n76) p373.
[87] C.Droege, (n78) p540.
[88] I.Scobbie, (n85) p452.
[89] A.Lindroos, 'Addressing Norm Conflicts in a Fragmented System: The Doctrine of Lex Specialis' (2005) 74 *Nordic Journal of International Law* 27, pp41-42; C.Droege, (n78) p524; ILC, 'Fragmentation of International Law' pp 35-36, para 58; N.Prud'homme, (n76) p382.
[90] Lindroos ibid; Droege suggest that the key indicators for determining a specialised rule are the precision and clarity of a rule and its adaptation to the particular circumstances at hand. C.Droege, Ibid.
[91] *Cyprus v. Turkey*, nos.6780/74 and 6950/75, (Commission Report, 10 July 1976)

necessary to examine the question of a breach of Article 5 for those designated as a POW because Turkey had assured its compliance with the Geneva Conventions and permitted the Red Cross access to the detention facilities.[92]In contrast, the Commission held that the internment of civilians violated Article 5.[93]The divergent approach could be explained as the Commission using IHL, the *lex specialis,* to set aside the Convention.[94]Yet, the deference to IHL was implicit and an isolated example in the Court's jurisprudence.[95]

The relationship between IHL and the Convention was also touched upon in the *Al-Jedda* case, albeit briefly. After assessing whether SCR 1546 trumped the UK's obligations under the Convention, the Court considered whether there was any other legal basis for the applicant's detention that disapplied Article 5(1).[96]In particular, the Court focused on any potential obligations under IHL. The Court's analysis was speculative as IHL did not apply to the detention, which occurred after the UK's occupation of Iraq had ended. Nonetheless, the Court did not regard the provisions of the Fourth Geneva Convention as imposing an obligation to intern but was instead a measure of last resort.[97]This part of the *Al-Jedda* judgment is perplexing. The relationship between IHL and the Convention was not relevant to the facts of the case, but the Court *chose* to tentatively engage with this issue. By pondering whether an obligation to intern under IHL could disapply the Convention, the Court left open the possibility that IHL could be prioritised over a conflicting Convention norm.

After dismissing the existence of an obligation to intern under IHL, the Court could have discussed whether the *power* to intern under Article 42 of GC IV prevails over the *prohibition* contained within Article 5. Unfortunately, the Court did not address this issue. Though, in the subsequent case of *Hassan v. UK,*[98]which will be discussed in due course, the Court refrained once more from prioritising IHL over the Convention, despite the unequivocal influence of IHL on its application of Article 5. This is further evidence of the Court's unwillingness to utilise the *lex specialis* tool as a means of prioritising conflicting norms under IHL and the Convention.

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[92] Ibid §313.
[93] Ibid §310.
[94] H.Krieger, 'After *Al-Jedda*: Detention, Derogation and an Enduring Dilemma*'* (2011) 50 *Military Law and the Law of War Review* 419, p432; S.Wallace, (n17) p153.
[95] M.Forowicz, *'The Reception of International Law in the European Court of Human Rights'* (OUP, 2010) p324.
[96] *Al-Jedda* §107.
[97] Ibid.
[98] *Hassan v. United Kingdom*, [GC], no.29750/09, ECHR 2014-VI. (Henceforth, *Hassan*)

2(4) Summary

The Court's jurisprudence reveals a reluctance to resolve norm conflicts through prioritisation. In particular, the Court is averse to regarding the Convention as subordinate to other norms of international law. Of the three maxims discussed, the *lex specialis* approach is commonly promoted as an appropriate solution to clashes between IHL and IHRL. However, the ECtHR has never explicitly utilised IHL to displace the Convention. Rather than resolving conflicts through prioritisation, the Court has preferred to interpret away 'apparent' norm incompatibility.

3.Norm Conflict Avoidance

There are usually two steps that ensue from the materialisation of an 'apparent' norm conflict. First, an attempt is made to interpret the conflicting norms in a way that makes them compatible. If avoidance of the conflict through interpretation is not possible, a 'genuine' norm conflict exists that can only be resolved through prioritisation.[99]Harmonising two seemingly contradictory rules through interpretation is supported by Article 31(3)(c) VCLT, which provides that 'any relevant rules of international law applicable in the relations between the parties' shall be considered when interpreting norms. This rule implies that international law facilitates the harmonious existence of divergent rules.[100]This notion extends to IHL and IHRL, which is said to have a complementary relationship by which the regimes can influence and mutually reinforce each other. Thus, IHRL can be interpreted in light of IHL and vice versa.[101]

There is widespread support for harmoniously interpreting IHL and IHRL. In General Comment No.31, the Human Rights Committee noted that IHL and IHRL are 'complementary, not mutually exclusive'.[102]Additionally, the harmonious interpretation of IHL and IHRL has been endorsed in the jurisprudence of the ICJ[103]and the Inter-

[99] M.Milanovic, 'Norm Conflict' pp465-466.
[100] C.Droege (n78) pp521-522.
[101] Ibid.
[102] UN Human Rights Committee, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) (UN Doc CCPR/C/21/Rev.1/Add.13) para 11; See also a reiteration of this point in UN Human Rights Committee, 'General Comment no.36, Article 6 (Right to Life)' (3 September 2019) (UN Doc CCPR/C/GC/35) para 64.
[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J Reports 2004, p178, §106.

American Commission on Human Rights.[104]Notably, the ECtHR has also frequently asserted that the Convention is to be interpreted in light of other principles of international law, including the rules of IHL.[105]

Prior to examining the ECtHR's harmonious interpretation of the Convention and IHL, it is helpful to provide an example of the complementarity principle in action. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ considered, *inter alia*, whether the loss of life resulting from the use of nuclear weapons would be arbitrary, thereby violating the right to life under Article 6 of the ICCPR. The Court noted that:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[106]

This statement, the ICJ's first proper attempt of articulating the relationship between IHRL and IHL,[107]demonstrates how IHL determines whether a killing is arbitrary in this context. Evidently, Article 6 of the ICCPR does not conflict with rules regulating the use of force under IHL. Rather, the norms have what Hathaway *et al* describe as a "relationship of interpretation" whereby one norm assists in the interpretation of another.[108]This example demonstrates the value of *lex specialis* as an interpretative tool for harmonising general terms or standards by reference to more specific norms contained within another branch of law.[109]

3(1) Implicit Influence of IHL on the Convention's Application

[104] *Coard el al v United* States, case 10.951, Report no 109/99, Inter-American Commission on Human Rights, §39 -The Commission noted that there is significant overlap between the two bodies, the application of one does not necessarily exclude or displace the other.
[105] *Hassan* §102; *Georgia v. Russia (II)* [GC], no.38263/08, 21 January 2021, §94. (Henceforth, *Georgia v. Russia (II)*)
[106] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, p226, §25. (Henceforth, *Advisory Opinion on Nuclear Weapons*)
[107] N.Prud'homme, (n76) p371.
[108]O.Hathaway *et al*, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law (2012) 96 *Minnesota Law Review* 1883, p1886.
[109] C.Droege, (n78) p524; M.Milanovic, 'Norm Conflict' p476.

The jurisprudence of the ECtHR reveals a willingness to flexibly apply the Convention in conflict situations.[110]Noticeably, in the context of military operations, IHL has influenced the Court's interpretation of the Article 2 requirement that lethal force must be 'absolutely necessary', which requires States to 'minimise, to the greatest extent possible, recourse to lethal force'[111] and prohibits killing against those that do not pose a serious threat or are suspected of committing a violent offence.[112]

In *Ergi v. Turkey*, Turkish security forces ambushed PKK insurgents in the vicinity of a village in South-East Turkey.[113]The Court considered whether the operations had been '[p]lanned and conducted in such a way to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers'.[114]Furthermore, the Court posited that Article 2 required States to take '[a]ll feasible precautions…with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.'[115]Subsequently, in *Ahmet Özkan and Others v. Turkey*, Turkish security forces surrounded the village of Ormaniçi and were fired upon by PKK members. In response, the security forces entered the village and opened intensive fire. In relation to Article 2, the Court reiterated the stance in *Ergi* that a State must take all feasible precautions to 'minimise incidental loss of civilian life'.[116]It then acknowledged that at the time there were serious disturbances in south-east Turkey involving armed conflict between the security forces and members of the PKK.[117]In light of these circumstances, the fact that the initial shots were fired against the security forces and that only one civilian was injured by the intensive firing in response, the Court accepted that the conduct of the security services was 'absolutely necessary' for the purpose of protecting life.[118]

The Court's application of Article 2 standards in the aforementioned cases is clearly modified by IHL. The requirement to minimise the risk to villagers was a departure from the general obligation to minimise the recourse to force.[119]In these

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[110] M.Forowicz, (n95) p345; See also the Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia in *Georgia v Russia (II*), which proposes how the Convention and IHL should interact following the failure of the Grand Chamber to engage on the issue.
[111] *McCann and Others v UK,* (1995), Series A 324, §194. (Henceforth, *McCann*)
[112] *Nachova and Others v. Bulgaria* [GC], nos.43577/98 and 43579/98, §95, ECHR-2005-VII.
[113] *Ergi v. Turkey*, no.23818/94, ECHR-1998-IV. See §§6-17 for the facts of the case, though they were disputed.
[114] Ibid §97.
[115] Ibid.
[116] *Ahmet Özkan and Others v Turkey,* no.21689/93, 6 April 2004, §297. (Henceforth, *Ahmet Özkan*)
[117] Ibid §305.
[118] Ibid §306.
[119] S.Wallace, (n17) p78; C.Droege, (n78) p532-533.

combat situations, the lives of those targeted were not considered.[120]The Court appeared to distinguish between civilians and the members of the PKK, which is comparable to the combatant/civilian distinction in IHL. Moreover, the Court did not discuss whether those targeted could have been spared,[121]tacitly accepting the use of force against the insurgents.[122]Droege contends that the standard applied by the Court differs from the normal human rights standard that demands that lethal force is only utilised as a last resort.[123]

The Court's emphasis on taking precautions to minimise 'incidental loss of civilian life' points to the influence of IHL. Here, the Court relied on the vocabulary of Article 57(2)(a)(ii) of Additional Protocol I[124]to transpose the precautionary principle of IHL into its analysis.[125]Additionally, in *Özkan,* the Court undertook a proportionality assessment, as enshrined in IHL, when it calculated whether the civilian loss of life outweighed the military advantaged gained by the operation.[126]Accordingly, the Court considered the force proportionate.[127]

The strict 'absolute necessity' requirement was also modified in the case of *Isayeva, Yusupova and Bazayeva v Russia.*[128]The application resulted from the Russian aerial bombardment of a civilian convoy that was attempting to leave the city of Grozny, which was, at the time, held by Chechen insurgents.[129]In the view of the Russian Government, the aerial attack was justified to protect the pilots and civilians in the vicinity from unlawful violence, in accordance with Article 2(2)(a), following the resort to heavy fire by Chechen insurgents.[130]However, Russia did not provide corroborating evidence that unlawful violence was threatened or likely.[131]Yet, given

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[120] A.Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in O.Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) p231.
[121] C.Landais and L.Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97 *International Review of the Red Cross* 1295, p1301; S.Wallace, (n17) p78.
[122] S.Wallace, (n17) p78; C.Droege, (n78) p533.
[123] C.Droege, (n78) p531.
[124] This provision requires that those who plan or decide upon attack shall: 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.
[125] M.Forowicz, (n95) p329; S.Wallace, (n17) p79.
[126] Ibid p331.
[127] *Ahmet Özkan* §§305-306.
[128] *Isayeva, Yusupova and Bazayeva v. Russia*, nos.57947/00, 57948/00 & 57949/00, 24 February 2005. (Henceforth, *Isayeva et al*)
[129] The facts of *Isayeva et al* can be found between §§13-35.
[130] *Isayeva et al* §160.
[131] Ibid §181.

the context of the conflict in Chechnya at the time, the Court assumed that 'the military *reasonably* considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.'[132]Rather than requiring an immediate threat to justify lethal force, the Court opted for a standard of 'reasonable necessity'[133]whereby the use of force is lawful when there is a reasonable risk of attack.[134]

Though IHL clearly influenced the Court's approach in the previous cases, the Court did not make any specific reference to IHL. The Court's *'sub silentio'*[135]application of IHL can be rationalised as a political consideration. Abresch posits that States routinely reject the application of IHL to internal violence to avoid tacitly accepting that another party exerts power within their borders.[136]In the aforementioned cases, neither Turkey nor Russia claimed the existence of an armed conflict,[137] which may explain the Court's reluctance to explicitly refer to IHL.

The Court's implicit utilisation of IHL has been inconsistent. Notably, in *Isayeva v. Russia*, which emerged from the same situation as *Isayeva, Yusupova and Bazayeva*, the Court considered that the events took place 'outside wartime' and must be judged 'against a normal legal background'.[138]Yet, despite claiming that *Isayeva* took place 'outside wartime', the Court did not question whether the rebels could be attacked and focused on the indiscriminate nature of the weapon used and the failure to warn civilians and provide them safe passage.[139]Confusingly, the Grand Chamber in *Al-Skeini v. UK* cited *Isayeva* as evidence of the continued application of the procedural limb of the right to life in armed conflict.[140]

In *Ergi*, *Özkan* and *Isayeva and Others*, the Court moved away from a general requirement to minimise the recourse to force and focused on whether States had reduced the risk to civilians. Implicitly, the Court distinguished between the insurgents and civilians, accepting that the former could be subject to targeting based on their

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[132] Ibid. (emphasis added)
[133] N.Melzer, *'Targeted Killing in International Law'* (OUP, 2008) p389.
[134] M.Forowicz, (n95) p334.
[135] W.Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) *European Journal of International Law* 741, p746; M.Forowicz, (n95) p331.
[136] W.Abresch Ibid p756
[137] Ibid pp754-755.
[138] *Isayeva v. Russia*, no.57950/00, 24 February 2005, §191.
[139] C.Droege, (n78) p532.
[140] *Al-Skeini and Others v. United Kingdom*, [GC], no.55721/07, §164, ECHR 2011-IV. (Henceforth, *Al-Skeini*)

status. This distinction defies the theoretical foundations of human rights law that protections are inherent and inalienable for 'all members of the human family'.[141]To legitimise status-based targeting is an 'anathema to human rights law'.[142]However, the Court has inconsistently distinguished between the status of individuals when applying the Convention. In *Esmukhambetov v. Russia*, the Court considered whether Russia's bombing of Kogi in Chechnya had been carried out in a way that minimised '[t]o the greatest extent possible, risks of loss of lives, *both of persons at whom the measures were directed and of civilians'.*[143]

Wallace bemoans the implicit and inconsistent utilisation of IHL by the Court, asserting that the modified application of the Convention has occurred randomly.[144]This critique is justified, and the Court's approach has been problematic. Without clearly guiding States as to whether and to what extent the concurrent application of IHL modifies the application of the Convention, it is unclear what Convention standards States must uphold during armed conflict. By implicitly and inconsistently engaging with IHL and its influence on the Convention's application, the Court failed to elucidate anything resembling a clear relationship of co-existence between the Convention and IHL. Yet, in 2014, the Court took a ground-breaking step in *Hassan v. UK* by openly engaging with IHL and explicitly modifying the application of the Convention in line with IHL.

a. Hassan v. UK: Explicit Engagement with IHL

Hassan was the first time that the Court explicitly addressed the interaction between the Convention and IHL. The facts of the case are briefly outlined as follows.[145]On the 23 April 2003, British armed forces sought to arrest the applicant at his house in Umm Qasr. The applicant, Khadim Resaan Hassan, a high-ranking member of Saddam Hussein's ruling Ba'ath Party, had already gone into hiding. Upon arriving at the property, British forces encountered Tarek Hassan, the applicant's brother, who was on top of the house armed with an AK-47. Inside the house, there were additional firearms and documents of intelligence value relating to local membership of the Ba'ath Party. As a result, Tarek Hassan was arrested by the British forces and taken

[141] Preamble, Universal Declaration of Human Rights. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III).
[142] D.Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel Law Review* 8, p25.
[143] *Esmukhambetov and Others v. Russia*, no.23445/03, 29 March 2011, §146. (Emphasis added)
[144] S.Wallace, (n17) p82.
[145] *Hassan* §§10-28.

to the Camp Bucca detention facility. On 2 May, following interrogation by both US and UK authorities, Tarek Hassan was taken by bus to a drop-off point, believed to be Umm Qasr, and released.[146]Four months later, in a town north of Baghdad, the dead body of Tarek Hassan was discovered with bullet wounds in his chest.

The applicant made various complaints relating to the arrest, detention, and subsequent death of his brother. It was alleged that the arrest and detention of Tarek Hassan gave rise to violations under Article 5.[147]Furthermore, it was alleged that the UK failed in its procedural duty under Articles 2 and 3 to investigate the ill-treatment and death of Tarek Hassan.[148]However, due to a lack of evidence that Tarek Hassan suffered ill-treatment in detention or that UK authorities were in any way responsible, directly or indirectly, for his death, the Court found the complaints under Article 2 and 3 were manifestly ill-founded and inadmissible.[149]Therefore, the Court's analysis was confined to the alleged violation of Article 5.

The UK's primary contention was that the capture and detention of Hassan took place during the active hostilities phase of an IAC and that the applicability of IHL precluded jurisdiction arising under the Convention.[150]The Court rejected this argument,[151]which would have effectively displaced the entire Convention where IHL applies. The facts of the case pointed towards a violation of Article 5 as internment is not a permitted ground for detention under Article 5(1) and the UK had not derogated from the Convention for its operations in Iraq. The UK claimed that IHL provided a legal basis for internment and that Article 5 was either displaced by IHL as *lex specialis* or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions.[152]For the first time, a respondent State had requested the Court to disapply or modify the application of Article 5 in light of the powers of detention under IHL.[153]Thus, it was incumbent on the Court to resolve the clash between conduct that was authorised by IHL but prohibited by the Convention.

[146] Ibid §80.
[147] Ibid §65.
[148] Ibid §§59-60.
[149] Ibid §§62-64.
[150] Ibid §71.
[151] Ibid §§76-77.
[152] Ibid §88.
[153] Ibid §99.

At the merits stage, the Court did not utilise IHL as *lex specialis* to displace Article 5. However, the Court was receptive to the UK argument that Article 5 should be modified to allow for internment during IAC. On the basis that the practice of the Contracting Parties during IAC was not to derogate from Article 5 when detaining individuals pursuant to the Third and Fourth Geneva Conventions,[154]the Court interpreted Article 5(1) as including internment during IAC within the permitted grounds for detention.[155]The Court justified its approach with reference to Article 31((3)(b) VCLT, according to which subsequent state practice may establish an agreement as to the interpretation of a treaty. The Court's approach represented an 'exceptional departure'[156]from its previous case law, which held that the list of permitted grounds for the deprivation of liberty are exhaustive.[157]

Subsequently, the Court invoked Article 31(3)(c) VCLT as authorising the consideration of provisions of IHL when interpreting and applying Article 5.[158]The Court did not regard the absence of a formal derogation under Article 15 as precluding this interpretive approach, asserting that the grounds of permitted deprivation of liberty should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.[159]Then, in accordance with the circumstances permitting the deprivation of liberty in Article 5(1), the Court required internment to be "lawful", which meant that the detention must comply with IHL and avoid arbitrariness, the fundamental purpose of Article 5(1).[160]

The Court also considered that the procedural safeguards of Article 5 must be interpreted to consider the context of the IAC and the applicable rules of IHL. During an IAC, the Court acknowledged that it might not be practicable for the legality of detention to be determined by an independent 'court' as generally required by Article 5(4). The Court was satisfied that a "competent body" pursuant to GC IV Articles 43 and 78 could review the legality of detention but added that it should provide sufficient

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[154] Ibid §101.
[155] M.Milanovic, 'A Few Thoughts on Hassan v. United Kingdom' (*EJIL:Talk!*, October 22 2014) <https://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/>; L.Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v. UK' (*EJIL:Talk!*, September 16 2014) <https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>
[156] C.Landais and L.Bass, (n122) p1308.
[157] *Al-Jedda* §99; *A and Others v. United Kingdom* [GC], no.3455/05, §163, ECHR-2009-II.
[158] *Hassan* §103.
[159] Ibid.
[160] Ibid §105.

guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the Court required that first review of the legality of detention should take place shortly after the person is detained, with subsequent reviews at frequent intervals, ensuring that anyone who falls outside the categories subject to internment is released without undue delay.[161]With respect to the procedural limb of Article 5, the Court read down the requirement under Article 5(4) that a court shall determine the legality of detention. However, the requirement for swift and frequent reviews of the legality of detention imposed a more stringent standard than GC IV, which requires internment to be periodically reviewed "if possible every six months".[162]

Applying these principles to the detention of Tarek Hassan, the Court considered that the detention was consistent with IHL and not arbitrary. Furthermore, the Court decided that the reason for detention would have been made apparent to Hassan, in accordance with Article 5(2). Also, the Court did not find it necessary to examine the alleged violation under Article 5(4) due to the short period of detention.[163]By thirteen votes to four, the Court held that the UK's detention of Tarek Hassan did not constitute a violation of Article 5.[164]

As internment is not a permitted ground for the deprivation of liberty under Article 5(1), the Court could not have arrived at its decision by embracing a literal reading of the Convention. However, by incorporating internment within Article 5(1), the Court could then determine the legality of the detention with reference to IHL.[165] *Hassan* provides an unequivocal example of the Court's preparedness to interpret the Convention in an evolutive and contextual manner. Yet, the Court's examination focused on the interaction of the Convention and IHL in the context of internment during IAC.[166]Consequently, questions remain unanswered about the application of other Convention provisions during IAC and whether, and to what extent, the Court would modify the application of the Convention during NIAC. Before assessing the potential implications of the *Hassan* judgment on the application of Article 2 during armed conflict, there are criticisms of the Court's approach that are worthy of attention.

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[161] Ibid §106.
[162] Articles 43 and 78 GC IV.
[163] *Hassan* §110.
[164] Ibid §111; The complaint under Article 5(3) was not relevant as it only arises in conjunction with 5(1)(c) which was not deemed to apply.
[165] L.Hill-Cawthorne (n155).
[166] *Hassan* §104.

b. Criticism of the Court's Approach in Hassan

Judges Spano, Nicolaou, Bianku and Kalaydjieva disagreed with the majority decision in *Hassan* and voiced various criticisms of the Court's approach in a partly dissenting opinion.[167]Initially, they shared disapproval of the Court's preparedness to modify the Convention's standards without requiring the UK to submit a derogation. According to the dissenting judges, the Convention applies equally in times of peace and war, which gives relevance to the mechanism of derogation in Article 15.[168]More specifically, the dissenting judges regarded the modification of the Convention without the invocation of a derogation as rendering Article 15 'effectively obsolete within the Convention structure as regards the fundamental right of liberty in times of war'.[169]

The dissenting judges then turned their attention to criticism of the Court's interpretation of Article 5. Their criticism was not directed at the Court's reference to the rules of treaty interpretation under the VCLT but rather focused on the Court's utilisation of these rules to reach its decision. Though Article 31(3)(b) VCLT provides that subsequent state practice relating to the application of a treaty can establish an agreement as to its interpretation,[170]the dissenting judges were unconvinced that the absence of derogation for internment during IAC can be relied upon by the Court as demonstrating an agreement that Article 5(1) did not prohibit internment in this context.[171]Notably, the state practice invoked by the Court was premised on the inapplicability of Article 5 during extraterritorial IAC, as the UK itself argued,[172]due to a lack jurisdiction.[173]Therefore, the absence of derogation in this context indicates that States viewed the Convention as inapplicable or were reluctant to concede the Convention's applicability, rather than a belief that internment during IAC was not prohibited by Article 5.[174]

Subsequently, the dissenting judges endorsed the harmonious interpretation of the Convention with other applicable rules of international, in accordance with Article

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[167] *Hassan*, Partly Dissenting Opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva, §§1-19. (Henceforth, *Hassan*, Partly Dissenting Opinion)
[168] Ibid §8.
[169] Ibid §16.
[170] For instance, the Court has observed that State compliance with the moratorium on capital punishment strongly indicates that Article 2 has been amended to prohibit the death penalty. See *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, §120, ECHR-2010-II.
[171] *Hassan*, Partly Dissenting Opinion §§11-15.
[172] See *Hassan* §86.
[173] *Hassan*, Partly Dissenting Opinion §12.
[174] L.Hill-Cawthorne (n155)

31(3)(c) VCLT. However, they asserted that the powers of internment under IHL directly conflict with Article 5 and cannot be accommodated by the provision.[175]Therefore, they claimed that the Court had no tools at its disposal to remedy the clash between IHL and the Convention and that priority should have been given by the Court to the Convention as its role under Article 19 is to ensure its observance by the High Contracting Parties.[176]To conclude, the dissenting judges noted that the majority finding did not reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention.[177]

The partly dissenting opinion raises legitimate criticisms of the majority judgment in *Hassan.* With regard to the Court's willingness to flexibly interpret the Convention without requiring the submission of a derogation, arguably, this undermines the function of Article 15.[178]However, the claim of the dissenting judges that the majority view renders Article 15 'effectively obsolete' in respect of the application of Article 5 in times of war is inaccurate.[179]Notably, in June 2015, nine months after the *Hassan* judgment, Ukraine derogated from Article 5 in parts of the Donetsk and Luhansk oblasts following fighting between its armed forces and Russia/Russian-backed armed groups.[180]

More broadly, it should also be acknowledged that there are benefits to derogation that go beyond the amendment of the Convention's application. For instance, states can signify their commitment to their human rights obligations *despite* the existence of an emergency situation by invoking a derogation. Moreover, Wallace notes that derogating also has a 'shielding value' for states with respect to civil litigation. Noting that the UK settled hundreds of claims for its detaining practices in Iraq follow the case of *Al-Jedda*, Wallace contends that had the UK derogated from

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[175] *Hassan*, Partly Dissenting Opinion §§16-18.
[176] Article 19, ECHR provides that the Court's function is 'to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto…'
[177] *Hassan*, Partly Dissenting Opinion §19.
[178] E.Stubbins Bates, 'Introductory Note to Hassan v. the United Kingdom' (2015) 54 *International Legal Materials* 83, p85. A.Habteslasi, 'Derogation in Time of War: The Application of Article 15 of the ECHR in Extraterritorial Armed Conflicts' (2016) 21(4) *Judicial Review* 302, p306.
[179] *Hassan*, Partly Dissenting Opinion §16.
[180] Ukraine's derogation was submitted on 5 June 2015. See Council of Europe, 'Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.005)' <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0> ; For further information on Ukraine's derogation, see T.Mariniello, 'Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise its Immune System' (2019) 20 *German Law Journal* 46, pp52-53.

Article 5 in Iraq, many of these claims would not have been viable.[181]Therefore, the Court's preparedness in *Hassan* to flexibly apply the Convention without the invocation of a derogation arguably undermines Article 15, but it does not represent a death knell for the provision.

The dissenting judges were right to question whether the absence of derogation in relation to internment during IAC could be relied upon by the Court as indicative of States interpreting Article 5 as not excluding detention pursuant to the Third and Fourth Geneva Conventions. Moreover, it is unclear why the Court viewed state practice as sufficient for incorporating internment within Article 5(1) but did not view the lack of extraterritorial derogations as indicative of States viewing their Convention obligations as inapplicable extraterritorially.[182]

Without incorporating internment within the permitted grounds for deprivation under Article 5(1), the dissenting opinion accurately asserted that the powers of internment under IHL could not be accommodated within Article 5. This contrasts with the right to liberty under Article 9, ICCPR, which *can* be harmoniously interpreted with IHL because it prohibits arbitrary detention and, during armed conflict, IHL can be utilised to determine the arbitrariness of a detention. This would mirror the ICJ's approach to interpreting whether a killing constitutes an arbitrary deprivation of life during armed conflict.[183]However, Article 5(1) of the Convention is worded exhaustively, rendering internment as 'textually excluded' by the Convention.[184]

Although the criticism of the majority judgment is justified, it should be acknowledged that Court was confronted with a challenging situation in *Hassan.* The case gave rise to a 'genuine' norm conflict between the prohibition of internment under the Convention and its authorisation under IHL, which necessitated a resolution through prioritisation. However, neither option available to the Court was desirable. The Court has frequently demonstrated its aversion to giving primacy to other norms over the Convention. On the other hand, prioritising the Convention would render internment during IAC as incompatible with Article 5, which would be difficult for the

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[181] S.Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform' (2020) 20 *Human Rights Law Review* 769, pp784-786.
[182] L.Hill Cawthorne (n155)
[183] See *Advisory Opinion on Nuclear Weapons* §25.
[184] F.Bernard, 'Deprivation of Liberty in Armed Conflicts: The Strasbourg Court's Attempt at Reconciling Human Rights Law and International Humanitarian Law in Hassan v. UK' (*Strasbourg Observers*, 2 October 2014) <https://strasbourgobservers.com/2014/10/02/deprivation-of-liberty-in-armed-conflicts-the-strasbourg-courts-attempt-at-reconciling-human-rights-law-and-international-humanitarian-law-in-hassan-v-uk/>

Court to sustain given how common this practice is.[185]Though, the Court could have mitigated the impact of this finding by insisting that derogation would allow for internment during IAC. Nevertheless, the Court sought to avoid prioritisation and opted to 'reconcile the irreconcilable'[186]by judicially creating a new permitted ground for detention,[187]internment during IAC, which then enabled the Convention to be harmoniously interpreted with IHL. Therefore, even if one disagrees with the Court's decision and/or the approach taken to accommodate internment within Article 5(1), the desire to avoid prioritisation explains the Court's approach.

Subsequently, Judge Pinto de Albuquerque provided further criticism of the decision in *Hassan*, claiming that the Court's approach weakened Convention standards and set a precedent that an evolutive interpretation of the Convention permits a regression in European human rights protection.[188]Wallace refutes the assertion that *Hassan* sets a precedent for weakening Convention standards because the modification of the Convention's application had previously occurred during military operations, albeit in an implicit and inconsistent way.[189]Wallace provides a more favourable appraisal of the Court's approach, arguing that overt engagement with IHL provides a sound justification for modifying the Convention's application whilst also providing a contextual barrier that prevents the invocation of modified standards outside of armed conflict.[190]Additionally, Wallace highlights that, in *Hassan,* the Court utilised the Convention to enhance the procedural safeguards applicable to internment during IAC. Thus, instead of focusing entirely on the weakening of Convention standards, there should also be recognition that a harmonious interpretation of the Convention can inform and enrich existing IHL paradigms.[191]

The Court's explicit engagement with IHL in *Hassan* is a positive development. Clearly, the Court supports harmoniously interpreting the Convention and IHL. Nonetheless, there are legitimate criticisms of the *Hassan* judgment. In particular, the Court undermined Article 15 by permitting a modified interpretation of the Convention without the invocation of a derogation. Moreover, probably due to an awareness that

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[185] S.Wallace, (n17) p163.
[186] *Hassan*, Partly Dissenting opinion §19.
[187] Ibid §18.
[188] Judge Paolo Pinto de Albuquerque, 'Is the ECHR Facing an Existential Crisis?' (*Speech Delivered at the Mansfield College*, Oxford, 28 April 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf> p5.
[189] S.Wallace, (n17) p162.
[190] Ibid pp162-163.
[191] Ibid p163.

accommodating the powers of internment within Article 5 was textually excluded, the Court relied on unconvincing state practice to conclude that Article 5(1) includes internment during IAC as permitted grounds for detention.

A consequence of the Court's judicial creativity in *Hassan* is that it is more difficult to predict how the Court would respond to other conflicts between the Convention's provisions and IHL. It is unclear the lengths that the Court is prepared to go to harmoniously interpret the Convention with IHL, especially when the only resolution of conflicting norms appears to be prioritisation. This issue is relevant to the application of the right to life during armed conflict.

4. The Implications of *Hassan* for the Application of Article 2 during Armed Conflict

Unlike Article 5, the Court has not explicitly considered the influence of IHL on the application of the right to life. The inter-state case of *Georgia v Russia (II)* provided an opportunity for the Court to apply Article 2 to attacks (bombing, shelling, artillery fire) during armed conflict and set out the relationship between the Convention and IHL within this context. Yet, the Court regarded the events during the active phase of hostilities as outside its purview due to the absence of jurisdiction and, as a result, did not assess the concurrent applicability of Article 2 and IHL.[192]However, as previously argued, the Court used the preliminary issue of jurisdiction to shield itself from having to address the legal complexities and practical challenges that admissibility would have brought.[193]

The absence of jurisdiction during the active phase of hostilities in *Georgia v Russia (II)* ensures that the impact of *Hassan* on the application of the right to life during armed conflict remains unknown. Yet, in the High Court case of *Al-Saadoon*, Justice Legatt posited that the *Hassan* approach should apply to Article 2. Consequently, the use of lethal force in armed conflict will be lawful under the Convention if it is consistent with IHL, even if lethal action is not 'absolutely necessary' for the purposes set out in Article 2(2).[194]

To arrive at this position, there are two steps that the ECtHR would need to take. First, the Court would need to accommodate armed conflict within the permitted grounds for forcible action under Article 2(2). Currently, lethal force during armed conflict is not one of the aims enumerated within Article 2(2) whereby killing may be

[192] See Chapter One, Section 2(3)(b).
[193] See Chapter One, Section 3.
[194] *Al-Saadoon and Others v. Secretary of State for Defence* [2015] EWHC 715 (Admin) §111.

lawful under the Convention.[195]Therefore, the Court would need to exhibit the same judicial creativity demonstrated in *Hassan* to read armed conflict as a permitted grounds for force under Article 2(2). Subsequently, Article 2 must be harmoniously interpreted, even without the invocation of a valid derogation, so that IHL provides the benchmark for assessing whether killing during an armed conflict was 'absolutely necessary'. The Court was prepared to take these 'steps' in *Hassan* and it is posited that the Court's interpretative practice suggests that it may take this approach in relation to Article 2. The Court has consistently exhibited an aversion to the prioritisation of IHL over the Convention. Yet, at the same time, the Court has been willing to apply the Convention less stringently in conflict situations. As previously noted, the Court has implicitly attenuated Convention standards in such circumstances.[196]Moreover, in addition to the flexibility demonstrated in *Hassan*, the Court has explicitly recognised that the procedural limb of the right to life must be applied realistically, noting the challenges facing investigators during armed conflict.[197] Therefore, it would be at odds with its jurisprudence for the Court to strictly apply Article 2 during armed conflict or to utilise IHL to displace the Convention. By replicating its approach in *Hassan*, the Court would be able to flexibly interpret Article 2 without subordinating the Convention to IHL. Consequently, if a killing conforms with IHL, the Court is likely to find that no violation of the substantive element of Article 2 has occurred.

Inevitably, by replicating its approach in *Hassan,* the Court would be susceptible to the same criticisms that its *Hassan* judgment received. In particular, to flexibly apply the standards in Article 2 without requiring the submission of a derogation, the Court would undermine Article 15(2), which provides a specific avenue for harmoniously interpreting Article 2 with IHL. Yet, if the Court refrained from applying its approach from *Hassan* in relation to the right to life, the Court would be susceptible to criticism for being inconsistent.

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[195] However, killings during armed conflict may result from force that is taken in self-defence or in defence of another, which would fall within Article 2(2)(a). Moreover, force during a NIAC *could* be viewed as for the purpose of 'quelling a riot or insurrection' per Article 2(2)(c). See: S.Aughey and A.Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies* 60, pp98-99.

[196] See Section 3(1).

[197] See Chapter Two, Section 3(1)(e). See also the allegation that the Court has paid 'lip-service' to its promise of applying the procedural obligation with flexibility.

Though it is proposed that the Court would follow its interpretive approach in *Hassan* to the application of Article 2 during armed conflict, there are two aspects of the *Hassan* judgment that suggests the Court may be reluctant to embrace this approach for killings conducted during NIAC. First, in *Hassan*, the Court claimed that:

> it can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.[198]

This statement could indicate that the Court would limit the harmonious interpretation of the Convention and IHL to IACs. However, this would be an inaccurate reading of *Hassan* that ignores the purpose of the Court's specific reference to IAC, which was to distinguish between the permissibility of internment in IAC and NIAC. As the Court correctly acknowledged, it is only in IAC that the taking of prisoners of war and the detention of civilians posing a security risk are 'accepted features' of IHL. The provisions of IHL applicable to internment during NIAC- Common Article 3 to the GCs and Article 5 of AP II-are not as extensive or precise as the provisions applicable to IAC.[199]In the case of *Serdar Mohammed v. Ministry of Defence*, the High Court stated that there is nothing in the provisions applicable to NIAC to suggest that they are intended to authorise or confer legality on any such detentions.[200]By confining its analysis in *Hassan* to IAC, the ECtHR qualified its judgment to prevent authorising internment in NIAC, nothing more and nothing less.

Second, Park contemplates whether the reference to internment being an 'accepted feature' of IHL suggests that the Court would be unwilling to interpreting the Convention in light of an ambiguous provision of IHL.[201]In particular, Park cites the uncertainty surrounding when individuals may be lethally targeted in NIAC as potentially preventing a harmonious interpretation of Article 2 in this context.[202]However, the issue raised by Park originates from a false premise. In *Hassan,* the reference to internment being an 'accepted feature' of IHL was an acknowledgment by the Court that the conduct had a clear legal basis, which is a prerequisite for the permitted grounds of detention under Article 5(1). Unlike

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[198] *Hassan* §104.
[199] C.Landais and L.Bass, (n121) p1302.
[200] *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) §243.
[201] I.Park, '*Right to Life in Armed Conflict'* (OUP, 2018) p113.
[202] Ibid.

internment, there is no dispute that there is a legal basis for killing during NIAC. Whilst there is debate about the precise circumstances when an individual may be subject to lethal force, there is no doubt that killing is an 'accepted feature' of NIAC. Generally, the harmonious approach advocated in *Hassan* is not limited to IAC. More specifically, there is nothing in the *Hassan* judgment to suggest that Court would be reluctant to interpret Article 2 in light of the targeting rules applicable during NIAC.

In *Hassan*, the Court went to great lengths to avoid prioritising IHL over the Convention, exercising judicial creativity to interpret the Convention in harmony with IHL. To date, there is no judgment that decisively articulates the relationship between Article 2 and IHL. However, at times, IHL has implicitly influenced the Court to interpret the right to life flexibility in situations of conflict. Therefore, it would be surprising for the Court to stringently apply the right to life during armed conflict. Yet, the existence of an armed conflict is not included within the exhaustive grounds that justify deploying lethal force under Article 2(2), which appears to give rise to a 'genuine' norm conflict between the right to life under the Convention and IHL. The ECtHR has been consistent in its desire to avoid prioritising other norms of international law over the Convention. Thus, it is posited that the Court would resolve the seemingly irreconcilable conflict between Article 2 and IHL by evolutively interpreting the Convention to include killing during armed conflict as an exception for lethal force within Article 2(2). This would then allow the Court to assess whether force was 'absolutely necessary' with reference to IHL, thereby enabling a harmonious interpretation of the right to life with IHL.

Though it is proposed that the Court would regard killings conducted in accordance with IHL as lawful under the ECHR, there is still the issue of the application of the procedural obligation under Article 2. There are two key question that must be contemplated when considering the application of the investigative duty during armed conflict. First, when does the procedural obligation arise? Second, what are the requirements of an 'effective' investigation in the context of an armed conflict? When answering these questions, it should be noted that the Court's approach in *Hassan* was to interpret the substantive component of Article 5 in accordance with IHL but to enhance the procedural safeguards that would otherwise be required by IHL. Effectively, the Court instigated a trade-off that saw a reduction of substantive standards in return for enhanced procedural protections. It is proposed that, if the

Court is prepared to flexibly apply the substantive aspect of Article 2, it would likely be less yielding to IHL in respect of procedural safeguards.

With respect to the first question, it should be noted that the circumstances giving rise to the obligation to investigate State killing under the ECHR and IHL are vastly different. Under Article 2, the State is obliged to investigate every killing conducted by its agents.[203]The scope of the investigative duty under IHL is not as broad as it is only when a killing constitutes a potential violation of IHL that an investigation is required. According to the Geneva Conventions and AP I, the procedural obligation arises in relation to 'grave breaches' of IHL.[204]Thus, there is a higher threshold that must be surpassed to trigger the investigative obligation under IHL.[205]

Bearing in mind the Grand Chamber's approach in *Hassan*, it is improbable that the high threshold of a 'grave breach' of IHL would be required for the investigative duty to arise. Yet, it is also difficult to envisage a situation whereby the Court would demand that Contracting States to investigate *every* individual killing conducted during armed conflict as this would impose an overwhelming burden on States, which the Court has sought to avoid.[206]Park posits that a potential 'middle-ground' would be the requirement to conduct an investigation whenever there are allegations of violations of IHL.[207]This suggestion would strike an appropriate balance between the Court's desire to avoid imposing an overwhelming burden on states and ensuring that procedural safeguards are not overly diluted by IHL. In their partly dissenting opinion in *Georgia v. Russia (II),* Judges Yudkivska, Pinto de Albuquerque and Chanturia noted that the requirement to investigate suspected violations of IHL would limit the scope of the procedural obligation to a more manageable level whilst simultaneously reinforcing the effective enforcement of IHL.[208]

In *Georgia v. Russia (II)* and *Hanan v. Germany*,[209] the Grand Chamber considered allegations of war crimes as 'special features' which contributed to its

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[203] *McCann* §161; See also Chapter Two, Section 3.
[204]Article 52, GC I; Article 53, GC II; Articles 121 and 132, GC III; Articles 131, 146 and 147, GC IV; Article 87, AP I.
[205] See Chapter Three, Section 5.
[206] *Osman v. United Kingdom* [GC], no.23452/94, §116, ECHR-1998-VIII; See also Chapter Two, Section 3(e).
[207] I.Park, (n201) p117.
[208] *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, §15.
[209] *Hanan v. Germany* [GC], no.4871/16, 16 February 2021.

finding that the respondent state's procedural obligation under Article 2 had been established, even in the absence of a jurisdictional link with respect to the substantive limb of the right to life.[210]This indicates the Court's preparedness to require Contracting States to effectively investigate allegations of war crimes.

In terms of the second question, IHL is 'largely silent' in relation to how investigations must be conducted.[211]In contrast, the jurisprudence of the ECtHR has established that Article 2 compliant investigations must be 'effective' and elucidated various requirements to ensure effectiveness.[212]However, within its jurisprudence, the Court has shown a willingness to flexibly interpret the elements comprising an effective investigation.[213]Notably, in *Al-Skeini*, the Court accepted that in difficult security conditions 'the procedural under Article 2 must be applied realistically, to take account of specific problems faced by investigators.'[214]Yet, where the procedural obligation arises, States must take 'all reasonable steps' to conduct an effective investigation.[215]

Though the Court's pragmatic interpretation of the procedural duty is commendable, it injects uncertainty into the law. The degree and nature of the investigation that a State will be required to conduct will inevitably be influenced by the circumstances at hand. Moreover, the practical challenges facing investigators and the allowances that the Court may be prepared to afford will vary on a case-by-case basis. For example, a remote investigation into a pre-meditated drone strike, where recorded footage of the deployment of lethal force exists, is less likely to be afforded discretion compared to an investigation taking place in the vicinity of intense hostilities. Nevertheless, the purpose of the procedural obligation is to require states to establish whether the resort to lethal force was compliant with Article 2. Thus, if the Court interpreted the substantive limb of the right to life harmoniously with IHL, an

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[210] In *Hanan*, the complaint was focused entirely on an alleged procedural violation, which obviated consideration of a jurisdictional link with respect to the substantive limb of Article 2. However, in *Georgia v. Russia (II)*, the Grand Chamber held that the procedural obligation was established in relation to deaths that were outside Russia's jurisdiction. See Chapter One, Section 2(3)(b) for a discussion of 'special features' giving rise to the procedural obligation under the right to life.
[211] D.Murray, *'Practitioners' Guide to Human Rights Law in Armed Conflict'* (OUP, 2016) p334.
[212] See Chapter Two, Section 3.
[213] Yet, Wallace notes that the Court has, at times, paid 'lip-service' to the idea of flexible interpretation by failing to make concessions when States have confronted practical challenges. See S.Wallace, (n17) p122.Similarly, Quenivet has also expressed frustration that the Court has not afforded states adequate flexibility when conducting investigations within challenging circumstances. See N.Quenivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) *Netherlands Quarterly of Human Rights* 119, p136.
[214] *Al-Skeini* §168; Reiterated in *Jaloud v. Netherlands* [GC], no.47708/08, §186, ECHR-2014-VI.
[215] *Al-Skeini* §164.

investigation into killings conducted during armed conflict would require a consideration of legality under IHL. Therefore, the investigation would need to focus on the adherence of the killing to the principles of distinction, proportionality, and precaution.

5. Conclusion

The ECHR and IHL provide contrasting approaches to the regulation of lethal force. During armed conflict, the concurrent application of these legal regimes may give rise to a norm conflict between the permissive rules of IHL and the strict standards contained within Article 2. The UK contends that in situations of armed conflict, Article 2 places no greater constraints on the effective pursuit of military activity than are clearly imposed by IHL, even without invoking a valid derogation. Without direct case law explicitly setting out the application of Article 2 in armed conflict, this chapter examined the Court's approach to addressing norm conflicts to determine whether the Court would likely accept that a State's compliance with IHL would fulfil its right to life obligations.

Norm conflicts can be resolved by interpreting 'apparent' conflicting norms in a way that mitigates or eradicates their incompatibility. A 'genuine' conflict cannot be avoided through interpretation but may be resolved by prioritising the application of one norm over another. The Court's jurisprudence reveals an aversion to prioritising norms over the Convention and a preference for seeking to interpret the Convention in harmony with other norms, at times going to great lengths to achieve a harmonious interpretation. In *Hassan,* the Court explicitly endorsed harmoniously interpreting the Convention with IHL.

The Court has shown that it is prepared to interpret the provisions of the Convention flexibly during armed conflict. In *Hassan,* the Court went beyond the harmonious approach and effectively amended Article 5 to accommodate internment as a ground for the deprivation of liberty. Based on the Court's willingness to flexibly interpret the Convention in conflict situations, as demonstrated unequivocally in *Hassan*, it is proposed that the Court is unlikely to apply the strict Article 2 standards associated with 'peacetime' to killing conducted during armed conflict. Moreover, it would be unrealistic for the Court to expect States to be able to abide by the rigorous 'peacetime' standards during armed conflict.

In terms of the substantive element of Article 2, it has been argued that the Court would be willing to regard killings conducted in accordance with IHL as lawful

under Article 2. However, to reach this position, the Court would need to follow its approach in *Hassan* and evolutively interpret the Convention to read into Article 2(2) the existence of an armed conflict as a permitted basis for lethal force. Subsequently, the Court could then harmoniously interpret Article 2 by utilising IHL to determine whether force deployed during armed conflict was 'absolutely necessary'. With respect to the procedural obligation, it is proposed that the duty to investigate will only arise when an alleged violation of IHL has occurred. This is a compromise between the normal Article 2 requirement to investigate every killing and the high threshold of a suspected 'grave breach' of IHL that triggers an investigation during armed conflict. Once there is an alleged violation of IHL, the requirements for an 'effective' investigation will depend on the circumstances at hand. However, the Court has noted in its jurisprudence that it is cognisant of the practical challenges facing investigators in conflict situations and that the investigative duty under Article 2 must be applied realistically. Thus, the Court is likely to afford states concessions when interpreting the effectiveness of investigations during armed conflict.

The preceding analysis aligns with the UK position that Article 2 would impose no greater constraints on the effective pursuit of military activity than are clearly imposed by IHL. If a killing conducted during armed conflict complied with IHL, the Court's jurisprudence indicates that it would be unlikely to find that a substantive violation of Article 2 had occurred. In the absence of a substantive violation, it would be unlikely that the Court would require an 'effective' investigation into the relevant killing because this duty would extend every killing during armed conflict, which would be an impossible burden for States to maintain.

Until subsequent jurisprudence provides clarity about the relationship between IHL and the right to life, the UK should embrace derogation for targeted killing operations conduct during armed conflict. By doing so, the UK can be confident that its lethal operations that adhere to IHL will not result in a violation of the Convention. Without derogating, the application of Article 2 is not yet conclusive.

Conclusion

This research examined the application of the ECHR to the UK Policy and sought to establish the legal standards that the UK must observe to ensure its targeted killing operations do not contravene the Convention. Moreover, where the UK's legal position differs from the applicable legal standards or there is ambiguity about the Convention's application to the UK Policy, recommendations were provided to mitigate the risk that the UK will violate the ECHR when utilising targeted killing. The key findings from each research chapter are presented below.

Chapter One: Examining the Applicability of the ECHR to Extraterritorial Targeted Killing

A state's obligations under the Convention are contingent on the exercise of jurisdiction. Consequently, before analysing the *application* of the ECHR to the UK Policy, it was necessary to consider the preliminary issue of the Convention's *applicability*. Absent direct case law relating to extraterritorial drone strikes, Chapter One examined Strasbourg's vast jurisprudence on extraterritorial jurisdiction to establish the circumstances whereby a state's obligations extend overseas. This enabled an evaluation as to whether the force envisaged by the UK Policy would constitute the exercise of extraterritorial jurisdiction.

The analysis of the jurisprudence on extraterritorial jurisdiction revealed Strasbourg's inconsistent interpretative practice and the existence of case law that is strewn with contradictions. It was proposed that the Court's failure to develop a coherent and intelligible concept of extraterritorial jurisdiction derives from the tension between universal aspirations and considerations of effective human rights protection, which has resulted in the Court shaping its jurisdictional concept, at times on a case-by-case basis, to strike what it perceives as an appropriate balance between these objectives. Nevertheless, in the last decade, the Court has established a relatively stable jurisdictional concept as the term 'jurisdiction' was interpreted as synonymous with 'control' over territory (spatial jurisdiction) or individuals (personal jurisdiction).

In practice, it is not a simple task to apply the 'spatial' or 'personal' jurisdictional concepts to concrete situations. Notably, the Court has failed to clarify the relationship between extraterritorial killing and the Convention's applicability. The Court's jurisprudence clarifies that the killing of detained individuals abroad or persons within an area under the effective control of the responsible State or during the exercise of

'public powers' would engage the Convention. However, outside of these circumstances, it is not clear whether lethal action would engage the Convention. In *Georgia v Russia (II)*, the ECtHR confirmed that killing can constitute the exercise of jurisdiction when it results from an isolated and specific non-instantaneous act involving an element of proximity. Yet, these imprecise conditions fail to provide clear guidance to ascertain whether a State's extraterritorial killing comes within the scope of the Convention.

Admittedly, there is no immediately apparent grounds to assert a jurisdictional link between the UK and those subject to its targeted killing policy. Yet, it was argued that it would be premature to dismiss the Convention's extraterritorial targeted killing on the basis of the inadmissibility of the aerial bombardment in *Banković*. Though comparisons can be made between the bombing in *Banković* and force pursuant to the UK Policy, the decisive factor for the Grand Chamber's admissibility decision was the context in which the killing occurred and not the method deployed to kill. Therefore, as *Banković* concerned lethal force during an IAC and the UK Policy relates to force outside of this context, *Banković* should not be invoked as the jurisdictional 'yardstick' for extraterritorial drone-operated targeted killings.

Subsequently, it was considered that the UK's utilisation of extraterritorial targeted killing for counterterrorism could be construed as the exercise of *'public powers'*, which would result in those killed being brought within the jurisdiction of the UK. It was also evaluated whether force pursuant to the UK Policy could equate to the exercise of *'physical power and control'* over those targeted. However, UK targeted killings are unlikely to satisfy all the imprecise conditions set out by the Grand Chamber in *Georgia v Russia (II)*, notably the requirement of proximity. Nevertheless, it was also proposed that Strasbourg will struggle to uphold the arbitrary conditions that it has used to justify how one killing constitutes the exercise of *'physical power and control'* whilst another may not. To avoid arbitrariness, it was suggested that the ECtHR should follow the interpretative approach taken by the Human Rights Committee in relation to jurisdiction and the right to life, which clearly delineates the relationship between intentional lethal force abroad and the obligations of states parties under the ICCPR. Consequently, UK targeted killing operations would come within the purview of the ECHR.

In correspondence to the JCHR, the then-Defence Secretary Michael Fallon asserted that the Convention was not applicable to the UK Policy. However, as the

law in this area is unclear and Strasbourg's erratic practice renders any prediction of its future decision-making speculative, it was advised that the UK should not assume the inapplicability of the Convention to targeted killing and consider the relevant standards that would apply should the Convention be deemed applicable. More broadly, the UK should note the Grand Chamber's recognition of an obligation to conduct an 'effective investigation' in *Georgia v. Russia* and *Hanan* due to the 'special features' of those cases, which included allegations of war crimes. These judgments suggest that the Court is prepared to find a jurisdictional link with respect to the procedural limb of the right to life when there are allegation of war crimes, even in the absence of a determination that there is a jurisdictional link in relation to the substantive aspect of Article 2. The UK should be mindful of these recent judgments when utilising extraterritorial force in the context of an armed conflict.

Chapter Two: The Application of Article 2 in 'Peacetime'

Chapter Two examined of the application of the right to life to targeted killings conducted outside the context of an armed, which is the Convention's 'normal legal background' of 'peacetime'. Intentional killing will only comply with the right to life when 'no more than absolutely necessary' for achieving one of the permitted aims enumerated within Article 2(2). To meet this standard, killing must only be utilised as a last resort when less than lethal measures are unavailable or would be ineffective in achieving the permitted aim. Moreover, the Court indicated in *Nachova* that intentional killing would be regarded as excessive, and therefore prohibited, unless the victim is seeking to avoid arrest for a violent crime or poses a life-threatening danger to others. Additionally, where force gives rise to incidental injury or loss of life, the collateral damage must not exceed the harm that the forcible measures seek to address.

When deploying lethal action, the Convention also requires that states plan and control operations in a manner that minimises recourse to lethal force and incidental loss of life. Therefore, the legality of a killing under the Convention will be assessed with reference to the killing itself and the circumstances that surround it. Article 2 also requires that states provide appropriate training, instruction and briefing to its agents entrusted with using lethal force and that the regulation of lethal force is adequately regulated in line with Convention standards.

The UK Policy, which seeks to prevent terrorist attacks against the UK or UK interests abroad, would bring targeted killings within the scope of Article 2(2)(a). To be 'absolutely necessary', targeted killing operations must be utilised as a last resort

when there is no other option available to prevent death or life-threatening harm. As the protection of persons from death or life-threatening harm must be the objective that underpins a lethal act of counterterrorism, the victim of a targeted killing must pose a 'concrete' threat to life or limb.

The UK Policy anticipates utilising armed drones to kill terrorists abroad that are planning attacks against the UK or UK interests overseas. It is improbable that the targeted killing of a terrorist that *orchestrates* an attack can meet the standard of absolute necessity when it is known how, where and when an attack will be carried out. In such circumstances, the UK's counterterrorism measures should be focused on those that intend to carry out an attack (who pose a direct threat) rather than those involved in its planning (who pose an indirect threat). If such measures would successfully prevent an attack coming to fruition, there would be no need to kill persons involved in its planning. Yet, even if measures directed at operatives would be unable to prevent an attack materialising, it is difficult to see how targeting those orchestrating the attack would be effective.

It is more likely that a targeted killing could be regarded as 'absolutely necessary' when the specificities of an attack are unclear, such as the target selected or those entrusted with carrying it out. Modern instantaneous global communication technology facilitates the recruitment, guidance and instruction of terrorist operatives, enabling those with malicious intent to plan numerous attacks simultaneously, which can develop rapidly and be launched remotely without warning. Due to the volume and speed at which attacks can be coordinated with modern technology, it may not always be possible for a state to identify the specificities of an attack despite knowing that a person is orchestrating attacks, which, it is argued, may necessitate preventative action.

It is posited that the Court, which is "acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence and recognises the complexity of this problem" and has afforded states some discretion when assessing fatal force in the context of counterterrorism, would be amenable to this argument. Of course, to justify the resort to lethal force, it would be incumbent on the UK to provide evidence that the victim of a drone strike was integral in planning attacks and that the targeted killing was a last resort due to non-fatal options being either unavailable or unable to effectively deal with the threat posed. Where incidental harm results from a targeted killing operation, the UK would also be required to demonstrate that it was

proportionate to the threat that the drone strike sought to mitigate. In the absence of specific detail about an attack, this would complicate the proportionality assessment. However, when targeting individuals that are prolific in planning attacks, previously foiled acts of terrorism could be referred to as indicative of the scale of the harm prevented.

Even where a killing is deemed 'absolutely necessary' at the time it is administered, the failure to minimise the recourse to lethal force and incidental loss of life will render it in contravention of Article 2. In the context of extraterritorial drone strikes targeting individuals in 'safe havens', it is difficult to see how the UK could minimise the recourse to lethal force. Yet, the application of the requirement to take precautions to minimise incidental is more predictable. Considering the power of drone missiles, individuals located near a target will inevitably be put in life-threatening danger. Therefore, the UK should conduct drone strikes at a time when targets are in sparsely populated areas. It may not always be possible to select an opportune moment to conduct a drone strike but where the option between a strike in an urban or rural area arises, the Convention would require the latter to be selected.

Lethal force must also be adequately regulated to comply with the right to life. For aerial operations, the UK targeting process is regulated by NATO's *'Allied Joint Publication'*, which makes no reference to human rights law. Similarly, the UK's *Joint Doctrine Publication on Unmanned Aerial Systems* (recently withdrawn), which, *inter alia,* provided guidance to military personnel on the legal issues arising from the use of drones, failed to consider the application of human rights law to lethal targeting. Currently, the UK's framework regulating aerial targeting is focused on adherence with IHL, which does not apply to lethal action during 'peacetime', despite the UK Government's response to the JCHR inquiry asserting that IHL was an important consideration in this context. Moreover, the UK's targeting framework fails to either acknowledge the applicability of the Convention or consider its application to lethal targeting. Presently, by failing to consider the application of the right to life to lethal targeting during 'peacetime', it is posited that the UK framework regulating aerial operations does not adequately protect the right to life. Nevertheless, the UK could easily remedy this deficiency by explicitly recognising within its targeting doctrines that it is the ECHR, rather than IHL, that must be complied with during 'peacetime' and detailing the application of this framework to lethal targeting, thus ensuring that targeted killing operations are adequately regulated. The UK should take the

opportunity when it publishes its next iteration of its *Joint Doctrine Publication on Unmanned Aerial Systems* to recognise the application of Article 2 to 'peacetime' operations.

The ECtHR has recognised that Article 2 implicitly contains a procedural obligation requiring states to conduct an effective investigation following the use of lethal force. The Court considers the effectiveness of an investigation with reference to the adequacy of the investigative measures utilised and its independence, transparency and promptness. To be adequate, investigators must take the reasonable steps available to obtain evidence relevant to the death and conduct their enquiries thoroughly without overlooking potentially relevant issues. The independence requirement, whereby those carrying out an investigation must be separate from those implicated in the killing, safeguards against undue influence or bias. The requirement of transparency demands that investigative proceedings and outcomes are subject to public scrutiny, ensuring accountability 'in practice as well as theory'. Finally, promptness requires investigations to commence without undue delay and be conducted with reasonable expedition, which maintains public confidence that the state is not tolerating potentially unlawful acts. Moreover, promptness has a practical dimension as the passage of time can erode the amount and quality of evidence available which may compromise the ability to determine the facts of a particular killing. Within its jurisprudence, the Court has acknowledged the practical challenges facing investigators, particularly in difficult security environments, noting that the procedural obligation must be applied realistically. At times, the Court has been accused of paying 'lip-service' to its promise of flexibility. However, in the cases where the Court has stringently applied the constitutive elements of an effective investigation, there are clear frustrations about the deployment of inadequate investigative measures. In contrast, where the Court has considered that a state has utilised adequate investigative measures, it has been willing to flexibly apply the requirements of transparency, independence and promptness.

Following a targeted killing, the UK would be required to examine compliance of the military operation with the substantive limb of Article 2. Consequently, the following questions must be explored:

- Did the targeted individual seek to inflict life-threatening violence?

- Was the utilisation of an armed drone the only way to prevent this harm materialising?
- If incidental harm resulted from the drone strike, was the damage caused proportionate to the injury and death averted?
- If incidental harm occurred, were precautions taken to minimise collateral damage?

To answer these questions, the UK's investigation would need to review the intelligence that informed the decision to conduct a targeted killing and the military operation that culminated in the discharge of an armed drone. Due to the UK utilising targeted killing in inaccessible regions, some conventional investigative measures, such as conducting an autopsy or interviewing witnesses on the ground, would be unavailable. However, UK drone operations are recorded and the decision to utilise targeted killing is pre-meditated and intelligence based. Consequently, the UK should have no difficult in establishing the facts of a targeted killing operation and assessing its lawfulness. Yet, even where adequate investigative measures are deployed, the effectiveness of a targeted killing investigation requires consideration of its independence, transparency and promptness.

In terms of the promptness of a targeted killing investigation, as the UK would possess the intelligence that led to the decision to utilise lethal force and the recorded footage of the drone strike, there would be no justification for a delay, either in initiating the investigation or carrying it out. It is recommended that, similar to where lethal force is utilised by police officers, the UK should automatically refer targeted killings for investigation, with the ISC suggested as an appropriate body for carrying out the investigation.

The transparency requirement will necessitate that the UK acknowledges that a targeted killing has occurred and to publish its investigative findings. However, given the sensitivity of intelligence-based military counterterrorism operations, the Court will likely afford the UK some discretion to omit certain transparency elements that would ordinarily be necessary. For example, the Court would likely permit the concealment of detailed intelligence information when its disclosure could compromise future intelligence gathering efforts.

To satisfy the independence requirement, the UK should entrust the ISC with investigating the intelligence that formed the basis for conducting a targeted killing.

The JCHR inquiry noted the appropriateness of the ISC for this purpose on the basis that all its members possess the relevant security clearance to review sensitive intelligence information. The ISC demonstrated it could perform for this function by reporting on the threat posed by Reyaad Khan that motivated the UK to resort to lethal force against him. Though, the ISC may be an appropriate body for examining the severity and nature of the terrorist threat posed by a victim of a targeted killing, it does not currently possess the power to review the deployment of an armed drone because military operations are outside of its remit. Nevertheless, even if the ISC's remit is not expanded to review military operations, the UK armed forces shooting incident review procedure would be adequately independent and enable an examination of the incidental harm resulting from a drone strike and the precautions taken to minimise such harm. It is important to note that irrespective of how the UK would review the intelligence and operational phases of a targeted killing, the transparency requirement necessitates that both aspects of the investigation are published. With respect to the operational stage of a targeted killing operation, the UK could opt to release the recorded drone footage as this would clearly demonstrate whether precautions were taken to minimise collateral damage and indicate the level of incidental harm that resulted from the drone strike.

In *Hanan*, the circumstances of the death were clear and the evidence in relation to the airstrike could not be compromised. Consequently, the Court was prepared to find that the investigation was effective despite significant deficiencies in relation to how the investigation was carried out. This case clearly demonstrates the Court's preparedness to grant concessions with respect to the independence, transparency and promptness of an investigation when adequate investigative measures are deployed. There are characteristics of *Hanan* that investigations into targeted killings will possess, notably that the video footage of drone strikes cannot be compromised. Given the quality of evidence available following a drone strike, it is posited that only substantial defects of a targeted killing investigation's independence, transparency or promptness would undermine its effectiveness.

Chapter Three: Derogation from the Right to Life

During 'peacetime', it will only be in exceptional circumstances that intentional lethal force is compliant with the right to life. Yet, Article 15(2) of the ECHR permits a deviation from the strict standards of Article 2 through the mechanism of derogation. As the UK has previously indicated support for derogating during extraterritorial

military operations, we considered the requirements for derogation from the right to life for targeted killing and how derogation would alter the ‘peacetime’ application of the right to life.

As states have not derogated from the Convention for extraterritorial conduct, the preliminary consideration was the permissibility of extraterritorial derogation. It was proposed that the absence of extraterritorial derogation is likelier a consequence of the Convention’s limited applicability beyond state borders obviating the need to derogate, rather than a belief that derogation would be unavailable. Moreover, the Court has implied in the cases of *Hassan* and *Al-Jedda* that extraterritorial derogation is not prohibited. Therefore, there is no reason to suggest that the location of the victim of a targeted killing operation would be a barrier to the UK derogating from the right to life.

In terms of the substantive requirements for derogation from the right to life, Article 15(2) confines derogation to ‘deaths resulting from lawful acts of war…’. Though the Court has not yet articulated what this term means, ‘war’ is generally understood to refer to international armed conflict (IAC) or non-international armed conflict (NIAC) and the legality of a killing within this context would logically be determined by international humanitarian law (IHL), which was established to regulate IAC and NIAC. As Article 15(2) precludes derogation for killings conducted outside the context of an armed conflict, the UK would be unable to derogate for targeted killing operations conducted during ‘peacetime’.

In addition to Article 15(2), a derogation from the right to life must adhere to the general substantive requirements under Article 15(1). Accordingly, derogation is only available in a ‘time of war or other public emergency threatening the life of the nation’, a state may only take derogating measures must only be taken ‘to the extent strictly required by the exigencies of the situation’ and those measures must not contravene a state’s other obligations under international law. The specific requirement for the existence of a ‘war’ under Article 15(2) significantly overlaps with the general requirement under Article 15(1).

In determining whether derogating measures were ‘strictly required by the exigencies of the situation’, the Court considers their necessity and proportionality. As necessity and proportionality are central tenets of IHL, it is proposed that lawful killing within this context would not be regarded as excessive. The Court may also consider whether the *adoption* of a targeted was also necessary and proportionate. It is

proposed that the UK's adoption of a targeted killing policy would also likely be regarded as necessary (to address terrorist threats) and proportionate (because it is limited to an act of last resort when there are no other measures available to mitigate the threat of terrorism). Finally, derogating measures must be consistent with the state's other obligations under international law. For killing during the context of 'war', this would include IHL, which must be complied with as a specific requirement for derogation from the right to life. 'Other obligations under international law' could also encompass the UN Charter, which would require extraterritorial force not to contravene Article 2(4) of the Charter as a requirement for derogation. However, throughout its jurisprudence, the ECtHR has avoided the politically controversial and legally complex issues relating to the *jus ad bellum*. Therefore, it was proposed that compliance with IHL will likely ensure that UK targeted killing operations are regarded as consistent with its 'other obligations under international law'. Moreover, it should be recognised that the 'conformity' requirement has played a marginal role in the Court's consideration of the validity of derogations.

As well as adhering to the aforementioned substantive requirements for derogation, there is also a procedural requirement to inform the Secretary General of the Council of Europe of the derogating measures taken, the reasons therefore, and when such measures have ceased to operate. To ensure a derogation from the right to life for targeted killing is procedurally sound, the UK must ensure that there is an official and public notice of derogation. However, it may not be necessary for the UK to submit a derogation for each targeted killing as the invocation of a general derogation during an armed conflict could apply to all targeted killing operations that occur within the armed conflict. Where the UK seeks to submit a derogation for a specific targeted killing, it is expected that this would be retrospective to avoid disclosing information on an upcoming counterterrorism operation. This would not be a barrier to derogation, but the UK must ensure that any submission of a retrospective derogation is not unjustifiably delayed.

As of yet, no state has derogated from the right to life. Consequently, the ECtHR has not had the opportunity to set out the impact that a valid derogation has on the application of Article 2. Yet, there is a general view that derogation aligns the application of Article 2 with IHL. This view was recently espoused by Judges Yudkivska, Pinto de Abuquerque and Chantiu in their partly dissenting opinion in *Georgia v. Russia (II).* Accordingly, deaths resulting from a 'lawful act of war', would

not constitute a violation of the substantive element of the right to life by the derogating state. In terms of the procedural obligation, derogation would narrow the scope of investigative duty by requiring an 'effective investigation' only where there is a potential violation of IHL. Therefore, it is posited, that where targeted killing operations are subject to a derogation and comply with IHL, the UK would likely conform with its right to life obligations.

Chapter Four: Targeted Killing as a 'Lawful Act of War'

Derogation from the right to life is only permissible for deaths resulting from a 'lawful act of war'. Chapter Four considered when the UK's utilisation of targeted killing against terrorists would be regarded as a 'lawful act of war'.

The existence of an armed conflict is a prerequisite for lethal force to regarded as an 'act of war'. An armed conflict between a state and a non-state actor (NSA), such as a terrorist group, would be categorised as a NIAC. For a NIAC to arise, a threshold of 'intense' violence must be surpassed between a State and an 'organised' NSA. There are a range of factors that must be considered when assessing the intensity of a violent confrontation and the organisation of the NSA involved. Consequently, a case-by-case analysis is required when assessing whether a violent confrontation possesses the constitutive elements of a NIAC. Yet, the requirement of bilateral hostilities to surpass the 'intensity' threshold would preclude a solitary targeted killing operation establishing a NIAC. Therefore, to be an 'act of war', the UK's utilisation of targeted killing must take place within the context of a pre-existing NIAC, which may materialise through its own hostilities with a NSA or, alternatively, the UK could become a party to a NIAC by supporting another state that is already engaged in an armed conflict with a NSA.

For killing to be 'lawful' under IHL, the principles of distinction, proportionality, and precaution must be obeyed. Additionally, lethal force must not be administered by banned weapons or through prohibited means. The use of armed drones is not illegal under IHL, nor is targeted killing forbidden. Therefore, the legality of UK targeting killing operations will be contingent on the victim being regarded as a legitimate target, avoiding excessive collateral harm and taking feasible precautions to prevent or minimise civilian harm.

In NIAC, civilians may be targeted whilst they directly participate in hostilities. Moreover, members of a non-State party to a NIAC (those who possess a 'continuous combat function'), whose status derives from repeated acts of direct participation in

hostilities, are legitimate military targets. The UK Policy seeks to neutralise terrorist threats and those that seek to carry out or orchestrate acts of terrorism can be regarded as directly participating in hostilities. For those that facilitate terrorist attacks to be regarded as directly participating in hostilities, they must play a key role in its planning, such as the recruitment of specific individuals to carry it out or the identification and selection of a particular target. However, when assessing whether an individual is a legitimate military target, the entirety of their conduct should be considered. Thus, though the UK's policy rationale for targeted killing is the prevention of terrorism, compliance with the distinction principle under IHL requires the targeted person to either directly participate in hostilities or be a member of the non-State party to the NIAC, which need not necessarily arise through committing or organising acts of terrorism.

To comply with the proportionality principle, the military advantage gained by utilising targeted killing must not exceed the collateral harm caused. There is no precise formula for determining the proportionality of collateral harm but the more severe the terrorist threat that the UK aims to address through targeted killing, the more collateral harm that would be tolerated. Where collateral harm arises, it must be demonstrated that all feasible measures were taken to prevent or minimise such harm. The technological capabilities of armed drones facilitate measures that can minimise or prevent civilian harm. For instance, the ability of drones to loiter for longer periods compared to other aircraft enhances target verification and enables the selection of an opportune moment when deploying lethal force, such as when a target is located in a rural area. However, whether a UK targeted killing is proportionate and adequate precautionary measures have been utilised can only be assessed with reference to the specific circumstances at hand.

The existence of an armed conflict does not bring every act, person or place within the scope of IHL. Therefore, for a targeted killing to be an 'act of war' and subject to IHL, the resort to lethal force must occur within the context of a prevailing armed conflict. In NIAC, IHL applies 'internally' throughout the State where the conflict emerged to conduct, persons or places that have a 'nexus' the conflict. For lethal operations, those that directly participate in hostilities, either continuously or on an isolated basis, possess a 'belligerent nexus', which brings them within the scope of the targeting rules of NIAC. Consequently, targeted killing operations against persons

that directly participate in the hostilities within the state where the NIAC originated, will be regarded as an ‘act of war’.

The law of NIAC may apply ‘externally’ but the circumstances whereby the law extends beyond the territory where the conflict materialised, and the extent of its geographical reach are not settled. There is a broad acceptance that the law of NIAC follows ‘spill over’ hostilities in neighbouring or adjacent states and to regions utilised to launch cross-border military operations.

Technological advancement facilitates the remote participation in hostilities. It was proposed that it would be arbitrary to put a geographical limitation on the scope of the law of NIAC and that a favourable approach to determining the application of IHL would be to focus on the connection (‘nexus’) between places, persons or conduct and the prevailing armed conflict. However, there is currently little state support or *opinio juris* in favour of a geographically unbound approach to the determination of the scope of the law of NIAC. Therefore, the UK should be mindful that in the absence of an independent NIAC arising, it is only likely to be in neighbouring or adjacent states that the law of NIAC can apply ‘externally’ and bring those subjected to targeted killing operations within the scope of IHL so as to be regarded as an ‘act of war’.

Chapter Five: The Application of the Right to Life during Armed Conflict: Examining the Concurrent Application of the Convention and IHL

During armed conflict, the ECHR applies concurrently with IHL. Therefore, in the context of war, lethal force would be regulated by two legal regimes with different regulatory approaches. Due to the comparatively permissive framework of IHL, there will inevitably be killings that comply with the law of armed conflict but fall below the stringent standards set out in Article 2. This situation is known as a norm conflict, whereby adherence to one norm may lead to the contravention of another.

In international law, there is a strong presumption against normative conflict. To prevent the materialisation of a clash between IHL and Article 2 during armed conflict, states could bring the application of the right to life in line with IHL through derogation. However, in the absence of a derogation, it would be incumbent on the Court to address any norm conflict that arises. To date, the ECtHR has not explicitly addressed the interaction between the right to life and IHL during armed conflict. Yet, the Court has been confronted with norm conflicts throughout its jurisprudence. Chapter Five scrutinised the Court’s approach when addressing norm conflicts to

understand how it would likely reconcile the divergent regulatory regimes of IHL and Article 2 of the Convention during armed conflict.

Norm conflicts can be either ‘genuine’ or ‘apparent’ and their categorisation alters the response needed to settle them. An ‘apparent’ conflict arises where the content of two norms appear contradictory, but their incompatibility can be interpreted away. A ‘genuine’ conflict cannot be avoided through interpretation but may be resolved by prioritising the application of one norm over another. An examination of the Court’s jurisprudence revealed an aversion to subordinating the Convention as to other norms of international law, such as IHL. Rather than resolving conflicts through prioritisation, the Court has preferred to interpret away ‘apparent’ norm incompatibility.

At times, IHL has influenced the Court’s interpretation of the Convention. In *Isayeva, Yusupova and Bazayeva v. Russia,* the Court modified the strict ‘absolute necessity’ requirement under Article 2 by applying a standard of ‘reasonable necessity’. However, the Court never explicitly acknowledged the influence of IHL, nor was the Court’s utilisation of IHL consistent. However, the Court took a ground-breaking step in *Hassan* by openly engaging with the law of armed conflict and explicitly modifying the application of the Convention in line with IHL. The Court held that the UK’s internment of Tarek Hassan for a period during the IAC in Iraq did not violate Article 5. Though internment was not included within the permitted restrictions on the deprivation of liberty under Article 5, the Court was receptive to the UK argument that Article 5 should be modified to allow for internment during IAC. On the basis that the Contracting Parties had not derogated from Article 5 when detaining individuals during IAC pursuant to the Geneva Conventions, the Court took this state practice as evidence of an agreement that Article 5(1) did not prohibit internment and evolutively interpreted Article 5(1) so as to include internment during IAC as justifying restrictions on the deprivation of liberty. Subsequently, the Court then considered the legality of the detention of Tarek Hassan with reference to IHL, despite the lack of a derogation by the UK.

In *Hassan*, the Court utilised judicial creativity to incorporate internment within Article 5(1), thereby avoiding a ‘genuine’ norm conflict between the Convention, which did not permit internment, and IHL, which does in certain circumstances. By evolutively interpreting Article 5, the Court was able to harmoniously interpret the Convention with IHL and did not need to prioritise either body of law. The Grand Chamber’s judgment was subject to criticism. Notably, the dissenting opinion of Judges Spano, Nicolaou,

Bianku and Kalaydjieva validly criticised the Court's willingness to flexibly interpret the Convention despite the absence of a derogation as undermining Article 15. Nevertheless, despite flaws in the *Hassan* judgment, the Court's willingness to explicitly engage with IHL was a positive development as it is now clear that the Court favours harmoniously interpreting the Convention and IHL.

The ECtHR has not yet explicitly considered the relationship between IHL and the right to life during armed conflict. Nevertheless, the existence of an armed conflict is not included within the exhaustive grounds that justify deploying lethal force under Article 2(2), which appears to give rise to a 'genuine' norm conflict between the right to life and IHL. However, occasionally, the Court has flexibly interpreted the right to life in challenging security environments, which suggests that Article 2 would not be stringently applied during armed conflict. Yet, the Court has also been consistent in its desire to avoid prioritising other norms of international law over the Convention. Thus, it was posited that the Court would resolve the seemingly irreconcilable conflict between Article 2 and IHL by following its approach in *Hassan* and evolutively interpreting the Convention to include killing during armed conflict as an exception for lethal force within Article 2(2). This would then allow the Court to assess whether force was 'absolutely necessary' with reference to IHL, thereby enabling a harmonious interpretation of the right to life with IHL. In *Hassan*, the Grand Chamber was accused of undermining Article 15 by flexibly interpreting the Convention without requiring the invocation of a derogation. If the right to life were to be applied in line with IHL during armed conflict, the Court would be open to this accusation once more. It would make Article 15(2) practically irrelevant if the Court would be prepared to modify the application of Article 2 in a way that mirrored the invocation of a derogation without actually requiring states to derogate from the right to life.

In *Hassan*, the Court was prepared to flexibly interpret the substantive limb of Article 5 by permitting internment during IAC in accordance with IHL. However, the Court effectively instigated a trade-off by enhancing the procedural safeguards that otherwise would have been provided for by IHL. It was proposed that, if the Court is prepared to flexibly apply the substantive aspect of Article 2, it would likely be less yielding to IHL in respect of procedural safeguards. The Convention requires an 'effective' investigation whenever state agents utilise lethal force, whereas the obligation to investigate under IHL is triggered by a potential 'grave breach' of the Geneva Conventions. Thus, IHL has a comparatively higher threshold that must be

surpassed for the obligation to investigate lethal force to arise. On the basis of the Court's approach in *Hassan*, it is improbable that the high threshold of a 'grave breach' of IHL would be considered necessary for the investigative duty to arise. Yet, it is also difficult to envisage a situation whereby the Court would demand that Contracting States investigate *every* killing conducted during armed conflict as this would impose an overwhelming burden on States, which the Court has sought to avoid. More likely, the Court would opt for a 'middle-ground' whereby there is a requirement on states to investigate each potential violation of IHL. This approach, endorsed by Judges Yudkivska, Pinto de Albuquerque and Chanturia in their partly dissenting opinion in *Georgia v. Russia (II)*, would strike an appropriate balance between the Court's desire to avoid imposing an overwhelming burden on states and ensuring that procedural safeguards are not overly diluted by IHL. In *Georgia v. Russia (II)* and *Hanan,* the Grand Chamber noted that allegations of war crimes were 'special features' that gave rise to the procedural obligation under Article 2. These judgments indicate that the Court is prepared ot require states to investigate alleged violations of IHL and that the 'middle-ground' approach would be palatable.

During the JCHR inquiry, the UK stated that Article 2 imposes no greater constraints on the effective pursuit of military activity than are clearly imposed by IHL. Therefore, even without derogation, the UK regards compliance with IHL as satisfying its obligations under Article 2. It was proposed that the Court's willingness to flexibly interpret the Convention to accommodate IHL would likely result in killings conducted in accordance with IHL being regarded by the Court as compatible with Article 2. However, until subsequent jurisprudence confirms the relationship between IHL and the right to life, the UK should embrace derogation when utilising targeted killings to have greater confidence that its operations conducted in accordance with IHL will not result in a violation of the Convention.

Final Remarks

The focus of this thesis was the examination of the ECHR to the UK Policy, but the preceding legal analysis would be pertinent to any Contracting Parties that may embrace a similar policy. Yet, the legal issues that have been analysed are not exclusive to the use of armed drones for the targeted killing of terrorists overseas. The extraterritorial applicability of the Convention, the concurrent application of the ECHR and IHL, the impact of derogation on the right to life, and the requirements of a valid derogation are just a select number of the issues that have been considered which

would be relevant whenever states parties conduct military operations abroad. Though the UK Policy broke new ground and provided a fresh context for assessing the Convention's application, it also offered an avenue through which some of the most contentious and unsettled issues concerning the application of the ECHR could be explored.

It is baffling that straightforward questions on the Convention's applicability/application require, at times, complex legal analysis and/or remain unsettled. The clearest example of this problem is the following question; if a state party to the ECHR utilises an armed drone to kill an individual overseas, does the acting state have any obligations under the Convention to the deceased? As has been noted within this thesis, there are valid reasons why the ECtHR has been reluctant to expand the Convention to extraterritorial military operations. In such circumstances, alleged violations are bound to be politically contentious, complex legal issues will need to be addressed, and the potential implications for the Court's resources may be overwhelming. Yet, throughout the Convention's existence, European states have utilised military force abroad and that is unlikely to stop. Inevitably, the Court will have to address the issues that it has sought to avoid in relation to extraterritorial military operations as its current piecemeal approach is unsustainable.

At this moment, Russia continues its brutal invasion of Ukraine on a scale not seen by the continent since the Second World War. Ukraine has launched an inter-state application alleging mass and gross human-rights violations committed by Russia during the course of its military operations on the territory of Ukraine since 24 February 2022. When the Court comes to address the admissibility and merits of the application, which it will do so jointly, it must not miss the opportunity to address the ambiguity in its jurisprudence and provide clarity after so long on *when* states have obligations during military operations overseas and *what* the requirements for compliance with the Convention are.

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xii. International Criminal Court

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G. Table of International Agreements

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

American Convention on Human Rights (adopted 27 November 1969, entered into force 18 July 1978) 1144 UNTS 123

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221

Declaration Renouncing the Use, in Time of War, of Expensive Projectiles under 400 Grammes Weight, Saint Petersburg, 29 November/ 11 December 1868

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August, entered into force 21 October 1950) 75 UNTS 31

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Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277

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Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

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H. UK Legislation

Anti-Terrorism, Crime and Security Act 2001

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