
The Legal Basis for Targeted Airstrikes Against Islamic State's British Citizens

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Introduction

On 7 September, Prime Minister David Cameron informed the House of Commons that the Royal Air Force had carried out a precision drone strike which killed Reyaad Khan, a 21 year old British citizen. The strike took place in the Islamic State capital of Raqqa, Syria, on 21 August. Killed alongside Khan was Ruhil Amin, a 26 year old Briton.

This is the second time a Western country has deliberately killed one of its own citizens as a result of a targeted airstrike. The other occasion was in September 2011, when a US drone killed Anwar al-Awlaki, the al-Qaeda in the Arabian Peninsula cleric, in northern Yemen.

This briefing outlines the legality of the UK strike and why the targeted killing of British citizens associated with the Islamic State will likely need to be utilised again in the future.

Context

According to the Prime Minister, Reyaad Khan – as well as Junaid Hussain, a British citizen killed in a US airstrike in Raqqa on 24 August – 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.”¹

The Prime Minister stated that there had been six IS plots targeting the UK thwarted in the past twelve months.² Khan’s involvement likely included the plots to target London’s ANZAC day commemorations

¹ ‘Syria: refugees and counter-terrorism - Prime Minister's statement’, HM Government, 7 September 2015, available at: <https://www.gov.uk/government/speeches/syria-refugees-and-counter-terrorism-prime-ministers-statement>, last visited: 8 September 2015.

² Ibid.

on 25 April 2015; and VE Day commemorations on 8 May 2015.³ Hussain, meanwhile, had attempted to recruit a candidate to detonate a pressure cooker bomb at an Armed Forces Day parade on 27 June.⁴

The Right to Self Defence

According to Cameron's statement in the House, targeting of Khan was an "act of self-defence" justified under the charter of the United Nations.⁵ Cameron is referring to Chapter VII, Article 51, which recognises states' right to self-defence under international law.⁶

This is a well-established legal position. According to former Attorney General Lord Goldsmith, it has been the belief of successive UK governments that "the right of self-defence under international law includes the right to use force where an armed attack is imminent."⁷

The definition of imminent is perhaps the most contentious area. The plotting Khan was thought to be involved with related to April and May, though it is possible that fresh attack planning was discovered by MI-6 or GCHQ. Yet even if not, as Lord Goldsmith, argues:

"[t]he concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts...It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."⁸

In the case of the US strike against Anwar al-Awlaki, the United States Department of Justice memo outlining the legality behind his targeting stated, "that the 'imminence' criterion could be satisfied by a finding that he was the leader of a group that sought to attack the United States whenever it could, even if he was involved in no such attacks at the time he was killed."⁹

³ 'UK Spies' Most Wanted Jihadis Killed in Drone Strike', *The Sun*, 8 September 2015, available at: <http://www.sunnation.co.uk/uk-spies-most-wanted-jihadis-killed-in-drone-strike/>, last visited: 8 September 2015.

⁴ 'I.S. plot to bomb UK today', *The Sun*, 27 June 2015, available at: <http://www.thesun.co.uk/sol/homepage/news/6518366/Islamic-State-monster-aimed-to-kill-British-soldiers.html>, last visited: 8 September 2015.

⁵ 'Syria: refugees and counter-terrorism - Prime Minister's statement', HM Government, 7 September 2015.

⁶ 'Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', United Nations Charter, available at: <http://www.un.org/en/documents/charter/chapter7.shtml>, last visited: 8 September 2015.

⁷ Cited in 'Written evidence submitted by Professor Philippe Sands QC', Select Committee on Foreign Affairs, 1 June 2004, available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfa/441/4060805.htm>, last visited: 8 September 2015.

⁸ Ibid.

⁹ 'Killing Our Citizens Without Trial', *The New York Review of Books*, 24 November 2011, available at: <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/>, last visited: 8 September 2015.

Attorney General Approval

The legal advice that the Prime Minister received from UK Attorney General Jeremy Wright regarding the permissibility of the strike is classified and will likely not be published. However, the Attorney General did confirm the legality of the strike against Khan.¹⁰

Parliamentary Approval

In September 2014, Parliament voted in support of airstrikes against IS – but only in Iraq, and not Syria. However, at the time, the Prime Minister provided a caveat: that he would “reserve the right [...] if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, [to] act immediately and explain to the House of Commons afterwards”.¹¹ This threshold appears to have been met with Khan, who was identified by UK intelligence agencies as a “direct threat” who was actively planning terrorist attacks in the homeland.¹²

It is also unfeasible, practically, to call a vote in the House on military issues such as this as it would serve to alert the terrorist targeted to Britain’s plans and ultimately serve to paralyse British military efforts.

Lack of Alternatives and an Inability to Prosecute

There is no evidence to suggest Khan wished to return to the UK, making his arrest by domestic law enforcement also impossible. This meant that, in order to mitigate the threat he posed, action would need to be taken in Syria, where a civil war is currently raging. The Bashar al-Assad regime, with its home in Damascus, is warring with a variety of rebel groups also fighting for influence across what is now essentially an ungoverned country.

Therefore, the UK does not have a partner to work with in Syria. The Assad regime has committed mass atrocities and is not a credible force to work with. Even if it were able to capture Khan from Raqqa (which is highly unlikely), the British government could not ask them to do so on its behalf.

Yet as there is no UK military presence in Syria, the Army cannot detain enemy fighters such as Khan in the battlefield, as they once did in Afghanistan and Iraq. Even if a Special Forces team were to be dispatched to Raqqa to try and capture Khan, they would likely meet resistance from IS or any number of hostile Islamist groups operating in Syria. The risk to UK troop lives would be far greater in a ground operation than one from the air. The practical impossibilities of launching a ground operation to capture Khan are important, as in international law, invoking the use of force in self-defence should be a last resort.¹³

¹⁰ ‘Syria: refugees and counter-terrorism - Prime Minister's statement’, HM Government, 7 September 2015.

¹¹ ‘Iraq: Coalition Against ISIL’, Hansard House of Commons debates, 26 September 2014, available at: <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm>, last visited: 8 September 2015.

¹² ‘Syria: refugees and counter-terrorism - Prime Minister's statement’, HM Government, 7 September 2015.

¹³ Cited in ‘Written evidence submitted by Professor Philippe Sands QC’, Select Committee on Foreign Affairs, 1 June 2004.

It should also be proportionate to the dangers posed. The UK carpet-bombing Raqqa to kill Khan, for example, would not be proportionate.¹⁴ The practical consequence of this was that even after Khan's location was tracked down, there was a need to minimise any risk of civilian casualties. As a result, weeks passed between identifying Khan's location and finding suitable conditions for the strike to take place.¹⁵ The time sensitivity of all this provides further evidence of why the operation could not be brought to Parliament for approval.

Citizenship

The US government – including President Barack Obama – has previously outlined the circumstances in which it would be permissible to target a US citizen. These arguments were made in the wake of the death of Anwar al-Awlaki, but similar principles also apply to Reyaad Khan.

In March 2012, then-Attorney General Eric Holder said US citizens working with international terrorist groups such as al-Qaeda could be targeted in the following circumstances. Firstly, that there was an “imminent threat of violent attack” posed by the individual (bearing in mind the aforementioned definition of imminence); secondly, that the strike adhered to the international law of war; and thirdly, that “capture is not feasible” because of “the nature of how terrorists act and where they tend to hide” (i.e. they operate in ungoverned space and there is not a partner government who can carry out the operation on behalf of the US).¹⁶

Addressing the specific issue of citizenship, President Obama said in May 2013 that it “should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team”.¹⁷

Conclusion

The British decision to target Reyaad Khan was sound legally and justified from a national security perspective. IS poses a direct threat to the West, recruiting thousands to join their ‘Caliphate’ – including hundreds from the UK – and either directing or inspiring attacks in the homeland. Therefore, the possibility of the UK carrying out targeted strikes against IS’ British citizens in the future remains a possibility. Mohammed Enwazi, for example, is likely to still reside in Syria and may meet all the criteria outlined above for targeted killing.

Following the death of Alwaki, sections of the media, public and political class expressed fears that it heralded a new era of the state regularly targeting its own citizens. Yet no US citizens have been killed in a targeted strike in the four years since. The UK will likely be just as cautious. Western countries targeting

¹⁴ Rozenberg, J., ‘Was it lawful for UK forces to kill British Isis fighters in Syria?’, The Guardian, 7 September 2015, available at: http://www.theguardian.com/commentisfree/2015/sep/07/lawful-uk-forces-british-isis-fighters-syria?CMP=share_btn_tw, last visited: 8 September 2015.

¹⁵ ‘UK Spies’ Most Wanted Jihadis Killed in Drone Strike’, *The Sun*, 8 September 2015.

¹⁶ ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’, United States Department of Justice, 5 March 2012, available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, last visited: 8 September 2015.

¹⁷ ‘Remarks by the President at the National Defense University’, The White House, 23 May 2013, available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>, last visited: 8 September 2015.

their own citizens in drone strikes will remain a rare occurrence and only ever carried out as a last resort. Retaining the option, however, is vital.

About the Author

Robin Simcox is a Research Fellow at The Henry Jackson Society, where he works on terrorism and security issues. He has written for the likes of *Foreign Affairs*, *Washington Post*, *Wall Street Journal*, *Los Angeles Times*, *The Guardian*, *New Republic* and *The Atlantic*; and comments in the media for the likes of the BBC, CNN, Sky News, al-Jazeera and Fox News. Simcox has spoken on a variety of platforms, including the UK Parliament and United States Southern Command. He has testified in the US Congress on multiple occasions. Simcox has an MSc in U.S. Foreign Policy from the Institute for the Study of Americas, University of London, and a BA in History (International) from the University of Leeds, which included a year at the University of Newcastle, Australia.



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