

## **Rage Against the Machines: Post-strike scrutiny for targeted killings**

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### **1. Introduction**

On 7<sup>th</sup> September 2015, the Prime Minister announced to Parliament that he had authorised the killing of a British national, Reyaad Khan, an alleged ISIL<sup>1</sup> fighter, in Syria on 21<sup>st</sup> August 2015.<sup>2</sup> Two other alleged militants died in the strike. The killings were justified on the basis of ‘self-defence.’<sup>3</sup> The Defence Secretary stated that the Government would ‘not hesitate’ to conduct further attacks against militants suspected of plotting against the UK,<sup>4</sup> despite the fact Parliament voted against British military action Syria, in August 2013.<sup>5</sup>

This essay examines the legal problems presented by the Government’s disclosure. It will be proposed that the rule of law mandates that there be a post-strike review, and suggests this can be achieved by imposing such an obligation on the Intelligence and Security Committee via amendment of the Justice and Security Act 2013.

### **2. The rule of law and the problem of secrecy**

The rule of law as a concept has been described as ‘capacious,’<sup>6</sup> and ‘elusive,’<sup>7</sup> being a principle which has received much endorsement, but little consensus as to its exact content.<sup>8</sup> Scholarly debate over formal versus substantive,<sup>9</sup> and thin versus thick<sup>10</sup> conceptions of the rule of law has dominated the discourse.

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<sup>1</sup> ‘ISIL’ is used here so as to be consistent with the Government’s case. *cf.* Ian Black, ‘The Islamic State: is it Isis, Isil – or possibly Daesh?’ *The Guardian* (21 September 2014).

<sup>2</sup> HC Deb, 7 September 2015, vol 599, cols 23-27.

<sup>3</sup> *Ibid.*

<sup>4</sup> John McDermott, ‘UK will order more Syria drone attacks, says Fallon,’ *Financial Times* (8 September 2015).

<sup>5</sup> ‘Syria crisis: Cameron loses Commons vote on Syria action,’ <<http://www.bbc.co.uk/news/uk-politics-23892783>> accessed 1 Oct 2015.

<sup>6</sup> Rosa Brooks, ‘Drones and the International Rule of Law,’ (2014) 28 *J. Ethics & Int’l Aff.* 83, 85.

<sup>7</sup> Mark Elliott and Robert Thomas, *Public Law* (2<sup>nd</sup> edn, OUP 2014) 62

<sup>8</sup> The Constitutional Reform Act 2005 recognises the ‘constitutional principle of the rule of law,’ but does not provide a definition.

<sup>9</sup> Paul Craig ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) PL 467.

<sup>10</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 3

Former UN Secretary General, Kofi Annan, has described the rule of law as:

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>11</sup>

The emphasis on arbitrariness and transparency are significant, particularly in the context of lethal force without trial. The Government's disclosure presents two important legal questions. First, it must be determined if lethal targeting is permissible under domestic law, with respect to parliamentary control of the executive, common law rights of procedural due process, and under the Human Rights Act 1998. Second, it must be determined if the use of drones complies with international law, particularly *jus ad bellum*, *jus in bello* and international human rights law.

Yet, those determinations are frustrated by a lack of transparency, inhibiting Parliament and the public from scrutinising the decision to use targeted drone strikes. For this very reason, Rights Watch UK has initiated judicial review proceedings against the Government, for its refusal to publish the Attorney General's legal advice.<sup>12</sup>

Milena Sterio describes this transparency vacuum as the 'problem of secrecy'<sup>13</sup> in the context of US drone strikes. Sterio suggests that because a large number of lethal strikes are conducted by covert CIA operations, it is impossible to determine whether

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<sup>11</sup> UNSC, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' (23 August 2004) UN Doc. S/2004/616.

<sup>12</sup> 'UK NGO commences proceedings against Government for failing to publish legal advice justifying strikes in Syria' <<http://rwuk.org/uk-ngo-rights-watch-uk-commences-proceedings-against-government-for-failing-to-publish-legal-advice-justifying-drone-strikes-in-syria/>> accessed 1 Oct 2015.

<sup>13</sup> Milena Sterio, 'The covert use of drones: how secrecy undermines oversight and accountability,' (2015) 8 Alb. Gov't L. Rev. 129

most strikes comply with the relevant provisions of both domestic and international law.<sup>14</sup>

Such strikes *may* be legal, but the very nature of secrecy prevents lawyers from making that assessment:

Secrecy...has disabled all of us from reaching appropriate legal, moral, and humanitarian judgments about the legality of drone strikes.<sup>15</sup>

This problem is only exacerbated by the fact that questions over the legality of drone strikes remain controversial in international law.<sup>16</sup> Hence, the imperative for accountability and oversight is even greater, since this is an exercise of executive power, with lethal effect, in a contested area.

### **3. Determining Legality: Deficiencies in the Government's case**

#### ***Jus ad bellum***

The Government has sought to rely on self-defence as the legal basis for justifying use of force on Syrian territory without its consent, invoking Article 51 of the UN Charter, which provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The right to use self-defence is not unfettered, and must comply with the principles of necessity and proportionality.<sup>17</sup> Necessity 'requires that no viable alternative to use of

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<sup>14</sup> Ibid.

<sup>15</sup> Fn 15 at 131.

<sup>16</sup> UNHCR, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,' (28 February 2014) UN Doc. A/HRC/25/59

<sup>17</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits (ICJ Reports 1986, p13-14); *Legality of the Threat or Use of Nuclear Weapons*,

force exist before a state may defend itself forcefully.’<sup>18</sup> Proportionality ‘requires a state acting defensively employ no more force than reasonably required to overcome a threat.’<sup>19</sup>

The circumstances in which self-defence can be claimed remain controversial.<sup>20</sup> In *Palestinian Wall Advisory Opinion*<sup>21</sup>, the ICJ took the view that the right is only available when the attack emanates from another sovereign state, as opposed to non-state actors not under the control of the host state. Though the ICJ reaffirmed that view,<sup>22</sup> it has been criticised as unrealistic given the threat of terrorism and state practice to the contrary.<sup>23</sup>

If the anticipatory right is accepted, it must be constrained by a requirement of imminence.<sup>24</sup> To date, all that is known is that Khan was alleged to be ‘involved in actively recruiting ISIL sympathisers and seeking to orchestrate specific and barbaric attacks against the UK.’<sup>25</sup>

Phillipe Sands QC has indicated this is not sufficient:

Planning a future attack at some far away place has never been good enough in international law on the use of self-defence - it has to be imminent and on that we need the evidence.<sup>26</sup>

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*Advisory Opinion* (ICJ Reports 1996, p 266); *Oil Platforms (Islamic Republic of Iran v United States of America)*, *Judgment* (ICJ Reports 2003, p 161).

<sup>18</sup> Michael Schmitt, ‘Drone Attacks Under the Jus Ad Bellum and Jus in Bello: Clearing the ‘Fog of Law,’ (2011) YIHL 311

<sup>19</sup> *Ibid.*

<sup>20</sup> Christine Gray, ‘The Use of Force and the International Legal Order,’ in Malcolm Evans (ed) *International Law*, (2<sup>nd</sup> edn, OUP 2004)

<sup>21</sup> ICJ Rep 2004, para 139

<sup>22</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* 2006 ICJ 116

<sup>23</sup> Martin Dixon, *International Law*, (6<sup>th</sup> edn, OUP 2007) 317; Michael Schmitt, ‘Drone Attacks Under the Jus Ad Bellum and Jus in Bello: Clearing the ‘Fog of Law,’ (2011) YIHL 6

<sup>24</sup> See the *Caroline Case* 29 Brit. & For. St. Papers 1137: ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.’

<sup>25</sup> HC Deb, 7 September 2015, vol 599, col 25.

<sup>26</sup> ‘Who, What, Why: When is it legal to kill your own citizens?’

<<http://www.bbc.com/news/magazine-34184856>> accessed 1 Oct 2015.

Allegations of planning and radicalisation were also used to justify the targeting of Anwar al-Aulaqi, an American radical cleric, killed in a US drone strike in Yemen in 2011. The decision to place al-Awulaqi on the covert 'kill-list' was challenged by his father, on the basis that the US was not at war with Yemen, because 'the government does not have a blank check to kill terrorism suspects wherever they are in the world.'<sup>27</sup> The plaintiff's claim was dismissed because he lacked standing and his claims were non justiciable under the 'political question' doctrine, being matters of national security.<sup>28</sup>

The US relied on an Israeli Supreme Court decision, *Public Committee Against Torture in Israel v Government of Israel*,<sup>29</sup> as authority for the proposition that targeted killings are permissible under international law. That is difficult to reconcile in light of the ICJ jurisprudence, and in view of the wide international condemnation<sup>30</sup> of the Israeli practice and scholarly divergence.<sup>31</sup> Crucially, for both the US and the UK, targeted killings represent a radical departure from the right to due process for terror suspects.

Even if the Government is afforded the very highest benefit of the doubt, at best it can be stated that this is a nascent development in international law. The limited information disclosed by the Government makes it difficult to assess whether the requirements of necessity, proportionality and imminence were satisfied in this instance.

### ***In whose defence?***

The Prime Minister indicated that this strike was justified on the basis that these individuals presented a threat to the UK.<sup>32</sup> That justification is not consistent with the official communication deposited by the Government to the UN Security Council.

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<sup>27</sup> 'Father plans to sue CIA after son put on 'kill' list,'

<<http://www.npr.org/templates/story/story.php?storyId=128971188>> accessed 1 Oct 2015.

<sup>28</sup> *Al-Aulaqi v Barack H Obama and others*, (2010) U.S. Dist. LEXIS 129601 (No-10-1469).

<sup>29</sup> *Public Committee Against Torture in Israel v Government of Israel* (2006) HCJ.769/02

<sup>30</sup> Press Release, Office of the Spokesman for Secretary General Kofi Annan, Secretary-General Urges Israeli Government To Cease Targeted Assassinations, (5 July 2001) U.N. Doc. SG/SM/7878.

<sup>31</sup> Kristen Eichensehr, 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings,' (2007) YLJ 1873, 1881

<sup>32</sup> HC Deb, 7 September 2015, vol 599, col 25.

The letter states that Khan represented a threat to the UK, because he was ‘actively engaged in planning and directing imminent armed attack against the UK,’ but goes on to justify the strike with reference to general threat presented by ISIL to Iraq.<sup>33</sup>

Unsurprisingly, this inconsistency has triggered much criticism among commentators. Kat Craig from Reprieve posits that the assertion of collective self-defence in the interests of Iraq may well have implications regarding Parliamentary consultation:

The Prime Minister’s supposed reasons for carrying out this unprecedented drone attack seem to be changing by the day. Parliament voted strikes in Syria down, the government promised to return to Parliament if it were going to strike again, and yet the PM has just told the United Nations he struck Syria in order to defend Iraq. This is precisely why we need a full explanation of the legal and factual rationale for this attack without further delay.<sup>34</sup>

This inconsistency is of the utmost importance. It is not merely a pedantic point, but rather goes to the very heart of the rule of law: the Government has exercised lethal force against a British citizen without trial, in secret, and without a full presentation of the legal basis for that decision.

### ***Paradigm lost: IHL or IHRL?***

The lack of transparency also presents another difficulty: are these strikes taking place in the context of an armed conflict or law enforcement? That question will determine whether international humanitarian law (IHL) or international human rights law (IHRL) applies.

If the UK considers that it is engaged in a non-international armed conflict with ISIL, it will need to meet the criteria set down in *Prosecutor v Tadic*<sup>35</sup>: that there is

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<sup>33</sup> UNSC, 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 No. S/2015/688.

<sup>34</sup> ‘UN drones letter to UN casts doubt on Prime Minister’s claims to Parliament,’ <<http://www.reprieve.org.uk/press/uk-drones-letter-to-un-casts-doubt-on-prime-ministers-claims-to-parliament/>> accessed 1 Oct 2015.

<sup>35</sup> *The Prosecutor v. Dusko Tadic*, ICTY, Judgment, IT-94-1-T, 7 May 1997, para. 561-568.

protracted armed violence between government authorities and organised armed groups. If such a threshold were met, ISIL fighters *might* be legitimately targeted if they are civilians who have lost their protected status by virtue of direct participation in hostilities. Even so, the International Committee of the Red Cross highlights that loss of civilian status is nuanced in its Interpretative Guidance.<sup>36</sup> An individual civilian can be legitimately attacked during the period in which he is participating in the conflict: his loss of protection is temporally linked to his conduct. For members of an organised group, like ISIL, they can be targeted solely on the basis of membership provided that they have engaged in a continuous combat function.<sup>37</sup>

If, on the other hand, the law enforcement paradigm applies to ISIL as terrorists, then IHRL applies, which will have three significant legal effects. First, the circumstances in which the Government can use lethal force will be significantly narrower than under IHL.<sup>38</sup> Second, the individual target ought to have the benefit of robust due process guarantees.<sup>39</sup> Third, where lethal force is used, the Government is under an obligation to conduct an effective investigation afterwards.<sup>40</sup>

Interestingly, the Prime Minister regards the strike as falling outside an armed conflict, stating that ‘it was a targeted strike to deal with a clear, credible and specific terrorist threats.’<sup>41</sup> Consequently, IHRL would apply to the targeting of Khan and others like him. This requires an even higher standard of scrutiny, given the narrow basis on which lethal force is permissible under the law enforcement paradigm. Yet, the standard of disclosure to date, the inertia regarding any public inquiry and the total lack of an effective investigation suggest that the Government has fallen into the American trap of blurring two distinct paradigms.<sup>42</sup>

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<sup>36</sup> Nils Melzer. *Interpretative Guidance on the Notion of Direct Participation in Hostilities* (ICRC 2009)

<sup>37</sup> *Ibid* at 21-22.

<sup>38</sup> Article 6(1) ICCPR; Article 2 ECHR.

<sup>39</sup> *Ibid*.

<sup>40</sup> *McKerr v UK* (App No 28883/95, judgment of 4 May 2001); *Hugh Jordan and others v UK* (App No 24746/96, judgment of 4 May 2001); *Shanaghan v UK* (App No 37715/97, judgment of 4 May 2001).

<sup>41</sup> HC Deb, 7 September 2015, vol 599, col 26.

<sup>42</sup> Noam Lubell, ‘The Legal Questions About Drone Strikes in Syria,’ (*Just Security*, 10 September 2015) <<https://www.justsecurity.org/25951/legal-questions-uks-targeted-killing-syria/>> accessed 1 Oct 2015.

Blurring these paradigms erodes the rule of law, and gives rise to the very strong perception that target killings amount to extra-judicial executions.<sup>43</sup>

#### **4. Reform: Amend the Justice and Security Act 2013**

In light of the foregoing legal quagmires, this essay submits that there be statutory obligation on the Intelligence and Security Committee (ISC) to conduct a post-strike review where (i) a strike has targeted a British citizen, and (ii) where a strike has resulted in the injury or death of a British citizen. The latter category would cover instances where civilians are affected as collateral damage.

While it has been reported that the newly constituted ISC may conduct an inquiry into the drone policy of its own volition,<sup>44</sup> it is submitted that this is not sufficient from a rule of law perspective.

The existing regime allows for the ISC to conduct an inquiry in the following circumstances:

- Section 2(1) provides that the ISC may examine or oversee the expenditure, administration, policy and administration of the Security Service, the Secret Intelligence Service and GCHQ; and
- Section 2(2) provides that the ISC may examine such other activities of the Government set out in a memorandum of understanding.

However, it should be noted that there is a possibility that the ISC is currently precluded from conducting such an inquiry by section 2(3) of the Act. Section 2(3) provides that the Committee can only consider operational matters provided it is not a part of any ongoing intelligence or security operation and is of significant national interest. Presently, it is not entirely clear if drone strikes have ceased to become

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<sup>43</sup> Gabriella Blum and Philip Heyman, *Laws, Outlaws and Terrorists: Lessons from the War on Terrorism* (2010, MIT Press) 14

<sup>44</sup> 'Cameron announces new Intelligence and Security Committee,' (*Politics Home*, 9 September 2015) <<https://www.politicshome.com/party-politics/articles/story/cameron-announces-new-intelligence-and-security-committee>> accessed 1 Oct 2015.

‘operational’ for the purposes of the 2013 Act. This further reinforces the need for a stand-alone requirement that the ISC conduct post-strike scrutiny; ongoing operations in Syria might preclude the ISC’s discretion to launch such an inquiry, further hampering accountability and transparency.

Such a proposal is not only desirable and useful but *essential*; the rule of law requires that power not be exercised arbitrarily. It cannot be acceptable that the Government can authorise the execution of citizens abroad without any independent oversight, a view that is shared by former DPP, Keir Starmer.<sup>45</sup> Entrusting the ISC with post-strike scrutiny is also practical because it is a security-cleared, security-conscious panel of parliamentarians who already work with highly sensitive information. The infrastructure for sharing, redacting and securing intelligence information already exists, thus saving further cost and delay.

## **5. Conclusion**

The legality of drone strikes is so riddled with serious legal questions that the rule of law mandates a post-strike review in every case where a British citizen is executed without trial. Designating the ISC with this role is not, however, a panacea; it will address one aspect of the accountability vacuum. Nonetheless, the ISC is perhaps the best placed body to undertake this type of work, on an urgent and secure basis, given its unique role and relationship with the intelligence and security agencies.

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<sup>45</sup> Keir Starmer, ‘Drone strikes in Syria must have independent scrutiny and transparency,’ *The Guardian* (8 September 2015).