

United Kingdom, The Government's Policy on the Use of Drones for Targeted Killings

Case prepared by Juliette Praz, Master student at the Graduate Institute of International and Development Studies, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. UK JOINT COMMITTEE ON HUMAN RIGHTS REPORT ON THE GOVERNMENT'S POLICY ON THE USE OF DRONES FOR TARGETED KILLING

[Source: UK Joint Committee on Human Rights, The Government's policy on the use of drones for targeted killing, Second Report of Session 2015-16, 10 May 2016, available at: <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> (footnotes omitted)]

[...]

1. Introduction

Background

1.1 On 21 August 2015 Reyaad Khan, a 21 year old British citizen from Cardiff, was killed by a Hellfire missile fired from an RAF Reaper drone whilst he was travelling in a vehicle in the area of Raqqa in Syria.

The drone was flown, and the missile fired, from a ground control station, or “virtual cockpit”. Khan, who had appeared in a recruitment video for the terrorist organisation ISIL [Islamic State in Iraq and the Levant]/Da’esh in June 2014 and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere, was the target of the strike. Two other people were also killed by the missile: Ruhul Amin, also a UK national, and Abu Ayman al-Belgiki, a Belgian national.

1.2 [...] on 29 August 2013 the House of Commons debated the Government’s motion raising the possibility of airstrikes (subject to a further Commons vote and efforts to secure a UN Security Council Resolution) against President Assad’s forces in Syria after their use of chemical weapons. The motion was defeated [...]. In September 2014, the House of Commons voted in favour of using military force, including airstrikes, against ISIL/Da’esh in neighbouring Iraq, but not in Syria [...]. At the time of the drone strike that killed Reyaad Khan, therefore, the Government had the express authorisation of the House of Commons to use military force against ISIL/Da’esh in Iraq, but airstrikes in Syria were expressly not endorsed without a separate Commons vote.

1.3 On 7 September 2015, [...] the Prime Minister made an oral statement [...] in which he told Parliament about the lethal drone strike in Syria on 21 August and explained the Government’s justification for the action. [...] In short, he said that Reyaad Khan had been killed in an act of self-defence, to protect the British people from a direct threat of terrorist attacks being plotted and directed by Khan. He 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 right here in Britain [...].” The Prime Minister said that the Government had acted because there was no alternative: in the absence of a Government in Syria that it could work with, and no military forces on the ground, direct action was the only way of preventing Khan’s planned attacks on Britain. The Attorney General had advised that there was a clear legal basis in international law, namely the UK’s inherent right to take necessary and proportionate action to defend itself against terrorist attack.

1.4 The Prime Minister explained that the strike was part of the Government’s comprehensive counter-terrorism strategy that seeks to prevent and disrupt plots against the UK at every stage [...]. Although the Prime Minister said there was clear evidence that the planned armed attacks on the UK were part of a series of actual and foiled attempts to attack the UK “and our allies”, he was very clear that the justification for the strike was to defend the British people against the threat of terrorist attack in the UK, rather than part of the armed conflict in Syria [...].

1.5 The Prime Minister acknowledged that this was the first time in modern times that a British military asset had been used in a country in which the UK was not involved in a war, and said that this was “a new departure”. [...]

1.6 On 2 December the House of Commons voted to extend its authorisation of the use of military force against ISIL/Da’esh from Iraq to Syria. Since that date any use of force by the UK against ISIL/Da’esh in Syria has therefore been part of an armed conflict in which the Government has been authorised by the House of Commons to participate.

Our inquiry

1.7 When our Committee was constituted in late October, we considered that the “new departure” in Government policy, to use drones for targeted killing outside of armed conflict, was one of the most significant human rights issues that demanded detailed scrutiny by Parliament. The taking of life in order to protect other lives raises human rights issues of profound importance. The UK had previously used armed drones to deliver lethal strikes, but only in areas such as Iraq and Afghanistan where the UK was already clearly involved in an armed conflict. The policy apparently announced by the Prime Minister on 7 September, of using armed drones to kill suspected terrorists in areas outside of armed conflict, as part of the Government’s counter-terrorism strategy, required careful consideration. [...]

1.8 “Targeted killing” is the phrase which has been used to describe the policy adopted by the US and Israel, involving the intentional, premeditated and deliberate use of lethal force by the State against specific, pre-identified terrorist suspects outside areas of armed conflict. We were aware of the controversy surrounding the use of “targeted killing” as part of a State’s counter-terrorism strategy, and of the common criticism of the US policy in particular that, particularly in its early days, there was insufficient transparency surrounding what was generally a covert programme of targeted killing by drones. We were conscious 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. We also noted that there was considerable uncertainty about exactly what the Government’s policy now was in the light of ambiguous and apparently contradictory Government statements about whether the action taken in Syria had been part of the armed conflict in which the UK was already involved in neighbouring Iraq.

1.9 As well as there being no clarity about precisely what the Government’s policy now is, there was also a lack of clarity about the legal basis of the policy. The Government had invoked the international law of self-defence, but said very little about whether the Law of War or human rights law were also relevant, and, if so, what they required. For reasons we explain in more detail below, we were particularly concerned about the importance of the Government complying, and being seen to comply, with the rule of law, including international law. We were also concerned that the ongoing uncertainty about the Government’s policy and its legal basis might leave front-line intelligence and armed service personnel in considerable doubt about whether what they are being asked to do would expose them to the risk of criminal prosecution for murder or complicity in murder. Ministers also run the same risk in giving those orders. We also thought that there were important questions to be asked about the decision-making process that precedes a lethal drone strike outside an area of armed conflict. What mechanisms exist to ensure that there is independent and effective scrutiny of such actions to ensure that there is accountability for the exercise of such an extraordinary power also required scrutiny.

1.10 We therefore decided to hold an inquiry into “The UK Government’s Policy on the Use of Drones for Targeted Killing”. We announced our inquiry and issued a call for evidence on 29 October 2015. We invited submissions on the following themes in particular:

- i) clarification of the Government’s policy and its legal basis;
- ii) the decision-making process that precedes the Government’s use of drones for targeted killing, including the safeguards to ensure the sufficiency of evidence; and

iii) accountability for actions taken pursuant to the policy (what independent checks exist before and/or after a strike; should there be independent scrutiny and, if so, who should carry it out?).

[...]

The threat posed by ISIL/Da'esh

1.20 We preface our Report by making clear that it is the Government's duty to ensure the safety and security of the people of this country and we endorse the Government's seriousness in discharging that duty. ISIL/Da'esh poses a very serious threat of terrorist attack in the UK and on British citizens abroad. In light of the horrific attacks in Paris in November 2015, and many other murderous attacks throughout the world, including the attack on tourists on the beaches of Tunisia which killed 30 British citizens, the UN Security Council has rightly determined that the threat posed by this organisation represents a threat to international peace, which has been confirmed by the attacks in Brussels and Ankara in March 2016.

1.21 Indeed, as Parliament's human rights committee we point out that, in the face of such a serious threat of terrorist attack, human rights law itself imposes a number of important duties on the State to take effective preventive action to ensure people's safety and security. As the Committee of Ministers 2002 Guidelines on Human Rights and the Fight Against Terrorism make clear, "States are under an obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts." The universally recognised and protected right to life, for example, requires the State to take action to protect life against clear risks such as terrorist attacks. [...]

[...]

1.23 It is important that the debate about this difficult issue is not framed as a clash between national security on the one hand and human rights on the other. It is about how best to reconcile both duties to protect the human right to life.

The implications of drone technology

1.24 We also wish to preface our Report by making clear that we have become well aware during our inquiry of the capability offered by drone technology in countering terrorism and other threats to national security. It is clear that, in addition to their contribution to surveillance capability, compared to conventional weapons platforms including fast jets, drones have the potential to enhance compliance with the Law of War in armed conflicts. The better quality surveillance and the greater precision in targeting, for example, make it easier to avoid civilian casualties. We also found persuasive the suggestion that the calmer conditions in the virtual cockpit of a drone, together with the superior access to intelligence and other information, and crews' enhanced concentration because of the ability to rotate personnel on shorter shifts than is possible in flight, all have the potential at least to make for better quality operational decision-making at the critical moment of whether or not to use lethal force.

The context : a new situation

1.25 The context in which we have conducted our inquiry is important. In the course of our inquiry it has become clear to us that two developments have combined to bring about a new situation for which our long established legal frameworks were not designed.

1.26 The first development is rapid technological advance which has transformed both the nature of the threat we face from terrorism and our capacity to counter it. Instantaneous global communication over the internet means that terrorist attacks can be launched remotely, from the other side of the world, and without warning. At the same time, rapidly developing drone technology means that some States have the capacity to defend themselves against terrorism by remotely gathering detailed visual intelligence and using lethal force with some precision against targets on the other side of the world. The increasing availability of drone technology means it is only a matter of time before this ability to deliver lethal force remotely is also at the disposal of terrorist organisations.

1.27 The second development which poses challenges for our legal frameworks is the changing nature of armed conflict, with the steady rise of non-state armed groups with the intent and capability to carry out terrorist attacks globally. The recent rapid rise of ISIL/Da'esh poses particular challenges: the UK is now threatened with attack by an armed terrorist organisation which claims to be a "State", occupies territory and has demonstrated that it has not only the intention but the ability to attack in many places across the world, including UK nationals overseas. Moreover, unlike other terrorist organisations which have threatened in the past, ISIL/Da'esh has global aspirations which are without territorial limit. We agree with the UN Security Council that this makes the nature of the terrorist threat from ISIL/Da'esh "unprecedented".

1.28 These two developments have led to a blurring of the lines between war in the traditional sense on the one hand, and countering the crime of terrorism on the other. Countering a threat from transnational terrorists abroad is quite different from the domestic enforcement of criminal law which has been the traditional way of countering terrorism. This blurring of the lines raises a number of questions about how the relevant legal frameworks are to be interpreted in this new set of circumstances. Does the Law of War alone govern the lawfulness of action taken to counter terrorism in such circumstances, or does human rights law apply? Do they overlap, and, if so, which takes precedence? Are there circumstances in which only one or other applies? When they apply, what are their requirements? Do we need a new legal framework to deal with this new situation, or just guidance about how existing legal frameworks apply? How flexible do the existing legal frameworks need to be to cope with these new challenges, and are they flexible enough? These are the sorts of questions with which we have grappled in our inquiry.

[...]

Why it matters

1.30 We are very conscious that, at a time when the world faces such a serious threat of attack from ISIL/Da'esh, some may question why we consider it to be such a priority to inquire into a particular aspect of the Government's response to that threat. We decided to inquire into this controversial subject for two main reasons: first, because of the importance we attach, as a human rights committee, to compliance with the

rule of law, including international law; and second, because of the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution.

[...]

3. Legal Basis

Introduction

3.1 The second main objective of our inquiry has been to clarify the legal basis of the Government's policy on the use of lethal force abroad outside of armed conflict for counterterrorism purposes. The legal basis of the Government's policy matters for a variety of reasons. The rule of law requires the Government to act lawfully when countering terrorism, including in accordance with the UK's international legal obligations. Moreover, the legal basis of the policy determines the legal standards that apply. The circumstances in which the Government will be prepared to use lethal force abroad outside armed conflict, pursuant to its policy, will therefore depend on the Government's view of its legal basis. If the Government proceeds on a misunderstanding about any aspect of the legal basis of its policy, it runs the risk of using lethal force in circumstances which cannot be legally justified, thereby exposing ministers and other personnel involved in such action to the risk of criminal prosecution.

3.2 In this chapter we examine the Government's apparent understanding of the legal position in light of the most relevant aspects of the various international legal frameworks that apply and the relationship between them. We consider first the international law on the use of force, which governs whether a State is entitled to resort to force at all on the territory of another State, and in particular the right of self-defence against threatened armed attacks by terrorist organisations. We then go on to consider the other relevant international legal frameworks which govern not whether but how force may be used: the Law of War and human rights law. We consider, first, when the Law of War applies and what it requires when it does apply; and, second, when human rights law applies and what it requires if it is applicable. [...]

[...]

The Government's understanding of the legal position

3.4 In our letter of 4 November to the Government at the start of our inquiry, we asked for a comprehensive description of the legal framework which the Government considers to be relevant to its policy, including international law, and an explanation of the circumstances in which it is lawful to use drones for targeted killing. We also asked for the Government's memorandum to address a number of much more detailed questions about their view of the relevant international law frameworks that govern the use of lethal force abroad, including the following four important questions:

- the Government's understanding of the meaning of the requirement in the international law on self-defence that an attack on the UK must be "imminent"

- whether the Government considers the UK to be involved in a non-international armed conflict with ISIL/Da'esh
- whether the Law of War applies to UK drone strikes in Syria
- whether international human rights law applies to UK drone strikes in Syria and, if so, what it requires.

[...]

3.6 While the Government's Memorandum contains some helpful analysis of some of the legal issues, we regret to say that, despite repeated requests, we never received a detailed memorandum from the Government setting out its understanding of the relevant international legal frameworks (such as whether human rights law applies) or its answers to some of our more specific questions about important aspects of those frameworks. [...]

[...]

3.9 In the absence of a detailed Government memorandum on the relevant legal frameworks, we have pieced together what we believe to be the Government's understanding of those frameworks from a variety of sources. The Government's understanding of the legal position is to be found primarily in the Prime Minister's statement to the House of Commons on 7 September; the evidence of the Attorney General to the Justice Committee on 15 September; the Government's brief Memorandum responding to our letter at the beginning of our inquiry; and the oral evidence of the Defence Secretary on 16 December.

3.10 The Prime Minister first set out the legal basis for the drone strike on Reyaad Khan in Syria in his statement to the House of Commons on 7 September. He said:

"I am clear that the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law. We were exercising the UK's inherent right to self-defence. [...] The United Nations charter requires members to inform the President of the Security Council of activity conducted in self-defence, and today the UK permanent representative will write to the President to do just that."

3.11 As we pointed out above, when the UK Permanent Representative wrote to the President of the Security Council later the same day, as well as the individual self-defence of the UK referred to by the Prime Minister, he invoked the right of collective self-defence of Iraq, notwithstanding that the Prime Minister had expressly disavowed that as the legal basis in his statement to the Commons. [...]

3.12 The Prime Minister's summary of the Government's legal position has been supplemented somewhat by

subsequent statements by ministers. The Attorney General himself went a little bit further than the Prime Minister when giving evidence to the Justice Committee on 15 September. He declined an invitation to disclose the legal test he had applied when advising that there was a clear legal basis for the drone strike [...]. However, he went on to say: “[...] in order for any state to act in lawful self-defence, it is necessary to demonstrate that there is an imminent threat that needs to be countered and that, in countering that threat, the action taken is both necessary and proportionate, and it is necessary to demonstrate that what you do complies with international and humanitarian law. In all of those respects I was satisfied that this was a lawful action.”

3.13 This went further than the Prime Minister’s statement by indicating that, in addition to satisfying the tests for lawful self-defence, the action also had to be compatible with the Law of War.

3.14 The Government’s Memorandum to our inquiry gives a little bit more detail in its explanation of the legal basis for the Government’s military action against ISIL/Da’esh in Syria. Invoking the inherent right of individual and collective self-defence, as recognised by Article 51 of the UN Charter, the Memorandum explains why, in the Government’s view, the requirement of an “armed attack” is satisfied:

“Individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an “armed attack” for these purposes if they are of sufficient gravity. This is demonstrated by UN Security Council resolutions 1368 (2001) and 1373(2001) following the attacks on New York and Washington of 11 September 2001. Whether the gravity of an attack is sufficient to give rise to the exercise of the inherent right of self-defence must be determined by reference to all of the facts in any given case. The scale and effects of ISIL’s campaign are judged to reach the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51.”

3.15 The Memorandum also explains that, in keeping with the long-held position of successive UK Governments, force may be used in self-defence not only where an armed attack is underway, but also where such an attack is imminent, and where the UK determines that it faces an imminent armed attack from ISIL, it is therefore entitled to use necessary and proportionate force to repel or prevent the attack. It explains why the legal test of an imminent armed attack was satisfied in the particular case of Reyaad Khan:

“There was clear evidence of Khan’s involvement in planning and directing a series of attacks against the UK and our allies, including a number which were foiled. That evidence showed that the threat was genuine, demonstrating both his intent and his capability of delivering the attacks. The threat of attack was current; and an attack could have become a reality at any moment and without warning. In the prevailing circumstances in Syria, this airstrike was the only feasible means of effectively disrupting the attacks planned and directed by this individual. There was no realistic prospect that Khan would travel outside Syria so that other means of disruption could be attempted. The legal test of an imminent armed attack was therefore satisfied.”

3.16 Finally, the Memorandum, like the Attorney General, goes beyond invoking the right of self-defence, and states that in addition “[t]he UK always adheres to International Humanitarian Law [i.e., the Law of War] when applying military force, including upholding the principles of military necessity, distinction, humanity and

proportionality.”

3.17 The Secretary of State for Defence, in his oral evidence to us, also elaborated a little on the law which the Government considers to apply to the action it takes in self-defence. He said “the military force we use is governed by humanitarian law [i.e., the Law of War].” He made no distinction in this respect between military force used in an area of armed conflict, and force used outside of armed conflict. In the Secretary of State’s view, all uses of military force are governed by the Law of War, and the applicable legal standards are therefore those of the Law of War. When we asked him directly about whether the human rights law standard applies, he said that if any human rights law obligations are thought to apply, they are discharged by the UK’s compliance with the Law of War:

The Chair: “The human rights law standard says that lethal force outside an armed conflict situation is justified only if it is absolutely necessary to protect life. Is that the standard?”

Michael Fallon MP: “I think that compliance with international humanitarian law discharges any obligation that we have under international human rights law, if I can put it that way. If any of those obligations might be thought to apply, they are discharged by our general conformity with international humanitarian law.”

[...]

3.19 The legal basis of the Government’s policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government’s view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law.

3.20 We now turn to consider whether this is a sound legal basis on which to rest the Government’s policy of using lethal force abroad outside of armed conflict for counterterrorism purposes, or whether there are aspects of the Government’s legal understanding which require clarification.

The right of self-defence in international law

3.21 As the Government rightly observes, any use of lethal force abroad outside of armed conflict must, first, be lawful under the international law on the use of force which governs whether a State is entitled to resort to force at all. The Government invokes the inherent right to self-defence against a threat of imminent armed attack.

[...]

3.24 We accept the Government’s argument that there is a right of self-defence against armed attack by non-State actors such as ISIL/Da’esh, and that anticipatory self-defence is also permitted. We have examined carefully two particular aspects of the Government’s individual self-defence argument: first, the assertion that the scale and effects of ISIL’s campaign reach the level of an “armed attack” and, second, the assertion that

the armed attack the UK faces is “imminent” in the sense required by the right of self-defence.

The meaning of “armed attack”

[...].

The meaning of “imminence”

[...]

3.37 We welcome the implicit indication in the Government’s Memorandum that for the test of imminence to be satisfied the threat must be “genuine” in the sense that there was both an intention to attack and the capability to do so; and that the attack could happen at any moment and without warning. We also note the Government’s recent answer to a written question asking the Secretary of State for Defence “what working definition of imminence his Department uses in the application of Article 51 of the UN Charter?”

“It has long been the position of successive UK Governments that “the inherent right of self-defence”, as recognised in Article 51 of the UN Charter, does not require a State to wait until an armed attack is actually under way before it can lawfully use force to alleviate the threat. A State may use force in anticipation of an armed attack where such an attack is imminent, provided that such force is both necessary and proportionate to averting the threat. The assessments would depend on the facts of each case, with consideration likely to include issues such as the nature and immediacy of the threat, the probability of an attack, its scale and effects and whether it can be prevented without force.”

[...]

3.39 We nevertheless have some concerns about the implications of too expansive a definition of “imminence” for the width of the right of self-defence in international law. Introducing flexibility into the meaning of imminence raises important questions about the degree of proximity that is required between preparatory acts and threatened attacks. Is it enough to trigger the right of self-defence, for example, if there is evidence that 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 as being involved in planning or directing attacks in the UK, does the wider meaning of imminence mean that an ongoing threat from that individual is, in effect, permanently imminent? These questions arise directly in relation to the UK drone strike in Syria on 21 August, as it appears that the authorisation of the use of force may have been given by the National Security Council in May 2015, up to three months before the actual use of lethal force. [...]

[...]

3.42 Subject to the two questions we have raised above about the Government’s understanding of the meaning of “armed attack” and “imminence”, we accept the Government’s understanding of the international law of self-defence which forms the first part of the legal basis for its policy of using lethal force abroad outside of armed conflict.

Other relevant international law frameworks

3.43 However, compliance with international law on the use of force does not exhaust all the questions which must be asked about the legal basis of a use of lethal force abroad. The fact that a use of lethal force is lawful under the international law on the use of force, for example because it was taken in self-defence, does not mean that the use of force is necessarily lawful under the other relevant international legal frameworks: the Law of War (otherwise known as the law of armed conflict or international humanitarian law) and international human rights law, which govern not whether but how force may be used. Any use of force in lawful exercise of the right of self-defence must also comply with those other legal frameworks where they apply. Human rights law requires standards to be met which are more protective of the right to life than those required by the Law of War. Which legal framework applies to a particular use of lethal force, and precisely what they require, are therefore of crucial importance. The applicability and requirements of those legal frameworks must also therefore be addressed, separately and in turn.

The Law of War

3.44 In the case of force used in armed conflict, the most relevant legal framework is the Law of War. The Law of War is the set of international law rules that governs the way in which armed conflict is conducted, premised on the idea that even in war some things are not permitted because military necessity must be tempered by basic principles of humanity.

When does the Law of War apply?

3.45 The Law of War applies where there is an armed conflict. Whether an armed conflict exists, for the purposes of deciding whether the Law of War applies, is not a matter for a State to decide for itself, by mere assertion; it is a legal question, governed by the international Law of War. Armed conflicts are of two types. An international armed conflict is the traditional type of armed conflict, between two or more States. A non-international armed conflict is an armed conflict between a State and an “organised non-State armed group” or several such groups. A non-international armed conflict can take place across State boundaries: the conflict is “non-international” because one of the parties is a non-State actor, even though the territorial scope of the conflict may cross State boundaries.

3.46 A non-international armed conflict exists if armed violence reaches a certain level of intensity and is with an armed group that is sufficiently organised to meet the international law criteria. Although ISIL/Da’esh claims to be a State, it is not recognised as such in international law. It is an organised non-State armed group, involved in protracted armed violence with governmental authorities in Iraq and Syria. It seems clear to us that, as a matter of international law, the UK is therefore involved in a non-international armed conflict with ISIL/Da’esh in Iraq and Syria, and that the Law of War applies to that armed conflict.

What does the Law of War require?

3.47 Where the Law of War applies, it permits targeted killing in an armed conflict, provided certain principles

are complied with. The principle of distinction requires targeting to distinguish between lawful military targets and civilians. A person is a lawful target in a non-international armed conflict if he or she is a member of an armed group or a civilian directly participating in hostilities. The principle of proportionality requires civilian casualties to be proportionate to the military advantage to be gained from the use of force. The principle of precaution requires care to be taken to minimise the danger to civilians in any use of force.

3.48 International human rights law also applies in armed conflict. However, the substantive protections of human rights law, including for the right to life, are to be read in light of the more specific requirements of the Law of War. Compliance with the lower standards of the Law of War will therefore usually be sufficient to satisfy the requirements of human rights law in armed conflict.

3.49 As will be seen when we consider the requirements of human rights law below, the relevant legal standards on the use of lethal force are therefore more permissive where the Law of War applies than where only international human rights law applies: the Law of War does not prohibit deliberate “targeted killing” in armed conflict provided certain principles are observed.

The US and UK positions on the applicability of the Law of War

3.50 The United States has caused controversy in the years since 9/11 by arguing that it is involved in a single, global non-international armed conflict with Al Qaida, so that the permissive rules of the Law of War, rather than the stricter rules of human rights law, apply to the use of lethal force against members of Al Qaida wherever in the world they may be found. The International Committee of the Red Cross has criticised this view that the international fight against terrorism is a single, global non-international armed conflict, but the US has continued to take this position and to use it to justify lethal drone strikes against suspected terrorists in a variety of countries which are not in an area of armed conflict, such as Yemen, Somalia and Pakistan.

3.51 The US position has been widely criticised on the ground that it risks turning the world into a global battlefield in which the lower protection of the Law of War is the norm rather than the exception. Some of the broader statements by ministers since the drone strike in Syria on 21 August suggested that the UK Government may have adopted the same position, and considers itself to be involved in a global armed conflict with ISIL/ Da’esh wherever it may be found.

3.52 Our inquiry has importantly established, however, that the UK Government does not take the US position that it is in a global war against ISIL/Da’esh such that it can use lethal force against them anywhere in the world. We asked the Secretary of State for Defence about this directly and he made absolutely clear in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da’esh wherever it may be found: rather than such a generalised state of conflict, with no geographical limits, the Government considers itself to be involved in a geographically defined non-international armed conflict with ISIL/Da’esh in Iraq and Syria : [...].

[...]

3.54 However, the Secretary of State went on to assert that where the UK uses lethal force abroad outside of armed conflict, pursuant to the policy we described in Chapter 2 above, it will comply with the Law of War

and that compliance will be sufficient to meet any obligations that the UK may have under human rights law. The effect of that assertion is that the UK Government's policy ends up in the same place as the US policy, despite disavowing the wide American view of the existence of a non-international armed conflict.

3.55 In our view, the Secretary of State's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misunderstanding of the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of humanitarian law. Outside of armed conflict, however, the conventional view, up to now, has been that the Law of War, by definition, does not apply. [...]

The European Convention on Human Rights ("ECHR")

3.56 International human rights law recognises and protects the right to life. This includes customary international law's rule against the arbitrary deprivation of life; the right to life under Article 6 of the International Covenant on Civil and Political Rights; and the right to life under Article 2 ECHR. The right to life is often referred to as the most fundamental human right, or the supreme right. [...] Of the international human rights standards, we focus in this Report on the right to life in Article 2 ECHR, which is part of UK law by virtue of the Human Rights Act, and from this point on we therefore refer to "the ECHR" rather than "human rights law" more generally.

3.57 Article 2 ECHR provides, so far as relevant:

"2(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than is absolutely necessary:

(a) in defence of any person from unlawful violence".

When does the ECHR apply?

3.58 The applicability of the right to life in Article 2 ECHR depends on the victim being "within the jurisdiction" of the UK. Jurisdiction under the ECHR is primarily territorial, but the ECHR also has extraterritorial application in certain circumstances, including the exercise of power and control over the person in question. On the current state of the case-law, the use of lethal force abroad by a drone strike is sufficient to bring the victim within the jurisdiction of the UK: in the recent case of *Al Saadoon v Secretary of State for Defence*, the High Court held that "whenever and wherever a state which is a contracting party to the [ECHR] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights." The judge found it difficult to imagine a clearer example of physical control over an individual than when the

State uses lethal force against them:

“I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. [...] jurisdiction arose through the exercise of physical power and control over the individual who was shot and killed.”

3.59 The right to life in the ECHR therefore clearly applies to the use of lethal force abroad outside of armed conflict. The same applies to the right to life in the ICCPR.

3.60 The ECHR permits States to take measures “derogating” from their obligations under the Convention “in time of war or public emergency threatening the life of the nation.” The effect of such a derogation is to make the relevant right not apply. One of the concerns often articulated about the Human Rights Act and the ECHR is that the European Court of Human Rights has, by interpretation, extended the scope of the Convention to the battlefield, which hinders the armed forces in the performance of their task. [...]

3.61 We therefore asked the Defence Secretary if the Government has any plans to derogate from the right to life in Article 2 ECHR. Although the Defence Secretary told us that the Government had no present plans that he was aware of, he was subsequently reported in the press as considering a derogation from the ECHR in relation to the actions of the UK’s armed forces on the battlefield. According to the press report, the Secretary of State considers that the ECHR is not needed in the field of military conflict overseas, because it merely duplicates the Law of War which already protects the human rights of combatants. Any future derogation is likely to be brought forward as part of the package of proposals in relation the Human Rights Act and a British Bill of Rights, which is now not likely to be before the EU referendum in June.

3.62 We note that any future derogation from the ECHR will not affect the Government’s policy in relation to the use of lethal force abroad outside of armed conflict. Derogation from the right to life in Article 2 ECHR is only possible in relation to “deaths resulting from lawful acts of war”. States can therefore choose to be bound by the more permissive rules of the Law of War, rather than the more restrictive rules of human rights law, in times of war or public emergency. However, the Government will not be able to derogate from the right to life in Article 2 where it uses lethal force abroad outside of armed conflict: such deaths will not be the result of “acts of war” because by definition they will have taken place outside armed conflict. The right to life in Article 2 ECHR therefore inescapably applies to uses of lethal force abroad outside of armed conflict.

What does the ECHR require?

3.63 What are the implications of the right to life in the ECHR applying to uses of lethal force abroad outside of armed conflict? Article 2 of the ECHR prohibits the taking of life by the use of force where this is not justified by any of the exceptions expressly permitted by its text. One of the exceptions is where the deprivation of life results from the use of force which is “no more than is absolutely necessary in defence of any person from unlawful violence”.

3.64 According to the case-law of the European Court, where the right to life in the ECHR applies, it requires (1) the use of lethal force must be “no more than absolutely necessary” to avert an immediate threat of

unlawful violence to other people and be strictly proportionate to that aim; (2) the use of lethal force by the state must be effectively regulated by a clear legal framework and the planning and control of any particular operation must be such as to minimise the risk of loss of life; and (3) there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life. The effect of the right to life in Article 2 ECHR applying, therefore, is that the applicable standards which govern the use of lethal force are in certain respects higher than those imposed by the Law of War.

3.65 The main difference as far as the relevant standards for the use of lethal force are concerned is that under the Law of War there is no “imminence” requirement, provided the use of force is necessary to advance the military objective. [...]

3.66 In Syria, for example, where we accept that the UK is involved in an armed conflict with ISIL/Da’esh, the question of the imminence of an armed attack by ISIL/Da’esh fighters does not arise so long as that armed conflict subsists, so they can be targeted without having to demonstrate that they pose a direct and imminent threat to the UK.

3.67 In Libya, however, which is outside armed conflict, the higher standards of the ECHR alone would apply and require there to be an immediate threat of unlawful violence to other people which makes it “absolutely necessary” to act to prevent it. In other words, outside of war the right of self-defence can only be exercised if there is an imminent threat of unlawful violence. Even if an individual has been previously identified as somebody suspected of planning terrorist attacks, the critical time for consideration of the imminence question is before the decision is taken to use lethal force against that individual. That assessment will depend very much on the facts, but it is important that the mind of the relevant decision-maker is directed to the question of imminence at the relevant point in time.

3.68 The Government must acknowledge that where the Government takes a life where we are not in armed conflict, the higher standards laid down in the Human Rights Act and the ECHR have to be met. It is only where the taking of life is in an armed conflict, that the lower standards of the Law of War apply.

3.69 The fact that the ECHR, and not the Law of War, applies to the use of lethal force outside of armed conflict does not, however, make it impossible to use force in such circumstances, and therefore shackle the Government’s ability to protect the UK from terrorism, as is commonly supposed, for two main reasons.

ECHR may require the use of lethal force to protect life

3.70 First, in the Government’s hypothetical example of the circumstances in which it might use lethal force abroad outside armed conflict (that is, as a last resort, where the Government has intelligence that there is a direct and imminent threat to the UK and there is no other way of preventing that threat), the ECHR would not only permit but positively require the use of lethal force by the Government if it were in a position to do so. This is because Article 2 of the ECHR imposes a positive obligation on the State to protect life, including by taking effective preventive measures against a real and immediate risk to life from a terrorist attack.

[...]

3.72 It follows that if the UK had clear and reliable intelligence that a terrorist attack was about to be launched on the UK or UK citizens from an ISIL/Da'esh training camp in Libya, so that there was a real and immediate risk to life, and the only way of preventing that attack and therefore saving those lives was to use lethal force against the would-be attackers in Libya, the Government would be under a positive obligation to use lethal force to protect life if it was in a position to do so.

Flexibility inherent in concepts of necessity and proportionality

3.73 The second reason why the applicability of the ECHR does not mean that the Government's ability to protect the UK from terrorism is undermined is that, even in less extreme circumstances than the hypothetical case just described, it is clear from the European Court's case-law that it will take a realistic approach to applying the concepts of necessity and proportionality in difficult counter-terrorism situations in which States have to make heat of the moment decisions about how to prevent a terrorist threat to life. [...]

[...]

3.77 In the light of this case-law, we do not consider that the applicability of the ECHR, rather than the Law of War, to any use of lethal force against ISIL/Da'esh outside armed conflict would necessarily hamper the Government's ability to protect lives from the threat of terrorism, provided there was a real and immediate threat to life by ISIL/Da'esh fighters and the use of force was proportionate to the threat to life posed by those fighters. Any assessment of the necessity and proportionality of the use of force will have to take account of the unprecedented nature and seriousness of the threat posed by ISIL/Da'esh.

3.78 While it is clear that the ECHR applies to any use of lethal force abroad for counterterrorism purposes outside of armed conflict, and that the Article 2 thresholds of necessity and proportionality would have to be met, exactly how the right to life in Article 2 ECHR will be interpreted, and precisely what it will be held to require in light of the unprecedented nature of the threat from ISIL/Da'esh is therefore open to interpretation.

[...]

Conclusion

3.90 In our view, the Government's assertion that the Law of War applies to a use of lethal force outside of armed conflict demonstrates the necessity of the Government clarifying, in its response to our Report, its understanding of the legal position. [...] We call on ministers to avoid conflating the Law of War and the ECHR and to remove the scope for such legal confusion by setting out the Government's understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves.

[...]

3.92 We therefore recommend that the Government provides clarification of its position on the following legal questions:

- its understanding of the meaning of the requirements of “armed attack” and “imminence” in the international law of self-defence;
- the grounds on which the Government considers the Law of War to apply to a use of lethal force outside armed conflict;
- its view as to whether Article 2 ECHR applies to a use of lethal force outside armed conflict, and if not why not;
- its understanding of the meaning of the requirements in Article 2 ECHR that the use of force be no more than absolutely necessary, and that there is a real and immediate threat of unlawful violence, in the context of the threat posed by ISIL/Da’esh; [...]

Discussion

I. Classification of the Conflict and Applicable Law:

1. (Paras 3.45-3.46)

a. How would you qualify the situation between the UK and the armed group ISIL in Iraq and Syria? Is it an armed conflict? An international or non-international armed conflict? What are the two criteria that need to be satisfied in order to determine the existence of a NIAC? Are they satisfied in this context? (GC I-IV, Arts. 2 and 3)

b. What IHL rules regulate the conflict between the UK and ISIL? Considering that ISIL “occupies territory” (see *para.* 1.27)? Can armed groups be said to “occupy” territory”? Does the term occupation in NIACs have the same meaning as in international armed conflicts? Does Additional Protocol II apply? Is the UK bound by it? (GC I-IV, Art. 3; P II, Art. 1; HR, Art. 42)

2. (Para. 3.19) Do you agree with the UK Government’s position that “the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State and (2) the Law of War”? Does IHL apply to counter-terrorism operations outside of armed conflict? What other legal regimes regulate the use of lethal force?

3. (Paras 1.1-1.6, 3.50-3.52)

a. At the time of the drone strike that killed Reyaad Khan, the UK was not involved in any military operations

in Syria. Do you think that a drone strike suffices to trigger a NIAC? Alternatively, could the drone strike against Reyaad Khan be considered as having taken place in the context of a global armed conflict against ISIL? Or was it part of the UK's NIAC against ISIL in Iraq? Can NIACs spill-over onto the territory of neighbouring States? If yes, how far? What is the geographical scope of IHL in a non-international armed conflict? Can IHL apply to drone strikes that occur outside the State where the conflict is taking place? What is the position of the UK government? What is the position of the Joint Committee? If the UK uses armed drones to target ISIL fighters in Lybia, does IHL apply? If IHL applies worldwide to hostilities between a State and an armed group as soon as the requirements for the intensity of a NIAC are fulfilled on the territory of one State, is that the same as recognising the existence of a "global armed conflict"? How could it be different? (GC I-IV, Art. 3; ICTY, *The Prosecutor v. Tadić*, para. 70; ICRC, *International humanitarian law and the challenges of contemporary armed conflicts* in 2011)

b. Could a drone strike trigger an international armed conflict? Even if the strike targets members of non-state armed groups, and not the armed forces of the State itself? Following the drone strike that killed Reyaad Khan, could one argue that the UK in an international armed conflict with Syria, triggered by the strike?

4. (*Para. 1.4*) According to the UK Prime Minister, the drone strike against Reyaad Khan was not part of an armed conflict. Does a State's qualification of a situation determine whether or not IHL applies?

II. Conduct of Hostilities

5. (*Document A, paras 1.1-1.4, 1.8, 3.47-3.49*)

a. Who can be targeted in a NIAC? Do you agree with the Report of the Joint Committee of Human Rights (JCHR Report) that "a person is a lawful target in a non-international armed conflict if he or she is a member of an armed group or a civilian directly participating in hostilities"? (see *para. 3.47*) Is any member of an armed group a lawful target under IHL? What about Reyaad Khan? According to the Government, Khan had been "involved in actively recruiting ISIL sympathisers and seeking to orchestrate specific and barbaric attacks against the west, including a number of planned terrorist attacks right here in Britain" (see *para 1.3*). Does recruiting personnel amount to direct participation in hostilities? What about planning attacks? (P I, Art. 51; P II, Art. 13; CIHL, Rules 1, 3, 5 and 6; ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities*)

b. What are targeted killings? May they occur in armed conflicts? According to the JCHR Report? Are targeted killings prohibited under IHL? In what circumstances may they be undertaken? Does the killing of Reyaad Khan by a drone strike qualify as a targeted killing?

c. Reyaad Khan was killed by a missile fired from a ground control station, or "virtual cockpit". Is such a ground control station a military objective? Even if it is located far away from where the hostilities are taking place? What if the ground control station is located in a State not party to the armed conflict? (P I, Arts 48 and 52(2); CIHL, Rules 7 and 8)

d. In addition to the principle of distinction, what other IHL principles must the UK observe before undertaking a drone strike? Did it respect these principles when targeting Reyaad Khan? According to the JCHR Report, two other persons were killed by the missile – does that imply that the UK violated the principle of proportionality? What if these two individuals were ISIL fighters with continuous combat functions? Or civilians? Do we look at the actual effects of the attack to determine whether the principle has been violated? (P I, Art. 51(5)(b) and Art. 57; CIHL, Rule 14 and 15)

6. (*Document A, paras 1.20, 1.27*) According to the JCHR Report, ISIL has committed several terrorist attacks in the world and poses a "serious threat of terrorist attack in the UK and on British citizens abroad".

Are terrorist attacks covered by IHL? Wherever they occur around the world? Do the general rules on the conduct of hostilities apply? Does IHL specially regulate terrorism? How? (GC IV, Art. 33; P I Art. 51(2); P II, Arts 13(2) and 4(2)(d); CIHL, Rule 2)

7. (Document A, para. 1.24) What are armed drones? How are they regulated by IHL? Do you agree with the JCHR Report that “drones have the potential to enhance compliance with the Law of War in armed conflicts”? How? Does it matter for IHL if the availability of armed drones encourages States to resort to the use of force abroad?

III. The Right to Life under International Human Rights Law

8. (Paras 3.48, 3.60) Does IHRL continue to apply in armed conflict? If yes, does the application of IHRL affect military operations? What human rights may a State have to respect when using drones?

9. (Paras 3.56-3.57) How is the right to life protected under IHRL? Are the protections the same under customary international law, Article 6 of the ICCPR and Article 2 of the ECHR?

10. (Paras 1.20-1.21, 3.70-3.72)

a. When is the use of lethal force lawful under IHRL? Does the threat of death posed by terrorism authorise States to use lethal force? Did Khan represent such a threat?

b. What principles must a State respect before using lethal force under IHRL? Are these the same as the principles of distinction, proportionality and precaution under IHL? Are the IHRL principles more flexible in cases of counter-terrorism? Did the UK respect these standards in its operation against Reyaad Khan? Were the incidental deaths of Abu Ayman al-Belgiki and Ruhul Amin lawful under IHRL?

c. According to the UK Prime Minister, “the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed” and “it was therefore necessary and proportionate for the individual self-defence of the United Kingdom”? (see Document A, para. 3.10). Is he referring to the right to life requirements on the use of lethal force? Do you think the use of lethal force by means of armed drones can ever comply with the right to life under IHRL?

11. (Paras 3.58-3.59) Does IHRL apply extraterritorially? In what situations? Does the right to life apply to extraterritorial targeted killings by armed drones? Under the ECHR according to the JCHR? Was Reyaad Khan within the jurisdiction of the United Kingdom? If yes, does that mean that the entire ECHR applies or only the right to life? Only the obligation to *respect* the right to life or equally the obligation to *protect* the right to life?

IV. The Relationship between IHRL and IHL

12. (Paras 3.17, 3.54, 3.66, 3.68)

a. Is there a conflict between the right to life under IHRL and the IHL rules on targeting? Does IHL give a right to kill? How should this conflict be solved? Can the right to life be interpreted in light of IHL? Do you agree with the UK Secretary of State that “if any human rights law obligations are thought to apply, they are discharged by the UK’s compliance with the Law of War”? Is that because IHL is the *lex specialis*? What does this term mean?

b. Can you give an example of a deliberate killing in an armed conflict which would not violate IHL but which would violate IHRL?

c. Is it possible to interpret the right to life in light of IHL? Under the ECHR, according to the JCHR Committee?

13. (Paras 3.60-3.62) With regards to the ECHR, is it possible to interpret article 2 in light of IHL without

making a derogation for “deaths resulting from lawful acts of war” under article 15? Will the UK need to make a derogation under the ECHR for future targeted killings by armed drones?

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