All Party Parliamentary Group on Drones

Oral evidence: APPG Inquiry into 'The Use of Armed Drones: Working with Partners'

Tuesday 5 December 2017

Witnesses: Nils Melzer; Marko Milanovic

Inquiry Members present: Clive Lewis MP; Lucy Powell MP; Murray Hunt (guest)

Chair: Professor Michael Clarke

Michael Clarke: Welcome to the last ever session of the All-Party Parliamentary Group's inquiry on drones. The inquiry is particularly looking at the implications to partnership arrangements, particularly partnerships between those countries operating drones, not just for surveillance purposes but also for lethal purposes. For your benefit, gentlemen, I'll ask the panel to introduce themselves, and then I'll ask you to introduce yourselves.

Murray Hunt: My name's Murray Hunt. I'm the Director of the Bingham Centre for the Rule of Law, and until this June, I was the legal advisor to the Joint Committee on Human Rights in the Westminster Parliament.

Michael Clarke: I'm Michael Clarke. I'm independently Chairing this inquiry and used to be the Director of the Royal United Services Institute.

Clive Lewis: I'm Clive Lewis MP. I'm the Chair of the APPG.

Lucy Powell: I'm Lucy Powell MP, and I'm also a member of the APPG.

Michael Clarke: So, it's a great pleasure to welcome Nils and Marko but I should say, Nils, that the reason we're starting late is that you've come from Geneva specifically for this meeting, and going back immediately after this meeting. I just want to thank you for making the effort. It's worth starting a little bit late if we could get you here this evening. Could I, gentlemen, just ask you to introduce yourselves, and just tell us a bit about your background, relevant to this inquiry. Marko?

> **Marko Milanovic**: Thank you, Michael. I'm an Associate Professor at the University of Nottingham School of Law. I'm just wrapping up as a visiting Professor at Colombia Law School. My scholarship generally deals with this sort of stuff. So, I wrote a book on the extraterritorial application of human rights treaties, and I've written a lot on the relationship between human rights and international humanitarian law, but clearly, I'm an academic, I do not

know much about drones from a practical side.

Nils Melzer: Thank you. My name's Nils Melzer. I'm a Professor of International Law in Glasgow. I'm also the human rights chair of the Geneva Academy for Humanitarian Law and Human Rights. I'd say my expertise in this area stems from two sources. On the one hand, I've spent twelve years as a legal advisor for the ICRC, the International Committee of the Red Cross in the field, and in Geneva, and also the author of the ICRC's interpretative guidance on the notion of direct participation in hostilities, which is one the important documents, I think, in this area. Also I have authored a book on targeted killing and international law (Oxford University Press), and also a study for the European Union Parliament on the human rights implications on the usage of drones and robots. Also covering autonomous weapons but it deals also with that aspect of drones. think an additional useful piece of professional experience that I contribute here, is that I have worked as a senior security policy advisor of the Swiss government in foreign affairs.

Q1. Michael Clarke: Thank you. Nils, can I ask you first, given that your immediate background and your policy focus, but I'll also ask Marko the question as well, could you give us a sense of where the big issues are in international law in relation to drones, and the use of drones for lethal purposes? I mean, this has been with us for a long time. We know that international law is moving quite quickly. I think, with your background and expertise, it would be interesting to get a sense of where you think the frontier issues are. What are the new issues that we ought to be aware of?

Marko Milanovic: Well, I think from now, if you look forward into the future, obviously an aspect that will become more important is the increasing autonomy of weapon systems, but I don't think that this is what we're addressing here predominantly. That should be a special focus but I think that's something that is, kind of, looming on the horizon but it's not yet, I think, the main concern of current practice. I think what we have seen obviously generally since the turn of the century, is just an evolution of the security environment into a direction of, kind of, fragmentalised types of violence that are not as structured as classic armed conflicts used to be confronted with in the past, including international conflicts, civil wars, where basically armed forces wanted to take over control of the country. Now we have what we're generally referring to as terrorist violence or non-state actors, organised groups, conducting hostilities or resorting the violence that we don't know whether it amounts to a conflict. So, what I want to say with this is that we have an issue at the outset determining which is the law that applies to the use of force.

What is the framework that we are applying here, and who are the actors that these bodies of law refer to? We're talking about combatants and civilians. How can we identify these people in the current environments where everyone tries to look like a civilian and act as a civilian, and then attack by surprise? So we have practical difficulty in applying these bodies of law. I see that time and again also in the field, when working with the armed forces and security forces. For them, the most difficult thing was not to understand the law, but to know what the facts are. Who is the enemy? It is not a legal question as much as how we define it. What's a combatant or a legitimate target? There are also some difficulties there but to know who actually is my enemy because they are all disguised. So, I think it's important in this whole area to distinguish problems of facts that we cannot solve by changing the law, and problems of law, which is to clarify the rules and the categories, and try to maintain the tremendous accomplishments of the past in terms of distinguishing civilian population and fighters and so on, trying to apply those categories also to the current context.

Therefore I believe it's important to ask the right questions. Are we dealing with a problem of fact? Are we dealing with a problem of law? If we're dealing with a problem of law, what framework are we applying? Also, within that area, I think what I see, there's a tendency to confuse various frameworks, human rights law and humanitarian law. But also the UN Charter law on the use of force, self-defence concepts as interstate self-defence. To confuse that or merge it, conflicted with concepts of self-defence in terms of individual self-defence, or the protection of civilians and so on. So, we can go into these discussions but I see that there's a big need or an urgent need to ask the clear questions. If you want to resolve these issues that are raised by the extra-territorial use of force through drones, drone killings, it's multi-layered questions, complex questions, and if you want to have clear answers, we have to ask the right questions,

Michael Clarke: Thank you. Marko, can I just ask if there's any other comment that you would like to add to that, or any different perspective you'd like to add?

Marko Milanovic: I would agree with what Nils has just said. There are few issues in international law that are specific to drones. So, you know, the only really drone-specific question in IHL is: 'is a drone, in principle, a lawful weapon?' The answer to that is clearly yes. There are all sorts of other questions that arise, that can also be posed to other types of weapon systems or other types of uses of force. All of these questions have been very acute since 9/11. Few of them have been resolved. Some of them perhaps are in the process of being resolved or being mainstreamed in a

certain direction. For example, when it comes to using self-defence against non-state actors etc. Claims that have been or arguments that have been more out there immediately after 9/11 have become more mainstream today, for example. That is a process that has happened but all of these issues are still with us. Legally, the problem is, as Nils was saying, this is a set of topics where several different legal frameworks interact. They were not designed in a way that you have clear answers as to how they interact, for the most part.

So, for example, nobody, when human rights treaties were drafted, and the IHL treaties, the Geneva Conventions were drafted, gave thought, schematically, to how they would apply together at the same time to the same problems. It was just not considered. So, we essentially are faced with this problem of having to apply old law to new facts or new issues, which is the problem all lawyers have to deal with all the time, you know. If you create a robotic car, you have to think about how you apply traffic regulations. The various methods of development that domestic law frequently has is often lacking in international law. So that's one set of problems. That's where you have these broad areas of uncertainty that are very problematic.

Q2. Michael Clarke: Just a final generic question from me, in terms of targeted killing in areas in which one's own forces may not be involved, so targeted killings, say, in a third country, in which you are not in a state of war. Has the law changed on that in the last twenty years? Has it evolved or is that still what it was some time ago?

Marko Milanovic: So, legally your questions suffers from assumptions that are problematic. So, for example, 'not in a state of war' is not any longer a technical legal issue, right? Targeted killing, I mean, Nils wrote a book about it, but targeted killing as such is not a legal concept in any kind of treaty. So, it is very difficult to answer that question. The best way to answer that question is to move from simple scenarios to more complex scenarios. So, don't start with the use of drones against Reyaad Khan in Syria. Start with a simpler example. If the UK had to kill somebody on UK territory, what would the law be like? Because the UK does that. So, UK police forces kill people every year, right? Ukraine is fighting an armed conflict on its territory. So, for example, one whole big issue, which is the extra-territorial application of human rights treaties, we can just postulate it away by looking at the whole thing from the perspective of Ukraine. The Ukraine is fighting this conflict on its own territory. So, 'Has the law changed?' is a very difficult question to ask. Some parts of the law may have changed. Some parts of the aw may have not, and not all parts of the law apply to the same type of scenario all the time.

Michael Clarke: I understand your point. I mean, I'm sure we'll come back to that. Let's think about self-defence a little bit. How do different scholars interpret the scope of imminence of self-defence? How do they interpret that concept? There are differences, aren't there?

> **Marko Milanovic**: First of all, there is a whole bunch of scholars, mainly continental European scholars, who do not get into that whole question. They simply say, 'The whole notion of imminence is irrelevant because you only have the right to self-defence if an armed attack occurs. You have to have an armed attack actually happen, and only then will you have the right to self-defence'. I mean, that's at least half of international lawyers, during the past 60 or 70 years. It's not a small group of people who believe that. So, when you have people like, you know, British Attorney General, who say, 'It is now widely accepted that-,' or, 'It is universally accepted that-,' that's not necessarily true. So, I mean, at least half the profession did not think that. So, you need to then move to the other half of the profession who thinks that self-defence is sometimes available when an armed attack is yet to happen. They're the people who care about imminence. So, it's only there where that concept really arises.

Clive Lewis: So, the British government have been quoted as saying that they make their decision based on issues other than temporal factors.

> **Marko Milanovic**: Yes.

Clive Lewis: Issues other than imminence. Do you want to just talk me through that very quickly?

> **Marko Milanovic**: Correct, so, among those people that think you can use the word 'self-defence' in anticipation of an attack, there have been two schools of thought. There are three schools of thought. There's, like, the Bush administration people who say, 'Whenever we think it's necessary to use force pre-emptively, we can do it.' Then there's the second group of people, who really the British government falls in, who say, 'In order to limit this idea of pre-emptive somehow, it will only be possible if an attack is imminent.' Then the whole question becomes how you define when an attack is imminent. Their one approach is to say, 'An attack is imminent if it is temporally proximate, it is about to happen.' This meeting is about to be over. In an hour and a half it's over, yes? Then there's the other school of people who say, 'So long as a causal chain has started, which without some kind of external interruption, will at some point in time, but far off potentially, result in

the attack. The attack is imminent.' So, in that school of thought, it is imminent that there will be a solar eclipse, you know, next year at that point. We can calculate those dates exactly for the next couple of thousand years. It is imminent that the sun will blow up 5 billion years from now. It's not a question of time.

Lucy Powell: Is that the third group of people?

Marko Milanovic: Correct, that's the British government.

Michael Clarke: Imminent could mean anything, is what you're saying now, by some standards.

Marko Milanovic: What they are saying, an attack becomes imminent if it is now necessary to act to stop it.

Michael Clarke: Okay.

Marko Milanovic: So they have redefined imminence by looking at necessity.

Clive Lewis: Is that linked to the work of Daniel Bethlehem QC?

Marko Milanovic: Correct, that's exactly where it comes from.

Clive Lewis: How does this apply to use of drones, the application of that, to the use of drones, with that interpretation?

Marko Milanovic: So, it applies to the use of drones as to any other weapons system, in the sense that if you want to use force on the territory of some other state. So, self-defence is only in issue if you need to use force on the territory of some other state, because that's the claim you have. You need self-defence to excuse the violation of sovereignty of that other state. If that state does not give you consent to operate in the territory, then you need self-defence. So, the argument goes, as in the Reyaad Khan case, you know, it was necessary for us to act at this moment to kill this guy because he was planning imminent attacks against UK people in the UK, but you could use the same argument for something else. So if, God forbid, Donald Trump nukes North Korea tomorrow, he will do that on the basis that it was necessary to act now to prevent North Korea from nuking the UK.

Q3. Michael Clarke: Nils, from Geneva, I'm particularly intrigued by this third strand of thinking, which is a big jump. It's a big logical step. Nils, this third strand of

thinking, is this really American neo-con inspired thinking, or is it more universally discussed?

> **Nils Melzer**: To be honest, maybe you'd expect me to say that, but I think there's something convincing about it, to say that imminence is a temporal aspect of necessity. Any use of force, against any individual or a state, needs to be governed by the principles of necessity and proportionality. There's also a temporal aspect to necessity and then there's a qualitative aspect, 'What do I need to do to achieve what I want to achieve, to avert a certain threat?' That's qualitative, 'Do I need to use force?' 'How much force do I need to use?' is quantitative. 'Do I need to use it now?' is temporal, and that's the imminence issue. That's, I think, what we already have in the Caroline criteria on justifying self-defensive action without first going through the neighbouring state. So, I can see the argument as being convincing, that it's the last window of opportunity where we can act to avert the threat. The dangerous thing is, does the threat really exist? I think that's the danger that we have to deal with, to avoid, you know, obviously forcible self-defence against illusionary threats that may not exist.
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> So that's what the difficulty is but I can see that there's an increasing tolerance, I would say, in state practice or states acting against these types of threats pre-emptively. What we don't have yet is a system that will ensure, a kind of, independent oversight, ensuring that these threats are not just imaginary. So, to me, imminence should not be attached to the attack but it should actually be attached to the necessity to act now. We need some kind of a safety net to avoid imaginary-, unjustified use of force against imaginary threats. To me, imminence is given when immediate force is required in order to avert the threat that, but for this intervening action, would result in armed attack, if you talk about the interstate one.

Q4. Michael Clarke: You also mentioned, early on, in the sense of a question of last resort, 'And there is no other way.' I mean, presumably the question of imminence, requires you to argue that there is no other alternative that has reasonable prospect of success.

> **Nils Melzer**: Correct, absolutely, that's the quantitative aspects of necessity that come first, 'Do I need to use force, if there are less harmful means?' 'If I need to use force, how much, what kind of degree of force do I need to use as a minimum, or are there less harmful means?' If the least harmful means I have at my disposal to defend myself is to use force and to use lethal force, then I still have to ask myself, 'Can I defer that to a later moment without taking disproportionate risks? Or do I have to act now?' That's already

encapsulates the test of proportionality, weighing benefits, which is obviously never a precise calculation.

Marko Milanovic: Can I just briefly follow up on your question, 'Is this a neo-con thing?' It's not necessarily.

Michael Clarke: I'm interested in how wide a view it may be.

Marko Milanovic: That's difficult to gauge. It's not like people have done a database of what all international lawyers have said through time, 'Now I can tell you exactly what proportion of international lawyers think that.' Reasonable people who are not involved in this from a purely self-interested perspective or working for Governments think that. Dapo Akande thinks that, that imminence is necessity. Nils thinks that. So, it is not some kind of mainstream view. The problem is this. If you think imminence serves as some kind of distinguishing factor, from this doctrine of pre-emption, which is more palatable, and the Bush doctrine of pre-emption, which was Saddam Hussein *could* have a weapon, which he *could* give to terrorists, which he *could* use to-, imminence does not help you to separate the two. Everything was down to the question, 'Is it necessary to act?' The problem with that is it will always be the person making that decision, Donald Trump, Theresa May, whoever it is, who will be making it.

Q5. Clive Lewis: I was just going to say, that decision that's taken is taken with imperfect knowledge, and, on top of that, interpretation, down through the chain of relevant individuals who've looked at this information and assessed it. How do we go about scrutinising that, making sure that there are mechanisms in place and oversights, which can look at the chain of decision making to say, 'this is imminent,' or not, and then to question that? I suppose the role I'm thinking of is what role can parliament play in that? Is there a role for parliament to play in that? Are there other mechanisms of oversight to, to be able to make, not a bias-free assessment, but at least an analytical one, based on certain principles?

Marko Milanovic: To an extent, that is the key question for these types of things. I think the first level of safeguards have to come from within government - how can we de-bias the intelligence gathering and processing of information, so that the person making the decision can have a non-biased account of what is happening? To avoid what was the case with Iraq and WMDs. So, that goes beyond this legal stuff, yes? Now, I mean, people in government will tell you, 'You cannot have parliament involved or the courts involved in these types of decision if we have to act *now* to avert a threat to human life on a large scale.' There's no time to ask a committee what they

think. It has to be the Prime Minister.

Clive Lewis: Particularly if the interpretation of imminence relies on other non-temporal factors?

Marco Milanovic: Definitely you have a bigger role to play ex post facto. I mean, scrutiny does not end at the moment the decision is made.

Michael Clarke: Okay, Murray?

Murray Hunt: Can I go back a step, to explore a bit the dangers of cutting the concept of imminence adrift from temporal factors only? It seems to me that the danger of the approach of imminence that the Attorney General is taking in his speech is that it factors it entirely to the necessity.

Marko Milanovic: Correct.

Q6. Murray Hunt: I'm just looking at-, so it's Daniel Bethlehem's principle eight, which the Attorney General adopts in his speech. That principle says, 'Whether an armed attack may be regarded as imminent, will fall to be assessed by reference to all relevant circumstances, including-,' and then he lists five. The first three are clearly temporal but then the fourth is 'the likely scan of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action'. Now, unless I'm missing something, I can't see that there's anything temporal in that criteria at all. The fifth is 'the likelihood that there will be other opportunities to undertake effective action in self-defence, that may be expected to cause less serious collateral injury, loss or damage', which is proportionality integration. Again, there's nothing temporal. What are the dangers if you collapse your imminence enquiry into your necessity enquiry? I suppose the question really is, what separate work does the imminence test do in the overall necessity enquiry, and where does it come in the sequence? Is it a prime question which we need to answer first, and then you only get to the later question?

Nils Melzer: Thank you for the question. To me, the necessity test, as I said, has three aspects, and the temporal aspect would be the last one. The first, 'Do I need to use force?' Then, 'How much force?' and then, 'When?' That's within the necessity part. The issue of the scale of the attack and the anticipated damage is a question of proportionality. 'How much risk am I prepared to take in view of the likely harm?' That's not a necessity test. That's a question of how much harm will I expect if I don't react now? One aspect that I think I should mention though here also, is that this whole question of imminence relates to a question of self-defence, for the

permissibility of using force within the sphere of sovereignty of another state. It does not yet mean that we can attack a specific individual. That's an entirely different assessment. There are always two assessments to be made, when considering the use of force. Even though this imminence question will bring us perhaps into a realm where we can use force in the territory of another state. We still have to go through a second assessment, justifying the use of lethal force against a specific individual.

Clive Lewis: Do you think the British government are doing that?

Nils Melzer: I think that's the big danger. We see it on the other side of the Atlantic but also I think in some of the governments here, at least it is not clear whether true assessments are being made. Sometimes it seems to imply that because we are defending ourselves, we can attack this person. There are two assessments to be made. Can we use force, in Syria or anywhere else? Then, who or what is the target of the use of force, and how do we justify that? Is that because they're a combatant? Is it status-based? Or is it because he poses a threat? Then we have to justify that assessment as well.

Q7. Clive Lewis: That secondary process, would that mean that you would perhaps have to exhaust the possibility of capturing this person? How would you prove that? How many resources, how many people would you endanger in the process of doing that? I mean, does that take place? Does that happen? I know obviously I'm thinking that there have been situations where we have killed individuals abroad. For example, it wasn't with drones but Osama bin Laden, I know there was a prominent Parliamentarian who said that he should have been captured. He was ridiculed for that. I'm just wondering about that process, and whether that's actually done.

Nils Melzer: Obviously I've not been part of the operational decisions in these types of operations but what we can see when we look at the results of some of these operations, that this assessment has not been properly made. So, I think that is one of the big dangers, what I said at the outset, that we are conflating two legal frameworks, just one, kind of, overall assessment, and blurring the criteria, which obviously are much rougher and bigger when we're dealing with using force in the sovereignty of another state. Then looking at the individual criteria, does that individual pose a threat that is sufficient to justify the use of lethal force if he's not a combatant, if you presume that he's a civilian. Is he a criminal threat? That's a higher threshold, a threat that we meet, or how do we come to the conclusion that this is a combatant or a legitimate target.

Q8. Michael Clarke: Before we move on, just take a slight step back, Article 51 of the charter of the UN, self-defence, and article 2, paragraph 127 is 'domestic jurisdiction', which is fine. Are we right to assume that the whole drones argument can be set in the context that certainly article 51 is becoming harder to apply or more ambiguously interpreted? Is that a fair generalisation in terms of the trends of thinking of the last 20 or 30 years?

> **Marko Milanovic**: I think it's more that, ever since 9/11-, the wrong use of force is always a tug of war between powerful states, those that have the capacity to use force, and the weaker states, those that force is going to be used against, right? So, the trend has certainly been, after 9/11, that powerful western states particularly, but not only them, want to be able to act unilaterally, without UN Security Council approval, more frequently. That's been what they've been pushing, for good or bad, that a whether that's a good or bad thing but that's clearly what they've been pushing. So, the Bethlehem principles are precisely and example of that type of effort. You have a group of states, state legal advisors, they are meeting over the course of several years. They are talking next to each other. By the way, the states they're meeting there are all powerful states. You don't have Iraq at the table or, you know, Zimbabwe at the table. It's the UK, US, France…and then they meet together and then they formulate some principles that look good to them.
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> Then Daniel Bethlehem publishes a paper saying, 'These are my views. They are not the views of any state, but they are informed by the dialogue I have had with a lot of state and governmental officials.' Then, after several years, you have first the state department legal advisor, the British Attorney General, and most recently the Australian Attorney General, come up and say, 'What Daniel said, we accept verbatim.' So you see how this mainstreaming process worked. We know that they are using imminence in this necessity, rather than a temporal, distinct temporal criteria, but as part of the necessity assessment, because he says that. So, if you look at Jeremy Wright's speech, he says, 'I think principle eight on imminence, as part of the assessment of necessity, is a helpful encapsulation of the modern law in this area.' It's clear what they're doing. The danger there is not drones. The danger is, say, North Korea. On the basis of this principle, the way that they have articulated it, a lawyer in the US Department of Justice can, today, write the memorandum telling President Trump, 'You can nuke North Korea.' So, that's the danger with this. It's not a slippery slope. It's a cliff.

Murray Hunt: It absolves the whole of the necessity test, doesn't it?

Marko Milanovic: Correct.

Murray Hunt: It totally collapses the two.

Marko Milanovic: Correct. Imminence is nothing. Imminence is a factor to be taken into account in necessity. 'Do we need to act now?' 'Okay, wait.' That's what it is but that's what 'necessity' means, right? The necessity test just states it a bit differently, which is fine, don't get me wrong. The problem is the whole game is necessity. You cannot ask the question, 'Is an armed attack imminent?' because the answer to that question is, 'Do I have to respond now?' Do you see what I mean? So it has redefined that concept into something else, which may or may not be a good thing but imminence is no longer a useful thing.

Q9. Murray Hunt: The Attorney General, in his speech, I think in his speech, assures us that this isn't what Marko referred to as 'the preventive approach'. It's not the Bush doctrine, but what are the safeguards elsewhere in what he puts forward that prevent that? If you redefine 'imminence' in that way, what else is there to stop that collapse from leading to a complete justification of a preventive strike?

Marko Milanovic: The short answer is little or nothing. The slightly longer answer is, the only distinguishing point really is, 'How certain do you have to be?' That's a different question. That's not a question of necessity or a question of time. It's a question of appreciation of evidence, which is what you have been talking about. Are we talking about 'coulds', 'mights'? Or are we talking about likelihoods, probabilities, or are we talking about near-certainty. Note the word Nils used. So, when you say, 'You have to be near certain that Kim Jong-un is going to launch an ICBM at Washington DC before you attack him,' that's a much higher test than, 'Well, if he could do that, we can now proceed pre-emptively.'

Murray Hunt: What is the threshold on the law, as you understand it to be now?

Marko Milanovic: It's difficult to say. I mean, anybody can say what they want because it's not spelled-out anywhere. So, the people who want to enable use of force, they're going to be saying, 'Well, if the consequences are very big, then the level of certainty could be lower.' So if they're going to nuke Washington, we don't have to be as certain if they only had one bomber, if you see what I mean. I don't find that particular argument persuasive. So, I would be, personally, in the 'near certainty' camp.

Nils Melzer: In international law you have to be able to switch and look

through the lens from the other side. So, if it's just about the capability of a country that could launch an attack for example, then look at the big powers in the world.

Marko Milanovic: Russia could do it today.

Nils Melzer: The UK could do it.

Marko Milanovic: Exactly, to Russia.

Nils Melzer: So that cannot be the standard. Capability cannot be it. It has to be intention, and that intention has to be determined with near certainty.

Q10. Clive Lewis: It sounds to me like rule of law is a fig leaf for powerful states to be able to do pretty much what they want, but then also say that they adhere to the rule of law, the rule of law is so vague, so open in its interpretation, that politically, if you decide to do something, and you have the capability, if you are the US or if you are Russia or China or the UK, then the hindrances to you are political not legal. Ultimately, the decisions on this are going to be made, and then, in retrospect, there may be a slap on the wrist. It seems to me that this is such a broad and open interpretation, you can pretty much do what you want, and they'll still say, on the international stage, you're abiding by the rule of law. That's what it sounds like to me.

Marko Milanovic: That is true to a great extent, that the powerful can get their way with things that the weak cannot, but that is not any different than it is in domestic law. I mean, how many bankers have gone to prison in this country? So, the powerful will always make the law to suit their interests, but yet, on the other hand, the law protects the weak. So, sometimes the law is completely devoid of any critical power. It is that this dynamic exists, and you can say, quite honestly, that, you know, some of these arguments that have been made this way enable a exercise of hypocrisy.

Michael Clarke: I should say that what we want to do in this session is to counterpoint on one hand the state of international law, in so far as relates to the law around conflict, but also, which we will come onto, the state of international humanitarian law, and the ways in which that might mitigate some of the things that we're talking about. We're interested in getting a sense that there is, if I'm reading this right, your interpretation is that the present state of law around conflict is in a certain amount of flux because it is being interpreted in ways, certainly since 9/11, that have widened some of the definitions.

Marko Milanovic: This is the law on use of force. It's not the law or armed

conflict.

Michael Clarke: So, in situating legal issues as they apply to drones, we have to be aware that, in this aspect, there is more scope for governments, powerful governments, to do what they have, and we'll talk in a moment about international humanitarian law, and the degree to which that might mitigate. Is that a reasonable interpretation?

Marko Milanovic: Yes.

Nils Melzer: I think one thing that's important here also is the role of parliament to ensure the rule of law. The government, as the executive power, will make policy, and the more space you give to the policy-makers, you know, the more space you also give to *potential* arbitrariness. So, I do believe that it's important. This type of area cannot be regulated too narrowly. So, we have to give a margin of appreciation as to what is precisely necessary at what point, what proportionality. This is not a precise calculation, but we have to maintain-, these principles are not negotiable as principles. It has to be necessary. There cannot be a less harmful means. So, I think this is really the importance of the role of parliament, to ensure that.

Q12. Murray Hunt: Just a very quick question, just to follow up on Clive's point, to test whether it really is as bad as Clive suggests, that the law is just a fig leaf. It's true that, often, when parliamentarians look at international law, I think often it does appear to be that way. So, I'm interested in whether the Attorney General giving this speech is likely to bring about this evolution of the law of self-defence in the desired direction. There's a fantastic piece by Elizabeth Wilmshurst and Michael Wood, which you'll be familiar with, in which they quote Lewis Carroll against Daniel Bethlehem, and say, 'What I tell you three times is true,' a Lewis Carroll quote, 'Is not an authoritative description of the formation of international law. That relation of four had been endorsed by two other states. My question is, what is an authoritative description of the fullness of international law? The view from a parliamentarian's perspective, I think it is often difficult to say, 'Okay, the powerful state having been saying this, how can that be checked as to whether or not that's correct as a legal interpretation?

Marko Milanovic: Some powerful states are saying this but not all powerful states are saying this. China has not said this. Russia has not said this. India has not said this. So, I mean, there's a group of powerful states that has said this. Now, the classic line I can give you is, state A, B and C, they can make a claim. Whether that claim is correct or not depends on how other

states respond to it. So, if you have push-back from other states, as you have had on many, many occasions, now, the non-aligned movement, 120 states, they say, 'We think interpretations of self-defence that go beyond the Charter are not acceptable. We think there is no such right as the right to humanitarian intervention,' as they have said. So, that type of push-back is what you need to look at. Now, we are currently in the situation where there's some push-back but the push-back itself is ambiguous. So, you do not have 120 states saying, 'No, this is bad.' They might or might not. If they accept it, then the law will have changed in that direction. If they do not accept it, the law will not go in that direction, if you see what I mean. So, that's the nature of customary law formation. These actors, they play such a game, and the question is, 'Do they accept or not the claims each other make?'

Michael Clarke: Thank you. Just before we move away from this area, there's one other area I wanted to raise, or sub-area, which is that about intelligence. When claiming, let's say, that this action may be imminent, for the reasons that you mentioned. Because we have information that X and Y is the case, that no other means were available to do anything about this particular person or problem. Governments increasingly appear to claim that that is based on intelligent information, which, by definition, is very difficult for anybody else to comment upon. In your opinion, is that a growing trend in legal argument, and if so, what's your reaction to that? Are there ways that we ought to react to the use of intelligence in these calculations? Nils?

Nils Melzer: Absolutely. I think it's a very dangerous trend, and not only in targeting investigations, it's also in terms of criminal justice, against suspected terrorists, where even the defence lawyers of the accused person do not have access to the incriminating evidence. So, we see that time and again in classic traditional rule of law countries like the United States. That, I think, is a very, very worrying trend, and you have to, obviously, take seriously the legitimate concerns of states in protecting their sources. On the other hand, we cannot sacrifice the rule of law. And, knowing human nature, if you don't give them a protective space. Any one of us is not completely safe from, you know, taking self-interested decisions. So, there's an absolute need for oversight. That's a dangerous trend, there.

Marko Milanovic: I agree.

Q13. Michael Clarke: Can we move on then to the second part of our discussion? Human rights treaties and international humanitarian law. First of all, just a general question. What is the extraterritorial scope of international human rights law? It sounds like it should be an open and shut question, but I don't think it is.

Marko Milanovic: It should be an open and closed question if you approach this from a purely normative perspective. Why do we have human rights? Because we're human. Even bad humans, even Hitler, is quite deserved to have human rights. That's the basic idea of universal treaty etc. So, why should territorial boundaries matter? That's the, sort of, universality claim that, as you say, should render these things open, shut. In reality, that's not how it works. So, the way it works, it revolves around interpretation of these specific clauses in human rights treaties, like, the one grouping convention, you say. Normally, some type of creational language. You know, that people will have rights in the treaty if they are within the jurisdiction of a state party. So, then the whole game becomes, how you interpret that one word and there have been two strands of the case law of this matter in the European Courts of Human Rights, the Inter-American Court of Human Rights, the Human Rights bodies and so on and the International of Justice, which say on the one hand, a person who is in jurisdiction of the state, if they are in a territory controlled by the state, regardless of how that state obtained control of the territory, lawfully or unlawfully.

So, for example, the people in Crimea right now, have human rights vis-a-vis Russia because Russia controls Crimea. Lawfully or unlawfully. The second strand of the case law is, you have human rights as a person. If you as a person are under the authority, power or control of an estate agent. Then, the issue is, what exactly does that mean? So, the European Court of Human Rights has been clear, for example, for a long time now. It has remained much clearer this case called *Hassan*. That if you are detained by an agent of the state, you are within the control of the state. So, if a British solider captures an Afghani Taliban person, in Afghanistan, that person, at that moment, has rights under European Convention of Human Rights. The issue is, the remaining problem is, if you don't physically hold the person captive, you just kill them. You have the power to kill them. Whether through a drone or an aerial bombardment more generally. Right, do they have human rights simply because you have the power to kill them? In one very infamous case called Bankovic the European Courts of Human Rights said no.

So, this was a case where NATO bomb Belgrade serving 1999. Some people were killed at the TV station and the European court said-, this is by December 2001. The European Court says, 'They don't have the right to life because it's not enough to have nearly the power to kill.' Now, that has been a very criticised decision. It has been, to an extent, overruled and this Hassan case in the UK. It still remains uncertain under the case law. What

would happen if you have the Ali Khan family bring a case to the European Court of Human Rights? Would the European Courts be on that side and say yes Ali Khan has the right to life in the UK or not? This is a threshold question, whether you even have rights or not. Then you have a different question if you have rights, is it justified to interfere with them? So, it's perfectly possible that, yes, Reyaad Khan has the right to life vis-à-vis the UK, but, it was just as right to kill him, under the human rights frame work. The British government released this today arguing, 'The mere power to kill somebody is not enough to bring them within the jurisdiction of the UK under the European Convention.' So, when we bomb in Syria, when we're bombing Iraq today. None of these people have a right to life. So, therefore, the European Convention does not even apply.

Michael Clarke: Is that because these people are regarded as living in an ungoverned space?

Marko Milanovic: No, it's because we, the UK, do not govern that space.

Michael Clarke: Okay.

Marko Milanovic: So, Serbia, which was bombed, was a governed state. But you know, the Supreme Court still said, and the British government said, the European Convention was not applied.

Michal Clarke: So, let me ask you a question a different way, does the existence of ungoverned spaces in the world today make any difference to the question of the jurisdiction under which somebody can claim Human Rights?

Marko Milanovic: It does to an extent under that first strand of the case law, which you remember was about control over territory. So for example, the Supreme Court said Turkey controls Northern Cyprus, therefore, the people of Northern Cyprus have Human Rights vis-a-vis Turkey. So, you have situations, for example, Ukraine, losing control over part of its territory, and then the court has to say, 'Okay, do these people have Human Rights vis-a-vis Ukraine,' because Ukraine no longer controls Eastern Ukraine, parts of it.

Michal Clarke: Say the territory that Daesh controlled, eighteen months ago?

Marko Milanovic: So, the issue there is that we don't control it. The fact that Iraq does not control it is irrelevant. So, the problem there is that we don't control the area when we do kill there.

Michal Clarke: So, but I'm still, sort of, struggling to see from where does Reyaad

Khan derive his human rights to life if he lives in an ungoverned space, or a space that nobody legitimately governs?

> **Marko Milanovic**: He derives it, or at least that's the argument, from the fact that's he's human, and he is controlled or at some stage the UK is exercising power over him by killing him.

Michal Clarke Right.

> **Marko Milanovic**: From that conflict, it would be argued.

Michael Clarke: Okay. Sorry, Nils?

> **Nils Melzer:** Yes, I think this whole discussion shows that perhaps, again, we have to be careful how we ask the question. The question is not whether a person has a Human Right, he does. The question is that if every right has a corresponding implication, who is obliged to ensure or respect that right? What state, what entity, and that's what jurisdiction. Jurisdiction wants to limit the applications of the signing, ratifying states to, you know, respect and ensure the rights to the persons who are living in this jurisdiction. It does not mean that if they're outside of jurisdiction they do not have Human Rights, but then, someone else is in charge, because we don't have jurisdiction and that normally means that we can't affect the Human Rights of the person.

Clive Lewis: My understanding from what was just said, is that Human Rights activate after an individual has been killed?

> **Marko Milanovic**: Before. It is the power to kill.

> **Nils Melzer**: Yes, exactly. So, I think that's what, you know, from what I just said, that the obligation, obviously, follows the jurisdiction notion, because jurisdiction is the usual, kind of, rough frame within which we can affect as states the rights of individuals, but we can affect them also outside of our territorial jurisdiction, through, you know, physical custody, but also through targeting, and there I think the conceptual distinction in positive and negative obligations is quite important. Positive obligations meaning we have to ensure and protect someone's right, and negative, simply, we cannot interfere with it.

> **Marko Milanovic**: Without justification.

> **Nils Melzer:** Without justification. Yes, and so, the right to life has this aspect, the negative aspect of the state is prohibited from arbitrarily depriving

of life, that's the negative obligation, but it also has an obligation to protect life against interference from others, criminals and so on. It can only do that reasonably in territories it controls. So, the positive obligations are reasonably limited to territorial jurisdiction, but the negative aspect of it should be also extended and is increasingly interpreted to be extended also outside the territory where a state can, has enough power to interfere with the right, pro-actively, it also has the obligations that come with it. I think that's, kind of, the argument that is the basis for this view, that I absolutely share, that as soon as lethal force, or any kind of force for that matter is used against somebody outside the territory, wherever, even in ungoverned space, or governed by someone else, then the right to life aspect, we have to respect the right to life and the criteria that comes with it – including the necessity and proportionality criteria.

Marko Milanovic: I completely agree.

Q14. Murray Hunt: How can we bring someone in the jurisdiction for the purposes of the right to life? It doesn't bring all the obligations within it, in terms of protecting everyone around the world against all the criminals, obviously, that's not the issue.

Marko Milanovic: I would just add that you can imagine, well, you don't have to imagine, this type of situations arises outside any kind of weapon or armed conflict scenario. So, when Russia sent an FSB assassin to London to kill Alexander Litvinenko using radioactive material, and they killed him in London, in a territory they do not control, the question is does Alexander Litvinenko have the right to life vis-a-vis Russia? When Kim Jong-un kills his brother in Malaysia using a poison, again, the question is does this person have the right to life? Which is the right to have your life not arbitrarily taken from you by the state, vis-a-vis North Korea, which by the way is a partner to the USCPR Human Rights treaty. So, the danger is with the UK position, the UK position simply says, the moment I go to France, the UK can send an assassin to kill me, and I cannot go to the European Court of Human Rights and say to the UK, 'Why did you kill me?'. That's the UK government's position today. It's a dangerous position, normatively not indefensible.

Nils Melzer: If we just take it outside of the use of lethal force, it becomes even more clear. Take right to privacy, the Internet.

Marko Milanovic: Surveillance.

Nils Melzer: What does it matter where you are? That can be affected anywhere. Just in the same way, maybe even more for somewhere else. So,

I feel that that's extremely dangerous.

Marko Milanovic: So, on the basis of this analogy, with Bankovic, the Investigative Powers Tribunal has ruled expressly, that the moment you leave the British Isles, and GCHQ reads your emails, you do not have the right to privacy under European Convention. So, that's the consequence of the British government's view, and that is why it is pursuing it, because it makes its life easier, it doesn't have to justify things. It simply says you have no rights.

Michael Clarke: Once you go outside physical jurisdiction?

Marko Milanovic: Correct.

Q15. Murray Hunt: I would just going to ask you to draw out your positions. I get a very strong sense from both of you that you both feel that the UK Government's position of this really is an outlier, and that there's an inevitability in international law terms that eventually it's going to lose that argument.

Nils Melzer: Yes.

Murray Hunt: It's really waiting for the Strasbourg Accords to expressly follow through the Bankovic judgement and actually, expressly over-rule it, but that, you both sense is an inevitability?

Nils Melzer: Just maybe one word or two words on Bankovic, and Bankovic has other issues of saying that Yugoslavia is not in the European space, but then how do you in Kenya, and there's several contradictions, but then also, I think one thing we have to be fair also, Bankovic is about the massive scale, I mean, comparatively, if you look at other operations, air operation, collective hostilities, and it is true that a Human Rights treaty is perhaps not the most suitable instrument to have regulate collective warfare. So, I can that why the court would have hesitated to apply it to an air campaign of the scale that we had over Yugoslavia, but that's not the same as a drone operation pursuing an individual, most of the time for weeks on end until they've been targeted. That is a typical Human Rights situation really.

Marko Milanovic: I think the bigger problem there for the court was how do you get the facts, you know? Had the court gone the other way in Bankovic, had they gone with, you know, what I think it should've done, the court would've become the arbiter of every use of force in Iraq, Afghanistan, any overseas theatre, and that's why the court wanted to have a limiting principle,

and it's normal. I mean, courts, judges are like that, you know? They are afraid of things that are uncertain, however, the trend is clearly there, because the other position, it just cannot be justified, normatively. You cannot justify saying one human being has the right to life and another human being does not have the right to life, and that's the big problem with the UK Government's position, which is why, at some future case, it will lose. As it has lost consistently on all of this extra-territoriality stuff since Bankovic. So, it was a case after case. So, ever since 2001, this Bankovic case, every time the UK Government made an argument that the European Convention does not apply, the UK Government and other governments lost, okay? So, a series of cases dealing with Iraq, then Afghanistan, and so on. So, then that is a huge waste of time and intellectual effort, when what they have to do is say, 'Yes, it applies, but we can justify why we did what we did.'

Michael Clarke: Are you saying that the UK is an outlier in terms of European thinking or an outlier internationally? If you think about the United States and Australia and some of the -

Marko Milanovic: It's better than in the United States. The United States say, 'Human Rights don't apply outside your territory,'. Why are people in Guantanamo?

Michael Clarke: Yes, but the context you're speaking about is essentially European, I sense.

Marko Milanovic: It's not. So, the UN Human Rights Bodies and the Inter-American Court of Human Rights, they have all consistently been more expansive on all this stuff than the European Court has, pretty much. Now, what other states in Europe think, the other states in Europe don't abuse force, so like, France and so on, they are doing the exact same thing as the UK government. They are exploiting the uncertainties in Strasbourg Case Law, and they're trying to wiggle through. So, the French President has a kill list, you know, of French people that they want assassinated in Mali, wherever, and they're being able to get away with it, because, for example, nobody's going to bring a case about that.

Q16. Michael Clarke: I sense, I know the answer to this question, but let me ask it anyway, we spoke about Reyaad Khan, but Mohammed Emwazi, Jihadi John as he was popularly called, was killed by an American drone in Syria, but there was, the Government made great play of the fact that UK drones contributed to the operation. In fact, they wanted to, if you like, I think it was pretty clear, that the Ministry of

Defence would've liked to have said that we killed him with one of our drones, but they didn't, it was the American drones, but that at least two British drones were operating surveillance in the period up to the one that killed. is there any legal difference if the government makes that claim than the claim that they owned the drone that actually fired the shot? Is that relevant or not? More than 90% of the drone operations are surveillance. Very few of them are lethal, but a great number of the surveillance operations have causality to the lethal operation. Is there any legal distinction to be understood in that relationship?

> **Nils Melzer**: It's Westminster's responsibility for aiding and assisting another state that might be committing an internationally wrongful act, but it's to the extent that the assisting state knows about facts that would make that operation unlawful and actually contributes to that operation, state responsibility will arise. Now, obviously, if the assisting state doesn't know about any of the circumstances that would make that act unlawful, you could argue that no state responsibility arises from the unlawfulness of that act, but when you have a track record of those sort of patterns of operations, you at least have to be accountable as an assisting state for having aided and assisted.
>
> **Marko Milanovic**: The attack may have been lawful.
>
> **Nils Melzer**: Exactly.
>
> **Marko Milaonvic**: It depends on the facts, really. I mean, the one thing I would add about your hypo, is that it is important not to dwell too much on the citizenship of the victim, of the target. So, the fact that a British citizen was killed by a British drone, or with the help of surveillance by a British drone, is legally the same as a non-British citizen is killed by a British drone. So, if considering Human Rights and the right to life, citizenship is not the issue. Politically, it's sensitive, but legally not the issue. So, under American law, if you're a citizen, an American citizen, you have a constitutional right to life, that you do not have if you're a non-citizen under domestic law, but for us, we don't have that.

Q17. Murray Hunt: Is the test one around knowledge in terms of complicity, or is there an objective element that they *ought* to have known? Is the test knowledge; that the intelligence is going to be used in a particular way?

> **Nils Melze**r: It's a two-fold test, one is that the assisting state knows about the circumstances that make unlawful, and the other fact is that the operational assistance actually has to facilitate that operation in fact. So, one

is factual, and one is no options.

Murray Hunt: To what extent is there, in international law, and arguable positive obligation on the state providing intelligence information which it knows is likely to be used in a lethal way to ascertain the basis of the rules of engagement, and the other equal approach of its partner with whom it's sharing the intelligence? Is there a positive obligation in international law in that situation?

Nils Melzer: Since assisting in unlawful operation would be unlawful, obviously, the assisting state has to ensure it's doing everything reasonable it can to ensure its own conduct is lawful, and so, if it assists a certain operation that might be unlawful, it risks being unlawful, obviously, there would be an attached obligation to ensure the state has the necessary knowledge. I cannot see how you could, you know, renounce that aspect.

Michael Clarke: Then the assisting state presumably has to receive some assurances as to how it's assistance will be used?

Nils Melzer: Exactly.

Michael Clarke: It is generally believed that GCHQ shares a great deal of intelligence on individuals and their whereabouts, some of which, and they may not know which parts, are then used to target individuals. That puts them, I would have thought, in a legally dubious situation where they would have to have some general assurance that their material is not used in this way, and I think it's very hard to see how that would actually be true.

Nils Melzer: Or it would be used in that way, only according to the principles that the assisting state agrees with. The targeting principles, because again, not all these operations will be unlawful.

Murray Hunt: If, as the New York Times has reported, there's been a change in the basis, or the guidance which is not public, of the current administration, do we need to infer from that that there ought to have been a reassessment of the basis in which intelligence is shared, as it follows from what you were saying?

Marko Milanovic: Yes.

Nils Melzer: Absolutely.

Marko Milanovic: So, the PPG, Presidential Policy Guidance, was not couched in Human Rights terms, but it very much encapsulated the spirit, if you will, of the Human Rights rules. So, it said, in particular, that if capture

was feasible, you could not proceed with a legal targeting operation, which is a Human Rights practicum. Now, how they said the feasibility is to be measured is a difficult question, but that was rule number one. Rule number two was no civilian casualties, which is way stricter even than a Human Rights rule. So, Human Rights, we have cases, Human Rights cases, which are actually permit collateral damage. I could point you, for example, to the Finogenov versus Russia case, which is about the Dubrovka Theatre Massacre Siege, where the Russian agents pumped gas to knock out the hostage-takers but a lot of the hostages died, and the court said that was okay. So, the PPG therefore allowed the United States to work with partners who may have had Human Rights constraints, because essentially it said, 'We will only use your info to target people if capture is not feasible,' but if they have changed that then that runs the risk of all those other states who aid and assist the United States to accrue state responsibility. Now, whether they do not in fact depends on the facts that we can't know, but the risk is elevated now.

Nils Melzer: I don't see a particular problem with the two kinds of kind of principles of avoiding collateral damage, obviously, and you know, capture rather than kill, but the question is, well, how are targets being identified? What are the criteria for identifying who is collateral damage and who is target?

Q18. Michael Clarke: Well, we've got to be careful about time, because we've only got about another ten minutes, so I would like to ask the members of the panel if they've got other areas to cover, and I want you to give us some final thoughts, particularly on parliamentary or what parliamentarians should be concerned about. I just wanted to go back on two things, before we do. One is, we'd like your view on how you think the UK lines up on the legality question. You said we seem to think it's something of an outlier and I'd just like to know if you want to expand on that a little bit, but also, we haven't said very much about non-state actors and, we understand the definition of the problems, but is there anything else that we ought to appreciate about the problem of no-state actors, it's a really empirical difficulty, those understanding competence in that context. Could you just perhaps just give us a statement about that?

Nils Melzer: Yes. I think there is probably one of the biggest problems. You see that targets are beginning to be fired based on membership of organised armed groups, or non-state groups, terrorist groups, or whatever, but it's obviously this membership issue, and then it's basically, the law of armed conflict logic. It's not a Human Rights logic, law enforcement logic, but a hostilities logic. Now, here, the most important thing we have to remember is

that under humanitarian law, targeting in armed conflict is based upon a principle of distinction, and the logic that you have two belligerent parties confronting each other, and each party has armed forces and a civilian population. The armed forced are the fighters. They have the function and the right, if a state's combatants, to fight to directly participate in hostilities. The civilian population is supportive of their armed forced and we should remember that. They're producing weapons, they're paying taxes, they're producing food, they're providing logistic functions.

That does not make them targets, they're still civilians, but they're contributing to the general war effort, but that's not direct participation in hostilities, it's indirect participation. They may also be completely oblivious to the facts. They can be involved without becoming targets. We have to apply the same on the non-state side. When we say membership, what do we mean? Membership in terms of supporting the opposition, the insurgency, or the armed group, in terms of financing them, smuggling weapons for them, producing explosive devices for them? They're all functions that on the state side we would expect as civilian functions. They may be punishable under criminal law, because they're supporting rebel groups, or criminal groups, but they're not making the person a target, and all we may have, obviously, on the non-state side, the armed wing, the fighting forces, the ones who are actually directly participating in hostilities, and they do that on a continuous basis. That's the fighters, and we have to distinguish.

Organised armed groups are conflated with the insurgency in general, and so we can phrase it as we like, but functionally, we have to make sure that in targeting decisions, we distinguish between the fighting forces of whatever organised group we're confronting, and the supportive civilian base. It's difficult to distinguish, but we have to, because if we don't, it means we deliberately target civilians, which is a war crime, invariably. So, then this is a distinction I don't see in some of the government declarations. We're saying, 'He's a member of…because he has the same hostile intent.' Well, the whole civilian population of a war has a hostile intent, but they're building the capacity of their armed forces by financing, producing, and so on, building capacity and the armed forces will use the capacity to cause harm to the enemy, and hostilities that makes you a target is about using capacity to harm the enemy, and we have to make sure that when we target persons in and around conflict, we only target that are fighters, that are using capacity to harm. Not the recruiters. They may be harmful, but they're not combatants, this is not combat.

> Just like civilians can recruit members of the armed forces, we have to be aware of that. It may be a crime, but it's not fighting, again, it's not combat. So, this is, to me, the most important point I want to make here - we cannot conflate our organised armed groups and the fighting forces. We have to distinguish fighting forces, political wings, civilian populations, and depending on the context, the criteria for distinguishing fighters from non-fighters may vary. In Afghanistan, there's something like seasonal warfare, where people are fighters for three months and farmers for nine months. You may arrest them in these nine months when they are farmers and maybe accuse them of a criminal act for having participated in an insurgency, but you cannot target them. That's my most important point, without a doubt.

Michael Clarke: Thank you. I mean, it goes back to what you said at the very beginning, you know, in your way, the issue is now the ambiguity of the law, it is the problem of empirical facts, or understanding the facts that you're trying to apply the law to.

> **Nils Melzer**: The last point of this targeting in military terms is about positively identifying illegitimate targets. If you cannot positively identify, presumption is protection, always.

Michael Clarke: That's a very important point. Say that again. If you cannot positively identify, the presumption should be protection.

> **Nils Melzer**: It must be, because the legal definition of a civilian is someone who has not been identified as the member of an armed force. That's the legal definition.

Clive Lewis: That was the standard in Afghanistan in 2009, that Stanley McChrystal had implemented, because if you could not PID at the exact that you called the air strike in. So, if you had seen someone and then they weren't there any longer, they had been there inside, always.

> **Nils Melzer**: I was in Afghanistan in 2009 actually and we discussed precisely that. That's the only way to go that's lawful.

Clive Lewis: It was frustrating…

Michael Clarke: Marko?

> **Marko Milanovic:** Well, can I push back a bit on your question about is the UK an outlier, because I think the framing of that question is problematic. I would say the UK is in the top 10th percentile of all countries in the world in terms of being law-abiding, but the number of states who engage in this type

of lethal force projection, using drones in particular, is very small. Now, what's our benchmark for whether the UK is an outlier? I am confident the UK is doing better than the US, for example, but should that satisfy us? So, the fact that we are way better than most states in how we comply with international generally, should not mean we cannot and should not do better, and I think we do need to do better.

Q19. Murray Hunt: I would just like to take Marko's point about the problem isn't the law so much as the facts. I'm very interested in whether in your views, both of you, you think there are any gaps in the legal frameworks we've got, are there bridges which need amendments in terms of international treaties, or is this all a question of interpretation, applying the laws we've got to a very rapidly changing factual situation with new technologies and so on?

Marko Milanovic: Can you imagine the Geneva Convention being negotiated today? I would not open that can of worms, I mean, in this particular environment? So, clearly it would be nice if some things were spelt out clearly, you know? It would be lovely if we had that, but the likelihood of doing that and being able to achieve a good result that would not undermine the framework that we have today in 2017 is I think very low, and saying we need a new law about x, always undermines the claim that the existing law covers x.

Murray Hunt: That's a very pragmatic and really understandable response, but in that case, is there anything that-, are there any, sort of, international initiatives that could be taken to try and build consensus around how the current legal framework should be interpreted?

Marko Milanovic: There are and there should be, and you know, the work that you are doing, the work that the Joint Committee of Human Rights is doing, the work of various international and non-international, non-governmental organisations working on drones, conversation that is ensuing between governments and all these actors, is that type of initiative that has led to some kind of crystallisation of some rules. So, today, very few governments will deny that Human Rights apply in non-conflict, and they did deny that immediately after 9/11, yes? Some positions have solidified in a good way, some perhaps in a bad way over the past twenty years, and we do have a fluid system that does that, but we have one.

Q20. Murray Hunt: The Attorney General talked about it in his speech, about the importance of the UK's leadership role and I was just interested in what sort of - if the UK's claiming that leadership role, what could it do to demonstrate that leadership in this context, by leading some sort of international process, other UN

based processes, which would try and build consensus about how this thing should be interpreted?

> **Nils Melzer**: I think the first thing about that comment is that no law is good enough that you cannot apply it in a bad way, and no law is bad enough that you can't apply it in a good way, so it really is that if you don't have to change the law, we have to interpret it and apply it correctly, and absolutely I agree that the UK, with its tradition and its institutions will be a great, you know, have a great opportunity to go forward as an example. I don't think, necessarily, the UK will have to trigger international mechanisms or initiatives as much as going forward, that its own practice of creating institutions perhaps or mechanisms within its own area and own jurisdiction to ensure independent oversight, to ensure that whatever its government is doing and its forces are doing, at some point, you know, they will be held accountable for it. Doesn't have to be unrealistic in terms of standards, we have to give practitioners the margin of error and appreciation that they need, in good faith, but it is important to set an example of transparency and accountability that will be an example for the world, because we actually do need that.

Michael Clarke: Thank you, Nils. Thank you very much, and to you to Marko. We have to draw to a close there because we have to vacate the room by 5.30pm, but just, on behalf of the, certainly the inquiry, but I think more broadly the APPG and all of the chairs, thank you very much for presenting your expertise for us. It's been a fascinating discussion, which I think has helped us to establish some base lines from which we need to draw our interpretation. I think on behalf of all of the group, I'm very grateful for your time, and certainly grateful for your commitment to come for this session, and go home to Geneva again this evening. Thank you very much indeed.