

Targeted killing outside armed conflict: a new departure for the UK?

By Christine Gray

On 21 August 2015 the UK carried out a targeted killing of a British citizen, Reyaad Khan, by an RAF drone strike in Syria. Reyaad Khan was suspected of involvement in plotting and directing terrorist attacks in the UK and elsewhere. He and two others were killed by a Hellfire missile fired from a Reaper drone. UK Prime Minister David Cameron in a speech to Parliament on 7 September 2015 said that this was the first time that a British military asset had been used in a country in which the UK was not involved in a war; it was “a new departure”. He said, “I want to be clear that the strike was not part of coalition military action against ISIL in Syria: it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home.” Was this in fact a major change by the UK? Has the UK now joined Israel and the USA as a state that carries out targeted killings off the hot battlefield? If so, what exactly is its new policy? These questions are complicated because the Government did not present a coherent position on the killing of Reyaad Khan. On the same day that the Prime Minister said that it was “a new departure” and not part of coalition military action in Syria, the UK offered a rather different explanation in the UN Security Council. Its letter reporting the targeted killing under Article 51 of the UN Charter said that the UK had undertaken military action in Syria “against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the UK was travelling” in exercise of the inherent right of individual *and collective* self-defence (and so as part of the US-led action in Syria).¹ Thus the Government presented conflicting explanations of the military action. The striking difference between the positions is partly explicable because of the different audiences addressed.

Following the drone attack, the UK Joint Committee on Human Rights decided to conduct an inquiry to achieve clarification on a number of important questions, including (1) what precisely is the Government’s policy, and (2) what is its legal basis. One of the Committee’s main objectives was to clarify whether the drone strike in Syria heralded the adoption of a new policy of targeted killing of suspected terrorists abroad. “This matters because the UK has never previously had an explicit policy of using lethal force abroad outside an area of armed conflict.”² It had consistently rejected the legality of “extrajudicial killing”. Section 2 of the Committee’s Report on *The Government’s policy on the use of drones for targeted killing* deals with this issue of whether there has been a change of policy by the UK.³

As regards the particular targeted killing of Reyaad Khan, the “contradictions and

inconsistencies” in the Government’s position had given rise to confusion as to whether there really was a new departure and, if so, what was its nature. The Committee considered three different issues: first, was there a new departure in terms of the UK constitutional convention that the Government should consult Parliament before undertaking military action abroad; second, did the particular incident constitute a new departure in that it was now part of the Government’s counter-terrorism strategy to use lethal force against suspected terrorists abroad who pose an imminent threat to the UK, even in countries where the UK is not involved in an armed conflict; third, was there a new departure in the sense that the UK Government had adopted a general policy of targeted killing outside an armed conflict?

The confusion arose because of the direct contradiction between the UK’s letter to the Security Council (implying that the targeted killing was part of the coalition military operation in Syria because it was done in the exercise of collective self-defence) and the Prime Minister’s statement that it was a new departure, and not part of coalition military action against ISIL in Syria. If the targeted killing was - as the UK implied to the UN Security Council - part of an ongoing armed conflict in Syria, then it would not in fact mark a change of policy by the UK despite the language of the Prime Minister. It would be consistent with UK practice of using drones to kill identified individuals in the ongoing armed conflicts in Afghanistan and Iraq. The Committee seemed very willing to explain away the Prime Minister’s statement on the basis of his concern with the constitutional convention: the Prime Minister was keen to establish that he had not ignored the will of the House of Commons, and therefore he did not want to say that the UK had joined in coalition military action in Syria without Parliamentary approval.

The background was that in August 2013, at a time of widespread concern about the use of chemical weapons in Syria, the UK House of Commons had refused to authorize the use of force in Syria. The UK Government had sought Parliamentary support for the use of force in the name of humanitarian intervention to prevent the alleged use of chemical weapons by the Assad government in Syria, but Parliament had rejected this request.⁴ And in 2014 when the USA began to carry out air strikes first in Iraq and then in Syria on the basis that it was acting in collective self-defence of Iraq, the UK took part only in operations in Iraq. The House of Commons did not endorse UK air strikes in Syria; in September 2014 it voted in favour of action against ISIL in Iraq, but it expressly resolved that air strikes in Syria would need a separate vote in Parliament. It said “this motion does not endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in

Parliament.”⁵

When the UK nevertheless carried out the targeted killing by a drone in Syria in August 2015, there was a call for an explanation: how was this compatible with Parliament’s earlier refusal of authority? The Report did not see any problem. The recently established UK constitutional convention required that Parliament be given an opportunity to discuss any proposed use of military force, except when there is an emergency which means that it would not be appropriate to consult the House of Commons in advance.⁶ Examples of such exceptions were cases where there is a critical British national interest at stake or where considerations of secrecy make it impossible. In this regard the Report expressly concluded that there had been a new departure in terms of the domestic constitutional convention governing the use of force abroad: this was the first time since the establishment of that convention that the Government had invoked the exception recognized by the convention, by using military force against ISIL not only outside the area (Iraq) authorized by the House of Commons, but in the very area (Syria) where the use of force had been expressly excluded by the terms of the authorizing resolution. That is, this “new departure” was of significance mainly for UK constitutional law, and also for the wider debate about the democratic accountability of Governments in decision-making on the use of force.

On the second question as to whether the targeted killing of Reyaad Khan marked a new departure, the Committee discounted the statement of the Prime Minister on 7 September 2015 that it was not part of the coalition operation in Syria, and accepted the Government’s claim that the targeted killing in Syria was indeed part of the same armed conflict in which the UK was already involved in Iraq. Therefore the particular action, the targeted killing of Reyaad Khan, was not a new departure; it was not a targeted killing *outside* armed conflict. The Committee considered the crucial issue of whether the UK was in fact involved in such an armed conflict in one brief paragraph in Chapter 3 of its Report. Its willingness to accept the Government’s assertions on this point is open to question; it gave no real explanation for its view.⁷ Was there a non-international armed conflict in Syria because the UK was involved in an armed conflict with ISIL in Iraq at the request of the government of Iraq and because ISIL operated in both states, even though the UK was not taking military action in Syria before its drone strike? The significance of this question is clear: if there is a non-international armed conflict between ISIL and the UK in Syria, the law of armed conflict rather than the stricter requirements of human rights law would apply to the targeted killing of Reyaad Khan.⁸ The UK Government view of the geographical scope of the non-international armed conflict between the UK and ISIL still accepts that the conflict is territorially limited to Iraq and Syria. The UK does not go as far as

the USA which has since the terrorist attacks of 9/11 taken the controversial position that its “global war on terror” (President Bush), and then its war on AlQaida (President Obama), and now its armed conflict with ISIL, have all formed part of a single global non-international armed conflict.⁹

However, the Joint Committee’s Report was not concerned to consider the legality of the particular targeted killing; its main focus was on the third question identified above, the question whether it is now the UK Government’s policy that it will in future be prepared to use lethal force against terrorist suspects abroad even outside armed conflict.¹⁰ The Government set out its position in a four-page Memorandum, criticised in the Report as an inadequate response to the Committee’s detailed questions.¹¹ The Memorandum is indeed an unimpressive document. The Committee said “We are disappointed by the Government’s unhelpfulness in this respect. . . Considerations of transparency and democratic accountability require the Government to explain publicly its understanding of the legal basis on which it takes action which so seriously affects fundamental rights.”¹²

In its evidence to the Committee, the Government expressly denied that it had a policy of targeted killing. Its official position in the past, like that of the EU, had been to reject the legality of extra-judicial killing.¹³ The RAF did not carry out drone attacks outside hot battlefields in Afghanistan and Iraq. However, there was some ambivalence in the UK’s position. There were convincing newspaper reports that it had provided intelligence and drone parts to the USA,¹⁴ and that it had embedded pilots with US drone teams carrying out CIA drone strikes.¹⁵ Accordingly the Committee in its Report calls on the Government to clarify the legal basis for its support to the USA.¹⁶ Although the UK Defence Committee had said that it was necessary to draw a clear distinction between the UK’s use of drones and that of the USA,¹⁷ the UK was not willing to criticise US targeted killings in Pakistan, Yemen, Somalia. It did not comment on the legality of the covert campaigns of the CIA outside hot battlefields. When the UK Government was pressed to take a public position, it consistently said only that US drone strikes against terrorist targets in Pakistan and Yemen were “a matter for the states involved”.¹⁸

When President Obama’s administration set out a framework for its extensive targeted killing programme in a series of speeches, they acknowledged that their closest allies followed a different approach.¹⁹ Whereas the USA took the position that since 9/11 it was involved in an ongoing armed conflict with AlQaida and its affiliates and did not have to show that each individual targeted killing was justified as self-defence, in contrast the allies operated on a case by case basis. For them an individual US targeted killing outside hot battlefields could be justified as self-defence

if it targeted AlQaida members who were “planning, engaging in or threatening an armed attack”. The clear implication was that the allies accepted that targeted killing outside armed conflict could be lawful self-defence, although they did not publicly put forward such a position at the time.²⁰

The Committee said that it understood the UK Government’s reluctance to describe its policy as one of “targeted killing”. The term was a sensitive one. However, as a matter of substance the Committee found that the Government is now willing to use lethal force abroad outside 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.²¹ This was in substance a new policy, even if the Government was not happy to put it forward as such. The policy was set out in the Government’s Memorandum, and confirmed by Ministerial statements and evidence to Parliamentary Committees.²² The Prime Minister had set out the legal basis for the drone strike against Reyaad Khan in his 7 September 2015 statement to the House of Commons. It was an act of self-defence to protect the British people. Reyaad Khan had been involved in actively recruiting ISIL sympathisers and seeking to orchestrate specific and barbaric attacks against the West, including directing a number of planned terrorist attacks in Britain, such as attacks on high profile public commemorations in May and June 2015.²³ The UK was acting in exercise of its inherent right to self-defence. It had acted because there was no alternative: in the absence of a Syrian government that it would work with and no military forces on the ground, direct action was the only way of preventing Khan’s planned attacks on the UK.²⁴ The Attorney General had advised that there was a clear basis in international law.²⁵ It was the UK’s right to take necessary and proportionate action to defend itself against terrorist attack. The strike was to defend the British people against the threat of terrorist attack in the UK.

The Prime Minister had made it clear that the particular targeted killing was part of a wider counter-terrorism strategy, and that the UK’s policy of “lethal action” extended to areas outside armed conflict. He said that he would always be prepared to take immediate action to stop a direct threat to the British people, “whether the threat is emanating from Libya, from Syria or from anywhere else.”²⁶ The action taken on 21 August 2015 was not a one-off. This was confirmed by the Secretary of State for Defence in his statements to the Committee.²⁷ He said, “If there is a direct and imminent threat to the UK and there is no other way of dealing with it . . . then of course as a last resort we have to use force.” He confirmed that it was the government’s policy to use lethal force abroad outside armed conflict. Moreover, the UK allows its bases to be used for US air strikes on ISIL training camps in Libya,

outside an armed conflict to which the UK is a party. Cumulatively these statements and this practice demonstrated to the Committee's satisfaction that the UK had now adopted a new policy with regard to targeted killing, whatever it was to be called. Its policy on the use of force outside areas of armed conflict did contemplate the possibility of pre-identified individuals being killed by the State to prevent a terrorist attack.²⁸

The Committee noted that the UK's apparent change of policy had not been preceded by any parliamentary scrutiny or debate and that the Government had not published any formulated policy.²⁹ There was now considerable uncertainty about what the Government's policy was, and a lack of clarity about the legal basis of that policy. The Government had invoked the international law of self-defence, but had said very little about whether the Law of War or human rights were also relevant and, if so, what they required. In spite of these criticisms, the Committee seemed broadly sympathetic to the Government's position on self-defence.³⁰ Although the Committee acknowledged that it was not clearly settled in international law whether there is a right of self-defence against a threat of armed attack by non-state actors who are not acting under the control or direction of another state, it accepted the wide view put forward by the Government on this issue.³¹ Its Report asserts that state practice "certainly accepts this right", and that Security Council Resolution 2249 "lends support to this view". However, both these assertions are still controversial, as is the Report's apparent acceptance of the necessity of targeted killing when the host state is "unwilling or unable" to prevent attacks.³² The Report also accepted the statement in the Government's Memorandum that an ongoing series of terrorist attacks may rise to the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51 if they are of sufficient gravity.³³ However, the Committee was more sceptical about the Government's argument for a flexible interpretation of the requirement of an "imminent" armed attack.³⁴

Perhaps not surprisingly, as the basis for its new policy the UK Government now seems to adopt the controversial doctrine of self-defence promulgated by Daniel Bethlehem, former FCO Legal Adviser after he stepped down from his position.³⁵ As he himself acknowledged, the doctrine he put forward was not fully worked out. The Government's position also needs further elaboration. If the technology of drone warfare now allows the UK to take lethal action against suspected terrorists abroad outside armed conflict, more detailed explanation of the new policy identified by the Committee is needed. In particular the Government's apparent position that it is the Law of Armed Conflict rather than human rights law that governs such killings needs further justification. This new policy has been adopted at a time when there is a

concerted attempt to widen the right of self-defence, apparent in the communications of western states to the Security Council with regard to military action against ISIL in Syria. It also comes at a time when more states and armed groups are acquiring the technology to carry out attacks by armed drones. There have been many warnings of the precedential impact of targeted killings. The Committee accordingly urged the Government not to try to develop a doctrine unilaterally, but to take part in international efforts to this end.³⁶

Those who are concerned about the legality and effectiveness of targeted killing by drones as a response to terrorist attacks - those who see drone attacks outside armed conflict as constituting punitive and/or preventive action rather than self-defence under international law - may perhaps take some comfort from the fact that the Government was reluctant openly to avow such a policy, and that it preferred to claim that its killing of Reyaad Khan was not a new departure, despite the language of the Prime Minister. The Committee welcomed the Government's recognition that the use of legal force abroad outside armed conflict should only ever be exceptional.³⁷ There have not, as far as we know, been any further UK targeted killings outside armed conflict to date. However, the reports of the existence of a UK kill list are not reassuring.³⁸

-
1. UN doc S/2015/688. For the Syrian response, see UN docs S/2015/719 and S/2015/727.
 2. The Cabinet Office, *The Cabinet Manual: a guide to laws, conventions and rules on the operation of government* (October 2011), para 2.2.
 3. Second Report of Session 2015-16, HL Paper 141, HC 574 (hereafter “the Report”).
 4. Sarvarian, ‘Humanitarian Intervention after Syria’, 36 *Legal Studies* (2016) 20.
 5. The House of Commons later authorized the UK Government to use force in Syria on 26 November 2015, after the Paris night club terrorist attacks. See *The Extension of Offensive British Military Operations to Syria*, Prime Minister HC Debate 26 Nov 2015 col 1491, Attorney General HC Deb 26 Nov 2015 col 1468.
 6. The Cabinet Office, *The Cabinet Manual: a guide to laws, conventions and rules on the operation of government* (October 2011) para 3.34.
 7. Report, para 3.46. Nor is there any more satisfactory explanation in Annex 1 to the Report.
 8. See XX below for a discussion of the different legal frameworks.
 9. Report, para 3.50 - 3.53. However, the Report points out that in substance UK policy “ends up in the same place as the US policy” despite disowning the wide US view, because the UK Government now asserts that when the UK uses lethal force abroad outside armed conflict compliance with the laws of war would meet its human rights obligations. See XX below for a discussion of the different legal frameworks.
 10. Report, para 1.11.
 11. Ministry of Defence, *Government Memorandum to the Joint Committee on Human Rights*, 3 December 2015 (hereafter the Memorandum). The Committee’s Report also includes Annex 1: The Relevant Legal Frameworks.
 12. Report, para 3.7.
 13. See the position it expressed on Israel’s targeted killing in UN SC meetings, UN docs S/PV 4929, S/PV 4945 (2004).
 14. See the discussion of the issues raised in the *Noor Khan case*, 84 *BYIL* (2012) 265. The UK Court of Appeal later upheld this decision, [2014] *EWCA Civ 24*.
 15. ‘Concern mounts on UK role in Pakistan drone attacks’, *The Observer*, 13 Sept 2015; ‘RAF using US drones in Afghan air strikes’, *The Guardian* 10 Feb 2014.
 16. See XX below on UK support for US lethal force.
 17. *Remote Control: Remotely Piloted Air Systems - current and future UK use*, Tenth Report of Session 2013-14, HC 772, 25 March 2014, at paras 19 - 21, 158 - 161..

18.83 BYIL (2012) 629 - 631; 84 BYIL (2013) 845. The UK does not comment on the operations of allies or on intelligence sharing.

19. See speech by John Brennan (Homeland Security), <<http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices>>. See also Gray, 'Targeted killings: recent US attempts to create a legal framework', 66 Current Legal Problems (2013) 75.

20. Brennan said "In practice, the US approach to targeting in the conflict with AlQaida is far more aligned with our allies' approach than many assume." At the time this claim seemed surprising, but it now seems justified, at least with regard to the UK.

21. Report, para 2.30 - 2.38.

22. Ibid, para 3.9.

23. The House of Commons Library Briefing Paper Number 7322, 20 October 2015, *UK drone attack in Syria: legal questions*, by Arabella Lang, at 7, 9, 10, pointed out that the Government had not provided evidence of this claim. It asked whether the targeted killing could be necessary if the alleged plots had in fact been foiled before the targeted killing was carried out.

24. Report, para 3.15.

25. Memorandum, page 4.

26. Report, paras 2.37, 2.5 - 2.7.

27. Report, para 2.33 - 2.38.

28. Report, para 2.39.

29. Ibid, para 1.8 - 1.9.

30. The House of Commons Library Briefing Paper mentioned in note 23 above was more nuanced in its approach and it acknowledged the many uncertainties about the scope of self-defence.

31. Ibid, para 3.22.

32. Ibid, para 3.23.

33. Ibid, para 3.25 - 3.29; Memorandum page 2. On the particular facts, the Memorandum asserted that the scale and effects of ISIL's campaign "are judged" to have reached this level of an armed attack against the UK, but it did not explain how this could be so.

34. Report, para 3.30 - 3.42.

35. 'Self-defense against imminent or actual armed attack by non-state actors', 106 AJIL (2012) 770, and responses by Glennon, O'Connell, Rona and Wala, Wilmshurst and Wood,

107 AJIL (2013) 378 - 390; and by Tladi and Hamoud, 107 AJIL (2013) 570, 576.

36.UN Human Rights Council Special Rapporteur Ben Emmerson in his 2014 Report had earlier urged governments to work together to address the controversial questions of *ius ad bellum*, human rights law, and IHL that arise out of targeted killing, UN doc A/HRC/25/59.

37.Report, para 2.39.

38.See House of Commons Library Briefing Paper, note 23 above, at page 24.