

Targeted killing: a new departure for British defence and security policy?

Briefing - March 2017 - Abigail Watson

Summary

On 21st August 2015, Reyaad Khan – a UK citizen fighting for ISIS – was killed by a Hellfire missile fired from a UK drone¹ in an operation possibly supported by UK Special Forces.² This strike occurred months before parliamentary approval of the use of military force in Syria, which was not given until December that year, and seemed to mark the first time the UK had undertaken a lethal strike that was outside of a war the UK was militarily involved in.

The then-Prime Minister David Cameron announced the strike as a “new departure”³ for British defence and security policy to a surprised Parliament, who were keen to understand both how the strike had occurred when they had voted against UK military engagement in Syria in August 2013 (and once again in September 2014 when they approved the use of force in Iraq but explicitly refused to extend operations to Syria)⁴, and on what basis the government had approved the use of lethal force against one of its own citizens abroad.

Unfortunately, the statements that followed from Cameron, the Permanent Representative to the UN (Matthew Rycroft) and the Secretary of State for Defence (Michael Fallon) were both “confused and confusing”⁵, making it hard to assess how “new” or how controversial this strike was. For example, Cameron claimed that the strike was the first time that “a British asset has been used to conduct a strike in a country where we are not involved in a war,”⁶ and was taken in self-defence.⁷ This would be hugely significant, as it would mean that the UK has joined the US in conducting targeted strikes against terrorist threats in areas where it is not at war – raising important questions about where you draw the line on when states can and cannot use lethal force. However, Rycroft’s, statement to the UN also justified the strike on the basis of the collective defence of Iraq.⁸

This seemed to indicate that, the strike *was* part of British involvement in a conventional conflict – namely, its authorised part in the war in Iraq.⁹

In response to widespread concern about the strike, the Joint Committee on Human Rights (JCHR) launched an inquiry into the UK’s policy of targeted killing. However, the government’s engagement with the JCHR was minimal. Cameron and the Attorney General both refused to engage – so evidence from Fallon and a somewhat vague government memorandum were relied upon. Fallon refused to discuss several key issues - such as the types of people targeted, how the UK policy differed from the US and Israel and the decision-making process that informed the strike – often stating “I am not able to discuss intelligence matters.”¹⁰

This is indicative of a wider problem of patchy transparency surrounding the UK’s policy on targeted killing. In January 2017, the Attorney General finally announced the government’s understanding of the legal basis for targeting non-state actors abroad.¹¹ This was a positive step, but did little to clarify how the legal criteria are being applied in practice. On top of this, the welcome move to open the strike to parliamentary scrutiny was somewhat undermined after it was recently revealed that neither the government nor the intelligence agencies have provided sufficient evidence to the Intelligence and Security Committee of Parliament (ISC) for it to reasonably conduct its assessments.

The current lack of transparency could have serious consequences for the effectiveness, accountability, and perceived legitimacy of UK action abroad:

Effectiveness – The government’s ability to target individuals outside areas it considers itself party to a conflict with minimal scrutiny might tempt them into using lethal force more often than they would otherwise do, even while questions remain over whether targeting individuals is an effective way to counter threats to national security.

Accountability – It is impossible to hold the government to account over these strikes, or scrutinise their decisions and behaviour, if it won’t explain the political and legal basis it was acting on or the evidence that informed it, even to the security-cleared ISC.

Legitimacy – The UK posits itself as a defender of international law.¹² However, without greater clarity over both the basis on which the government targeted and killed a UK citizen in a country where military engagement had not been authorised, and how the UK distinguishes itself from the controversial practices of the US and Israel, this vision of the UK, and the perceived legitimacy of its operations abroad, may be damaged.

Why the controversy over targeted killing?

Targeted killing has become a key component in the fight against terrorism. The term was defined by Philip Alston, the former Special Rapporteur on extrajudicial, summary or arbitrary executions, as: “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”¹³

One of the main controversies over targeted killing is how closely it resembles practices that are widely accepted to be illegal. For example, Alston states that targeted killing can be achieved through a variety of methods,¹⁴ including many which would be more commonly associated with assassination – such as car bombs and poison.¹⁵

In fact, Alston argues that the main difference between targeted killing and “extrajudicial execution”, “summary execution”, and “assassination” is that while “in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal” – unlike these other terms which “are, by definition, illegal.”¹⁶ Thus, a key distinguishing factor

between targeted killing and assassination or murder is the fact targeted killing can be legal.

“Targeted killing” does not feature in international law and is a term popularised by Israel, who made a public policy of using lethal force against alleged terrorists in Occupied Palestinian Territory after the Second Intifada in September 2000.¹⁷ This policy was publicly criticised by many countries; for example, when discussing targeted killing as a part of Israel’s counterterrorism strategy in July 2001 the US Ambassador to Israel warned: “The United States government is very clearly on record as against targeted assassinations...They are extrajudicial killings.”¹⁸

The US is, however, now one of the biggest users of targeted killing.¹⁹ Since the 9/11 attacks and the beginning of the war on terror, the US has massively increased its use of targeted killing operations against al-Qaeda and affiliated groups using Special Forces in kill or capture missions and drones in lethal strikes.²⁰ For example, in 2011 alone there were 2,200 Special Forces raids²¹ and, in Obama’s two terms, there “was a total of 563 strikes, largely by drones, [targeting] Pakistan, Somalia and Yemen.”²²

These operations too have received widespread condemnation. Many argue that the humanitarian impact has been devastating, with many civilians killed²³ – especially in signature strikes – and the communities “living under drones” experiencing social and psychological turmoil.²⁴ Others, including some former senior US military and counterterrorism personnel,²⁵ argue that the policy has not worked or has actually helped terrorist organisations – for example, through increasing their local support.²⁶ Beyond this the campaign has, at times, been incredibly damaging to the domestic and international reputation of the administrations carrying out the strikes.²⁷

A ‘new departure’ for Britain?

Despite the controversy surrounding these operations, many aspects are not an especially “new departure” for the UK. The UK has long engaged in targeted killings within areas it considers itself party to a conflict. For example, in 2013, it was reported that “British Special Forces have been in the forefront of targeted killing campaigns in Afghanistan and Iraq, and British ‘drones’ are now deployed in Afghanistan to the same end.”²⁸

The UK also has a long history of deploying its military assets in areas where it is not officially militarily engaged. For example, in Libya, official figures claim that UK military operations in the country began and ended with the 2011 NATO mission; however, six years later, it appears the UK is still playing a direct military role in the country. Our May 2016 briefing brought attention to the fact that the UK is continuing to deny its role in Libya despite an increasing number of UK

Special Forces sightings that have been reported in British and international media.²⁹ In September, the Foreign Affairs Committee stated: “British Special Forces have reportedly been deployed to Libya, where they apparently engaged in frontline combat in May 2016.”³⁰ As recently as February this year, there were reports of UK Special Forces supporting US strikes in the country.³¹

Similarly, in 2014 the Minister of State for Foreign Affairs, Hugh Robertson, said “drone strikes against terrorist targets in Yemen are a matter for the Yemeni and US governments.”³² However, in April 2016, *VICE News* revealed that UK intelligence agents and Special Forces soldiers had played a pivotal role in operations in the country.³³ More recently, the government has been keen to distance itself from the Saudi-led airstrikes in the country, stating “British military personnel are not directly involved in Coalition operations” – even though they appear to be playing an important and sustained role.³⁴

These are just two examples of a rising trend in British defence and security policy; secretive yet growing military commitments in areas where the UK is not generally considered to be at war. Instead of deploying regular British troops to the front lines, increasingly it is British Special Forces who can be found on the ground, with the UK’s armed drone fleet, intelligence agencies, and military advisers and trainers also playing important roles. In this sense, then, the strike against Khan was not particularly “new”.

Saying this, however, the strike represented a pivotal moment in the UK’s official understanding of its legal right to self-defence against non-state actors. Most importantly, its definition of an “imminent threat” appeared much broader than previously employed,³⁵ and seemed to bring its practice significantly closer to the targeted killing policies of the US and Israel. Despite criticisms of its vague and confusing political and legal basis, the UK Government has reserved the right to undertake similar strikes in the future.

The question of imminence

In January this year, the Attorney General (Jeremy Wright Q.C.), outlined for the first time the legal considerations that would be discussed before lethal action is taken against non-state groups in self-defence against an imminent attack. As Wright’s speech notes, the traditional definition of an “imminent threat” is one that is “instant, overwhelming, leaving no choice of means, and no moment of deliberation” – typified by the Caroline Incident of 1837.³⁶

Wright argued that the threat of terrorism has “irretrievably altered [the]... frontline” of war. As he notes, instead of “troops massing on the horizon”, the

threats to British security are now planned by a loose network of individuals who could “inspire, enable” or carry out attacks on UK streets – as recent attacks in Paris³⁷, Berlin³⁸, Istanbul³⁹ and London⁴⁰ show. He argued that the UK Government had to adopt a broader definition of imminence to make sure the law is keeping up with these changes.⁴¹

Wright explained that the UK now assesses whether a threat is imminent by using the five considerations developed by Sir Daniel Bethlehem in 2012,⁴² these are:

- 1) The nature and immediacy of the threat;
- 2) The probability of an attack;
- 3) Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
- 4) The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and
- 5) The likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage.⁴³

This is clearly more expansive than the traditional definition, especially given the assertion made by Bethlehem, and repeated by Wright, that:

“...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 the right of self-defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.”⁴⁴

Lack of clarity can be a dangerous thing

The Attorney General’s speech represents some welcome transparency over the UK policy; however, with a more expansive legal understanding of imminence the UK should be clearer about how it applies Bethlehem’s principles before undertaking a lethal strike.

James A. Green, a law professor at the University of Reading, maintains that the definition of imminence is too vague, and “tells us very little unless it is clear what is meant by imminence.”⁴⁵ Monica Hakimi, a law professor at the University of Michigan, also notes that “the devil is in the detail”; she argues that without knowledge of how the factors Bethlehem outlines “relate to one another, or how much weight any particular one carries” we cannot know how they apply.⁴⁶

What controls does the UK have on its use of targeted killing?

Nor is this just a case of semantics. It is possible that the lack of clarity could greatly reduce the threshold for the use of force. If specific evidence of an attack is no longer needed, it is more likely that individuals who demonstrate patterns of suspicious behaviour (such as meeting with members of militant groups) but do not necessarily represent an immediate threat to the UK could end up being targeted. Reducing the specificity and immediacy required by the evidence may also increase the risk that people followed because of mistaken identities⁴⁷ or flawed intelligence⁴⁸ could be killed sooner. As Elizabeth Wilmshurst and Michael Wood argued in response to Bethlehem's criteria in 2012⁴⁹, citing The Chatham House Principles of International Law on the Use of Force in Self-Defence:

"The more far-reaching, and the more irreversible its external actions, the more a State should 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."⁵⁰

This is not an abstract concern; US officials have directly quoted Bethlehem's criteria as their own guiding principles.⁵¹ As noted, the expansive policies of the US have been highly criticised; while the US Government claimed to be targeting only high value targets, it became clear that US forces were targeting a far wider pool of individuals than just a small number of leaders directly planning attacks on the US.⁵² For example, the US has engaged in "signature strikes" against military aged males "on battlefields around the world"⁵³ and has killed people whose threat to the US remains heavily disputed, such as 16-year-old Abdulrahman Anwar al-Awlaki and eight-year-old Nawar al-Awlaki,⁵⁴ the son and daughter of Anwar al-Awlaki, the US born Yemeni-cleric also killed by a US drone strike.⁵⁵

This is especially worrying in light of criticisms questioning whether Khan could be considered an imminent threat. In evidence provided to the JCHR, a number of experts questioned whether the Government's vague descriptions of the threat Khan presented to the UK could be considered "imminent".⁵⁶ More recently, *The Times* cited two intelligence officials who opposed the strike, claiming they "weren't convinced that the drone strike reached the legal threshold."⁵⁷ One argued that "while Khan had gone on to become a poster boy for ISIS and a prolific Twitter user who acted as a propagandist, there was no evidence that he posed an imminent threat."⁵⁸

The Government has justified its opacity over its policy and the legal criteria on which it targeted Khan by opening up the strike to scrutiny by the ISC. The ISC is a committee composed of nine members from parties across the political spectrum and from both houses. All its members are security cleared and so they can see sensitive information which the rest of Parliament cannot, including the intelligence and legal advice that informed the strike against Khan.

However, in January last year Cameron revealed under questioning from the Liaison Committee that while the ISC has been allowed to examine the intelligence that prompted the strike, "ministers would retain the right to withhold some intelligence." Andrew Tyrie MP, chair of the Liaison Committee, claimed: "On the basis of today's evidence, the Intelligence and Security Committee will not be able to do a thorough job."⁵⁹

In response, the Government claimed to be "co-operating fully with the ISC in its examination of the 21 August 2015 airstrike, after agreeing the scope of their investigation under the terms of the existing Memorandum of Understanding."⁶⁰

However, in February this year it was reported that the ISC was "dissatisfied" with the information it had been provided on the attack. It was claimed that the ISC felt it was not provided enough information to make a judgement on how well the Government had assessed the potential for "collateral damage" and, importantly, to judge how "imminent" the threat posed by Khan was.⁶¹ It still remains unclear whether the ISC will receive more information, although it looks unlikely given that the intelligence services have claimed the committee is going beyond its remit by questioning the military decision-making behind the drone attack.⁶²

This is worrying - if even the ISC is not given enough evidence to judge how the Bethlehem principles were applied in the case of Reyaad Khan, the prospects of the UK's policy being satisfactorily scrutinised in the future are not promising.

Implications for UK policy

The UK Government must allow proper scrutiny over its strike against Reyaad Khan, and any future strikes of this nature. The speech made by the Attorney General is an important step forward, however there continues to be a lack of understanding about how and why Khan was targeted before parliamentary authorisation for operations in Syria and how the UK would apply its expanded definition of “imminence” to other potential threats in the future.

More transparency over these issues, through public debate when if possible and within the closed doors of the ISC when it is not, could greatly improve the effectiveness, accountability and legitimacy of UK operations abroad.

Effectiveness - The UK’s policy appears to have moved closer to that of the US and Israel. But as Bruce Riedel, a former CIA analyst and a counterterrorism adviser to Obama, said: “The problem with the drone is it’s like your lawn mower. You’ve got to mow the lawn all the time. The minute you stop mowing, the grass is going to grow back.”⁶³ With an increasing number of commentators – including senior military personnel – questioning the utility of the targeted killing policies of these two countries, a healthier level of debate is essential to ensure the UK is adopting the best, not only the most expedient, policy to control threats to its national security.

Accountability - It is hard to hold the Government to account for policies that are unclear or actions that we do not fully understand. The Attorney General’s speech shows an acknowledgement of the importance of transparency in democratic systems; however, the government’s poor engagement with the JCHR and failure to offer any additional insight into its actions, even to the ISC, is disheartening. Given the changes in UK military engagement – to more secretive, light footprint deployments – the government must ensure that the UK’s systems of democratic oversight are keeping pace.

Legitimacy - The UK’s use of targeted killing will remain controversial, perhaps even if greater clarity is provided by the government. Nevertheless, commentary of the Attorney General’s speech indicates that the UK’s reputation has already started to suffer because of its vague basis for targeting threats abroad.⁶⁴ The Obama administration is a clear demonstration of how greater

transparency over controversial policies can improve their legitimacy. The relatively high support of Obama’s drone policy in the US⁶⁵ may well be helped by better communication of the methods, rationale and legality behind it. For example, in the aftermath of the release of the Presidential Guidance on the use of military force Ned Price, National Security Council spokesman said: “Our counter-terrorism actions are effective and legal, and their legitimacy is best demonstrated by making public more information about these actions as well as setting clear standards for other nations to follow.”⁶⁶

Conclusions

Unfortunately, in line with a growing trend in UK foreign policy towards secretive engagement in overseas conflicts, the government appears reluctant to engage with both the public and Parliament over both its policy and the legal basis for the strike against Reyaad Khan in August 2015.

Given the controversy surrounding the idea of targeted killing, it is perhaps unsurprising that the government is unwilling to publicly set out the conditions for a “UK targeted killing policy”. However, by targeting Khan the UK has implied a willingness to use lethal force abroad without fully explaining the conditions, rationale or legal basis for doing so. If the UK government intends to target more individuals in this way – which it has indicated that it might⁶⁷ – it must have a clear policy for doing so.

Although greater transparency is unlikely to remove all the controversies surrounding the use of targeted killing, the current status quo risks undermining the effectiveness, accountability and legitimacy of UK operations abroad, and must therefore be addressed. This is especially true given the recent speech made by the Attorney General which, while a welcome step forward in terms of transparency, also suggests that the government may be lowering the threshold for the use of force against non-state actors – a move that warrants further discussion and careful scrutiny.

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Remote Control is a project of the **Network for Social Change** hosted by **Oxford Research Group**. The project examines changes in military engagement, with a focus on remote control warfare. This form of intervention takes place behind the scenes or at a distance rather than on a traditional battlefield, often through drone strikes and air strikes from above, with special forces, intelligence operatives, private contractors, and military training teams on the ground.

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