

The United Kingdom, Unmanned Aerial Vehicles, and Targeted Killings

By: David Turns

Unlike in the United States, in the United Kingdom the use of unmanned aerial vehicles (UAVs or drones) for targeted killings has generally been “under the radar” due to the British government’s longstanding refusal to admit that any such policy exists. That approach was subverted in late 2015 when then-Prime Minister David Cameron told the House of Commons that a British citizen, Reyaad Khan, had been killed by such a strike near Raqqa in Syria.¹ On that occasion there was surprisingly little direct comment; but eight months later the Parliamentary Joint Committee on Human Rights (JCHR) produced its *Second Report of Session 2015-16: The Government’s Policy on the Use of Drones for Targeted Killing*² (Report). The Report is notable for highlighting an apparently new concept for the use of force by the U.K. in a foreign country where it is not engaged in a situation of armed conflict, as well as the application of international humanitarian law (IHL) and human rights law (HRL)—specifically, the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR)—to such operations. In particular, the British government seems to have arrived at a newly expansive interpretation of the scope and ambit of the right of self-defense in international law; and by implication, it is turning the clock back fifteen years by effectively advertent to a concept of a “Global War on Terror” that neither the U.K. nor any other European state has previously subscribed to. This is a substantial realignment of the U.K. position, which had previously shared a European and broader international consensus of a less consistently militarized response to transnational terrorism.³ At the same time, the government’s position on the application of IHL and HRL to such operations is alternately vague and confusing. These new interpretations of international law represent a change in official attitudes and perceptions that bring the U.K. closer to the policies of the Bush administration in 2001–2008. Despite some clarification since the publication of the Report, the British government’s position remains one of “contradictions and inconsistencies,”⁴ and it continues to insist that it does not have “a ‘policy on targeted killing’ . Rather[,] it has a policy to defend the UK and its citizens against threats to their security.”⁵

Use of Force Without Armed Conflict

An important preliminary question, which dominates much of the Report, is whether or not the U.K. is involved in the armed conflict in Syria. The U.K. has been participating in military

action against the so-called Islamic State in Iraq and the Levant (ISIL) since 2014; the legal basis of the action was stated at the time as being, “in support of the collective self-defence of Iraq as part of international efforts led by the United States.”⁶ In 2013, then-Prime Minister David Cameron sought Commons approval for British military action on Syrian territory after the reported use of chemical weapons by President Bashar al-Assad’s forces, but the government’s motion to authorize airstrikes in Syria was defeated.⁷ Just over one year later, a resolution to authorize airstrikes against ISIL was approved by the House, but only on the territory of Iraq, and the text of the resolution made it clear that “any proposal to [endorse U.K. airstrikes in Syria] would be subject to a separate vote in Parliament.”⁸ At the time of the Raqqa strike, no such additional vote had been moved and there was therefore no parliamentary authorisation for the action on the record. It could accordingly have been viewed as illegal in light of the modern constitutional convention in the U.K. that military deployments overseas should normally be debated in the Commons beforehand.⁹

When Prime Minister Cameron reported the strike to the Commons *ex post facto*, however, he emphasized that it had not been in the context of the armed conflict against ISIL, but rather had been an entirely free-standing action: “[A] targeted strike to deal with a clear, credible and specific terrorist threat to our country at home.”¹⁰ He referred to this as a “new departure” for the U.K. and admitted that the Raqqa strike was its first application. Cameron stated that as part of the national counterterrorism strategy, the government will always be prepared to use lethal force abroad against suspected terrorists who pose an imminent threat to the U.K., even if that involves executing a strike on the territory of a foreign state where the U.K. is not involved in any armed conflict.¹¹ At the same time, he indicated that the operational parameters of the strike were determined by IHL considerations: “The strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity. The military assessed the target location and chose the optimum time to minimise the risk of civilian casualties.”¹² Government lawyers, responding to a threat of judicial review proceedings challenging the failure to publish any existing policies or procedures regarding targeted killings, subsequently claimed that the strike took place “in the context of an active armed conflict” and that Khan and the two other ISIL cadres killed alongside him were “participants” in that conflict.¹³

The JCHR accepted that the strike in Syria was in fact part of the same armed conflict in which the U.K. was already involved against ISIL in Iraq. This was partly on the terms of the U.K.’s notification of the strike to the UN Security Council¹⁴ and partly because Cameron’s insistence that it was not part of that conflict was imperfectly designed to reassure Parliament that the government was complying with the stated exceptions to the constitutional convention on the use of force. Under that convention, if there is some emergency or critical necessity that renders it inappropriate to seek preauthorization by Parliament, the government will act first and report back to Parliament at the earliest possible subsequent opportunity.¹⁵ Nevertheless, in the sense that the traditional British

approach to counterterrorism has primarily been seen in terms of criminal law enforcement rather than the use of military force,¹⁶ the boundaries between those paradigms have become blurred. This is apparent in that the U.K. may now use lethal force in targeted strikes against suspects in foreign states with which the U.K. is not at war, rather than seeking to have such suspects arrested, investigated, and prosecuted or extradited.¹⁷ This change in policy gives cause for concern about the expansion of the use of force concept—there have been reports of British Special Forces destroying ISIL targets in Libya, for example.¹⁸ On the other hand, it does reflect a growing perception of the imperative to take military action against terrorists who are believed to pose a direct and imminent threat to the U.K. but who are located in a state where, for one reason or another, traditional law enforcement is not seen as a realistic option. In that sense, it aligns the U.K. approach more closely with that adopted by the U.S. after the 9/11 attacks.

Self-Defense

The U.K.'s letter to the Security Council notifying it of the Raqqa strike invoked “the inherent right of individual and collective self-defence” in accordance with Article 51 of the UN Charter, on the basis that (i) Khan himself was “actively engaged in planning and directing imminent armed attacks” against the U.K., and (ii) Khan was a member of ISIL, which “is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.”¹⁹ Although Cameron only mentioned the U.K.'s reliance on the right of individual self-defense, the most important aspects of this justification are the U.K.'s understanding of the concepts of “armed attack” and “imminence” (the latter not being mentioned in Article 51, but long subscribed to by the U.K. in customary international law).

On the construction of an armed attack by non-state actors, the government clarified the U.K.'s understanding that the threshold for grave terrorist violence to amount to such an attack is where it “reaches a level of gravity such that were it to be perpetrated by a State it would amount to an armed attack.”²⁰ That terrorists can commit an armed attack for the purposes of self-defense has been widely accepted in international law since 9/11, but questions of the level of magnitude, scale, or intensity required for this to be the case have been begged by open-ended Security Council resolutions and left unanswered by international jurisprudence. Although the U.K. interpretation makes sense *per se* and seems consistent with contemporary *opinio juris*,²¹ it does not answer those questions.

As to imminence, the U.K. had previously distanced itself from the post-9/11 U.S. concept of preemptive self-defense against remote threats, but government responses to the JCHR

suggest a conflation with that concept, as it appears the U.K. now favors a more flexible interpretation of the concept of imminence. Although as long ago as 2004 the Attorney-General had averred that the concept needed to be adaptable in the context of evolving technology, the new approach suggests obliquely that “[a]n effective concept of imminence cannot . . . be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack.”²² As noted by the JCHR, the expansiveness of the new approach “raises important questions about the degree of proximity that is required between preparatory acts and threatened attacks. Is it enough . . . if . . . an individual is planning terrorist attacks in the UK, or does the preparation need to have gone beyond mere planning? Once a specific individual has been identified . . . does the wider meaning of imminence mean that an ongoing threat from that individual is, in effect, permanently imminent?”²³ These, and the “broader range of indicators” mentioned, have not been clarified; the implication of a constant state of imminent threat and preemptive self-defense is legally uncomfortable. It suggests, contrary to settled international law doctrine, that a state may resort to the use of force in self-defense against an indefinitely ongoing situation regarding a designated “enemy,” rather than a specific armed attack. Although this has for some years been the position of a very few states (principally the U.S. and Israel), it has not previously been subscribed to by the U.K. or the large majority of the international community. Moreover, it is inconsistent with the understanding that self-defence in public international law justifies a state’s *initial* recourse to force under the *jus ad bellum*, as opposed to rationalising its ongoing operations in the course of a situation of armed conflict.

IHL and HRL

As current U.K. defense doctrine only contemplates the use of drone strikes within an armed conflict paradigm,²⁴ the use of such strikes, combined with statements about compliance with IHL (which by definition only applies in situations of armed conflict), confirms that the government *does* see the situation in those terms. The JCHR notes that the government’s insistence on a geographically-limited non-international armed conflict against ISIL in Iraq and Syria is contradicted by the stated policy of willingness to strike outside armed conflict and apply IHL, which in the government’s view meets any obligations it might have under HRL; the effect of the two assertions together is that the U.K.’s policy “ends up in the same place” as the U.S. policy, which the U.K. has hitherto consistently disavowed.²⁵ Finally, the JCHR averred that current jurisprudence requiring the extraterritorial application of the ECHR to individuals in the physical control of the state means that HRL would apply to drone strikes conducted outside of armed conflict where there is an imminent threat that cannot be prevented in any other way and the use of lethal force is absolutely necessary; but it would be harder to justify British support to U.S. airstrikes against more remote threats, such as where the target was, for example, a

training camp for terrorists with “ill intent in their minds,”²⁶ because the threshold for the permissible use of lethal force is much higher in HRL than in IHL.

The ECHR, in requiring that the state’s taking of life be absolutely necessary (e.g. in defense against unlawful violence), strictly proportionate to the aims sought, and followed by an effective official investigation, basically assumes that the state will try to detain its enemies in order to put them on trial, rather than simply killing them—a “capture rather than kill” paradigm. This is unknown to IHL, wherein enemy combatants and other persons directly participating in hostilities may lawfully be targeted in any place and at any time as long as they are not *hors de combat* by reason of wounds or sickness, attempting to surrender, or already in custody.

Conclusion

The U.K. government’s application of IHL to the Raqqa strike is consistent with its current defence doctrine and its persistent argument that the ECHR does not apply to extraterritorial military operations except in limited situations where there is effective control of an area or where state agents have personal control over an individual. The JCHR blithely assumes that HRL applies extraterritorially to all uses of lethal force in non-armed conflict situations (on the basis that killing someone is a clear expression of physical control over that individual), but in fact this point remains far from settled in the jurisprudence of the English courts, not to mention that of the European Court of Human Rights, to which the latest domestic decision²⁷ will surely be appealed in due course. Finally, the U.K.’s newly-expansive understanding of the imminence criterion for self-defense (very recently amplified in a strangely intangible speech by the Attorney-General at the International Institute for Strategic Studies)²⁸ aligns with a subjective and potentially abusive appreciation of the notion of a foreign state being “unable or unwilling” to counter a terrorist threat emanating from its territory²⁹ and risks further diluting the already-hazy broth that is the law restraining the unilateral use of force by states.

¹ 7 Sept. 2015, Parl Deb HC (2015) cols. 25-27 (UK).

² Joint Committee on Human Rights, *The Government’s Policy on the Use of Drones for Targeted Killing*, 2015-16, HC 574/HL 141 (UK) [hereinafter “Report”].

³ See David Turns, *The “War on Terror” Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues* 10 N.Y. CITY L. REV. 435 (2007).

⁴ Report, *supra* note 2, at § 2.2.

⁵ Joint Committee on Human Rights, *The Government’s Policy on the Use of Drones for Targeted Killing: Government Response to the Committee’s Second Report of Session 2015–16, 2016-17*, HC 747/HL 49 (UK), 1 *Appendix: Government Response*, 14, available at <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/747.pdf> [hereinafter “Government Response”].

⁶ Identical Letters Dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2014/851 (Nov. 26, 2014).

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- ⁷ 29 Aug. 2013, Parl Deb HC (2013) cols. 1425-1556 (UK).
- ⁸ 26 Sept. 2014, Parl Deb HC (2014) col. 1255 (UK). This was despite the UK's notification of the action to the UN (*supra* note 6) referring to the purpose of the action as being, "to end the continuing attack on Iraq [by ISIL], to protect Iraqi citizens and to enable Iraqi forces to regain control of the borders of Iraq *by striking ISIL sites and military strongholds in Syria*" (emphasis added).
- ⁹ See *The Cabinet Manual – A Guide to Laws, Conventions and Rules on the Operation of Government* (2011), §§ 5.36-38, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.
- ¹⁰ 7 Sept. 2015, Parl Deb HC, *supra* note 1, at col.26.
- ¹¹ *Id.* at col. 30.
- ¹² *Id.* at col. 26.
- ¹³ Government Legal Department, Letter to Leigh Day & Co., Solicitors §21 (Oct. 23, 2015) available at http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Govt_Legal_Dept_Leigh_Day_231015.pdf.
- ¹⁴ *Infra* note 19.
- ¹⁵ Report, *supra* note 2, at §§ 2.20-29.
- ¹⁶ See generally, Turns, *supra* note 3.
- ¹⁷ Report, *supra* note 2, at §§ 2.31-38.
- ¹⁸ See *Commons Committee Chairman Urges Clarity over UK Special Forces in Libya*, BBC NEWS (May 26, 2016), <http://www.bbc.co.uk/news/uk-36392039>.
- ¹⁹ Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, UN Doc. S/2015/688 (Sept. 2015).
- ²⁰ Government Response, *supra* note 5, at 15.
- ²¹ See generally Karl Zemanek, *Armed Attack*, *Max Planck Encyclopedia of Public International Law* (2013), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>.
- ²² Government Response, *supra* note 5, at 16.
- ²³ Report, *supra* note 2, at § 3.39.
- ²⁴ See Ministry of Defence, *Joint Doctrine Note 2/11 – The UK Approach to Unmanned Aircraft Systems* (Mar. 30, 2011), §§ 502-15.
- ²⁵ Report, *supra* note 2, at §§ 3.50-55.
- ²⁶ *Id.* at §§ 3.56-89.
- ²⁷ *Al-Saadoon v. Secretary of State for Defence* [2016] EWCA (Civ) 811 (Eng.).
- ²⁸ Jeremy Wright, *The Modern Law of Self-Defence*, EJIL:TALK! (Jan. 11 2017) <http://www.ejiltalk.org/the-modern-law-of-self-defence/>.
- ²⁹ See Brian Egan, Legal Advisor, U.S. Dep. of State, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, Remarks to the American Society of International Law (Apr. 1 2016), (transcript available at <https://www.state.gov/s/l/releases/remarks/255493.htm>)(endorsing publically this standard on behalf of the US).