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UK drone attack in Syria: legal questions

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Summary

In August 2015 a targeted UK drone attack killed three ISIS fighters in Syria, two of whom were British.

The UK Government's legal advice apparently said the attack was permitted under international law because the UK was [defending itself – and Iraq – against an armed attack](#). International law on resorting to armed force allows states to use force in other states in self-defence against a current or imminent armed attack, as long as the force to be used is necessary and proportionate to the threat faced. The Government has mentioned some specific recent threats against the UK but has disclosed little evidence of imminent attacks by those targeted. The context is the UK's political commitment to seeking the consent of the House of Commons before carrying out air strikes in Syria, except in an emergency. Critics have described the August strike as '[targeted killing](#)' or '[summary execution](#)', and questioned the need for urgency.

But even in situations where states can lawfully resort to force, two other bodies of international law can apply: the laws of war (International Humanitarian Law, IHL) and human rights law. For example, IHL sets out rules on when people may be directly targeted with intentional lethal force; and human rights law prohibits arbitrary killing except in closely-defined circumstances.

The drone attack in Syria raises many legal questions, including:

- Was the drone attack an act of (individual or collective) self-defence?
- Was it in response to an actual or imminent armed attack?
- Was the response necessary and proportionate?
- Was Syria unable and unwilling to prevent the threat – and is that relevant?
- Do the laws of war apply to any act of self-defence?
- What do those laws say about targeted killing and assassination?
- Does human rights law apply, even to UK actions in Syria?

The implications of the targeted killing are potentially huge, when a large number of people are allegedly planning attacks against the UK, and other countries or organisations might in future use drone attacks and see UK actions as a precedent. However, many aspects of law in this area are unclear, and/or depend on evidence which is unlikely to be made public. There have been calls for the government to be clearer and more transparent about what appears to be a change in policy direction, not just on Syria but on when, where, and who the UK will attack overseas.

1. UK drone attack killed two Britons in Syria

On 21 August 2015, in Raqqa, northern Syria, a drone piloted by the Royal Air Force killed three people described as 'ISIL fighters'. Two were UK citizens: Reyaad Khan and Ruhul Amin.¹ Khan was the target of the strike. According to the Prime Minister, this was 'the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war'.²

The Prime Minister reported the attack to the House of Commons just over two weeks later, on 7 September 2015, when the House returned from recess and after reports had already emerged:

In recent weeks it has been reported that two ISIL fighters of British nationality, who had been plotting attacks against the UK and other countries, have been killed in air strikes. Both Junaid Hussain and Reyaad Khan were British nationals based in Syria and were 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, such as plots to attack high profile public commemorations, including those taking place this summer.

We should be under no illusion; their intention was the murder of British citizens, so on this occasion we ourselves took action. Today, I can inform the House that in an act of self-defence and after meticulous planning, Reyaad Khan was killed in a precision airstrike carried out on 21 August by an RAF remotely piloted aircraft while he was travelling in a vehicle in the area of Raqqa in Syria. In addition to Reyaad Khan, who was the target of the strike, two ISIL associates were also killed, one of whom, Ruhul Amin, has been identified as a UK national. They were ISIL fighters, and I can confirm that there were no civilian casualties.

We took this action because there was no alternative. In this area, there is no Government we can work with; we have no military on the ground to detain those preparing plots; and there was nothing to suggest that Reyaad Khan would ever leave Syria or desist from his desire to murder us at home, so we had no way of preventing his planned attacks on our country without taking direct action. The US Administration has also confirmed that Junaid Hussain was killed in an American airstrike on 24 August in Raqqa.³

The Government had previously said that it would consult the House of Commons before carrying out attacks in Syria, unless there was 'a critical British national interest at stake' or 'a need to act to prevent a humanitarian catastrophe'.⁴

¹ See *ISIS/Daesh: the military response in Iraq and Syria*, Commons Briefing Paper CBP 06995, 13 October 2015

² [HC Deb 7 September 2015 c30](#). UK drone attacks in Afghanistan, for instance, were in an acknowledged armed conflict, and were used only where UK or ISAF forces were threatened by fighters on the ground: Professor Michael Clarke, '[RAF air strike on British citizen: A high risk strategy](#)', *RUSI Analysis*, 7 Sep 2015

³ [HC Deb 7 September 2015 cc25-26](#)

⁴ [HC Deb 26 September 2014 c1265](#)

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Another Commons briefing note, [*ISIS/Daesh: the military response in Iraq and Syria*](#),⁵ looks at the part the UK plays in the US-led air strikes against ISIS in Iraq and Syria, and the arguments around whether the UK should expand its air campaign into Syria.

⁵ CBP 6995, last updated 13 October 2015

2. Was it 'self-defence'?

Summary

The Government claims that the lethal attack was permitted under international law because the UK was defending itself – and Iraq – against an armed attack. The addition of the 'collective self-defence' argument has been controversial.

To resort lawfully to force in self-defence, there must be a current or imminent armed attack. In this case, the UK appears to be using an extended definition of 'imminent'. Also the force to be used must be necessary and proportionate to the threat faced.

It has been suggested that the self-defence justification is connected to the Prime Minister's commitment to parliamentary authorisation for air strikes in Syria.

2.1 Introduction

In the Prime Minister's statement about the drone attacks, he used the language of international law to justify them as necessary, proportionate acts of self-defence against armed attacks on the UK:

First, 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. There was clear evidence of these individuals planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies, and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.⁶

The UK's [report to the UN Security Council](#), dated 7 September 2015, said that the attack was 'a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom', and also part of the 'collective self-defence' of Iraq.

Article 2(4) of the [UN Charter](#) prohibits states from resorting to force.⁷ The fact that the attack took place on Syrian territory is likely to be enough to engage this, even though the target was British. But there are three recognised exceptions to the ban on using force. Firstly, Article 51 of the United Nations Charter preserves the right of states under customary international law to use force in self-defence:

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...

⁶ [HC Deb 7 September 2015 cc25-26](#)

⁷ 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

Secondly, the state against which force is used can consent; and thirdly the UN Security Council can authorise the use of force.

In this case, there is no suggestion that Syria invited the UK to attack or consented to it;⁸ and the Security Council has not authorised the use of force in Syria. Humanitarian intervention is not fully established as a fourth exception, and has not been raised as a justification for this attack.

States must meet certain requirements if resorting to force in either individual or collective self-defence is to be lawful under international law. Firstly, the attack must be actually happening or imminent. Secondly, the actions in self-defence must be necessary and proportionate. And thirdly, there are legal uncertainties over whether or when states can attack 'non-state actors' in self-defence. We can look at these aspects of the international law of self-defence in turn.

2.2 Individual self-defence

The right of individual self-defence under international law can be triggered by an attack against the UK itself.

In his 7 September statement to the House of Commons, the Prime Minister used individual self-defence as the legal basis for the drone killings. He said that both Khan and Junaid Hussain (another British citizen killed a few days later by a US drone attack) had planned attacks against 'the west' including Britain:

Both Junaid Hussain and Reyaad Khan were British nationals based in Syria and were 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, such as plots to attack high profile public commemorations, including those taking place this summer.

[...]

We were exercising the UK's inherent right to self-defence. There was clear evidence of these individuals planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies,

The Government's letter to the UN Security Council gave no more details of the threat they posed to the UK, but did say that Khan was 'known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom'.⁹ It is perhaps not surprising that the Government has not made public any of the evidence behind the attack, but it makes its actions harder to assess. If the Joint Intelligence and Security Committee investigates the drone attack, it will have access to the intelligence that lay behind it.

⁸ President Assad has however reportedly said that he is willing to cooperate with the US in the fight against terrorism in Syria: '[Syria's President Speaks: A Conversation With Bashar al-Assad](#)', *Foreign Affairs*, March-April 2015

⁹ [Letter from UK Permanent Representative to the United Nations S/2015/688](#), 7 September 2015

2.3 Collective self-defence

The UN Charter also allows 'collective self-defence', which means action on behalf of an ally who is being attacked.

Although the Prime Minister's statement referred only to individual self-defence, the Government included a reference to the collective self-defence of Iraq in its letter to the UN Security Council explaining the air strike:

As reported in our letter of 25 November 2014, ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.¹⁰

There was no specific mention of Khan planning attacks against Iraq, or of Iraq specifically asking for the UK's assistance against him.

The argument is that because the UK is engaged in military action against ISIS on behalf of Iraq (which has requested it), the UK can defend Iraq by attacking targets elsewhere. However, it is difficult to reconcile this with the Prime Minister's statement that 'the strike was not part of coalition military action against ISIL in Syria'.

The additional citation of collective self-defence of Iraq prompted questions from Members. Jeremy Corbyn reportedly said:

The government appears to have used an additional and entirely separate justification for this covert strike in their letter to the UN, which was not mentioned in the prime minister's statement to parliament. Why did the government cite the defence of Iraq when justifying this strike to the UN, but not when doing so to parliament?¹¹

David Davis said the letter appeared to show a 'material change of strategy'.¹²

The US has also used the collective self-defence argument to justify the ongoing US air strikes in Syria:

States must be able to defend themselves ... when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing (Islamic State) threat to Iraq.¹³

On 9 September 2014, FCO Minister Tobias Ellwood had argued that collective self-defence might be the justification for future military action in Syria:

The US have been clear that in carrying out military actions in Syria they are acting on the basis of both collective and individual

¹⁰ [Letter from UK Permanent Representative to the United Nations S/2015/688](#), 7 September 2015

¹¹ ['UK envoy makes new legal argument for drone killings in Syria'](#), *The Guardian*, 10 September 2015

¹² ['UK envoy makes new legal argument for drone killings in Syria'](#), *The Guardian*, 10 September 2015

¹³ ['Exclusive: United States defends Syria airstrikes in letter to U.N. chief'](#), *Reuters*, 23 September 2014

self-defence. If the UK were to undertake military strikes in Syria we would only do so on a sound legal basis and that would depend on the facts on the ground at the time, for example in line with the US led international efforts in collective self defence pursuant to the Iraqi request of 20 September.¹⁴

2.4 Imminent armed attack

An armed attack must be already launched, or at least imminent, in order for states to resort to force in individual or collective self-defence. Action against *past* attacks risks being categorised as reprisal, which is unlawful in peacetime;¹⁵ action against *future* attacks might be considered pre-emptive or preventative, which again is generally considered unlawful.¹⁶

When reporting the drone attack in Syria to the UN Security Council, the UK referred to previous planned attacks, and has also said that more planned attacks were imminent, but has disclosed no evidence of this.

Although article 51 of the UN Charter refers only to force in self-defence 'if an armed attack occurs', state practice at least since the *Caroline* affair in 1837 suggests that under customary international law, a state threatened with an *imminent* armed attack may be entitled to take appropriate measures to repel such a threat.

Traditionally, the need for action must be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.¹⁷ In other words, action in self-defence by another state may not be taken save for the most compelling emergency.¹⁸ However, the need for the threat to be happening or imminent could cover situations where there are 'active preparations at an advanced stage, if there is the requisite intent and capability', or where an attack has been completed but another is anticipated:

... the criterion of imminence requires that it is believed that any further delay in countering the intended attack will result in the inability of the defending State effectively to defend itself against the attack ... in this sense, necessity will determine imminence: it must be necessary to act before it is too late.¹⁹

Professor Marc Weller considers that the UK successfully argued that an armed attack against the UK was imminent:

¹⁴ Iraq and Syria, PQ208633, 9 September 2014

¹⁵ See [International Court of Justice advisory opinion, *Threat or Use of Nuclear Weapons*](#) [1996] ICJ Rep 244, para 46: 'The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed inter alia by the principle of proportionality.'

¹⁶ [Letter from UK Permanent Representative to the United Nations S/2015/688](#), 7 September 2015

¹⁷ Letter from US State Department to UK Prime Minister Fox, 24 April 1841 (reproduced in Hunter Miller, '[British-American Diplomacy: The Caroline Case](#)', Yale University Avalon Project, 2008

¹⁸ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p13

¹⁹ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p13

When you want to involve self-defence in the sense that you, as one state, are defending yourself against the actions of another state, or perhaps the actions of a non-state actor based in another state, you have to demonstrate quite specifically that there exists an instant, overwhelming necessity, leaving no choice of means and no moment of deliberation—in other words, an imminent armed attack is going to happen against you unless you act now. The United Kingdom successfully made that argument in relation to the operation that took place in August, when it argued that there was a terrorist cell engaged directly in an activity that would lead inevitably to an attack on the United Kingdom.²⁰

However, the evidence is not publicly available, and the examples given by the Prime Minister were in the past: he gave no evidence that Khan was actively involved in a current or imminent armed attack. Instead, the need to strike was explained as the ‘only feasible means of effectively disrupting the attacks planned and directed by this individual’, ie the only way to stop him trying again, and followed ‘meticulous planning’. This seems to be extending the concept of ‘imminence’:

... evaluating the ‘imminence’ of the threat posed by Khan would appear to be in the nature of a probabilistic risk assessment of his (high) propensity to plan and direct another terrorist attack in the UK; by virtue of his pattern of activity, his very continued life constituted an imminent risk. Also included in this extended concept of imminence is whether other opportunities to kill the target will present themselves, should he not be targeted now.²¹

An extended concept of imminence was first set out by the US, and taken up by former Foreign Office legal adviser Sir Daniel Bethlehem QC who set it out as one of his proposed principles on the use of force in self-defence against non-state actors:

Whether an armed attack may be regarded as ‘imminent’ will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.²²

²⁰ [Evidence to the Foreign Affairs and Defence Select Committees’ inquiry on UK Policy in Syria](#), 8 October 2015, Q63

²¹ Nehal Bhuta, ‘[On Preventive Killing](#)’, *EJIL Talk!*, 17 September 2015

²² See Daniel Bethlehem, ‘[Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors](#)’, *American Journal of International Law* vol 106 no 4 (October 2012), pp769-777 at 775-6

Sir Daniel nevertheless accepted that 'There is little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats'.²³

There is however widespread agreement that the right to use force in self-defence does not extend to non-imminent threats.²⁴ Elizabeth Wilmshurst of Chatham House (also a former Foreign Office legal adviser) has suggested that 'a forceful action to disrupt a terrorist act being prepared in another state might, depending upon the circumstances, be legitimate; force to attack a person who may in the future contemplate such activity is not'.²⁵ The US has nevertheless invoked a right to preventative self-defence against attacks that have not yet materialised.²⁶

A proposed legal challenge against the government argues that its statements on the immediacy of the threat have not been consistent, using words including 'potential', 'direct' and 'likely', as well as 'imminent'.²⁷

2.5 Necessity and proportionality

Any resort to force in self-defence – whether by drone or otherwise – must also meet requirements of necessity and proportionality.²⁸ Under international law, states can resort to force in self-defence only if it is both *necessary* to ensure that the armed attack (or imminent threat) is stopped,²⁹ and *proportionate* (ie no greater than necessary to end the attack or remove the threat).³⁰

The International Court of Justice (ICJ) has held that even following a significant attack, there is no right to use force in self-defence if the use of force is not necessary to prevent ongoing or future attacks (the *Nicaragua*³¹ and *Nuclear Weapons*³² decisions). There must be no

²³ See Daniel Bethlehem, '[Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors](#)', *American Journal of International Law* vol 106 no 4 (October 2012), pp769-777 at 773

²⁴ Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp212; Elizabeth Wilmshurst, '[Principles of International Law on the Use of Force by States In Self-Defence](#)', Chatham House Working Paper, October 2005, pp4-5 and pp8-9

²⁵ Elizabeth Wilmshurst, '[Principles of International Law on the Use of Force by States In Self-Defence](#)', Chatham House Working Paper, October 2005, p9

²⁶ See David Yost, 'NATO and the anticipatory use of force', *International Affairs* 83: 1 (2007) 39-68; Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp208-217

²⁷ '[Parliamentarians threaten legal challenge over Government secret kill policy](#)', Leigh Day news, 24 September 2015

²⁸ See Rebecca Wallace and Olga Martin-Ortega, *International Law*, 6th edition, 2009, pp297-8

²⁹ See Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp203-7

³⁰ Elizabeth Wilmshurst, '[Principles of International Law on the Use of Force by States In Self-Defence](#)', Chatham House Working Paper, October 2005

³¹ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US)*, 1986 ICJ 14, 27 June 1986

³² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, 245 para 41, 8 July 1996

practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.³³

The Prime Minister's 7 September statement argued that the drone attack was the only option:

We took this action because there was no alternative. In this area, there is no Government we can work with; we have no military on the ground to detain those preparing plots; and there was nothing to suggest that Reyaad Khan would ever leave Syria or desist from his desire to murder us at home, so we had no way of preventing his planned attacks on our country without taking direct action [...] and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.³⁴

But it is at least possible that the UK had managed to foil the previous planned attacks without resorting to lethal force, which raises a question of why they could not do so again. Alternatively, if the attacks failed without any intervention, was Khan perhaps not such a serious threat after all?

The proportionality test is often difficult to apply in practice, as a report on the NATO bombing of the former Yugoslavia identifies:

... the main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied ... it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.³⁵

In this case, although only one of the three men killed was accused of planning specific attacks, the Prime Minister said that the other two were also ISIS fighters. Writing in the *Guardian*, Joshua Rozenberg argues that the attack could be seen as proportionate:

It is obviously harder to justify the attacks on the two men travelling with Khan than it is to justify killing Khan himself. On the other hand, if they were Isis fighters then they should have known that Khan was a likely target and that they would be at risk by travelling with him. If Khan had been hiding in a village or even a large compound, it would have been disproportionate to bomb the entire area. But attacking a vehicle containing Isis fighters would be seen by many as a proportionate response to the threat Khan posed.³⁶

2.6 Attacks by 'non-state actors'

Experts are divided over whether states may lawfully resort to force in self-defence under Article 51 if the 'armed attack' was not carried out

³³ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States in Self-Defence](#), Chatham House Working Paper, October 2005, pp7-8

³⁴ HC Deb 7 September 2015, c25-27

³⁵ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras 48-50

³⁶ Joshua Rozenberg, '[Was it lawful for UK forces to kill British Isis fighters in Syria?](#)', *Guardian*, 7 September 2015

by or on behalf of a state – which is still the legal test applied by the International Court of Justice.³⁷ This has triggered calls for the ‘armed attack’ test to be adapted for a world where ‘non-state actors’ regularly launch attacks against states, often from external bases.³⁸

In the *Congo v Uganda* case,³⁹ the ICJ found that where armed force cannot be attributed to a state, there is no right of self-defence against that state. Uganda’s use of force on the territory of the Democratic Republic of Congo (DRC) was therefore unlawful, even though according to Uganda its aim was to halt the cross-border incursions by armed groups based in the DRC. In reaching this conclusion, the Court found that because DRC did not control the armed groups on its territory, it was not legally responsible for their conduct. It therefore followed that the DRC’s failure to take action against the groups did not justify Uganda’s use of force in self-defence in the DRC’s territory.

Article 51 of the UN Charter says nothing about who must be responsible for the threat, although the state-centred nature of the international legal order requires some kind of link between a state towards which self-defence is directed (the ‘territorial state’) and military groups that have carried out acts of aggression against the target state.⁴⁰

There is an argument that there is enough of a link if the territorial state is ‘unwilling or unable’ to prevent the non-state actor’s attacks.⁴¹ Many states have taken action against irregular forces in neighbouring states, claiming that failure to prevent those forces’ activities was enough to justify self-defence.⁴² But international law gives little guidance about what the ‘unwilling or unable’ test might require. Ashley Deeks has suggested a few principles that could be ascertained from state practice:

The principles might include requirements that the acting state:
(1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state’s control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state’s proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state. However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps

³⁷ See Karl Zemanek, “[Armed Attack](#)”, *Max Planck Encyclopedia of Public International Law*, last updated April 2009 (accessed 11 May 2011)

³⁸ See Ashley S. Deeks, “[Pakistan’s Sovereignty and the Killing of Osama Bin Laden](#)”, *ASIL Insights* Volume 15, Issue 11, 5 May 2011; Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, ch5

³⁹ [Armed Activities on the Territory of the Congo \(Democratic Republic of Congo v. Uganda\)](#) 2005 ICJ 301, 19 December 2005

⁴⁰ Giovanni Distefano, ‘Use of Force’, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, 2014, ch 22, p558

⁴¹ See for example Ian Brownlie, “International Law and the Activities of Armed Bands”, *7 International and Comparative Law Quarterly* 712, 732 (1958); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010); Harold Koh, US Legal Adviser, “[The Obama Administration and International Law](#): Keynote Address at the American Society of International Law 104th Annual Meeting”, 25 March 2010.

⁴² Christine Gray, *International Law and the Use of Force*, 3rd edition 2008, p132ff

to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.⁴³

The UK Government clearly considers the Government of Syria to be 'unwilling or unable to take effective action to counter the threat posed by ISIL',⁴⁴ although it has not publicly taken all the steps suggested by Ashley Deeks. Lord Hannay, a former UK Ambassador to the UN, concurs:

... military operations against Iraq are being launched by ISIL from the large area in the east of Syria which it controls. The Assad regime seems to be both unwilling and unable to do anything to prevent that, which is assuredly its duty under international law.⁴⁵

Whilst the Prime Minister did not directly use the phrase 'unwilling or unable' in relation to the drone attack in Syria, he did say 'there was no alternative...there is no Government we can work with'.

Another argument is that acts of self-defence against non-state actors do not require the consent of the state where they take place, because they are not an attack on or against its territory.⁴⁶ However, this view is not clearly established in international law.

2.7 Connection with the need for UK parliamentary authorisation

Writing in the European Journal of International Law's blog, Professor Nehal Bhuta⁴⁷ argues that the Prime Minister's categorisation of the August 2015 attack as self-defence was connected with his commitment to parliamentary authorisation for air strikes in Syria:

Cameron's language concerning the UK's inherent right to self-defence, and the necessity and proportionality of this specific strike, could perhaps be best understood as intended to overcome the serious UK domestic constitutional law problem that the [Parliament voted to authorize UK participation in strikes against ISIS only in Iraq, and not in Syria](#). During the debate on that vote, on 26 September 2014, the Prime Minister sought to reserve to the government a discretion to strike within Syrian national territory "if there were a critical British national interest at stake or there were a need to act to prevent a humanitarian catastrophe". In those circumstances, "you could act immediately and explain to the House of Commons afterwards. I am being very frank about this because I do not want to mislead anybody." (Hansard, 26 September 2014, column 1265). Thus, Cameron's elaboration now of a self-defence argument seems tailored to satisfying the House of Commons and the British public that he was acting properly within the discretion reserved to the executive to act in response to an urgent threat emanating from Syrian territory,

⁴³ Ashley S. Deeks, '[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)', *ASIL Insights* Volume 15 Issue 11, 5 May 2011

⁴⁴ Iraq and Syria, PQ208633, 9 September 2014

⁴⁵ HL Deb 26 September 2014, c1684

⁴⁶ See Jordan J Paust, '[Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan](#)', *Journal of Transnational Law & Policy*, Vol 19 No 2, 2010, p 237

⁴⁷ Professor of Public International Law, European University Institute

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even if this action exceeded the authorization granted by the Parliament in its vote of 26 September.⁴⁸

The Prime Minister argued that the strike did not contravene the August 2013 House of Commons vote against military action in Syria or the September 2014 vote authorising air strikes only in Iraq:

The position with regard to the wider conflict with ISIL in Syria has not changed. As the House knows, I believe there is a strong case for the UK taking part in airstrikes as part of the international coalition to target ISIL in Syria, as well as Iraq, and I believe that that case only grows stronger with the growing number of terrorist plots being directed or inspired by ISIL's poor leadership in Raqqa. However, I have been absolutely clear that the Government will return to the House for a separate vote if we propose to join coalition strikes in Syria.⁴⁹

This argument probably precludes an assessment that the UK is involved in an armed conflict which extends to Syria – an assessment that would arguably have given the UK greater latitude in attacking targets there (see below) and avoided the questions around imminence.

When the House of Commons authorised the UK Government to carry out air strikes in Iraq, the motion specifically ruled out attacks in Syria:

... 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;⁵⁰

During that debate, the Prime Minister had said that if the UK were to act in Syria, the legal basis for that would be 'collective self-defence against ISIL which threatens Iraq'.⁵¹ But he added that if Britain was threatened he would attack in an emergency even without prior authorisation from the House of Commons:

I think it is important to reserve the right that if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, you could act immediately and explain to the House of Commons afterwards.⁵²

Whether or not either of these conditions was met in the Khan case is impossible to say without seeing the evidence. But the first limb chimes with the Government's self-defence argument for the drone attack.

⁴⁸ Nehal Bhuta, '[On Preventive Killing](#)', *EJIL Talk!*, 17 September 2015

⁴⁹ [HC Deb 7 September 2015 c26](#)

⁵⁰ [HC Deb 26 September 2014 c1255](#)

⁵¹ [HC Deb 26 September 2014 c1263](#)

⁵² [HC Deb 26 September 2014, c1265](#)

3. What about the laws of war?

Summary

Even if the *conditions* for resorting to force have been met, Governments still have to act lawfully in *how* they use that force. The laws of war, also called International Humanitarian Law or IHL, could apply simply as a result of using force in self-defence, or because the situation is considered an armed conflict. IHL allows enemy combatants to be targeted, including those carrying out a 'continuous combat function' for a non-state group like ISIS. It requires any acts to be proportionate to the military objective, and precautions must be taken to avoid civilian casualties.

3.1 When do the laws of war apply?

Establishing that the conditions for resorting to armed force in self-defence have been met does not of course give *carte blanche*. Both the [laws of war](#) (international humanitarian law or IHL) and human rights law (see section 4 below) can also apply to such acts in certain circumstances.

According to the International Court of Justice, 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'.⁵³ It appears to be saying that this is the case whether or not the situation would otherwise be classified as an armed conflict.

The Prime Minister has stated that the UK is 'not involved in a war' in Syria.⁵⁴ Some legal specialists agree, and argue that IHL therefore does not apply:

If the strike were part of an existing armed conflict, international humanitarian law would apply, including rules on targeting which permit the killing of fighters in a 'non-international' armed conflict. But one military strike in self-defence does not give rise to the intensity of action required to meet the threshold for a non-international armed conflict. For an isolated act of self-defence, only human rights law applies.⁵⁵

But others argue that the UK is part of a 'non-international armed conflict' with ISIS that extends to Iraq and parts of Syria:

... the UK is already in a non-international armed conflict with ISIL, as part of a collective self-defence action on behalf of the Government of Iraq. To the extent that this conflict spills over into Syrian territory and Syria has effectively lost all control over some parts of its territory governed by ISIL (and Raqqa would meet that test), it seems to me that one does not need any additional ad

⁵³ [International Court of Justice advisory opinion, *Threat or Use of Nuclear Weapons* \[1996\] ICJ Rep 244, para 42](#)

⁵⁴ [HC Deb 7 September 2015 c30](#)

⁵⁵ Harriet Moynihan, '[UK Drone Strike on ISIS Raises Legal Questions](#)', Chatham House expert comment, 15 September 2015

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bellum justification, specific to the UK, to attack ISIL fighters in their Syrian stronghold.⁵⁶

A recent report adopted by the Parliamentary Assembly for the Council of Europe on [Drones and targeted killings: the need to uphold human rights and international law](#), argues that a wide interpretation of non-international armed conflict risks allowing people to be targeted lawfully anywhere they go:

In order to justify the application of international humanitarian law, which allows for a wider use of targeted killings than international human rights law, the notion of non-international armed conflict has been given such a wide interpretation by some States as to include numerous regions across the world as “battlefields” of the “global war on terror”. In my view, this threatens to blur the line between armed conflict and law enforcement to the detriment of the protection of human rights and should therefore be resisted. In the extreme, “[a]dvising otherwise would mean that the whole world is potentially a battlefield and that a person moving around the globe could be lawfully targeted under international humanitarian law in the territories of States not party to any armed conflict”.⁵⁷

But the report adds that in the rapporteur’s view, using drones against ISIS would in any case be governed by IHL:

This said, I would have little doubt that the fight against the terrorist group known as “IS” or against organised guerilla groups acting under the banner of Al Quaida is warfare and not police work, so the use of armed drones would be assessed under international humanitarian law.⁵⁸

At the most basic level, the ‘law applicable in armed conflict’ means the rules on

- distinction between civil and military objectives;
- military necessity;
- proportionality; and
- precautions in attack.

According to the International Committee of the Red Cross, there is ‘no doubt’ that International Humanitarian Law (IHL) applies to the use of drones in armed conflict.⁵⁹

⁵⁶ Nehal Bhuta, ‘[On Preventive Killing](#)’, *EJIL Talk!*, 17 September 2015

⁵⁷ Committee on Legal Affairs and Human Rights, Parliamentary Assembly for the Council of Europe, [Drones and targeted killings: the need to uphold human rights and international law](#), 16 March 2015, para 24

⁵⁸ Committee on Legal Affairs and Human Rights, Parliamentary Assembly for the Council of Europe, [Drones and targeted killings: the need to uphold human rights and international law](#), 16 March 2015, para 25

⁵⁹ International Committee of the Red Cross (ICRC), [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011, p36. See also APV Rogers and Dominic McGoldrick, “Assassination and targeted killing – the killing of Osama bin Laden”, *International and Comparative Law Quarterly* vol 60, July 2011, pp778-788 at 781

3.2 What about targeted killing?

One of the fundamental tenets of IHL is the principle of distinction between combatants and civilians.⁶⁰ Enemy combatants are lawful targets, but civilians may not be targeted unless they are actively participating in the fighting.⁶¹

Where a non-state organisation like ISIS is a party to an armed conflict, people who are members of its organised armed groups are not considered civilians if they are carrying out a 'continuous combat function'. For as long as they do so, they lose their protection against direct targeting. But people who take part in hostilities on a merely spontaneous, sporadic or unorganised basis are considered to be civilians and cannot be targeted unless and for such time as they take a direct part in hostilities. However, preparing for executing a specific act of direct participation in hostilities, as well as going to and returning from it, constitute an integral part of that act.⁶²

The target of the UK's August drone attack in Syria was described as an 'ISIL fighter' who was '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'.⁶³ Assessing whether or not he was carrying out a continuous combat function, or taking a direct part in hostilities at that time, would require evidence that is not publicly available.

Even where someone may be targeted under IHL, it does not preclude the option of arrest, apprehension and prosecution.⁶⁴ Furthermore, where the UK is fighting a non-state organisation, 'a member of the security forces who kills a dissident [combatant] or a civilian will also have to justify his actions under domestic law and may be tried before the courts for any offence he may have committed'.⁶⁵

3.3 What about assassination?

Assassination is generally considered to be prohibited in times of both war and peace, although the conduct that amounts to assassination differs in the two cases. In the context of IHL, the prohibited conduct involves the targeted killing of an individual by perfidious (treacherous) means.⁶⁶ According to the UK's *Manual of the Law of Armed Conflict*:

⁶⁰ See Ministry of Defence, [Joint Service Manual of the Law of Armed Conflict](#), JSP 383, 2004 edition, para 15.5ff. Other fundamental principles governing the parties to an armed conflict include military necessity, humanity and proportionality.

⁶¹ Ministry of Defence, [Joint Service Manual of the Law of Armed Conflict](#), JSP 383, 2004 edition, para 2.5.2

⁶² See Marco Sassòli, '[Direct participation in hostilities](#)', *Intercross* blog (ICRC), 8 September 2015; and ICRC, [Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL](#), 2009

⁶³ David Cameron, [HC Deb 7 September 2015 cc25-26](#)

⁶⁴ Kenneth Anderson, "[Anwar Al-Aulaqi Killed in Drone Strike in Yemen](#)", *Opinio Juris*, 30 September 2011

⁶⁵ Ministry of Defence, [Joint Service Manual of the Law of Armed Conflict](#), JSP 383, 2004 edition, para 15.6.2

⁶⁶ Although see L Green, *The Contemporary Law of Armed Conflict*, 3rd edition, 2008, p169, for arguments that assassination is always contrary to the customary law of armed conflict.

Whether or not the killing of a selected enemy individual is lawful depends on the circumstances of the case. There is no rule dealing specifically with assassination, but the following rules would be applicable in such a case:

- a. attacks may not be directed against civilians, see paragraph 5.3;
- b. attacks must be limited to military objectives, including enemy combatants, see paragraph 5.4;
- c. only combatants have the right to participate directly in hostilities;
- d. enemy combatants may not be killed by resort to perfidy, see paragraph 5.9.⁶⁷

In peacetime, the element of perfidy is absent.

3.4 Proportionality and precautions

Under IHL, all attacks must be proportionate to the military objective:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.⁶⁸

This requirement is similar to the proportionality requirement for resorting to armed force (see above), and forms part of customary international law applicable in any armed conflict.

Customary international law also requires parties to take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁶⁹

⁶⁷ Ministry of Defence, [Joint Service Manual of the Law of Armed Conflict](#), JSP 383, 2004 edition, para 5.13

⁶⁸ ICRC, '[Customary IHL: proportionality in attack](#)' [accessed 19 October 2015]

⁶⁹ ICRC, '[Customary IHL: precautions in attack](#)' [accessed 19 October 2015]

4. How does human rights law apply?

Summary

Human rights law – which allows only very limited exceptions to the prohibition on lethal force – is generally considered to apply both during armed conflict (with exceptions) as well as in law enforcement or anti-terrorist operations.

It can sometimes apply even outside the territory of the states that have ratified a convention, where they are exercising control or power. The European Convention on Human Rights (ECHR) has been held not to apply to NATO air strikes in Belgrade, but to apply to UK forces shooting in Iraq. It is not clear where lethal drone attacks would fit into this spectrum.

Even where the ECHR does apply, lethal force can be lawful if it fits into one of the justifications for or derogations from the prohibition on arbitrary killing, which should be widely interpreted in security situations. But the UK has in the past been held in breach of the ECHR where its soldiers could have taken alternative action.

4.1 Relationship between laws of war and human rights

International human rights law (IHRL) is normally considered to apply even during an armed conflict.⁷⁰

The International Committee of the Red Cross (ICRC) considers that IHL and IHRL are complementary systems, but recognises that there are situations where they would produce different outcomes.⁷¹ For example, since the use of lethal force is inherent to armed conflict, IHL permits parties to kill, whereas IHRL provides that ‘the intentional use of lethal force may not exceed what is strictly or absolutely necessary to protect life’.⁷² However, the [European Convention on Human Rights](#) (ECHR), for example, permits some derogations during war.⁷³

The rules on proportionality in IHL and IHRL can have similar outcomes in practice:

Legal scholars mostly agree that, ‘... at the end of the day, the concrete operation of the principles of proportionality seems broadly equivalent in both branches of international law’, even if a stricter precautionary norm applies.⁷⁴

⁷⁰ See for example UN Human Rights Committee GC 31, 2004, para 10

⁷¹ International Committee of the Red Cross, [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011

⁷² International Committee of the Red Cross, [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011, p19. See also *International Covenant on Civil and Political Rights*, Article 6(1)

⁷³ Article 15

⁷⁴ Frederik Rosén, ‘[Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility](#)’, *Journal of Conflict and Security Law*, 2 April 2014, quoting G Gaggioli and R Kolb, ‘A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights’ (2007) 37 *Israeli Ybk Human Rights* 115, 138; A Gioia, ‘The Role of the European Court of Human Rights’ in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law*, 2011, 201.

However, some lawyers argue that the missiles and bombs carried by drones are not the type of weaponry permitted by international human rights law in non-combat situations.⁷⁵

4.2 Where do the rights apply?

Whilst customary IHRL and many international human rights treaties have universal (or near-universal) scope, and can apply to everyone under the effective control of the acting state, their enforcement can be tricky. Most do not have their own courts, and have not been incorporated into UK law, so their principles do not automatically bind UK courts as a matter of domestic law.

The ECHR, on the other hand, is directly enforceable in the UK: it has the European Court of Human Rights (ECtHR) to interpret and apply it, and is also applied in the UK through the *Human Rights Act 1998*. And although as a general principle the ECHR does not apply outside the jurisdiction of its Member States,⁷⁶ during the last decade or so the ECtHR has progressively extended the extra-territorial application of the ECHR. In the 2011 case of *Al-Skeini*, the ECtHR said that extra-territorial application will occur where state agents exercise 'authority and control', or where the state exercises 'effective control' over an area as a consequence of (lawful or unlawful) military action.⁷⁷

The UK could not be said to exercise 'effective control' through a drone attack in Syria. But could it be described as 'state agent authority and control'?

In its March 2015 decision in the case of *Al-Saadoon*, the High Court said that the ECHR applied where Iraqis were shot by British forces during security operations because that involved 'the exercise of physical power and control over that person'.⁷⁸ The Court of Appeal appears to have followed this approach in the *Serdar Mohammed* case.⁷⁹ David Scott, writing in the UK Human Rights blog, suggests that whether this applies to drone attacks depends on whether 'physical power' requires physical presence or simply physical consequences.⁸⁰ He suggests that Legatt J's judgment in *Al-Saadoon* could be read either way, quoting this passage:

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. Nor as it seems to me can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply

⁷⁵ ME O'Connell, "[The International Law of Drones](#)", *ASIL Insight*, vol 14 issue 37, 12 November 2010

⁷⁶ Article 1 ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

⁷⁷ *Al-Skeini and Others v United Kingdom*, 7 July 2011 para 130ff

⁷⁸ *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 (Admin), 17 March 2015

⁷⁹ *Serdar Mohammed and Others v Secretary of State for Defence* [2015] EWCA Civ 843, 30 July 2015, para 95

⁸⁰ David Scott, '[A clash of rights- Does the ECHR apply in Syria?](#)', *UK Human Rights blog*, 18 September 2015

shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not.... **Making the applicability of a system of human rights law depend on the distance between the gun and a person's head in a case where a person is shot is not a position which in my view can reasonably be sustained.**⁸¹

A further uncertainty is that in the earlier *Bankovic* case the ECtHR decided that a NATO airstrike did not amount to 'effective control' giving rise to a jurisdictional link.⁸² Whether drone surveillance and attacks are more like an airstrike (no extra-territorial application) or shooting someone (ECHR applies extra-territorially) is yet to be seen. Frederik Rosén asks 'How much drone surveillance combined with precision weapons would be needed to equal the amount of control exercised by 30 000 ground troops?'⁸³

4.3 When can lethal force be used?

Customary law prohibits arbitrary killing, with very limited exceptions. This is reflected in a wide range of human rights treaties, including [Article 2 ECHR](#):

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 absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

States are allowed to derogate from Article 2 in wartime:

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the

⁸¹ [Al-Saadoon & Ors v Secretary of State for Defence](#) [2015] EWHC 715 (Admin), 17 March 2015, paras 95-96

⁸² [Bankovic and others v Belgium and others](#), App. No. 52207/99, 2001

⁸³ Frederik Rosén, '[Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility](#)', *Journal of Conflict and Security Law*, 2 April 2014

reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

In *Al-Saadoon*, Legatt J pointed out that even if a lethal attack abroad by UK armed forces is considered within the UK's jurisdiction, it will not necessarily breach Article 2 ECHR:

It...does not follow that, because shooting an individual involves an exercise of physical power which brings that person within the UK's jurisdiction, there is any breach of a Convention right if the individual is killed or wounded. Whether there is such a violation depends on whether the use of force was justified...

...I think it important that courts should recognise their lack of institutional competence to judge actions or decisions taken on the battlefield or when seeking to maintain security in dangerous and hostile conditions. For similar reasons as apply in the context of combat immunity, the courts should afford a wide latitude or, to use the jargon of the Strasbourg case law, "margin of appreciation" when judging the legality of lethal force used in such circumstance.⁸⁴

David Scott suggests that a lethal drone attack that complies with IHL could be lawful even if it appears to breach Article 2 ECHR, not least because the court is very reluctant to intervene in such sensitive national security considerations.⁸⁵

However, in the 1995 'Death on the Rock' case, the ECtHR found that the UK had breached Article 2 when SAS soldiers in Gibraltar killed three IRA members who they suspected were about to detonate a bomb.⁸⁶ Despite accusations of extrajudicial killing or a 'shoot to kill' policy, the court found no evidence of an 'execution plot';⁸⁷ but it did rule that the soldiers could have taken alternative action, and that the UK had failed to make sufficient allowances for the possibility that its intelligence assessments might, in some respects at least, be wrong.⁸⁸

⁸⁴ *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 (Admin), 17 March 2015, paras 109-111

⁸⁵ David Scott, '[A clash of rights- Does the ECHR apply in Syria?](#)', *UK Human Rights blog*, 18 September 2015

⁸⁶ *McCann v UK* (1995)

⁸⁷ para 180

⁸⁸ para 213

5. Legal significance and possible implications

In this case it is unlikely that anyone will successfully challenge the UK's actions. At a state level only the UK and Syria would have standing to do so. At an individual level no relatives of the people killed have publicly challenged the UK. Two parliamentarians, Caroline Lucas MP and Baroness Jenny Jones, have however issued a 'letter before action' to the Secretary of State for Defence and the Attorney General. They argue that the government has failed to formulate and/or publish an adequate 'targeted killing policy', and that inconsistency over the level of threat posed raises serious concerns over the use of lethal force.⁸⁹

Regardless of any legal challenge, the attack seems to mark a significant change in the Government's approach to when, where and who it can attack. It had previously treated cases like this as matters for criminal rather than international law. Speaking on Radio 4's Today programme on 8 September 2015, the Defence Secretary, Michael Fallon, said that the Government 'would not hesitate' to carry out similar actions again, should they ever prove necessary.⁹⁰ The organisation Reprieve is amongst those who are concerned that the UK now considers that it can kill anyone anywhere, at any time, with no justification, evidence or oversight.⁹¹

The potential implications could be huge. The Guardian reported in September 2015 that the UK has had a 'kill list' including suspected British terrorists in Syria since shortly after the Conservative government came to power.⁹² If reports in the Times are accurate, there could be '3,000 terror suspects plotting against the UK'.⁹³

Moreover, UK and US drone attacks could be used as precedents for other countries or armed groups with similar technology.

Legal specialists have called for as much public evidence as possible to help assess the legality of such action:

The determination of 'imminence' is in the first place for the relevant state to make, but it must be made in good faith and on grounds which are capable of objective assessment. Insofar as this can reasonably be achieved, the evidence should be publicly demonstrable. Some kinds of evidence cannot be reasonably produced, whether because of the nature or source, or because it is the product of interpretation of many small pieces of information. But evidence is fundamental to accountability, and accountability to the rule of law. The more far-reaching, and the more irreversible its external actions, the more a state should

⁸⁹ ['Parliamentarians threaten legal challenge over Government secret kill policy'](#), Leigh Day news, 24 September 2015

⁹⁰ MOD, [Defence in the Media](#), 8 September 2015

⁹¹ See Leigh Day, ['Parliamentarians threaten legal challenge over Government secret kill policy'](#), 24 September 2015

⁹² ['The "kill list": RAF drones have been hunting UK jihadis for months'](#), *Guardian*, 19 September 2015

⁹³ [Times](#), 18 September 2015

accept (internally as well as externally) the burden of showing that its actions were justifiable on the facts. And there should be proper internal procedures for the assessment of intelligence and appropriate procedural safeguards.⁹⁴

More transparency, it is suggested, could improve public confidence and lessen the potential 'blowback' of this attack:

While the government cannot be expected to release confidential intelligence information, some form of greater transparency on the application of the relevant legal criteria would help to reassure parliament and the public that the assessment process is sound and made in good faith. More transparency in this area could also lessen the likelihood of such attacks encouraging more people to join terrorist groups in the UK or elsewhere. On a broader level, it is important to reassure the public that drones – which are set to become an integral part of the UK's military capability – are being used within a framework of rigorous scrutiny and established procedures.

There is a range of options for greater transparency that would fall short of disclosing intelligence or the full advice of the attorney general. These include publication of a summary of the legal advice (as with the Iraq war); scrutiny of the decision by a parliamentary body such as the Intelligence and Security Committee; or review by other security-cleared officials such as privy counsellors or the UK's independent reviewer on counterterrorism, David Anderson QC. Improving public and parliamentary confidence in the legal basis for strikes may also strengthen the government's hand in any future vote on military action in Syria.⁹⁵

⁹⁴ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p9

⁹⁵ Harriet Moynihan, ['UK Drone Strike on ISIS Raises Legal Questions'](#), *Chatham House expert comment*, 15 September 2015

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