

## The Joint Committee, drone strikes and self-defence: Caught in no man's land?

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### I. Introduction

The Joint Committee's Report<sup>1</sup> centres around a crucial issue concerning the use of drones by the UK to target suspected terrorists outside of armed conflict, namely the meaning and application of the right of self-defence, and whether such strikes meet the key elements of such a right – that there is an imminent armed attack necessitating the use of lethal force against a terrorist or terrorists. The Report is clear in its finding that 'it is the Government's policy to be willing to use lethal force, *outside of armed conflict* ..., against individuals suspected of planning an imminent terrorist attack against the UK, as a last resort, when there is no other way of preventing the attack'.<sup>2</sup>

This brief op-ed explores the Joint Committee's interrogation of this policy under both the law governing the use of force by states (*the jus ad bellum*),<sup>3</sup> and the law applying when a state uses lethal force outside of armed conflict (international human rights law),<sup>4</sup> arguing that self-defence is the thread that links both. Although the Report does consider both legal frameworks, and makes some very telling criticisms of the government's policy, it does not fully explore the relationship between the two, and so is caught in no man's land between them. It is concluded that it is only by understanding that self-defence arguments operates at two levels that we can properly assess any government claim that a particular drone strike is justifiable as a lawful use of force.

### II. Self-defence under the *jus ad bellum*

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<sup>1</sup> House of Lords, House of Commons, Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing', Second Report of Session 2015-16, HL Paper 141, HC 574.

<sup>2</sup> Ibid, 7 (emphasis in the original). See also ibid, paras 1.7, 2.2.

<sup>3</sup> As contained in the UN Charter 1945, Articles 2(4) and 51 and customary international law.

<sup>4</sup> As contained in the European Convention on Human Rights 1950 (ECHR), and the International Covenant on Civil and Political Rights 1966 (ICCPR), and customary international law.

The Report critically engages with the government's policy on the use of armed drones outside of armed conflict: it found that the government's explanation of when it will use drone strikes lacks specificity on crucial elements of self-defence, particularly whether the attack is 'imminent',<sup>5</sup> and whether the attack has the 'intensity' required to trigger a state's right of self-defence contained in Article 51 of the UN Charter and customary law.<sup>6</sup> Despite this, there appears to be a presumption underlying the Report that the use of force by drone strikes against known terrorists would often (but not always) be justified as an action in defence of the UK under the *jus ad bellum*. This note argues that triggering the right of self-defence in this sense would be rare but may, nonetheless, be justifiable as a defence of *individuals* under human rights law.

Assuming that armed attacks triggering a state's right of self-defence can originate from non-state actors,<sup>7</sup> *prima facie* the threat arising from one individual terrorist would not, by itself, be of such scale and intensity to constitute an armed attack within the framework of the *jus ad bellum*,<sup>8</sup> triggering the right of self-defence of the target state to use its massive firepower (albeit in a necessary and proportionate way) to respond to the attack; nor does that individual's membership of a terrorist group, by itself, mean that an attack is imminent.

When the UK is engaged in an armed conflict the simple fact of membership of an armed group involved in the conflict will justify the use of force, including drone strikes, against a member of that group.<sup>9</sup> Outside of that condition of armed conflict there has to be a legal basis for using force in another state (principally self-defence, including the proof of an imminent armed attack, or acting under the authority of the Security Council responding to a threat to international peace),<sup>10</sup> and there has to be compliance with other rules of international law that potentially apply when lethal force is being used or contemplated, principally the right to life under international human rights law.<sup>11</sup>

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<sup>5</sup> Joint Committee Report (n 1) para 3.30.

<sup>6</sup> *Ibid*, para 3.25.

<sup>7</sup> The Report favours the understanding that attacks by non-state actors can trigger the right of self-defence. See Joint Committee Report (n 1), paras 3.22, 3.29. However, it relies for support on the presence of Security Council resolutions that indicate that attacks of the scale of 9/11 in 2001, or those undertaken by ISIL, can reach the threshold of an 'armed attack' within the meaning of Article 51 of the Charter. See SC Res 1368, UN Doc S/RES/1368 (2001) referred to at para 3.14; and SC Res 2249, UN Doc S/RES/2249 (2015) referred to at para 3.28.

<sup>8</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, para 195.

<sup>9</sup> Under treaty law contained in the four Geneva Conventions of 1949 and two Additional Protocols of 1977, plus customary international humanitarian law.

<sup>10</sup> Articles 42 and 51 UN Charter 1945.

<sup>11</sup> Article 2 ECHR; Article 6 ICCPR.

It follows that while the present author largely applauds the Report's willingness to go behind the government's sweeping claims to self-defence, this op-ed points to the fact that the Report too readily accepts uses of force against individual terrorists as justifiable under the self-defence provisions of the *jus ad bellum*, when the reality is that the circumstances in which a state's sovereign rights are sufficiently under imminent threat from individual terrorists will surely be rare. As the Report states, to 'constitute an "armed attack" for the purposes of the right of self-defence that attack must cross a certain threshold of seriousness or intensity', so that a 'series of minor attacks is not necessarily enough to constitute an armed attack'.<sup>12</sup> It is the case that ISIL as a whole represents a threat to the UK, but it seems to be a step too far for the Report to accept that the attacks already mounted on the UK by ISIL 'satisfy the requirement that there must be an armed attack on the UK which entitles it to invoke the right of self-defence'.<sup>13</sup> The reality is that those (largely unfulfilled)<sup>14</sup> attacks by ISIL indicate that it is a continuing threat to the UK, but that of itself it is not sufficient to trigger the right of self-defence under the *jus ad bellum*, since there needs to be proof of an imminent attack by ISIL, and proof that the targeted individual was a part of that imminent attack not simply part of the terrorist group.

In his evidence to the Committee, Michael Fallon, Secretary of State for Defence, gave the example of ISIL's attack in Tunisia in June 2015 that led to the deaths of 30 British tourists, saying that 'if we had known that our 30 citizens were going to be murdered on the beach in Sousse, and we knew that that attack was being directed from a training camp in Libya', military action in self-defence would have been justifiable.<sup>15</sup> Self-defence at the international level is a last resort response to an attack against a state, where there is no choice of means and no moment for deliberation.<sup>16</sup> The Report raises the question of whether the meaning of imminence as identified in the *Caroline* incident of 1837<sup>17</sup> needs to be modified in the light of the modern terrorist threat, suggesting that a state may be able to exercise its discretion to strike earlier when the attack was being planned rather than just before the attack is realised, but warns against drawing that discretion too widely.<sup>18</sup>

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<sup>12</sup> Joint Committee Report (n 1) para 3.25.

<sup>13</sup> *Ibid*, para. 3.29.

<sup>14</sup> The main example of a successful attack by ISIL on the UK (in the form of its nationals) is the killing of 30 British tourists in Sousse, Tunisia, on 26 June 2015, referred to in *ibid*, paras 2.36, 3.28.

<sup>15</sup> *Ibid*, para 3.26. See also para 3.25.

<sup>16</sup> The so-called *Caroline* test cited in the *ibid*, para 3.31.

<sup>17</sup> See Letter dated 27 July 1842, from Daniel Webster to Lord Ashburton (1841-42) XXX *British and Foreign State Papers* 193-94, extract taken from Webster's earlier letter to Henry S Fox dated 24 April 1841, (1840-41) XXIX *British and Foreign State Papers* 1137-38, 1137-38.

<sup>18</sup> *Ibid*, 8.

While defending a large number of citizens from an imminent existential attack may meet the requirements of self-defence under the *jus ad bellum*, the deliberate picking off of ISIL members one by one by drone strikes would not. Instead, it would amount to a policy of targeted killing that would neither comply with the *jus ad bellum* nor the requirements for when lethal force is permitted under human rights law, unless the strikes were carried out within an armed conflict when the rules of international humanitarian law allow for the targeting of known enemy combatants. In the Sousse incident in Tunisia – which occurred outside of any armed conflict – discovering the terrorist plot at the planning stage would have enabled the UK to take preventive measures short of the use of force, including ensuring the protection or evacuation of those citizens, but if the time for such precautions had passed and the attack would otherwise have been unstoppable, then the imminence requirement of self-defence would have been met.

The Report does not make the criteria of imminence clear enough.<sup>19</sup> Instead it asks the government to clarify its understanding of it,<sup>20</sup> thereby potentially allowing the government to exploit the space between unavoidable and necessary self-defence, and military action, which is but one choice the government has in response to a terrorist threat. As the Report relates: the ‘Government has made it clear ... that it favours a more flexible approach to the meaning of “imminence”, to include an ongoing threat of a terrorist attack from an identified individual who has both the intent and the capability to carry out such an attack without notice’.<sup>21</sup> This position comes close to a policy of targeted killings, where membership of ISIL creates a presumption at least that a drone strike against such an individual is justified. The Report recognises the problems with this approach,<sup>22</sup> repeating on several occasions the views of Mark Field MP that ‘the notion that an individual is on the list until such time as they are assassinated seems to be at odds with the “imminence” requirement in Article 51 of the UN Charter’.<sup>23</sup>

The Report warns against using force ‘pre-emptively against a threat which is too remote, such as attacks which have been discussed or planned but which remain at a very preparatory stage’.<sup>24</sup> Having said that, the Report accepts the need for a ‘degree of flexibility’, in order to meet the threat from terrorism in an era of instantaneous communication.<sup>25</sup> Indeed,

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<sup>19</sup> For detailed discussion of the meaning of ‘imminence’ in relation to the right of self-defence, see, for example, Noam Lubell, ‘The Problem of Imminence in an Uncertain World’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 695.

<sup>20</sup> Joint Committee Report (n 1) para 3.41.

<sup>21</sup> *Ibid*, para 3.33.

<sup>22</sup> *Ibid*, para 3.40.

<sup>23</sup> For example, *ibid*, para 4.16.

<sup>24</sup> *Ibid*, para 3.41.

<sup>25</sup> *Ibid*, para 3.36.

technology has changed the nature of security, both negatively and positively, but the essence of self-defence, as essentially an instinctive response to an otherwise unavoidable attack, cannot change. Indeed, it should be recalled that the *Caroline* incident concerned an exchange of notes between the UK and US on the use of force by the UK against a ship that had been conveying rebels (non-state actors) from the US to Canada. Self-defence in customary international law was not solely forged as a response to the appearance of the enemy on a state's shores or advancing towards its borders as suggested by the government, but in part, at least, as a response to attacks by non-state actors.<sup>26</sup> Self-defence does not involve a period of planning or premeditation by the attacked state but is something instinctive and immediate. Admittedly that is sometimes difficult to translate to something as abstract as a state, but state actors (ultimately the Prime Minister) with responsibility for authorising the use of force have to be in a position of having no choice but to authorise force to defend the state from imminent attack against it.

The fact that the Report found that the killing by a drone strike of Reyaad Khan in Syria in August 2015 occurred within an armed conflict (between the UK and ISIL in Iraq) seemed to fly in the face of the Prime Minister's statement to the House on 7 September 2015, when he justified the strike not as an act of war but as an act of self-defence against an imminent attack. This should not, however, deflect from the fact that the Report's major contribution is to consider the legal basis for drone strikes against individuals *outside* of armed conflict.<sup>27</sup>

While the Joint Committee's findings on the Reyaad Khan incident seems odd, given that the UK did not extend its military campaign against ISIL to Syria until later in 2015, the Report relies on the letter sent by the UK ambassador to the UN Security Council which stated that the strike was both an act of self-defence of the UK in the face of terrorist attack, and an act of collective self-defence of Iraq against on-going attacks by ISIL.<sup>28</sup> The UK has been involved in defending Iraq from ISIL since 2014, giving rise to the contention that Reyaad Khan's membership of ISIL and his presence in neighbouring Syria brought him within that armed conflict and, therefore, made him a legitimate target for the purposes of the laws of war. While Khan *may* have been a lawful target within an armed conflict in Iraq, and he *may* have been engaged in an imminent armed attack against the UK, these two separate possibilities do not somehow combine to make the killing of Khan unimpeachable.

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<sup>26</sup> Ibid, para 3.34.

<sup>27</sup> Ibid, p.5.

<sup>28</sup> Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (8 September 2015) UN Doc S/2015/688. See Joint Committee Report (n 1) para. 3.11.

The Report too readily accepts the argument that Khan was lawfully killed in an armed conflict involving the UK in defending Iraq from ISIL attack, a conflict ‘spilling over into Syria’,<sup>29</sup> but fails to question the justifications given most prominently by the Prime Minister on 7 September 2015 that the action was in self-defence of the UK per se. David Cameron stated that following the advice of the Attorney General he was clear that the killing of Khan and two others (a British national and a Belgian one) was an ‘entirely lawful’ exercise of the ‘UK’s inherent right to self-defence’, in that there was ‘clear evidence of these individuals planning and directing armed attacks against the UK’.<sup>30</sup> The Prime Minister pointed to evidence that Khan was ‘seeking to orchestrate specific and barbaric attacks against the west, including directing a number of planned attacks right here in Britain, such as plots to attack high profile public commemorations, including those taking place this summer’.<sup>31</sup> Rather than exploring whether this constituted an imminent armed attack of such intensity to trigger the right of self-defence by the UK, as claimed by the Prime Minister, the Committee seems to have been distracted by the issue of whether Khan could be brought within an armed conflict thereby legitimating the use of force against him under the more permissible framework of international humanitarian law (*jus in bello*).<sup>32</sup> The Committee lost sight of the issue before it, which was the government’s policy on use of force by drones in self-defence outside of armed conflict, which was put forward by the Prime Minister as the initial justification for the drone strike against Reyaad Khan.

### **III. Lethal force in defence of individuals under human rights law**

If, as would normally be the case, the threat posed by an individual terrorist or a small group of terrorists neither reaches the level of intensity nor the degree of imminence required to trigger state’s right to self-defence under the *jus ad bellum*, then a drone strike taken in response to that threat will violate the sovereignty of the host state. Due to its surgical nature and limited impact a drone strike would probably not be of sufficient gravity as to amount to armed attack against the host state: more likely it would constitute an unlawful use of force or intervention by the drone operating state.<sup>33</sup>

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<sup>29</sup> Ibid, para 2.29.

<sup>30</sup> HC Deb, 7 September 2015, col 26. See Joint Committee Report (n 1) 3.10.

<sup>31</sup> Ibid, cols 23-27. See Joint Committee Report (n 1) para 1.3.

<sup>32</sup> Ibid, conclusions and recommendations, 81.

<sup>33</sup> *Nicaragua* (n 8) particularly paras 191-95.

Although this aspect of drone usage is not raised in the Report, it considers that such strikes, when taken outside of armed conflict, are subject to the requirements of international human rights law binding on the UK, namely that life should not be taken arbitrarily by agents of the state. The Report correctly rejects the government's position that the laws of war apply to drone strikes outside of armed conflicts.<sup>34</sup> Here the Report must be applauded for its willingness to discuss the implication of human rights law for drone strikes outside armed conflict, and is to be further applauded by its clear acceptance of the judgment of Leggatt J in *Al-Saadoon* that the use of lethal force extraterritorially by UK agents engages the jurisdiction of the state for the purposes of the European Convention on Human Rights.<sup>35</sup> While there can be no question as to the ethics and logic of this, the legacy of the *Bankovic* case still casts its shadow of doubt over such a conclusion,<sup>36</sup> but the Report adds to the general move towards its acceptance.<sup>37</sup> Indeed, the killing of someone by state agents, whether at home or abroad, seems to be the ultimate assertion of jurisdiction in the form of the exercise of physical power and control by a state and therefore should engage the right to life under the applicable human rights treaties.<sup>38</sup>

The application of human rights law to uses of lethal force by drones operating overseas would also include an assessment of the law of self-defence but at a sub-state level, where the state itself is not being defended but its agents may still have to use force to defend individuals since one of the recognised non-arbitrary means of taking of life is by state agents acting 'in defence of any person from unlawful violence'.<sup>39</sup> Although an imminent terrorist attack may not be of the intensity to justify triggering the *jus ad bellum*, it could still justify the use of lethal force if the state agents directing and operating the drone honestly believe they had no choice but to use force to protect individuals under threat of imminent attack.

Given the remote nature of drone usage, this state of mind would be provable in situations involving defence of British nationals - for example, to prevent an imminent devastating strike by ISIL operatives against British oil workers in Libya, or again on British tourists in Tunisia. As the Report states: '[O]utside of war the right of self-defence can only be

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<sup>34</sup> Joint Committee Report (n 1) paras 3.55, 3.68; and conclusions and recommendations, 83.

<sup>35</sup> *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715, para 117. Cited in Joint Committee Report (n 1) paras 3.58.

<sup>36</sup> *Bankovic v Belgium* [2001] 11 BHRC 435, para 75.

<sup>37</sup> See, for example, Inter-American Court of Human Rights judgement in *Armando Alejandro Jr, Carlos Costa, Mario de la Pena and Pablo Morales v Cuba (Brothers to the Rescue)*, Case 11.589, Report No 86/99 (28 September 1999) para 25.

<sup>38</sup> Joint Committee Report (n 1) para 3.59.

<sup>39</sup> Article 2(2)(a) ECHR. Indeed, the Joint Committee Report (n 1) para 3.72, indicates that the UK would be under a positive obligation under the ECHR to protect citizens in these circumstances.

exercised if there is an imminent threat of unlawful violence’, and then ‘even if an individual has been previously identified as somebody suspected of planning terrorists attacks, the critical time for consideration of the imminence question is before the decision is taken to use lethal force against the individual’.<sup>40</sup> Although ‘that assessment will depend very much on the facts ... it is important that the mind of the relevant decision-maker is directed to the question of imminence at the relevant point in time’.<sup>41</sup>

However, as demonstrated by the killing of Reyaad Khan, the government’s policy seems to be to use a drone strike when there is evidence that the targeted terrorist has been involved in plots in the past and that he was planning new ones, and these conclusions are used as the basis upon which to *plan* a strike against him. A planned strike does not fit the essence of self-defence either under the *jus ad bellum* or under human rights law, both of which involve responding immediately to an imminent attack with no moment for deliberation. A use of force taken too early against a suspected terrorist is a pre-emptive strike, while a use of force taken too late is punishment; neither constitutes a lawful action of self-defence (either at the level of defence of the state under the *jus ad bellum*, or at the level of defence of individuals under human rights law).

#### **IV. Conclusion**

Although the Report usefully discusses the exercise of the right of self-defence by a state both at the level of protecting the state from imminent attack and at the level of protecting individuals from imminent attack, it is not clear from the Report where one ends and the other begins. Indeed, the Report sees them as entirely separate frameworks: one concerning *whether* force can be used (*jus ad bellum*), and one concerning *how* it should be used (human rights law unless in armed conflict when international humanitarian law applies),<sup>42</sup> rather than seeing both as also being concerned with *when* lethal force should be used. As well as being concerned with how force should be used, human rights law (and international humanitarian law) still involve questions as to whether and when it should be used. International humanitarian law is more permissive than human rights law in the extent that it allows for greater lethal force and

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<sup>40</sup> Ibid, para. 3.67.

<sup>41</sup> Ibid.

<sup>42</sup> ibid, para 3.43. For a broader discussion, see, Nigel D. White and Lydia Davies-Bright, ‘Drone Strikes: A Remote Form of Self-Defence?’ in Jens Ohlin (ed), *Research Handbook on Remote Warfare* (Elgar, forthcoming).



is, therefore, the preferred framework of the UK government, but, as the Committee correctly states, this is not acceptable outside of armed conflict.<sup>43</sup>

A large-scale imminent attack orchestrated by a terrorist organisation that threatens the life of a significant number of citizens may have the intensity needed to trigger the right of self-defence under the *jus ad bellum* as being necessary to defend the *state* itself from attack. However, an imminent attack by a ‘lone wolf’ terrorist or, indeed, a small cell loosely connected to a larger terrorist organisation, may well not have that level of intensity – but it may still be justify an extra-territorial use of lethal force by drones, judged under human rights law as a defence of individuals. The violation of state sovereignty that results from drone strikes that cannot be justified under the *jus ad bellum* would have to be weighed by the government against the state’s duty to protect its citizens under existential and imminent threat of violence. It is not enough for the UK simply to make broad claims to self-defence on the basis of classified intelligence or evidence if it wants to retain a credible policy relating to drone strikes.

The Report should provoke further debate and clarification of these crucial issues,<sup>44</sup> as the UK and other states continue to struggle to adopt controlled and calibrated methods of tackling threats to security in the current age of terror. Claiming that the existence of a state may be threatened by terrorist attacks and threats thereof gives rise to a real danger of fuelling the terrorist ideology that purports to justify random acts of murder. Applied in the way suggested above, the law relating to self-defence is capable of limiting the current tendency of governments to over-react, to escalate violence, and to believe that terrorism can be defeated by the use of lethal force, including by armed drones, against known terrorists.

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<sup>43</sup> Ibid, para 3.48-9.

<sup>44</sup> Starting with the government’s response to the Report, which, at the time of writing, has not been published.